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STATE OF WASHINGTON
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No. 90204-6

# IN THE SUPREME COURT OF THE STATE OF WASHINGTON

**JOHN WORTHINGTON, ET AL**
**appellants,**
**Vs.**

**CITY OF KENT, et al**
**respondents**

# PLAINTIFF-INTERVENER-APPELLANT WEST'S PETITION FOR DISCRETIONARY REVIEW

**On appeal from the ruling of**
**Division I of the Court of Appeals**

**Arthur West**
**120 State Ave N.E. #1497**
**Olympia, Washington, 98501**

ORIGINAL

## A. IDENTITY OF PETITIONER

Comes now Plaintiff-Intervener-Appellant West and respectfully moves for relief designated in Part B of this petition.

## B. RELIEF REQUESTED

This case presents the simple question of whether the Division I of the Court of Appeals can, or should, expressly overturn a published decision of the Supreme Court, and undermine the requirements of uniformity in the enforcement of the federal Uniform Controlled Substances Act[1] and RCW 69.50.603[2].

West requests review of the decision of the Washington State Court of Appeals for Division I in Case No. 70396-0-I filed March 31, 2014, along with the final Order Denying Modification of April 25, 2014.

On March 31, 2014, Division I, in a published opinion authored by the Honorable Judge Dwyer, upheld the City of Kent's ban on collective gardens, basing its ruling upon a legal conclusion explicitly overruling a contrasting legal conclusion of the Supreme Court of the State of Washington entered on September 13, 2013 in State v. Kurtz.

The decision meets the criteria for RAP 13.4 (b), and the Washington State Supreme Court should accept review, reverse and remand with instructions to issue an order in conformity with the ruling of the Supreme Court of the State of Washington in State v. Kurtz. A copy of the March 31, 2014 decision of the Court of Appeals is appended as Appendix B, and a Copy of the ruling of this Court in State v. Kurtz is attached as Exhibit C.

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[1] See, generally, *Uniform Controlled Substances Act of 1990*, Richard L. Braun Campbell Law Review

[2] This chapter shall be so applied and construed as to effectuate its general purpose **to make uniform the law** with respect to the subject of this chapter among those states which enact it. RCW 69.50.603 (emphasis added)

## C. WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth (in pertinent portions) the following grounds for review of appellate decisions:

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or...

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The issue of whether the legislature, in 2011, **"amended the Act (RCW 69.51A) making qualifying marijuana use a legal use, not simply an affirmative defense,"** (as this Court ruled in Kurtz) or alternatively whether **"by default, qualifying patients and designated providers are entitled only to an affirmative defense"** (as the Court of Appeals ruled in Reis and the present case), and the conclusions in the area of land use regulation necessarily flowing therefrom are subject to review under sections one, three and four of this rule.

**Uniformity** in the enforcement of the **Uniform** Controlled Substance Act is more than a semantic or metaphysical tautology but the fundamental public interest underlying the entire field of regulation of controlled substances under the **Uniform** Controlled Substance Acts.

**RAP 13.4(b) Section 1 - Irreconcilable Conflict With This Court's Ruling in State v. Kurtz**

The direct and irreconcilable conflict between this Court's ruling in State v. Kurtz and the ruling of Division I in this case, (and, incidentally, Reis) presents a confused and potentially harmful uncertainty in the uniform administration of criminal prosecutions in this State. Should prosecutors in Division I make charging decisions in accord with the September 2013 ruling of this Court in Kurtz, or alternatively, the April 31, 2014 rulings of Division I? How about prosecutors in Divisions II and III? Since the rulings of Division I are not binding on those jurisdictions, what standard are they supposed to follow? Suppose, as is now relatively common, an appeal (of a medical marijuana case) is transferred from Division II to Division I?

Even more troubling, what are patients, police officers, prosecutors, and judges supposed to rely upon as far as the black letter of the law? Under the published decisions of Division I patients are criminals entitled to an affirmative defense, while under this Court's determination in Kurtz, they are enjoying protected associational activities that are perfectly legal under State law. This profound dichotomy gives rise to serious issues under the State and federal Uniform Controlled Substance Acts, 1st Amendment Associational rights, substantive due process as protected by the 5th and 14th Amendments and the Void for Vagueness Doctrine.

By creating (or re-creating) a criminal offense after it had been eliminated by the State Supreme Court, Division I has also implicated interests protected under equal protection and the constitutional proscription on ex post facto law, since now those who believed themselves to be acting lawfully since September of 2014 are apparently subject to criminal prosecution as criminals, at least in the lower court answerable to Division I.

**RAP 13.4(b) Section 3 - Significant Issues of State and Constitutional Law**

In addition to raising serious questions involving this state's medical marijuana laws and the Uniformity of Uniform Controlled Substance enforcement, the uncertainty and potential for non-uniform enforcement created by the Kurtz-Reis conundrum also implicates Fifth and Fourteenth Amendment substantive due process issues expressed in the Void for Vagueness Doctrine.

"Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222, 227-28 (1972).

Under the present state of the law, patients, prosecutors, policemen, judges and juries all must guess as to who is a criminal and as to what standard applies to medical marijuana prosecutions, with potentially costly and disastrous results if they guess wrong. The subjective, ad hoc resolution of these issues in different ways in different jurisdictions has the very real prospect of promoting arbitrary and discriminatory application, undermining respect for the legitimate and uniform administration of justice.

Equal protection of the law and the ex post facto prohibition contained in Article 1 Section 10 of the Constitution of the United States require that clear notice of what conduct is criminal be provided **prior** to subjecting citizen to new and potentially egregious criminal penalties. Yet many

individuals who believed their actions legal since September of 2013 awoke on April Fool's Day of 2014 to learn that, according to Division I of the Court of Appeals, they were criminals potentially subject to substantial prison sentences for conduct that had been declared to be legal by the Supreme Court of the State of Washington for over six months. A more substantial set of constitutional and state law issues is hard to imagine.

**RAP 13.4(b) Section 4 - Substantial Public Interest**

There is a substantial public interest that criminal laws be so written that they explicitly and definitely state what conduct is punishable and so that justice may be administered impartially and fairly.

A substantial public interest inheres in the requirement that all persons receive a fair notice of what is punishable as a crime and what is not.

A similar substantial public interest underlies the requirement that the laws be definite enough to foreclose the prospect of arbitrary enforcement and arbitrary and capricious prosecution of citizens. These public interests are not served by the present state of the law under the baffling Kurtz-Reis-CAC pastiche.

Without a definitive ruling one way or the other, the uncertainty created by the dichotomous Kurtz-Reis-CAC melange is severe enough to undermine the uniformity and certainty of enforcement of the marijuana laws in Washington State.

The continuation of such uncertainty is in many ways worse than the situation under an explicit determination of the law one way or the other. At least with one legal standard patients would know whether their activities were legal or merely subject to an affirmative defense. Prosecutors would know who to prosecute, defendants would know more certainly whether they would be liable to conviction and imprisonment, and the unnecessary costs of litigating in an uncertain legal landscape would be ameliorated. Judges and juries would be presented with much more straightforward issues to

determine and the burden on the appellate courts of determining numerous unnecessary appeals would be eliminated.

A further public interest is involved in the issue of whether municipalities and counties may lawfully impose bans upon what the Supreme Court has determined is lawful activity under State law.

There is a substantial public interest in the issues of this case that compels review by the Supreme Court.

## D. ISSUES PRESENTED

1. The Court of Appeals erred, and created an unreasonable uncertainty, in overturning the ruling of the Supreme Court of the State of Washington in State v. Kurtz.
2. The Appeals Court decision below conflicts with State v. Kurtz and prior rulings of the Supreme Court of the United States holding that criminal offenses must be encompassed in unambiguous and unmistakable terms.
3. The vagueness and uncertainty created by materially conflicting standards of what is criminal conduct in decisions published by the Supreme Court and the Court of Appeals undermines the substantial public interest in substantive due process under the 5th and 14th Amendments that fair notice of what conduct is criminal be afforded in order to provide clear guidance to the public and to ensure nondiscriminatory and **uniform** application of the **Uniform** Controlled Substances Act.

## E. STATEMENT OF THE CASE

This case arises out of a dispute regarding the enforcement of a City of Kent ban on medical cannabis collectives. In 2011, the Legislature adopted Engrossed Second Substitute Senate Bill 5073, (Hereafter ESSSB 5073), amending Washington's laws pertaining to the medical use of cannabis. The City of Kent passed ordinance KCC 15.08.290 as a rolling moratorium, on June 5, 2012. CP 28, 34, 335-341.

On June 5, 2012, West joined other plaintiff's and filed suit in King County Superior Court challenging the City of Kent's rolling moratoria and ordinance banning medical marijuana collectives. CP 1-18.

On July 12, 2012, Worthington and the other plaintiff's filed a Motion for Summary Judgment, (CP 652- 657), arguing that there was no local control over RCW 69.51A.085 or federal preemption.

On August 15, 2012, the City of Kent also filed a motion for Summary Judgment, (CP 135-168), and asked for a Permanent Injunction against the plaintiff's, to uphold their ban. The City of Kent argued, that RCW 69.51A.140 contained language that allowed them to ban medical marijuana collectives

On October 5, 2012, the Honorable King County Superior Court Judge Jay White ruled the City of Kent could enforce their ordinance banning medical cannabis collectives and issued permanent injunctions against all the plaintiffs. CP 558-560.

On October 15, 2012, plaintiffs filed a motion to reconsider, (CP 563-580), arguing federal law did not preempt state law, and the rolling moratoria ordinance violated state law. They also argued RCW 69.51A.025 contained language that protected the rights of qualified patients and designated providers from local control or an outright ban.

On March 31, 2014, the Washington State Court of Appeals upheld the City of Kent's rolling moratoria and ban on medical marijuana collective gardens with a 26 page published Opinion. This ruling was expressly based upon a determination that medical marijuana patients were, by default, left with only an affirmative defense, a conclusion that materially contradicts the holding of this Court in Kurtz.

On April 25, 2014, the Court of Appeals issued a final Order on Denying Modification.

On May 5, 2014 Mr. Worthington, and also West filed timely Petitions for Review to the Washington State Supreme Court.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

**Uniformity** in the interpretation and enforcement of the **Uniform** Controlled Substance Act is more than a semantic or metaphysical tautology but the fundamental public interest underlying the entire field of state and federal regulation of controlled substances under the **Uniform** Controlled Substances Acts.

Judges, prosecutors, police officers, medical marijuana patients, and the citizens generally all share a mutual and substantial interest in a clear, unambiguous, **uniform** bright line standards for the definition and prosecution of marijuana related offenses. Counties and municipalities also need a bright line standard to guide their promulgation of (presumably) **uniform** land use determinations and ordinances regulating marijuana.

