IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

The City of Garden Grove, a Municipal Corporation, Petitioner, **v.** **Orange County Superior Court,** Respondent, **Felix Kha,** Real Party in Interest.	G036250

Orange County Superior Court No. GG98995
Linda S. Marks, Judge

BRIEF OF AMICUS CURIAE BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

BILL LOCKYER
Attorney General of the State of California

JAMES HUMES
Chief Assistant Attorney General

STACY BOULWARE EURIE
Senior Assistant Attorney General

CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General

TERI L. BLOCK
Deputy Attorney General
State Bar No. 195980
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone:
Fax: (916) 324-5567

Attorneys for Attorney General, State of California

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IDENTITY AND INTEREST OF AMICUS CURIAE

Attorney General Bill Lockyer submits this brief as amicus curiae pursuant to Rule 13(c) of the California Rules of Court. Amicus has an interest in upholding the California Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5 et seq.) ("CUA"), which regulates the use and distribution of medicinal marijuana. The CUA was a ballot initiative that was passed by a majority of California voters in 1996.

Petitioner City of Garden Grove ("the City") petitions this Court for a writ of mandate that would instruct a California trial court to withdraw its order to return seized medicinal marijuana to Felix Kha, a "qualified patient" under the CUA. The trial court's order was proper under the CUA, and in harmony with various provisions of the California Penal Code that require California courts to order lawfully possessed seized property returned to its owner. Notwithstanding, the City argues that the trial court had a duty to order the marijuana destroyed because possession of marijuana is illegal under the federal Controlled Substances Act (21 U.S.C. § 801 et seq.) ("the CSA").

This Court should deny the City's petition for writ of mandate because (1) the City lacks standing for writ relief; (2) the trial court had no duty to order Kha's medical marijuana destroyed; (3) the trial court did not abuse its discretion in ordering the seized marijuana returned to Kha because the court found that he was a "qualified patient" under the CUA; (4) the trial court did not exceed its authority in ordering the marijuana returned because the CSA does not preempt the CUA; and, (5) the Tenth Amendment precludes the relief that the City requests.

ARGUMENT

I.

WRIT RELIEF IS NOT APPROPRIATE

The City petitions this Court for a writ of mandate on the ground that if it complies with the trial court's order, it will be returning illegal contraband to a defendant in violation of federal law. (Opening Brief ("OB") at p. 1.) Writ relief is not available in this case because the City lacks standing – it does not have a particularized "beneficial interest" in the outcome of these proceedings and cannot demonstrate that it will suffer irreparable injury if relief is denied. Moreover, there is no showing that the trial court abused its discretion or failed to carry out a nondiscretionary duty when it ordered law enforcement to return Kha's medical marijuana pursuant to California law. For these reasons, the court must deny the City's petition for writ of mandate.

A. The City Lacks Standing To Seek Writ Relief

1. The City Cannot Establish That It Is "Beneficially Interested."

Standing is a jurisdictional issue that may be raised at any time in the proceedings. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438.) Code of Civil Procedure section 1086 provides in pertinent part that a

writ of mandate "must be issued upon the verified petition of the party beneficially interested." This provision has been held to establish a standing requirement – the writ will issue only at the request of one who is beneficially interested in the subject matter of the action. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351.) To establish a beneficial interest, the petitioner must show that he or she has some special interest to be served or some particular right to be preserved or protected through issuance of the writ, over and above the interest held in common with the public at large. (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.) Stated differently, the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied. (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232, citing *Parker, supra,* 40 Cal.2d at p. 351.) This standard "is equivalent to the federal 'injury in fact' test, which requires a party to prove by a preponderance of the evidence that it has suffered an invasion of a legally protected interest that is [both] (a) concrete and particularized, and (b) actual or imminent . . . ." (*People ex rel. Dept. of Conservation v. El Dorado County* (2005) 36 Cal.4th 971, 986, internal quotation marks and citation omitted.) [1/]

The City contends that it is beneficially interested in ensuring that the seized marijuana is not returned to Kha because it "has a police department that is actively engaged in attempting to limit the amount of illegal drugs that circulate in the City." (OB at p. 11.) This does not satisfy the particularized

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1. As Witkin explains: "The [mandate] statute speaks of compelling the respondent to perform a 'duty,' . . . on petition of 'the party beneficially interested.' (C.C.P. [Code of Civil Procedure sections] 1085, 1086.) The terms are suggestive of the basic dual requirements for mandamus: (1) a clear, present (and usually ministerial) duty on the part of the respondent; [and] (2) a clear, present, and beneficial right in the petitioner to the performance of that duty." (8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 72, p. 853, and cases cited therein. See also *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd.* (1999) 75 Cal.App.4th 327, 331.)

