IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF RIVERSIDE, Plaintiff and Respondent, v. INLAND EMPIRE PATIENT'S HEALTH AND WELLNESS CENTER, INC., *et al.*, Defendants and Petitioners.	No. S198638 (E052400)

After Decision by the Court of Appeal
Fourth Appellate District, Division Two

County of Riverside Superior Court
The Honorable John D. Molloy, Judge, Presiding

APPLICATION AND BRIEF OF AMERICANS FOR SAFE ACCESS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to California Rule of Court 8.520(f), *Amicus* Americans for Safe Access moves for leave to file the attached brief *Amicus Curiae* in Support of Petitioner Inland Empire Patient's Health and Wellness Center, Inc. This application is timely made within 30 days after the filing of the reply brief on the merits.

Americans for Safe Access ("ASA") is the nation's largest member-based organization of patients, medical professionals, scientists, and concerned citizens working to promote safe and legal access to marijuana for therapeutic use and research. ASA works to overcome political and legal barriers to the provision of medical marijuana to the seriously ill through legislation, education, litigation, grassroots actions, advocacy and services for patients and their providers. ASA has over 30,000 active members with chapters and affiliates in more than 40 states. ASA has litigated many significant medical marijuana cases, including *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, as well as *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th.798, *Spray v. Superior Court*, G037541 (4th Dist. 2007), and *City of Garden Grove v. Superior Court (Kha)* (2007) 157 Cal.App.4th 355. It has also appeared as an *amicus curiae* in *People v. Mentch* (2008) 45 Cal.4th 274 and *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734.

The outcome of this case is of great concern to ASA because local bans on medical marijuana collectives, like the one at issue here, thwart the intent of the electorate and the Legislature to ensure safe access to medical marijuana for the seriously ill persons who need it and to have uniformity of such access throughout the State. If the decision of the court of appeal is affirmed, the medical marijuana patients represented by ASA will be deprived of the mechanism deemed appropriate by the Legislature to provide safe and affordable access of marijuana to the seriously ill. ASA requests leave of this Court to brief the issues of federal and state law preemption to ensure safe access of medical marijuana to its seriously ill constituents.

I certify that no party or counsel for any party in this matter participated in authoring this brief, and nobody except for ASA has made any monetary contribution to fund the preparation or filing of this brief.

DATED: July 6, 2012 Respectfully submitted,

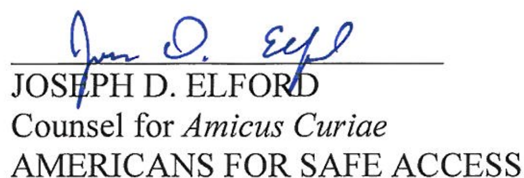

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF FACTS 2

ARGUMENT 4

I. THE CITY OF RIVERSIDE'S COMPLETE BAN OF MEDICAL MARIJUANA COLLECTIVES AND COOPERATIVES THROUGHOUT THE CITY CONFLICTS WITH, AND IS PREEMPTED BY STATE LAW 4

II. FEDERAL LAW DOES NOT PREEMPT THE MMPA 18

A. Legal Standards 19

B. The CSA Expressly Provides for Federal Preemption of State Drug Laws Only Where There Is a "Positive Conflict" Such that the Two Sets of Laws Cannot Stand Together 22

C. There Is No Positive Conflict Between State and Federal Law 24

D. Even If Obstacle Preemption Were to Apply, The MMPA Does Not Stand as an Obstacle to the Objectives of Congress 27

E. Federal Preemption of the MMPA IS Foreclosed by the Tenth Amendment 30

CONCLUSION 32

CERTIFICATE OF WORD COUNT 33

DECLARATION OF SERVICE 34

TABLE OF AUTHORITIES

Cases

Americans Financial Services Ass'n v. City of Oakland (2005) 34 Cal.4th 1239 4

Bronco Wine Co. v. Jolly (2004) 33 Cal.4th 943 20

Carter v. Chotiner (1930) 210 Cal. 288 17

City of Escondido v. Desert Outdoor Advertising, Inc. (1973) 8 Cal.3d 785 15

City of Garden Grove v. Superior Court (2007) 157 Cal.App.4th 355 .... *passim*

City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc. (2011) 133 Cal.Rptr.3d 363, 367, review granted Jan. 18, 2012 3

Cohen v. Board of Supervisors (1985) 40 Cal.3d 277 4

Conant v McCaffrey (9th Cir. 2002) 309 F.3d 629 30

County of Los Angeles v. Alternative Medicinal Cannabis Collective (2012) -- Cal.Rptr.3d --, 2012 WL 2511800 .... 10, 14