The current state of the law, where a published decision of Division I of the Court of Appeals materially conflicts with the published decision of this Court in Kurtz, is Kafkaesque in its implications for uncertain and conflicting application in the realm of municipal policy and criminal prosecution in different areas of the State, and undermines the **uniform** foundation of the **Uniform** Controlled Substances Act.

Without a clear ruling by this Court, patients will not know for certain where they can live and associate in collectives, or even whether they are criminals or not, and police will not know who to arrest, prosecutors will not know who to charge, and judges and juries will differ on who to convict. Proceedings within the jurisdictional boundaries of Divisions II and III in particular will be conducted in a no man's land of uncertainty. Criminal defendants will be faced with multiple and conflicting determinations at the various locations and levels and of the courts and those prosecuting, defending, and adjudicating them will lack clear standards to ensure **uniform** and impartial results in the application of the **Uniform** Controlled Substances Act.

Cities and Counties, particularly those in Divisions II and III, will be faced with uncertainty in their ability to impose bans and moratoria on medical marijuana related activities further impairing the public interest in equitable and uniform application of the laws.

There is a clear and overriding public interest in one **uniform** and definite standard to define and separate the bounds of lawful and illegal conduct in the area of both municipal land use and prosecution for violations of the **Uniform** Controlled Substances Act.

## F. CONCLUSION

**Uniformity** in the enforcement of the **Uniform** Controlled Substance Act is more than a semantic or metaphysical tautology but the fundamental public interest underlying the entire field of regulation of controlled substances under the **Uniform** Controlled Substance Acts.

The issue of whether the legislature, in 2011, **"amended the Act (RCW 69.51A) making qualifying marijuana use a legal use, not simply an affirmative defense,"** (as this Court ruled in Kurtz) or alternatively, whether **"by default, qualifying patients and designated providers are entitled only to an affirmative defense"** (as the Court of Appeals ruled in Reis and the present case), and the conclusions in the area of land use regulation necessarily flowing therefrom are matters of substantial public importance that should be subject to one **uniform**, clear and unambiguous bright line determination so that that the laws can be **uniformly** applied in every city and county throughout the State.

This Court should accept review, and remand with instructions to Division I to adhere to the recent ruling in Kurtz and overturn and vacate the order of the King County Superior Court that is the original subject of this action. In the interim, the Order preserving the status quo should not be altered.

Only in this manner may the necessary public interest in the uniformity of enforcement under the Uniform Controlled Substances Act be perpetuated and maintained.

Done May 5, 2014, in Olympia Washington.

ARTHUR WEST

## APPENDIX A

### 1st Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### 5th Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### 14th Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### Section 10, Clause 1: Contracts Clause

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

| | | |
|---|---|---|
| CANNABIS ACTION COALITION, ARTHUR WEST, | ) | DIVISION ONE |
| Plaintiffs, | ) | No. 70396-0-I (Consolidated with No. 69457-0-I) |
| STEVE SARICH, JOHN WORTHINGTON, and DERYCK TSANG, | ) | |
| Appellants, | ) | |
| v. | ) | |
| CITY OF KENT, a local municipal corporation, | ) | PUBLISHED OPINION |
| Respondent. | ) | FILED: March 31, 2014 |

DWYER, J. — The Washington Constitution grants the governor the power to veto individual sections of a bill. The governor may exercise this power even when doing so changes the meaning or effect of the bill from that which the legislature intended. As a corollary of this power, when the governor's sectional veto alters the intent of the bill and the legislature does not override the veto, the governor's veto message becomes the exclusive statement of legislative intent that speaks directly to the bill as enacted into law.

In this case, the governor vetoed over half of the sections in a 2011 bill amending the Washington State Medical Use of Cannabis Act[1] (MUCA), substantially changing the meaning, intent, and effect of the bill. Although Engrossed Second Substitute Senate Bill (ESSSB) 5073 was originally designed to legalize medical marijuana through the creation of a state registry of lawful users, as enacted it provides medical marijuana users with an affirmative defense to criminal prosecution.

Following the governor's sectional veto and the new law's effective date, the City of Kent enacted a zoning ordinance which defined medical marijuana "collective gardens" and prohibited such a use in all zoning districts. By so doing, Kent banned collective gardens.

An organization and several individuals (collectively the Challengers) brought a declaratory judgment action challenging the ordinance. The Challengers claimed that ESSSB 5073 legalized collective gardens and that Kent was thus without authority to regulate or ban collective gardens. In response, Kent sought an injunction against the individual challengers enjoining them from violating the ordinance. The superior court ruled in favor of Kent, dismissed the Challengers' claims for relief, and granted the relief sought by Kent.

We hold that neither the plain language of the statute nor the governor's intent as expressed in her veto message supports a reading of ESSSB 5073 that legalizes collective gardens. The Kent city council acted within its authority by enacting the ordinance banning collective gardens. Accordingly, the trial court

[1] Ch. 69.51A RCW.

did not err by dismissing the Challengers' actions and granting relief to Kent.

I

In 2011, the Washington legislature adopted ESSSB 5073, which was intended to amend the MUCA.[2] The bill purported to create a comprehensive regulatory scheme, whereby—with regard to medical marijuana—all patients, physicians, processors, producers, and dispensers would be registered with the state Department of Health. The legislature's intended purpose in amending the statute, as stated in section 101 of the bill, was so that

> (a) Qualifying patients and designated providers complying with the terms of this act and registering with the department of health will no longer be subject to arrest or prosecution, other criminal sanctions, or civil consequences based solely on their medical use of cannabis;
>
> (b) Qualifying patients will have access to an adequate, safe, consistent, and secure source of medical quality cannabis; and
>
> (c) Health care professionals may authorize the medical use of cannabis in the manner provided by this act without fear of state criminal or civil sanctions.

ENGROSSED SECOND SUBSTITUTE S. B. (ESSSB) 5073, § 101, 62nd Leg., Reg. Sess. (Wash. 2011) (italics and boldface omitted). The legislature also amended RCW 69.51A.005, the MUCA's preexisting purpose and intent provision, to state, in relevant part:

> Qualifying patients with terminal or debilitating medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of cannabis, shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of

[2] The MUCA, as it existed prior to the 2011 legislative session, was a product of Initiative Measure No. 692 passed by the voters in the 1998 general election and subsequently codified as chapter 69.51A RCW. The MUCA was amended in 2007 and 2010 in manners not pertinent to the issues presented herein. LAWS OF 2007, ch. 371; LAWS OF 2010, ch. 284.

cannabis, notwithstanding any other provision of law.

ESSSB 5073, § 102.

As drafted by the legislature, ESSSB 5073 established a state-run registry system for qualified patients and providers. Significantly, section 901 of the bill required the state Department of Health, in conjunction with the state Department of Agriculture, to "adopt rules for the creation, implementation, maintenance, and timely upgrading of a secure and confidential registration system." ESSSB 5073, § 901(1). Patients would not be required to register; rather, the registry would be "optional for qualifying patients." ESSSB 5073, § 901(6). On the one hand, if a patient was registered with the Department of Health, he or she would not be subject to prosecution for marijuana-related offenses.[3] ESSSB 5073, § 405. On the other hand, if a patient did not register, he or she would be entitled only to an affirmative defense to marijuana-related charges.[4] ESSSB 5073, § 406.

The bill also allowed qualified patients to establish collective gardens for the purpose of growing medical marijuana for personal use.[5] ESSSB 5073,

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[3] This section of the bill is now codified as follows:

> The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have real or personal property seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, and investigating peace officers and law enforcement agencies may not be held civilly liable for failure to seize cannabis in this circumstance.

RCW 69.51A.040.

[4] This section is now codified as RCW 69.51A.043(1), which states, "A qualifying patient or designated provider who is not registered with the registry established in *section 901 of this act may raise the affirmative defense."

[5] Now codified as RCW 69.51A.085, this section provides:

§ 403. Furthermore, even though the bill purported to legalize medical marijuana for registered patients and providers, it nevertheless granted authority to municipalities to regulate medical marijuana use within their territorial confines. Section 1102, now codified as RCW 69.51A.140, provides in relevant part:

> (1) Cities and towns may adopt and enforce any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction: Zoning requirements, business licensing requirements, health and safety requirements, and business taxes. Nothing in this act is intended to limit the authority of cities and towns to impose zoning requirements or other conditions upon licensed dispensers, so long as such requirements do not preclude the possibility of siting licensed dispensers within the jurisdiction. If the jurisdiction has no commercial zones, the jurisdiction is not required to adopt zoning to accommodate licensed dispensers.

ESSSB 5073, § 1102.

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(1) Qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use subject to the following conditions:

(a) No more than ten qualifying patients may participate in a single collective garden at any time;

(b) A collective garden may contain no more than fifteen plants per patient up to a total of forty-five plants;

(c) A collective garden may contain no more than twenty-four ounces of useable cannabis per patient up to a total of seventy-two ounces of useable cannabis;

(d) A copy of each qualifying patient's valid documentation or proof of registration with the registry established in *section 901 of this act, including a copy of the patient's proof of identity, must be available at all times on the premises of the collective garden; and

(e) No useable cannabis from the collective garden is delivered to anyone other than one of the qualifying patients participating in the collective garden.

(2) For purposes of this section, the creation of a "collective garden" means qualifying patients sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use such as, for example, a location for a collective garden; equipment, supplies, and labor necessary to plant, grow, and harvest cannabis; cannabis plants, seeds, and cuttings; and equipment, supplies, and labor necessary for proper construction, plumbing, wiring, and ventilation of a garden of cannabis plants.

(3) A person who knowingly violates a provision of subsection (1) of this section is not entitled to the protections of this chapter.

The bill was passed by both houses of the legislature and sent to Governor Gregoire for her signature.

On April 14, 2011, the United States Attorneys for the Eastern and Western Districts of Washington wrote an advisory letter to Governor Gregoire regarding ESSSB 5073. Therein, the district attorneys explained the Department of Justice's position on the bill:

> The Washington legislative proposals will create a licensing scheme that permits large-scale marijuana cultivation and distribution. This would authorize conduct contrary to federal law and thus, would undermine the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances. . . . In addition, state employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the CSA.[6] Potential actions the Department could consider include injunctive actions to prevent cultivation and distribution of marijuana and other associated violations of the CSA; civil fines; criminal prosecution; and the forfeiture of any property used to facilitate a violation of the CSA.

After receiving this missive, Governor Gregoire vetoed all sections of the bill which might have subjected state employees to federal charges. The governor vetoed 36 sections[7] of the bill that purported to establish a state registry, including section 901, and including section 101, the legislature's statement of intent. LAWS OF 2011, ch. 181. The governor left intact those sections of the bill that did not create or were not wholly dependent on the creation of a state registry. LAWS OF 2011, ch. 181. In her official veto message, Governor Gregoire explained her decision to leave parts of the bill intact:

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[6] Controlled Substances Act, Title 21 U.S.C., Ch. 13.

