Case No. F070597

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

Joan Byrd and Susan Juvet,

Plaintiffs and Appellants,

v.

County of Fresno, City of Fresno,
Defendants and Respondents.

On Appeal from Fresno County Superior Court,
Case No. 14CECG01502
The Honorable Carlos A. Cabrera, Judge

Plaintiff-Appellants' Opening Brief

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Plaintiff-Appellants' Certificate of Interested Entities or Persons

I certify that Plaintiff-Appellants know of no interested entity or person that must be listed under Rule of Court 8.208.

Dated: March 13, 2015

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1. INTRODUCTION AND SUMMARY OF ARGUMENT

Both the County of Fresno and the City of Fresno have enacted ordinances that completely prohibit the cultivation and storage of medical marijuana. Violators are subject to criminal prosecution, civil fines, and abatement. The primary question in this appeal is whether these ordinances are wholly or partially preempted by state laws relating to marijuana—medical and non-medical—and therefore violate article XI § 7 of the California Constitution.

Our Supreme Court has held that the "comprehensive nature of [state law] in defining drug crimes and specifying penalties … is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation," and that state drug laws therefore preempt local ordinances that attempt to use nuisance and abatement law to regulate marijuana and other state-controlled drugs. *O'Connell v. City of Stockton*, 41 Cal.4th 1061, 1071, 1075 (2007); *see In re Sic*, 73 Cal. 142, 146, 149 (1887) (invalidating local criminal drug law as preempted). As in these cases, the City and County ordinances are preempted because they conflict with the comprehensive state statutes regulating the cultivation and possession of medical and other marijuana. Prior opinions allowing the local regulation of medical marijuana dispensaries do not suggest a different outcome, because state law specifically authorizes that regulation. In contrast, state law does not allow local regulation of cultivation or possession; to the contrary, it provides a uniform state standard under which every "qualified patient or primary caregiver may possess no more than eight

ounces of dried marijuana" as well as "six mature or 12 immature marijuana plants" per patient. Health & Safety Code § 11362.77(a).

The second issue in this appeal involves our state and federal constitutional protections against unreasonable searches and seizures. Both the County and the City ordinances purport to authorize police and other officials to enter residences and other private property to search for marijuana armed only with an administrative warrant, issued without individualized probable cause. Because the cultivation and possession of marijuana are criminal offenses under state and federal law, these provisions violate the state and federal prohibitions against the issuance of warrants without probable cause. *See Parrish v. Civil Serv. Comm'n of Alameda Cnty.*, 66 Cal.2d 260, 267 (1967)*; Salwasser Mfg. Co. v. Mun. Ct.*, 94 Cal.App.3d 223, 231-32 (1979).

The third issue is whether a superior court can deny mandamus relief against the government on the grounds that declaratory and injunctive relief are also available. Numerous California courts have squarely and correctly held that the answer is no. *See, e.g, Glendale City Emps.' Ass'n, Inc. v. City of Glendale*, 15 Cal.3d 328, 343 n.20 (1975); *Cal. Teachers Ass'n v. Nielsen*, 87 Cal.App.3d 25, 28-29 (1978).

The superior court therefore erred when it dismissed Plaintiffs' petition for a writ of mandate to stop the County and City from unlawfully enforcing these ordinances.

2. FACTS AND PLAINTIFFS

Because the superior court dismissed the petition on the

pleadings, the facts are taken from Plaintiffs' First Amended Verified Petition for a Writ of Mandate and Complaint. *See* Code of Civ. Proc. § 1086. All record citations are to the one-volume Joint Appendix; that appendix also contains the City and County ordinances at issue as well as the ballot materials relating to the 1996 Compassionate Use Act, materials that provide "insight into the voters' intent." *People v. Mentch*, 45 Cal.4th 274, 282 (2008); *see Legislature v. Eu*, 54 Cal.3d 492, 504-05 (1991) (discussing import of ballot analysis and arguments).

Plaintiffs are two Fresno residents who, with their doctors' recommendations, use medical marijuana to deal with serious medical issues. J.A. 005-06, 007. Plaintiff Joan Byrd is a 67-year-old retired employee of the Fresno County Sheriff's Department who uses medical marijuana to alleviate the pain she suffers from a work-related injury that resulted in traumatic brain injury; broken teeth and hairline fractures in her jaw, which led to infections and the loss of teeth; and herniated disks in her neck and back. *Id.* 005-006. Plaintiff Susan Juvet uses medical marijuana to treat the pain that she suffers as a result of fibromyalgia, which she has had since she was eleven years old, and to treat arthritis. *Id.* 007. Her doctor had previously prescribed opiate drugs to deal with these conditions, but these caused allergic reactions that led to the removal of eighteen inches of Ms. Juvet's colon. *Id.*

Both plaintiffs live in the City of Fresno. *Id.* 006-07. They bring suit against the City because they have cultivated their own medical marijuana in the past and would like to continue to

do so, but cannot because of the City's ban. *Id.* In addition, they bring suit against the City and the County as taxpayers and as citizens. *Id.*; *see Green v. Obledo,* 29 Cal.3d 126, 144-45 (1981) (citizen standing to request mandamus); *Van Atta v. Scott*, 27 Cal.3d 424, 449-50 (1980) (taxpayer standing to request mandamus) *abrogated on unrelated grounds as discussed in In re York*, 9 Cal.4th 1133, 1143 n.7 (1995).

3. LEGAL BACKGROUND: STATE MARIJUANA LAW AND THE LOCAL ORDINANCES

Because the major issues in this case involve the constitutionality of the City and County marijuana ordinances and whether those laws conflict with state marijuana laws in whole or in part, a description of those laws is necessary.

3(A) State law has long regulated the cultivation, possession, and storage of marijuana.

California has regulated marijuana since 1913. *See Gonzales v. Raich,* 545 U.S.1, 5-6 (2005). The state long treated marijuana as any other drug with a medical purpose: as far back as 1921 it made it "unlawful for any person, firm, or corporation … to have in their or his possession any … hemp or loco weed (cannabis sativa) [or] Indian hemp … excepting upon the written order or prescription of a physician, dentist, or veterinary surgeon." Poison Act § 8 (reprinted in Hennings General Laws of California Vol. 2 at 2279, 2282 (1921)); *see id.* § 8b (requiring seizure and destruction of illegal marijuana). A copy of the 1921 statute is attached to this brief under Rule of Court 8.204(d).

Since 1972, marijuana possession and cultivation have been

prohibited by Health & Safety Code sections 11357 and 11358, respectively. The term "marijuana" includes "all parts of the plant Cannabis sativa L., whether growing or not," except mature stalks, fiber, and sterile seeds. *Id.* § 11018.

The maximum punishment for marijuana cultivation is three years in jail and a $10,000 base fine. *Id.* § 11358; Penal Code § 672. Possession of less than 28.5 grams of marijuana is an infraction; possession of more than that amount is a misdemeanor. Health & Safety Code § 11357(b), (c). Buildings and other places used to store or manufacture (*i.e.*, grow[1]) marijuana are subject to abatement. *Id.* § 11570. Marijuana is also subject to forfeiture. *Id.* § 11470(a). Defendants accused of cultivating or possession marijuana for personal use are eligible for diversion. *See* Penal Code § 1000(a).

3(B) The voters enacted the 1996 Compassionate Use Act (CUA) to allow access to medical marijuana.

In 1996, the voters adopted the Compassionate Use Act to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes." CUA § 1 (J.A. 25), codified as Health & Safety Code § 11362.5(b)(1)(A). As the Legislative Analyst explained, the CUA "allow[s] persons to grow or possess marijuana for medical use when recommended by a physician." J.A. 22. This right to home cultivation is integral to the CUA's purpose: the law "allows patients to cultivate their own marijuana simply because federal laws prevent the sale of

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[1] Growing marijuana is manufacturing it. *See United States v. Bernitt*, 392 F.3d 873, 879 (7th Cir. 2004).

marijuana, and a state initiative cannot overrule those laws." *Id.* 23 (arguments in favor).

To accomplish its objectives, the initiative created a medical defense to California's then-existing laws relating to marijuana possession and cultivation:

> 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.
>
> Health & Safety Code § 11362.5(d) (CUA § 1).

At the time the voters enacted the CUA, it does not appear that any local jurisdiction in this state banned or regulated the cultivation of marijuana; as discussed below, it had long been clear that local jurisdictions lacked authority to regulate substances already banned by state law. Nothing in the CUA gives local jurisdictions any authority to ban the personal use, possession, or cultivation of medical marijuana.

3(C) The Legislature enacted the 2004 Medical Marijuana Program (MMP) to further expand access to medical marijuana and promote uniformity throughout the state.

In 2004, the Legislature expanded the protections for medical-marijuana use by enacting the Medical Marijuana Program, § 11362.7 *et seq.* The MMP is intended to "promote uniform and consistent application of the [CUA] among the counties within the state." *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 56 Cal.4th 729, 744 (2013) (quoting Stats. 2003, ch. 875, § 1, subd. (b)); *Qualified Patients Ass'n v. City of*

Anaheim, 187 Cal.App.4th 734, 744 (2010).

The MMP is much more detailed and precise than is the CUA. Most relevant to this matter, whereas the CUA authorizes patients and caregivers to grow and possess a "reasonable amount" of marijuana without being subject to certain sanctions, *People v. Kelly*, 47 Cal.4th 1008, 1017, 1028 (2010), the MMP affirmatively authorizes them to cultivate and grow specific quantities of medical marijuana: a

> qualified patient or primary caregiver *may possess* no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver *may also maintain* no more than six mature or 12 immature marijuana plants per qualified patient. Health & Safety Code § 11362.77(a) (emphasis added).

This provision applies to patients and caregivers as defined by the CUA regardless of whether they obtain an official MMP identification card. *See Kelly*, 47 Cal.4th at 1024-25; *id.* at 1016-17 & n.9.

A separate provision of the MMP goes beyond the CUA by providing additional protection to patients who *do* take the additional step of obtaining an official medical card. Patients who have a physician's recommendation for marijuana but not an official card are still subject to arrest for possession or cultivation of marijuana; the law simply provides them with an affirmative defense. *Kelly*, 47 Cal.4th at 1013-15. But patients and caregivers with official cards are immune from "arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established" by the MMP. Health & Safety Code § 11362.71(e); *see Kelly*, 47 Cal.4th at 1014.

Thus, the MMP creates two distinct protections for medical-marijuana patients not found in the CUA: it authorizes *all* patients to cultivate and possess the statutory quantities of marijuana for personal medical use; and it provides immunity from arrest for those who obtain an official card.

Importantly, although the MMP expressly authorizes cities and counties to "retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to **exceed** the state limits," it does not authorize local governments to impose lower limits. Health & Safety Code § 11362.77(c) (emphasis added). Thus, "the amounts set forth in [§ 11362.77(a)] were intended 'to be the threshold, not the ceiling.'" *People v. Wright*, 40 Cal.4th 81, 97 (2006) (citing legislative history).

The MMP also expressly authorizes local governments to regulate in two other areas covered by the law: they may establish civil or criminal regulations of medical-marijuana cooperatives and dispensaries. Health & Safety Code §§ 11362.768(f), (g), 11362.83(a), (b). It does not include any corresponding authorization allowing them to regulate cultivation or possession by individual patients or caregivers.

3(D) The County and City ordinances prohibit the cultivation and storage of medical marijuana.