Ex Parte Quong Wo (1911) 161 Cal. 220 18

Flahive v. City of Dana Point (1999) 72 Cal.App.4th 241 16

Frost v. City of Los Angeles (1919) 181 Cal. 22 15

Gonzales v. Raich (2005) 545 U.S. 1 17

Great Western Shows, Inc. v. County of Los Angeles (2002) 27 Cal.4th. 853 18

Gregory v. Ashcroft (1991) 501 U.S. 452 20

In re Lane (1962) 58 Cal.2d 99 7

Jardine v. City of Pasadena (1926) 199 Cal. 64 17

Jevne v. Superior Court (2005) 35 Cal.4th 935 21

Johnson v. Bradley (1992) 4 Cal.4th 389 .... 4, 7

Johnson v. City of San Diego (1895) 109 Cal. 468 30

Jones v. City of Los Angeles (1931) 211 Cal. 304 15

Lancaster v. Municipal Court (1972) 6 Cal.3d 805... 4

Lorillard Tobacco Co. v. Reilly (2001) 533 U.S. 525 21

McPheeters v. McMahon (1933) 131 Cal.App. 418 18

Medtronic v. Lohr (1996) 518 U.S. 470 22

Nagel v. Dorrington (1927) 202 Cal. 698... 15

New York v. United States (1991) 505 U.S. 144 30

O'Connell v. City of Stockton (2007) 41 Cal.4th 1061 8

Parker v. Colburn (1925) 196 Cal. 169 16

People v. Colvin (2012) 203 Cal.App.4th 1029 5

People v. Bass (1963) 225 Cal.App.2d Supp. 777 9

People v. Mower (2002) 28 Cal.4th 457 26

People v. Robin (1943) 56 Cal.App.2d 885 18

People v. Urziceanu (2005) 132 Cal.App.4th 747.. 5

People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal.3d 476 4

People ex rel. Younger v. County of El Dorado (1979) 96 Cal.App.3d 403 15

Printz v. United States (1997) 521 U.S. 898... 30

San Diego Tuberculosis Assn. v. City of East San Diego
(1921) 186 Cal. 252 15

Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893 4

Suter v. City of Lafayette (1997) 57 Cal.App.4th 1109 10

Tosi v. County of Fresno (2008) 161 Cal.App.4th 799 9

United States v. $79,123.49 in United States Cash & Currency
(7th Cir. 1987) 830 F.2d 94 23

Vesper v. Forest Lawn Cemetery Assn. (1937) 20 Cal.App.2d 157 18

Viva! Int'l Voice for Animals v. Adidas Prom. Retail Ops., Inc.
(2007) 41 Cal.4th 929 .... 19, 20, 21, 23

Wyeth v. Levine (2009) 555 U.S. 555 .... 20, 26

Statutes and Constitutional Provisions

Health & Saf. Code, § 11362.5 .... *passim*

Health & Saf. Code, § 11362.7 .... *passim*

Health & Saf. Code, § 11362.765 .... *passim*

Civil Code, § 3479 16

Civil Code, § 3482 16

21 U.S.C. § 801(2) 27

21 U.S.C. § 903 25

INTRODUCTION

Through their enactment of the Compassionate Use Act [hereinafter *CUA*] in 1996 and the Medical Marijuana Program Act [hereinafter *MMPA*] in 2003, the California electorate and Legislature have promised seriously ill Californians that they would be able to obtain and use marijuana where that use has been deemed appropriate by a physician. Because many of these seriously ill individuals are too sick or are otherwise unable to cultivate the medicine they need to alleviate their suffering, the voters of California called upon the State to devise a distribution system to ensure that qualified patients are able to obtain marijuana. In response, in 2003, the Legislature authorized the formation and operation of medical marijuana collectives and cooperatives, which enable medical marijuana patients to associate together to provide one another with medical marijuana. Some cites, however, like the City of Riverside [hereinafter *City* or *Riverside*] do not wish to have medical marijuana collectives, so they have banned them. These bans contravene state law and are, therefore, preempted. While municipalities may pass reasonable regulations over the location and operation of medical marijuana collectives, they cannot ban them absolutely. These bans thwart the Legislature's stated objectives of ensuring access to marijuana for the seriously ill persons who need it in a uniform manner throughout the State.

STATEMENT OF FACTS

On November 4, 1996, the California electorate enacted the Compassionate Use Act (Health & Safety Code, § 11362.5) "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." (Health & Safety Code, § 11362.5, subd. (b)(1)(A).) Although the CUA did not expressly provide for a distribution system of marijuana to the seriously ill, it sought "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (Health & Safety Code, § 11362.5, subd. (b)(1)(C).) Seven years later, on September 10, 2003, the California Legislature responded to the voters' challenge by passing S.B. 420, also known as the "Medical Marijuana Program Act" or "the MMPA" (Health & Safety Code, § 11362.7 *et seq.*), which provides that "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely

on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (Health & Safety Code, § 11362.775). In passing the MMPA, the Legislature declared at the outset its purpose to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" (Stats, 2003, C. 875 (S.B. 420), § 1, subd. (b)(3)) and to "[p]romote uniform and consistent application of the act among the counties within the state." (Stats, 2003, C. 875, § 1, subd. (b)(2).)

