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No. 70396-0-I

DIVISION ONE OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

CANNABIS ACTION COALITION, ET AL.,

Appellants

V.

CITY OF KENT, ET AL.,

Respondents

BRIEF OF RESPONDENT CITY OF KENT

(In Response to Late Brief of Appellant Sarich)

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I. INTRODUCTION

Respondent, city of Kent, filed its first Brief of Respondent which was received by the Supreme Court on March 18, 2013. On July 2, 2013, 2013, after the Supreme Court denied direct review, Appellant Sarich was granted leave to file a late Brief of Appellant. The City submits this Brief of Respondent in response to Appellant Sarich's late Appellate Brief.

In this brief, the City goes to great effort to explain what amounts to an extremely confusing statutory structure. This structure is the result of attempts to amend Ch. 69.51A RCW, the Medical Cannabis Act (hereinafter also referred to as the "MCA"), through a contentious legislative process that produced ESSSB 5073 and a gubernatorial veto which gutted the bill. The statutory interpretation and arguments set forth below are not a regurgitation of the same interpretation and arguments in the City's prior Brief of Respondent. To the extent possible, this analysis is intended to be complimentary.

After a thorough analysis of the MCA, and the intent that is apparent by both the existing language and the language of ESSSB 5073 which was vetoed by the governor, it is clear that the relief requested by the Appellants should be denied for the following reasons:

- It is not legal to produce, process, transport, deliver or possess medical cannabis through participation in collective gardens. Thus, the City's zoning prohibition is consistent with state law.

- The MCA was only intended to immunize qualified patients and designated providers from state law criminal and civil consequences. The immunity sections intended by ESSSB 5073 were not intended to apply to city regulations.

- The MCA and the City's zoning prohibition can harmoniously exist, as one need only refrain from participating in a collective garden to comply with both laws.

- The MCA does not expressly preempt city zoning codes, and provides cities with concurrent jurisdiction over zoning of medical cannabis activities.

- A determination by this Court that the MCA allows the production and processing of cannabis through participation in collective gardens, or that cities are required to permit collective gardens within their boundaries, will result in an obstacle to the purpose of the federal Controlled Substances Act ("CSA"), and will result in federal preemption.

II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

A. ASSIGNMENTS OF ERROR

The City assigns no error to the trial court's determinations.

B. STATEMENT OF ISSUES

Appellants' assignments of error raise the following issues for consideration by the Court:

1. Medical cannabis activities engaged in through participation in collective gardens remain illegal in Washington, and only afford participants an affirmative defense to state criminal and civil charges.

2. The City has the authority to zone for and prohibit medical Cannabis collective gardens.

3. The City's collective garden zoning prohibition is not preempted by, or in conflict with, the general laws of Washington.

4. A determination that it is legal to produce and process cannabis, or that the City is required to permit collective gardens, will result in federal preemption of the MCA.

5. The trial court did not abuse its discretion when it enjoined Appellants from violating the City's zoning code.

6. Appellant Sarich has failed to carry his burden of establishing standing.

III. STATEMENT OF THE CASE

On June 5, 2012, the Kent City Council passed Ordinance 4036. (CP 334-341; Appendix A). Ordinance 4036 became effective on June 13, 2012, and amended the City's zoning code, which is found in Title 15 of the Kent City Code ("KCC"). Ordinance 4036 added a new section 15.02.074 to the KCC, which defined collective gardens, and a new section 15.08.290, which prohibited collective gardens in all zones of the

City. (CP 334-341). Ordinance 4036 also declared that a violation of the ban on collective gardens constitutes a nuisance. (CP 334-341).

On June 5, 2012, Appellants filed suit in the King County Superior Court seeking, among other things, a judgment declaring the City's ordinance unconstitutional and in conflict with state law. (CP 1-34). Appellants appeared in their individual capacities. The City filed a counterclaim seeking injunctive relief. (CP 658-757).

With the exception of Deryck Tsang, Appellants were not citizens of the City, and maintained no business within the City. Arthur West was a citizen of Olympia, John Worthington was a citizen of Renton, and Steve Sarich was a citizen of Seattle. (CP 4; 8). The non-resident litigants did not own or operate a business in the City, they had never applied for a business license or any type of building permit in the City, and had never paid utility fees in the City. (CP 371-379). Appellant Deryck Tsang alleged that he resided in Kent and operated a medical cannabis collective in the West Valley Business Park at 19011 68th Ave S., Ste A-110, Kent, WA 98032. (CP 4; 8; 196; 198).

Cross-motions for summary judgment were heard on October 5, 2012. The trial court granted the City's motion for summary judgment, and issued a permanent injunction enjoining Appellants from participating

in a collective garden in the City.[1] (CP 553-554; 558-560). The court denied Appellants' motion for summary judgment. (CP 561-562).

With the exception of the Cannabis Action Coalition, the Plaintiff's at the trial court level appealed.[2] Subsequent to the filing of most of the parties' briefs in this matter, Mr. Sarich obtained permission of the Court to file a late Brief of Appellant.

IV. ARGUMENT

A. MEDICAL CANNABIS ACTIVITIES ENGAGED IN THROUGH PARTICIPATION IN COLLECTIVE GARDENS REMAIN ILLEGAL IN WASHINGTON, AND ONLY AFFORD PARTICIPANTS AN AFFIRMATIVE DEFENSE TO STATE CRIMINAL AND CIVIL CHARGES.

1. BRIEF HISTORY OF CH. 69.51A RCW

Cannabis is classified as a Schedule I controlled substance under state and federal law. RCW 69.50.204; 21 U.S.C. § 812 (c). This classification is based upon a determination that cannabis has a high potential for abuse and no accepted medical use. RCW 69.50.203 – 204; 21 U.S.C. § 812 (b) – (c).

In 1998, Washington voters approved Initiative 692, later codified as Ch. 69.51A RCW. By 2010, after two amendments, the chapter provided a method whereby users of medical cannabis could become

[1] Mr. Tsang continues to operate his collective garden pursuant to a temporary stay of the injunction issued by the Supreme Court Commissioner on December 5, 2012.
[2] Arthur West appealed separately, but failed to file a Brief of Appellant.

"qualified patients" and those who supplied limited amounts of cannabis to qualified patients could become "designated providers." These qualified patients and designated providers would have an affirmative defense to various criminal charges in the event they met certain conditions. The possession, manufacture, and delivery of medical cannabis was still a crime in Washington. *State v. Fry,* 168 Wn.2d 1, 7, 228 P.3d 1 (2010).

In 2011, the legislature passed ESSSB 5073. (Appendix B). The underpinnings of ESSSB 5073 were found in the scheme of state licensing for the production, processing, and dispensing of cannabis, as well as the state registry, participation in which was a prerequisite to state legalization of any medical cannabis activity.

Prior to signing ESSSB 5073, the governor received a stern warning from the federal government. On April 14, 2011, Washington state's United States Attorneys, speaking on behalf of the Department of Justice, warned the governor that state workers carrying out the duties of the licensing and registration system would not be immune from liability under the federal Controlled Substances Act ("CSA"). (CP 290-292). In light of these warnings, the governor vetoed 36 of the 58 sections of ESSSB 5073, including the state licensing and registry systems. The governor left intact Sections 401 & 402 (now codified in RCW

69.51A.040 - .043) which collectively maintain the affirmative defense.[3] She also left intact the provision for collective gardens now codified in RCW 69.51A.085. Finally, she left intact city authority to zone for medical cannabis uses now codified at RCW 69.51A.140.

2. WHEN INTERPRETING THE MCA, THE COURT MUST REVIEW THE CHAPTER AS A WHOLE, AND CONSIDER VETOED LANGUAGE TO FIND THE CORRECT INTERPRETATION OF THE STATUTE.

If there ever was a chapter of the Revised Code of Washington worthy of application of the rules of statutory construction, it is Ch. 69.51A RCW, with its recent amendment that was subject to evisceration through the governor's veto powers. The rules of statutory construction are well settled by the Washington Supreme Court, which held:

> The meaning of a statute is inherently a question of law and our review is de novo. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000); *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 352, 932 P.2d 158 (1997). The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and

[3] It is important to note, when considering what remains of the various sections of ESSSB 5073, that in accordance with Const. art. 3, § 12 (amend.62), the governor may veto only entire sections of bills. (see also *Wash. State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 670, 763 P.2d 442 (1988). Thus, the governor was without authority to simply carve out references to the registry system that appear throughout the MCA. As a result of this limited veto power, a number of sections remain in the statute that refer to the registry but only to give effect to other concepts established by ESSSB 5073.

> purpose. *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004); *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question. *Campbell & Gwinn*, 146 Wn.2d at 11. If, after this inquiry, the statute can reasonably be interpreted in more than one way, then it is ambiguous and resort to principles of statutory construction to assist in interpreting it is appropriate. *State ex rel. Citizens Against Tolls(CAT) v. Murphy*, 151 Wn.2d 226, 243, 88 P.3d 375 (2004); *Campbell & Gwinn*, 146 Wn.2d at 12.

*Dep't of Labor & Indus. v. Gongyin,*154 Wn.2d 38, 44, 109 P.3d 816 (2005).

Where an ambiguity exists, the court must attempt to harmonize or reconcile the language of a statute in order to give effect to all of its provisions. *State ex rel. Royal v. Bd. of Yakima County Comm'Rs,,* 123 Wn.2d 451, 465, 869 P.2d 56 (1994). The court may look to legislative history, including vetoed language, to find the correct interpretation of the statute after determining it is impossible to give effect to the legislative intent by harmonizing existing statutory provisions. *Id.* at 465.

3. CH. 69.51A RCW IS NOT INTENDED TO RESTRICT CITY REGULATION OF MEDICAL CANNABIS ACTIVITIES.

By the clear terms of Ch. 69.51A RCW, the portions of the chapter protecting qualified patients from arrest, prosecution, other criminal or civil sanctions was never intended to restrict city regulation of medical

cannabis. Pursuant to ESSSB 5073, RCW 69.51A.005, entitled, "Purpose and intent," was amended by the legislature.[4] This section, which was not impacted by the governor's veto, now provides:

> (1) Therefore, the legislature intends that:
> (a) Qualifying patients . . . *shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under* <u>*state*</u> *law based solely on their medical use of cannabis, notwithstanding any other provision of law*;
> (b) Persons who act as designated providers . . . *shall also not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under* <u>*state*</u> *law, notwithstanding any other provision of law, based solely on their assisting* with the medical use of cannabis.[5]

RCW 69.51A.005 (*emphasis added*). This legislative intent was carried through to the statute that dictates how a person can avoid state criminal or civil liability. RCW 69.51A.040, also a product of ESSSB 5073 entitled, "Compliance with chapter – Qualifying patients and

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[4] Prior to the amendment, RCW 69.51A.005 provided:

> (1) Therefore, the people of the state of Washington intend that:
> (a) Qualifying patients . . . *shall not be found guilty of a crime under* <u>*state*</u> *law* for their possession and limited use of marijuana;
> (b) Persons who act as designated providers . . . *shall also not be found guilty of a crime under* <u>*state*</u> *law* for assisting with the medical use of marijuana.

