#703960

NO. 88079-4

SUPREME COURT
OF THE STATE OF WASHINGTON

CANNABIS ACTION COALITION, STEVE SARICH, ARTHUR WEST, JOHN WORTHINGTON,

and

DERYCK TSANG,

Appellants,

v.

CITY OF KENT, et al.,

Respondents.

REPLY BRIEF OF APPELLANT TSANG

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I. INTRODUCTION

Engrossed Second Substitute Senate Bill 5073, as passed out of the Legislature, created an extensive and complicated regulatory system allowing the State to license the commercial production, processing and dispensing of medical cannabis. While amending Washington's voter approved laws on the medical use of cannabis, Ch. 69.51A RCW, fifty of ESSSB 5073's 58 sections would have created new statutes. Governor Gregoire's veto of 36 sections of ESSSB 5073 left a somewhat confusing patchwork of statutes that often reference sections that were not enacted into law and entities that do not exist. The Governor's veto eliminated the entire regulatory and licensing structure for commercial production, processing and dispensing of medical cannabis.

One section of ESSSB 5073 that was not vetoed was Section 403, now codified at RCW 69.51A.085, dealt exclusively with a new entity – collective gardens. In sharp contrast with the commercial producers, processors, and dispensers that the majority of ESSSB 5073 was concerned with, RCW 69.51A.085 expressly authorized qualifying patients to pool their resources and create and participate in "collective gardens." Qualifying patients participating in collective gardens are strictly limited in terms of number of participants, quantity of cannabis

grown and stored, and valid documentation. Importantly, collective gardens are not commercial operations or commercial dispensaries. Medical cannabis grown by the collective garden can only be delivered to the qualifying patients participating in the collective garden.

As written, RCW 69.51A.085 is a stand-alone statute. Collective gardens are defined within the context of RCW 69.51A.085 and were *not* defined in the vetoed new definitions within ESSSB 5073, Section 201. In addition, all of the conditions necessary for participating in a collective garden are contained within the confines of RCW 69.51A.085. The statute does not reference either explicitly or implicitly additional requirements outside of the five listed conditions. And perhaps most importantly, collective gardens, unlike the proposed but vetoed commercial producers, processors, and dispensaries, did not need to be licensed or registered. Because RCW 69.51A.085 is not ambiguous, the Court should rely on its plain language. The Legislature has authorized collective gardens and the City of Kent is not free to ban their existence within the City limits.

The City's argument that it is authorized to ban collective gardens is based largely on its read of RCW 69.51A.140. But unlike RCW 69.51A.085, RCW 69.51A.140 must be read in context of the remainder of ESSSB 5073. While RCW 69.51A.140 appears to grant

authority to local governments to adopt zoning and other regulatory controls, those controls were limited only to regulating commercial producers, processors, and dispensers – all entities that were vetoed. Because there are no licensed commercial producers, processors or dispensers, RCW 69.51A.140 is an orphaned section and without effect. It certainly does not provide express authority for local governments to regulate or ban collective gardens.

The City of Kent's Ordinance 4036 purports to outright prohibit collective gardens within the City of Kent. Because the City is prohibiting what State law expressly allows, the City has exceeded its authority under Article XI, Section 11, of the Washington Constitution by enacting a law in conflict with the State's general laws. Because the City's ordinance prohibits what RCW 69.51A.085 expressly allows, Ordinance 4036 is preempted and void.

II. ARGUMENT IN REPLY

A. The City's Ban on Collective Gardens is Preempted by State Law

1. RCW 69.51A.085 Authorizes Collective Gardens

As explained in Tsang's Opening Brief at 8, 13-15, RCW 69.51A.085, on its face, expressly authorizes qualifying patients to

participate in collective gardens subject only to five express conditions. Apparently conceding the effect of the plain language, the City insists that the statute cannot be read in isolation and that the Court must look beyond the plain language and instead interpret RCW 69.51A.085 in conjunction with the vetoed registration requirements for "licensed" producers and dispensers. Resp. Br. at 22-28. But, as discussed below, ESSSB 5073 drew sharp distinctions between "collective gardens" and the ultimately vetoed provisions for registration and licensing of producers, processors, and dispensers. The two types of entities were defined and addressed in different sections and treated very differently.

