NO. 95730-4

SUPREME COURT OF THE STATE OF WASHINGTON

EMERALD ENTERPRISES, LLC, and JOHN M. LARSON,

Appellants,

v.

CLARK COUNTY,

Respondent,

and

ROBERT W. FERGUSON,
Attorney General of the State of Washington,

Intervenor-Respondent.

ATTORNEY GENERAL'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Since Washington voters enacted Initiative 502 in 2012, five superior courts, one Attorney General Opinion, and the Court of Appeals in this case have considered the issue presented here: whether I-502 preempts local authority as to marijuana businesses. They have uniformly agreed that I-502 preserves local power. The Legislature has confirmed this conclusion, enacting multiple amendments to I-502 that explicitly contemplate local power to regulate or prohibit marijuana businesses. There is no legal authority to the contrary and no dispute warranting this Court's review.

In arguing to the contrary, Petitioners Emerald Enterprises and John M. Larson (collectively Emerald) argue that the decision below conflicts with preemption cases analyzing different statutes. But it should come as no surprise that when courts apply the same preemption standard to different state statutes and local ordinances, the results may be different. That unremarkable proposition shows no conflict here, where the state law at issue expressly contemplates ordinances like the one challenged.

Washington courts recognize a strong presumption against finding state preemption of local authority. Petitioners cannot overcome that presumption here, as reflected in the universal agreement among the lower courts on this issue. This Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUE

Does state law expressly or impliedly preempt local ordinances that prohibit marijuana businesses within the local jurisdiction?

III. COUNTERSTATEMENT OF THE CASE

Washington voters approved I-502 at the November 2012 general election. Laws of 2013, ch. 3 (*codified in* RCW 69.50). I-502 decriminalized under state law the possession of limited amounts of marijuana by persons twenty-one years or older. RCW 69.50.4013(3). It also established a licensing program for three types of marijuana businesses: producers, processors, and retailers. RCW 69.50.325. Since then, the Legislature has amended the statutes a number of times, including two comprehensive 2015 amendatory acts that merged regulation of recreational and medical marijuana and overhauled the structure for regulation and taxation. *See* Laws of 2015, ch. 70 (cannabis patient protection act); Laws of 2015, 2d Spec. Sess., ch. 4 (comprehensive marijuana market reforms).

As amended, state law authorizes the Washington State Liquor and Cannabis Board (LCB) to issue licenses to marijuana producers and processors, and to a limited number of retail outlets. RCW 69.50.354. This regulated system is flourishing, with steadily-increasing volume. Retailers operate in every corner of the state and sold nearly $1.4 billion worth of

licensed products in 2017.[1] The state statutes recognize that some cities and counties may choose to prohibit marijuana businesses within their localities, RCW 69.50.540(2)(g)(i)(B), and some have exercised that prerogative.

In Clark County, several cities allow marijuana businesses, and many of those businesses are thriving.[2] The County Council chose to enact an ordinance banning marijuana businesses in unincorporated parts of the county. Clark County Code § 40.260.115(B)(4). Emerald challenged the ordinance, alleging that state law preempted it. The superior court granted summary judgment in favor of Clark County and the Attorney General, holding that I-502 does not preempt the County's ordinance. The Court of Appeals affirmed. Pet. Ex. A.

IV. REASONS WHY THIS COURT SHOULD DENY REVIEW

The Legislature's decision to amend state law to specifically recognize the possibility that cities or counties might impose local bans on marijuana businesses precludes a preemption argument, even before turning

[1] Sales and excise tax data by county demonstrate that, even with some local jurisdictions choosing to impose bans, retail sales take place in all parts of the state. *See* https://lcb.wa.gov/sites/default/files/publications/Marijuana/sales_activity/FY17-MJ-Sales-Excise-Tax-by-County.xlsx. For further data on the regulated marijuana industry, *see* https://lcb.wa.gov/records/frequently-requested-lists.