[7] The bill contained 58 sections as passed by the legislature. The governor vetoed 36 of those sections.

> Today, I have signed sections of Engrossed Second Substitute Bill 5073 that retain the provisions of Initiative 692 and provide additional state law protections. Qualifying patients or their designated providers may grow cannabis for the patient's use or participate in a collective garden without fear of state law criminal prosecutions. Qualifying patients or their designated providers are also protected from certain state civil law consequences.

LAWS OF 2011, ch. 181, governor's veto message at 1374-75.

The governor recognized that her extensive exercise of the sectional veto power rendered meaningless any of the bill's provisions that were dependent upon the state registry, noting that "[b]ecause I have vetoed the licensing provisions, I have also vetoed" numerous other sections. LAWS OF 2011, ch. 181, governor's veto message at 1375. However, the governor also recognized that—after her extensive vetoes—portions of some sections would remain meaningful even though references to the registry within those sections would not. Importantly, in one particular example, the governor stated:

> I am not vetoing Sections 402 or 406, which establish affirmative defenses for a qualifying patient or designated provider who is not registered with the registry established in section 901. Because these sections govern those who have <u>not</u> registered, this section is meaningful even though section 901 has been vetoed.

LAWS OF 2011, ch. 181, governor's veto message at 1376. Another section that the governor believed to have meaning, even though it referenced registered entities, was section 1102. With respect to this section, the governor stated:

> Section 1102 sets forth local governments' authority pertaining to the production, processing or dispensing of cannabis or cannabis products within their jurisdictions. The provisions in Section 1102 that local governments' zoning requirements cannot "preclude the possibility of siting licensed dispensers within the jurisdiction" are without meaning in light of the vetoes of sections providing for such licensed dispensers. It is with this understanding that I approve

section 1102.

LAWS OF 2011, ch. 181, governor's veto message at 1375. The bill, now consisting only of the 22 sections not vetoed by the governor, was signed into law and codified in chapter 69.51A RCW. The legislature did not override the governor's veto.

Subsequently, Kent sought to exercise its zoning power to regulate collective gardens. On July 5, 2011 and January 3, 2012, Kent issued six month moratoria prohibiting collective gardens within the city limits. On June 5, 2012, Kent enacted Ordinance No. 4036 (the Ordinance), defining collective gardens and banning them within the city limits. The Ordinance states, in relevant part:

> A. *Collective gardens*, as defined in KCC 15.02.074, are prohibited in the following zoning districts:
>
> 1. All agricultural districts, including A-10 and AG;
>
> 2. All residential districts, including SR-1, SR-3, SR-4.5, SR-6, SR-8, MR-D, MR-T12, MR-T16, MR-G, MR-M, MR-H, MHP, PUD, MTC-1, MTC-2, and MCR;
>
> 3. All commercial/office districts, including: NCC, CC, CC-MU, DC, DCE, DCE-T, CM-1, CM-2, GC, GC-MU, O, O-MU, and GWC;
>
> 4. All industrial districts, including: MA, M1, M1-C, M2, and M3; and
>
> 5. Any new district established after June 5, 2012.
>
> B. Any violation of this section is declared to be a public nuisance per se, and shall be abated by the city attorney under applicable provisions of this code or state law, including, but not limited to, the provisions of KCC Chapter 1.04.

Thereafter, the Cannabis Action Coalition, Steve Sarich, Arthur West, John Worthington, and Deryck Tsang filed suit against Kent, seeking declaratory,

injunctive, and mandamus relief.[8] Worthington, Sarich, and West stated in their complaint that they intended to participate in a collective garden in Kent. None of the three, however, actually resided in, owned or operated a business in, or participated in a collective garden in Kent. Tsang, on the other hand, is a resident of Kent and currently participates in a collective garden in the city limits.

In the superior court proceeding, the parties filed competing motions for summary judgment. After considering all documentation submitted by the parties, the trial court ruled in favor of Kent. The trial court dismissed the claims of Cannabis Action Coalition, Sarich, West, and Worthington for lack of standing.[9] On the merits of Tsang's claims, the trial court held that "[t]he Kent City Council had authority to pass Ordinance 4036, Ordinance 4036 is not preempted by state law, and Ordinance 4036 does not violate any constitutional rights of Plaintiffs." The trial court also granted Kent's request for a permanent injunction against all plaintiffs, prohibiting them from violating the Ordinance.

The Challengers appealed to the Washington Supreme Court and requested a stay of the injunction. The Supreme Court Commissioner granted the stay. While the appeal was pending, Kent filed a motion to strike portions of Worthington's reply brief, which Worthington countered with a motion to waive Rule of Appellate Procedure (RAP) 10.3(c).[10] The Supreme Court transferred

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[8] The Cannabis Action Coalition is no longer a party to this matter. Although West filed a notice of appeal, he never filed an appellate brief; he has thus abandoned his appeal.

[9] However, the trial court stated that "even if all plaintiffs do have standing," its motion granting summary judgment in favor of Kent was "dispositive as to all plaintiffs."

[10] Kent asserts that the majority of Worthington's reply brief should be stricken because they contain arguments not raised in the trial court, they contain arguments not raised in Worthington's opening brief, and they are not in response to Kent's brief. Worthington contends

the appeal to this court, along with the two unresolved motions.

II

A

The Challengers contend that the plain language of the MUCA legalizes collective gardens.[11] This is so, they assert, because the MUCA provides that

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that this court should waive RAP 10.3(c) and that his entire reply brief should be considered in order to "meet the ends of justice and facilitate a ruling on the merits."

RAP 10.3(c) provides that, "[a] reply brief should conform with subsections (1), (2), (6), (7), and (8) of section (a) and be limited to a response to the issues in the brief to which the reply brief is directed." "A reply brief is generally not the proper forum to address new issues because the respondent does not get an opportunity to address the newly raised issues." City of Spokane v. White, 102 Wn. App. 955, 963, 10 P.3d 1095 (2000) (citing RAP 10.3(c); Dykstra v. Skagit County, 97 Wn. App. 670, 676, 985 P.2d 424 (1999)).

Sections A, C, G, and I of Worthington's reply brief all consist of arguments not previously raised or are premised on facts not in the record. Kent's motion is granted with respect to these sections. Kent's motion is denied with respect to sections B, D, and H.

Kent additionally moved to strike all appendices to Worthington's reply brief. "An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)." RAP 10.3(a)(8).

Appendix D does not appear in the record, nor did Worthington seek permission from the Supreme Court to include materials not contained in the record. We therefore grant Kent's motion to strike appendix D. Kent's motion is denied with respect to Appendices A and C.

Appendix B is a copy of an unpublished federal district court decision, which Worthington cited in support of his argument in section G. As we have already stricken section G, we have no basis to consider the material in Appendix B. Kent's motion with respect to this appendix is thus moot.

Worthington contends that we should waive RAP 10.3(c) and nevertheless consider sections A, C, G, I, and Appendices B and D. RAP 18.8(a) allows this court to waive any of the RAPs "in order to serve the ends of justice." In addition to Worthington's opening brief, this court has received briefing from Sarich, Tsang, Kent, and two amici curiae. Accordingly, it is not necessary to consider Worthington's new arguments "in order to serve the ends of justice" in this case. Worthington's motion is denied.

[11] As an initial matter, Kent claims that Sarich and Worthington lack standing to assert these arguments. However, in the trial court, Kent sought and was granted affirmative relief against all plaintiffs, including Sarich and Worthington. Because Sarich and Worthington are now subject to a permanent injunction, they both have standing on appeal. Orion Corp. v. State, 103 Wn.2d 441, 455, 693 P.2d 1369 (1985); see also Casey v. Chapman, 123 Wn. App. 670, 676, 98 P.3d 1246 (2004) ("Parties whose financial interests are affected by the outcome of a declaratory judgment action have standing."). Moreover, as soon as Kent sought affirmative relief against them in the trial court, their standing was established. Vovos v. Grant, 87 Wn.2d 697, 699, 555 P.2d 1343 (1976) ("A person has standing to challenge a court order or other court action if his protectable interest is adversely affected thereby.") The critical question is whether "if the relief requested is granted," will the litigants' protectable interests be affected. Herrold v. Case, 42 Wn.2d 912, 916, 259 P.2d 830 (1953); cf. Snohomish County Bd. of Equalization v. Dep't of Revenue, 80 Wn.2d 262, 264-64, 493 P.2d 1012 (1972) ("Without a decision of this court, [the

"[q]ualifying patients may create and participate in collective gardens." RCW 69.51A.085(1). Kent, in response, contends that the plain language of the MUCA did not legalize collective gardens because collective gardens would only have been legalized in circumstances wherein the participating patients were duly registered, and the registry does not exist. The trial court properly ruled that Kent is correct.

We review issues of statutory interpretation de novo. Fiore v. PPG Indus., Inc., 169 Wn. App. 325, 333, 279 P.3d 972 (2012). "The goal of statutory interpretation is to discern and carry out legislative intent." Bennett v. Seattle Mental Health, 166 Wn. App. 477, 483, 269 P.3d 1079, review denied, 174 Wn.2d 1009 (2012). "The court must give effect to legislative intent determined 'within the context of the entire statute.'" Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (quoting State v. Elgin, 118 Wn.2d 551, 556, 825 P.2d 314 (1992)). "If the statute's meaning is plain on its face, we give effect to that plain meaning as the expression of what was intended." TracFone Wireless, Inc. v. Dep't of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). "In approving or disapproving legislation, the governor acts in a legislative capacity and as part of the legislative branch of government." Hallin v. Trent, 94 Wn.2d 671, 677, 619 P.2d 357 (1980). Accordingly, when the governor

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plaintiffs] were placed in a position of making a determination of a difficult question of constitutional law with the *possibility of facing both civil and criminal penalties* if they made the wrong choice. One of the purposes of declaratory judgment laws is to give relief from such situations." (emphasis added) (footnotes omitted)).

vetoes sections of a bill, the governor's veto message is considered a statement of legislative intent. Dep't of Ecology v. Theodoratus, 135 Wn.2d 582, 594, 957 P.2d 1241 (1998).

The plain language of ESSSB 5073, as enacted, does not legalize medical marijuana or collective gardens. Subsection (1) of RCW 69.51A.085 delineates the requirements for collective gardens. RCW 69.51A.085 further provides that "[a] person who knowingly violates a provision of subsection (1) of this section is not entitled to the protections of this chapter." RCW 69.51A.085(3).

