IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

QUALIFIED PATIENTS ASSOCIATION, et al., Plaintiffs and Appellants, v. CITY OF ANAHEIM, Defendant and Respondent.	D040077 (Superior Court No 07CC09524)

AMICUS CURIAE BRIEF OF AMERICANS FOR SAFE ACCESS IN SUPPORT OF APPELLANTS

Appeal from a Judgment of the Superior Court
County of Orange, State of California
Honorable David R. Chaffee, Judge Presiding

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Fourth APPELLATE DISTRICT, DIVISION Three	Court of Appeal Case Number: G040077
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APPELLANT/PETITIONER: QUALIFIED PATIENTS ASSOCIATION, et al. RESPONDENT/REAL PARTY IN INTEREST: CITY OF ANAHEIM	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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Date: November 3, 2008

Joseph D. Elford
(TYPE OR PRINT NAME)

▶ Joseph D. Elford
(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION

Because many medical marijuana patients are unable to cultivate the medicine they need to augment their health, the California electorate called upon the State to devise a distribution system to ensure that qualified patients are able to obtain marijuana. In response, in 2003, the Legislature authorized the formation and operation of medical marijuana collectives and cooperatives, which enable patients to associate together to provide each other with medical marijuana. Some cites, however, do not wish to have medical marijuana collectives, so they have banned them. These bans contravene state law and are, therefore, preempted. While municipalities may pass reasonable regulations over the location and operation of medical marijuana collectives, they cannot simply ban them.

STATEMENT OF FACTS

On November 4, 1996, the California electorate enacted the Compassionate Use Act (Health & Safety Code § 11362.5) [hereinafter "the CUA" or "the Act"] "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." (Health & Safety Code § 11362.5, subd. (b)(1)(A).) Although the Act did not expressly provide for a distribution system for marijuana to the seriously ill, it sought "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable

distribution of marijuana to all patients in medical need of marijuana." (Health & Safety Code § 11362.5, subd. (b)(1)(C).) To meet the voters' challenge, on September 10, 2003, the California Legislature passed S.B. 420, also known as the "Medical Marijuana Program Act" or "the MMPA" (Health & Saf. Code § 11362.7 *et seq.*), which provides that "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (Health & Safety Code § 11362.775). In passing the MMPA, the Legislature declared at the outset its purpose to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" (Stats, 2003, C. 875 (S.B. 420), § 1, subd. (b)(3)) and to "[p]romote uniform and consistent application of the act among the counties within the state." (Stats, 2003, C. 875, § 1, subd. (b)(2).)

Notwithstanding these state laws expressly designed to ensure access to medical marijuana for seriously ill patients throughout the state through patient collectives, the City of Anaheim has passed an outright ban on such collectives under threat of criminal sanction. Anaheim Ordinance No. 6067, enacted pursuant to the City's police powers to implement federal law (see CT 311), broadly defines a medical marijuana dispensary as "any facility or location where medical marijuana is made available to and/or distributed by or to three or more of the following: a qualified patient, a person with an identification card, or a primary caregiver." (CT 312) The Ordinance, then, states: "It shall be

unlawful for any person or entity to own, manage, conduct, or operate any Medical Marijuana Dispensary or to participate as an employee, contractor, agent or volunteer, or in any other manner or capacity, in any Medical Marijuana Dispensary in the City of Anaheim." (CT 313) Qualified Patients Association, which is a nonprofit medical marijuana collective comprised of medical marijuana patients living in Anaheim (CT 4), has challenged this ban.

ARGUMENT

I. THE CITY'S BAN ON MEDICAL MARIJUANA COLLECTIVES AND COOPERATIVES OF ALL TYPES THROUGHOUT THE CITY CONFLICTS WITH, AND IS PREEMPTED BY THE MMPA

The California Constitution provides that a municipal ordinance is preempted and, therefore, void if it conflicts with state law. (See *Americans Financial Services Association v. City of Oakland* (2005) 34 Cal.4th 1239, 1251; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 747; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 290; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484; *Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 807.) Such conflict between state law and a local ordinance exists where a local "ordinance duplicates or is coextensive therewith, *is contradictory or inimical thereto*, or enters an area either expressly or impliedly fully occupied by general law." (*American Financial Services Association v. City of Oakland, supra*, 34 Cal.4th at p. 1251 [Italics added]; see *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-898.) Stated differently, a local ordinance conflicts with, and is preempted by state law if it is repugnant to a matter of statewide concern. (See *Johnson v. Bradley* (1992) 4 Cal.4th 389, 404.)