[5] Appellants cite RCW 69.51A.005 to support their argument that it is legal to participate in a collective garden. This statute, which begins with "(1) The legislature finds that" is nothing more than a statement of legislative intent. It is not operative language. When the legislature employs the words "the legislature finds," it sets forth policy statements that do not give rise to enforceable rights and duties. *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004) (citing *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 135, 139, 588 P.2d 185 (1978)). Such declarations and recitals, while not operative rules of action, may play an important part in determining what action shall be taken. *Whatcom County v. Langlie*, 40 Wn.2d 855, 863, 246 P.2d 836 (1952) (citing *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523 (1915)).

designated providers not subject to penalties – Law enforcement not subject to liability" provides,

> 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* . . .

RCW 69.51A.040 (*emphasis added*).

The Court must assume that the use of the word "state" has significance and must give it meaning.

> [E]ach word of a statute is to be accorded meaning. *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971) . Whenever possible, statutes are to be construed so 'no clause, sentence or word shall be superfluous, void, or insignificant.' *Kasper v. City of Edmonds*, 69 Wn.2d 799, 804, 420 P.2d 346 (1966) (quoting *Groves v. Meyers*, 35 Wn.2d 403, 407, 213 P.2d 483 (1950)). A court 'is required to assume the Legislature meant exactly what it said and apply the statute as written.' *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).

HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 452, 210 P.3d 297(2009). With these interpretive rules in mind, it is evident that the intent of the statute was to protect qualified patients and designated providers from state criminal law and civil consequences, and was not intended to restrict city regulation. The City posits that this is a very sensible approach by the legislature. As will be discussed later, a state law

that restricts city regulation in regards to an act that constitutes a federal criminal offense will be found to frustrate the purpose of federal law, and thus will be deemed in conflict with federal law.

4. THE REMNANTS OF THE REGISTRY AND THEIR RELATION TO THE AFFIRMATIVE DEFENSE AND COLLECTIVE GARDENS.

The legislature intended to immunize qualified patients and designated providers from state law criminal and civil consequences only if they were registered with the state registry. This intent was made clear in the first section of ESSSB 5073, a section which was vetoed by the governor, which provided in part:

> (2) The legislature intends to amend and clarify the law on the medical use of cannabis so that:
> (a) Qualifying patients and designated provides 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 marijuana.

Laws of 2011, ch. 181 § 101 (*emphasis added*).

Part IX, Section 901 of ESSSB 5073 was entitled, "Secure Registration of Qualifying Patients, Designated Providers and Licensed Producers, Processors, and Dispensers." While this section of ESSSB 5073 established a state registration system, defined how information in the registry would be retained by the state, and the conditions under which law enforcement could access the information, it said nothing about how

registration impacted the legality of cannabis production, processing distribution or possession. It did, however, specify that "registration in the system shall be optional for qualifying patients and designated providers, not mandatory . . . ." Laws of 2011, ch. 181 § 901. When the entire registration system was vetoed by the governor, legalization of medical cannabis went with it.

Section 401 of ESSSB 5073, now codified at RCW 69.51A.040, was the only statute that established how registration would affect the legal status of the qualified patient or designated provider engaging in what would otherwise be criminal conduct. The statute provides:

> 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* . . . if:
> (1)(a) The qualifying patient or designated provider possesses no more than fifteen cannabis plants and:
> (i) No more than twenty-four ounces of useable cannabis;
> (ii) No more cannabis product than what could reasonably be produced with no more than twenty-four ounces of useable cannabis; or
> (iii) A combination of useable cannabis and cannabis product that does not exceed a combined total representing possession and processing of no more than twenty-four ounces of useable cannabis.

> (b) If a person is both a qualifying patient and a designated provider for another qualifying patient, the person may possess no more than twice the amounts described in (a) of this subsection, whether the plants, useable cannabis, and cannabis product are possessed individually or in combination between the qualifying patient and his or her designated provider;
> *(2) The qualifying patient or designated provider presents his or her proof of registration with the department of health, to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;*
> *(3) 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 (*emphasis added*). Clearly, this statute expresses the concept that there would be no legalization without registration in the state registry. As Appellants point out, collective gardens were mentioned only in RCW 69.51A.085. At discussed below, that statute requires registration, and there is no exception to the registration requirement for participants in collective gardens found in either RCW 69.51A.085 or RCW 69.51A.040. Clearly, if one wanted to engage in legal medical cannabis activity, registration in the state registry was a requirement of all qualified patients and designated providers, <u>even those participating in a collective garden</u>. Had the legislature intended an exception to the registration requirements for collective garden participants, it would have

stated this in RCW 69.51A.040 or RCW 69.51A.085 (the collective garden statute).

RCW 69.51A.040 still exists despite the fact that the registration requirement of subsections (2) and (3) cannot be met. This is due to the fact that this same statute provides, in subsection (1), the cannabis quantities that a person may possess in order to satisfy the requirements of the affirmative defense, which is found in RCW 69.51A.043. Put another way, the affirmative defense found in RCW 69.51A.043 cannot exist without the language found in subsections (2) and (3) of the statute that established legalization through registration.

RCW 69.51A.043 provides that in the event a qualified patient or designated provider is not registered with the state registry [which we know cannot be done due to the governor's veto], she may have an affirmative defense if she possesses no more than the permissible amount of cannabis set forth in subsection (1) of RCW 69.51A.040. RCW 69.51A.043 provides:

> Failure to register -- Affirmative defense
> (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 . . .
> *(b) The qualifying patient or designated provider possesses no more cannabis than the limits set forth in RCW 69.51A.040(1);*

RCW 69.51A.043 (*emphasis added*). The reference to RCW 69.51A.040 that appears in RCW 69.51A.043(1)(b) is of critical importance, as it is the only reason that RCW 69.51A.040 still exists. Had RCW 69.51A.040 been vetoed by the governor, subsection (1)(b) which states, "The qualifying patient or designated provider possesses no more cannabis than the limits set forth in RCW 69.51A.040(1)" would be rendered unachievable, which would have jeopardized the affirmative defense that had long been the foundation of the MCA. Due to the constitutional limitations of the governor's veto power, the governor was not permitted to veto only certain sentences of RCW 69.51A.040. Not wanting to eliminate the affirmative defense, she left RCW 69.51A.040 intact, but only for the purpose of maintaining the affirmative defense in RCW 69.51A.043. The result is that the conditions of lawful possession cannot be met, because there is no registry system, but the affirmative defense remains available.

5. UNABLE TO SATISFY THE REGISTRATION REQUIREMENTS OF RCW 69.51A.040, COLLECTIVE GARDEN PARTICIPANTS MAY ONLY ASSERT AN AFFIRMATIVE DEFENSE.

Without question, RCWs 69.51A.040 and .043 apply to collective gardens. First, the clear legislative intent of RCW 69.51A.040 was that <u>every</u> qualifying patient or designated provider must have been registered with the state registry in order to satisfy the requirements of legal cannabis

possession, manufacture, or delivery, whether the engaged in such activity through a collective garden or otherwise. There is no exception for collective gardens in RCW 69.51A.040.

Second, the collective garden statute itself acknowledges that a participant would be registered, but then allows for the affirmative defense set forth in RCW 69.51A.043 if he or she were not registered. The collective garden statute is found in RCW 69.51A.085, and provides:

> (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.*

RCW 69.51A.085 (*emphasis added*). Subsection (3) of RCW 69.51A.085 provides that a person who does not comply with subsection (1) is not entitled to the protections of the MCA. The protections of the MCA included either conduct deemed legal by virtue of registration in accordance with RCW 69.51A.040 [impossible to achieve due to the governor's veto] or an affirmative defense by virtue of the application of RCW 69.51A.043.

Subsection (1)(c) of RCW 69.51A.085 recognizes that there were two options for the qualified patient or designated provider participating in the collective garden: (1) either provide valid documentation of a health care provider and be subject to criminal charges but retain an affirmative defense, or (2) be registered with the state registry and participate in collective garden activities lawfully. Without either of these two requirements met, the collective garden participant could not claim either of the protections (legality or affirmative defense) provided by the statute. Again, as we know, the registration system was vetoed by the governor, and therefore, lawful participation in a collective garden is now

impossible. What remains, then, is only the availability of the affirmative defense, which is defined by application of both RCWs 69.51A.040 and .043.

6. THE COLLECTIVE GARDEN STATUTE CANNOT BE INTERPRETED IN ISOLATION. TO DO SO WOULD CAUSE ABSURD RESULTS.

Appellants ask this court to read RCW 69.51A.085 in isolation, completely independent of the registration requirement in RCW 69.51A.040. Appellants argue that the language of RCW 69.51A.085 which states, "Qualifying patients may create and participate in collective gardens . . . ." provides legal authority to grow cannabis without the threat of criminal charges completely independent of the registration requirement that was intended by RCW 69.51A.040 and its reference to Section 901 of ESSSB 5073.

Not only would this interpretation require the Court to ignore the attempt by the legislature to create a detailed registration system, it would lead to a number of absurd results. First, while it would be illegal for a qualifying patient to grow medical cannabis in the privacy of her own home, it would be lawful for her to do so in a collective garden setting. This is so because, without question, one person alone cannot lawfully grow cannabis for personal use due to the inability to register with a state registry (there is no statutory section like the collective garden statute that would apply to a personal grow).

Second, the collective garden statute states:

> (a) A *collective garden* may contain no more than fifteen plants per patient, up to a total of forty-five plants.

> (b) 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.