"beneficial interest" requirement that section 1086 contemplates.

The decision in *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd.*, *supra*, 75 Cal. App.4th 327 is instructive. There, a fire protection district sought a writ of mandate against a county assessment appeals board after the board upheld a lower assessed valuation for a taxpayer's real property, resulting in the fire district's having to refund previously collected taxes. (*Id*. at p. 330.) The fire district claimed that it was beneficially interested in the assessed valuation assigned to the particular piece of property because the district's funding was based, in part, on assessed property values. (*Id*. at pp. 331-332.) The Third District Court of Appeal rejected this argument:

> [T]he District does not have "some special interest to be served or some particular right to be preserved or protected over and above the interest [it holds] in common with the public at large." (*Carsten* [*v. Psychology Examining Com*. (1980) 27 Cal. 3d 793] at p. 796.) The District and its residents, and indeed the public at large, share a common interest in seeing that the District's public function is effectively funded.

(*Id*. at p. 332.)

Similarly, in this case the City's shared interest with the public at large in limiting the circulation of illegal drugs does not establish a particularized "beneficial interest" for purposes of writ relief. (*Id; Waste Management of Alameda County*, *supra*, 79 Cal. App.4th at 1233 [holding plaintiff's interest must be direct, substantial and special in the sense that it is over and above interest held in common by the public at large].) Indeed, the City's interest in stemming the flow of illegal drugs is shared by every community in the nation. Because the City has not demonstrated a "beneficial interest" over and above the public at large, the court must deny its petition for lack of standing.

2. The "Public Interest" Exception To The "Beneficial Interest" Requirement Does Not Apply.

The courts have recognized a public interest exception to beneficial interest requirement: "[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced . . . . [This] exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right . . . ." (*Sacramento County Fire Protection Dist., supra*, 75 Cal.App.4th at p. 333, internal quotation marks and citations omitted.)

As a preliminary matter, the City does not raise the public interest exception, and indeed, makes no showing that it applies; consequently, this argument is waived. (*Cal West Nurseries, Inc. v. Superior Court (A.J. West Ranch, LLC)* (2005) 129 Cal.App.4th 1170, 1174 [holding issues not supported by argument and citation to authority are considered waived].) Even if it had asserted the exception, the City could not establish that it applies here.

Historically, the public interest exception has been applied to individual citizens, (*McDonald v. Stockton Met. Transit Dist.* (1973) 36 Cal. App.3d 436);[2/] however, the courts have been willing to extend the exception to a non-individual entity when circumstances suggest that the entity should be accorded the attributes of a citizen litigant. (*Waste Management of Alameda County, supra*, 79 Cal. App.4th at p. 1238.) Such circumstances are not present in this case because the City is not charged with enforcing the CSA, which forms the basis of its petition for relief. (*Sacramento County Fire Protection*

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2. "Citizens" are natural persons who are born and/or reside within a community. (See Gov. Code, §§ 240, 241.)

Dist., supra, 75 Cal.App.4th at p. 335 [holding fire district could not use the "public interest exception" to establish standing because it was not charged with enforcing the property tax scheme on which its petition for relief was based].)

Thus, because the City cannot establish that it has a beneficial interest in writ relief or that the "public interest" exception applies, the court must deny the City's petition for lack of standing. Even if the City could establish a beneficial interest, relief is not available because the City cannot not demonstrate irreparable injury.