Courts interpret local ordinances as they would any other legislative enactment, beginning with their plain language and looking beyond that to other indicia of legislative intent only where the statutory language is unclear. *Tower Lane Props. v. City of Los Angeles*, 224 Cal.App.4th 262, 268-69 (2014); *Pope v.*

Superior Ct., 136 Cal.App.4th 871, 875 (2006).

Although styled as zoning ordinances, the County and City laws do not merely regulate competing land use.[2] Instead, they completely ban cultivating and storing medical marijuana. Under their unambiguous language, they prohibit a patient from growing even a single plant in the privacy of her bedroom. Moreover, because the ordinances' definition of cultivation includes not just "planting, growing, and harvesting" but also the "storage" of any marijuana, they also ban the possession of medical marijuana that a patient stores in her house for later medical use.

3(D)(1) The County Ordinance

On January 7, 2014, the Fresno County Board of Supervisors adopted Fresno County Ordinance No. 14-001 "to prohibit cultivation of medical marijuana." Fresno County Ordinance No. 14-001 § 3, codified as Cnty. Ord. § 10.60.010 (J.A. 027, 030). Under the ordinance, "Medical marijuana cultivation is prohibited in all zone districts in the County." *Id.* § 10.60.060 (J.A. 033). Marijuana has "the same definition as in California Health & Safety Code Section 11018," which, as noted above, defines the term to include "all parts of the plant Cannabis sativa L." *Id.* § 10.60.030(B) (J.A. 031). "Medical marijuana" means "marijuana used for medical purposes" under the MMP. *Id.*

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[2] As its name suggests, "zoning is simply the division of a city into districts and the prescription and application of different regulations in each district." *Miller v. Bd. of Pub. Works,* 195 Cal. 477, 486 (1925).

§ 10.60.030(C) (J.A. 031).

The ordinance defines "cultivation" very broadly to include activities beyond the term's usual meaning: "'Cultivate' or 'cultivation' is the planting, growing, harvesting, drying, processing, or *storage* of one or more marijuana plants *or any part thereof* in any location." Cnty. Ord. § 10.60.030(D) (J.A. 032) (emphasis added). The law does not contain any definition of the term "storage" that would suggest it means anything other than its dictionary definition: "the state of being kept in a place when not being used."[3] The ordinance thus prohibits the possession of any marijuana that is not currently being used (the state definition makes clear that "any part" of a marijuana plant means any marijuana).

"The establishment, maintenance, or operation of any prohibited cultivation of medical marijuana, as defined in this chapter, within the County is declared to be a public nuisance and each person or responsible party is subject to abatement." *Id.* § 10.60.070 (J.A. 033). Public officials may then be authorized to "remove, demolish, raze or otherwise abate" the medical marijuana. *Id.* § 10.62.090 (J.A. 041).

Violations are misdemeanors under § 10.60.080(A) (J.A. 033) and Penal Code sections 372 and 373a, which make all public nuisances misdemeanors. *See Bd. of Sup'rs of L.A. Cnty. v. Simpson*, 36 Cal.2d 671, 674-75 (1951). Violations are also

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[3] Merriam–Webster OnLine definition of "storage," available at http://www.merriam-webster.com/dictionary/storage?show=0&t=1422467656; *see Pope*, 136 Cal.App.4th at 876-77 (dictionary definitions demonstrate unambiguous meaning of local ordinance).

punishable by a civil fine of $1000 per plant, plus additional fines of $100 per day that each plant remains in violation of an abatement order. *Id.* § 10.64.040(A) (J.A. 046). In just one pair of meetings last fall, the County Board of Supervisors upheld fines ranging from $11,000 (meaning at most 11 plants, which is less than the MMP's limit for immature plants) to $316,000.[4] There is no provision for any sort of diversion, as there would be in a state-law prosecution.

The ordinance also "continue[s] in effect Fresno County's prohibition of medical marijuana dispensaries." County Ord. § 10.60.010 (J.A. 030-31); *see id.* § 10.60.050 (J.A. 033) (prohibiting medical-marijuana dispensaries).

As part of a Code Chapter entitled "Abatement of Public Nuisances Created by Cultivation of Medical Marijuana" the County specifically authorizes its officers to enter private structures and other property to enforce the cultivation ban if they obtain an administrative inspection warrant issued under Code of Civil Procedure sections 1822.50-1822.59. *See* County Ord. §§ 10.62.030 (J.A. 035-36), 10.62.020(C) (J.A. 035). This provision is discussed in more detail below.

3(D)(2) The City Ordinance

On March 27, 2014, the City of Fresno also banned all

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[4] Plaintiff-Appellants' Request for Judicial Notice at 1-3. Specifically, the Board upheld penalties in the amounts of $87,000, $180,000, $126,000, $45,000, $316,000, $68,000, $162,000, $299,000, $95,000, $228,000, $52,000, and $11,000. *Id.* In two cases the Board reduced penalties that had originally totaled $107,000 and $81,000 to $1,000. *See id.* ¶¶ 13, 15. In one case, it reduced a $100,000 penalty to $100. The minutes do not indicate why these penalties were reduced.

cultivation of medical marijuana by enacting Ordinance No. 2014.20, codified as Fresno City Municipal Code § 12-2101 *et seq.* (J.A. 056). The express purpose of this ordinance is "to prohibit the cultivation of marijuana." City Code § 12-2101 (J.A. 059). It thus states that "Marijuana cultivation by any person, including primary caregivers and qualified patients, collectives, cooperatives or dispensaries, is prohibited in all zone districts within the city." *Id.* § 12-2104 (J.A. 061). It defines marijuana as "all parts of the plant Cannabis sativa L., whether growing or not, and includes medical marijuana." *Id.* § 12-2103(b) (J.A. 060). Like the County, the City defines "cultivation" broadly to mean "the planting, growing, harvesting, drying, processing, or storage of one or more marijuana plants or any part thereof in any location." *Id.* § 12-2103(a) (J.A. 060). Thus, it, like the County ordinance, bans not just growing medical marijuana but also storing medical marijuana.

The ordinance states that violations "shall be" civilly prosecuted by the City Attorney and makes violators subject to civil fines of $1000 per plant, plus additional fines of $100 per day that each plant remains in violation of an abatement order. *Id.* § 12-2105(a), (b) (J.A. 061). The City, like the County, may also abate any medical marijuana. *Id.* § 12-2105(c) (J.A. 061).

Like all violations of the City Code (other than those declared to be infractions), violations of these provisions may be prosecuted as misdemeanors. *See id.* § 1-304(b) (J.A. 71). Because they are zoning code violations, they are public nuisances, *id.* § 10-605(j) (J.A. 72, 74), a violation of which is a misdemeanor.

See Penal Code §§ 372, 373a. Each day is a separate violation. City Code § 12-2105(a) (J.A. 061). There is no provision for any sort of diversion.

As discussed below, the City authorizes its officer to enter private property to enforce its bans on marijuana, with only an administrative inspection warrant issued under Code of Civil Procedure sections 1822.50-1822.59. *See* City Code § 1-303 (J.A. 71).

4. PROCEDURAL HISTORY

Plaintiffs filed the operative Verified First Amended Petition for a Writ of Mandate and Complaint for Declaratory and Injunctive Relief on June 23, 2014. Because they were not able to obtain a hearing date for a motion for a peremptory writ of mandate until October 14, they instead filed an *ex parte* application for an alternative writ/order to show cause on July 7. J.A. 67. When, on September 22, the Court had yet to act on this application, Plaintiffs noticed and filed a motion for a peremptory writ to be heard on October 22. *Id.* 129.

On September 29, the superior court issued an order denying Plaintiff's July 7 *ex parte* application on the grounds that mandamus was inappropriate because Plaintiffs' "causes of action for declaratory relief and injunctive relief demonstrate that writ relief is neither necessary nor proper." *Id.* 154. The Court dismissed the Petition for a Writ of Mandate and vacated the hearing that Plaintiffs had set for their motion for a peremptory writ. *Id.*

On October 16, Plaintiffs voluntarily dismissed the remainder

of the action (*i.e.*, the Complaint for Injunctive and Declaratory relief) under Code of Civil Procedure § 581(c) so that they could appeal the dismissal of the Petition. *Id.* 161. They filed a timely notice of appeal on October 27. *Id.* 167.

5. STATEMENT OF APPEALABILITY

Under Code of Civil Procedure § 581d, "[a]ll dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action, and those orders when so filed shall constitute judgments and be effective for all purposes." Thus, the superior court's September 29, 2014, signed order dismissing the verified petition constitutes a judgment that would have been immediately appealable had it not been joined with a still-pending complaint for injunctive and declaratory relief. *See, e.g., Siliga v. Mortgage Elec. Registration Sys., Inc.*, 219 Cal.App.4th 75, 80-81 & n.3 (2013); *Agosto v. Bd. of Trs. of Grossmont-Cuyamaca Cmty. Coll. Dist.*, 189 Cal.App.4th 330, 335 & n.3 (2010); *Schram Constr., Inc. v. Regents of the Univ. of Cal.*, 187 Cal.App.4th 1040, 1051 (2010). Plaintiffs' October 16, 2014, voluntary dismissal of the remainder of the case under § 581(c) created a final, appealable judgment. *See Kurwa v. Kislinger*, 57 Cal.4th 1097, 1104-06 (2013); *Abatti v. Imperial Irr. Dist.*, 205 Cal.App.4th 650, 665-67 (2012); *Haight v. City of San Diego*, 228 Cal.App.3d 413, 416 & n.3 (1991).[5]

[5] Even if this case were not directly appealable, this Court could properly treat this appeal as a petition for a writ of mandate. *See Morehart v. Cnty. of Santa Barbara*, 7 Cal.4th 725, 745-46 (1994) (treating appeal of non-final judgment in case arguing preemption of local laws as writ petition and deciding merits).

6. STANDARD OF REVIEW

This Court applies de novo review to an order dismissing a petition for a writ of mandate. *Royalty Carpet Mills, Inc. v. City of Irvine*, 125 Cal.App.4th 1110, 1118 (2005) (citation omitted). In doing so, it "assumes the truth of the petition's allegations." *Id.* at 1115 (citations omitted); *accord, e.g., Schwartz v. Poizner*, 187 Cal.App.4th 592, 596 (2010). And, of course, the question of "[w]hether a local ordinance is unconstitutional or preempted by state statute is a question of law subject to [this Court's] de novo review." *Cnty. of Tulare v. Nunes*, 215 Cal.App.4th 1188, 1195 (2013) (citation omitted).

Plaintiffs note as a threshold matter that the merits of this case are properly before this Court even though the superior court dismissed the Petition on erroneous procedural grounds without reaching the merits. As our Supreme Court has explained, "it is judicial action, and not judicial reasoning or argument, which is the subject of review." *Int'l Ass'n of Cleaning & Dye House Workers v. Landowitz*, 20 Cal.2d 418, 423 (1942) (citation omitted); *see In re Quantification Settlement Agreement Cases*, 201 Cal.App.4th 758, 805 (2011) ("[W]e review the judgment, not the rationale.") (citation omitted). This means that the Court of Appeal reviews all of the purely legal issues that were properly presented to the superior court, whether or not that court reached them. *See Kahn v. Bower*, 232 Cal.App.3d 1599, 1610 (1991) ("The trial court did not reach this issue, but that does not preclude our considering it on appeal."); *Bank of Am. v. Angel View Crippled Children's Found.*, 72 Cal.App.4th

451, 459 & n.6 (1999).