(RCW 69.51A.085(1), *emphasis added*). The statute speaks to the amount of useable cannabis that the *collective garden* may maintain, but it does not speak to personal possession of cannabis by the qualifying patients or designated providers participating in the collective garden (because an individual's lawful possession was addressed by the registry requirement of RCW 69.51A.040). As a result, under the Appellants' tortured interpretation of the statutory structure of the MCA, the collective garden could possess cannabis legally, but the individual qualifying patients and designated providers participating in the collective, who would be unable to register, could not.

In addition, the adoption of the argument that the collective garden statute provides an independent basis to legally grow cannabis would require the Court to ignore subsection (3) of RCW 69.51A.085, which provides:

> 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 (*emphasis added*). This subsection demonstrates that the protections of the MCA were provided in other sections of the MCA, namely RCWs 69.51A.040 and .043. If it were true that RCW 69.51A.085

provided a lawful way for a qualifying patient to produce, process or possess cannabis independent of the registry requirement, there would be no need to refer to the "protections of this chapter." The Appellant's interpretation of the collective garden statute would render RCW 69.51A.085(3) meaningless.

7. THE IMPACT OF KURTZ

The City anticipates that Appellants will rely on a recent decision of our Supreme Court for the proposition that the MCA provides for legal cannabis use, as opposed to an affirmative defense. In *State v. Kurtz*, ___ Wn. 2d ___, (No. 87078-1, September 19, 2013), the Supreme Court overruled Division II of the Court of Appeals, which held that the MCA was the controlling law on affirmative defenses, and therefore, the use of cannabis could not form the basis of a medical necessity defense. In a close five to four decision, the Court stated, "in 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense." *State v. Kurtz,* No. 87078-1, Slip Op. at 11. The Court also stated that "[o]ne 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." *Id.*

First, it can be assumed that Mr. Kurtz was charged with marijuana related offenses under Ch. 69.50 RCW, which are state laws criminal

offenses, and not city ordinance offenses. These statements must not be taken out of context. Importantly, there is no question that the legislature did indeed amend the MCA in order to make "qualifying" cannabis use a legal use. Not addressed by the Court in *Kurtz,* however, is the impact of the governor's veto, which made such legalization without effect. In addition, the Court in *Kurtz* quoted a significant portion of RCW 69.51A.005, which is not operative language, but rather the legislature's statement of intent in passing ESSSB 5073. (see argument infra). As noted above, this intent section does not give rise to enforceable rights. *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d at 203.

The purpose of making these statements is also important. The Court was addressing the impact the MCA had on the ability of one to use the medical necessity defense. It is clear that the Court was not attempting to declare, after analysis of the statute, that cannabis is legal. Rather, the Court was pointing out that the legislature only intended to make "qualifying" cannabis use legal, and thus, some cannabis use would remain illegal. As the Court stated, "Only where one's conduct falls outside of the legal conduct of the Act, would a medical necessity defense be necessary." *Id.* Thus, according to the Court, there was still a need for the medical necessity defense because the MCA did not legalize all cannabis use.

Moreover, it is significant that the charges Mr. Kurtz was facing arose in 2010, prior to the effective date of ESSSB 5073. There was simply no need for the Supreme Court to venture into the difficult statutory analysis that presents itself in this case, and it should be noted that neither the prosecutor nor Mr. Kurtz addressed the issue in briefing. (Appendix C). Had the Court performed the statutory analysis, it would have found that the paragraph in the *Kurtz* case which the above statements were made was of no significance to its holding, as the remainder of its decision rests, in part, on the concept that the presence of a statutory affirmative defense does not automatically nullify the medical necessity defense.

The statements made in the *Kurtz* case are dicta. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *Pierson v. Hernandez,* 149 Wn. App. 297, 305, 202 P.3d 1014 (2009) (quoting *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683 n.16, 964 P.2d 380 (1998)), (quoting *State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992)). Stated in the negative,

> [t]he Supreme Court's interpretation of a statute does not constitute dictum if disputing parties placed the question of the meaning of the statute before the court in a case in which the statute's meaning is central to the dispute, the question was thoroughly briefed and argued by the parties,

> and the court deliberately expressed itself on the statute's meaning in resolving the case.

City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 53, 959 P.2d 1091 (1998). In *Kurtz*, the statements in question were not necessary to its decision, apply to statutory language passed after Mr. Kurtz was alleged to have engaged in the criminal conduct, were not briefed by either party in the case, did not receive the analysis the complicated statute warranted, and were made in passing.

B. THE CITY HAS THE AUTHORITY TO ZONE FOR AND PROHIBIT MEDICAL CANNABIS COLLECTIVE GARDENS.

1. THE CITY'S GENERAL ZONING AUTHORITY.

Kent is a non-charter code city formed pursuant to Title 35A RCW. KCC 1.01.120. As a result, it enjoys the broadest of powers available to a city in Washington. As set forth in RCW 35A.11.050, entitled, "Statement of purpose and policy,"

> The general grant of municipal power conferred by this chapter and this title on legislative bodies of noncharter code cities . . . is intended to confer the greatest power of local self-government consistent with the Constitution of this state and shall be construed liberally in favor of such cities.
>
> RCW 35A.11.050
>
> Pursuant to RCW 35A.11.020, the City:

> may adopt and enforce ordinances of all kinds relating to and regulating its local or municipal affairs and appropriate to the good government of the city . . . " [and] "shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law . . . In addition . . . the legislative body . . . shall have any authority ever given to any class of municipality or to all municipalities of this state . . . .

When there is any doubt regarding its authority, such doubt must be resolved "liberally in favor" of the City. (See RCW 35A.11.050).

Authority to zone rests with the City. RCW 35A.63.100 provides the City with the authority to divide the area within its boundaries into appropriate zones within which specific standards, requirements, and conditions may be provided for regulating the use of public and private land and buildings. This authority is consistent with the City's general police powers.

Pursuant to Article XI, Section 11 of the Washington Constitution, the City 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. It is well established that zoning ordinances are constitutional in principle as a valid exercise of this police power. *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 150, 995 P.2d 33 (2000) (internal cites omitted). Moreover, the Washington Supreme Court has held repeatedly that the regulation of cannabis is a valid exercise

of the government's police powers. *Seeley v. State,* 132 Wn.2d 776, 799, 940 P.2d 604 (1997); citing *State v. Smith*, 93 Wn.2d 329, 339, 610 P.2d 869 (1980). See also *State ex rel. Hendrix v. Waters,* 89 Wn. App. 921, 927, 951 P.2d 317 (1998). It follows that zoning for uses that involve cannabis constitutes a valid exercise of the City's police power.

It is evident, pursuant to Title 35A RCW and Article XI, Section 11 of the Washington Constitution, that the power to zone for medical cannabis land uses rests with the City unless that power is limited by the legislature through a specific statute, or when its exercise of authority directly conflicts with the general laws of the state.

2. NOTHING IN THE MCA LIMITS THE CITY'S GENERAL ZONING AUTHORITY. IN FACT, THE MCA SPECIFICALLY PERMITS THE CITY'S COLLECTIVE GARDEN ZONING PROHIBITION.

In order to find that the MCA limits the City's authority to prohibit medical cannabis collective gardens through zoning, the MCA must specifically provide for this limitation. This is in accordance with RCW 35A.11.020 which provides the City with all powers under the constitution "not specifically denied . . . by law." A comprehensive review of the MCA will find nothing that specifically denies the City authority to prohibit medical cannabis collective gardens.

Appellants argue that RCW 69.51A.140 limits the City's authority to prohibit medical cannabis collective gardens. To the contrary, RCW

69.51A.140, which speaks to the authority of cities to regulate the production, processing, or dispensing of cannabis, provides:

> 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. . .

RCW 69.51A.140. The first full sentence of this statute provides cities with the specific authority to zone for the "production, processing, or dispensing" of cannabis. (see supra regarding concurrent jurisdiction).

Appellants argue that this language provides a city with authority to zone only "licensed" production, processing or dispensing facilities. This argument fails. ESSSB 5073, prior to the governor's veto, would have significantly overhauled the definitions section of the MCA found in RCW 69.51A.010. While this definition overhaul was vetoed by the governor, it does supply the Court with an indication of the legislature's intent. This section was to establish specific definitions of "licensed dispenser," "licensed processor" and "licensed producer." (Laws of 2011 c. 181§ 201). Simply put, had the legislature intended RCW 69.51A.140 to apply only to "licensed" producers, processors and dispensers, the

legislature would have used the definitions set forth in RCW 69.51A.010 when referring to them in RCW 69.51A.140. By not including the word "licensed" in describing city authority in regards to zoning, the legislature gave specific authority to cities to zone all businesses that produce, process and dispense cannabis, only limiting that authority with regards to "licensed" "dispensers." Thus, it was the intent of the legislature that cities be permitted to prohibit unlicensed dispensers, licensed and unlicensed producers, and licensed and unlicensed processors.

By definition, a collective garden is nothing more than a mechanism designed for the unlicensed production and processing of cannabis. The collective garden statute provides:

> For the 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 . . . .

RCW 69.51A.085(2) (*emphasis added*). Reviewing RCW 69.51A.085 and RCW 69.51A.140, and keeping in mind the definitions vetoed by the governor, the legislature clearly intended to permit cities to adopt and enforce zoning requirements, including a prohibition, for the unlicensed production, processing and dispensing of cannabis through collective gardens.

In addition, the fact that the legislature specifically chose to limit the ability of a city to prohibit licensed dispensaries, but did not impose this limitation with regards to licensed and unlicensed producers and processors, and unlicensed dispensers, demonstrates the intent of the legislature to affirm the ability of cities to prohibit them. Although the sections of ESSSB 5073 that established licensed dispensers were vetoed, the reference to dispensers in RCW 69.51A.140 is useful in divining legislative intent. "Under the statutory canon *expressio unius est exclusio alterius*, the express inclusion in a statute of the situations in which it applies implies that other situations are intentionally omitted." *In re Det. of Strand,* 167 Wn.2d 180, 190 217 P.3d 1159 (2009) (*citing State v. Delgado,* 148 Wn.2d 723, 729, 63 P.3d 792 (2003). Upon applying this canon to RCW 69.51A.140, it is clear that while the legislature intended to restrict the zoning powers of cities in regards to licensed dispensers, it intended that cities have the authority to prohibit collective gardens.

The effect of the governor's partial veto of ESSSB 5073 does not support a contrary reading of RCW 69.51A.140. The governor's intent is expressed in her veto message, which provides:

> 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.
> 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.