[2] The Municipal Research and Service Center (MRSC) maintains an interactive map showing the legal status of marijuana businesses in cities and towns throughout the state. For Clark County, this map reveals that marijuana retailers are allowed in the cities of Vancouver, Battle Ground, and Woodland. *See* http://mrsc.org/getdoc/8cd49386-c1bb-46f9-a3c8-2f462dcb576b/Marijuana-Regulation-in-Washington-State.aspx. The LCB has licensed retailers in all three of those cities, including thirteen in Vancouver, two in Battle Ground, and one in Woodland. *Id.*

to the considerations set forth in RAP 13.4(b). Beyond that, review is not supported by any of the three factors Emerald cites.

A. State Law Expressly Recognizes that Some Cities or Counties Might Choose to Prohibit Marijuana Businesses Locally

The Washington Constitution vests police powers directly in cities and counties, requiring no affirmative grant of legislative authority. "Any 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." Const. art. XI, § 11. A party arguing that a local ordinance is preempted therefore must show that some state statute takes away what would otherwise be a local power derived directly from the Constitution. Without a preemptive statute withdrawing local power, counties retain concurrent jurisdiction with the state over the subject matter. *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 225-26, 351 P.3d 151 (2015).

As detailed further later in this brief, nothing in I-502 deprived cities and counties of their power to regulate or ban marijuana businesses. But even if that conclusion were subject to reasonable dispute, in 2015 the Legislature amended state law to explicitly recognize the authority of cities and counties to prohibit marijuana businesses. The Legislature amended the statute governing the distribution of marijuana excise tax revenue to provide some of that revenue to counties, cities, and towns. It did so, however, only

for jurisdictions that have not prohibited such businesses. RCW 69.50.540(2)(g)(i), *as amended by* Laws of 2015, 2d Spec. Sess., ch. 4, § 206. Thirty percent is distributed to local governments where marijuana retailers are physically located. *Id.* The remaining seventy percent is distributed to local governments without regard to whether a retailer is physically located within the jurisdiction. But the Legislature explicitly limited that distribution such that: "Funds may only be distributed to *jurisdictions that do not prohibit* the siting of any *state licensed* marijuana producer, processor, or *retailer*." *Id.* (emphases added).[3] As the Court of

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[3] The Legislature amended RCW 69.50.540 to add a new subsection (2)(g)(i):

> (g) At the end of each fiscal year, the treasurer must transfer any amounts in the dedicated marijuana account that are not appropriated pursuant to subsection (1) of this section and this subsection (2) into the general fund, except as provided in (g)(i) of this subsection (2).
>
> (i) Beginning in fiscal year 2018, if marijuana excise tax collections deposited into the general fund in the prior fiscal year exceed twenty-five million dollars, then each fiscal year the legislature must appropriate an amount equal to thirty percent of all marijuana excise taxes deposited into the general fund the prior fiscal year to the treasurer for distribution to counties, cities, and towns as follows:
>
> (A) Thirty percent must be distributed to counties, cities, and towns where licensed marijuana retailers are physically located. Each jurisdiction must receive a share of the revenue distribution under this subsection (2)(g)(i)(A) based on the proportional share of the total revenues generated in the individual jurisdiction from the taxes collected under RCW 69.50.535, from licensed marijuana retailers physically located in each jurisdiction. For purposes of this subsection (2)(g)(i)(A), one hundred percent of the proportional amount attributed to a retailer physically located in a city or town must be distributed to the city or town.
>
> (B) Seventy percent must be distributed to counties, cities, and towns ratably on a per capita basis. Counties must receive sixty percent of the distribution, which must be disbursed based on each county's total proportional population. *Funds may only be*

Appeals observed, this statute "strongly indicate[s] that the legislature intended to preserve the right of local governments to ban retail stores." *Emerald Enterprises, LLC v. Clark County*, No. 47068-3-II, slip op. at 12 (Wash. Ct. App. Mar. 13, 2018). "By expressly contemplating that local jurisdictions can 'prohibit the siting of any state licensed marijuana . . . retailer,' [RCW 69.50.540(2)(g)(i)] acknowledges that local governments retain zoning authority over retail locations." *Id.* at 13-14 (quoting RCW 69.50.540(2)(g)(i)(B)).