Notwithstanding these state laws expressly designed to ensure safe access to medical marijuana for seriously ill patients throughout the State through medical marijuana collectives, the City of Riverside has passed an outright ban on such collectives. Riverside Municipal Code sections 19.150.020 and 19.910.140 [hereinafter *Ordinance*] provides that medical marijuana dispensaries involving more than three persons are prohibited. (*City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc.* (2011) 133 Cal.Rptr.3d 363, 367, review granted Jan. 18, 2012 [hereinafter *Riverside*].) Through the instant action, Inland Empire Patient's Health and Wellness Center, Inc. [hereinafter *Inland Empire Center*], which is a nonprofit mutual benefit corporation comprised of qualified medical marijuana patients who collectively cultivate marijuana and distribute it the collective's members, is challenging this ban. (*Ibid.*)

ARGUMENT

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

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

Here, in enacting the MMPA, the Legislature declared at its outset that its purposes were to "[e]nhance the access of patients and caregivers to

medical marijuana through collective, cooperative cultivation projects" and to "[p]romote uniform and consistent application of the act among the counties within the state." (Stats, 2003, C. 875 (S.B. 420), Section 1, subd. (b)(2), (3).) To this end, the Legislature enacted Health and Safety Code section 11362.775, which exempts medical marijuana collectives from the state laws criminalizing marijuana cultivation, possession, distribution, and maintaining a place where marijuana is cultivated or sold. (Health & Safety Code, § 11362.775.) Significantly, the Legislature also exempted medical marijuana collectives from "the laws declaring the use of property for these purposes a nuisance." (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785.) The courts have construed the MMPA as the State's initial response to the voters' request for a safe and affordable distribution system of marijuana to the seriously ill. (*Urziceanu, supra*, 132 Cal.App.4th at 785; *People v. Colvin* (2012) 203 Cal.App.4th 1029, 137 Cal.Rptr.3d 856, 859.)

In *Urziceanu, supra*, the court, described the MMPA as "represent[ing] a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers and fits the defense defendant attempted to present at trial. Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the

services provided in conjunction with the provision of that marijuana." (*Id.* at p. 785.) The *Urziceanu* court properly understood that the Legislature intended the MMPA to establish medical marijuana collectives and cooperatives as the mechanisms to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate. . . ." (See Health & Safety Code, § 11362.5, subd. (b)(1)(A); see also Health & Safety Code, § 11362.5, subd. (b)(1)(C) [encouraging "the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana"].)

Consistent with the Legislature and the judiciary, the Attorney General issued Guidelines on August 25, 2008, that recognize the legality of medical marijuana collectives and cooperatives under California law. (California Attorney General's Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use [found at http://medicalmarijuana.procon.org/sourcefiles/Brown_Guidelines_Aug08.pdf [hereinafter *AG Guidelines*].) The AG Guidelines state "the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law," so long as it comports with the Guidelines. (AG Guidelines at p. 11.) Thus, the AG Guidelines, like the MMPA and

Urziceanu, affirm the legality of medical marijuana collectives and cooperatives under California law.

Despite this clear articulation by the courts and the Attorney General that medical marijuana dispensaries are the mechanism by which qualified medical marijuana patients may obtain their medicine, the City of Riverside, under the guise of its zoning powers, has legislated the contrary federal view. (See *Riverside, supra*, 133 Cal.Rptr.3d at p. 367.) While the Riverside City Council is free to disagree with the policy choice made by the California electorate and Legislature, it may not pass laws that are "inimical to" (*American Financial Services Association v. City of Oakland, supra*, 34 Cal.4th at p. 1251) or "repugnant to" a matter of statewide concern (see *Johnson v. Bradley, supra,* 4 Cal.4th at p. 404). Nor can it exercise its police or zoning powers to enforce competing federal law. (Cf. *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 380 ["we think judicial enforcement of federal drug policy is precluded in this case because the act in question-possession of medical marijuana-does not constitute an offense against the laws of both the state and the federal government. Because the act is strictly a federal offense, the state has "no power to punish ... [it] ... *as such.*"] [Italics in original] [quoting *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1445].)

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

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

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

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

> drug crimes involving the manufacture, sale, or possession for sale of specified amounts of certain controlled substances.