Here, in enacting the MMPA, the Legislature declared that its purposes were to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" and to "[p]romote uniform and consistent application of the act among the counties within the state." (Stats, 2003, C. 875 (S.B. 420), Section 1, subd. (b)(2), (3).) To this end, the Legislature enacted Health and Safety Code section 11362.775, which exempts medical marijuana collectives from the state laws criminalizing marijuana cultivation, possession, distribution, and maintaining a place where marijuana is cultivated or sold. (Health & Safety Code § 11362.775). The courts have construed this legislation as the State's initial response to the voters' request for a safe and affordable distribution system for marijuana, exempt from the criminal laws pertaining to marijuana distribution, as well as "the laws declaring the use of property for these purposes a nuisance." (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785.)

In *Urziceanu, supra*, the court, described the MMPA as "represent[ing] a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers and fits the defense defendant attempted to present at trial. Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." (*Id.* at p. 785.) The *Urziceanu* court properly understood that the Legislature intended the MMPA to establish medical marijuana collectives and cooperatives as the mechanisms to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is

deemed appropriate. . . ." (See Health & Safety Code § 11362.5, subd. (b)(1)(A); see also Health & Safety Code § 11362.5, subd. (b)(1)(C) [encouraging "the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana"].)

Consistent with the Legislature and the judiciary, the Attorney General issued Guidelines on August 25, 2008, that recognize the legality of medical marijuana collectives and cooperatives under California law. (California Attorney General's Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use [hereinafter "AG Guidelines"].) The AG Guidelines state "the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law," so long as it comports with the Guidelines. (AG Guidelines at p. 11.) Thus, the AG Guidelines, like the MMPA and *Urziceanu*, affirm the legality of medical marijuana collectives and cooperatives under California law.

In direct conflict with the purposes of the MMPA to ensure the "formation and operation" of medical marijuana collectives and to establish uniformity of the medical marijuana laws throughout the State in order to promote the health and well-being of seriously ill Californians, the City of Anaheim has exercised its police powers to legislate the contrary federal view. Anaheim Ordinance No. 6067 states: "[B]ecause of the inconsistency between state and federal law relating to the possession, sale and distribution, and because of the documented threat to public health, safety and welfare, it is in the best interest of the citizens of the City of Anaheim that the City prohibit the

establishment and operation of medical marijuana dispensaries within the City of Anaheim. . . ." (CT 311) While the City of Anaheim is free to disagree with the policy choice made by the California electorate and legislature, it may not pass laws that are "inimical to" (*American Financial Services Association v. City of Oakland, supra*, 34 Cal.4th at p. 1251) or "repugnant to" a matter of statewide concern (see *Johnson v. Bradley, supra,* 4 Cal.4th at p. 404). And it may not exercise its police powers to enforce competing federal law. (Cf. *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 380 ["we think judicial enforcement of federal drug policy is precluded in this case because the act in question-possession of medical marijuana-does not constitute an offense against the laws of both the state and the federal government. Because the act is strictly a federal offense, the state has "no power to punish ... [it] ... *as such.*"] [Italics in original] [quoting *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1445].)

The City contends that it has the authority to ban medical marijuana collectives because the MMPA does not expressly "require that cities provide for or allow the establishment and/or operation of medical marijuana dispensaries. . . ." (CT 310; see also Respondent's Brief at p. 34 ["It defies logic to conclude the Legislature intended to strip cities of their police power merely by creating a limited exemption from state criminal liability."].) This represents a fundamental misunderstanding of the relevant law on preemption, as preemption under California law need not be express.

In *In re Lane* (1962) 58 Cal.2d 99, the California Supreme Court held that a city ordinance criminalizing adultery conflicted with state law and was, therefore, void

because the State had extensive regulations governing sexual activity but had chosen not to criminalize adultery. (*Id.* at p. 105.) The Court described the panoply of state laws relating to sexual activity and found that the exclusion of adultery from these laws makes "clear that the Legislature has determined by implication that such conduct shall not be criminal in this state." (*Id.* at p. 104. [citing *Abbott v. City of Los Angeles* (1960) 53 Cal.2d 674, 685].) "Accordingly, a city ordinance attempting to make sexual intercourse between persons not married to each other criminal is in conflict with the state law and is void." (*Id.* at p. 105.)