These amendments confirmed what legal authorities had already concluded. Shortly after the voters adopted I-502, the Attorney General's Office issued a formal opinion concluding that I-502 did not preempt local authority to regulate marijuana businesses. Op. Att'y Gen. 2 (2014). And in 2014 and 2015, six superior courts across the state reached the same conclusion, with none concluding the opposite.[4] The Legislature was well aware of these opinions when it comprehensively amended the

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> *distributed to jurisdictions that do not prohibit the siting of any state licensed marijuana producer, processor, or retailer.*

Laws of 2015, 2d Spec. Sess., ch. 4, § 206(2)(g)(i) (emphasis added).

[4] Those six are Pierce County Superior Court in *MMH, LLC v. City of Fife*, No. 14-2-10487-7 and *Green Collar, LLC v. Pierce County*, No. 14-2-11323-0; Chelan County Superior Court in *SMP Retail, LLC v. City of Wenatchee*, No. 14-2-00555-0; Benton County Superior Court in *Americanna Weed, LLC v. City of Kennewick*, No. 14-2-02226-1; Asotin County Superior Court in *City of Clarkston v. Valle del Rio, LLC*, No. 15-2-00148-1; and Cowlitz County Superior Court in this case.

relevant statutes in 2015. Yet rather than contravening these decisions, the Legislature added a provision that expressly recognizes that local jurisdictions can prohibit marijuana businesses. RCW 69.50.540(2)(g)(i)(B). State law remains devoid of any provisions limiting local authority to impose bans at the local level.

This Court should decline review in this case, where the essential issue is whether a local ordinance is preempted by a state statutory system that expressly contemplates such an ordinance.

B. The Court of Appeals Decision Does Not Conflict With Decisions of This Court

Emerald argues that the Court of Appeals decision conflicts with the test announced for conflict preemption in prior decisions of this Court. Pet. at 6-14. This argument fails because the Court of Appeals applied the same test as this Court did in the cases Emerald cites, it simply reached a conclusion Emerald dislikes.

Emerald relies upon the test for conflict preemption derived from *City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960): whether the ordinance permits what the statute forbids or forbids what the statute permits. The Court of Appeals applied the same standard. *Emerald Enterprises*, slip op. at 7.

Emerald contends that the Attorney General's Office argued for a different standard in this case. But the contention is false for the same reason

that Emerald's argument ultimately fails on the merits: they misunderstand and oversimplify how this test is applied. As recently explained, "[t]hough the rule may be easily stated, the analysis is often nuanced." *Cannabis Action Coal.*, 183 Wn.2d at 227 (rejecting argument that state law preempted city ordinance banning medical marijuana "collective gardens").

Washington courts have never held that any time state law permits an activity in some general sense local governments must allow it. Indeed, this Court has held that even "[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law." *Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d 621 (1998). Rather, the proper question is whether "the statute creates an unabridged right" to take the action forbidden by the ordinance. *Weden v. San Juan County*, 135 Wn.2d 678, 695, 958 P.2d 273 (1998).

In *Weden*, the Court upheld San Juan County's ban on jet-skis, even though state law created a licensing and registration system for jet-skis and regulated their use. The Court explained: "Nowhere in the language of the statute can it be suggested that the statute creates an unabridged right to operate [jet-skis] in all waters throughout the state." *Weden*, 135 Wn.2d at 695. Instead, "[r]egistration of a vessel is nothing more than a precondition to operating a boat." *Id*. "No unconditional right is granted by obtaining such registration." *Id*.