The starting point for interpreting a statute is the plain language. If a statute is clear on its face, "its meaning is to be derived from the language of the statute alone." *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

> This court has repeatedly held that an unambiguous statute is not subject to judicial construction[5] and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it.[6] A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable.

Kilian, 147 Wn.2d at 20-21. Only where a statute is ambiguous does this Court "resort to statutory construction, legislative history and relevant case law to assist in interpreting it." *Id.*

There is no ambiguity in RCW 69.51A.085. The statute contains three clear provisions: subsection (1) establishes that qualified patients may create and participate in collective gardens subject to five equally clear conditions; subsection (2) is the self-contained definition of a "collective garden"; and subsection (3) confirms that anyone violating the requirements of subsection (1) is not entitled to protections in Ch. 69.51A RCW. Because there is no ambiguity, there is no need to look beyond the plain language. RCW 69.51A.085 establishes (subject to conditions) the right for qualifying patients to participate in collective gardens within the state.

Without specifying where the ambiguity lies, the City insists that this Court look beyond the plain language and read the stand-alone provisions in RCW 69.51A.085 together with the vetoed provisions within ESSSB 5073 pertaining to the registration and licensing of producers, processors, and dispensers. But a review of ESSSB 5073, as vetoed, demonstrates that RCW 69.51A.085 was adopted as a stand-alone provision of the law. As a whole, ESSSB 5073 *would* have authorized the

Department of Health to issue licenses and regulate the commercial production, processing and dispensing of medical cannabis. But Governor Gregoire's veto of 36 sections of ESSSB 5073 resulted in the elimination of the entire licensing and regulatory scheme.

As written, ESSSB 5073 established a clear distinction between non-commercial "collective gardens" and "licensed" commercial producers, processors, and dispensers. The two types of entities were defined and addressed in different sections and treated differently. For example, Section 201, which would have amended RCW 69.51A.010 (Ch. 69.51A RCW's definition section), would have created definitions for "produce," "production facility," "process," "processing facility," "dispense," and "licensed dispenser." These terms and their variations were terms used throughout other sections in ESSSB 5073, including Section 1102 (codified at RCW 69.51A.140). Section 201 was vetoed. In contrast, collective gardens were not defined within the vetoed Section 201. Collective gardens were defined in only one location – Section 403 (codified at RCW 69.51A.085).

The two types of entities are also distinct in that collective gardens are, by definition not commercial, profit-making entities. Rather, as reflected in the statute, they are a method for resource pooling by

members to provide medical cannabis only to the qualifying patients participating in the garden. *See* RCW 69.51A.085(1)(e) ("no useable cannabis from the collective garden is delivered to anyone other than one of the qualifying patients participating in the collective garden"). *See also* RCW 69.51A.085(2) (definition does not include commercial sales). In contrast, the vetoed portions of ESSSB 5073 would have allowed licensed dispensers to operate commercial businesses and "deliver, distribute, dispense, transfer, prepare, package, repackage, label, relabel, sell at retail, or possess ..." medical cannabis for qualifying patients. ESSSB 5073, Part VII.[1] Similarly, the definitions for processing and production facilities included commercial sale to dispensers. Infra at 10-11.

Perhaps most importantly, collective gardens were excluded from the state licensing framework. Had ESSSB 5073 been signed, "licensed dispensers" would have been required to obtain licenses from the Department of Health, ESSSB 5073, Section 701. Collective gardens, however, were not subject to this same requirement – a license was not needed. RCW 69.51A.085. If the Legislature had intended licensing requirements to carry over to collective gardens, it could have either included a licensing requirement within RCW 69.51A.085, or identified

[1] The Legislature's intent to distinguish commercial operations from private non-commercial operations is also evident in RCW 69.51A.025. Tsang's Br. at 16.

collective gardens as needing a license under the vetoed Part VII of ESSSB 5073. It did neither. Instead, the Legislature imposed five specific conditions on the operation of collective gardens. RCW 69.51A.085(1)(a)-(f). The list is exhaustive and does not identify other applicable rules or regulations that might apply.[2]

