AMERICAN CIVIL LIBERTIES UNION of NORTHERN CALIFORNIA FOUNDATION

January 24, 2014

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Request for depublication of *Maral v. City of Live Oak*, 221 Cal. App. 4th 975, 164 Cal. Rptr. 3d 804 (3rd Dist. No. C071822, Nov. 26, 2013).

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The American Civil Liberties Union of Northern California (ACLU-NC) respectfully asks this Court to depublish the Court of Appeal's opinion in this matter, a copy of which is attached to this letter.[1]

The Court should depublish the opinion because it upholds a local ban on marijuana cultivation against a preemption challenge but fails to address a critical part of California's preemption analysis: a local ordinance is preempted if it "duplicates" state law. *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 743 (2013). Because the Live Oak ordinance completely prohibits the cultivation of marijuana, it duplicates the state's nearly identical prohibition on marijuana cultivation and is preempted. *Compare* Live Oak Municipal Code § 17.17.040 *with* Health & Safety Code § 11358.[2]

In addition, the court's failure to address preemption by duplication led it to misunderstand the preemptive effect that the Compassionate Use Act[3] (CUA) and the Medical Marijuana Program[4] (MMP) have on local attempts to

[1] Rule of Court 8.1125.
[2] All undesignated statutory references are to the Health and Safety Code.
[3] § 11362.5
[4] § 11362.7 *et seq.*

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 DRUMM STREET, SAN FRANCISCO, CA 94111 | T/415.621.2493 | F/415.255.1478 | TTY/415.863.7832 | WWW.ACLUNC.ORG

prohibit marijuana cultivation. Because it was already clear when these laws were enacted that state law would preempt local attempts to prohibit the cultivation of marijuana, medical or not, their failure to mention local ordinances does not suggest that the voters or the legislature intended to allow local laws that would prevent seriously ill Californians from cultivating or using medical marijuana.

INTEREST OF THE ACLU

The ACLU is a nationwide, nonprofit, nonpartisan membership organization with over 550,000 members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. The ACLU-NC, founded in 1934, is the largest ACLU affiliate. The ACLU and the ACLU-NC have been active participants in the debate over the reformation of laws prohibiting and regulating the use of marijuana.

The ACLU-NC requests depublication because the Court of Appeal's opinion wrongly authorizes California cities and counties to ban the cultivation – and, by logical extension, the possession of – medical marijuana by seriously ill Californians whose right to obtain, possess, and use medical marijuana is protected by the CUA and MMP.

DISCUSSION

1. The Court of Appeals failed to conduct a complete preemption analysis because it did not even address whether the Live Oak ordinance duplicates state law.

A local ordinance is preempted by California law if it either "*duplicates*, contradicts, *or* enters an area fully occupied by general law, either expressly or by legislative implication." *City of Riverside*, 56 Cal. 4th at 743 (quoting *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993)) (emphasis added). Local ordinances duplicate state laws if they are "coextensive" with them, meaning they ban the same conduct that state law prohibits. *Id.*; *see also Ex parte Bell*, 19 Cal. 2d 488, 498 (1942) ("An

ordinance is invalid if it makes illegal the same acts that are made illegal by the general laws of the state.") (citations omitted).

This Court has repeatedly applied this type of preemption to invalidate local ordinances that attempt to ban drugs and other vice that state laws already prohibit. It first applied duplication preemption in a case that, like this one, attempted to regulate the use of drugs, *In re Sic.*, 73 Cal. 142 (1887).[5] The City of Stockton had passed an ordinance effectively prohibiting the smoking of opium, even though state law already banned the practice. *See id.* at 144-45. Although the wording and details of the two provisions differed, the Court concluded that the local law "covers the same ground as the Penal Code." While noting that the local ordinance "was probably intended to cover some supposed defects in the Penal Code," *id.* at 146, the Court held, as a matter of first impression, that the ordinance was void because both laws would "punish precisely the same acts." *Id.* at 149.