Similarly, in *Lawson v. City of Pasco*, 168 Wn.2d 675, 230 P.3d 1038 (2010), state law imposed many regulations on mobile home tenancies, and it contemplated that such tenancies could include recreational vehicles (RVs). The City of Pasco, however, banned RVs from mobile home parks. The plaintiff contended that "Pasco's ordinance conflicts with [state law] because it prohibits what [state law] permits: the placement of RVs in mobile home parks." *Lawson*, 168 Wn.2d at 682-83. The Court rejected this argument, concluding that state law did not "affirmatively authorize[ ] [RVs] on any mobile home lot in the state." *Id.* at 683. "The statute does not forbid recreational vehicles from being placed in the lots, nor does it create a right enabling their placement." *Id*. Because state law created no affirmative right to place an RV in a mobile home park, it did not prevent municipalities from barring them. *Id*. at 684.

As these cases illustrate, to show that local law "prohibits what state law permits" requires more than showing that state law allows an activity generally. Rather, a local ordinance "forbids what state law permits" only when the state law creates an entitlement to engage in the activity in specific circumstances forbidden by the local legislation. *Lawson*, 168 Wn.2d at 683-84; *Weden*, 135 Wn.2d at 694. The real question is whether state law creates a "right" to do something that the ordinance specifically prohibits. *Weden*, 135 Wn.2d at 695 (finding no conflict because state law created no

"right to operate [jet-skis] in all waters throughout the state"); *Lawson*, 168 Wn.2d at 683 (finding no conflict because the "statute does not . . . create a right enabling [RV] placement"); s*ee also Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't*, 153 Wn.2d 657, 663, 105 P.3d 985 (2005) (holding that conflict preemption arises only "when an ordinance and statute cannot be harmonized").

Emerald's argument ultimately fails because the statute at issue does not create a right for any license holder to operate without regard to local law. Emerald identifies no provision of state law that vests a right in anyone to open a marijuana business without regard to local law. In fact, in adopting rules to implement this provision, the Board specified: "The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances *including, but not limited to*: Building and fire codes, zoning ordinances, and business licensing requirements." WAC 314-55-020(15) (emphasis added).

Emerald fails to identify any conflict between the court's decision below and this Court's prior cases. RAP 13.4(b)(1) provides no basis for granting review.

C. The Decision Below Does Not Conflict With *Department of Ecology v. Wahkiakum County*

Emerald next asserts that the decision of the Court of Appeals in this case conflicts with its own prior decision in *Department of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 337 P.3d 364 (2014). But Emerald ignores the profound differences between the statute at issue in this case and in *Wahkiakum*, which the Court of Appeals addressed in detail. This difference logically leads to a different outcome between the two cases.

At issue in *Wahkiakum* was a county ordinance that prohibited application of "class B biosolids" (treated municipal sewage) anywhere within the county. Division II of the Court of Appeals held that this ordinance conflicted with the state biosolids statute. That statute directs the Department of Ecology to establish a program to manage biosolids so that, "to the maximum extent possible . . . municipal sewage sludge is reused as a beneficial commodity." RCW 70.95J.005(2). Applying that legislative directive, "Ecology adopted a regulatory scheme that specifically grants permits for land application of class B biosolids and . . . *created a right to land application of class B biosolids when a permit is acquired*." *Wahkiakum County*, 184 Wn. App. at 381 (emphasis added). Because the statutory and permitting scheme "created a right to land application of class B biosolids when a permit is acquired", *id*., and because the ordinance

precluded the Department of Ecology from meeting its mandate under state law to maximize the beneficial use of biosolids, Division II found irreconcilable conflict with state law. *Wahkiakum County*, 184 Wn. App. at 374.

Here, by contrast, the LCB itself does not consider a license issued under I-502 a right to operate regardless of local law. WAC 314-55-020(15). Moreover, unlike the state law at issue in *Wahkiakum*, which directed the Department of Ecology to regulate biosolids such that, "to the maximum extent possible . . . municipal sewage sludge is reused as a beneficial commodity", RCW 70.95J.005(2), state marijuana laws contain no similar directive to the LCB to maximize marijuana use or sales. On the contrary, I-502 directs the LCB to limit the number of marijuana retailers, tightly restricts marijuana advertising, and directs some of the taxes generated by marijuana sales to advertising campaigns aimed at reducing marijuana abuse. RCW 69.50.354, .357, .540(2)(b). Far from setting forth the kind of state mandate at issue in *Wahkiakum*, I-502 merely provides that when licensed marijuana businesses produce, process, and sell marijuana, their actions "shall not be a criminal or civil offense under Washington state law." RCW 69.50.325.