3. The City Will Not Suffer Irreparable Injury If Relief Is Denied.

Mandate lies only if the petitioner will suffer irreparable injury without it. (*Omaha Indemnity Co. v. Superior Court* (1989) Cal.App.3d 1266, 1274.) A writ of mandate is granted "only where necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered *by the petitioner* if said writ is denied." (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 707-708 (emphasis in original) (internal quotation marks and citation omitted). Irreparable injury occurs when the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal. (*City of Half Moon Bay v. Superior Court* (2003) 106 Cal.App.4th 795, 803 [finding irreparable injury where contested coastal development could proceed immediately and appeal was not available because litigation was ongoing].)

The City offers no showing of irreparable injury. The suggestion is that the City will suffer harm if mandate is denied because it risks contempt charges if it refuses to comply with the trial court's order, and violation of federal law (the CSA) if it complies with the order. (OB at p. 1.) This argument fails because the City and its police officers are entitled to protection under 21 U.S.C. section 885(d), which immunizes local officials "lawfully engaged in the enforcement of any law or municipal ordinance relating to

controlled substances" from civil or criminal liability. [3/] Here, because the trial court's order carries the force and effect of law,[4/] City officials would be immune from liability if they complied with it. (*Id*.) Thus, the City will not suffer irreparable injury if writ relief is denied.

Nor can the City argue that it would suffer irreparable harm if forced to defend itself against federal prosecution for alleged violation of the CSA.[5/] Irreparable harm is seldom established merely by the fact that, if the trial court ruling is wrong, the petitioner will have to bear the time and expense of going to trial unnecessarily. (*Ordway v. Superior Court* (1988) 198 Cal. App.3d 98, 101, fn. 1 ["Prerogative writs should issue where irreparable injury is threatened, but rarely otherwise. A trial does not generally meet the definition of 'irreparable injury,' being at most an irreparable inconvenience."].) Thus, writ relief is not available also because the City will not suffer irreparable harm if the petition is denied.

B. The Trial Court Did Not Fail To Exercise A Non-Discretionary Duty Or Abuse Its Discretion In Ordering Kha's Medical Marijuana Returned

The City's petition also fails on the merits. Mandate lies to enforce a nondiscretionary duty to act (*Timmons v. McMahon* (1991) 235 Cal.App.3d 512, 517-18) or to correct an abuse of discretion. (*State Farm Mut. Auto. Ins.*

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3. The section provides in relevant part: "[N]o civil or criminal liability shall be imposed by virtue of this title upon any duly authorized Federal officer lawfully engaged in the enforcement of this title, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." (21 U.S.C. § 885(d).)

4. See Code of Civ. Proc., §§ 128, 177.

5. Moreover, and in any event, amicus is unaware of any federal prosecution of a California municipality for alleged violation of the CSA.

Co. v. Superior Court (Corrick) (1956) 47 Cal.2d 428, 432.) The City argues that the trial court had a mandatory duty to order the destruction of Kha's marijuana under California Health and Safety Code section 11473.5(a) because the marijuana was not "lawfully possessed" under the federal CSA. (OB at p. 19.) Alternatively, the City contends that the trial court abused its discretion in ordering the marijuana returned because the order violates the CSA, which forbids possession of marijuana for any purpose. (*Id*.) Both arguments lack merit.

1. The Trial Court Had No Duty To Order The Destruction Of Kha's Medical Marijuana

"It is well settled that mandamus will not lie to control the discretion of a court or judicial officer or to compel its exercise in a particular manner, except in those rare instances when under the facts it can be legally exercised in but one way [citations]." (*Mannheim v. Superior Court of Los Angeles County* (1970) 3 Cal.3d 678, 685.) Under this standard, mandamus is not appropriate unless the City can demonstrate that the trial court had no choice but to order Kha's medical marijuana destroyed.

Although the CUA is silent on the question of returning seized medical marijuana, it does not call for its destruction. The California Health and Safety Code requires California courts to order destroyed all seized controlled substances not "lawfully possessed." (Health & Saf. Code, § 11473.5, subd. (a).) Because possession of marijuana is illegal under the federal CSA, the City contends that Kha's medical marijuana was not "lawfully possessed," and that, therefore, the court had a mandatory duty to order the marijuana destroyed under section 11473.5 subd. (a).[6] (OB at p. 19.) This