This Court has applied *Sic* to invalidate other local attempts to regulate vice. For example, a state law prohibiting the use of a house for gambling preempted a local ordinance that attempted to do the same thing. *In re Portnoy*, 21 Cal. 2d 237, 239-40 (1942). The Court therefore invalidated the local ordinance, even though its prohibitions were somewhat broader than the state law and "the control of gambling activities is a matter concerning which local governments possess power to enact and enforce local regulations not in conflict with general law." *See id.* at 239-42; *see also, e.g., In re Mingo*, 190 Cal. 769, 772-74 (1923) (preempting local liquor law because it duplicated state law). *See generally Pipoly v. Benson*, 20 Cal. 2d 366, 370-71 (1942) (discussing duplication preemption).

Despite the long line of cases from this Court invalidating local vice laws as duplicative of state statutes, the Court of Appeal here failed to even address this type of preemption.[6] Had it done so, it would have seen that the ordinance is invalid.

---

[5]Dicta in *Sic* that suggested limitations on preemption was disapproved of in *Ex parte Lane*, 58 Cal. 2d 99, 105 (1962).

[6] It may well be that the argument was not properly presented to the Court of Appeal.

2. The Live Oak Ordinance duplicates state law because the Health and Safety Code already criminalizes the exact same conduct.

Health and Safety Code § 11358 has long banned marijuana cultivation and processing:

> Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law [is guilty of a crime].

The Live Oak ordinance purports to prohibit precisely the same conduct:

> Marijuana cultivation by any person, including primary caregivers and qualified patients, collectives, cooperatives or dispensaries is prohibited in all zone districts within the City of Live Oak.
> LOMC § 17.17.040

The ordinance defines cultivation to mean "the planting, growing, harvesting drying or processing of marijuana plants or any part thereof." *Id.* § 17.17.030(D).

The plain language of the statute and the ordinance thus show that Live Oak's prohibition, with its broad definition of "cultivation," prohibits precisely the same conduct as does § 11358: growing, harvesting, drying, and processing marijuana. Although it is styled as a zoning law, it does not merely specify *where* in the city medical-marijuana patients can or cannot cultivate cannabis; instead, it applies to every part of the city as an absolute prohibition that would prevent a qualified medical marijuana patient from growing even a single plant in the privacy of her bedroom.

It therefore duplicates state law and is preempted.

3. The CUA and MMP preempt Live Oak's attempt to prohibit the cultivation of medical marijuana.

The Court of Appeal's failure to consider whether § 11358 preempted Live Oak's ordinance also led it to err in analyzing the preemptive effect of

the CUA and MMP. Courts must presume that the voters who passed an initiative were "aware of existing related laws" and intend to "maintain a consistent body of rules."[7] Thus, the criminal-defense lawyers who drafted, and the voters who passed, the CUA are presumed to have known both that there were no local prohibitions on marijuana cultivation and that there could be no such local prohibitions because §11358 would preempt them. Creating a defense against prosecution under § 11358 was all that was necessary to permit seriously ill Californians to cultivate medical marijuana, just as a defense to prosecution under § 11357 was sufficient to allow them to possess and use medical marijuana.[8] This explains why the CUA only mentions these two statutes: the drafters did not need to clutter the initiative with references to local prohibitions that did not and could not exist. Similarly, the legislature needed only to provide protections against state statutes when it enacted the MMP to accomplish its goal of allowing patients and caregivers to possess medical marijuana. *See* §§ 11362.765, 11362.775.

Thus, read in light of the longstanding rule of preemption by duplication, the language of the CUA serves fully to accomplish the measure's express goal of "ensur[ing] that seriously ill Californians have the right to obtain and use marijuana for medical purposes." § 11362.5(b)(1)(A). As the official ballot pamphlet emphasized, the initiative was meant to accomplish this by permitting patients and their caregivers to "grow" and "cultivate" marijuana for medical use.[9] In fact, the very first point made in

---

[7] *People v. Bunyard*, 45 Cal. 3d 1189, 1238 (1988); *People v. Weidert*, 39 Cal.3d 836, 844 (1985) ("The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted. This principle applies to legislation enacted by initiative.") (internal citations omitted).

[8] *See* § 11362.5 ("Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver . . . [.]"