Citing *Lane, supra*, the California Supreme Court held in *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, that a municipal ordinance permitting the city to seize and hold for forfeiture any motor vehicle used to purchase a controlled substance was preempted, and rendered void, by California's Uniform Controlled Substances Act (Health & Saf. Code § 11000 et seq.) [hereinafter "UCSA"]. The Court reasoned that "[t]he comprehensive nature of the UCSA in defining drug crimes and specifying penalties (including forfeiture) is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation." (*Id.* at p. 1071.) Comparing *Lane*, the Court concluded:

> Here too the Legislature's comprehensive enactment of penalties for crimes involving controlled substances, but exclusion from that scheme of any provision for vehicle forfeiture for simple possessory drug offenses, manifests a clear intent to reserve that severe penalty for very serious drug crimes involving the manufacture, sale, or possession for sale of specified amounts of certain controlled substances.

(*Ibid.*) Because the city, in essence, made a legislative judgment that state law did not go far enough in combating the vice of drug transactions in the city, the Court held that the local regulation was preempted and void. (See *id.* at pp. 1077-1078 [dis. Opn. of Corrigan, J]; cf. *Tosi v. County of Fresno* (2008) 161 Cal.App.4th 799, 806 [holding that county ordinances imposing obligations on scrap metal dealers were preempted by state law; "the County of Fresno apparently determined that the state legislation did not go far enough in regulating the conduct of scrap metal dealers. Because the ordinances regulate in a more restrictive manner the very conduct regulated in state law, the ordinances impermissibly conflict with state law"]; see also *People v. Bass* (1963) 225 Cal.App.2d Supp. 777, 782 [Los Angeles ordinance prohibiting possession of a knife with a blade over three inches long found void; "having prohibited the carrying of dirks, daggers and switch-blade knives, [the Legislature] has not only itself not forbidden one to carry the knife possessed by the defendant, but has shut off the power of the city to forbid it"].)

It is, thus, established that the Legislature's exclusion of certain conduct from the penal provisions of the UCSA evidences the Legislature's intent to preempt municipal laws that penalize such conduct. (See *Tosi, supra*, 161 Cal.App.4th at p. 806 ["The local laws in *O'Connell* did conflict with state law—and were preempted—because they imposed the penalty of forfeiture in circumstances in which state law comprehensively regulated the conduct but did not impose that penalty."] [citing *O'Connell, supra*, 41 Cal.4th at pp. 1071 & 1075].) Here, the Legislature's intent to preempt local law can be gleaned not just through omission, as it was in *O'Connell* and *Lane*, but through the affirmative actions of the Legislature. In enacting the MMPA at the voters' behest, the

Legislature stated that it intended to "[p]romote uniform and consistent application of the act among the counties within the state" (Stats, 2003, C. 875, § 1, subd. (b)(2)) and it carved out specific exceptions to the comprehensive scheme of marijuana laws that would otherwise make medical marijuana collectives illegal under state law in order to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats, 2003, C. 875 (S.B. 420), § 1, subd. (b)(3).) As in *O'Connell, Stockton*, and the other authorities cited, the municipal ordinance penalizing conduct deemed noncriminal by the State is preempted. (See also *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1124 [a local ordinance is "inimical to state law [if] it penalizes conduct that state law expressly authorizes"].)

Thus, when the Attorney General was asked whether various local ordinances regarding medical marijuana would be preempted by state law, he answered as follows:

> [T]he establishment and protection of a right to possess and use medical marijuana notwithstanding state criminal statutes is plainly a matter of statewide concern. Further, it is self evident that the procedures and protections afforded by the 2003 legislation are reasonably related to the resolution of this statewide concern. Hence, these state laws would prevail over any conflicting regulatory acts of a charter city. (See, e.g., *Johnson v. Bradley, supra*, 4 Cal.4th at p. 404; *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 507; 83 Ops. Cal. Atty. Gen. 24, 26-29 (2000); 82 Ops. Cal. Atty. Gen. 165, 167-170 (1999).)

(88 Ops. Cal. Atty. Gen. 113, 4 fn. 5 (2005); see also *id.* at pp. 4-5 ["a city would be preempted from allowing possession of marijuana at levels less than what the state law permits . . . because such provision[] would directly contradict state law.