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6. The City maintains that marijuana remains illegal contraband under federal law, citing *Ross v. Ragingwire Telecommunications, Inc*. (2005) 132 Cal.App.4th 590, review granted Nov. 30, 2005, S138130; however, *Ross* is no longer authority. (Cal. Rules of Court, rules 976(d)(1), 977(a).)

argument runs afoul of the Tenth Amendment, (see discussion, *infra* at p. 17), and ignores the fact that medical marijuana is considered "lawfully possessed" for purposes of section 11473.5(a). Moreover, the CSA does not require the destruction of *any* seized marijuana. Since neither the federal nor the state law require the trial court to order seized medical marijuana destroyed, it cannot be said that the court here had no other choice. Accordingly, the City's claim that the trial court had a nondiscretionary duty to order Kha's medical marijuana destroyed must be rejected.

2. The Trial Court Properly Exercised Discretion In Ordering Kha's Medical Marijuana Returned.

As previously noted, the CUA is silent on the question of returning seized medical marijuana, and section 11473.5(a) of the Health and Safety Code (calling for the destruction of controlled substances not lawfully possessed) is not applicable here because Kha's medical marijuana was lawfully possessed under the CUA. When a statute is silent on a given issue, the court should construe it to effectuate the purpose of the law. (*T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 277.)

> The purpose of the CUA is
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> > [t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes . . .[,] that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction[, and 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 & Saf. Code, § 11362.5 subd. (b)(1)(A),(B) and (C).) Vesting the trial court with discretion to order the return of lawfully possessed seized medical marijuana effectuates this purpose. Indeed, if the court can determine that the marijuana was lawfully obtained by a qualified patient for medicinal use, failure

to order it returned arguably would be at odds with the purpose of the CUA. Moreover, ordering the return of seized medical marijuana would be in harmony with various provisions of the Penal Code, which call for the return of lawfully possessed seized property. (See, e.g., Penal Code, §§ 1538.5, 1539 and 1540.)

Finally, affording the trial court discretion to decide whether or not to order seized marijuana returned allows the court to consider the facts on a case-by-case basis. Indeed, the court must be given the latitude to evaluate the totality of the circumstances to determine, e.g., whether the owner of the seized marijuana is a "qualified patient." An inconclusive record on this issue would give the court discretionary grounds to deny a petition for return of seized marijuana that would otherwise be illegal contraband.

Here, the trial court implicitly found that Kha was a "qualified patient" when it reviewed Kha's doctor's recommendation and dismissed the possession charge, and the City has offered no conclusive evidence to suggest that this finding was erroneous.[7/] Under these circumstances, the trial court did not abuse its discretion in ordering the marijuana returned.

In summary, writ relief is not available in this case because the City

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7. The City argues that Kha is not a "qualified patient" because he received his marijuana from a "lab in Long Beach," which is not a "primary caregiver" under section 11362.7(d)(3) of the CUA. (Reply at p. 5.) The City appears to overlook section 11362.7(d)(1), however, which lists various health care facilities as "primary caregivers." (Health & Saf. Code, § 11362.7 subd. (d)(1).) Since the trial court reasonably could have determined that the lab was a primary caregiver under section 11362.7(d)(1), this Court must reject the City's argument that the trial court erred in finding that Kha was a qualified patient. (*City and County of San Francisco v. State of California* (2005) 128 Cal. App. 4th 1030, 1037 [noting that the burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power].)

has no particularized "beneficial interest" and will not suffer irreparable harm if the petition is denied. Additionally, the City's petition fails on the merits because the trial court had no duty to order Kha's medical marijuana destroyed and the court did not abuse its discretion in ordering the marijuana returned. For these reasons, the City's petition for writ of mandate must be denied.

C. The CSA Does Not Preempt The CUA

The City also argues that the trial court had no authority to order Kha's medical marijuana returned because the federal CSA preempts the CUA. (OB at p. 20.) In *English v. General Electric* (1990) 496 U.S. 72, the Supreme Court explained that federal preemption occurs in three circumstances: (1) Congress can define explicitly the extent to which its enactments preempt state laws (field preemption); (2) in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively (usually inferred from a scheme of federal regulation that leaves no room for the states to regulate) (implied field preemption); and, (3) state law is preempted to the extent that it actually conflicts with federal law (conflict preemption). (*Id*. at p. 78-79.) None of these circumstances are present here.