The "protections of this chapter" to which RCW 69.51A.085(3) refers are found in RCW 69.51A.040 and 69.51A.043. RCW 69.51A.040 provides that "[t]he medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime" if the patient meets the six listed requirements. One of the listed requirements is that

> The qualifying patient or designated provider keeps a copy of his or her *proof of registration with the registry established in *section 901 of this act* and the qualifying patient or designated provider's contact information posted prominently next to any cannabis plants, cannabis products, or useable cannabis located at his or her residence.

RCW 69.51A.040(3) (emphasis added). Therefore, in order to obtain the protections provided by RCW 69.51A.040, the patient must be registered with the state.

RCW 69.51A.043, on the other hand, delineates the protections for patients who are not registered:

> *(1) A qualifying patient or designated provider who is not registered with the registry established in *section 901 of this act*

> *may raise the affirmative defense set forth in subsection (2) of this section, if:*
>
> (a) The qualifying patient or designated provider presents his or her valid documentation to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;
>
> (b) The qualifying patient or designated provider possesses no more cannabis than the limits set forth in RCW 69.51A.040(1);
>
> (c) The qualifying patient or designated provider is in compliance with all other terms and conditions of this chapter;
>
> . . .
>
> (2) *A qualifying patient or designated provider who is not registered with the registry established in *section 901 of this act, but who presents his or her valid documentation to any peace officer who questions the patient or provider regarding his or her medical use of cannabis, may assert an affirmative defense to charges of violations of state law relating to cannabis through proof at trial, by a preponderance of the evidence, that he or she otherwise meets the requirements of RCW 69.51A.040.* A qualifying patient or designated provider meeting the conditions of this subsection but possessing more cannabis than the limits set forth in RCW 69.51A.040(1) may, in the investigating peace officer's discretion, be taken into custody and booked into jail in connection with the investigation of the incident.

(Emphasis added.) Section 901 of ESSSB 5073, referred to in both RCW 69.51A.040 and 69.51A.043, was vetoed. As a result of the governor's veto, the state registry does not exist. Thus, it is impossible for an individual to be registered with the registry. Accordingly, no individual is able to meet the requirements of RCW 69.51A.040.

Pursuant to RCW 69.51A.043, patients who are *not registered* may be entitled to an affirmative defense. As we hold today in State v. Reis, No. 69911-3-I, slip op. at 11 (Wash. Ct. App. Mar. 31, 2014), "by default, qualifying patients and designated providers are entitled only to an affirmative defense." As such, the only available "protection" to which collective garden participants are entitled pursuant to RCW 69.51A.085(3) is an affirmative

defense to prosecution.

Although such a reading may appear to render RCW 69.51A.040 meaningless, it does not, in fact, do so. RCW 69.51A.040 delineates the non-registry related conditions for possessing medical marijuana. These conditions are referenced in RCW 69.51A.043[12] and are essential components of the affirmative defense. Thus, the plain language of the statute does not legalize the use of medical marijuana.[13] Instead, it provides a defense to an assertion that state criminal laws were violated. As such, medical marijuana use, including collective gardens, was not legalized by the 2011 amendments to the MUCA.

B

All parties contend that the legislative history of ESSSB 5073 supports their reading of the Act. In order to analyze the legislative history of ESSSB 5073 as enacted, however, we must first determine which sources of legislative intent are proper for us to consider. For the reasons that follow, we hold that the

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[12] "(b) The qualifying patient or designated provider possesses no more cannabis than the limits set forth in RCW 69.51A.040(1); (c) The qualifying patient or designated provider is in compliance with all other terms and conditions of this chapter." RCW 69.51A.043(1).

[13] In State v. Kurtz, 178 Wn.2d 466, 476, 309 P.3d 472 (2013), the Supreme Court briefly stated in dicta, "[I]n 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense." As authority for this assertion, the court cited RCW 69.51A.005. RCW 69.51A.005, a preexisting provision entitled "Purpose and intent," was amended by the legislature in ESSSB 5073, section 102. Section 102 was included in the bill as passed by both houses of the legislature and accurately expresses the intent of the original bill. While the governor did not veto section 102, the governor's veto of numerous other sections of the bill significantly changed the bill's purpose. Additionally, the governor *did* veto section 101, a new statement of legislative purpose quoted, supra, at 3. Moreover, the parties in Kurtz did not address this question in their briefing to the Supreme Court and the court's footnoted statement was not important to its holding. Thus, we do not view this statement in Kurtz as controlling the outcome of this litigation. In our decision in Reis, No. 69911-3-I, we further explain our view in this regard.

governor's veto message is the sole source of relevant legislative history on the 2011 amendments to the MUCA, as enacted.

Article III, section 12 of the Washington Constitution allows for the governor to veto "one or more sections . . . while approving other portions of the bill." Prior to 1984, the long-standing rule governing the governor's sectional veto power was that the governor could only use the executive veto power in a "negative" manner, and not in an "affirmative" manner. Wash. Fed'n of State Employees, AFL-CIO, Council 28 AFSCME v. State, 101 Wn.2d 536, 545, 682 P.2d 869 (1984). Phrased another way,

> "[T]he Governor may use the veto power to prevent some act or part of an act of the legislature from becoming law. Likewise, the Governor may not use the veto power to reach a new or different result from what the legislature intended. In other words, the veto power must be exercised in a destructive and not a creative manner."

State Employees, 101 Wn.2d at 545 (alteration in original) (quoting Wash. Ass'n of Apartment Ass'ns v. Evans, 88 Wn.2d 563, 565-66, 564 P.2d 788 (1977)).

In State Employees, the Supreme Court disavowed that rule, holding that, "[i]ts use by the judiciary is an intrusion into the legislative branch, contrary to the separation of powers doctrine, and substitutes judicial judgment for the judgment of the legislative branch." 101 Wn.2d at 546 (citations omitted). From then on, "[t]he Governor [was] free to veto 'one or more sections or appropriation items', without judicial review." State Employees, 101 Wn.2d at 547. Thus, the current analytical approach is that the governor is free to veto sections of a bill even

when doing so changes the meaning of the bill from that which the legislature originally intended.

Significantly, the Supreme Court characterized the veto process as follows:

> "In approving or disapproving legislation, the Governor acts in a legislative capacity and as part of the legislative branch of government." Hallin v. Trent, 94 Wn.2d 671, 677, 619 P.2d 357 (1980). In effect, the Governor holds one-third of the votes. The veto is upheld if the Legislature fails to override it. Fain v. Chapman, 94 Wn.2d 684, 688, 619 P.2d 353 (1980). To override the Governor's veto, the Senate and House must agree by a two-thirds vote. Const. art. 3, § 12 (amend. 62).

State Employees, 101 Wn.2d at 544. The legislature's power to override, the Supreme Court held, serves as an adequate "check" on the governor's veto power. State Employees, 101 Wn.2d at 547. Thus, if the legislature disapproves of the new meaning or effect of the bill resulting from the governor's veto, it can vote to override the veto and restore the bill to its original meaning or effect.

Here, Governor Gregoire vetoed 36 of the 58 sections of ESSSB 5073. This veto significantly altered the meaning and effect of the sections that remained for enactment. When returning the bill to the Senate, the governor provided a formal veto message expressing her opinion as to the meaning and effect of the bill after her veto. See Wash. State Grange v. Locke, 153 Wn.2d 475, 490, 105 P.3d 9 (2005) ("The expression of [an opinion as to the statute's interpretation] is within the governor's prerogative.") Had the legislature objected to the governor's veto, it could have overturned it by a two-thirds vote. CONST.

art. III, § 12. A legislative override would also have nullified the governor's veto message. By not overriding the veto, the legislature failed to provide an interpretation of the MUCA contrary to that articulated by Governor Gregoire. Cf. Rozner v. City of Bellevue, 116 Wn.2d 342, 349, 804 P.2d 24 (1991) (legislature's actions in not overriding veto, but later amending parts of the statute, functioned as legislative approval of governor's veto message with respect to unamended portions of the statute).

All parties urge us to consider the intent of the legislature in passing ESSSB 5073. However, ESSSB 5073, as passed by both houses of the legislature, was not the bill that was enacted. Rather, the bill that was enacted was that which existed after the governor's veto. Thus, the governor's veto message is the only legislative history that speaks directly to the law as it was enacted. It is the paramount source for us to refer to in order to discern the legislative intent behind the enacted law.

The governor's intent in vetoing a significant portion of ESSSB 5073 was that there should not be a state registry, and that medical marijuana should not be legalized. In her veto message, Governor Gregoire stated:

> *I have been open, and remain open, to legislation to exempt qualifying patients and their designated providers from state criminal penalties* when they join in nonprofit cooperative organizations to share responsibility for producing, processing and dispensing cannabis for medical use. Such exemption from criminal penalties should be conditioned on compliance with local government location and health and safety specifications.

LAWS OF 2011, ch. 181, governor's veto message at 1376 (emphasis added). By stating that she was open to future legislation that would exempt patients from

criminal penalties, the governor indicated that she did not read *this* bill as creating any such exemptions.

> Further, the governor concluded her veto message by stating:
>
> I am not vetoing Sections 402 or 406, which establish affirmative defenses for a qualifying patient or designated provider who is not registered with the registry established in section 901. Because these sections govern those who have not registered, this section is meaningful even though section 901 has been vetoed.

LAWS OF 2011, ch. 181, governor's veto message at 1376. This statement indicates that the governor realized that her veto would preclude the legislature's attempt to legalize certain medical marijuana uses. The governor affirmatively stated her understanding that only affirmative defenses to criminal prosecutions survived her veto.

These two statements, read in conjunction, demonstrate that the governor did not intend for ESSSB 5073 to legalize medical marijuana. The governor did not read the bill as enacted as exempting medical marijuana users from prosecution. Significantly, although the MUCA provides for an affirmative defense, "[a]n affirmative defense does not per se legalize an activity." State v. Fry, 168 Wn.2d 1, 10, 228 P.3d 1 (2010). Thus, the plain language of the statute, which does not read so as to legalize medical marijuana, is consonant with the governor's expressed intent in signing the bill, as amended by her vetoes.

The governor's statement regarding collective gardens does not suggest otherwise. In her veto message, Governor Gregoire stated, "Qualifying patients or their designated providers may grow cannabis for the patient's use or

participate in a collective garden without fear of state law criminal prosecutions."[14] LAWS OF 2011, ch. 181, governor's veto message at 1374-75. Two paragraphs earlier, Governor Gregoire stated, "In 1998, Washington voters made the compassionate choice to remove the fear of state criminal prosecution for patients who use medical marijuana for debilitating or terminal conditions." LAWS OF 2011, ch. 181, governor's veto message at 1374. The governor's use of the phrase "state criminal prosecution[s]" in both sentences indicates that she intended for the bill to extend the *existing* legal protections to collective gardens. The 1998 ballot initiative (I-692) provided qualifying patients with an affirmative defense to drug charges. Former RCW 69.51A.040 (1999). I-692 did not legalize medical marijuana, but the governor nevertheless described it as "remov[ing] the fear of state criminal prosecution." Her use of the same phrase when describing ESSSB 5073 must be read in this light. The governor plainly did not intend for ESSSB 5073, after her vetoes, to legalize medical marijuana. The plain language of the MUCA is consonant with the governor's expressed intent.