This is particularly appropriate here, for two reasons: First, because the superior court dismissed the petition on the pleadings, this Court "may affirm … only if the complaint fails to state a cause of action under any possible legal theory." *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal.4th 992, 998 (2009) (on review of demurrer); *see Kempton v. City of Los Angeles*, 165 Cal.App.4th 1344, 1347-48 (2008) (judgment on pleadings). Second, "[i]n mandamus actions, the trial court and appellate court perform the same function." *Friends of the Old Trees v. Dep't of Forestry & Fire Prot.*, 52 Cal.App.4th 1383, 1393 (1997) (citations omitted); *see id.* ("We review the matter without reference to the trial court's actions." (citations omitted)). As one court noted in a similar situation, the superior "court should have ruled on the merits of the issue. Because the issue is one of law, it would serve no useful purpose to remand it to the trial court." *See Knight v. McMahon*, 26 Cal.App.4th 747, 754 (1994) *disapproved on other grounds by Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd.*, 13 Cal.4th 1017 (1996) (citation omitted).

Here, Plaintiffs asked the superior court to grant a writ of mandate prohibiting the government from enforcing unconstitutional ordinances; that court refused to do so and instead dismissed the petition. It is the dismissal and the resulting judgment, not the superior court's reasoning, that this Court must review.[6] It should therefore resolve all of the

[6] California appellate courts routinely decide questions that were not considered

questions of law that the petition raises, just as it would if the superior court had merely dismissed the petition without any explanation.

7. ARGUMENT

7(A) Mandate will issue against the government regardless of whether injunctive and declaratory relief are also available.

Because government officials have a duty to obey the law—including the Constitution—mandamus lies to "challenge the validity of a legislative measure" and to prevent the government from acting unlawfully. *Candid Enters, Inc. v. Grossmont Union High Sch. Dist.,* 39 Cal.3d 878, 885 n.3 (1985) (citation omitted); *Zubarau v. City of Palmdale,* 192 Cal.App.4th 289, 305 (2011); *Connerly v. State Pers. Bd.*, 92 Cal.App.4th 16, 28-31 (2001). "The writ *must* be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." Code Civ. Proc. § 1086 (emphasis added).

Plaintiffs, as City residents, have a direct interest in prohibiting the City from preventing them from cultivating the medial marijuana they use to treat their medical problems. As Citizens and as taxpayers they have a beneficial interest in requiring the County to follow the constitution. *See Green v. Obledo*, 29 Cal.3d 126, 144-45 (1981) (citizen-taxpayers); *Van Atta v. Scott*, 27 Cal.3d 424, 449-50 (1980) (taxpayers). Thus, if

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by the trial court. *See, e.g., People v. Wright*, 40 Cal.4th 81, 92 (2006) (reversing marijuana conviction based on newly enacted MMP, even though neither court below had applied it); *Finberg v. Manset*, 223 Cal.App.4th 529, 533 (2014); *Schwarzburd v. Kensington Police Prot. & Cmty. Servs. Dist. Bd.*, 225 Cal.App.4th 1345, 1352-53 (2014); *Thayer v. Kabateck Brown Kellner LLP*, 207 Cal.App.4th 141, 144-45 (2012).

they can show that the ordinances in question are unconstitutional in whole or in part and that they lack an adequate alternative remedy, the superior Court *must* issue the writ; it has no discretion to deny it. *See Flora Crane Serv., Inc. v. Ross*, 61 Cal.2d 199, 203-04 (1964); *Hudson v. Cnty. of Los Angeles*, 232 Cal.App.4th 392, 408 (2014). An adequate legal remedy is one that is "capable of directly affording and enforcing the relief sought" and that "is equally convenient, beneficial, and effective as … mandamus." *Dufton v. Daniels*, 190 Cal. 577, 582 (1923) (citations omitted).

The superior court held that Plaintiffs have an adequate alternative remedy because injunctive and declaratory relief are also available. But it is well established that in suits against public entities mandate is proper regardless of whether declaratory and injunctive relief are also available. Our Supreme Court has directly addressed this issue in a case requesting both declaratory relief and mandamus and held that "[t]he fact … that an action in declaratory relief lies does not prevent the use of mandate." *Glendale City Emps.' Ass'n, Inc. v. City of Glendale*, 15 Cal.3d 328, 343 n.20 (1975) (citing *Brock v. Super. Ct.*, 109 Cal.App.2d 594, 603 (1952)) (internal punctuation omitted). Numerous decisions from the Court of Appeal have similarly held that in suits against public entities "the availability of injunctive relief is not a bar to mandate." *Cal. Teachers Ass'n v. Nielsen*, 87 Cal.App.3d 25, 28-29 (1978); *see Timmons v. McMahon*, 235 Cal.App.3d 512, 518 (1991); *Elmore v. Imperial Irr. Dist.*, 159 Cal.App.3d 185, 198 (1984); *L.A. Cnty. v. Dep't of Pub. Health*,

158 Cal.App.2d 425, 446 (1958); *Brock*, 109 Cal.App.2d at 603.

There is no reason for this Court to depart from this settled rule. "Mandamus, rather than mandatory injunction, is the traditional remedy" to require government officials to obey the law. *Common Cause v. Bd. of Sup'rs*, 49 Cal.3d 432, 442 (1989). The superior court's rule would turn this tradition on its head and essentially eliminate the use of the writ of mandate against government agencies, because injunctive and declaratory relief will *always* be possible alternatives to mandamus. *See id.* (mandate and injunctive relief); *Green,* 29 Cal.3d at 145 n.14 (mandate and declaratory relief).

Thus, the availability of declaratory and injunctive relief does not affect Plaintiffs' right to a writ of mandate in this matter. If they are correct that the challenged ordinances are preempted or otherwise unconstitutional, they are entitled to a writ of mandate.[7]

7(B) Defendants' bans on medical-marijuana cultivation and storage are preempted by state law relating to marijuana and medical marijuana.

Our Supreme Court has recently summarized California preemption law in a case that, like this one, involved a local attempt to regulate controlled substances:

> Under article XI, section 7 of the California Constitution, 'a county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general

[7] It is proper to join a petition for a writ of mandate with a complaint for injunctive and declaratory relief. *Bullock v. City & Cnty. of San Francisco,* 221 Cal.App.3d 1072, 1086 (1990).

> state laws.' If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. A conflict exists if the local legislation (1) duplicates, (2) contradicts, or (3) enters an area fully occupied by general law, either expressly or by legislative implication.
> *O'Connell v. City of Stockton*, 41 Cal.4th 1061, 1067 (2007) (citations and internal punctuation omitted, numbering added).

All three of these types of preemption are relevant to this case: the local laws would have been preempted before the passage of the CUA and the MMP as duplicative of state law, and there is no indication that the voters and legislature who passed those medical-marijuana laws intended to change this so as to provide cities and counties with greater authority to regulate cultivation and possession than they had previously had. Furthermore, the MMP specifically authorizes patients and caregivers to cultivate and possess specific quantities of medical marijuana by stating that they "may" do so; the local prohibitions contradict this express authorization. Finally, state law occupies the narrow field of regulating the amount of medical marijuana that patients and caregivers may cultivate and possess for personal use.

7(B)(1) Duplication Preemption

"A local ordinance *duplicates* state law when it is 'coextensive' with state law." *Id.* Our Supreme Court first applied this type of preemption to invalidate a local ordinance that, like the ones here at issue, attempted to regulate controlled substances: specifically, it struck down a local law that made it unlawful for people to "assemble, be, or remain in any room or place for the purpose of smoking opium," as duplicative of a state law that

made it a crime to visit any place for the purpose of smoking opium. *In re Sic*, 73 Cal. 142, 144, 146, 149 (1887); *see also, e.g., In re Portnoy*, 21 Cal.2d 237, 239-42 (1942) (local gambling prohibition preempted as duplicative of state law); *Ex parte Mingo*, 190 Cal. 769, 772-74 (1923) (local liquor law preempted as duplicative of state law).

7(B)(2) Contradiction Preemption

"A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law." *O'Connell*, 41 Cal.4th at 1068 (noting *Ex Parte Daniels*, 183 Cal. 636, 641–48 (1920), as example). California courts have employed this type of preemption to invalidate local laws that prohibit what a state "statute permits or authorizes." *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 56 Cal.4th 729, 763 (2013) (Liu, J., concurring). Thus, our Supreme Court has invalidated local laws that are "inimical to the important purposes" of state statutes. *Action Apartment Ass'n, Inc. v. City of Santa Monica*, 41 Cal.4th 1232, 1243 (2007); *see id.* at 1244-46, 1249 (invalidating local ordinance as inimical to purpose of state-law privilege). The Second District has similarly held that a local ordinance prohibiting landlords from setting rental rates was inimical to a state law that stated that landlords "may establish the initial rental rate" for their properties and was thus preempted. *Palmer/Sixth St. Props., L.P. v. City of Los Angeles*, 175 Cal.App.4th 1396, 1410 (2009). And the First District has invalidated a local attempt to prohibit a controversial medical therapy where state law said that "such treatment 'may be

administered'" under a set of specified circumstances. *N. Cal. Psychiatric Soc'y v. City of Berkeley*, 178 Cal.App.3d 90, 103-04 (1986).[8]

7(B)(3) Field preemption

"A local ordinance *enters a field fully occupied* by state law in either of two situations—when the Legislature 'expressly manifest[s]' its intent to occupy the legal area or when the Legislature 'impliedly' occupies the field." *O'Connell*, 41 Cal.4th at 1068:

> When the Legislature has not expressly stated its intent to occupy an area of law, [courts] look to whether it has *impliedly* done so. This occurs in three situations: when (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; or (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.
>
> *Id.* (citations and internal quotations omitted).

"Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the

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[8] These cases make clear that, as discussed in Justice Liu's *City of Riverside* concurrence, statements in other opinions that suggest that this type of preemption applies only when one law demands what the other prohibits are inaccurate. 56 Cal.4th at 763-64. Such a narrow rule would be flatly inconsistent with the holding of *Action Apartment Association*, as the dissent in that case made clear. *See* 41 Cal.4th at 1253 (Corrigan, J., dissenting).

field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme." *Id.*; *see id.* at 1069. To determine the legislative purpose and scope, courts must employ the standard tools of statutory interpretation, such as legislative history and the law's objectives. *See Morehart v. Cnty. of Santa Barbara*, 7 Cal.4th 725, 752 (1994); *Big Creek Lumber Co. v. Cnty. of Santa Cruz*, 38 Cal.4th 1139, 1151-53 (2006); *Am. Fin. Servs. Ass'n v. City of Oakland*, 34 Cal.4th 1239, 1261 (2005). This may mean that state law preempts only a very narrow field; for example, the Supreme Court has held that state law preempted a county zoning law only as it applied in very narrow circumstances. *Morehart*, 7 Cal.4th at 758-60 (applying implied field preemption); *see Baron v. City of Los Angeles*, 2 Cal.3d 535, 543-44 (1970) ("State Bar Act preempts the field of regulation of attorneys only insofar as they are 'practicing law' under the act," and so preempts only some applications of local law.).