Governor's Explanation of Partial Veto, 2011 c. 181 (April 29, 2011). The governor's statement demonstrates her intent to retain the authority of municipalities to zone for medical cannabis uses, yet ensure that dispensers could not rely on vestigial language to argue that cities must allow licensed dispensers.

The legislature limited the ability to prohibit medical cannabis uses only in regards to licensed dispensers. Certainly, if the legislature wanted to limit the authority of the City in relation to collective gardens, or even unlicensed producers, processors, or dispensers, it could have.[6] Here, the

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[6] Limiting the City's zoning authority, as it did with licensed dispensers, is nothing new to the legislature. It has taken action similar in the past, including:

- RCW 36.70A.200(5) - No city development regulation may preclude the siting of essential public facilities.
- RCW 35A.63.215(1) - City development regulation may not prohibit use of a residential dwelling, located in an area zoned for residential or commercial use, as a family day-care provider's home facility.
- RCW 70.128.140 – Adult family homes are considered a permitted use in all areas zoned for residential or commercial purposes including areas zoned for single-family dwellings.

legislature chose not to limit the City's police power and statutory authority under RCW 35A.63.100 to prohibit collective gardens. Thus, the City's authority in this regard is unrestrained by statute.

C. THE CITY'S COLLECTIVE GARDEN ZONING PROHIBITION IS NOT PREEMPTED BY, OR IN CONFLICT WITH, THE GENERAL LAWS OF THE STATE OF WASHINGTON.

Appellants argue that the City's zoning prohibition is in conflict with and preempted by state law. Appellants bear "a heavy burden" of proving an ordinance unconstitutional. *Lawson v. City of Pasco*, 144 Wn. App. 203, 209, 181 P.3d 896 (2008); citing *Brown v. Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991); *Hous. Auth. v. City of Pasco*, 120 Wn. App. 839, 86 P.3d 1217 (2004). An ordinance is presumptively valid unless proven unconstitutional. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009).

An ordinance may be found to be unconstitutional when it is preempted by state law. *Lawson v. City of Pasco*, 144 Wn. App. at 209. A state statute preempts an ordinance on the same subject if the statute occupies the field, leaving no room for concurrent jurisdiction, or if a conflict exists such that the statute and the ordinance may not be harmonized. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038

(2010); citing *Brown*, 116 Wn.2d at 559. A statute will not be construed as taking away a municipality's power to legislate unless that intent is clearly and expressly stated. *State ex rel. Schillberg v. Everett Dist. Justice Court*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979); *Lawson v. City of Pasco,* 144 Wn. App. at 209.

1. THE CITY'S ORDINANCE IS CONSISTENT WITH THE MCA.

As discussed in detail above, when the legislature passed ESSSB 5073, it intended to establish a system of legalization with registration. Collective gardens were offered as a mechanism to produce and process cannabis. Participation in collective gardens would have been legal only if certain criteria were met, including that all qualifying patients and designated providers be registered with the state registry. There was never an intent to allow a person to lawfully participate in a collective garden without first registering with the state. If the person failed to register, the person's conduct would be illegal under the law, and the person would only have for themselves an affirmative defense to criminal charges.

As we know, the governor vetoed the registry sections found in ESSSB 5073, Section 901. Thus, the ability of a qualifying patient to legally participate in a collective garden has become impossible, participation in a collective garden remains a criminal act, and participants

are only entitled to an affirmative defense to criminal charges if they meet certain conditions.[7] It follows that if participation in collective gardens is not legal under state law, the City's ordinance that prohibits collective gardens is consistent with state law, and not in conflict with it. Kent's zoning prohibition merely prohibits an act that is illegal under the MCA.

2. THE OPERATIVE SECTIONS OF THE MCA DO NOT APPLY TO THE CITY.

As noted above, the portions of the chapter protecting qualified patients from arrest, prosecution, other criminal or civil sanctions were not intended to restrict City regulation of medical cannabis. RCW 69.51A.005 sets forth the clear intent of the legislature that qualified patients and designated providers "shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under *state* law." The intent that the MCA provide a safe harbor from state criminal charges is carried through to the operative section of the MCA, RCW 69.51A.040, which provides:

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[7] The existence of an affirmative defense assumes the existence of underlying criminal conduct to which the defense can be raised. An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1(2010); citing *State v. Votava*, 149 Wn.2d 178, 187-88, 66 P.3d 1050 (2003) (citing *State v. Riker*, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994)). An affirmative defense does not negate any elements of the charged crime. *Id.* In this case, the existence of the affirmative defense assumes that the production, processing, delivery and possession of medical cannabis is illegal in the state of Washington.

> . . . 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* . . . .

RCW 69.51A.040 (*emphasis added*). The legislature meant exactly what it said when it limited the relief from criminal or civil prosecution to state crimes and civil enforcement. (See infra, *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d at 452). The statute contains no language restricting a city's ability to regulate collective gardens.

In this respect, the intent of the legislature in passing ESSSB 5073 was to create a medical cannabis program similar to California's. Recently, the California Supreme Court issued a decision on an issue identical to that being considered in this appeal, and in doing so, reviewed a California constitutional provision regarding city authority that is strikingly similar to Washington's Constitution, and a California medical cannabis statute strikingly similar to that intended by ESSSB 5073.[8]

In *Riverside v. Inland Empire Patients Health and Wellness Center*, 56 Cal 4th 729, 300 P. 3d 494 (2013), the California Supreme Court determined that the city of Riverside's zoning prohibition of

[8] California's constitution with respect to the authority of cities is nearly identical to Article XI, Section 11 of the Washington Constitution, and provides that a "city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws."

medical cannabis dispensaries was not preempted by California statutes that allowed for dispensaries. The Court described the California statutory structure as follows:

> [T]he [Compassionate Use Act] CUA provides that the state law proscriptions against possession and cultivation of marijuana . . . shall not apply to a patient, or the patient's designated primary caregiver, who possesses or cultivates marijuana for the patient's personal medical purposes upon the written or oral recommendation or approval of a physician . . . .
> In 2004, the Legislature adopted the [Medical Marijuana Program] MMP. One purpose of this statute was to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." . . . Accordingly, the MMP provides, among other things, that "[q]ualified patients ... and the designated primary caregivers of qualified patients . . . who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under [s]ection 11357 [(possession)], 11358 [(cultivation, harvesting, and processing)], 11359 [(possession for sale)], 11360 [(transportation, sale, furnishing, or administration)], 11366 [(maintenance of place for purpose of unlawful sale, use, or furnishing)], 11366.5 [(making place available for purpose of unlawful manufacture, storage, or distribution)], or 11570 [(place used for unlawful sale, serving, storage, manufacture, or furnishing as statutory nuisance)]."

Riverside v. Inland Empire Patients Health and Wellness Center, 300 P. 3d at 497. (Appendix D).

Riverside passed an ordinance prohibiting medical cannabis dispensaries and then obtained injunctive relief against a dispensary

operator. On appeal, the California Supreme Court determined that the California CUA and MMP were limited in scope and only provided that "when particular described persons engage in particular described conduct, they enjoy, with respect to that conduct, a limited immunity from specified state marijuana laws." *Riverside v. Inland Empire Patients Health and Wellness Center*, 300 P. 3d at 503. The court determined that California law neither expressly or impliedly preempted local regulation of medical cannabis activities, and upheld Riverside's injunction against medical cannabis dispensaries. *Id.* at 507

In Washington, the intent of the MCA was similarly limited such that particular described people (qualified patients and designated providers registered with the state registry), engaging in particular described conduct (participating in a collective garden in accordance with the terms of RCW 69.51A.085), would enjoy immunity from particular <u>state</u> criminal and civil consequences or laws. Like California law, the MCA was intended to do nothing more and in no way was intended to limit local regulation of medical cannabis land uses. Unlike California law, Washington law was not passed due to the governor's veto, and thus, the intent of legislature in amending the MCA was never even achieved.

3. THE CITY'S ORDINANCE AND THE MCA DO NOT CONFLICT. THEY COEXIST HARMONIOUSLY.

A local ordinance may be preempted by state law when both laws govern the same conduct, and the ordinance "directly and irreconcilably conflicts with the statute." *Lawson*, 168 Wn.2d at 682. Put in more succinct terms, an ordinance is invalid if it "permits what state law forbids or forbids what state law permits." *Id.* If the two may be harmonized, however, no conflict will be found. *Id.* In determining whether an ordinance and statute stand in direct conflict, or whether the two can be harmonized, this Court has repeatedly stated that ambiguities are to be resolved in favor of harmonization, and the court "will not interpret a statute to deprive a municipality of the power to legislate on a particular subject unless that clearly is the legislative intent." *State v. Kirwin,* 165 Wn.2d 818, 826, 203 P.3d 1044 (2009) (*citing HJS Development v. Pierce County,* 148 Wn.2d 451, 480, 61 P. 3d 1141 (2003)).

While the governor's veto resulted in the illegality of collective gardens (one participating in them can only assert an affirmative defense), it is clear there would not have been a conflict in the event the governor had not exercised her veto power. RCW 69.51A.085 does not <u>require</u> (and never intended to require) collective gardens. At most, it was intended to permit them. Conversely, the City's zoning prohibition does

not require any conduct that the MCA would have forbidden. Clearly, the two regulations can coexist, as a person who refrains from establishing a collective garden in Kent is not violating the MCA, and is not violating the City's zoning prohibition.

4. THE MCA CONTAINS NO EXPRESS PREEMPTION OF CITY ZONING AUTHORITY, AND PREEMPTION CANNOT BE IMPLIED.

The City's ordinance would only be invalid under the theory of field preemption if the MCA contained "express legislative intent to preempt the field, or if such intent is necessarily implied." *Lawson*, 168Wn.2d at 679; *Rabon v. City of Seattle,* 135 Wn.2d 278, 287, 957 P.2d 621 (1998). Where a statute provides some measure of concurrent jurisdiction, express legislative intent to preempt the field is absent. *Tacoma v. Luvene*, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992); see also *Rabon,* 135 Wn.2d at 290; citing *Brown*, 116 Wn.2d at 560. In determining whether preemption is implied, "[t]his court 'will not interpret a statute to deprive a municipality of the power to legislate on a particular subject unless that clearly is the legislative intent.'" *HJS Dev. v. Pierce County*, 148 Wn.2d at 481.