. . . Similarly, a city program that defined 'attending physician' and 'primary caregiver' more narrowly than state law would be preempted"].)[1]

In response, the City contends that the MMPA leaves open the possibility of local bans of medical marijuana dispensaries because it provides: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article." (Respondent's Brief at p. 40 [quoting Health & Safety Code § 11362.83].) This provision, however, only authorizes municipalities to pass laws that are "consistent with" the state's medical marijuana laws--such as creating possession guidelines that exceed those set forth in the MMPA or adopting regulations governing the operation of medical marijuana collectives--not to pass laws that criminalize conduct deemed legal by the State. As explained above, the City's absolute ban on medical marijuana collectives is inconsistent with the MMPA's goals of "[e]nhanc[ing] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" and "[p]romot[ing] uniform and consistent application of the act among the counties within the state." (Stats, 2003, C. 875 (S.B. 420), Section 1, subd. (b)(2) & (3).) Under both the express language of the MMPA and generally applicable preemption principles, the Anaheim Ordinance is preempted.

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1 The City misleadingly cites this Attorney General opinion for the proposition that "[e]ven the Attorney General has found no preemption in the area of medical marijuana." (Respondent's Brief at p. 36.) To discern the true opinion of the Attorney General, this Court should request briefing directly from him.

II. THE MMPA DOES NOT UNCONSTITUTIONALLY AMEND THE COMPASSIONATE USE ACT

Properly understood as the Legislature's response to the voters' request that it "implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana" (*Urziceanu, supra*, 132 Cal.App.4th at p. 785 [quoting Health & Safety Code § 11362.5, subd. (b)(1)(C)]), the MMPA does not amount to an unconstitutional amendment of a voter-approved initiative. Under Section 10(c) of Article II of the California Constitution, "The Legislature . . . may amend or repeal an initiative statute by another statute . . . when approved by the electors unless the initiative statute permits amendment or repeal without their approval." (See also *Amwest Surety Insurance Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251 [electorate may authorize legislature to amend an initiative].) Moreover, "legislative enactments related to the subject of an initiative statute may be allowed" if they address a "related but distinct area" or if they address a "different legal relationship." (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22; *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 43; see also *People v. Cooper* (2002) 27 Cal.4th 38, 47 [legislation may be passed relating to the subject of an initiative that the initiative "does not specifically authorize or prohibit"].)

Here, the MMPA advances the electorate's goal of "ensur[ing] that seriously ill Californians have the right to obtain and use marijuana for medical purposes" where recommended to do so by a physician." (Health & Saf. Code § 11362.5, subd. (b)(1)(A).) And it does so at the voters' behest. (See Health & Saf. Code § 11362.5, subd. (b)(1)(C)

[encouraging state to "implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana"].) The MMPA, therefore, is not an unconstitutional amendment of a voter-approved initiative – either because it addresses a "different legal relationship" (marijuana distribution) than that addressed by the Compassionate Use Act (cf. *Knight, supra*, 128 Cal.App.4th at p. 22) or because it was authorized by the electorate (cf. *Amwest Surety Insurance Co. v. Wilson, supra*, 11 Cal.4th at p. 1251).

The court explained the disputed provisions of the MMPA in *Urziceanu* as follows:

> Under the law that preexisted the Medical Marijuana Program Act, the collective cultivation and distribution of marijuana was not provided for in the Compassionate Use Act. (See part IA, *ante*.) As we have noted, the Compassionate Use Act stated that one of its purposes was to encourage the state and federal government to implement a plan to provide for the safe and affordable distribution of medical marijuana to those patients who need it. (§ 11362.5, subd. (b)(1)(C).) The Medical Marijuana Program Act is the Legislature's initial response to that directive. (Stats. 2003, ch. 875, § 1.)
>
> In the Medical Marijuana Program Act, the Legislature sought to: "(1) Clarify the scope of the application of the [Compassionate Use Act] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers. [¶] (2) Promote uniform and consistent application of the [Compassionate Use Act] among the counties within the state. [¶] (3) Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats.2003, ch. 875, § 1(b), p. 2.) The Medical Marijuana Program Act further evidenced "the intent of the Legislature to address additional issues that were not included within the [Compassionate Use Act], and that must be resolved in order to promote the fair and orderly implementation of the act." (Stats.2003, ch. 875, § 1(c), p. 2.)

(*Urziceanu, supra*, 132 Cal.App.4th at p. 783.) *Urziceanu*, thus, makes clear that the medical marijuana collective provision of the MMPA does not constitute an unconstitutional amendment.