The lack of an express preemption clause does not create any inference against implied field preemption. *Am. Fin. Servs. Ass'n*, 34 Cal.4th at 1261. Nor does the fact that a statutory scheme allows some local regulation prevent it from implicitly preempting other aspects of the field. *Morehart*, 7 Cal.4th at 758-60 (finding implicit field preemption of one narrow zoning provision even though state law specifically provided local agencies with "broad authority" to regulate other aspects of zoning). This means that the Legislature may preempt a field generally but then allow specific types of local regulation within

that field; for example, the Vehicle Code generally preempts the field of traffic regulation but allows local regulation in a number of areas. *Compare* Veh. Code § 21 *with*, *e.g., id.* §§ 21100 *et seq.*, 22357, 22506; *see generally Rumford v. City of Berkeley,* 31 Cal.3d 545, 551-58 (1982). Thus, that a local entity may decide *where* certain activities may take place does not allow it to completely prohibit those activities. *See Big Creek Lumber Co.*, 38 Cal.4th at 1158-59; *cf. id.* at 1152-53 ("an ordinance that avoids speaking to *how* timber operations may be conducted and addresses only *where* they may take place" is a valid zoning law, not an invalid (because preempted) attempt to regulate the conduct of timber operations) (citing *Big Creek Lumber Co. v. Cnty. of San Mateo*, 31 Cal.App.4th 418, 424-25, 426-27 (1995) *and Desert Turf Club v. Bd. of Sup'rs of Riverside Cnty.,* 141 Cal.App.2d 446, 452 (1956)). For example, because state law preempts local regulation of horse racing, local government cannot use zoning laws to ban that activity, even though they could of course ban it from residential districts. *Desert Turf Club*, 141 Cal.App.2d at 452 (holding ban preempted by state law).

"Where a statute and an ordinance are identical it is obvious that the field sought to be covered by the ordinance has already been occupied by state legislation." *Am. Fin. Servs. Ass'n*, 34 Cal.4th at 1253 (quoting *Pipoly v. Benson,* 20 Cal.2d 366, 371 (1942)); *accord O'Connell*, 41 Cal.4th at 1068.

7(B)(4) <u>The ordinances would have been preempted before the passage of the CUA and MMP.</u>

Putting aside the CUA and MMP, the local bans would be

preempted by state drug laws. First, our Supreme Court has held that the "comprehensive nature of [state law] 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" relating to marijuana- and other drug-related crimes. *O'Connell*, 41 Cal.4th at 1071; *see id.* at 1067, 1069-72. Local jurisdictions therefore cannot enact ordinances that treat drug-related activity as a public nuisance subject to abatement except as specifically authorized by state law. *See id.* at 1074-75; *see also id.* at 1068; *Pipoly*, 20 Cal.2d at 371.

Moreover, local ordinances that duplicate state drug laws are preempted. *See Pipoly*, 20 Cal.2d at 370-71; *Portnoy*, 21 Cal.2d at 239-42 (local law that made it unlawful to maintain a gambling establishment preempted as duplicative of state law); *Mingo*, 190 Cal. at 772-74 (local liquor law preempted as duplicative of state law); *Sic.*, 73 Cal. at 146, 149 (local law banning assembling or remaining in a place for purpose of smoking opium preempted as duplicative of state law prohibiting opium smoking). Local governments cannot avoid this limitation on their power by using different language than is found in the state statute; it is the laws' impact, not their wording, that matters. *See Portnoy*, 21 Cal.2d at 241-42; *Pipoly*, 20 Cal.2d at 370-71; *Sic.*, 73 Cal. at 146.

The city and county ordinances ban all cultivation, processing, and storage of marijuana, conduct that falls squarely within the scope of Health & Safety Code §§ 11357, 11358, 11570. As under state law, violations can lead to civil and criminal penalties. Moreover, the local laws are in some ways much

harsher than state law: they can result in the imposition of hundreds of thousands of dollars in civil penalties (much more than the maximum fine for a conviction for cultivating marijuana under state law); these fines can be imposed without proof beyond a reasonable doubt of a violation; they apply to the mere storage of marijuana (which is an infraction or at most a misdemeanor under state law); and they lack the provision for diversion that is a part of the state law. *See O'Connell*, 41 Cal.4th at 1075 ("the ordinance conflicts with state law because" violators are "subject to penalties in excess of those prescribed by the Legislature"); *id.* at 1071 (that local law did not require proof beyond reasonable doubt to impose civil forfeiture exacerbated conflict with state law). Thus, unless the enactment of state medical-marijuana laws has changed this, the ordinances are preempted by the state's long-existing drug laws, just as were the local attempts to regulate drugs in *O'Connell* and *Sic*.

7(B)(5) The voters who enacted the 1996 CUA did not intend to allow local jurisdictions to prohibit medical marijuana cultivation.

The people of this state voted to adopt the Compassionate Use Act to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" and "to ensure 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." Health & Safety Code § 11362.5(b)(1)(A), (B). As the Legislative Analyst emphasized, the CUA is meant to allow patients and their caregivers to "grow" and "possess" marijuana for medical

use. J.A. 22. The proponents explained the reason for this: the CUA "allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana." *Id.* at 23.

The CUA thus makes each "patient [] primarily responsible for noncommercially supplying his or her own medical marijuana" and allows a primary caregiver "to act for a seriously or terminally afflicted patient who was too ill or bedridden to do so." *City of Riverside*, 56 Cal.4th at 747. This is in fact the *only* way that the CUA authorizes patients to obtain medical marijuana. The CUA does not authorize any marijuana sales or transfers of marijuana except between a patient and her caregiver, which is defined narrowly to include only a single person who "consistently provide[s the patient with] care in such areas as housing, health, and safety, independent of any help with medical marijuana" such as a "spouse or domestic partner," a "child caring for [an] ailing parent," or a "hospice nurse." *Id.*; *People v. Mentch*, 45 Cal.4th 274, 287 (2008). Furthermore, the CUA does not expressly provide a defense to the crime of transporting marijuana, Health & Safety Code § 11360, as would be necessary if patients could not personally cultivate it and instead had to travel to a different city or county to purchase it (in a transaction that would itself be illegal). *People v. Wright*, 40 Cal.4th 81, 84 (2006); *cf. id.* at 91-92 (noting split of authority over whether CUA implicitly creates a defense to some types of transportation). Nor does it allow sales or other transfers except between a patient and her caregiver. *See People ex rel. Trutanich v. Joseph*, 204 Cal.App.4th 1512, 1521 (2012); *People* ex rel.

Lungren v. Peron, 59 Cal.App.4th 1383, 1394 (1997).

The text, structure, and express purpose of the CUA thus show that its overarching goal is to allow every seriously ill Californian to, either alone or with the assistance of a caregiver, personally grow a limited amount of marijuana at the patient's residence for that patient's personal use. *See* Health & Safety Code § 11362.5(d). There is nothing in the law to suggest that the voters intended to give local governments the authority to interfere with this goal. Local laws that require seriously ill patients and their caregivers to travel long distances to obtain medical marijuana and prohibit patients and caregivers from storing the medical marijuana they have grown or otherwise acquired are "inimical to the important purposes of the" CUA and are therefore preempted by it. *Action Apartment Ass'n, Inc. v. City of Santa Monica,* 41 Cal.4th 1232, 1243 (2007); *see Tosi v. Cnty. of Fresno*, 161 Cal.App.4th 799, 806-07 (2008); (finding implied field preemption where an "ordinance requires conduct … where the [state] statute does not and forbids conduct … permitted by the [state] statute."); *N. Cal. Psychiatric Soc'y v. City of Berkeley*, 178 Cal.App.3d 90, 107-09 (1986) (contradiction and implied field preemption of medical practice).

7(B)(6) <u>That the CUA only mentions state law does not mean that it allows local regulation, because when the voters enacted the CUA there was no—and could be no—local regulation.</u>

To accomplish its goal of allowing patients to use and cultivate medical marijuana, the initiative created a defense to all of the then-existing criminal laws prohibiting marijuana possession and cultivation: Health & Safety Code § "11357,

relating to the possession of marijuana, and [§] 11358, relating to the cultivation of marijuana." Health & Safety Code § 11362.5(d). That it focuses exclusively on state laws is not surprising, because when the voters enacted the CUA, it had been clear for more than a century that cities and counties lacked authority to enact local laws regulating drugs already regulated by state law. The electorate is presumed to have understood this existing legal framework when it passed the CUA. *See In re Lance W.*, 37 Cal.3d 873, 890 n.11 (1985) (citing *Bailey v. Superior Court*, 19 Cal.3d 970, 977 n.10 (1977)). And there is no indication that the voters who chose to *allow* access to medical marijuana intended to change this long-established rule so as to give local jurisdictions new authority to *ban* the that same marijuana. This indicates that they intended to leave the pre-existing law as it was. *See Bailey*, 19 Cal.3d at 977 n.10; *see also Big Creek Lumber Co.*, 38 Cal.4th at 1149-50 ("[I]t is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.") (citations omitted). In fact, our Supreme Court has held that even a statute that specifically states it is not intended to limit local authority does not thereby give local jurisdictions any new power to pass ordinances that would previously have been preempted. *Mingo*, 190 Cal. at 771-72.

Thus, after the passage of the CUA, state laws regulating lawful *and* unlawful cultivation, possession, and use of marijuana

continue to occupy the field, just as they had for decades previously. Local jurisdictions cannot prohibit the possession, use, or cultivation of medical marijuana that state law expressly allows any more than they could prohibit persons with a valid prescription for antibiotics or codeine from possessing or using those medicines. *See N. Cal. Psychiatric Soc'y*, 178 Cal.App.3d at 108 ("Among the numerous aspects of health care comprehensively regulated by state statute are … the availability and administration of medical treatment and drugs.") (citations omitted).

Relatedly, there is no indication that in 1996 any California city or county banned or regulated the possession or cultivation of marijuana. The long history of exclusive state regulation weighs heavily in favor of implicit field preemption. *See Am. Fin. Servs. Ass'n v. City of Oakland,* 34 Cal.4th 1239, 1255, 1261 (2005), (holding local mortgage regulations preempted by implication based largely on history of exclusive state regulation). Because there were no local laws – and could be no local laws – the CUA could accomplish its objectives of ensuring that seriously ill Californians have access to medical marijuana simply by addressing the state prohibitions on possession and cultivation. *See id.* Thus, although the CUA only expressly mentions state statutes, its purpose, the previous state of the law, and the benefits it seeks to provide show that it was not intended to allow cities and counties to prohibit what it was enacted to allow. *See O'Connell*, 41 Cal.4th at 1068.

7(B)(7) The MMP's Health & Safety Code § 11362.77(a) preempts local attempts to ban the cultivation or possession of medical marijuana.

Under the MMP, a "qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana" and "may also maintain no more than six mature or 12 immature marijuana plants." Health & Safety Code § 11362.77(a). By stating that qualified Californians "may" take these actions, the statute gives them permission or power to do so. *See S. Cal. Jockey Club v. Cal. Horse Racing Bd.*, 36 Cal.2d 167, 173 (1950); *Cnty. of Orange v. Bezaire*, 117 Cal.App.4th 121, 129 (2004) ("May" means "you can do it if you want, but you aren't being forced to."); *see also* Health & Safety Code § 16 ("'may' is permissive"). Thus, for example, a statute stating that initiative proponents "may" file a ballot argument "establish[es] the[ir] right" to do so. *Ferrara v. Belanger*, 18 Cal.3d 253, 262-63 (1976). The Legislature often authorizes individuals to engage in conduct that would ordinarily be unlawful by stating that they "may" do so. *See, e.g.,* Fish & Game §§ 2021(c)-(e); 2300(b), 6852, 8342; Food & Agric. § 14063(a)-(d); Health & Safety § 4064(f).