In this case, there is no basis to conclude that the MCA expressly preempts a local ordinance prohibiting, as a nuisance, the use of property to produce, process, transport or deliver medical cannabis. There is no

statutory language to support the conclusion that the City's ordinance is expressly preempted.

The MCA is also devoid of any language or legislative history in which the Court could conclude that preemption is implied. As noted, due to the governor's veto, the MCA did not legalize collective gardens. In addition, the MCA was intended only to provide immunity from state criminal and civil consequences.

Finally, the MCA, in RCW 69.51A.140, provides cities with concurrent jurisdiction over the location of every type of medical cannabis land use with the exception of the prohibition of "licensed dispensaries." The statute explicitly allows cites to "adopt and enforce . . . [z]oning requirements" related to medical cannabis activities. RCW 69.51A.140. Thus, in accordance with *Tacoma v. Luvene,* concurrent jurisdiction is obvious, and implied preemption is not possible.

Appellants argue that uniformity in the area of medical cannabis land uses is "necessary to avoid infringement on RCW 69.51A's statutory and constitutional rights." First, there is no statutory or constitutional right guaranteed by the MCA. More important is the fact that as Appellants know, there is absolutely no expression in the MCA of how land use regulations would apply to collective gardens. There is no uniformity specified in the statute. Is it, thus, Appellants argument that medical

cannabis collective gardens may be located anywhere, and may not be subject to any local land use regulation? Appellants are asking this Court to elevate a so called land use "right" to participate in collective gardens above any other use of land in Washington.

In addition, just because a statute may permit someone to engage in an activity does not mean she can engage in the activity free from local regulation. The *Lawson* court, when it determined that a local ordinance prohibiting recreational vehicles within mobile home parks did not conflict with state law pertaining to the same area of law, noted that while the state law regulated certain rights and duties related to recreational vehicles in mobile home parks, it was "not equivalent to an affirmative authorization of their presence . . . nor does it create a right enabling their placement." *Lawson,* 168 Wn.2d at 683. In other words, the fact that the state may regulate an activity does not mean that a city must allow it. Similarly, in an analogous situation involving a local regulation of animals that was challenged on the theory of state preemption, this Court stated, "[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 at 292. In summary, even if this Court determines that the MCA permits a person to participate in a collective garden, nothing in the statute requires that a city permit them.

D. A DETERMINATION THAT IT IS LEGAL TO PRODUCE AND PROCESS CANNABIS, OR THAT A CITY IS REQUIRED TO PERMIT COLLECTIVE GARDENS WILL RESULT IN FEDERAL PREEMPTION OF THE MCA.

Appellants are asking this court to determine that the City must allow medical cannabis collective gardens. To do so, the Court must first determine that the production, processing, transportation, and delivery of medical cannabis via participation in collective gardens is lawful. If the Court were to make either of these determinations, the result would be a state law that presents an obstacle to, and which is therefore preempted by, the federal CSA.

The United States Supreme Court has held that under federal law, the production, distribution, and possession of cannabis, by virtue of its inclusion in Schedule I of the CSA, is prohibited in all circumstances, despite use that is in accordance with state laws permitting cannabis for medical purposes. *Gonzales v. Raich,* 545 U.S. 1, 28, 125 S. Ct. 2195, 162 L.Ed.2d 1 (2005). (Appendix E). Further, because of Congress' broad power, under the Commerce Clause, to regulate all activity involving cannabis, the CSA preempts all state laws with which it conflicts. *Id. at 29.*

As the Supreme Court noted, Congress has the power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. *Id.* at 17. Thus, as the

Court held in *Raich*, cannabis produced solely for homegrown consumption is within the reach of the federal CSA through the Commerce Clause. *Id.* at 19. It follows, then, that the production and processing of cannabis through participation in collective gardens is within the reach of the federal CSA, despite any permission arguably granted by Washington's MCA.

According to the Washington Supreme Court, conflict preemption is found where it is impossible to comply with both state and federal law or where state law "stands as an **obstacle** to the accomplishment of the full purposes and objectives of Congress." *McKee v. AT&T Corp.*, 164 Wn.2d 372, 387 191 P.3d 845 (2008); citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984).

In order to analyze whether the MCA presents an obstacle to the federal CSA, it is important to understand the purpose behind the federal CSA. As set forth in 21 U.S.C. § 801, it was critical to Congress for there to be uniformity in the regulation of controlled substances across the nation, between the states, and within the states. 21 U.S.C. § 801 provides:

> § 801. Congressional findings and declarations: controlled substances. The Congress makes the following findings and declarations: . . .
> (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

> (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because
> (A) after manufacture, many controlled substances are transported in interstate commerce,
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
> (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
> (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
> (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic. . . .
>
> 21 U.S.C. § 801.

The Washington Supreme Court has recognized that a major purpose of the federal CSA was to achieve uniformity in the regulation of controlled substances and the importance of uniformity between Washington's Controlled Substances Act and the federal CSA. *Seeley v. State,* 132 Wn.2d 776, 790, 940 P.2d 604 (1997). The Court in *Seeley* stated:

> [T]he substantial similarities between RCW 69.50 and the federal controlled substance law indicate that Washington's Uniform Controlled Substances Act is intended to be part of a uniform policy to control illegal drugs. See *State v. McFadden*, 63 Wn. App. 441, 447, 820 P. 2d 53 (1991), review denied, 119 Wash. 2d 1002, 832 P.2d 487 (1992) ("adoption by the Washington State Legislature of a uniform narcotics control statute substantially identical to the federal legislation is a clear statement that the matter is not one of special local concern but one as to which national and uniform policies are desirable"). The Uniform Controlled Substances Act has been adopted in some form by all 50 states, all of which place marijuana on schedule I. See Uniform Controlled Substances Act, 9 U.L.A. prefatory note at 2 (1988).
>
> The Prefatory Note for the Uniform Controlled Substances Act summarizes the important interest in maintaining the integrity of uniform state and parallel federal law.
>
> [The] Uniform [Controlled Substances] Act was drafted to achieve uniformity between the laws of the several States and those of the Federal government. It has been designed to complete the new Federal Narcotic dangerous drug legislation and provide an interlocking trellis of Federal and State law to enable government *at all levels* to control more effectively the drug abuse problem. . . . Much of [the] major increase in drug use and abuse is attributable to the increased mobility of our citizens . . . . It becomes critical to approach . . . this problem at the State and local level on a uniform basis. Id. It is apparent that there is a need for national uniformity in the area of controlled substance regulation and that Washington's Uniform Controlled Substances Act was intended to be part of a national scheme.

Seeley, 132 Wn.2d at 790 – 791.

With the clear purpose of uniformity between state and federal law and the need for uniformity at all levels of government in mind, "legalization" of cannabis through participation in collective gardens,

whether by legislative act or by a decision of this Court, would result in a conflict with the federal CSA. In fact, the Oregon Supreme Court has made this very determination.[9] The accomplishment of the stated purpose of 21 U.S.C. § 801 (2)-(6), which according to *Gonzales v. Raich,* is superior to Washington law, could not be achieved.

While legalization of the production and processing of cannabis through participation in collective gardens would present an obstacle to the purpose of the federal CSA, there could be nothing more contrary to the purpose of the federal CSA than a decision by this Court that a City must allow the production and processing of cannabis within its borders. The objective of the federal CSA is uniformity in the regulation of controlled substances across the nation, between the states, and within each state. This is set forth in 21 U.S.C. § 801, was recognized by the U.S. Supreme Court in *Gonzales v. Raich*, and was recognized by the Washington Supreme Court in S*eeley v. State*, where the Court stated that the Controlled Substance Act was designed to ". . . provide an interlocking

---

[9] In *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,* 348 Ore. 159, 230 P.3d 518 (2010), the Court noted that a conflict between state and federal law exists either when it is impossible to comply with both state and federal law, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,* 348 Ore. at 175. The Oregon Court held that, "[t]o the extent that [state law] affirmatively authorizes the use of medical cannabis, federal law preempts that subsection, leaving it 'without effect.'" *Id.* at 178. (Appendix F)

trellis of federal and state law to enable government at all levels to control more effectively the drug abuse problem . . . ." *Seeley v. State*, 132 Wn.2d at 791. A determination by this Court that the City must permit the production and processing of cannabis within its borders could not possibly be squared with the objective of the federal CSA, and therefore, would result in federal preemption of state law.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ENJOINED THE APPELLANTS FROM VIOLATING THE CITY'S ZONING CODE.

The issuance of injunctions for zoning code violations is nothing new for the courts. For example, the Washington Supreme Court ordered the issuance of an injunction in a case in which a restaurant was maintained in a residential district in violation of King County's zoning code. *King County v. Lunn,* 32 Wn. 2d 116, 122, 200 P. 2d 981 (1948); see also *Mercer Island v. Kaltenbach*, 60 Wn. 2d 105; 371 P. 2d 1009. According to the Court of Appeals, the equities must be very compelling indeed to avoid an injunction to correct a clear violation of a zoning ordinance. *Radach v. Gunderson*, 39 Wn. App. 392, 400, 695 P.2d 128 (1985).

A trial court's decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion.

Kucera v. DOT, 140 Wn.2d 200, 209, 995 P.2d 63(2000); citing *Washington Fed'n of State Employees v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). A trial court abuses its discretion if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary. *Id.*

In this case, the City has a clear legal right to enact an ordinance prohibiting collective gardens, and absent a determination by this Court that it is lawful to produce, process, deliver or possess medical cannabis through participation in collective gardens, there is simply no other option. Appellant Tsang continues to operate his collective garden, even after the City filed criminal charges, and after being enjoined from such activity by the Superior Court. The other Appellants have expressed a desire and intent to operate collective gardens in the future. The failure of this Court to affirm the trial court's decision to grant the injunction will result in the inability of the City to effectively enforce its lawfully passed ordinance.

F. APPELLANT SARICH HAS FAILED TO CARRY HIS BURDEN OF ESTABLISHING STANDING.

It is well settled that an individual may not maintain an action to declare an ordinance invalid unless specific, concrete damage or injury to his person or property has been or will be done. *Grant Cy. Fire Prot. Dist. V. Moses Lake,* 150 Wn.2d 791, 802, 83 P.3d 419 (2004). The burden to

establish standing is on Appellant Sarich. *MRCC Receivables Corp. v. Zion,* 152 Wn. App. 625, 629, 218 P. 3d 621 (2009). Standing is a jurisdictional issue. A court has no jurisdiction to hear a suit with regards to a litigant without standing. *Branson v. Port of Seattle*, 152 Wn.2d 862, 875, 101 P.3d 67 (2004); citing, *High Tide Seafoods v. State,* 106 Wn.2d 695, 702, 725 P.2d 411 (1986) ("If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it").