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

It is, thus, established that the Legislature's exclusion of certain conduct from the penal provisions of the UCSA evidences the Legislature's intent to preempt municipal laws that penalize such conduct. (See *Tosi*, *supra*, 161 Cal.App.4th at p. 806 ["The local laws in *O'Connell* did conflict

marijuana dispensaries conflicts with, and is thus preempted by California's medical marijuana laws. (*Id.* at p. *2.) The court reasoned that, "[b]y enacting the MMP, the Legislature expressly authorized collective, cooperative cultivation projects as a lawful means to obtain medical marijuana under California law." (*Id.* at p. *9 [citing Health & Safety Code, § 11362.775].) Because "[t]he Legislature also expressly chose to place such projects beyond the reach of nuisance abatement under section 11570, if predicated solely on the basis of the project's medical marijuana activities," a complete ban on medical marijuana dispensaries in a municipality as a zoning ordinance is foreclosed by the MMPA. (*Id.* at pp. *9-12.) Stated succinctly:

> [The] County's per se ban on medical marijuana dispensaries prohibits what the Legislature authorized in section 11362.775. The contradiction is direct, patent, obvious, and palpable: County's total, per se nuisance ban against medical marijuana dispensaries directly contradicts the Legislature's intent to shield collective or cooperative activity from nuisance abatement "solely on the basis" that it involved distribution o medical marijuana authorized by section 11362.775. Accordingly, County's ban is preempted.

(*Id.* at p. *12.)

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

> [T]he establishment and protection of a right to possess and use medical marijuana notwithstanding state criminal statutes is plainly a matter of statewide concern. Further, it is self

> evident that the procedures and protections afforded by the 2003 legislation are reasonably related to the resolution of this statewide concern. Hence, these state laws would prevail over any conflicting regulatory acts of a charter city. (See, e.g., *Johnson v. Bradley, supra*, 4 Cal.4th at p. 404; *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 507; 83 Ops. Cal. Atty. Gen. 24, 26-29 (2000); 82 Ops. Cal. Atty. Gen. 165, 167-170 (1999).)

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

To salvage its Ordinance from state law preemption, Riverside points to Health and Safety Code sections 11362.83 and 11362.768, which describe the authority delegated to municipalities by the Legislature to regulate medical marijuana dispensaries and collectives. In particular, when the Legislature enacted the MMPA is 2003, as later amended in 2011, it allowed for local regulation as follows: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing . . . laws *consistent with* this article." (Health & Safety Code, § 11362.83 [Italics added].) This provision, however, like its constitutional counterpart, only authorizes municipalities to pass laws that are "consistent with" the State's medical marijuana laws--such as creating possession

guidelines that exceed those set forth in the MMPA or adopting regulations governing the operation of medical marijuana collectives--it does not authorize municipalities to pass laws that criminalize conduct deemed legal by the State. As explained above, the City's absolute ban on medical marijuana collectives is inconsistent with the MMPA's goals of "[e]nhanc[ing] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" and "[p]romot[ing] uniform and consistent application of the act among the counties within the state." (Stats, 2003, C. 875 (S.B. 420), Section 1, subd. (b)(2) & (3).)[1] Under both the express language of the MMPA and generally applicable preemption principles, the Riverside ban on medical marijuana dispensaries is preempted.

Nor does the amendment to the MMPA passed in 2010, Health and Safety Code section 11362.768, give Riverside the authority to completely ban medical marijuana collectives and dispensaries in the City, as the City contends. (See Respondent's Brief [hereinafter RB] at pp. 6, 7, 32, 33, 34.) Section 11362.768, subdivision (b) provides: "No medical marijuana cooperative, collective, dispensary, operator, establishment, or provider

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[1] It bears noting that approximately fifty localities regulate medical marijuana dispensaries without banning them. (See http://americansforsafeaccess.org/article.php?id=3165.) More than one hundred localities have passed complete bans. (See *ibid.*) There is no evidence such dispensaries lead to an increase in crime. (See http://safeaccessnow.org/downloads/dispensaries.pdf.)

who possesses, cultivates, or distributes medical marijuana pursuant to this article shall be located within a 600-foot radius of a school." Subdivision (e) of this section, in turn, limits its application "to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a *storefront or mobile retail outlet* which ordinarily require a local business license." ([Italics added].) "[T]he repeated use of the term 'dispensary' throughout the statute and the reference in subdivision (e) to a 'storefront or mobile retail outlet' make it abundantly clear that the medical marijuana cooperatives or collectives authorized by section 11362.775 are permitted by state law to perform a dispensary function." (*AMCC, supra*, at pp. *9-*10.) While section 11362.768 permits municipalities to "further restrict" medical marijuana dispensaries, it does not authorize them to ban them altogether.

In essence, despite the clear direction from the Legislature that the collective and cooperative provision of the MMPA was designed to "enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" and "[p]romote uniform and consistent application of the act among the counties within the state," (Stats, 2003, C. 875 (S.B. 420), Section 1, subd. (b)(2) & (3)), Riverside contends that the power to "regulate" (consistent with State law) includes the power to "prohibit" medical marijuana dispensaries altogether.

(See RB at pp. 45-47.) In its words, "there is no categorical distinction between the government's power to 'regulate' and its power to 'prohibit.'" (RB at p. 45.)