1. Congress Did Not Explicitly Or Inferentially Occupy The Field Regulating Medicinal Use Of Marijuana

Section 903 of the CSA, entitled "Application of State Law," provides:

> No provision of this title 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 title and that State law so that the two cannot consistently stand together.

(21 U.S.C. § 903.)

Thus, although Congress expressly declared that it did not intend to occupy the field of controlled substances, it did not specify the extent to which states could do so. Consequently, the U.S. Supreme Court has wrestled at various times with the regulatory scope of the CSA. In *Gonzales v. Raich* (2005) 545 U.S. 1, for example, the Court considered whether Congress had authority under the Commerce Clause to regulate intrastate medicinal marijuana. There, respondents brought an action against the federal government seeking injunctive relief prohibiting enforcement of the CSA to the extent that it prevented them from possessing or obtaining medical marijuana for personal use under the CUA. (*Id*. at p. 8.) Ultimately, in a four-three decision in which Justice Scalia concurred separately, a divided majority concluded that Congress did not exceed its authority under the Commerce Clause when it enacted the CSA because intrastate marijuana use can be shown to affect interstate commerce. (*Id*. at p. 32.)

Citing *Raich*, the City contends that the CSA preempts the CUA. (OB at p. 21.) The City correctly points out that the Court in *Raich* determined that Congress had a rational basis for enacting the CSA, based, in part, on Congress' finding that marijuana had no medicinal value. Borrowing from the Court's rational basis analysis, the City erroneously concludes, however, that *Raich* holds that Congress intended to occupy the field of marijuana use for all purposes, including medicinal use. (Reply at p. 11.) This not only runs afoul of the express language of section 903, but confuses the Court's rational basis analysis with the holding of the case. Indeed, the Court did not analyze the validity of Congress' findings. Rather, based on the assumption that the findings were valid, the Court simply concluded that Congress had a rational basis for enacting the CSA without carving out an express exemption for medical marijuana. (*Raich*, *supra,* 545 U.S. at p. 19 ["Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would . . . affect price and market conditions."].)

In fact, *Raich* merely held that Congress' authority to regulate interstate markets for medicinal substances *can* reach intrastate medicinal substances under the Commerce Clause. (*Id*. at p. 2201.) The Court's holding, however, does not suggest or even address whether Congress *intended* to preempt state regulation of intrastate medical marijuana. (*English v. General Elec. Co.*, *supra*, 496 U.S. at pp. 78-79 [preemption fundamentally is a question of congressional intent].)

Indeed, *Raich* did not discuss section 903 – the CSA's anti-preemption provision. Moreover, the majority did not concern itself with the fact that California's regulation of medicinal marijuana falls squarely within the traditional rights of states to regulate health and safety matters, or more precisely, the practice of medicine. (See, e.g., *Hillsborough County v. Automated Medical Laboratories, Inc.* (1985) 471 U.S. 707, 719; *Rice v. Santa Fe Elevator Corp*. (1947) 331 U.S. 218, 230.)

By contrast, more recently the Court determined that the narrow purpose of the CSA was to regulate recreational drug abuse, noting that the Act was silent on the practice of medicine generally. (*Gonzales v. Oregon* (2006) __ U.S. __, 126 S.Ct. 904, 924.) In *Gonzales v. Oregon*, the Court concluded that Oregon's assisted suicide law is not preempted by the CSA because health and welfare concerns historically have been regulated by the states. (*Id*. at 923.) The Court observed that to construe the preemptive scope of the CSA to include the practice of medicine would "effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it." (*Id*. at 925.)

Thus, the Supreme Court has unequivocally determined that (1) the purpose of the CSA is to regulate recreational drug abuse; and, (2) Congress did not intend to preempt states' traditional rights to regulate medicine.

Additionally, contrary to the City's claim, *Raich* did not hold that the CSA preempts the CUA, nor has Congress expressed any intent to occupy the field of controlled substances, or more precisely, medical marijuana. This ambiguity weighs in favor of the well-established presumption against preemption. Moreover, in areas "which the States have traditionally occupied," the Supreme Court has required a stronger showing before it will find state law preempted. (*Rice, supra,* 331 U.S. at p. 230 ["[W]e 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."].) Such "clear and manifest purpose" is notably absent in this case.