The doctrine of standing prohibits a litigant from asserting another's legal right. *West v. Thurston County,* 144 Wn. App. 573, 578, 183 P.3d 346 (2008); citing *Miller v. U.S. Bank of Wash., NA*, 72 Wn. App. 416, 424, 865 P.2d 536 (1994). One who is not adversely affected by an ordinance may not question its validity. *Grant Cy. Fire Prot. Dist. V. Moses Lake,* 150 Wn.2d at 802. In order to establish standing, a party must have suffered an "injury in fact." *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 594, 192 P.3d 306 (2008). See also *State v. Rowe*, 60 Wn.2d 797, 799, 376 P.2d 446 (1962) ("[o]ne who challenges the constitutionality of a statute must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general framework of the statute."). Bald assertions of injury are insufficient to invoke standing. *Concerned*

Olympia Residents for Env't v. Olympia, 33 Wn. App. 677, 683, 657 P.2d 790 (1983).

Mr. Sarich's lack of standing in this case presents facts similar to those in *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). In *Warth*, a non-profit organization called Metro-Act, Inc., which was located in Rochetser, NY, as well as eight citizens of Rochester, brought an action for declaratory judgment to invalidate a zoning ordinance in an adjacent municipality called Penfield, asserting that the ordinance excluded persons of low or moderate income from living in the town of Penfield in violation of the Constitution. The Court held:

> [A] plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices *harm him*, and that *he personally* would benefit in a tangible way from the court's intervention. Absent the necessary allegations of *demonstrable, particularized injury*, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger v. Reservists to Stop the War*, 418 U.S., at 221-222.

Warth v. Seldin, 422 U.S. at 508 (emphasis added). The Court determined that none of the plaintiffs could show particularized injury and thus had no standing to challenge the zoning ordinance. The Court made this determination despite finding:

> [P]etitioners . . . alleged in conclusory terms that they are among the persons excluded by respondents' actions. None of them has ever resided in Penfield; each claims at least implicitly that he desires, or has desired, to do so. Each asserts, moreover, that he made some effort, at some time, to locate housing in Penfield that was at once within his means and adequate for his family's needs. Each claims that his efforts proved fruitless.

Id., 422 U.S. at 503. Consistent with *Warth*, at least one jurisdiction has determined that a person lacks standing to challenge an ordinance by the simple fact that he is a non-citizen. In *Pichette v. City of N. Miami*, 642 So. 2d 1165 (1994), the plaintiffs filed a declaratory judgment action seeking to invalidate a zoning ordinance. (Appendix G). The appellate court determined the plaintiffs lacked standing as they did not reside in the subject city.

In this case, the record relating to Mr. Sarich's standing contains only bald assertions of injury, and nothing more. Appellant Sarich is a citizen of Seattle. He does not reside in Kent, does not own property in Kent, and does not own or operate a business in Kent. (CP 371-379). He has never applied for a business license or paid utility fees in Kent. (CP 371-379). While he asserted that he was involved in the "process of establishing and/or joining collective gardens in the city of Kent," the trial court record is noticeably devoid of any specific, concrete facts demonstrating that Kent's ordinance harms him personally in any tangible way. As in *Warth* and *Pichette*, his relationship with Kent is far too

remote and his unarticulated and unsupported claims too speculative to establish injury.

In this case, the Court's decision to grant standing to a non-citizen such as Appellant Sarich in an action challenging the City's zoning decisions would be an evisceration of the standing requirement altogether, for if he can sue, then any person in the world could sue simply because he wishes to obtain cannabis in the City.

V. CONCLUSION

After a thorough analysis of the MCA, and the intent that is apparent by both the existing language and the language of ESSSB 5073 which was vetoed by the governor, it is clear that the relief requested by the Appellants should be denied.

RESPECTFULLY SUBMITTED this 1st day of November, 2013.

CITY OF KENT

By: _____
Arthur "Pat" Fitzpatrick, WSBA #25068
Acting City Attorney

DECLARATION OF SERVICE

I, Kim Komoto, declare as follows:

I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness herein, and have personal knowledge of the facts stated below.

On November 1, 2013, I caused to be filed the foregoing Brief of Respondent City of Kent, on behalf of the City of Kent, with the Clerk of the Court via Regular U.S. Mail. On this same date, and in the manner indicated below, I caused the City's Brief and this appended Declaration of Service to be served upon:

David Scott Mann
Gendler & Mann LLP
1424 4th Avenue, Ste 715
Seattle, WA 98101-2297

[X] Regular U.S. Mail
[X] Email: mann@gendlermann.com

Joseph L. Broadbent
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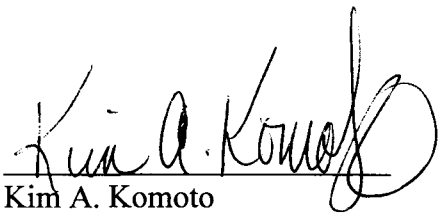
John Worthington
4500 S.E. 2nd Place
Renton, WA 98059

[X] Regular U.S. Mail

DATED at Kent, Washington on this 1st day of November, 2013.



Kim A. Komoto

APPENDIX A

ORDINANCE NO. 4036

AN ORDINANCE of the city council of the city of Kent, Washington, amending Title 15 of the Kent City Code, to specify that medical cannabis collective gardens are not permitted in any zoning district within the city of Kent.

RECITALS

A. Recent amendments to Chapter 69.51A RCW, relating to the medical use of cannabis, have expanded the scope of certain activities, involving the use of cannabis for medical purposes that are permitted under state law.

B. Section 69.51A.085 RCW allows "qualifying patients" to create and participate in "collective gardens" for the purpose of producing, processing, transporting, and delivering cannabis for medical use, subject to certain conditions.

C. Section 69.51A.140 RCW delegates authority, to cities and towns, to adopt and enforce zoning requirements, business licensing requirements, health and safety requirements, and business taxes, as

those requirements and taxes relate to the production, processing, or dispensing of medical cannabis within their jurisdictions.

D. The city council understands that approved medical uses of cannabis may provide relief to patients suffering from debilitating or terminal conditions, but potential secondary impacts from the establishment of facilities for the growth, production, and processing of medical cannabis are not appropriate for any zoning designation within the city.

E. The city council further understands that while the medical benefits of cannabis have been recognized by the state legislature, cannabis remains a Schedule I controlled substance under the federal Controlled Substances Act (CSA), and possession and use of cannabis is still a violation of federal law. The city council wishes to exercise the authority granted pursuant to state law in order to clarify that the establishment of a collective garden will be deemed to be a violation of city zoning ordinances, but the city council expressly disclaims any intent to exercise authority over collective gardens in a manner that would directly conflict with the CSA.

F. The city's State Environmental Policy Act (SEPA) official issued a Determination of Nonsignificance on September 26, 2011.

G. On September 23, 2011, notice was sent to the Washington State Department of Commerce requesting expedited review. On, October 10, 2011, the city was granted expedited review

and was informed that it had met the Growth Management Act notice requirements under RCW 36.70A.106.

H. The Economic and Community Development Committee considered this matter at its September 12, 2011 workshop, and held a public hearing on October 10, 2011. The matter was then considered at the Economic and Community Development Committee meetings on November 14, 2011, and December 12, 2011. The city council further considered this matter at its regular meeting on January 3, 2012, and the Economic and Community Development Committee again took up the matter at its May 14, 2012 meeting.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF KENT, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

ORDINANCE

SECTION 1. – *Amendment*. Chapter 15.02 of the Kent City Code is amended to add a new Section 15.02.074 to read as follows:

Sec. 15.02.074. Collective gardens.

Collective garden means the growing, production, processing, transportation, and delivery of cannabis, by qualifying patients, for medical use, as set forth in Chapter 69.51A RCW, and 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, including a copy of the patient's proof of identity, must be available at all times on the premises of the collective garden;

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

F. A collective garden may contain separate areas for growing, processing, and delivering to its qualified patients, provided that these separate areas must be physically part of the same premises, and located on the same parcel or lot. A location utilized solely for the purpose of distributing cannabis shall not be considered a collective garden; and

G. No more than one collective garden may be established on a single tax parcel.

SECTION 2. - *Amendment*. Chapter 15.08 of the Kent City Code is amended by adding a new Section 15.08.290 to read as follows:

Sec. 15.08.290. Medical cannabis collective gardens.

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.

C. Nothing in this section is intended to authorize, legalize, or permit the establishment, operation, or maintenance of any business, building, or use which violates any city, state, or federal law or statute.

SECTION 3. – *Severability*. If any one or more sections, subsections, or sentences of this ordinance are held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this ordinance and the same shall remain in full force and effect.

SECTION 4. – *Corrections by City Clerk or Code Reviser*. Upon approval of the City Attorney, the City Clerk and the code reviser are authorized to make necessary corrections to this ordinance, including the correction of clerical errors; references to other local, state or federal laws, codes, rules, or regulations; or ordinance numbering and section/subsection numbering.

SECTION 5. – *Effective Date*. This ordinance shall take effect and be in force five (5) days from and after its passage, approval and publication as provided by law. The City Clerk is directed to publish a summary of this ordinance at the earliest possible publication date.

SUZETTE COOKE, MAYOR

ATTEST:

Brenda Jacober

BRENDA JACOBER, CITY CLERK

APPROVED AS TO FORM:

TOM BRUBAKER, CITY ATTORNEY

PASSED: 5 day of June, 2012.

APPROVED: 5 day of June, 2012.

PUBLISHED: 8 day of June, 2012.

I hereby certify that this is a true copy of Ordinance No. 4036 passed by the city council of the city of Kent, Washington, and approved by the Mayor of the city of Kent as hereon indicated.