RCW 69.51A.085 provides clear and unambiguous authority for qualifying patients to participate in collective gardens. It is not necessary to look beyond the plain language of the statutory language. But if this Court does look beyond the plain language, even when read in context with the remainder of ESSSB 5073, it is clear that the Legislature opted to treat collective gardens distinctly from licensed and regulated commercial production, processing, and dispensing operations.[3]

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[2] While RCW 69.51A.085(1)(d) references the "registration established in section 901" as one means of identifying qualifying patients participating in the collective garden, "registration" was only one of two methods for identification. So long as a copy of each qualifying patient's "valid documentation" (defined by RCW 69.51A.010(7)) is available at the collective garden, the requirement in RCW 69.51A.085(1)(d) is satisfied. There is no need for the vetoed "registration."

[3] The City argues that it would be absurd for it to be legal for an individual qualifying patient to grow medical cannabis at home, but not in a collective. Resp. Br. at 24. But this is not absurd. In addition to the strict requirements for quantity and display of valid documentation, a collective garden has the benefit of allowing its participants to pool resources, and like Tsang, ensure that they have a secure premise without having to risk their homes.

2. RCW 69.51A.140 Does Not Grant Express or Implied Authority for the City to Ban Collective Gardens

In contrast with the stand-alone provisions in RCW 69.51A.085, the "local authority" provisions in RCW 69.51A.140 (ESSSB 5073, Section 1102) must be read in context with the remaining provisions in ESSSB 5073. Although RCW 69.51A.140 references the ability for cities to adopt zoning, licensing, health and safety and taxing requirements, when viewed in context, this provision was part of the larger extensive regulatory scheme that ESSSB 5073 sought to establish. Read in context, it is clear that the provision was intended to apply to those that would have been licensed by the State to produce, process and dispense cannabis.

For example, RCW 69.51A.140 refers to imposing zoning requirements on "licensed dispensers" three times. But as discussed above, the term "licensed dispenser" was defined, but vetoed in ESSSB 5073, Section 201. Because there is no such entity as a "licensed dispenser," that portion of RCW 69.51A.140 is simply of no effect.

Similarly, while the first sentence in RCW 69.51A.140 might appear to grant broad regulatory authority to local government, the Legislature granted that authority pertaining only to the "production,

processing, or dispensing of cannabis ... " These are the same three words defined and used throughout the vetoed sections of ESSSB 5073 in order to establish the proposed licensed and regulated commercial system.

For example, the vetoed definition for a "production facility" means:

> The premises and equipment where cannabis is planted, grown, harvested, processed, stored, handled, packaged, or labeled by a licensed producer *for wholesale, delivery, or transportation to a licensed dispenser or licensed processor* ... .

ESSSB 5073, Section 201(24) (emphasis added). Similarly, the vetoed definition for a "processing facility" means:

> the premises and equipment where cannabis products are manufactured, processed, handled, and labeled *for wholesale to licensed dispensers.*

ESSSB 5073, Section 201(22) (emphasis added). Finally, the vetoed definition of a "licensed dispenser" means:

> a person licensed to dispense cannabis for medical use to qualifying patients and designated providers by the department of health in accordance with the rules adopted by the department of health pursuant to the terms of this chapter.

ESSSB 5073, Section 201(12).[4]

The plain language of RCW 69.51A.140, read in context with ESSSB 5073, demonstrates that the Legislature intended to give local governments authority to impose regulations and conditions upon the *commercial* producers, processors, or dispensaries *that would have been licensed* under the proposed regulatory scheme. However, as a result of the partial veto, licenses will not be issued. Without licenses, "producers," "processors," and "dispensers" simply do not exist. Consequently, the first sentence of RCW 69.51A.140 is also of no effect. Because all provisions in ESSSB 5073 related to commercial and licensed producers, processors, and dispensers were vetoed, RCW 69.51A.140 is an orphaned section without effect.