[9] *See Medical Use of Marijuana. Initiative Statute. Official Title and Summary Prepared by the Attorney General*, CALIFORNIA BALLOT PAMPHLET GENERAL ELECTION NOVEMBER 05, 1996 at 59 (Analysis By Legislative Analyst: "This measure amends state

the Attorney General's Title and Summary is that the law "[e]xempts patients and defined caregivers who possess or *cultivate* marijuana ... from criminal laws which otherwise prohibit possession or *cultivation* of marijuana.[10] Nothing suggested that local governments could *re*criminalize what the initiative *de*criminalized. A city cannot thwart the will of the voters simply by passing an ordinance that prohibits the cultivation or possession of medical marijuana, any more than the legislature could evade the CUA's protections for medical marijuana cultivation and possession simply by duplicating the provisions of § 11357 and § 11358 in the Penal Code with new section numbers. *See People v. Kelly*, 47 Cal. 4th 1008, 1025 (2010) (discussing CUA) (legislature cannot "undo[] what the people have done, without the electorate's consent.") (citation omitted).

4. This result is entirely consistent with this Court's decision in *City of Riverside*

In City of Riverside, this court rejected a claim that CUA and the MMP preempted local bans on medical-marijuana dispensaries. Importantly, the dispensaries in that case apparently did not argue that the ordinance duplicated any existing prohibitions on marijuana; they claimed only that they were preempted by the CUA and MMP. *See* 56 Cal. 4th at 737, 754. Thus, the only duplication-preemption argument that this Court addressed was whether the ban on dispensaries duplicated the CUA; because the CUA does not even mention, much less ban, dispensaries, this Court held that there was no preemption. *See id.* at 754.

Nor does *City of Riverside* indicate that the CUA and MMP allow local prohibitions on cultivation like the one here at issue. Neither the text of the CUA nor the ballot materials make any mention of dispensaries or even the

---

law to allow persons to grow or possess marijuana ....); *id.* at 60 (Argument in Favor: "Proposition 215 allows patients to cultivate their own marijuana ....") *available* at http://librarysource.uchastings.edu/ballot_pdf/1996g.pdf. These ballot materials indicate the voters' understanding of what the law would do and their intent in enacting it. *See Robert L. v. Superior Court*, 30 Cal. 4th 894, 906 (2003).

[10] *Id.* at 58 (emphasis added).

sale or distribution of medical marijuana; they do, however, expressly permit the cultivation of medical marijuana, just as they permit its possession and use, as discussed above. Further, "the MMP expressly recognizes local authority to 'regulate' medical marijuana" dispensaries, showing a legislative intent not to preempt bans on them. *Id.* at 760 (citing §§ 11362.768 (f), (g), 11362.83). Nothing in the MMP indicates any parallel intent to allow local bans on the cultivation of medical marijuana. To the contrary, the MMP expressly provides that patients and caregivers "may" cultivate and possess certain amounts of marijuana and only allows local governments to "retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to *exceed* the[se] state limits." § 11362.77(c) (emphasis added). This does not authorize a city to enact a law limiting patients to quantities *less* than those set by the MMP, much less to enact a total ban.

CONCLUSION

The Court of Appeals held that the Live Oak ordinance is not preempted by state law without even addressing the critical argument that it is preempted because it duplicates § 11358. This failure produced both an incorrect result and an incorrect analysis of preemption by the CUA and the MMP.

This Court should therefore depublish the Court of Appeal's opinion.

Sincerely,

Michael T. Risher
Staff Attorney
Cal. Bar. #191627

Encl.

221 Cal.App.4th 975
Court of Appeal,
Third District, California.

James MARAL et al., Plaintiffs and Appellants,
v.
CITY OF LIVE OAK, Defendant and Respondent.

C071822 | Filed November 26, 2013

Synopsis

Background: Objectors petitioned for writ of mandate challenging city ordinance prohibiting cultivation of marijuana. The Superior Court, Sutter County, No. CVCS120144, Perry Parker, J., sustained demurrer without leave to amend. Objectors appealed.

[Holding:] The Court of Appeal, Duarte, J., held that Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMPA) do not preempt a city's police power to prohibit all marijuana cultivation.

Affirmed.

APPEAL from a judgment of the Superior Court of Sutter County, Perry Parker, Judge. Affirmed. (Super. Ct. No. CVCS120144)

Attorneys and Law Firms

John J. Fuery, Oakland, for Plaintiffs and Appellants.