This Court, however, has established that "prohibition is very different from regulation, and can be justified only on the ground that [a lawful business], no matter how well conducted, is a menace to the public peace, morals, health, or comfort." (*San Diego Tuberculosis Assn. v. City of East San Diego* (1921) 186 Cal. 252, 254.) Stated another way, "it is generally held that a municipality's power to regulate lawful businesses may not be used to prohibit them entirely." (*City of Escondido v. Desert Outdoor Advertising, Inc.* (1973) 8 Cal.3d 785, 790, disapproved on other grounds in *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 216; see also *People ex rel. Younger v. County of El Dorado* (1979) 96 Cal.App.3d 403, 406 ["However laudable its purpose, the exercise of police power may not extend to total prohibition of activity not otherwise unlawful."] [Citations omitted].) It is only when the danger of a private business to the public has been shown to be sufficiently great, that such businesses may be wholly prohibited. (See *Jones v. City of Los Angeles* (1931) 211 Cal. 304, 316; *Nagel v. Dorrington* (1927) 202 Cal. 698, 700 ["unless [a gas station] is operated in some extraordinary manner so as to be a nuisance because of such operation, this court cannot say that it is a nuisance"]; *Frost v. City of Los Angeles* (1919) 181 Cal. 22, 28; cf.

(*Parker v. Colburn* (1925) 196 Cal. 169, 177 ["[A] law or ordinance by or under which a lawful occupation, in itself, when properly conducted, in nowise injurious to persons, property or the public interest, may be absolutely prohibited at the dictation of any official body without cause [other] than its own will or desire, is beyond the legislative power and to that extent void."]; see also Civil Code, § 3479 ["Anything which is injurious to health, or is indecent or offensive to the sense, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."]; Civil Code, § 3482 ["Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."].)

Here, unsurprisingly, the City of Riverside has not, and cannot, show that Inland Empire Center or other dispensaries are a nuisance to their neighbors, yet the City ordains them as such. While a city may declare a nuisance by ordinance (Civil Code, § 38771), "[a] city's designation of a nuisance pursuant to an ordinance does not necessarily make it so." (*Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 244 fn. 4, citing *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 718.) The City of Riverside District Attorney's Office has issued a White Paper entitled "Medical Marijuana: History and Current Complications," which claims

that medical marijuana dispensaries cause an increase in violent crime, but, as the court recognized in *Garden Grove, supra*, the facts do not support this. (See *Garden Grove, supra*, 157 Cal.App.4th at p. 367 ["Suffice it to say, there is nothing in the record of this particular case to indicate a link between medical marijuana—in Riverside or anywhere else—and violent crime in Garden Grove."]; see generally *Gonzales v. Raich* (2005) 545 U.S. 1, 63 [dis. opn. of Thomas, J.] [many law enforcement officials report that the introduction of medical marijuana laws has *not* affected their law enforcement efforts."] [Italics added.].) Absent any proof that medical marijuana dispensaries, which are products of State law, are injurious to the public, Riverside cannot ban them altogether as nuisances per se.

Instead, it seems obvious that the City of Riverside has banned medical marijuana dispensaries throughout the City because it does not like them. Numerous authorities have established that such prejudice against activities that are not illegal under State law cannot be banned completely under the guise of a nuisance per se. (See *Jones, supra*, 211 Cal. at p. 304 [a properly conducted sanitarium for the care and treatment of the mentally ill cannot be held to constitute a nuisance]; *Carter v. Chotiner* (1930) 210 Cal. 288 [cemetery is not a nuisance per se]; *Nagel, supra,* 202 Cal. at p. 700 [gas stations cannot be enjoined as nuisances per se]; *Jardine v. City of Pasadena* (1926) 199 Cal. 64 [a well-conducted hospital for the treatment of contagious and infectious diseases may not be deemed a nuisance]; *Ex*

Parte Quong Wo (1911) 161 Cal. 220 [a lawfully operated public laundry is not a nuisance per se]; *People v. Robin* (1943) 56 Cal.App.2d 885 [unlawful sale of liquor, by itself, without further facts, does not constitute a nuisance that can be abated by city attorney]; *Vesper v. Forest Lawn Cemetery Assn.* (1937) 20 Cal.App.2d 157 [operation of a mortuary is not a public nuisance]; *McPheeters v. McMahon* (1933) 131 Cal.App. 418 [dance halls are not nuisances per se]; 79 Ops. Cal. Atty. Gen. 112 (June 20, 1996) [domestic violence shelters are not nuisances].) "[W]hen a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th. 853, 868 [citing *Blue Circle Cement, Inc. v. Board of County Commissioners of County of Rogers* (10th Cir. 1994) 27 F.3d 1499, 1506-1507].; cf. *Int'l Bd. Of Elec. Workers v. City of Gridley* (1983) 34 Cal.3d 191, 193 ["Although the Legislature did not intend to preempt all aspects of labor relations in the public sector, we cannot attribute to it an intention to permit local entities to adopt regulations which would frustrate [its] declared policies and purposes."].)