Brenda Jacober (SEAL)

BRENDA JACOBER, CITY CLERK

P \Civil\Ordinance\Med Cannabis Zoning-Final 3 docx

APPENDIX B

CERTIFICATION OF ENROLLMENT

ENGROSSED SECOND SUBSTITUTE SENATE BILL 5073

Chapter 181, Laws of 2011

(partial veto)

62nd Legislature
2011 Regular Session

MEDICAL CANNABIS

EFFECTIVE DATE: 07/22/11

Passed by the Senate April 21, 2011
YEAS 27 NAYS 21

BRAD OWEN

President of the Senate

Passed by the House April 11, 2011
YEAS 54 NAYS 43

FRANK CHOPP

Speaker of the House of Representatives

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SECOND SUBSTITUTE SENATE BILL 5073** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

Approved April 29, 2011, 3:00 p.m., with the exception of Sections 101, 201, 407, 410, 411, 412, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 701, 702, 703, 704, 705, 801, 802, 803, 804, 805, 806, 807, 901, 902, 1104, 1201, 1202, 1203 and 1206, which are vetoed.

CHRISTINE GREGOIRE

Governor of the State of Washington

FILED

April 29, 2011

Secretary of State
State of Washington

ENGROSSED SECOND SUBSTITUTE SENATE BILL 5073

AS AMENDED BY THE HOUSE

Passed Legislature - 2011 Regular Session

State of Washington 62nd Legislature 2011 Regular Session

By Senate Ways & Means (originally sponsored by Senators Kohl-Welles, Delvin, Keiser, Regala, Pflug, Murray, Tom, Kline, McAuliffe, and Chase)

READ FIRST TIME 02/25/11.

1 AN ACT Relating to medical use of cannabis; amending RCW
2 69.51A.005, 69.51A.020, 69.51A.010, 69.51A.030, 69.51A.040, 69.51A.050,
3 69.51A.060, and 69.51A.900; adding new sections to chapter 69.51A RCW;
4 adding new sections to chapter 42.56 RCW; adding a new section to
5 chapter 28B.20 RCW; creating new sections; repealing RCW 69.51A.080;
6 prescribing penalties; and providing an effective date.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8 **PART I**
9 **LEGISLATIVE DECLARATION AND INTENT**

10 ***NEW SECTION.** Sec. 101. (1) The legislature intends to amend and*
11 *clarify the law on the medical use of cannabis so that:*
12 *(a) Qualifying patients and designated providers complying with the*
13 *terms of this act and registering with the department of health will no*
14 *longer be subject to arrest or prosecution, other criminal sanctions,*
15 *or civil consequences based solely on their medical use of cannabis;*
16 *(b) Qualifying patients will have access to an adequate, safe,*
17 *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.

(2) This act is not intended to amend or supersede Washington state law prohibiting the acquisition, possession, manufacture, sale, or use of cannabis for nonmedical purposes.

(3) This act is not intended to compromise community safety. State, county, or city correctional agencies or departments shall retain the authority to establish and enforce terms for those on active supervision.

****Sec. 101 was vetoed. See message at end of chapter.***

Sec. 102. RCW 69.51A.005 and 2010 c 284 s 1 are each amended to read as follows:

(1) The ((~~people of Washington state~~)) legislature finds that:

(a) There is medical evidence that some patients with terminal or debilitating ((~~illnesses~~)) medical conditions may, under their health care professional's care, ((~~may~~)) benefit from the medical use of ((~~marijuana~~)) cannabis. Some of the ((~~illnesses~~)) conditions for which ((~~marijuana~~)) cannabis appears to be beneficial include ((~~chemotherapy-related~~)), but are not limited to:

(i) Nausea ((~~and~~)), vomiting ((~~in cancer patients; AIDS wasting syndrome~~)), and cachexia associated with cancer, HIV-positive status, AIDS, hepatitis C, anorexia, and their treatments;

(ii) Severe muscle spasms associated with multiple sclerosis, epilepsy, and other seizure and spasticity disorders; ((~~epilepsy;~~))

(iii) Acute or chronic glaucoma;

(iv) Crohn's disease; and

(v) Some forms of intractable pain.

((~~The people find that~~)) (b) Humanitarian compassion necessitates that the decision to ((~~authorize the medical~~)) use ((~~of marijuana~~)) cannabis by patients with terminal or debilitating ((~~illnesses~~)) medical conditions is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion.

(2) Therefore, the ((~~people of the state of Washington~~)) legislature intends that:

(a) Qualifying patients with terminal or debilitating ((~~illnesses~~)) medical conditions who, in the judgment of their health care

professionals, may benefit from the medical use of ((~~marijuana~~)) cannabis, shall not be ((~~found guilty of a crime under state law for their possession and limited use of marijuana~~)) arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law;

(b) Persons who act as designated providers to such patients shall also not be ((~~found guilty of a crime under state law for~~)) arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law, notwithstanding any other provision of law, based solely on their assisting with the medical use of ((~~marijuana~~)) cannabis; and

(c) Health care professionals shall also ((~~be excepted from liability and prosecution~~)) not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law for the proper authorization of ((~~marijuana~~)) medical use ((~~to~~)) of cannabis by qualifying patients for whom, in the health care professional's professional judgment, the medical ((~~marijuana~~)) use of cannabis may prove beneficial.

(3) Nothing 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.

(4) Nothing in this chapter diminishes the authority of correctional agencies and departments, including local governments or jails, to establish a procedure for determining when the use of cannabis would impact community safety or the effective supervision of those on active supervision for a criminal conviction, nor does it create the right to any accommodation of any medical use of cannabis in any correctional facility or jail.

Sec. 103. RCW 69.51A.020 and 1999 c 2 s 3 are each amended to read as follows:

Nothing in this chapter shall be construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale, or use of ((~~marijuana~~)) cannabis for nonmedical purposes. Criminal penalties created under this act do not preclude the prosecution or punishment for other crimes, including other crimes involving the manufacture or delivery of cannabis for nonmedical purposes.

PART II
DEFINITIONS

*Sec. 201. RCW 69.51A.010 and 2010 c 284 s 2 are each amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Cannabis" means all parts of the plant Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. For the purposes of this chapter, "cannabis" does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. The term "cannabis" includes cannabis products and useable cannabis.

(2) "Cannabis analysis laboratory" means a laboratory that performs chemical analysis and inspection of cannabis samples.

(3) "Cannabis products" means products that contain cannabis or cannabis extracts, have a measurable THC concentration greater than three-tenths of one percent, and are intended for human consumption or application, including, but not limited to, edible products, tinctures, and lotions. The term "cannabis products" does not include useable cannabis. The definition of "cannabis products" as a measurement of THC concentration only applies to the provisions of this chapter and shall not be considered applicable to any criminal laws related to marijuana or cannabis.

(4) "Correctional facility" has the same meaning as provided in RCW 72.09.015.

(5) "Corrections agency or department" means any agency or department in the state of Washington, including local governments or jails, that is vested with the responsibility to manage those individuals who are being supervised in the community for a criminal conviction and has established a written policy for determining when the medical use of cannabis, including possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, is inconsistent with and contrary to the person's supervision.

(6) "Designated provider" means a person who:

(a) Is eighteen years of age or older;

(b) Has been designated in ((~~writing~~)) a written document signed and dated by a qualifying patient to serve as a designated provider under this chapter; and

(c) Is ((~~prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and~~

~~(d) Is the designated provider to only one patient at any one time.~~

~~(2)~~)) in compliance with the terms and conditions set forth in RCW 69.51A.040.

A qualifying patient may be the designated provider for another qualifying patient and be in possession of both patients' cannabis at the same time.

(7) "Director" means the director of the department of agriculture.

(8) "Dispense" means the selection, measuring, packaging, labeling, delivery, or retail sale of cannabis by a licensed dispenser to a qualifying patient or designated provider.

(9) "Health care professional," for purposes of this chapter only, means a physician licensed under chapter 18.71 RCW, a physician assistant licensed under chapter 18.71A RCW, an osteopathic physician licensed under chapter 18.57 RCW, an osteopathic physicians' assistant licensed under chapter 18.57A RCW, a naturopath licensed under chapter 18.36A RCW, or an advanced registered nurse practitioner licensed under chapter 18.79 RCW.

((~~(3)~~)) (10) "Jail" has the same meaning as provided in RCW 70.48.020.

(11) "Labeling" means all labels and other written, printed,or graphic matter (a) upon any cannabis intended for medical use, or (b) accompanying such cannabis.

(12) "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 rules adopted by the department of health pursuant to the terms of this chapter.

(13) "Licensed processor of cannabis products" means a person licensed by the department of agriculture to manufacture, process, handle, and label cannabis products for wholesale to licensed dispensers.

(14) "Licensed producer" means a person licensed by the department of agriculture to produce cannabis for medical use for wholesale to licensed dispensers and licensed processors of cannabis products in accordance with rules adopted by the department of agriculture pursuant to the terms of this chapter.

(15) "Medical use of ((~~marijuana~~)) cannabis" means the manufacture, production, processing, possession, transportation, delivery, dispensing, ingestion, application, or administration of ((~~marijuana, as defined in RCW 69.50.101(q),~~)) cannabis for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or debilitating ((~~illness~~)) medical condition.

((~~(4)~~)) (16) "Nonresident" means a person who is temporarily in the state but is not a Washington state resident.

(17) "Peace officer" means any law enforcement personnel as defined in RCW 43.101.010.

(18) "Person" means an individual or an entity.

(19) "Personally identifiable information" means any information that includes, but is not limited to, data that uniquely identify, distinguish, or trace a person's identity, such as the person's name, date of birth, or address, either alone or when combined with other sources, that establish the person is a qualifying patient, designated provider, licensed producer, or licensed processor of cannabis products for purposes of registration with the department of health or department of agriculture. The term "personally identifiable information" also means any information used by the department of health or department of agriculture to identify a person as a qualifying patient, designated provider, licensed producer, or licensed processor of cannabis products.

(20) "Plant" means an organism having at least three distinguishable and distinct leaves, each leaf being at least three centimeters in diameter, and a readily observable root formation consisting of at least two separate and distinct roots, each being at least two centimeters in length. Multiple stalks emanating from the same root ball or root system shall be considered part of the same single plant.

(21) "Process" means to handle or process cannabis in preparation for medical use.

(22) "Processing facility" means the premises and equipment where cannabis products are manufactured, processed, handled, and labeled for wholesale to licensed dispensers.

(23) "Produce" means to plant, grow, or harvest cannabis for medical use.

(24) "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 of cannabis products, and all vehicles and equipment used to transport cannabis from a licensed producer to a licensed dispenser or licensed processor of cannabis products.