As Harvard Professor Laurence Tribe explains, there is an overriding reluctance to infer preemption in ambiguous cases:

> Such reluctance seems particularly appropriate in light of the Supreme Court's repeated emphasis on the central institutional role of Congress and of congressional political processes in protecting the sovereignty of the states . . . . By declining to infer preemption in the face of congressional ambiguity, the Court is not interposing a judicial barrier to Congress' will in order to protect state sovereignty . . . but is instead . . . requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end.

(Tribe, American Constitutional Law (3rd ed. 2000) § 6-28, p. 1175.) Given the ambiguities in this case, it is not appropriate to infer that the CSA preempts the CUA. Accordingly, the City must demonstrate that the CUA conflicts the CSA in order to find preemption here. On this point, the City's arguments fail as well.

2. The CUA Does Not Conflict With The CSA

The Supreme Court has found conflict preemption where it is impossible for a private party to comply with both state and federal

requirements (*Florida Lime Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142-143), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67.) The City argues that the CUA conflicts directly with the CSA because it "condones and facilitates the possession of federal contraband" that is prohibited by the CSA. (OB at p. 21.) Without further analysis, the City also suggests that the CUA is preempted because it stands as an obstacle to the purposes and objectives of the CSA. (*Id.*)

The latter (obstacle preemption) does not apply because the Supreme Court has determined that Congress' purpose and objective in enacting the CSA were to "combat[] recreational drug abuse." (*Gonzales v. Oregon, supra,* 126 S.Ct. at p. 924.) California's regulation of marijuana use for medicinal purposes does not stand as an obstacle to combating recreational drug abuse.

Notwithstanding, the City contends the two statutes "cannot consistently stand together" because the CUA permits medical use of marijuana while the CSA prohibits the distribution, manufacture or possession of marijuana for any purpose other than federal research. (OB at p. 21.) This mischaracterizes the CSA and oversimplifies conflict preemption.

In *Florida Lime Growers, supra*, the Supreme Court explained conflict preemption as follows:

> The issue under the head of the Supremacy Clause is . . . this: Does either the nature of the subject matter . . . or any explicit declaration of congressional design to displace state regulation, require [the state law] to yield to the federal [law]?

(*Id.*, 373 U.S. at p. 143.) In this case, Congress has expressly declared that the states may regulate controlled substances and other areas traditionally reserved for state regulation. (21 U.S.C. § 903.) The CUA's regulation of medicinal marijuana falls squarely within both categories. The City argues, nonetheless, that Congress declared an intent to displace state regulation of medicinal

marijuana because the CSA prohibits possession of marijuana for any purpose other than FDA-approved research, citing sections 823(f), 841(a)(1), and 844(a). (OB at p. 21.)

As a preliminary matter, the sections cited by the City do not prohibit distribution or possession of medical marijuana. Section 823(f) deals with the registration requirements for research regarding controlled substances defined by the Act. (21 U.S.C. § 823(f).) Section 841(a)(1) prohibits the illegal manufacture, distribution, or possession of a controlled substance. (21 U.S.C. § 841(a)(1).) Section 844(a) prohibits possession of a controlled substance absent a valid prescription, and possession of a list one chemical (which includes marijuana) for research purposes after the registration for such research has been revoked or suspended, or has expired. (21 U.S.C. § 844(a).)[8/]

Moreover, there is no conflict between the CSA and the CUA because the Supreme Court has expressly determined that the purpose of the CSA was to combat recreational drug abuse, not to displace state regulation of medicinal use of controlled substances. (*Gonzales v. Oregon, supra,* 126 S.Ct. at 924.)

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8. Section 844(a) provides in relevant part:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this title [21 U.S.C. § 823] or section 1008 of title III [21 U.S.C. § 958] if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration.

(21 U.S.C. § 844(a).)

The observations of the District Court of Oregon citing another Supreme Court decision are also instructive:

> [T]he legislative history of both the 1970 enactment [of the CSA] and the 1984 amendments overwhelming support a conclusion that Congress' intent was to address problems of drug abuse, drug trafficking, and diversion of drugs from legitimate channels to illegitimate channels. (*See United States v. Moore* (1975) 423 U.S. 122, 134-135 ["Congress was concerned with the nature of the drug transaction, rather than with the status of the defendant"].)