II. FEDERAL LAW DOES NOT PREEMPT THE MMPA

Lastly, despite the court of appeal's determination that "federal preemption of state medical marijuana law is not a valid basis for upholding

Riverside's zoning ordinance banning MMD's" (*Riverside, supra*, 133 Cal.Rptr.3d at p. 372, citing *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 763) and the coexistence of California's medical marijuana laws with federal law for more than fifteen years, Riverside contends that the conflict between the two sets of laws is so intractable that California law must be held invalid. In making this argument, Riverside misstates the effect of state preemption of its Ordinance. The MMPA does not require localities to affirmatively authorize or sanction medical marijuana dispensaries; rather, it requires them only to remain neutral and not ban them. As a sovereign state under our federalist system of government, California cannot be compelled, or commandeered, by the federal government to enforce the federal government's prohibition on marijuana possession for all purposes, even if the federal government may enforce its own laws in the State of California. The Tenth Amendment precludes Riverside's argument that federal law *requires* California or its subdivisions to enforce federal law by enacting bans on medical marijuana dispensaries.

A. Legal Standards

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

798, 815]; accord *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 956-957.) Courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Viva! Int'l, supra*, 41 Cal.4th at p. 938 [quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230]; accord *United States v. Bass* (1971) 404 U.S. 336, 349; see also *Bronco Wine Co., supra*, 33 Cal.4th at p. 974 [in areas of traditional state regulation, a "strong presumption" against preemption applies and state law will not be displaced "unless it is clear and manifest that Congress intended to preempt state law"].) The strong presumption against federal preemption of state law "'provides assurance that the "federal state balance" will not be disturbed unintentionally by Congress or unnecessarily by the Courts.'" (*Olszewski, supra*, 30 Cal.4th at p. 815 [quotation omitted].) To find preemption, the Court must be "absolutely certain that Congress intended" that result. (See *Gregory v. Ashcroft* (1991) 501 U.S. 452, 464; see also *Wyeth v. Levine* (2009) 555 U.S. 555, 565 ["the purpose of Congress is the ultimate touchstone in every pre-emption case"] [quotation omitted].)

Ordinarily, there are four ways in which a statute may be preempted: (1) where Congress enacts a statute that explicitly preempts state law, (2) where state law actually conflicts with federal law, (3) where federal law occupies a field to such an extent that it is reasonable to conclude that Congress does not wish the states to regulate in that area, or (4) where the

state law at issue stands as an obstacle to the accomplishment of the objectives of Congress. (*Viva!, supra*, 41 Cal.4th at p. 936.) At its core, the preemption question is one of Congressional intent, which is the "ultimate touchstone." (*Viva!, supra*, 41 Cal.4th at p. 939 [quoting *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485]; *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949; *County of San Diego v. NORML* (2008) 165 Cal.App.4th.798, 822; *Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at p. 382.)

To determine whether Congress intended to preempt state law, courts look to the statutory text as the best indicator of Congress' intent. (*Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 62-63.) Where, as here, "Congress has expressly identified the scope of the state law it intends to preempt, [courts] infer [that] Congress intended to preempt no more that that absent sound contrary evidence." (*Viva!, supra*, 41 Cal.4th at p. 945; see also *Sprietsma v. Mercury Marine, supra*, 537 U.S. at pp. 62-63 [where a stature "contains an express pre-emption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent'"] [quoting *CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. 658, 664]; *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541 ["In these cases our task is to identify the domain expressly preempted, [citation], because 'an express definition of the pre-emptive reach of a

statute . . . supports a reasonable inference . . . that Congress did not intend to preempt other matters"] [quotation omitted].) Because the MMP and CUA address fields historically occupied by the states--medical practices (*Medtronic v. Lohr* (1996) 518 U.S. 470, 485) and state criminal sanctions for drug possession (*City of Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at pp. 383-386, 68 Cal.Rptr.3d 656) -- "the presumption against preemption informs our resolution of the scope to which Congress intended the Controlled Substances Act [hereinafter *CSA*] to supplant state laws, and cautions us to narrowly interpret the scope of Congress's intended invalidation of state law. (*Medtronic, supra.*)" (*San Diego, supra*, 165 Cal.App.4th at p. 823.) Due to this historical allocation of power to the states regulate in these areas, as well as their status as "independent sovereigns in our federalist system," the United States Supreme Court has concluded that a clear statement is required before the Court will conclude that Congress intended to interfere with those powers. (*Medtronic Inc., supra*, 518 U.S. at pp. 475 & 485.)