Underscoring the point that the collective and cooperative provision of the MMPA does not constitute an unconstitutional amendment of the Compassionate Use Act is that it does not "undo" what the electorate has done. In *Knight, supra,* the court explained that the purpose of the constitutional provision forbidding legislative amendments of voter-approved initiatives is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." (*Knight, supra,* 128 Cal.App.4th at p. 22 [quoting *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484].) Rather than undermine the purpose of the Compassionate Use Act to ensure access of marijuana to seriously persons who need it, the MMPA furthers this purpose by providing for a marijuana distribution system. (Cf. *Cooper, supra*, 27 Cal.4th at p. 47-48 [holding that trial court's restriction of presentence credits does not unconstitutionally amend the Briggs Initiative where it did not "circumvent the intent of the electorate in adopting the Briggs Initiative"]; see also *Amwest Surety Insurance Co. v. Wilson, supra*, 11 Cal.4th at p. 1255 ["constitutional limitations on legislative power are strictly construed and may not be given effect as against the general power of the legislature" "unless such limitations clearly inhibit the act in question"].)

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III. FEDERAL LAW DOES NOT PREEMPT THE MMPA

Despite the coexistence of California's medical marijuana laws with federal law for nearly twelve years, the City of Anaheim contends that the conflict between the two sets of laws is so intractable that California law must be held invalid. Although there can be no question that California has chosen to tread a different path than the federal government when it comes to medical marijuana, this does not mean that California's laws in this area are preempted. Federal officials may enforce the federal government's prohibition on marijuana for all purposes, even in derogation of the medical marijuana laws of the state, if that is how they choose to expend their resources.

Notably, the federal government has not itself claimed that its laws preempt and invalidate California's medical marijuana laws. To the contrary, out of respect for our federalist system of government and the historical power of the states over matters of health and safety, Congress included in the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) [hereinafter "CSA"] an express anti-preemption provision that disclaims any intent that the federal drug laws preempt those of the states, unless there is a positive conflict "so that the two cannot consistently stand together." Here, the MMPA and the CSA can coexist.

A. Legal Standards

"[C]ourts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it." (*Viva! Int'l Voice for Animals v. Adidas Prom. Retail Ops., Inc.* (2007) 41 Cal.4th 929, 936 [quoting *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815]; accord *Bronco Wine Co. v. Jolly* (2004) 33

Cal.4th 943, 956-957.) Courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Viva! Int'l, supra*, 41 Cal.4th at p. 938 [quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230]; accord *United States v. Bass* (1971) 404 U.S. 336, 349; see also *Bronco Wine Co., supra*, 33 Cal.4th at p. 974 [in areas of traditional state regulation, a "strong presumption" against preemption applies and state law will not be displaced "unless it is clear and manifest that Congress intended to preempt state law"].) The strong presumption against preemption "'provides assurance that the "federal state balance" will not be disturbed unintentionally by Congress or unnecessarily by the Courts.'" (*Olszewski, supra*, 30 Cal.4th at p. 815 [quotation omitted].) To find preemption, the Court must be "absolutely certain that Congress intended" that result. (See *Gregory v. Ashcroft* (1991) 501 U.S. 452, 464.)

Ordinarily, there are four ways in which a statute may be preempted: (1) where Congress enacts a statute that explicitly preempts state law, (2) where state law actually conflicts with federal law, (3) where federal law occupies a field to such an extent that it is reasonable to conclude that Congress does not wish the states to regulate in that area, or (4) where the state law at issue stands as an obstacle to the accomplishment of the objectives of Congress. (*Viva!, supra*, 41 Cal.4th at p. 936.) At its core, the preemption question is one of Congressional intent, which is the "ultimate touchstone." (*Viva!, supra*, 41 Cal.4th at p. 939 [quoting *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485]; *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949; *County of San*

Diego v. NORML (2008) 165 Cal.App.4th.798, 822; *Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at p. 382.)

To determine whether Congress intended to preempt state law, courts look to the statutory text as the best indicator of Congress' intent. (*Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 62-63.) Where, as here, "Congress has expressly identified the scope of the state law it intends to preempt, [courts] infer [that] Congress intended to preempt no more that that absent sound contrary evidence." (*Viva!, supra*, 41 Cal.4th at p. 945; see also *Sprietsma v. Mercury Marine, supra*, 537 U.S. at pp. 62-63 [where a stature "contains an express pre-emption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent'"] [quoting *CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. 658, 664]; *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541 ["In these cases our task is to identify the domain expressly preempted, [citation], because 'an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to preempt other matters"] [quotation omitted].) "Because the MMP and CUA address fields historically occupied by the states--medical practices (*Medtronic v. Lohr* (1996) 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700) and state criminal sanctions for drug possession (*City of Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at pp. 383-386, 68 Cal.Rptr.3d 656)--the presumption against preemption informs our resolution of the scope to which Congress intended the CSA to supplant state laws, and cautions us to narrowly interpret the scope of Congress's intended invalidation of state law. (*Medtronic, supra.*)" (*San Diego,*

supra, 165 Cal.App.4th at p. 823.) Due to this historical allocation of power to the states regulate in these areas, as well as their status as "independent sovereigns in our federalist system," the United States Supreme Court has concluded that a clear statement is required before the Court will conclude that Congress intended to interfere with those powers. (*Medtronic Inc., supra*, 518 U.S. at pp. 475 & 485.)

