



February 12, 2014

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

Amicus letter in support of request for review of *Maral v. City of Live Oak*,
No. S215000 (opinion below reported at 221 Cal. App. 4th 975(2013)).

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The American Civil Liberties Union of Northern California (ACLU-NC) respectfully asks this Court to grant review in this case to address an important question of law: whether state law preempts local attempts to completely ban the cultivation of medical marijuana. As discussed below, amicus asks that this Court fully address this question, even if aspects of it were not raised below. If the Court believes it is not appropriate to address the entire preemption issue, it should simply depublish the Court of Appeal's opinion, as amicus has separately requested, and allow the issue to be decided in later litigation.

The Court of Appeal erred because it upheld a local criminal ban on marijuana cultivation against a preemption challenge but failed 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 § 11358.¹

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

In addition, the court's failure to address preemption by duplication led it to misunderstand the preemptive effect that the Compassionate Use Act² (CUA) and the Medical Marijuana Program³ (MMP) have on local attempts to 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 review 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. Other localities in California have already begun to enact similar bans. *See* Fresno County Code § 10.60.050 (“Medical marijuana cultivation is prohibited in all zone districts in the County.”) (adopted January 2014).⁴

² § 11362.5

³ § 11362.7 *et seq.*

⁴ The Fresno County Board of Supervisors apparently decided to enact this complete ban after it learned that the Court of Appeal had upheld the Live Oak ordinance here at issue. *See* Marc Benjamin, *Fresno County Supervisors Ban Growing of Medical Marijuana*, THE FRESNO BEE, Jan. 7, 2014, available at <http://www.fresnobee.com/2014/01/07/3702201/fresno-county-supervisors-ban.html>.

DISCUSSION

1. This Court should fully decide the question of whether the Live Oak ordinance is preempted by the state's marijuana laws

This Court should reject the City's attempt to narrow the scope of the preemption question presented by this case.⁵ Even if the City is correct that only one aspect of that question was raised below, this Court can and should consider "a different argument bearing on" the preemption question. *Cedars-Sinai Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 7 n.2, 954 P.2d 511, 514 (1998). Indeed, this Court has often "decided issues raised for the first time before [it], where those issues were pure questions of law, not turning upon disputed facts, and were pertinent to a proper disposition of the cause or involved matters of particular public importance." *People v. Randle*, 35 Cal. 4th 987, 1001-02, 111 P.3d 987, 996-97 (2005) (collecting cases).⁶ This is particularly appropriate where the issues are "closely linked" or involve "the same ultimate question." *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659, 685, 247 P.3d 130, 145 (2011)⁷; *Cedars-Sinai Med. Ctr.*, 18 Cal. 4th at fn. 2; see Rule of Court 8.516(b).

This case raises only pure questions of law, all of which ultimately devolve to a single question: whether a local ban on marijuana cultivation is preempted by the state's marijuana laws, Health and Safety Code § 11357 *et seq.* See *Cedars-Sinai Med. Ctr.*, 18 Cal. 4th at fn. 2. Because it involves an appeal from a demurrer the City cannot suffer any sort of prejudice if this Court considers the entire question. See *Smith v. Commonwealth Land Title Ins. Co.*, 177 Cal. App. 3d 625, 629-30 (1986). There is no reason for the Court to take this case but decide only part of the preemption question. If this case is not an appropriate one for the Court to address the entire issue, it should depublish the opinion below rather than granting review. *Cf.* Rule of Court 8.500(c)(1).

⁵ See City's Answer to Petition for Review at 6-8.

⁶ Overruled on other grounds by *People v. Chun*, 45 Cal. 4th 1172 (2009)

⁷ *Cert.* granted, judgment vacated on other grounds, 132 S. Ct. 496 (2011)

2. 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).⁸ 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).

⁸ Dicta in *Sic* that suggested limitations on preemption was disapproved of in *Ex parte Lane*, 58 Cal. 2d 99, 105 (1962).

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.⁹ Had it done so, it would have seen that the ordinance is invalid.

3. The Live Oak Ordinance duplicates state law because it criminalizes the exact same conduct as the Health and Safety Code.

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 cultivation ban purports to prohibit precisely the same conduct. The ordinance defines cultivation broadly to include “the planting, growing, harvesting, drying or processing of marijuana plants or any part thereof.” LOMC § 17.17.030(D). The ordinance then completely bans these activities:

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.

Id. § 17.17.040

A violation of this prohibition is a misdemeanor, punishable by up to six months imprisonment and a fine. *See id.* §§ 1.12.010, 17.60.030.¹⁰

The plain language of the statute and the ordinance thus show that Live Oak’s prohibition, with its broad definition of “cultivation,” criminalizes precisely the same conduct as does § 11358: growing, harvesting, drying, and

⁹ It may well be that the argument was not properly presented to the Court of Appeal.

¹⁰ Section 17.60.030 of the Live Oak Code makes it a misdemeanor to violate “any of the provisions of” Title 17 of that Code, and the prohibition against cultivating marijuana is part of that Title. The punishment for a misdemeanor is “fine not to exceed five hundred dollars or by imprisonment not to exceed six months, or by both such fine and imprisonment.” *Id.* § 1.12.010. This punishment is cumulative to any other remedy allowed. *Id.* § 17.60.050.

processing marijuana. Although 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 both prevent anybody – including a qualified medical marijuana patient – from growing even a single plant in the privacy of her bedroom.

The ordinance therefore duplicates state law and is preempted.

4. 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.”¹¹ 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.¹² 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

¹¹ *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).

¹² *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 . . . [.]”)

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.¹³ In fact, the very first point made in 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.”¹⁴ Nothing suggested that local governments could *recriminalize* what the initiative *decriminalized*. 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).

5. 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

¹³ *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 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 accomplish and their intent in enacting it. *See Robert L. v. Superior Court*, 30 Cal. 4th 894, 906 (2003).

¹⁴ *Id.* at 58 (emphasis added).

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 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 either grant review to fully consider the important question of whether state law preempts the ordinance or depublish the Court of Appeal’s opinion.

Sincerely,



Michael T. Risher
Staff Attorney
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DECLARATION OF SERVICE BY MAIL

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

Case No.: S215000

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is clamprecht@aclunc.org. On February 12, 2014, I served a true copy of the attached,

Amicus letter in support of request for review of *Maral v. City of Live Oak*, No. S215000 (opinion below reported at 221 Cal. App. 4th 975(2013)).

each of the following, by placing same in an envelope(s) addressed as follows:

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Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in San Francisco, California, on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 12, 2014, at San Francisco, California.



Carey Lamprecht, Declarant