III

A

The Challengers nevertheless contend that the plain language of the MUCA does not allow Kent to regulate collective gardens. This is so, they assert, because RCW 69.51A.085, which deals with collective gardens, is a stand-alone statute that does not grant any regulatory authority to municipalities.

[14] Kent characterizes this statement as errant. As stated above, the governor was not saying that she intended to legalize marijuana. As the bill did add an affirmative defense relating to collective gardens, the governor's statement was not errant.

We disagree.

Although RCW 69.51A.085 does not itself grant powers to municipalities, this statutory provision cannot be read in isolation. "We construe an act as a whole, giving effect to all the language used. Related statutory provisions are interpreted in relation to each other and all provisions harmonized." C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 708, 985 P.2d 262 (1999) (citing State v. S.P., 110 Wn.2d 886, 890, 756 P.2d 1315 (1988)). RCW 69.51A.085 was passed as part of a comprehensive bill amending the MUCA. This provision must therefore be read in conjunction with the other enacted provisions of ESSSB 5073.

Importantly, ESSSB 5073, as enacted, includes a section specifically granting regulatory powers to municipalities. RCW 69.51A.140 states:

> *Cities and towns may adopt and enforce any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction: Zoning requirements, business licensing requirements, health and safety requirements, and business taxes.* Nothing in chapter 181, Laws of 2011 is intended to limit the authority of cities and towns to impose zoning requirements or other conditions upon licensed dispensers, so long as such requirements do not preclude the possibility of siting licensed dispensers within the jurisdiction.

(Emphasis added.) The plain language of this section allows municipalities to regulate the production, processing, and dispensing of medical marijuana. Only "licensed dispensers" are listed as users that a city may not exclude. This necessarily implies that a city retains its traditional authority to regulate

all other uses of medical marijuana.[15] Thus, the MUCA expressly authorizes cities to enact zoning requirements to regulate or exclude collective gardens.

B

The Challengers contend that the legislative history of ESSSB 5073 does not support a reading of RCW 69.51A.140 that would allow a city to regulate or exclude collective gardens. To the contrary, it is the Challengers' interpretation of the statute that is not supported by the legislative history.

In enacting the 2011 amendments to the MUCA, the governor provided some insight into a locality's ability to regulate medical marijuana. In her veto message, the governor stated:

> Section 1102 sets forth local governments' authority pertaining to the production, processing or dispensing of cannabis or cannabis products within their jurisdictions. The provisions in Section 1102 that local governments' zoning requirements cannot "preclude the possibility of siting licensed dispensers within the jurisdiction" are without meaning in light of the vetoes of sections providing for such licensed dispensers. It is with this understanding that I approve Section 1102.

LAWS OF 2011, ch. 181, governor's veto message at 1375. This statement indicates that the governor intended section 1102 to have meaning even though one provision therein was meaningless. Accordingly, the governor's understanding of section 1102 of the bill was that municipalities would be able to regulate medical marijuana production, processing or dispensing within their territorial confines.

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[15] A city's traditional authority is defined by the state constitution as the power to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." CONST. art. XI, § 11.

Further, the governor stated:

> I have been open, and remain open, to legislation to exempt qualifying patients and their designated providers from state criminal penalties when they join in nonprofit cooperative organizations to share responsibility for producing, processing and dispensing cannabis for medical use. *Such exemption from state criminal penalties should be conditioned on compliance with local government location and health and safety specifications.*

LAWS OF 2011, ch. 181, governor's veto message at 1376 (emphasis added). "[L]ocation and health and safety specifications" are precisely what the Washington Constitution anticipates municipalities will address by enacting ordinances. "Municipalities derive their authority to enact ordinances in furtherance of the *public safety*, morals, *health* and welfare from article 11, section 11 of our state constitution." City of Tacoma v. Vance, 6 Wn. App. 785, 789, 496 P.2d 534 (1972) (emphasis added); accord Hass v. City of Kirkland, 78 Wn.2d 929, 932, 481 P.2d 9 (1971). The governor's message thus indicated her understanding that, in the future, if a bill succeeded in legalizing medical marijuana, municipalities should continue to retain their ordinary regulatory powers, such as zoning.

Nonetheless, the Challengers contend that the phrase "production, processing, or dispensing of cannabis or cannabis products" in RCW 69.51A.140 refers only to commercial production, processing, or dispensing. The Challengers' interpretation would render all of RCW 69.51A.140 a nullity. Commercial producers, processors, and dispensers are those producers, processors, and dispensers that would have been licensed by the Department of Health. ESSSB 5073, § 201(12), (13), (14). As a result of the governor's veto of

all sections creating a licensing system, commercial producers, processors, and dispensers do not exist. If "producers, processors, and dispensers" referred only to those commercial licensed entities, all of section 1102 would be meaningless. However, the governor did not veto section 1102 along with the other sections creating licensed producers, processors, and dispensers. Rather, the governor stated in her veto message that only those "provisions in Section 1102 that local governments' zoning requirements cannot 'preclude the possibility of siting licensed dispensers within the jurisdiction' are without meaning." LAWS OF 2011, ch. 181, governor's veto message at 1375. The governor's veto did not leave municipalities without the ability to regulate. In this regard, the Challengers' interpretation of the amended MUCA is contrary to the legislative history of the bill.

The governor clearly understood the bill to allow cities to use their zoning power to regulate medical marijuana use within their city limits. The governor's understanding is consistent with the plain language of the MUCA.

IV

The Challengers next contend that the Ordinance is invalid because, they assert, the MUCA preempts local regulation of medical marijuana and because the Ordinance conflicts with state law.[16] We disagree.

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[16] The Challengers also contend that RCW 69.51A.025 precludes cities from banning collective gardens. This provision states, "Nothing in this chapter or in the rules adopted to implement it precludes a qualifying patient or designated provider from engaging in the private, unlicensed, noncommercial production, possession, transportation, delivery, or administration of cannabis for medical use as authorized under RCW 69.51A.040." RCW 69.51A.025. Contrary to the Challengers' assertion, a city zoning ordinance is not a "rule adopted to implement" the MUCA. The cited provision refers to anticipated Department of Health regulations which would

Generally, municipalities possess constitutional authority to enact zoning ordinances as an exercise of their police power. CONST. art. XI, § 11. However, a municipality may not enact a zoning ordinance which is either preempted by or in conflict with state law. HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs., 148 Wn.2d 451, 477, 61 P.3d 1141 (2003).

State law preempts a local ordinance when "the legislature has expressed its intent to preempt the field or that intent is manifest from necessary implication." HJS Dev., 148 Wn.2d at 477 (citing Rabon v. City of Seattle, 135 Wn.2d 278, 289, 957 P.2d 621 (1998); Brown v. City of Yakima, 116 Wn.2d 556, 560, 807 P.2d 353 (1991)). Otherwise, municipalities will have concurrent jurisdiction over the subject matter. HJS Dev., 148 Wn.2d at 477. The MUCA does not express the intent to preempt the field of medical marijuana regulation. To the contrary, as previously discussed in section III, the MUCA explicitly recognizes a role for municipalities in medical marijuana regulation. As the MUCA explicitly contemplates its creation, the Ordinance is not directly preempted by state law.

A local ordinance that is not directly preempted may nevertheless be invalid if it conflicts with state law. Pursuant to article XI, section 11 of the Washington Constitution, "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." A city ordinance is unconstitutional under

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have been adopted as rules contained within the Washington Administrative Code, had the governor not vetoed the regulatory scheme.

article XI, section 11 if "(1) the ordinance conflicts with some general law; (2) the ordinance is not a reasonable exercise of the city's police power; or (3) the subject matter of the ordinance is not local." Edmonds Shopping Ctr. Assocs. v. City of Edmonds, 117 Wn. App. 344, 351, 71 P.3d 233 (2003). Whether a local ordinance is valid under the state constitution is a pure question of law, which this court reviews de novo. Edmonds Shopping Ctr., 117 Wn. App. at 351.

Here, the Challengers contend that the Ordinance is unconstitutional because it conflicts with the MUCA.[17] Ordinances are presumed to be constitutional. HJS Dev., 148 Wn.2d at 477. As the party challenging the Ordinance, the burden is on the Challengers to prove beyond a reasonable doubt that it is unconstitutional. Edmonds Shopping Ctr., 117 Wn. App. at 355. "'In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.'" City of Tacoma v. Luvene, 118 Wn.2d 826, 834-35, 827 P.2d 1374 (1992) (internal quotation marks omitted) (quoting City of Bellingham v. Schampera, 57 Wn.2d 106, 111, 356 P.2d 292 (1960)). "The conflict must be direct and irreconcilable with the statute, and the ordinance must yield to the statute if the two cannot be harmonized." Luvene, 118 Wn.2d at 835.

"The scope of [a municipality's] police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people." State v. City of Seattle, 94 Wn.2d 162, 165, 615 P.2d 461 (1980). Generally speaking, a municipality's police powers are

[17] The Challengers do not contend that the Ordinance is unreasonable or not local.

coextensive with those possessed by the State. City of Seattle, 94 Wn.2d at 165. Without question, a municipality's plenary powers include the power to "enact ordinances prohibiting and punishing the same acts which constitute an offense under state laws." Schampera, 57 Wn.2d at 109; accord State v. Kirwin, 165 Wn.2d 818, 826-27, 203 P.3d 1044 (2009). As the plain language of the statute and the governor's veto message indicate, collective gardens are not legal activity. The Ordinance, by prohibiting collective gardens, prohibits an activity that constitutes an offense under state law. As it prohibits an activity that is also prohibited under state law, the Ordinance does not conflict with the MUCA.[18] The trial court did not err by so holding.[19]

Affirmed.

We concur:

[18] To decide this case, we need not determine whether the Ordinance would be valid had the MUCA actually legalized medical marijuana. Therefore, we decline to further address this subject.