As this Court has recognized, a local ordinance that "forbids conduct … permitted by [a state] statute" is preempted. *Tosi*, 161 Cal.App.4th at 806-07. Thus, a local ordinance cannot prohibit Californians from doing what state law specifically says they "may" do. For example, the First District invalidated a local attempt to prohibit a controversial medical therapy where state law said that "such treatment 'may be administered'" in certain

specified circumstances. *N. Cal. Psychiatric Soc'y v. City of Berkeley*, 178 Cal.App.3d at 103 (quoting Welfare and Institutions Code §§ 5326.7, 5326.75); *see id.* at 105-06 (ordinance "is in direct conflict with the Legislature's intention both that [the treatment] be available in cases which meet the" statutory criteria). And the Second District has held that Civil Code § 1954.53(a), which states that landlords "may establish the initial" rent for their properties, preempts local rent-control law that prevented them from doing so. *Palmer/Sixth St. Properties, L.P. v. City of Los Angeles*, 175 Cal.App.4th 1396, 1402, 1411 (2009); *see id.* at 1411 ("rent restrictions [] conflict with and are inimical to" state law). As these cases illustrate, when the Legislature declares that Californians "may" do something, it thereby preempts local attempts to prohibit that activity.

Moreover, the local laws are inimical to the purposes of § 11362.77 and therefore conflict with them. As one federal court has noted in enjoining local officials from seizing medical-marijuana plants without a warrant, the plain language of this provision "explicitly allows for cultivation, so that patients are not required" to obtain their medical-marijuana" elsewhere. *Allen v. Cnty. of Lake*, __ F.Supp.3d __, No. 14–cv–03934–TEH, 2014 WL 5211432, at *8 (N.D. Cal. Oct. 14, 2014) (citing Health & Safety Code § 11362.77). But the County and City local ordinances here *prohibit* this cultivation and therefore *require* patients to obtain their medical marijuana elsewhere. They are therefore "inimical to the important purposes of the" MMP and therefore preempted. *See Action Apartment Ass'n, Inc.*, 41

Cal.4th at 1243 (holding local ordinance preempted); *see id.* at 1242-43 (citing, in discussing of this type of preemption, *Ex parte Daniels*, 183 Cal. 636, for proposition that "a city ordinance that set a lower maximum speed than the maximum speed permitted by state law was preempted").

7(B)(8) The MMP's express authorization for specific types of local regulation confirms its intent to preempt the type of local regulation here at issue.

When the Legislature took up the topic of medical marijuana in 2004, it presumably understood the longstanding legal rule that local governments lack authority to regulate marijuana, and that if it wanted to authorize local regulation of medical marijuana, it had to do so expressly. *See Lance W.*, 37 Cal.3d at 890 n.11. Consistent with this understanding, the MMP expressly allows local regulation in a few specific areas: it authorizes a "city or other local governing body" to enact local ordinances to "regulate the location, operation, or establishment of a medical marijuana cooperative or collective," and to adopt "other laws consistent" with the MMP. Health & Safety Code § 11362.83(a), (c). And, perhaps most importantly, it authorizes cities and counties to "retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed" the amounts specified by § 11362.77(a), but contains no provision that allows local governments to impose lower limits. § 11362.77(c).

This express grant of authority to regulate cooperatives and collectives, to enact limits on cultivation and possession that exceed the state limits, and to pass laws *consistent* with the Act

confirms that the legislature did not intend to authorize local regulations that are *in*consistent with the Act, particularly local laws that prohibit individual patients and caregivers from cultivating the number of plants authorized by the MMP. *See Cal. Redev. Ass'n v. Matosantos*, 53 Cal.4th 231, 261 (2011) ("*inclusio unius est exclusio alterius*"). After the enactment of the MMP, state law provides a detailed statutory scheme that determines who may and may not lawfully cultivate and possess medical marijuana, the quantities they may cultivate and possess, and the consequences for violating all aspects of this regulatory scheme. "Because the ordinances regulate in a more restrictive manner the very conduct regulated in state law, the[y] impermissibly conflict with state law." *Tosi v. Cnty. of Fresno*, 161 Cal.App.4th at 806 (invalidating recycling ordinance under implied field preemption); *see also Agnew v. City of Los Angeles*, 51 Cal.2d 1, 5-6 (1958) (city electrical code preempted because imposed additional requirements on contractors already licensed under state law).

7(B)(9) Cases allowing local regulation of medical-marijuana dispensaries and collectives are not to the contrary, because the MMP specifically authorizes such regulation.

That the Supreme Court in *City of Riverside* rejected a claim that the CUA and the MMP preempt local bans on medical-marijuana dispensaries does not suggest that local prohibitions on cultivation for personal medical use are lawful. *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 56 Cal.4th 729 (2013). *City of Riverside* involved the regulation of large-scale commercial medical-marijuana

distribution, an activity that could be incompatible with "some communities [that] are predominantly residential and do not have sufficient commercial or industrial space to accommodate facilities that distribute medical marijuana." *Id.* at 755 (citation omitted). The dispensaries in that case did not argue, as Plaintiffs here do, that the ordinance was preempted by general state prohibitions on marijuana; they claimed only that the ordinances were preempted by the CUA and the MMP. *See id.* at 737, 754. And the Court understandably rejected these arguments: the CUA does not even mention, much less authorize, dispensaries or the sale or distribution of medical marijuana. *See People ex rel. Trutanich v. Joseph*, 204 Cal.App.4th 1512, 1521 (2012). And "the MMP expressly recognizes local authority to 'regulate' medical marijuana" dispensaries and other large-scale operations, showing a legislative intent not to preempt bans on them. *City of Riverside*, 56 Cal.4th at 760 (citing §§ 11362.768 (f), (g), 11362.83). *City of Riverside* therefore held only that the city could regulate conduct that the CUA never mentions and the MMP specifically allows local jurisdictions to regulate.

In contrast, neither the CUA, the MMP, nor any other statute contains any corresponding language authorizing local jurisdictions to regulate the cultivation or possession of medical marijuana for personal use. To the contrary, the statutory scheme expressly permits individual patients and their caregivers to cultivate, use, and possess specified amounts of medical marijuana. *See* Health & Safety Code § 11362.77(a); *Allen,* __ F.Supp.3d __, 2014 WL 5211432, at *8 (§ 11362.77

"explicitly allows for cultivation"). And cultivation of small quantities of medical marijuana for personal use simply does not raise the same types of concerns as those raised by large commercial dispensaries. In fact, as the Fresno County Counsel noted when he recommended that the County amend its ordinance so as to except from its cultivation ban patients who grow 12 or fewer plants, even the Fresno County Sheriff's Department "does not believe that such an exception would materially hinder their work in the field or enforcement of the" County marijuana ordinance.[9] That cities and counties can regulate or ban the businesses at issue in *City of Riverside* therefore does not suggest that they can prohibit seriously ill Californians from growing and possessing small quantities of medical marijuana in their own homes for their personal medical use.

Similarly, this Court's 2013 decision upholding local regulation of medical-marijuana *collectives* relied on the fact that the CUA "does not provide for collectives" and that the MMP expressly authorizes local regulation of collectives. *Cnty. of Tulare*, 215 Cal.App.4th 1188, 1199, 1203 (2013). In addition, this Court emphasized that the ordinance in question, which allowed for the cultivation of 99 marijuana plants (much more than the quantities specified by the MMP), was "not an outright prohibition, but simply a limitation on quantity." *Id.* at 1202-03.

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[9] Fresno County Counsel, Report on Marijuana Cultivation Ordinances and Potential Amendments at 3 (December 2, 2014), available at http://www2.co.fresno.ca.us/0110a/Questys_Agenda/MG216237/AS216238/AS216252/AI216329/DO216405/DO_216405.pdf.

In contrast, the laws here at issue are an outright prohibition on personal cultivation and possession of medical marijuana by qualified patients. That local governments may prohibit patients from engaging in large-scale cultivation far in excess of what the MMP specifically authorizes does not mean they can prohibit cultivation that complies with that state statute.

7(B)(10) *Maral v. City of Live Oak* is distinguishable and wrongly decided.

Although the Third District has upheld a local ban on medical-marijuana cultivation, the plaintiffs in that case argued only that the CUA and MMP "create a right to obtain and cultivate medical marijuana." *See Maral v. City of Live Oak*, 221 Cal.App.4th 975, 979-80, 984 (2013). The court therefore may not have squarely considered the argument that the entire statutory scheme—including sections 11357 and 11358—preempts local attempts to ban the cultivation and storage of medical marijuana. An opinion is not authority for propositions it did not consider. *See Riverside Cnty. Sheriff's Dep't v. Stiglitz*, 60 Cal.4th 624, 641 (2014).

In any event, *Maral* was wrongly decided and this Court need not follow it. *See In re Christopher R.*, 225 Cal.App.4th 1210, 1218 (2014). *Maral's* two-paragraph analysis of whether the CUA or MMP preempts local bans on cultivating medical marijuana does not even cite our Supreme Court's decision in *O'Connell*. Nor does it discuss or even cite Health & Safety Code § 11362.77 or the differences in the MMP's treatment of personal cultivation and commercial dispensaries. Instead, the opinion simply asserts that its result is required by two prior cases, *City of Riverside*

(which it refers to as *Inland Empire*), 56 Cal.4th 729, and *Browne v. Cnty. of Tehama*, 213 Cal.App.4th 704, 711 (2013). But neither of these cases addressed the question of whether a local government could ban the cultivation of medical marijuana.

Browne involved a local ordinance that allowed qualified patients to grow "12 mature marijuana plants or 24 immature marijuana plants" on any parcel of land, twice the amount permitted by the MMP. 213 Cal.App.4th at 714 n.4. In upholding that limit, the court emphasized that it would "express no opinion as to whether a local ban on cultivating medical marijuana is preempted by state law." *Id.* at 721; *see id.* at 721 n.11 (distinguishing *N. Cal. Psychiatric Soc'y v. City of Berkeley*, 178 Cal.App.3d 90 (1986), as a case involving "an outright ban" which was therefore "inapposite"). As discussed above, *City of Riverside* involved the regulation of dispensaries, a regulation that, unlike personal cultivation and storage, is specifically authorized by the MMP. Thus, these cases do not support the conclusion that a city can completely ban the cultivation of medical marijuana or impose limits lower than what the MMP specifies. *Maral*'s reasoning is not persuasive and this Court should not follow it.[10]

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[10] *Maral*'s opening (and only) brief never even cites *O'Connell* or *Sic* or any of their progeny and contains no discussion of California preemption doctrine, much less any analysis how that doctrine applies to local bans on medical-marijuana cultivation; indeed, it contains only a single mention of the word "preemption" or any of its variants buried among its numerous arguments. *See* Appellants' Opening Brief in *Maral v. City of Live Oak*, No. C071822, 2013 WL 8609254 (March 1, 2013). The Third District's online docket shows that Maral failed to submit a reply brief and then waived oral argument. *See* http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=2023004&doc_no=C071822.

7(C) The County and City many not authorize their officials to use inspection warrants, issued without individualized probable cause, to enter the homes of seriously ill Californians to inspect for marijuana.