B. The CSA Expressly Provides for Federal Preemption of State Drug Laws Only Where There Is a "Positive Conflict" Such that the Two Sets of Laws Cannot Stand Together

It was out of respect for the traditional role of the states in regulating medicine and crime that Congress included in the CSA an express preemption provision, which contains an unambiguous expression of intent *not* to preempt state law. 21 U.S.C § 903 provides as follows:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

This express preemption provision has been referred to as the CSA's "anti-preemption" provision. (Cf. *United States v. $79,123.49 in United States Cash & Currency* (7th Cir. 1987) 830 F.2d 94, 98 [referring to 21 U.S.C § 903 as the "anti-preemption provision of Controlled Substances Act"]; *City of Hartford v. Tucker* (Conn. 1993) 621 A.2d 1339, 1341 [same]; Am. Jur. 2d Drugs and Controlled Substances § 30 (2007) [same]; see also *Gonzales v. Oregon* (2006) 546 U.S. 243, 251 ["The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption

provision"]; *City of Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at p. 383 ["in enacting the CSA, Congress made it clear it did *not* intend to preempt the states on the issue of drug regulation" "This express statement by Congress that the federal drug law does *not* generally preempt state law gives the usual assumption against preemption additional force"] [Italics in Original] [citation omitted].) Division One of this Court found in *County of San Diego v. NORML, supra*, that this anti-preemption provision precludes the implied conflict analysis of obstacle preemption. (*San Diego, supra*, 165 Cal.App.4th at pp. 823-824 [citing *Southern Blasting Services v. Wilkes County* (4th Cir. 2002) 288 F.3d 584]; cf. *Viva!, supra*, 41 Cal.4th at p. 945 [where "Congress has expressly identified the scope of the state law it intends to preempt, [courts] infer [that] Congress intended to preempt no more that that absent sound contrary evidence"]; see also *Gonzales v. Oregon, supra*, 546 U.S. at pp. 270-271 ["Further cautioning against the conclusion that the CSA effectively displaces the States' general regulation of medical practice is the Act's pre-emption provision, which indicates that, absent a positive conflict, none of the Act's provisions should be 'construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State'"] [quotation omitted].) Under title 21 United States Code section 903, the CSA only preempts state laws that positively conflict with the CSA "so that simultaneous compliance with both sets of laws is impossible." (*San Diego, supra*, 165 Cal.App.4th at p. 825.)

C. There Is No Positive Conflict Between State and Federal Law

Judged by this appropriate standard, there is no positive conflict between the challenged provision of the MMPA and the CSA. Notwithstanding the City's attempt to create a conflict by pointing to the very different treatment of medical marijuana under state versus federal law, the important points for CSA preemption purposes are that the MMPA does not require anyone to violate federal law and it does not purport to immunize persons from prosecution under the CSA. With regard to federal preemption of California's medical marijuana laws, this Court stated in *Garden Grove v. Superior Court, supra,* as follows:

> In considering the City's preemption argument, it is also important to recognize what the CUA does *not* do. It does not expressly "exempt medical marijuana from prosecution under federal law." (*United States v. Cannabis Cultivators Club* (N.D. Cal. 1998) 5 F.Supp.2d 1086, 1100.) "[O]n its face," the Act "does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from California drug laws." (*Ibid.*) While in passing the CUA the voters may have wanted to go further and actually exempt marijuana from prosecution under federal law, a result which would have led to an irreconcilable conflict between state and federal law (*ibid.*), we know from *Raich* that the Commerce Clause forecloses that possibility. So, what we are left with is a state statutory scheme that limits state prosecution for medical marijuana possession but does not limit enforcement of the federal drug laws. This scenario simply does not implicate federal supremacy concerns. (*United States v. Cannabis Cultivators Club, supra*, 5 F.Supp.2d at p. 1100.)

(*Garden Grove v. Superior Court, supra,* 157 Cal.App.4th at pp. 385-385 [Italics in original] [footnote omitted].)