(*Oregon v. Ashcroft* (D. Or. 2002) 192 F.Supp.2d 1077, 1090.) Thus, the City's suggestion that the CSA was intended to displace state regulation of medical marijuana is an overstatement that finds no support in the statute itself, legislative history, or any Supreme Court decision interpreting the statute. Under these circumstances, there is no basis for finding field preemption, implied field preemption or conflict preemption.

D. The Tenth Amendment Precludes The Relief That The City Seeks

Under the Tenth Amendment, "the federal government may not compel States to implement, by legislation or executive action, federal regulatory programs." (*Printz v. United States* (1997) 521 U.S. 898, 925.) The crucial proscribed element is coercion; the residents of the State or municipality must retain "the ultimate decision" as to whether or not the State or municipality will comply with the federal regulatory program. (*New York v. United States* (1992) 505 U.S. 144, 168.) The purpose of Tenth Amendment was to allay fears that national government might seek to exercise powers not granted, and that states might not be able to exercise fully their reserved rights. (*United States v. Darby* (1941) 312 U.S. 100, 124.)

Here, the City requests this Court to issue a writ of mandate directing the trial court to set aside its order and enter a new order denying Kha's petition for return of property. (OB at p. 22.) The City's request presumes that the CSA preempts the CUA, and therefore, obligates the trial court to deny Kha's

petition for return of property. This argument fails for the reasons previously stated. Moreover, because the CSA does not preempt the CUA, a writ of mandate directing the trial court to set aside an otherwise lawful order based on the CSA would violate the Tenth Amendment. (*New York v. United States, supra,* 505 U.S. at p. 161 ["Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."] (internal quotation marks and citation omitted).) Accordingly, the Court must deny the City's petition on Tenth Amendment grounds as well.

CONCLUSION

Writ relief is not available in this case because the City cannot establish for standing purposes that it is "beneficially interested" or that it will suffer irreparable injury if this petition is denied. Even if the City could establish standing, the petition fails on the merits because the trial court had no duty under state or federal law to order Kha's medical marijuana destroyed, and the City failed to demonstrate that the court abused its discretion in ordering the marijuana returned. Additionally, there is no basis for finding that the trial court exceeded its authority because CSA does not preempt the CUA. Finally, the Tenth Amendment precludes the relief that the City requests. For these reasons, this Court must deny the City's petition for writ of mandate.

Dated: November 1, 2006

BILL LOCKYER
Attorney General of the State of California

JAMES HUMES
Chief Assistant Attorney General

STACY BOULWARE EURIE
Senior Assistant Attorney General

CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General

TERI L. BLOCK
Deputy Attorney General
Attorneys for Attorney General, State of California

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF OF AMICUS CURIAE BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA uses a 13 point Times New Román font and contains 5609 words.

Dated: November 1, 2006

BILL LOCKYER
Attorney General of the State of California

JAMES HUMES
Chief Assistant Attorney General

STACY BOULWARE EURIE
Senior Assistant Attorney General

CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General

TERI L. BLOCK
Deputy Attorney General
Attorneys for Attorney General, State of California

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **City of Garden Grove v. Orange County S.C. (Kha)**

No.: **California Court of Appeal, Fourth District No. G036250**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 1, 2006, I served the attached **BRIEF OF AMICUS CURIAE BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

John R. Shaw, Esq.
Woodruff, Spradlin & Smart
701 South Parker Street, Suite 8000
Orange, CA 92868-4760

Orange County Office of the
District Attorney
West Justice Center
8141 - 13th Street
Westminster, CA 92863

Hon. Linda S. Marks
Orange County Superior Court
West Justice Center
8141 - 13th Street, Department W3
Westminster, CA 92863-7593

Joseph D. Elford, Esq.
Americans for Safe Access
1322 Webster Street, Suite 402
Oakland, California 94612

Supreme Court of the State of California
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013-1233

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 1, 2006, at Sacramento, California.

JO FARRELL
Declarant

Signature

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