Both the County and the City purport to allow government officials to enter homes to inspect for medical marijuana armed only with an inspection warrant which, as discussed below, need not be supported by traditional probable cause. Chapter 10.62 of the County Code—titled "Abatement of Public Nuisances Created by Cultivation of Medical Marijuana"—authorizes public officials to seek an inspection warrant as defined in Code Civ. Proc. § 1822.50 to enter private property to search for "any cultivation of marijuana in violation of" the County Code. Cnty. Ord. §§ 10.62.020(C), 10.62.030 (J.A. 034, 035-36). This includes inspection of "structures" by the sheriff or anybody else appointed by the Board of Supervisors to administer Chapter 10.62. *Id.* § 10.62.020(B), (D) (J.A. 035).

The City, too, authorizes its officers to enter private property to enforce its bans on medical marijuana, with only an administrative inspection warrant issued under the same state statutory scheme. *See* City Code § 1-303 (J.A. 71).

These provisions violate the state and federal constitutional rule that police and other government officials cannot enter a home to search for marijuana or other evidence of a crime without a warrant supported by probable cause to believe that the search will actually uncover that evidence. Moreover, the statute governing inspection warrants does not allow them to issue to search for marijuana.

7(C)(1) The ordinances violate the Fourth Amendment and Article I § 13 of the state Constitution because they allow the government to enter a home to search for marijuana without individualized probable cause.

The Fourth Amendment requires that, absent consent or exigent circumstances, government officials must have a valid warrant, supported by probable cause to believe that the search will uncover evidence of a crime, to enter a person's home. *Jones v. United States*, 357 U.S. 493, 497-98 (1958); *see Groh v. Ramirez,* 540 U.S. 551, 558-59 (2004). Article I § 13 of the California Constitution, which creates an even "more exacting standard" for protecting privacy than does the Fourth Amendment, requires no less. *See People v. Cook*, 41 Cal.3d 373, 379 (1985) (emphasizing the "particular zeal" with which California guards the individual's privacy within his home or office and the "high privacy interest in the 'curtilage' of a residence"); *People v. Ruggles*, 39 Cal.3d 1, 11 (1985); *see also In re Lance W.*, 37 Cal.3d 873, 886-87 (1985) (discussing the continued vitality of Article I § 13 even though violations no longer lead to exclusion of evidence).

The meaning of probable cause to search for marijuana and other evidence of crime is well established: "Probable cause" means "facts that would lead a man of ordinary caution to entertain a *strong suspicion* that the object of the search is in the particular place to be searched" or that show "a *fair probability* that contraband or evidence of a crime will be found in a particular place." *People v. Tuadles*, 7 Cal.App.4th 1777, 1782-83 (1992) (quoting *Illinois v. Gates*, 462 U.S. 213 (1983) and *Wimberly v. Superior Court*, 16 Cal.3d 557, 564 (1976))

(emphasis in *Tuadles*).

Until 1967 many courts made an exception to the warrant requirement for searches conducted by health inspectors and other non-law-enforcement officials. *See Frank v. State of Md.*, 359 U.S. 360, 366 (1959). But in 1967, both the California Supreme Court and the U.S. Supreme Court held that the warrant requirement does apply to non-consensual home searches conducted by other government officials. *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523 (1967); *Parrish v. Civil Serv. Comm'n of Alameda Cnty.*, 66 Cal.2d 260 (1967).

In *Parrish*, the California Supreme Court held that social workers need a warrant, supported by traditional probable cause, to enter a home to search for violations of welfare-eligibility rules for the purpose of cancelling benefits. *Parrish*, 66 Cal.2d at 267-68. The court distinguished *Frank* on four grounds, the primary two being that, first, "the evidence sought by the health inspector in the *Frank* case would not itself have afforded a basis for criminal prosecution," while the evidence sought in *Parrish* could have formed the basis for a prosecution, and, second, that *Frank*, unlike *Parrish*, did not involve evidence to be used for "forfeitures." *Id.* at 266.[11]

Importantly, *Parrish* held that when government agents of any kind enter a house to search for matter that shows criminal

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[11] The *Parrish* court also noted that *Frank* had involved a search conducted in the middle of the day with some level of individualized suspicion, whereas the searches in *Parrish* were conducted at 6:30 a.m. and constituted "mass raids" without any suspicion of wrongdoing. 66 Cal.2d at 263, 267.

activity, they need a search warrant *supported by traditional probable cause*: Where "the evidence sought" will "afford[] a basis for prosecution without further action on [the government officials'] part or subsequent culpable conduct by the" target of the search, the government must comply "with the standards which govern searches for evidence of crime." *Id.* at 266, 267. This is true even when the searches are not intended to aid in criminal prosecutions. *Id.* at 265 & n.6. Furthermore, "a search directed at securing evidence in aid of a forfeiture should be treated in the same manner as a search for evidence of crime." *Id.* at 267.[12]

Later that same year, *Camara* overruled *Frank* and held that code-inspection officials who seek to enter a house must obtain consent or a warrant. *Camara*, 387 U.S. at 538. But the Court also indicated that such warrants may be issued under a different standard of probable cause than the traditional criminal standard. *Camara*, 387 U.S. at 538 ("a health official need [not] show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime"). Instead, this type of probable cause may be established if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to [the] particular dwelling" to be searched, such as "the passage of time"

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[12] Although *Parrish* only mentions the federal constitution, our high court has made it clear that the "fact that [its] opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent" under analogous provisions of the California constitution. *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899, 908 (1979) *aff'd*, 447 U.S. 74 (1980) (citation omitted); *accord Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal.4th 850, 864 n.6 (2007). Thus, *Parrish* controls the analysis under Article I § 13.

since the last inspection or "the condition of the entire area" where the house is located. *Id.*

The purpose of these warrants is to enable "routine periodic inspections of all structures" to ensure "universal compliance with the minimum standards required by municipal codes." *Id.* at 535-36. The *Camara* Court cited several factors that support the issuance of inspection warrants based on this new type of probable cause: the need to prevent or abate "dangerous conditions," the "long history of judicial and public acceptance" of entry to inspect for traditional code violations, and the fact that those traditional inspections are not "aimed at the discovery of evidence of crime." *Id.* at 537.

The following year, the California legislature created a system allowing California courts to issue such inspection warrants, Code Civ. Proc. § 1822.50 et seq. Under this statutory scheme,

> An inspection warrant is an order, in writing, … signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning.
> *Id.* § 1822.50

Inspection warrants do not require traditional probable cause; instead, they "shall be issued upon cause," established by affidavit, unless some other provision of state or federal law provides a different standard. *Id.* § 1822.51. "Cause" is defined to include either the generalized legislative or administrative standards allowed by *Camara* or "reason to believe" a violation is occurring:

> Cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle.
> Code Civ. Proc. § 1822.52.

Neither prong of this standard in California's statutory scheme necessitates traditional probable cause, which requires not just "a reason to believe" a violation exists but rather a "fair probability" or "strong suspicion that the object of the search is in the particular place to be searched." *Tuadles*, 7 Cal.App.4th at 1783 (citations omitted).

Because the warrants at issue here are aimed at the discovery of evidence of a crime, are not supported by judicial history nor public acceptance, are more intrusive than traditional code inspections, and do not relate to the public health or safety, they are impermissible under *Camara*.

First, the searches at issue here are "aimed at the discovery of evidence of crime" and therefore cannot be authorized by an inspection warrants under *Camara*. *Id.* at 537; *see Michigan v. Clifford*, 464 U.S. 287, 294 (1984) ("If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.") (plurality opinion). The cultivation of marijuana – including medical marijuana – is a felony under federal and state law, and a misdemeanor under the local laws challenged in this

case.[13] Thus, marijuana plants and stored marijuana are, by definition, evidence of a crime. As our Supreme Court explained in *Parrish*, where "the evidence sought" can "afford[] a basis for prosecution without further action on [the government officials'] part or subsequent culpable conduct by the" target of the search, government agents must comply "with the standards which govern searches for evidence of crime" before they enter a home. *Id.* at 266, 267. This is true even when the government does not intend to use the fruits of the search to aid in criminal prosecutions. *Id.* at 626 & n.6; *see generally People v. Woods*, 21 Cal.4th 668, 678-81 (1999) (holding in context of probation search that legality of search under Fourth Amendment generally does not depend on officers' subjective motivation).

This Court's opinion in *Salwasser Mfg. Co. v. Municipal Court* confirms this rule. In that case, this Court held that because the California Occupational Safety and Health Act makes any violation a misdemeanor as well as a civil violation, the state and federal constitutions require the government to obtain a warrant supported by probable cause, rather than the lesser standard for inspection warrants, to enter a business to search for Cal-OSHA violations. *Salwasser Mfg. Co. v. Mun. Ct.*, 94 Cal.App.3d 223, 231-33 (1979). This Court reached this holding even though it acknowledged the "strong administrative purpose to a Cal/OSHA

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[13] *See* 21 U.S.C.A. § 841(b)(1)(D); *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 489-90 (2001); *United States v. Stacy*, 734 F. Supp. 2d 1074, 1084 (S.D. Cal. 2010); Health & Safety Code § 11358; *People v. Wright*, 40 Cal.4th 81, 85 (2006); *People v. Moret*, 180 Cal.App.4th 839, 856 (2009).

inspection" and the extreme rarity of criminal prosecutions under the statute. *Id.* at 232; *see People v. Todd Shipyards Corp.*, 192 Cal.App.3d Supp. 20, 30 (1987).[14]

The case at bar presents an even stronger case for requiring a warrant supported by traditional probable cause than did *Salwasser Mfg. Co.*, for several distinct reasons. First, these searches involve homes, rather than businesses, and the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980) (citation omitted); *see Florida v. Jardines*, 133 S.Ct. 1409, 1414 (2013). Second, marijuana cultivation is a felony under state and federal law, carrying much more severe penalties than the six-month misdemeanor punishment that could be imposed in *Salwasser Mfg. Co. See* 94 Cal.App.3d at 230-31. Third, one object of the searches here is to "abate" patients' medical marijuana; this both threatens the well-being of seriously ill patients such as Plaintiffs and also provides a distinct reason to require a search warrant under *Parrish*'s holding that searches intended to lead to forfeitures must be supported by traditional probable cause. *See Parrish*, 66 Cal.2d at 266. Finally, the enormous fines that the City and County can impose on individuals are themselves akin to criminal punishment—a patient growing the 12 immature plants specifically allowed by the MMP would face fines starting at

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[14] This Court has since questioned whether this ruling is still good law under the Fourth Amendment, but not under the state constitution. *See Salwasser Mfg. Co.*, 214 Cal.App.3d at 629 n.1.

$12,000, which is itself more than the maximum base fine for felony cultivation of marijuana under state law.[15]

Second, searches for marijuana plants and stored marijuana do not "involve a relatively limited invasion" of privacy, "welcomed by all but an insignificant few." *Camara*, 387 U.S. at 537 (quoting *Frank*). The scope of the searches here is not limited to a house's plumbing or wiring; like any searches for drugs, they may encompass any place where marijuana could be grown or stored. And few medical-marijuana patients are likely to welcome the government to enter and search their houses so that it can confiscate their medicine and fine them thousands of dollars.

Third, there is no "long history" of allowing government officials to enter houses without a warrant to look for marijuana or drugs in general. *Cf. Camara*, 387 U.S. at 537. To the contrary, the government has long had to obtain search warrants or consent when it wants to enter a home to search for or seize drugs and other contraband. *See* Poison Act § 8b (1921) (authorizing issuance of search warrants to seize marijuana and other drugs). The government cannot circumvent the warrant requirement simply by adding a layer of civil penalties to what has long been a criminal offense.