[19] The Challengers additionally assert that the trial court erred by issuing a permanent injunction against them. We review the trial court's decision to grant a permanent injunction for an abuse of discretion. Wash. Fed'n of State Emps. v. State, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). "A party seeking an injunction must show (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) actual and substantial injury as a result." Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 445-46, 300 P.3d 376 (2013). In their pleadings, each plaintiff expressed an intention to violate Kent's ordinance. Thus, the trial court did not abuse its discretion by granting the injunction.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>WILLIAM ANDREW KURTZ,<br><br>Petitioner. | ) | No. 87078-1<br><br>En Banc<br><br>Filed SEP 19 2013 |

MADSEN, C.J.—William Kurtz challenges the Court of Appeals decision affirming his conviction for possession and manufacturing of marijuana. He argues that the trial court erred in denying his request to raise a common law medical necessity defense. We hold that medical necessity remains an available defense to marijuana prosecution and that the Washington State Medical Use of Marijuana Act (the Act),[1] chapter 69.51A RCW, does not abrogate the common law. We reverse and remand for further proceedings.

FACTS

In 2010, police executed a search warrant on petitioner William Kurtz's home and found marijuana and marijuana plants. The State charged Kurtz with manufacturing and

[1] The Medical Use of Marijuana Act was changed to the Washington State Medical Use of Cannabis Act in 2011. RCW 69.51A.900.

possession of marijuana. At trial, Kurtz attempted to present medical authorizations in support of a common law medical necessity defense and a statutory medical marijuana defense. The State moved in limine to prevent these defenses, contending that neither was available to him.

After reviewing the case law, the trial court refused to allow Kurtz to raise either defense. The jury found Kurtz guilty and he appealed. The Court of Appeals affirmed the ruling as to the defenses but remanded on a separate issue relating to an improperly calculated offender score. Kurtz then petitioned this court for review, arguing that the common law medical necessity defense for marijuana continues to be an available defense, under case law and after the enactment of the Act.

ANALYSIS

Kurtz contends the trial court erred by not allowing him to present a common law medical necessity defense for his marijuana use. Specifically, he argues that the necessity defense was not abolished by this State's jurisprudence, nor was the defense superseded by the Act. The trial court's determination is a question of law which we review de novo. *State v. Fry*, 168 Wn.2d 1, 11, 228 P.3d 1 (2010).

The common law medical necessity defense for marijuana was first articulated in *State v. Diana*, 24 Wn. App. 908, 916, 604 P.2d 1312 (1979), by Division Three of the Court of Appeals. In *Diana*, the defendant argued a defense of medical necessity when he was charged with possession of marijuana. Following a discussion of the common law necessity defense, the court recognized a medical necessity defense could exist as a

defense to marijuana possession in very limited circumstances, relying in part on the legislature's passage of the "Controlled Substances Therapeutic Research Act," Laws of 1979, 1st Ex. Sess., ch. 176. *Diana*, 24 Wn. App. at 915-16. The court remanded for the trial court to determine whether the evidence presented supported the defense.[2] *Id.* at 916. Specifically, the court instructed that medical necessity would exist in that case if "(1) the defendant reasonably believed his use of marijuana was necessary to minimize the effects of multiple sclerosis; (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and (3) no drug is as effective in minimizing the effects of the disease." *Id.* This medical necessity defense was subsequently recognized by Division One and Division Two. *See State v. Pittman*, 88 Wn. App. 188, 196, 943 P.2d 713 (1997) (discussing *Diana* and determining that the absence of a legal alternative that is as effective as marijuana is an implicit element of the necessity defense); *State v. Cole*, 74 Wn. App. 571, 578, 580, 874 P.2d 878 (adopting the reasoning of *Diana* and concluding the trial court usurped the jury's role in how it analyzed evidence of a potential medical necessity defense), *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994).

The Court of Appeals subsequently called the necessity defense into question in *State v. Williams*, 93 Wn. App. 340, 347, 968 P.2d 26 (1998), *review denied*, 138 Wn.2d 1002, 984 P.2d 1034 (1999). The *Williams* court determined that an accepted medical use was an implicit element of the medical necessity defense, that the legislature was tasked with this determination, and that it had determined there was no accepted medical

[2] The charges in *Diana* were tried to the bench. *Diana*, 24 Wn. App. at 913.

use for marijuana when it classified marijuana as a schedule I substance. *Id.* at 346-47 (citing *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997) (holding that the statute designating marijuana as a schedule I controlled substance does not violate the Washington Constitution)). Thus, *Williams* concluded there could be no common law medical necessity defense for schedule I substances, including marijuana, and interpreted *Seeley* as overruling *Diana* and *Cole* by implication. *Id.* at 347.

One month before the *Williams* opinion was published, the people passed Initiative 692, which was later codified in chapter 69.51A RCW as the Act. The Act declared that the medical use of marijuana by qualifying patients is an affirmative defense to possession of marijuana. Former RCW 69.51A.040 (1999).[3] The Act also stated that "[t]he people of Washington state find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana." Former RCW 69.51A.005 (1999).[4] *Williams* cited Initiative 692 in a footnote, without analyzing what effect, if any, this initiative might have on its view that inclusion of marijuana as a schedule I controlled substance reflected a legislative determination that marijuana had no accepted medical use.[5] *Williams*, 93 Wn. App. at 347 n.1.

[3] The legislature has since amended the statute to state that such a use "does not constitute a crime." RCW 69.51A.040.

[4] This language has since changed to state that the legislature finds "[t]here is medical evidence that some patients with terminal or debilitating medical conditions may, under their health care professional's care, benefit from the medical use of cannabis." RCW 69.51A.005(1)(a).

[5] In *State v. Butler*, 126 Wn. App. 741, 747, 750, 109 P.3d 493 (2005), the Court of Appeals concluded that *Williams* was still good law and that, in any event, the Act superseded any common law necessity defense.

We first address whether the Court of Appeals in *Williams* correctly concluded that *Seeley* implicitly abolished the common law medical necessity defense. In *Seeley*, we considered whether the legislature's classification of marijuana as a schedule I substance under the Uniform Controlled Substances Act (UCSA), chapter 69.50 RCW, violated the Washington Constitution. *Seeley*, 132 Wn.2d at 786. Although the UCSA authorizes the board of pharmacy to schedule or reschedule substances considering, among other factors, the effect of the substance under former RCW 69.50.201 (1998), the legislature made the initial classification of marijuana as a schedule I substance.[6] *Seeley*, 132 Wn.2d at 784. With that in mind, we determined that there was substantial evidence to support the legislature's action. *Id.* at 813. While acknowledging the existence of a medical necessity defense, we did not comment on its validity or overrule *Diana*. *Id.* at 798. Rather, we simply stated, "The recognition of a potential medical necessity defense for criminal liability of marijuana possession is not relevant in this equal protection analysis." *Id.* Thus, we did not discuss the viability of the common law medical necessity defense as applied to marijuana.

In rejecting the medical necessity defense for marijuana, the *Williams* court stated that *Seeley* "makes it clear that the decision of whether there is an accepted medical use for particular dugs has been vested in the Legislature by the Washington Constitution." *Williams*, 93 Wn. App. at 347. This in incorrect. In fact, we stated that "the determination of whether new evidence regarding marijuana's potential medical use

[6] The UCSA was amended in 2013 to reflect the new "Pharmacy Quality Assurance Commission." This was not a substantive change.

should result in the *reclassification* of marijuana is a matter for legislative or administrative, not judicial, judgment." *Seeley*, 132 Wn.2d at 805-06 (emphasis added). Nothing in *Seeley* suggests that by classifying marijuana as a schedule I controlled substance, the legislature also made a finding that marijuana has no accepted medical benefit for purposes of the common law medical necessity defense.[7] *Cf. State v. Hanson*, 138 Wn. App. 322, 330-31, 157 P.3d 438 (2007) (determining that the Act only provided an affirmative defense to a drug crime and was not inconsistent with the scheduling statute). Indeed, the legislature defers to the state board of pharmacy for future additions, deletions, and rescheduling of substances which strongly suggests that the question of medical efficacy is subject to change. Former RCW 69.50.201(a). To conclude that a determination of medical use for scheduling purposes constitutes a legislative value determination of a substance for purposes of a necessity defense would yield the anomalous result that the necessity defense could be abrogated and reinstated whenever the board of pharmacy chooses to reclassify a controlled substance. We reject the

[7] In *Williams*, the court noted that substances are classified as schedule I if there "is (1) a high potential for abuse, (2) no currently accepted medical use in treatment in the United States, and (3) no accepted safety for use in treatment under medical supervision," under former RCW 69.50.203(a) (1993). *Williams*, 93 Wn. App. at 345. However, the court failed to discuss former RCW 69.50.203(b), which allows the board of pharmacy to place a substance in schedule I without the aforementioned findings, if the substance is "controlled under Schedule I of the federal Controlled Substances Act by a federal agency as the result of an internationally treaty, convention, or protocol." Marijuana is under Schedule I of the federal Controlled Substances Act and is a substance under the Single Convention on Narcotic Drugs of 1961, to which the United States is a party. 21 U.S.C. 812(c) sched. I, (c)(10); Single Convention on Narcotic Drugs, opened for signature Mar. 30, 1961, No. 6298, 18 U.S.T. 1407, 1967 WL 90243. Thus, the legislature's initial determination to classify marijuana as a schedule I substance does not necessarily rest on a determination that there is no accepted medical use.

contention that by scheduling a drug the legislature has also decided the efficacy of that substance for purposes of a medical necessity defense.

Our conclusion is bolstered by the passage of chapter 69.51A RCW, which evidences the legislature's belief that despite its classification of marijuana as a schedule I controlled substance there may be a beneficial medical use for marijuana. RCW 69.51A.005(1)(a) states, "The legislature finds that . . . [t]here is medical evidence that some patients with terminal or debilitating medical conditions may, under their health professional's care, benefit from the medical use of cannabis."[8] Accordingly, we agree with Kurtz that neither the legislature's classification of marijuana as a schedule I substance nor our decision in *Seeley* regarding legislative classification of marijuana abrogates the medical necessity defense.

We now turn to the question of whether the Act supersedes the common law medical necessity defense for marijuana. In general, Washington is governed by common law to the extent it is not inconsistent with constitutional, federal, or state law. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008) "However, we are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law." *Id.* at 76-77. When "the provisions of a later statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force, the statute will be deemed to abrogate the common law." *State ex rel. Madden v. Pub. Util. Dist. No. 1 of Douglas*

[8] As originally codified, this section stated, "The people of Washington state find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana." Former RCW 69.51A.005.

*County*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973) (citing *State v. Wilson*, 43 N.H. 415 (1862)).