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

It was out of respect for the traditional role of the states in regulating medicine and crime that Congress included in the CSA an express

preemption provision, which contains an unambiguous expression of an intent *not* to preempt state law. 21 U.S.C section 903 provides as follows:

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

This express preemption provision has been referred to as the CSA's "anti-preemption" provision. (Cf. *United States v. $79,123.49 in United States Cash & Currency* (7th Cir. 1987) 830 F.2d 94, 98 [referring to 21 U.S.C § 903 as the "anti-preemption provision of Controlled Substances Act"]; *City of Hartford v. Tucker* (Conn. 1993) 621 A.2d 1339, 1341 [same]; Am. Jur. 2d Drugs and Controlled Substances, § 30 (2007) [same]; see also *Gonzales v. Oregon* (2006) 546 U.S. 243, 251 ["The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision"]; *City of Garden Grove v. Superior Court, supra,* 157 Cal.App.4th at p. 383 ["in enacting the CSA, Congress made it clear it did *not* intend to preempt the states on the issue of drug regulation" "This express statement by Congress that the federal drug law does *not* generally preempt state law gives the usual assumption against preemption additional force"] [Italics in Original] [citation omitted]; cf. *Viva!, supra*, 41 Cal.4th at p. 945 [where "Congress has expressly identified the scope of the state law

it intends to preempt, [courts] infer [that] Congress intended to preempt no more that that absent sound contrary evidence"]; see also *Gonzales v. Oregon, supra*, 546 U.S. at pp. 270-271 ["Further cautioning against the conclusion that the CSA effectively displaces the States' general regulation of medical practice is the Act's pre-emption provision, which indicates that, absent a positive conflict, none of the Act's provisions should be 'construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State'"] [quotation omitted]; *San Diego, supra*, 165 Cal.App.4th at pp. 823-824 [holding that anti-preemption provision of CSA precludes obstacle preemption] [citing *Southern Blasting Services v. Wilkes County* (4th Cir. 2002) 288 F.3d 584].) Under Title 21, United States Code section 903, the CSA only preempts state laws that positively conflict with the CSA "so that simultaneous compliance with both sets of laws is impossible." (*San Diego, supra*, 165 Cal.App.4th at p. 825.)

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

Judged by this appropriate standard, there is no positive conflict between the challenged provision of the MMPA and the CSA. Notwithstanding the City of Riverside's attempt to create a conflict by pointing to the very different treatment of medical marijuana under state

versus federal law, the important points for CSA preemption purposes are that the MMPA does not require anyone to violate federal law and it does not purport to immunize persons from prosecution under the CSA. With regard to federal preemption of California's medical marijuana laws, this Court stated in *Garden Grove v. Superior Court, supra,* as follows:

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

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

Likewise, here, the Inland Empire Center is not asking the City of Riverside to participate in its activities; rather, it is only asking that the City remain neutral and not ban collectives. If it so chooses, the federal government may continue to prosecute seriously ill Californians for cultivating and possessing marijuana for medical purposes (*Gonzales v.*

Raich (2005) 545 U.S. 1, 28-29), but this can be accomplished, while at the same time leaving California's medical marijuana laws, "which involve state law alone" (*People v. Mower* (2002) 28 Cal.4th 457, 465 fn. 2), intact. There is no positive conflict under the CSA where, as here, the two sets of laws coexist in this manner (See *San Diego, supra,* 165 Cal.App.4th at pp. 825-826; cf. *Viva, int'l, supra*, 41 Cal.4th at p. 944 [stating that there is no conflict preemption where compliance with both federal and state law is not a "physical impossibility"] [quoting *Hillsborough County v. Automated Medical Labs., Inc.* (1985) 471 U.S. 707, 713]; cf. *Qualified Patients Assn, supra*, 187 Cal.App.4th at p. 759 ["the high court's decision in *Gonzales* demonstrated the absence of any conflict preventing coexistence of the federal and state regimes 'enforcement of the CSA can continue as it did prior to [the enactment of California's medical marijuana laws]"] [quotation omitted]; see also *Wyeth, supra*, 555 U.S. at p. 575 ["the case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and tolerate whatever tension there [is] between them"] [quotation omitted]; *Hyland v. Fukuda* (9th Cir. 1978) 580 F.2d 977, 980, 981 [holding that Hawaii law exempting state employees from Hawaii law prohibiting possession of firearms by felon was not preempted by federal law containing no such exemption].)

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

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

that Congress sought to prevent [in the CSA] was that deriving from the drug's 'stimulant, depressive, or hallucinogenic effect on the central nervous system.'" (See Statement of Attorney General Reno on Oregon's Death with Dignity Act (June 5, 1998) [found at http://judiciary.house.gov/Legacy/attygen.htm [quoting 21 U.S.C. § 811(f)]; see also *Gonzales, supra,* 546 U.S. at p. 273 ["The statutory criteria for deciding what substances are controlled, determinations which are central to the Act, consistently connect the undefined term 'drug abuse' with addiction or abnormal effects on the nervous system."].) The use of marijuana for medical purposes does not implicate these issues.