Fourth, administrative inspection warrants may only properly issue to enforce laws relating to "minimum physical standards for private property," "conditions which are hazardous to public health and safety," "fires and epidemics," "unsightly

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[15] Because Health & Safety Code § 11358 does not specify the maximum fine for marijuana cultivation, Penal Code § 672's default fine of $10,000 applies.

conditions," "fire, housing, and sanitation standards," or "fire, health, and housing." *Camara*, 387 U.S. at 535, 533. Small-scale medical marijuana cultivation or possession for personal use is neither an aspect of the physical structure of a building nor a fire hazard or an epidemic; nor is it unsightly or even necessarily visible to the public. It does not negatively affect sanitation or health—in fact, both the voters and the Legislature have determined people with medical need for marijuana should be allowed to use it.[16]

Thus, none of the factors that led the *Camara* Court to allow a warrant to issue based on its non-traditional standard of probable cause are present here.

The ordinances also violate *Camara's* requirement that inspection warrants issued without traditional probable cause must instead be supported by "reasonable legislative or administrative standards" such as "the passage of time" since the last inspection, the "nature of the building," and the "condition of the area." *Camara*, 387 U.S. at 535, 538. *Camara* does not allow residential inspection warrants to issue based on some level of

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[16] The City and County cannot make medical marijuana into a nuisance simply by passing ordinances declaring that it is. As one federal court has held in issuing an injunction to prohibit warrantless abatement of medical marijuana plants under the Fourth Amendment, under California law, a "local government typically "has statutory power, vested in its governing body, to declare and abate public nuisances. But neither at common law nor under such express power can it, by its mere declaration that specified property is a nuisance, make it one when in fact it is not." *Allen v. Cnty. of Lake*, __ F.Supp.3d __, No. 14–cv–03934–TEH, 2014 WL 5211432, at a*3 (N.D. Cal. Oct. 14, 2014) (quoting *Leppo v. City of Petaluma*, 20 Cal.App.3d 711, 718 (1971)).

individualized suspicion that does not meet the traditional probable-cause standard; instead, it recognizes a different type of probable cause that applies to searches conducted as part of a routine inspection regimen. Thus, when the government "targets a single dwelling as the object of suspicion" —as opposed to seeking to enter homes as part of "a *routine* inspection of an *area*" —it must have a warrant supported by the "traditional standard of probable cause." *Town of Bozrah v. Chmurynski*, 36 A.3d 210, 218, 220-21 (Conn. 2012) (citing *Camara*). This led the Supreme Court of Connecticut to

> hold that before a court may issue an order permitting a zoning enforcement officer to enter and search a particular property, there must be a preliminary showing of facts … sufficient to cause a reasonable person to believe that conditions constituting a violation of the zoning ordinances are present on the subject property.
>
> *Id. at* 221 (citations omitted).

Neither the County nor the City's regulatory scheme contains reasonable legislative or administrative standards that would satisfy *Camara*'s standard of probable cause for inspection. Fresno County's municipal code authorizes an official to obtain an inspection warrant on the basis of "receipt of information leading him/her to believe that a public nuisance" related to medical marijuana exists in the area. Cnty. Ord. § 10.62.030 (J.A. 035). The City of Fresno code references no standards, simply authorizing entrance into private property "to ascertain" whether there are municipal code violations within. City Code § 1-303 (J.A. 71). There are no generalized standards here in either code, like passage of time since the last inspection or condition of an

area. Instead, the codes simply purport to allow government officials—including law enforcement—to enter homes where they suspect marijuana is being grown or stored without first having to show traditional probable cause. *Camara* does not allow this. The ordinances violate the state and federal constitutional protections against unreasonable searches of the home.

7(C)(2) State law does not authorize inspection warrants to search for marijuana or other controlled substances.[17]

Under the Code of Civil Procedure, an inspection warrant may issue to facilitate an "inspection required or authorized by state or local law or regulation *relating to building, fire, safety, plumbing, electrical, health, labor, or zoning*." Code Civ. Proc. § 1822.50 (emphasis added). A complete ban on cultivating even a single medical-marijuana plant clearly does not relate to building, fire, plumbing, electrical, or labor issues. Nor does it relate to safety, health, or zoning. As noted above, zoning traditionally refers to where—not whether—certain activities can take place. And the cultivation or possession of medical marijuana does not reasonably relate to health or safety; the City and County make no attempt to regulate the *use* of medical

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[17] Although Plaintiffs argued in superior court that the ordinances violate the state statutes relating to search warrants, rather than the statutes relating to inspection warrants, this Court properly addresses this issue on appeal of the dismissal of their Petition, for three reasons: First, as discussed above, this Court "may affirm the sustaining of a demurrer only if the complaint fails to state a cause of action under any possible legal theory." *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal.4th 992, 998 (2009). Second, "the rule that on appeal a litigant may not argue theories for the first time does not apply to pure questions of law." *Carman v. Alvord*, 31 Cal.3d 318, 324 (1982) (citation omitted). Third, Courts must resolve cases upon statutory, rather than constitutional, grounds if at all possible. *See People v. Williams*, 16 Cal.3d 663, 667 (1976).

marijuana by qualified patients. Thus, the plain language of the statute does not authorize inspection warrants to search for marijuana cultivation or storage, any more than it authorizes the issuance of inspection warrants to search for stolen property, unregistered firearms, or other evidence of crime.

Moreover, that the Legislature enacted this statute the year after *Parrish* and *Camara* were decided suggests it intended to authorize courts to issue inspection warrants for inspections like those in *Camara* but not for searches that *Parish* indicated would require a traditional search warrant.[18] As discussed above, *Parrish* held that the government must obtain a traditional search warrant to enter a house to search for evidence of criminal activity. *Parrish*, 66 Cal.2d at 266-67. *Camara* involved "area code-enforcement inspections" and stressed the "long history" of these programs. *Camara*, 387 U.S. at 537. Courts must presume that the Legislature intended to enact a statute that complied with the holdings of these two cases. *See Hughes v. Bd. of Architectural Examiners*, 17 Cal.4th 763, 788 (1998); *see also People v. Overstreet*, 42 Cal.3d 891, 897 (1986) (legislature presumed aware of existing case law). Furthermore, because the Penal Code already authorized courts to issue warrants to search for material that constitutes evidence of a crime, there would have been no reason for the Legislature to create a new type of warrant to authorize these same searches. *See* Penal Code § 1523

[18] The authority to use inspection warrants to search for labor violations was not added until 1980. *See* Code Civ. Proc. § 1822.50, historical note, citing Stats.1980, c. 230, § 1.

et seq. Thus, the Legislature presumably intended the new type of warrant to authorize inspections like those in *Camara* but not those that require a traditional search warrant under *Parrish.*

Interpreting section 1822.50 to exclude warrants to search for marijuana is thus consistent with the statutory language, the likely legislative intent, and the rule that, wherever possible, statutes must be construed so as to eliminate doubt as to their constitutionality. *See Hughes*, 17 Cal.4th at 788. The statute is simply not intended to allow local officials—including sheriffs—be able to use an inspection warrant to enter a residence to search for or seize controlled substances.

8. CONCLUSION

For the reasons discussed above, this Court should reverse the dismissal of the petition and hold that

1. Defendants' bans on cultivating and storage of medical marijuana are preempted by state law in violation of article XI, section 7 of the California Constitution and cannot be enforced;
2. Defendants may not enter a home or curtilage to search for marijuana without a warrant supported by traditional probable cause to think that the search will uncover evidence of a violation.

Respectfully submitted,

Dated: March 13, 2015 *__/s/ Michael Risher___*
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CERTIFICATE OF COMPLIANCE

I certify that the text in the attached Brief contains 13,747 words, as calculated by Microsoft Word, including footnotes but not the caption, the table of contents, the table of authorities, signature blocks, or this certification. *See* Rule of Court 8.204(c)(1), (3).

Dated: March 13, 2015

By: *__/s/ Michael Risher___*
Michael T. Risher

Attachment:

Poison Act §§ 8-8b

HENNING'S

GENERAL LAWS

OF

CALIFORNIA

AS AMENDED AND IN FORCE AT THE CLOSE OF THE FORTY-THIRD SESSION OF THE LEGISLATURE, 1919, INCLUDING INITIATIVE AND REFERENDUM ACTS ADOPTED AT THE GENERAL ELECTION OF 1920.

THIRD EDITION
IN TWO VOLUMES

EDITED AND ANNOTATED
BY
W. H. HYATT

VOLUME TWO

SAN FRANCISCO
BENDER-MOSS COMPANY
LAW-BOOK PUBLISHERS
1921

of business and performs plumbing work himself, since the former may operate without a license, and the latter can not, and moreover is liable to be deprived of his means of livelihood at the caprice of an examining.—Aaroe v. Crosby, (Cal. App.) 192 Pac. 97.

5. Same—Act is special legislation.—The act is special legislation as discriminating in its application between persons engaged in the same trade, without any reasonable basis for a classification.—Aaroe v. Crosby, (Cal. App.) 192 Pac. 97.

6. Same—Invalidity not removed by provisions of act of 1885.—The act of 1885, lacking the discriminatory features of the present act, if it was not intended to be repealed by it, merely emphasizes those objectionable features, and can not be said to remove them.—Aaroe v. Crosby, (Cal. App.) 192 Pac. 97.

7. Implied power to appoint plumbing examiners can not be delegated.—Where the charter of a municipality contains no express power to appoint plumbing examiners, such examiners can only be appointed under its general implied powers, and such powers can not be delegated to a subordinate municipal body or persons and is moreover subject to general laws inconsistent with its exercise.—Ex parte Grey, 11 Cal. App. 125, 104 Pac. 476.

8. Same.—The city of San Jose has no express power under its charter to delegate to the board of police commissioners and fire commissioners of the city the power to appoint a board of plumbing examiners; and an ordinance attempting to do this, is void as being in conflict with the general law.—Ex parte Grey, 11 Cal. App. 125, 104 Pac. 476.

9. Plumbers' license tax imposed under freeholders' charter is a "municipal affair." The imposition of a plumber's license tax in the city of Stockton, operating under a freeholders' charter, is a "municipal affair."—In re Prentice, 24 Cal. App. 345, 141 Pac. 220.

10. Ordinance of Stockton not in conflict with act.—An ordinance of the city of Stockton requiring a license of master-plumbers as a condition of their right to engage in the business of plumbing, is not in conflict with the act of 1885.—In re Prentice, 24 Cal. App. 345, 141 Pac. 220.

PLYMOUTH.

See Act 3094, note.

POINT ARENA.

See Act 3094, note.

CHAPTER 279.

POISONS.

References: See, generally, tits. "Medicine"; "Pharmacy."
Poisons, sale of, see Kerr's Cyc. Penal Code, § 347a.

CONTENTS OF CHAPTER.

POISON ACT.

ACT 3528—An act to regulate the sale of poisons in the state of California and providing a penalty for the violation thereof.

Amendment of title of act. The original title of this act was amended by the amending act of 1909, by adding the words "and use" after "to regulate the sale."