More importantly, nothing in RCW 69.51A.140 provides authority for local governments to regulate or impose additional conditions on the separately defined "collective gardens." Had that been the intent, the Legislature could easily have added the term "collective gardens" to RCW 69.51A.140. Instead, the court defined "collective gardens" separately

[4] *See also, e.g.*, ESSSB 5073, Part VI (vetoed provisions for licensed producers and licensed processors); Part VII (vetoed provisions for licensed dispensers); Part VIII (vetoed "miscellaneous provisions applicable to all licensed producers, processors, and dispensers"); Part IX (vetoed provisions pertaining to patients, providers and "licensed producers, processors, and dispensers").

from producers, processors, and dispensers, and imposed express conditions on their operation within RCW 69.51A.085. This Court has consistently concluded that it is not appropriate to add terms to an unambiguous statute where the Legislature chose not to include the language. *See State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *Killian*, 147 Wn.2d at 20 ("Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute."). Because the Legislature did not authorize local regulatory control over collective gardens, RCW 69.51A.140 should not be expanded to include.

Moreover, "[c]ourts will not expand the powers of local government beyond express delegations." *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 694, 169 P.3d 14 (2007); *City of Spokane v. J–R Distributors, Inc.*, 90 Wn.2d 722, 726, 585 P.2d 784 (1978); *see also Lauterbach v. City of Centralia*, 49 Wn.2d 550, 554, 304 P.2d 656 (1956). Here, RCW 69.51A.140 provides local government authority to enact zoning for "producers, processors, or dispensers" – entities that, after the Governor's partial veto, do not exist. The Legislature did not grant zoning authority over "collective gardens" and certainly the Legislature did not grant authority in RCW 69.51A.140 for local governments to ban

collective gardens. Collective gardens are exclusively addressed in RCW 69.51A.085 which both defines and sets forth the list of conditions applicable to them.

3. The City has banned what RCW 69.51A.085 expressly allows

The City begins its preemption argument by outlining its general authority as a non-charter code city to adopt zoning. Resp. Br. at 30-32. But, as the City recognizes, its authority has definite limits. As this Court explained in *Biggers:*

> We begin our constitutional analysis with article XI, section 11 of the Washington Constitution. Section 11 includes a specific exception to its simple statement of the general police powers of local governments: "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.*" (Emphasis added.); *see also, e.g., HJS Dev., Inc. v. Pierce County,* 148 Wash.2d 451, 482, 61 P.3d 1141 (2003) ("Local jurisdictions may enact ordinances upon subjects already covered by state legislation if their enactment does not conflict with state legislation" (citing *Lenci v. Seattle,* 63 Wash.2d 664, 670, 388 P.2d 926 (1964)).
>
> Any grant of police power to local government is subject to constitutional limitation, which is judicially enforced. "Our cases uniformly state that exercises of

> the police power are subject to judicial review." *Petstel, Inc. v. County of King*, 77 Wash.2d 144, 154, 459 P.2d 937 (1969).

Biggers, 162 Wn.2d at 693-94.

Article XI, Section 11, requires a local law to yield to a state statute on the same subject matter on either of two grounds: if the statute "preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists such that the two cannot be harmonized." *City of Tacoma v. Luvene*, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992); *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991).

a. RCW 69.51A.085 preempts the field

"Preemption occurs when the Legislature states its intention either expressly or by necessary implication to preempt the field." *Brown*, 116 Wn.2d at 560. Where the Legislature is silent as to its intent, the Court looks to the purpose of the statute and "the facts and circumstances upon which the statute was intended to operate." *Id.* In *Brown*, for example, the Court upheld a municipal law restricting the sale of fireworks based on express language in the state law, RCW 70.77.250(4), defining the state standards as "minimum" and providing express authority for the adoption of local rules "more restrictive than state law... ." *Id.*

In sharp contrast, RCW 69.51A.085, unlike *Brown*, makes no reference to local laws, local rules, or local governments. And, although RCW 69.51A.140 left room for local jurisdiction to impose restrictions on (but not prohibit) "producers, processors, or distributors" and "licensed distributors," it does not mention or imply application to "collective gardens." The Legislature has stated its intention to preempt the field as it relates to collective gardens through plain language, and by necessary implication. By making RCW 69.51A.085 the only provision addressing collective gardens, making no reference to local regulations or other requirements, and omitting any reference to collective gardens in RCW 69.51A.140, the Legislature has made clear that RCW 69.51A.085 contains the entire field of requirements for collective gardens.