There is thus no conflict between the decision below and the decision in *Wahkiakum*. As the Court of Appeals properly explained here:

"The ordinance in *Wahkiakum County* frustrated Ecology's mandate to encourage 'to the maximum extent possible' the safe disposal of biosolids through land application. RCW 70.95J.005(2); 184 Wn. App. at 382. In this case, the Ordinance frustrates no such mandate." *Emerald Enterprises, LLC*, slip op. at 11-12. Accordingly, Emerald's petition finds no support in RAP 13.4(b)(2).

D. This Case Presents No Question of Fundamental Statewide Importance

Finally, Emerald contends that this case presents a fundamental question of statewide importance. Emerald argues that the fundamental issue of statewide importance is not the legal question resolved by the Court of Appeals, but rather the policy issue of whether state law *should* preempt local bans on marijuana businesses. Pet. at 18-19. This argument fails both legally and practically.

The Washington Constitution directly grants cities and counties the authority to legislate locally pursuant to their inherent police powers. Const. art. XI, § 11. The question of whether state statutes *should* have preemptive effect is vested in the Legislature and in the people's initiative power. *See Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007). If the sponsors of I-502 had wanted to preempt local authority to ban marijuana businesses, they easily could have said so, and the people's

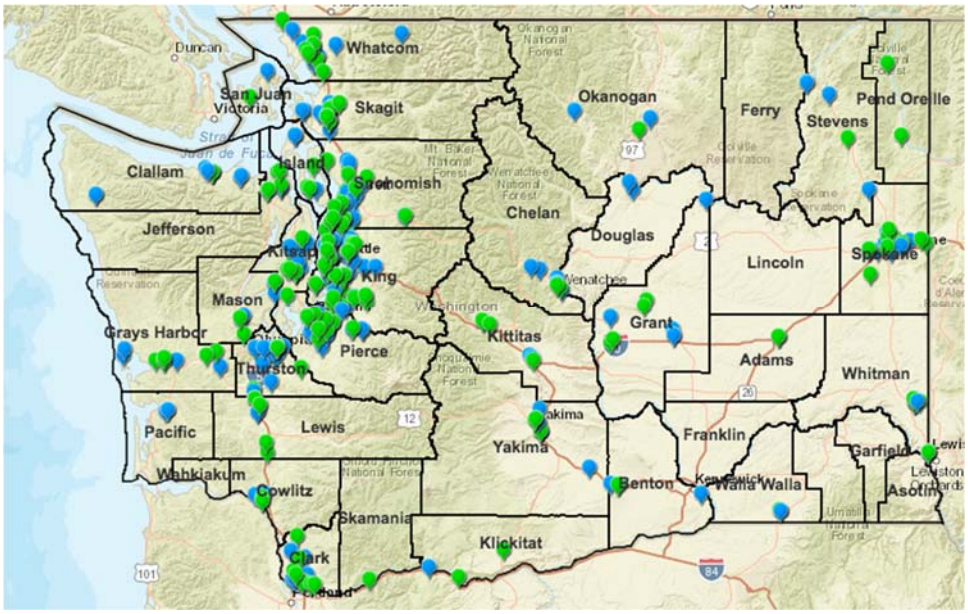
approval of such language would have settled the policy dispute. But they included no such language. Similarly, if the Legislature concludes that public policy supports preempting local bans, it can certainly pass a statute to do so. But to date, it has only spoken on the subject to the contrary, recognizing that some local governments will choose to impose bans. RCW 69.50.540(2)(g)(i)(B).