History: Approved March 6, 1917, Stats. 1907, p. 124. Amended (1) March 19, 1909, Stats. 1909, p. 422; (2) April 25, 1911, Stats. 1911, p. 1106; (3) June 11, 1913, in effect August 10, 1913, Stats. 1913, p. 692; (4) May 27, 1915, in effect August 8, 1915, Stats. 1915, p. 863; (5) June 1, 1915, in effect August 8, 1915, Stats. 1915, p. 1066; (6) May 27, 1919, Stats. 1919, p. 1275, which last amendment was suspended by referendum and submitted to the people at the general election of November 2, 1920, and adopted. The title of the amending act of 1919 recites that a new section is added, number 8g, but no such section appears in the body of the act. Prior acts of April 16, 1880, Stats. 1880, p. 102, codified by § 347a of the Penal Code (see Kerr's Cyc. Penal Code, § 347a); March 11, 1891; amended March 3, 1893, Stats. 1893, p. 68; repealed by the act of March 15, 1901, Stats. 1901, p. 299, which was no doubt superseded, as to the sale of poisons, by the present act.

this act shall be paid by the magistrate receiving same, seventy-five per cent to the state board of pharmacy, and twenty-five per cent to the city treasurer of the city, if incorporated, or to the county treasurer of the county in which the prosecution is conducted. The following is schedule "A" referred to in section one, viz.: Schedule "A," arsenic, its compounds and preparations, corrosive sublimate, and other poisonous derivatives of mercury, cyanide of potassium, strychnine, hydrocyanic acid, oils of croton, rue, savin, and tansy, phosphorus and its poisonous derivatives and compounds, strophanthus or its preparations, aconite, belladonna, nux vomica, veratrum viride, their preparations, alkaloids or derivatives, ant poison containing any of the poisons enumerated in this schedule.

The following is schedule "B": Hydrochloric or muriatic acid, nitric acid, oxalic acid, sulphuric acid, bromide, chloroform, cowhage, creosote, ether, solution of formaldehyde or formaline; cantharides, cocculus indicus, all their preparations; iodine, or its tinctures, oil of pennyroyal, tartar emetic, and other poisonous derivatives of antimony, sugar of lead, sulphate of zinc, wood alcohol, lysol and compound solution of cresol. [Amended by referendum November 2, 1920.]

This section was also amended March 19, 1909, Stats. 1909, p. 422; June 11, 1913, Stats. 1913, p. 692; June 1, 1915, Stats. 1915, p. 1066; and was amended as above May 27, 1919, Stats. 1919, p. 1275.

§ 8. It shall be unlawful for any person, firm or corporation to sell, furnish or give away or offer to sell, furnish or give away or to have in their or his possession any cocaine, opium, morphine, codeine, heroin, alpha eucaine, beta eucaine, nova caine, flowering tops and leaves, extracts, tinctures and other narcotic preparations or hemp or loco weed (cannabis sativa), Indian hemp, peyote (anhalonium), or chloral hydrate or any of the salts, derivatives or compounds of the foregoing substances or any preparation or compound containing any of the foregoing substances or their salts, derivatives or compounds excepting upon the written order or prescription of a physician, dentist or veterinary surgeon, licensed to practice in this state, which order or prescription shall be dated and shall contain the name of the person for whom prescribed, written in by the person writing said prescription, or if ordered by a veterinary surgeon it shall state the kind of animal for which ordered and shall be signed by the person giving the prescription or order. Such order or prescription shall be permanently retained on file by the person, firm or corporation who shall compound or dispense the articles ordered or prescribed, and it shall not be again compounded or dispensed if each fluid or avoirdupois ounce contains more than ten grains of chloral hydrate, or four grains of Indian hemp or loco weed excepting upon the written order of the prescriber for each and every subsequent compounding and dispensing. No copy or duplicate of such written order or prescription shall be made or delivered to any person but the original shall be at all times open to inspection by the prescriber and properly authorized officers of the law and shall be preserved for at least three years from the date of the filing thereof; provided, that the above provisions shall not apply to sales at wholesale by jobbers, wholesalers and manufacturers to pharmacies, as defined in section one of an act entitled "An act to regulate the practice of pharmacy in the state of California and to provide a penalty for the violation thereof; and for the appointment of a board to be known as the California state board of pharmacy," approved March 20, 1905, and acts amendatory thereof; or physicians, nor to each other, nor to the sale at retail in pharmacies by pharmacists to physicians, dentists or veterinary surgeons duly licensed to practice in this state; provided, further, that all such wholesale jobbers, wholesalers and manufacturers, in this section mentioned shall keep in a manner readily accessible, the written orders or blank forms required to be preserved under the provisions of section two of the act of congress, approved December 17, 1914, relating to the production, importation, manufacture, compounding, sale, dispensing or giving away of opium

or coca leaves and salts, derivatives or preparations. And said records shall always be open for inspection by any peace officer or any member of the board of pharmacy or any inspector authorized by said board and such records shall be preserved for at least two years after the date of the last entry therein. The taking of any order, or making of any contract or agreement, by any traveling representative, or any employee, of any person, firm or corporation, for future delivery in this state, of any of the articles or drugs mentioned in this section shall be deemed a sale of said articles or drugs by said traveling representative, or employee, within the meaning of the provision of this act; provided, further, that a true and correct copy of all orders, contracts or agreements, taken for narcotic drugs specified in this section shall be forwarded by registered mail to the secretary of the California state board of pharmacy within twenty-four hours after the taking of such order, contract or agreement, unless such order, contract or agreement is recorded as required under the provisions of section two of an act of congress, approved December 17, 1914, relating to the production, importation, manufacture, compounding, sale, dispensing or giving away of opium or coca leaves, their salts, derivatives or preparations of some wholesale jobber, wholesaler, or manufacturer permanently located in this state, as provided for in this section. It shall be unlawful for any practitioner of medicine, dentistry or veterinary medicine to administer to himself as a habitual user or furnish to or prescribe for the use of any other habitual user of the same, or of anyone representing himself as such, any cocaine, opium, morphine, codeine, heroin, or chloral hydrate, or any salt, derivative or compound of the foregoing substances or their salts, derivatives or compounds; and it shall also be unlawful for any practitioner of medicine or dentistry to prescribe or give any of the foregoing substances for himself or any person not under his treatment in the regular practice of his profession, or for any veterinary surgeon to prescribe or furnish any of the foregoing substances for the use of himself or any other human being; provided, however, that the provisions of this section shall not be construed to prevent any duly licensed physician from furnishing or prescribing in good faith as their physician by them employed as such, for any habitual user of any narcotic drugs who is under his professional care, such substances as he may deem necessary for their treatment, when such prescriptions are not given or substances furnished for the purpose of evading the purposes of this act; provided, that such licensed physician shall report in writing, over his signature, by registered mail, to the office of the California state board of pharmacy, within twenty-four hours after the first treatment, each and every habitual user of such narcotic drugs as are enumerated in this section whom he or she has taken, in good faith, under his or her professional care, for the cure of such habit, such report to contain the date, name and address of such patient, and the name and quantity of the narcotic or narcotics prescribed in such treatment; and provided, further, that the above provisions shall not apply to preparations of the United States pharmacopoeia and national formulary or other recognized or established formula or remedies sold or dispensed without a physician's prescription containing not more than two grains of opium, or one-fourth grain of morphine, or one grain of codeine, or one-eighth grain of heroin, or ten grains of chloral hydrate or four grains of Indian hemp or loco weed in one fluid ounce, or, if a solid preparation, in one ounce, avoirdupois, except tincture opii camphorata (commonly known as paregoric) which may be sold only upon the prescription of a physician licensed to practice in this state and said prescription shall not be again refilled or dispensed. [Amended by referendum November 2, 1920.]

This section was also amended March 19, 1909, Stats. 1909, p. 422; April 25, 1911, Stats. 1911, p. 1106; June 11, 1913, Stats. 1913, p. 692; June 1, 1915, Stats. 1915, p. 1066; and was amended as above May 27, 1919, Stats. 1919, p. 1275.

Possession of opium pipes, misdemeanor.

§ 8a. The possession of a pipe or pipes used for smoking opium (commonly known as opium pipes) or the usual attachment or attachments thereto, or other contrivances used

for smoking opium, or extracts, tinctures or other narcotic preparations of hemp, or loco weed, their preparations or compounds containing more than four grains to each fluid or avoirdupois ounce (except corn remedies containing not more than fifteen grains of the extract or fluid extract of hemp to the ounce, mixed with not less than five times its weight of salicylic acid combined with collodion), is hereby made a misdemeanor, and upon conviction thereof shall be punishable by the penalties prescribed in section seven of this act. [Amendment of June 1, 1915. In effect August 8, 1915, Stats. 1915, p. 1070.]

This section was added April 25, 1911, Stats. 1911, p. 1108. It was also amended June 11, 1913, Stats. 1913, p. 697.

Narcotics and opium pipes may be seized by peace officer. Order of destruction. Alternative disposition.

§ 8b. All narcotic drugs specified in section eight and also all pipes used for smoking opium (commonly known as opium pipes) or the usual attachments thereto, flowering tops and leaves, or extracts, tinctures, or other narcotic preparations of hemp, or loco weed, their preparations or compounds containing more than four grains of Indian hemp or loco weed to each fluid or avoirdupois ounce (except corn remedies containing not more than fifteen grains of the extract or fluid extract of hemp to the ounce, mixed with not less than five times its weight of salicylic acid combined with collodion), may be seized by any peace officer, and in aid of such seizure a search warrant or search warrants may be issued in the manner and form prescribed in chapter III of title XII of part II of the Penal Code. All such narcotic drugs, pipes used for smoking opium (commonly known as opium pipes) or the usual attachments thereto, and all such hemp or preparation of hemp or loco weed seized under the provisions of this act shall be ordered destroyed by the judge of the court in which final conviction was had; said order of destruction shall contain the name of the party charged with the duty of destruction as herein required; provided, however, that the judge shall turn all such evidence over to the California state board of pharmacy for such destruction; and provided, further, that any narcotic drug specified in section eight, opium pipes and the usual attachments thereto, or smoking opium, seized under the provisions of this act, now in the possession of any city or county official or officials, or the California state board of pharmacy, or which may hereafter come into their or its possession, in which no trial was had, shall be delivered to the California state board of pharmacy for destruction by said board; provided, however, that none of the narcotic drugs specified in section eight, opium pipes and the usual attachments thereto, or smoking opium coming into the possession of said board, as above described, shall not be destroyed within a period of six months from the date of such seizure; and provided, further, that the board of pharmacy may dispose of all narcotics now on hand or hereafter coming into their possession (other than smoking opium), either by gift to the medical director of California state prisons or state hospitals or by sale to wholesale druggists, the funds received from such sales to be applied by the board of pharmacy to the carrying out the provisions of this act or of the act creating such California state board of pharmacy. [Amendment of June 1, 1915. In effect August 8, 1915, Stats. 1915, p. 1070.]

This section was added April 28, 1911, Stats. 1911, p. 1108. It was also amended June 11, 1913, Stats. 1913, p. 697.

Revocation of registration of pharmacist for violation.

§ 8c. The board may revoke the registration of any registered pharmacist or assistant pharmacist upon conviction of the second offense for violating any of the provisions of section eight or eight a of this act, and in such case said registration shall not be restored before the period of one year from the date of said revocation. [Amendment of June 1, 1915. In effect August 8, 1915, Stats. 1915, p. 1071.]

This section was added June 11, 1913, Stats. 1913, p. 698.