In addition, the Legislature has made it clear that medical cannabis is exclusively controlled by state law. All patients and caregivers must obtain an identification card issued by the Department of Health. Further, state law provides the only basis by which it can be determined whether a patient, caregiver, or collective garden is authorized to obtain or use cannabis. No entity other than the State may authorize the use of medical cannabis or alter the conditions or requirements in either RCW 69.51A.040 or .043.

b. The City's ban on collective gardens directly conflicts with RCW 69.51A.085

There can be no doubt that Kent's Ordinance 4036 (codified as part of Kent City Code Title 15) conflicts directly with RCW 69.51A.085. Ordinance 4036 outright prohibits collective gardens in all zoning districts within the City of Kent. KCC 15.08.290.A. Ordinance 4036 declares also that violation of the prohibition against collective gardens is a "public nuisance" and subject to mandatory abatement, as well as civil and criminal penalties. KCC 15.08.290.B.

The test for whether an ordinance is in conflict with a general law promulgated by the Legislature is simply whether the "ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Weden v. San Juan Cy.*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998) (quoting *City of Bellingham v. Schampera,* 57 Wn.2d 106, 111, 356 P.2d 292 (1960). On its face, RCW 69.51A.085 states that "[q]ualifying patients may create and participate in collective gardens ..." if they meet the statute's five conditions. KCC 15.08.290, in direct contrast, outright prohibits the creation of or participation in a collective garden within the City. KCC 15.08.290 forbids and prohibits within the City of Kent what RCW 69.51A.085 expressly permits, and is preempted.

B. RCW 69.51A.085 is not preempted by the Federal Controlled Substances Act (CSA)

The "ultimate touchstone" in analyzing a challenge to state law on federal preemption grounds is Congressional purpose: whether Congress intended the federal law to preempt the state law. *Wyeth v. Levine,* 555 U.S. 555, 565 (2009). Moreover, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditional occupied,' ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Congressional intent may be express or implied. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008). Implied preemption may be either "field preemption," in which Congress has regulated so extensively in an area that it has occupied the field and left no room for state regulation, or "conflict preemption." *Id.*; *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). Conflict preemption can be further separated into direct conflict or impossibility, and obstacle conflict. *Crosby*, 530 U.S. at 372-73.

The City accepts that the federal Controlled Substances Act ("CSA"), on its face, demonstrates Congress's clear intent to avoid both express and field preemption. City's Response at 46, citing 21 U.S.C. § 903.[5] The City instead focuses its preemption argument on a supposed "obstacle conflict." The City position appears to be its belief that for it to respect the protection provided qualified patients under RCW 69.51A.085 to participate in collective gardens free of criminal or civil prosecution creates an "obstacle to the accomplishment of the purpose and objective of the federal CSA." City's Response at 46-52. The City's argument, however, is premised on the incorrect assumption that federal government can count on the City or State to enforce its laws – that the City somehow has a duty to protect the CSA.

[5] While not argued by the City, RCW 69.51A.085 is also not in direct conflict with the federal CSA. Direct conflict, or impossibility, occurs when it is impossible to comply with both federal and state laws. *Wyeth v. Levine*, 555 U.S. 555 (2009); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). More specifically, a direct conflict occurs when federal law prohibits an act that state law *requires*, or vice versa. *Pliva Inc. v. Mensing*, 564 U.S. ___, 131 S. Ct. 2567 (2011). California appellate courts have applied the impossibility analysis in federal preemption challenges to its Compassionate Use Act and local medical marijuana ordinances, and found laws that did not *require* anyone to grow, distribute, or possess marijuana did not create a "positive conflict ... so that the two cannot consistently stand together" as prescribed by 21 U.S.C. § 903. *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734 (2010); *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798 (2008), *cert. denied*, 129 S. Ct. 2380 (2009); *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (2007), *cert. denied*, 555 U.S. 1044 (2008). An individual may comply with both state and federal law simply by choosing not to participate in a collective garden.