Rich, Fuidge, Morris & Lane, Inc., Brant J. Bordsen, Marysville, and Landon T. Little, for Defendant and Respondent.

Opinion

DUARTE, J.

***978** In December 2011, the City of Live Oak (the City) passed an ordinance prohibiting the cultivation of marijuana for any purpose within the City. Plaintiffs sued, contending the ordinance violated the Compassionate Use Act (CUA) (****806** Health & Saf. Code,[1] § 11362.5), the Medical Marijuana Program (MMP) (§ 11362.7 et seq.), equal protection, and due process. The trial court sustained the City's demurrer and dismissed the complaint. Plaintiffs appeal.

Plaintiffs argue that the CUA and the MMP grant them the right to cultivate medical marijuana. As our Supreme Court recently held in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729 at page 753, 156 Cal.Rptr.3d 409, 300 P.3d 494 (*Inland Empire*), the objectives of the CUA and MMP were "modest," and those acts did not create a "broad right" to access medical marijuana. *Inland Empire* held that the CUA and the MMP do not preempt the authority of cities and counties to regulate, even prohibit, facilities that distribute medical marijuana. (*Id.* at p. 762, 156 Cal.Rptr.3d 409, 300 P.3d 494.) The reasoning of *Inland Empire* applies to the cultivation of medical marijuana as well as its distribution, as both are addressed in the CUA and MMP. Accordingly, we conclude the CUA and MMP do not preempt a city's police power to prohibit the cultivation of all marijuana within that city. We shall affirm.

BACKGROUND

The Ordinance

On December 21, 2011, by a vote of 5–0, the City Council of the City adopted Ordinance 538 (Ordinance) regarding the cultivation and sale of medical marijuana within the city limits. The Ordinance added a new Chapter 17.17 to the Live Oak Municipal Code (LOMC).

In adopting the ordinance, the City made several factual findings. It found that the cultivation of medical marijuana had significant impacts or the ***979** potential for significant impacts on the City. These impacts included damage to buildings, dangerous electrical alterations and use, inadequate ventilation, increased robberies and other crime, and the nuisance of strong and noxious odors. (LOMC, § 17.17.010, ¶ A.) The City also noted the limited scope of the CUA, which the City said was to provide a criminal defense, and of the MMP, which the City said was to establish a statewide identification program. (*Id.* ¶ B.) The City found that the CUA and MMP had not "facilitated" their stated goals as most use of marijuana was recreational, not medicinal. (*Id.* ¶ E.) Further, the possession and cultivation of marijuana remained illegal under federal law, and the City did not wish to violate federal law. (*Id.* ¶ J.)

plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (§ 11362.5, subds. (b)(1)(A)-(C).)

[1] Rather than granting a blanket right to use marijuana for medical purposes, the CUA only immunizes specific persons from criminal prosecution under two sections of the Health and Safety Code. Thus, the CUA grants only "a limited immunity from prosecution." (*People v. Mower* (2002) 28 Cal.4th 457, 470, 122 Cal.Rptr.2d 326, 49 P.3d 1067.) The CUA provides: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).) The CUA creates only a limited defense to certain crimes, "not a constitutional right to obtain marijuana." (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 774, 33 Cal.Rptr.3d 859.)

In 2003, the Legislature passed the MMP; it did so in part to clarify the scope of the CUA and promote its uniform application "among the counties within the state." (Stats. 2003, ch. 875, § 1.) The MMP created a voluntary program for the issuance of identification cards to qualified patients and primary caregivers. (§ 11362.71.)

[2] The MMP also "immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. [Citation.]" (*People v. Mentch* (2008) 45 Cal.4th 274, 290, 85 Cal.Rptr.3d 480, 195 P.3d 1061 (*Mentch*).) "Section 11362.765 accords qualified patients, primary caregivers, and holders of valid identification cards, an affirmative defense to certain enumerated penal sanctions that would otherwise apply to transporting, processing, administering, or giving away marijuana to qualified persons for medical use." (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1171, 100 Cal.Rptr.3d 1 (*Kruse*).) The MMP provides that specified individuals "shall not be subject, on that sole basis, to criminal liability" under sections 11357 [possession], 11358 [cultivation], 11359 [possession for sale], 11366 [maintaining location for selling, giving away or using controlled substances], 11366.5 [managing location for manufacture or storage of controlled substance], or 11570 ["drug den" abatement law]. (§ 11362.765, subd. (a).) This immunity extends to those "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for ***982** medical purposes." (§ 11362.775.) The MMP does not, however, "confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose." (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 869, 121 Cal.Rptr.3d 722 (*Hill*).)