Moreover, as a practical matter, there is no evidence that I-502's allowance of local bans is undermining the Initiative's purpose. Emerald suggests that allowing local bans inherently undermines statewide marijuana legalization. But Emerald neglects to mention that every single state that has created a legal system for sale and distribution of recreational marijuana has allowed local governments to prohibit marijuana sales.[5] And there is no evidence that I-502's purposes are being thwarted by local bans.

[5] As in Washington, the laws in other states express the intent to take marijuana sales out of the black market and into a state-regulated system. *See* Alaska Stat. § 17.38.010(b)(2); 2016 Cal. Legis. Serv., Prop. 64, § 2(H); Colo. Const. art. XVIII, § 16(1)(b)(iv); 2016 Mass. Acts, ch. 334, § 1; Or. Rev. Stat. § 475B.005. Yet those other states also allow local governments to prohibit marijuana businesses. Alaska Stat. § 17.38.210; Cal. Bus. & Prof. Code § 26200; Colo. Const. art. XVIII, § 16(5)(f); Mass. Gen. Laws, ch. 94G, § 3(a)(2)(i); Or. Rev. Stat. § 475B.461. Maine's measure did not include an intent section, but does expressly preserve the authority of local governments to prohibit marijuana businesses. Me. Rev. Stat. Title 7, § 2449. Washington is the only state not to address this issue explicitly. These examples make clear that it is quite possible for voters to pass statewide reform intended to suppress the black market while also intending to leave local governments with their normal police powers.

Retailers operate in every corner of the state and sold nearly $1.4 billion worth of licensed products in 2017.[6]

The map below shows the location of licensed retailers throughout the state:



Washington State Liquor and Cannabis Board, *Retail Marijuana Locations,* http://wslcb.maps.arcgis.com/apps/View/index.html?appid=a84ba123b8d94a65aa03ae573a65c1aa. While six Washington counties have banned marijuana sales in unincorporated areas (Benton, Clark, Franklin, Klickitat,

[6] Sales and excise tax data by county demonstrate that, even with some local jurisdictions choosing to impose bans, retail sales take place in all parts of the state. *See* https://lcb.wa.gov/sites/default/files/publications/Marijuana/sales_activity/FY17-MJ-Sales-Excise-Tax-by-County.xlsx. For further data on the regulated marijuana industry, *see* https://lcb.wa.gov/records/frequently-requested-lists.

Yakima, and Walla Walla), there are cities in all but one of those counties that allow such sales and where retailers are located.[7]

Emerald is also wrong to claim that the decision below "furthers uncertainty about the law." Pet. at 19. As detailed above, there is no meaningful uncertainty, Emerald just doesn't like the answer that courts, the Attorney General's Office, and the Legislature have all reached.

In short, RAP 13.4(b)(4) also fails to support review.

V. CONCLUSION

This Court should deny the petition for review. The petition is not properly grounded in any of the considerations set forth in RAP 13.4(b), and the analysis of the Court of Appeals is consistent with both state statute and established precedent.

RESPECTFULLY SUBMITTED this 16th day May 2018.

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[7] As revealed in data accumulated by MRSC, marijuana businesses are allowed in the Clark County cities of Vancouver, Battle Ground, and Woodland. The Benton County cities of Prosser and Benton City allow marijuana businesses. The same is true of the Kilicktat County cities of White Salmon and Bingen. In Yakima County, marijuana businesses are permitted in Yakima, Union Gap, and Granger. The city of Walla Walla and the town of Waitsburg permit marijuana businesses in Walla Walla County. The only county that prohibits marijuana business and lacks any city that does not do so is Franklin County, which neighbors Adams, Benton, and Walla Walla counties. MRSC maintains an interactive map reflecting this information at http://mrsc.org/getdoc/8cd49386-c1bb-46f9-a3c8-2f462dcb576b/Marijuana-Regulation-in-Washington-State.aspx.

Certificate of Service

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail and regular US Mail, a true and correct copy of the Attorney General's Citation to Supplemental Authority upon the following:

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s/Stephanie N. Lindey
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SOLICITOR GENERAL OFFICE

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