Likewise, here, the Qualified Patients Association is not asking the City to participate in its activities; rather, it is only asking that the City remain neutral and not

ban collectives.[2] If it so chooses, the federal government may continue to prosecute seriously ill Californians for cultivating and possessing marijuana for medical purposes (*Gonzales v. Raich* (2005) 545 U.S. 1, 28-29), but this can be accomplished, while at the same time leaving California's medical marijuana laws, "which involve state law alone" (*People v. Mower* (2002) 28 Cal.4th 457, 465 fn. 2), intact. There is no positive conflict under the CSA where, as here, the two sets of laws can stand together in this fashion. (See *San Diego, supra*, 165 Cal.App.4th at pp. 825-826; cf. *Viva, int'l, supra*, 41 Cal.4th at p. 944 [stating that there is no conflict preemption where compliance with both federal and state law is not a "physical impossibility"] [quoting *Hillsborough County v. Automated Medical Labs., Inc.* (1985) 471 U.S. 707, 713].)

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2 In its *amici curiae* brief, the Cities contend that that a decision in the Qualified Patients Association's favor will require cities to issue business licenses to medical marijuana collectives. (Amici Curiae Brief in Support of Respondent at pp. 15-16.) Aside from the fact that this issue is not presently before the Court, this does not mean that state law is preempted. The mere issuance of a business license, which is largely ministerial, does not subject the city official who issues the license to criminal liability under the CSA, since the city official does not actively participate in the medical marijuana collective and, license or not, it might never even come to fruition. (See *San Diego, supra*, 165 Cal.App.4th at 825 fn. 13 ["the *Garden Grove* court has already concluded, and we agree, that governmental entities do not incur aider and abettor liability by complying with their obligations under the MMP"] [citing *City of Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at pp. 389-392]; cf. *Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at p. 368 ["The requisite intent to transgress the law is so clearly absent here that the argument is no more than a straw man"].) Furthermore, the city official would be immunized from liability under the CSA by 21 U.S.C. § 885(d), which provides that "no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political subdivision thereof, . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." (*Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at pp. 368-369.)

D. Even if Obstacle Preemption Were to Apply, the MMPA Does Not Stand as an Obstacle to the Objectives of Congress

In any event, California's medical marijuana laws do not stand as an obstacle to the objectives of Congress in enacting the CSA. The purpose of the CSA, as declared at its outset, is to promote the "health and general welfare of the American people." *See* 21 U.S.C. § 801(2). To this end, as the Supreme Court, the Ninth Circuit, and this Court have recognized, the CSA was narrowly drafted to "combat recreational drug use, not to regulate a state's medical practices." (*San Diego, supra,* 165 Cal.App.4th at p. 826 [citing *Gonzales v. Oregon, supra,* 546 U.S. at pp. 270-272]; see *Garden Grove v. Superior Court, supra,* 157 Cal.App.4th at p. 383; cf. *Oregon v. Ashcroft* (9th Cir. 2004) 368 F.3d 1118, 1128 & 1129, *affd. in Gonzales v. Oregon, supra* ["Congress clearly intended to limit the CSA to problems associated with drug abuse and addiction;" noting "CSA's limited mandate to combat prescription drug abuse and addiction"] [collecting citations]; see also *Gonzales v. Raich*, 545 U.S. 1, 12 (2005) ["The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."]; *Oregon v. Ashcroft* (D. Or. 2002) 192 F.Supp.2d 1077, 1092, *affd. in* 368 F.3d 1118 (9th Cir. 2004), *affd. in* 126 S.Ct. 904 (2006) ["The CSA was never intended, and the USDOJ and DEA were never authorized, to establish a national medical practice or act as a national medical board."].) "The particular drug abuse that Congress sought to prevent [in the CSA] was that deriving from the drug's 'stimulant, depressive, or hallucinogenic effect on the central nervous system.'" (See Statement of Attorney General Reno on Oregon's Death with Dignity Act (June 5, 1998) [found at

http://judiciary.house.gov/Legacy/attygen.htm [quoting 21 U.S.C. § 811(f)]; see also *Gonzales, supra,* 546 U.S. at p. 273 ["The statutory criteria for deciding what substances are controlled, determinations which are central to the Act, consistently connect the undefined term 'drug abuse' with addiction or abnormal effects on the nervous system."].)