The Act contains no language expressing a legislative intent to abrogate the common law. To the contrary, a 2011 amendment to chapter 69.51A RCW added that "[n]othing in this chapter establishes the medical necessity or medical appropriateness of cannabis for treating terminal or debilitating medical conditions as defined in RCW 69.51A.010," suggesting the legislature did not intend to supplant or abrogate the common law. RCW 69.51A.005(3). In explaining the purpose of the Act the legislature stated that "[h]umanitarian compassion necessitates that the decision to use cannabis by patients with terminal or debilitating medical conditions is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion." RCW 69.51.005(1)(b). To hold that this Act limits existing defenses for medical necessity would undermine the legislature's humanitarian goals.

The State argues, however, that because the legislature spoke directly to the purpose of the common law necessity defense, it intended to abrogate the common law. The State relies on two United States Supreme Court cases for this rule of construction, *City of Milwaukee v. Illinois*, 451 U.S. 304, 315, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981), and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-26, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978). These cases concern the test for determining whether federal acts displace federal common law and general maritime law and do not address the effect of legislative action on Washington's common law. *Milwaukee*, 451 U.S. at 315-17; *Mobile*

*Oil*, 436 U.S. at 625-26. As *Milwaukee* notes, "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision"; rather federal common law is developed in only restricted instances. 451 U.S. at 312-13 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)). The federal common law analysis proceeds on the principle that Congress, not federal courts, is to articulate the standards to be applied as a matter of federal law. *Id.* at 316. In contrast, common law is not a rarity among the states and is often developed through the courts, as was the case with medical necessity for marijuana. *Diana*, 24 Wn. App. at 916. Indeed, Washington has several statutory provisions addressing the authority of common law. *See, e.g.*, RCW 4.04.010; RCW 9A.04.060. Because the federal and state schemes differ, federal cases are unhelpful. In addition, the "directly speaks" language on which the State relies is not a part of the test we outlined in *Potter* and we decline to apply it here.

The State also contends that each element of the medical necessity defense is addressed by the Act and establishes inconsistencies between the two. As to the requirement that a defendant provide medical testimony to support his belief that use of marijuana was medically necessary, the State notes that the Act similarly requires a defendant to obtain authorization for use from a qualifying physician. As to the balancing of harms requirement, the state contends this element is met by the Act's limitation on the quantity of marijuana that a patient may possess. Responding to the final requirement, that no drug is as effective at treatment, the State notes an individual

under the Act is not required to show there are no other drugs as effective. While some of these elements are indeed similar to the common law defense, they are not identical and are not clearly inconsistent. For example, the fact that the Act does not require proof that no other drug is as effective simply means the Act is broader in that respect. Other elements in the Act may overlap with the common law defense, but are not identical nor "so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force." *Madden*, 83 Wn.2d at 222.

The State points to other aspects of the Act that it views as "obvious inconsistencies." Suppl. Br. of Resp't at 11. For example, the State hypothesizes that an individual who obtains authorization by an unqualified physician would not satisfy the Act but will be able to assert the common law defense. The State also posits that an individual who possesses a certain amount of marijuana may not have a defense under the Act but would under the common law. While correct, these examples do not show inconsistencies, but rather demonstrate that the common law may apply more broadly in some circumstances.

The State also asserts that the statutory language and initiative make it clear that the Act was intended to replace the common law defense with an affirmative defense for certain individuals with terminal or debilitating illnesses. The State relies on *Washington Water Power Co. v. Graybar Electric Co.*, 112 Wn.2d 847, 855, 774 P.2d 1199, 779 P.2d 697 (1989), where this court determined that the legislature intended to preempt common law product liability claims through passage of the "Washington Product Liability Act"

(WPLA), chapter 7.72A RCW. However, there we noted that the scope of the statue defining product liability claims could not have been broader and there was evidence WPLA was intended to eliminate confusion surrounding product liability by creating a single cause of action. *Wash. Water Powr Co*, 112 Wn.2d at 853-54. Here, the Act is not so broad as to cover every situation of marijuana use that might arise. *See, e.g., Fry*, 168 at 13 (holding that the defendant did not qualify under the Act because he did not have one of the listed debilitating conditions).

Moreover, in 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense. RCW 69.51A.040. A necessity defense arises only when an individual acts contrary to law. Under RCW 69.51A.005(2)(a), a qualifying patient "shall not be arrested, prosecuted, or subject to other criminal actions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law." One who meets the specific requirements expressed by the legislature may not be charged with committing a crime and has no need for the necessity defense. Only where one's conduct falls outside of the legal conduct of the Act, would a medical necessity defense be necessary. The 2011 amendment legalizing qualifying marijuana use strongly suggests that the Act was not intended to abrogate or supplant the common law necessity defense.

Finally, the State contends the legislature is assumed to be aware of the common law under *Madden*, 83 Wn.2d at 222, and would have expressly saved the common law defense if that was its intent. This argument inverts the requirements in *Potter;* there

must be clear evidence of the legislature's intent to deviate from the common law, not clear evidence to preserve it.

When a question arises as to whether a statute abrogates the common law, there is likely to be overlap. *See In re Estate of Tyler*, 140 Wash. 679, 689, 250 P. 456 (1926) ("'No statute enters a field which was before entirely unoccupied.'" (quoting HENRY CAMPBELL BLACK, HANDBOOK ON CONSTRUCTION AND INTERPRETATION OF THE LAWS 233 (1896))). But under our holdings, the relevant question is whether the common law and statute are inconsistent or the legislature clearly intended to deviate from the common law. Where, as here, there was no statement in the statute expressing such intent, and no inconsistencies between the two, we hold that the common law defense of medical necessity continues to be an available defense if there is evidence to support it.

The State argues, though, that even if the necessity defense is theoretically available, Kurtz could not rely on the defense because the Act provides a legal avenue for his marijuana use. As discussed, the Court of Appeals in *Diana* provided a three part summary of the marijuana necessity defense. *Diana*, 24 Wn. App. at 917. In summarizing the rule, *Diana* referred to two authorities: the *Handbook on Criminal Law* and the Model Penal Code (MPC). *Diana*, 24 Wn. App. at 913-14 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 381-83, 386 (1972); MODEL PENAL CODE § 3.02 (Proposed Official Draft (1962))). Under the MPC, conduct an actor believes is necessary to avoid a harm or evil to himself or another is justifiable if:

> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

MODEL PENAL CODE § 3.02(1). The court cited the *Handbook on Criminal Law* for the principle that the defense is not applicable where a legal alternative is available to the accused. *Diana*, 24 Wn. App. at 913-14 (citing LAFAVE & SCOTT, *supra*, at 387). The United States Supreme Court also addressed necessity and duress defenses and noted that "[u]nder any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail." *United States v. Bailey*, 444 U.S. 394, 410, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980) (quoting LAFAVE & SCOTT, *supra*, at 379). Thus, implicit in the marijuana necessity defense is whether an individual has a viable legal alternative to the illegal use of marijuana. In other words, the mere existence of the Act does not foreclose a medical necessity defense, but it can be a factor in weighing whether there was a viable legal alternative to a violation of the controlled substances law. The State's view that Kurtz must show "'no other law provides exceptions or defenses'" misstates the MPC, and adds language to the test that *Diana* adopted.[9] Suppl. Br. of Resp't at 14.

[9] The dissent contends that the legislature rejected § 3.02(1) of the MPC, and so it was inappropriate for courts to adopt and apply the necessity defense. Dissent at 7. The dissent's argument is speculative at best. Although the judiciary committee proposed adding a "justification" defense that closely mirrored § 3.02(1), there is no legislative history explaining

Here, the trial court did not consider whether the evidence supported a necessity defense as outlined in *Diana* , including whether Kurtz had a viable legal alternative. Instead, the record suggests that the trial court denied the common law defense concluding it was unavailable after *Butler* and denied the statutory defense because Kurtz did not obtain timely medical authorizations. Accordingly, we reverse the Court of Appeals and remand to the trial court to determine whether Kurtz presented sufficient evidence to support a medical necessity defense, including whether compliance with the Act was a viable legal alternative for Kurtz. If the evidence supports the necessity defense, Kurtz is entitled to a new trial.

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why that provision was not adopted. JUDICIARY COMM. OF WASH. LEGIS. COUNCIL, LEGISLATIVE COUNCIL'S JUDICIARY COMMITTEE, REVISED WASHINGTON CRIMINAL CODE, at ii (Dec. 3, 1970). "[W]hen the Legislature rejects a proposed amendment . . . we will not speculate as to the reason for the rejection." *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992) (citing *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 63-64, 821 P.2d 18 (1991)). In the absence of any statutory language or history, we should not assume that the legislature rejected the necessity defense when it chose not adopt § 3.02(1). Further, the dissent's assertion that *Diana* and this opinion rely heavily on § 3.02(1) is inaccurate. The defense adopted in *Diana* was based derived from several sources, including § 3.02(1). *Diana*, 24 Wn. App. at 914-15 (citing, *e.g.*, LAFAVE & SCOTT, *supra*, at 381-83, 386; *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842); *United States v. Ashton*, 24 F. Cas. 873 (C.C.D. Mass. 1834); *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974)).

When the legislature is otherwise silent, courts may look to the common law, which shall supplement all penal statutes. RCW 9A.04.060. As discussed in this opinion, the United States Supreme Court has recognized a common law necessity defense. *United States v. Bailey*, 444 U.S. 394, 410, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980) (discussing the common law necessity defense). Therefore, even if we were to conclude, as the dissent suggests, that the legislature rejected § 3.02(1) of the MPC, the common law necessity defense as formulated in *Diana* has not been rejected by the legislature.

## CONCLUSION

We hold that the common law medical necessity defense for marijuana remains available following the Medical Use of Marijuana Act. We remand to the trial court for further proceedings consistent with this opinion.

Madsen, C.J.

WE CONCUR:

Johnson, J.

Stephens, J.

González, J.

Clenduse, J.P.T.

No. 87078-1

OWENS, J. (dissenting) -- While I sympathize with William Kurtz's unfortunate situation, I am compelled to dissent because the common law defense of necessity is predicated on a lack of legal alternatives. Washington voters have provided a comprehensive statutory scheme for the use of medical marijuana, enacted by initiative in 1998. Because individuals in this state have a legal way of using medical marijuana, the previously articulated common law defense of medical necessity for marijuana use is no longer appropriate. Therefore, I respectfully dissent.

The common law necessity defense has existed for hundreds of years for defendants who were forced to violate the law to avoid a greater harm. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 444 (2d ed. 1986). To assert the

necessity defense, a defendant must reasonably believe the unlawful action was necessary to avoid harm. *State v. Diana*, 24 Wn. App. 908, 914, 604 P.2d 1312 (1979); LAFAVE & SCOTT, *supra*, at 446. In addition, the harm the defendant sought to avoid must outweigh the harm caused by a violation of the law. *Diana*, 24 Wn. App. at 914; LAFAVE & SCOTT, *supra*, at 446-47. Finally, and most importantly for our analysis of this case, the defense cannot be asserted when "a legal alternative is available to the accused." *Diana*, 24 Wn. App. at 913-14; LAFAVE & SCOTT, *supra*, at 448-49.