III

Inland Empire

In *Inland Empire, supra,* 56 Cal.4th 729, 156 Cal.Rptr.3d 409, 300 P.3d 494, the California Supreme Court considered whether California's medical marijuana laws preempt a local ban on facilities that distribute medical marijuana. The court concluded they did not. (*Id.* at p. 737, 156 Cal.Rptr.3d 409, 300 P.3d 494.)

The court noted the broad language of intent in the CUA —the language on which plaintiffs rely—but found "the operative steps the electorate took toward these goals were modest." (*Inland Empire, supra,* 56 Cal.4th at p. 744, 156 Cal.Rptr.3d 409, 300 P.3d 494.) The CUA only provided certain protections to physicians who ****809** recommended medical marijuana to patients and declared that two statutes prohibiting possession and cultivation of marijuana "did not apply" to certain patients and their primary caregivers. (*Ibid.*) Similarly, while the Legislature used some broad language in its declaration of intent in adopting the MMP, "the steps the MMP took in pursuit of these objectives were limited and specific." (*Id.* at p. 745, 156 Cal.Rptr.3d 409, 300 P.3d 494.) The MMP established a program for identification cards and granted specified persons engaged in specified conduct certain immunities from criminal prosecution. (*Ibid.*) Neither statute created a "broad right" of access to medical marijuana. (*Id.* at p. 753, 156 Cal.Rptr.3d 409, 300 P.3d 494.)

The high court noted that its earlier decisions had "stressed the narrow reach of these statutes." (*Inland Empire, supra,* 56 Cal.4th at p. 745, 156 Cal.Rptr.3d 409, 300 P.3d 494.) In *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200, the court found the modest and narrow immunity provisions of the CUA did not require an employer to accommodate an employee's use of medical marijuana. "[T]he only 'right' to obtain and use marijuana created by the [CUA] is the right of 'a patient, or ... a patient's primary caregiver, [to] possess[ ] or cultivate [ ] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a

of the City Council and other City employees in enacting the Ordinance "were fraught with irregularities that arguably violated the Brown Act, fundamental fairness, the right of citizens to be heard in a public forum." Plaintiffs cite various irregularities in public meetings, such as limiting public participation in meetings to those who supported the Ordinance. They assert that because of those irregularities, the second amended complaint stated a cause of action for violation of due process. Third, plaintiffs contend that the City is "unnecessarily negatively impacting long-cherished property rights" by prohibiting the cultivation of medical ****811** marijuana in one's home. They argue, "Qualified medical marijuana patients should have the right to use their homes as they see desire [*sic*], as long as this use does not infringe on the property rights of their neighbors." However, "[a]n appellate court is not required to examine undeveloped claims, nor to make arguments for parties. [Citation.]" (***985** *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106, 87 Cal.Rptr.2d 754.) Our role is to evaluate "legal argument with citation of authorities on the points made." (*People v. Stanley* (1995) 10 Cal.4th 764, 793, 42 Cal.Rptr.2d 543, 897 P.2d 481.) Because plaintiffs have failed to make proper arguments on these points, we decline to address them.

DISPOSITION

The judgment is affirmed. The City shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

We concur:

MAURO, Acting P.J.

HOCH, J.

Parallel Citations

221 Cal.App.4th 975, 13 Cal. Daily Op. Serv. 12,857, 2013 Daily Journal D.A.R. 15,472

Footnotes

1 Further undesignated statutory references are to the Health and Safety Code.

2 The City requests that we take judicial notice of the following facts: Sutter County is comprised of approximately 600 square miles, the majority of which is primarily agricultural land; and the Sutter County Ordinance Code has no prohibitions and restrictions on the cultivation of medical marijuana. Because we find this information unnecessary to resolve the issues on appeal, we deny the request.

End of Document