With these objectives of Congress properly understood, it can be seen that the MMPA does not pose a "significant conflict" with the CSA. (See *San Diego, supra,* 165 Cal.App.4th at p. 826 [under obstacle preemption, "not every state law posing some de minimus impediment will be preempted. To the contrary, '[d]isplacement will occur only where, as we have variously described, a '*significant conflict*' exists between an identifiable 'federal policy or interest and the [operation] of state law,'"] [quoting *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 507] [Italics in original].) Seriously ill persons who use marijuana after having this treatment recommended to them by a physician are not engaging in drug abuse, as that term has been conventionally understood. (Cf. *People v. Mower* (2002) 28 Cal.4th 457, 482 [equating possession of marijuana in compliance with the CUA to "the possession of any prescription drug with a physician's prescription"]; *Oregon v. Ashcroft* (9th Cir. 2004) 368 F.3d 1118, 1166, *affd. in* 126 S.Ct. 904 (2006) [contrasting "drug abuse" and "medical practice"].) In any event, because medical marijuana patients comprise only a tiny fraction of all marijuana users, medical marijuana collectives, which consists only of qualified patients, will not significantly conflict with Congress' goal of curbing drug abuse. (Cf. *Garden Grove, supra,* 157 Cal.App.4th at p. 384 ["[i]t is unreasonable to believe that use of medical

marijuana by [qualified users under the CUA] for [the] limited purpose [of medical treatment] will create a significant drug problem, so as to undermine the stated objectives of the CSA"] [quoting *Conant v. McCaffrey* (N.D. Cal. 1997) 172 F.R.D. 681, 694 fn. 5, *affd. in Conant v. Walters, supra,* 309 F.3d 629]; see also *Gonzales v. Raich* (2005) 545 U.S. 1, 63 (dis. opn. of Thomas, J.) ["many law enforcement officials report that the introduction of medical marijuana laws has *not* affected their law enforcement efforts"] [Italics added].)

IV. FEDERAL PREEMPTION OF THE MMP IS FORECLOSED BY THE TENTH AMENDMENT

If the federal government *had* sought to preempt state law in this area, which it has not, such "commandeering" of the states would violate the Tenth Amendment. (See *Printz v. United States* (1997) 521 U.S. 898, 930-31; *New York v. United States* (1991) 505 U.S. 144, 157; *Nat'l Federation of Republican Assemblies v. United States* (S.D. Ala. 2002) 218 F.Supp.2d 1300, 1352 ["the federalism concerns that the Tenth Amendment embodies counsel hesitation before construing Congress's enumerated powers to intrude upon the core aspects of state sovereignty"].) Under the Tenth Amendment, the federal government may not "commandeer" state officials to enforce federal law -- "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." (*New York, supra,* 505 U.S. at p. 935.) The reason is that under our federalist system of government, sovereign states, at a minimum, must be able to control their own purse strings. As the Court stated in *Printz,*

supra: "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service--and at no cost to itself--the police officers of the 50 States." (521 U.S. at p. 922.)

Here, whereas the State of California has made a decision to conserve its scarce judicial resources by not subjecting medical marijuana patients who form patient collectives to criminal sanction, the City of Anaheim contends that federal law *requires* it to pass such criminal laws. Such conscription of local government violates the Tenth Amendment. (Cf. *San Diego, supra*, 165 Cal.App.4th at p. 828 [holding that the CSA does not preempt the MMPA, even if Congress intended this result, due to the Tenth Amendment]; *Conant v McCaffrey* (9th Cir. 2002) 309 F.3d 629, 646-647 (conc. op. of Kozinski, J.) [explaining that federal government's threat of revoking DEA licenses of California physicians who recommend marijuana to their patients violates the Tenth Amendment.].)

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's judgment.

DATED: November 3, 2008 Respectfully submitted,

JOSEPH D. ELFORD
Counsel for Americans for Safe Access

CERTIFICATE OF WORD COUNT

I, JOSEPH D. ELFORD, declare as follows:

I am the attorney for Amicus Curiae Americans for Safe Access in this matter. On November 3, 2008, I performed a word count of the above-enclosed brief, which revealed a total of 6,913 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of November in Oakland, California.

JOSEPH D. ELFORD

DECLARATION OF SERVICE

I am a resident of the State of California and over the age of eighteen years. My business address is Americans for Safe Access, 1322 Webster St., Suite 402, Oakland, CA 94612. On November 3, 2008, I served the within document(s):

AMICUS CURIAE BRIEF OF AMERICANS FOR SAFE ACCESS IN SUPPORT OF APPELLANTS

Via first-class mail to:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this 3rd day of November, 2008, in Oakland, California.

JOSEPH D. ELFORD