With these objectives of Congress properly understood, it can be seen that the MMPA does not pose a "significant conflict" with the CSA. (See *San Diego, supra*, 165 Cal.App.4th at p. 826 [under obstacle preemption, "not every state law posing some de minimus impediment will be preempted. To the contrary, '[d]isplacement will occur only where, as we have variously described, a '*significant conflict*' exists between an identifiable 'federal policy or interest and the [operation] of state law,'"] [quoting *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 507] [Italics in original]; see also *Chamber of Commerce of U.S. v. Whiting* (2011) 131 S.Ct. 1968, 1985 [plurality opn. of Roberts, J.] ["a high threshold must be met of a state law is to be preempted for conflicting with the purposes of a federal Act"] [quoting *Gade v. Nat'l Solid Wastes Mgmt.*

Assn. (1992) 505 U.S. 88, 110 [conc. opn. of Kennedy, J.].) Seriously ill persons who use marijuana after having this treatment recommended to them by a physician are not engaging in drug abuse, as that term has been conventionally understood. (Cf. *People v. Mower* (2002) 28 Cal.4th 457, 482 [equating possession of marijuana in compliance with the CUA to "the possession of any prescription drug with a physician's prescription"]; *Oregon v. Ashcroft* (9th Cir. 2004) 368 F.3d 1118, 1166, *affd. in* 126 S.Ct. 904 (2006) [contrasting "drug abuse" and "medical practice"].) In any event, because medical marijuana patients comprise only a tiny fraction of all marijuana users, medical marijuana collectives, which consists only of qualified patients, will not significantly conflict with Congress' goal of curbing drug abuse. (Cf. *Garden Grove, supra*, 157 Cal.App.4th at p. 384 ["[i]t is unreasonable to believe that use of medical marijuana by [qualified users under the CUA] for [the] limited purpose [of medical treatment] will create a significant drug problem, so as to undermine the stated objectives of the CSA"] [quoting *Conant v. McCaffrey* (N.D. Cal. 1997) 172 F.R.D. 681, 694 fn. 5, *affd. in Conant v. Walters, supra,* 309 F.3d 629]; see also *Gonzales v. Raich* (2005) 545 U.S. 1, 63 (dis. opn. of Thomas, J.) ["many law enforcement officials report that the introduction of medical marijuana laws has *not* affected their law enforcement efforts"] [Italics added].)

E. Federal Preemption of the MMPA Is Foreclosed By the Tenth Amendment

If the federal government *had* sought to preempt state law in this area, which it has not, such "commandeering" of the states would violate the Tenth Amendment. (See *Printz v. United States* (1997) 521 U.S. 898, 930-31; *New York v. United States* (1991) 505 U.S. 144, 157; *Nat'l Federation of Republican Assemblies v. United States* (S.D. Ala. 2002) 218 F.Supp.2d 1300, 1352 ["the federalism concerns that the Tenth Amendment embodies counsel hesitation before construing Congress's enumerated powers to intrude upon the core aspects of state sovereignty"].) Under the Tenth Amendment, the federal government may not "commandeer" state officials to enforce federal law -- "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." (*New York, supra,* 505 U.S. at p. 935.) The reason is that under our federalist system of government, sovereign states, at a minimum, must be able to control their own purse strings. As the Court stated in *Printz, supra:* "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service--and at no cost to itself--the police officers of the 50 States." (521 U.S. at p. 922.)

Here, whereas the State of California has made a decision to conserve its scarce judicial resources by not subjecting medical marijuana patients who form patient collectives to criminal sanction or nuisance abatement actions, Riverside effectively argues that federal law *requires* it to pass such criminal laws. Such conscription of local government violates the Tenth Amendment, since municipalities are creatures of the State. (See *Johnson v. City of San Diego* (1895) 109 Cal. 468, 473, 474 ["Municipal corporations, in their public and political aspect, are not only creatures of the state, but are parts of the machinery by which the state conducts its governmental affairs."]; cf. *San Diego, supra*, 165 Cal.App.4th at p. 828 [holding that the CSA does not preempt the MMPA, even if Congress intended this result, due to the Tenth Amendment]; *Conant v McCaffrey* (9th Cir. 2002) 309 F.3d 629, 646-647 [conc. opn. of Kozinski, J.] [explaining that federal government's threat of revoking DEA licenses of California physicians who recommend marijuana to their patients violates the Tenth Amendment.].)

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CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeal.

DATED: July 6, 2012 Respectfully submitted,

JOSEPH D. ELFORD
Counsel for Americans for Safe Access

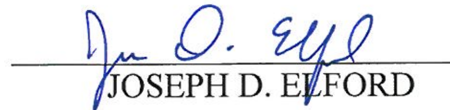
CERTIFICATE OF WORD COUNT

I, JOSEPH D. ELFORD, declare as follows:

I am the attorney for Amicus Curiae Americans for Safe Access in this matter. On July 6, 2012, I performed a word count of the above-enclosed brief, which revealed a total of 8,111 words.

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

Executed this 6th day of July in Oakland, California.



JOSEPH D. ELFORD

DECLARATION OF SERVICE

I am a resident of the State of California and over the age of eighteen years. My business address is Americans for Safe Access, 1322 Webster St., Suite 402, Oakland, CA 94612. On July 6, 2012, I served the within document(s):

BRIEF OF AMERICANS FOR SAFE ACCESS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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

Executed on this 6th day of July, 2012, in Oakland, California.

JOSEPH D. ELFORD