Recent challenges to medical marijuana laws in California brought on "obstacle preemption" grounds have similarly argued that allowing marijuana-related activities undermines federal law enforcement efforts. *See, e.g., Qualified Patients Ass'n v. City of Anaheim,* 187 Cal. App. 4th 734, 760 (2010); *County of San Diego v. San Diego NORML,* 165 Cal. App. 4th 798, 827 (2008), *cert. denied,* 129 S. Ct. 2380 (2009). These arguments fail, however, because they rest on the faulty premise that the federal government can conscript local actors in pursuit of its goals.

> The city further explains "[t]he 'obstacle' to federal goals presented by Section 11362.775 is the creation of the exemption for collectives," which is "being abused" "by allowing the diversion of 'medical' marijuana to those not qualified to use it." But the city's complaint is thus *not* that state law amounts to an obstacle to federal law, but that "abuse[ ]" or violation of state law does. These circumstances call for enforcement of the state law, not its abrogation. Upholding the law respects the state's authority to legislate in matters historically committed to its purview.
>
> In any event, obstacle preemption only applies if the state enactment undermines or conflicts with federal law to such an extent that its purposes " 'cannot otherwise be accomplished....' " (*Crosby, supra,* 530 U.S. at p. 373–374,) ... . Preemption theory, however, is not a license to commandeer state or local resources to achieve federal

> objectives. As Judge Kozinski has explained: "That patients may be more likely to violate federal law if the additional deterrent of state liability is removed may worry the federal government, but the proper response—according to *New York* and *Printz*—is to ratchet up the federal regulatory regime, *not* to commandeer that of the state." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (original italics)(Kozinski, J., concurring).

Qualified Patients Ass'n, 187 Cal. App. 4th at 760-61.

The Supreme Court has confirmed that the Tenth Amendment restrains Congress from both requiring a state to enact or keep on its books any law requiring or prohibiting certain acts, *New York v. U.S.*, 505 U.S. 144, 166 (1992), and also from commandeering state actors to enforce federal laws:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible

> with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

Printz v. United States, 521 U.S. 898, 935, (1997). Since the federal government cannot, as a constitutional matter, count on state resources to enforce its laws, a state's decision to afford qualified patients the right to participate in collective gardens without fear of criminal or civil prosecution under state or local laws cannot be said to undermine federal law enforcement. The federal government's remedy is to increase deployment of its own law enforcement forces:

> That patients may be more likely to violate federal law if the additional deterrent of state liability is removed may worry the federal government, but the proper response—according to *New York* and *Printz*—is to ratchet up the federal regulatory regime, *not* to commandeer that of the state.

Conant v. Walters, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring; footnote omitted).

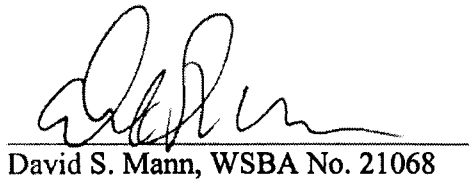
RCW 69.51A.085 and the protection it provides for qualified patients to participate in collective gardens free of criminal or civil prosecution, does not create an "obstacle" to the accomplishment of the purpose and objective of the federal CSA and is not preempted.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the superior court's October 5, 2012, orders dismissing Tsang et al.'s action for declaratory judgment and declare the City of Kent's Ordinance 4036 preempted by state law and null and void. Further, because the superior court's permanent injunction was based on an error of law, the Court should also reverse the superior court's injunction.

Respectfully submitted this 15th day of May, 2013.

GENDLER & MANN, LLP



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DECLARATION OF SERVICE

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I, DENISE BRANDENSTEIN, under penalty of perjury under the laws of the State of Washington, declare as follows:

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Subject: RE: Reply Brief for filing

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Subject: Reply Brief for filing

Attached is a PDF copy for filing of Reply Brief of Appellant Tsang, and our Declaration of Service.

Case: Cannabis Action Coalition, et al. v. City of Kent, et al.

Case No.: 88079-4

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