A common example of the necessity defense is a prisoner who escapes from a prison on fire. *See People v. Whipple*, 100 Cal. App. 261, 279 P. 1008 (1929). Such a prisoner could theoretically defend against a charge of prison escape by arguing that there was no legal alternative to avoid severe injury or death. *Id.* at 263 (noting a prominent 1736 treatise on criminal law that states, "'[i]f a prison be fired by accident, and there be a necessity to break prison to save his life, this excuseth the felony.'" 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 611 (1736), *available at* http://archive.org/details/historiaplacitor01hale). In contrast, a prisoner who escapes from prison because he claims the conditions amounted to brutal and inhumane treatment cannot assert the defense of necessity when there is no record that he attempted to address prison conditions through lawful means. *Id.* at 262, 265.

Thus, the necessity defense is specifically predicated on a defendant's lack of legal alternatives. The United States Supreme Court has made this clear for the defenses of necessity and duress: "if there was a reasonable, legal alternative to violating the law . . . the defenses will fail." *United States v. Bailey*, 444 U.S. 394, 410, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980). As the Court of Appeals has stated, the requirement to show a lack of legal alternatives is "[n]ot only . . . consistent with existing Washington case law, it is mandated by common sense." *State v. Pittman*, 88 Wn. App. 188, 196, 943 P.2d 713 (1997).

When the Court of Appeals created the medical necessity defense for marijuana use in 1979, there was no provision for legal medical use of marijuana to treat the defendant's multiple sclerosis. *Diana*, 24 Wn. App. at 915. Accordingly, the Court of Appeals created a three-part medical necessity defense, including a requirement that defendants present evidence that there was no legal alternative to using marijuana illegally to treat their symptoms. *Id.* at 916. Specifically, defendants had to show that no legal drug was as effective as marijuana in minimizing the effects of their disease. *Id.* Defendants that made such a showing could assert the medical necessity defense because they had no legal alternative to use marijuana for medical purposes.

But in 1998, the people of this state passed Initiative Measure 692 (the Washington State Medical Use of Marijuana Act,[1] chapter 69.51A RCW), which provided a legal alternative for individuals to use marijuana for medical purposes. Consequently, the crucial underpinning to the necessity defense—the lack of legal alternatives—no longer existed for medical marijuana use. This change is particularly evidenced by *Diana*'s requirement that defendants show that no legal drug was as effective as marijuana in minimizing the effects of their disease. Logically, I do not see how Kurtz can show that no legal drug is as effective as marijuana when marijuana itself is now allowed for medical purposes. The specific necessity defense designed by the Court of Appeals for medical marijuana use has become moot by its own terms.

Courts consistently reiterate that defendants asserting the necessity defense must show that they lacked legal alternatives. The Court of Appeals has held that a person eluding a pursuing police vehicle to help a friend in danger cannot assert the necessity defense when there is a legal alternative: seeking that police officer's assistance. *State v. Gallegos*, 73 Wn. App. 644, 651, 871 P.2d 621 (1994). In *Gallegos*, the court reviewed the case of a man who believed his female friend was in danger and began speeding toward her location. *Id.* at 646. When he was pulled over

[1] The Medical Use of Marijuana Act was renamed the Washington State Medical Use of Cannabis Act in 2011. RCW 69.51A.900.

by a police officer en route, he yelled to the officer that he was okay and that the officer should follow him. *Id.* He then sped off. *Id.* When he was later charged with attempting to elude a pursuing police vehicle, the court held that he could not assert the necessity defense because he had a legal alternative—he could have explained the situation to the officer and asked for help for his friend. *Id.* at 651. This was a reasonable legal alternative that would have averted harm to his friend without violating the law against eluding a pursuing police officer.

The Alaska Supreme Court has held that stealing highway construction equipment to free a stranded vehicle is unnecessary when there is a legal alternative: calling a tow truck. *Nelson v. State*, 597 P.2d 977, 980 (Alaska 1979). In *Nelson*, an Alaska man "borrowed" highway construction equipment to free his truck that was stuck in nearby mud. *Id.* at 977-78. His unsuccessful attempt to free his truck resulted in significant damage to the construction equipment, and he was charged with destruction of personal property and joyriding. *Id.* at 978. He attempted to assert the necessity defense, explaining that he believed his truck was in danger of tipping over and being damaged. *Id.* at 980. The court held that he could not assert the necessity defense because he had several legal alternatives to unlawfully using the construction equipment, noting that multiple people had stopped and offered assistance to the defendant, including rides or offers to telephone state troopers or a tow truck. *Id.*

Similarly, the Ninth Circuit Court of Appeals has held that trespassing on a military base to warn fellow trespassers of impending danger from a military test exercise is unnecessary when there is a legal alternative: informing the military about the presence of the other trespassers. *United States v. Mowat*, 582 F.2d 1194, 1208 (9th Cir. 1978). In *Mowat*, a group of individuals were charged with trespassing for entering an island military base to protest military actions. *Id.* at 1197. One of the individuals who entered the base later than his cohorts asserted a necessity defense, claiming that he entered the military base to warn his friends about an impending bombing of the island. *Id.* at 1208. The court held that "the assertion of the necessity defense requires that optional courses of action appear unavailable" and that the defendant could not assert the defense because he "made no attempt to secure consent to enter the island, nor did he take the simple step of notifying the officials on the island who could have notified [his friends]." *Id.*

These cases are unified by the principle that the necessity defense is unavailable to defendants who fail to avail themselves of reasonable legal alternatives. The necessity defense is not an unlimited license to violate the law to avoid a potential harm. Rather, the defense exists to protect defendants who truly have no legal alternatives.

Of course the overall common law necessity defense continues to protect defendants who are forced to violate the law to avert a greater harm. But the narrow

medical necessity defense developed in *Diana* specifically for individuals with a medical need to use marijuana no longer makes sense in a state that specifically provides a legal method for the medical use of marijuana. I would hold that a defendant wishing to assert a necessity defense would have to prove the broader elements that have developed over hundreds of years—including the lack of legal alternatives—not the narrow medical necessity test developed in a context that no longer exists. In Kurtz's case, the record shows that he was later able to obtain appropriate authorization to legally use medical marijuana for his serious condition. He had a legal alternative to violating the law and thus does not qualify for the necessity defense.

In addition, both *Diana* and the majority opinion rely heavily on section 3.02 of the Model Penal Code (MPC) (Proposed Official Draft (1962)), despite the fact that the legislature considered and *rejected* that exact provision. A brief review of the legislature's consideration of the MPC is instructive. In 1967, the Washington State Senate delegated the responsibility of recommending revisions to the criminal code of 1909 to the Judiciary Committee of Washington's Legislative Council. JUDICIARY COMM. OF WASH. LEGIS. COUNCIL, LEGISLATIVE COUNCIL'S JUDICIARY COMMITTEE, REVISED WASHINGTON CRIMINAL CODE at ii (Dec. 3, 1970). In 1970, the judiciary committee published a proposed draft of the revised criminal code that adopted MPC section 3.02's necessity defense, calling it a "justification" defense. *Id.* at ii, 64.

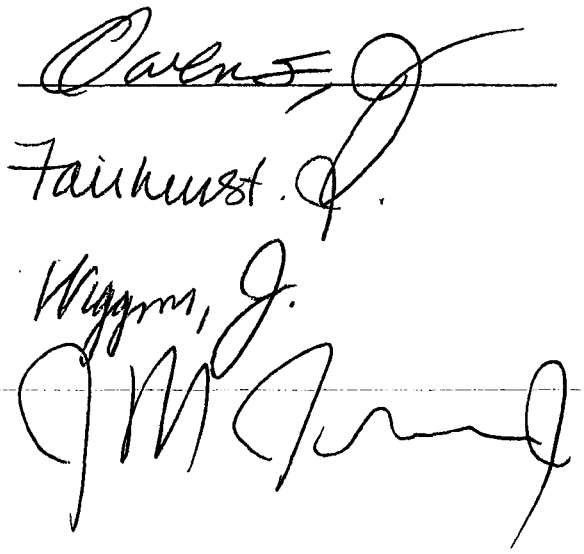
However, when the legislature adopted the criminal code of 1965, it did not include the justification defense. LAWS OF 1975, 1st Ex. Sess., ch. 260, at 828-30. Since MPC section 3.02 was explicitly proposed by the judiciary committee and then rejected by the full legislature, it seems inappropriate for the courts to subsequently adopt and apply that exact test.

Furthermore, I find no way to avoid the conclusion that the Medical Use of Marijuana Act abrogated the common law defense. A statute abrogates the common law when "'the provisions of a . . . statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force.'" *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77 196 P.3d 691 (2008) (alteration in original) (quoting *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wn.2d 219, 225, 517 P.2d 585 (1973)). In this case, the Medical Use of Marijuana Act created a defense to charges of use or possession of marijuana if the defendant can show that he or she was using the marijuana for medical purposes—the exact issue addressed by the common law defense. Because the Medical Use of Marijuana Act addresses the very concern addressed by the common law, the two cannot coexist. The Medical Use of Marijuana Act sets out a comprehensive structure for the defense, including the qualifying conditions or diseases, the amount of marijuana allowed, and documentation of a physician's recommendation. As a result of these detailed requirements, the statutory defense is much narrower than the common law defense. The common law did not

require any communication with a physician nor did it place a limit on the amount of marijuana at issue. Therefore, the provisions of the Medical Use of Marijuana Act's defense are so inconsistent with the prior common law that both cannot simultaneously be in force. It does not make sense that the state would create a significantly narrower and more detailed statutory defense if it did not mean to replace the broader common law defense.

Moreover, allowing the common law defense to coexist with the statutory defense would frustrate the purpose of the Medical Use of Marijuana Act. When determining whether a statute is exclusive, this court has repeatedly indicated that it must strive to uphold the purpose of the statute. *See, e.g.*, *Potter*, 165 Wn.2d at 87; *see also Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 855, 774 P.2d 1199, 779 P.2d 697 (1989). In passing the Medical Use of Marijuana Act voters set up a structure to allow medical marijuana, but they specifically limited the defense to individuals using medical marijuana under a doctor's supervision. If the court were to uphold the broader common law defense without the requirement of a doctor's supervision, the court would frustrate the purpose of the voters that specifically added that requirement for the medical use of marijuana.

I respectfully dissent.



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Please be in receipt of plaintiff-intervener-appellant West's proposed Petition for Discretionary review, and Motion to Intervene. Cover pages and appendices are in separate pdfs. Declaration of service to follow tomorrow A.M.

Thank you for your consideration.