(25) "Public place" includes streets and alleys of incorporated cities and towns; state or county or township highways or roads; buildings and grounds used for school purposes; public dance halls and grounds adjacent thereto; premises where goods and services are offered to the public for retail sale; public buildings, public meeting halls, lobbies, halls and dining rooms of hotels, restaurants, theatres, stores, garages, and filling stations which are open to and are generally used by the public and to which the public is permitted to have unrestricted access; railroad trains, stages, buses, ferries, and other public conveyances of all kinds and character, and the depots, stops, and waiting rooms used in conjunction therewith which are open to unrestricted use and access by the public; publicly owned bathing beaches, parks, or playgrounds; and all other places of like or similar nature to which the general public has unrestricted right of access, and which are generally used by the public.

(26) "Qualifying patient" means a person who:

(a) (i) Is a patient of a health care professional;

((~~(b)~~)) (ii) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition;

((~~(c)~~)) (iii) Is a resident of the state of Washington at the time of such diagnosis;

((~~(d)~~)) (iv) Has been advised by that health care professional about the risks and benefits of the medical use of ((~~marijuana~~)) cannabis; ((~~and~~

~~(e)~~)) (v) Has been advised by that health care professional that

((~~they~~)) he or she may benefit from the medical use of ((~~marijuana~~)) cannabis; and

(vi) Is otherwise in compliance with the terms and conditions established in this chapter.

(b) The term "qualifying patient" does not include a person who is actively being supervised for a criminal conviction by a corrections agency or department that has determined that the terms of this chapter are inconsistent with and contrary to his or her supervision and all related processes and procedures related to that supervision.

((~~(5)~~)) (27) "Secretary" means the secretary of health.

(28) "Tamper-resistant paper" means paper that meets one or more of the following industry-recognized features:

(a) One or more features designed to prevent copying of the paper;

(b) One or more features designed to prevent the erasure or modification of information on the paper; or

(c) One or more features designed to prevent the use of counterfeit valid documentation.

((~~(6)~~)) (29) "Terminal or debilitating medical condition" means:

(a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or

(b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or

(c) Glaucoma, either acute or chronic, limited for the purpose of this chapter to mean increased intraocular pressure unrelieved by standard treatments and medications; or

(d) Crohn's disease with debilitating symptoms unrelieved by standard treatments or medications; or

(e) Hepatitis C with debilitating nausea or intractable pain unrelieved by standard treatments or medications; or

(f) Diseases, including anorexia, which result in nausea, vomiting, ((~~wasting~~)) cachexia, appetite loss, cramping, seizures, muscle spasms, or spasticity, when these symptoms are unrelieved by standard treatments or medications; or

(g) Any other medical condition duly approved by the Washington state medical quality assurance commission in consultation with the board of osteopathic medicine and surgery as directed in this chapter.

((~~(7)~~)) (30) "THC concentration" means percent of

tetrahydrocannabinol content per weight or volume of useable cannabis or cannabis product.

(31) "Useable cannabis" means dried flowers of the Cannabis plant having a THC concentration greater than three-tenths of one percent. Useable cannabis excludes stems, stalks, leaves, seeds, and roots. For purposes of this subsection, "dried" means containing less than fifteen percent moisture content by weight. The term "useable cannabis" does not include cannabis products.

(32)(a) Until January 1, 2013, "valid documentation" means:

((~~(a)~~)) (i) A statement signed and dated by a qualifying patient's health care professional written on tamper-resistant paper, which states that, in the health care professional's professional opinion, the patient may benefit from the medical use of ((~~marijuana~~)) cannabis; ((~~and~~

~~(b)~~)) (ii) Proof of identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035; and

(iii) In the case of a designated provider, the signed and dated document valid for one year from the date of signature executed by the qualifying patient who has designated the provider; and

(b) Beginning July 1, 2012, "valid documentation" means:

(i) An original statement signed and dated by a qualifying patient's health care professional written on tamper-resistant paper and valid for up to one year from the date of the health care professional's signature, which states that, in the health care professional's professional opinion, the patient may benefit from the medical use of cannabis;

(ii) Proof of identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035; and

(iii) In the case of a designated provider, the signed and dated document valid for up to one year from the date of signature executed by the qualifying patient who has designated the provider.

**Sec. 201 was vetoed. See message at end of chapter.*

PART III
PROTECTIONS FOR HEALTH CARE PROFESSIONALS

Sec. 301. RCW 69.51A.030 and 2010 c 284 s 3 are each amended to read as follows:

((~~A health care professional shall be excepted from the state's~~

~~criminal laws and shall not be penalized in any manner, or denied any right or privilege, for~~)) (1) The following acts do not constitute crimes under state law or unprofessional conduct under chapter 18.130 RCW, and a health care professional may not be arrested, searched, prosecuted, disciplined, or subject to other criminal sanctions or civil consequences or liability under state law, or have real or personal property searched, seized, or forfeited pursuant to state law, notwithstanding any other provision of law as long as the health care professional complies with subsection (2) of this section:

((~~(1)~~)) (a) Advising a ((~~qualifying~~)) patient about the risks and benefits of medical use of ((~~marijuana~~)) cannabis or that the ((~~qualifying~~)) patient may benefit from the medical use of ((~~marijuana where such use is within a professional standard of care or in the individual health care professional's medical judgment~~)) cannabis; or

((~~(2)~~)) (b) Providing a ((~~qualifying~~)) patient meeting the criteria established under RCW 69.51A.010(26) with valid documentation, based upon the health care professional's assessment of the ((~~qualifying~~)) patient's medical history and current medical condition, ((~~that the medical use of marijuana may benefit a particular qualifying patient~~)) where such use is within a professional standard of care or in the individual health care professional's medical judgment.

(2)(a) A health care professional may only provide a patient with valid documentation authorizing the medical use of cannabis or register the patient with the registry established in section 901 of this act if he or she has a newly initiated or existing documented relationship with the patient, as a primary care provider or a specialist, relating to the diagnosis and ongoing treatment or monitoring of the patient's terminal or debilitating medical condition, and only after:

(i) Completing a physical examination of the patient as appropriate, based on the patient's condition and age;

(ii) Documenting the terminal or debilitating medical condition of the patient in the patient's medical record and that the patient may benefit from treatment of this condition or its symptoms with medical use of cannabis;

(iii) Informing the patient of other options for treating the terminal or debilitating medical condition; and

(iv) Documenting other measures attempted to treat the terminal or

debilitating medical condition that do not involve the medical use of cannabis.

(b) A health care professional shall not:

(i) Accept, solicit, or offer any form of pecuniary remuneration from or to a licensed dispenser, licensed producer, or licensed processor of cannabis products;

(ii) Offer a discount or any other thing of value to a qualifying patient who is a customer of, or agrees to be a customer of, a particular licensed dispenser, licensed producer, or licensed processor of cannabis products;

(iii) Examine or offer to examine a patient for purposes of diagnosing a terminal or debilitating medical condition at a location where cannabis is produced, processed, or dispensed;

(iv) Have a business or practice which consists solely of authorizing the medical use of cannabis;

(v) Include any statement or reference, visual or otherwise, on the medical use of cannabis in any advertisement for his or her business or practice; or

(vi) Hold an economic interest in an enterprise that produces, processes, or dispenses cannabis if the health care professional authorizes the medical use of cannabis.

(3) A violation of any provision of subsection (2) of this section constitutes unprofessional conduct under chapter 18.130 RCW.

PART IV

PROTECTIONS FOR QUALIFYING PATIENTS AND DESIGNATED PROVIDERS

Sec. 401. RCW 69.51A.040 and 2007 c 371 s 5 are each amended to read as follows:

((~~(1) If a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of marijuana, take a representative sample that is large enough to test, but not seize the marijuana. A law enforcement officer or agency shall not be held civilly liable for failure to seize marijuana in this circumstance.~~

~~(2) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated provider who assists a qualifying patient in the~~

~~medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.~~

~~(3) A qualifying patient, if eighteen years of age or older, or a designated provider shall:~~

~~(a) Meet all criteria for status as a qualifying patient or designated provider;~~

~~(b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and~~

~~(c) Present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana.~~

~~(4) A qualifying patient, if under eighteen years of age at the time he or she is alleged to have committed the offense, shall demonstrate compliance with subsection (3)(a) and (c) of this section. However, any possession under subsection (3)(b) of this section, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility of the parent or legal guardian of the qualifying patient.~~)) 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 maynot be held civilly liable for failure to seize cannabis in this circumstance, if:

(1)(a) The qualifying patient or designated provider possesses no more than fifteen cannabis plants and:

(i) No more than twenty-four ounces of useable cannabis;

(ii) No more cannabis product than what could reasonably be produced with no more than twenty-four ounces of useable cannabis; or

(iii) A combination of useable cannabis and cannabis product that does not exceed a combined total representing possession and processing of no more than twenty-four ounces of useable cannabis.

(b) If a person is both a qualifying patient and a designated provider for another qualifying patient, the person may possess no more than twice the amounts described in (a) of this subsection, whether the plants, useable cannabis, and cannabis product are possessed individually or in combination between the qualifying patient and his or her designated provider;

(2) The qualifying patient or designated provider presents his or her proof of registration with the department of health, to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;

(3) 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;

(4) The investigating peace officer does not possess evidence that:

(a) The designated provider has converted cannabis produced or obtained for the qualifying patient for his or her own personal use or benefit; or

(b) The qualifying patient has converted cannabis produced or obtained for his or her own medical use to the qualifying patient's personal, nonmedical use or benefit;

(5) The investigating peace officer does not possess evidence that the designated provider has served as a designated provider to more than one qualifying patient within a fifteen-day period; and

(6) The investigating peace officer has not observed evidence of any of the circumstances identified in section 901(4) of this act.

NEW SECTION. **Sec. 402.** (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;

(d) The investigating peace officer does not have probable cause to believe that the qualifying patient or designated provider has committed a felony, or is committing a misdemeanor in the officer's presence, that does not relate to the medical use of cannabis;

(e) No outstanding warrant for arrest exists for the qualifying patient or designated provider; and

(f) The investigating peace officer has not observed evidence of any of the circumstances identified in section 901(4) of this act.

(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.

NEW SECTION. **Sec. 403.** (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.

NEW SECTION. **Sec. 404.** (1) A qualifying patient may revoke his or her designation of a specific provider and designate a different provider at any time. A revocation of designation must be in writing, signed and dated. The protections of this chapter cease to apply to a person who has served as a designated provider to a qualifying patient seventy-two hours after receipt of that patient's revocation of his or her designation.

(2) A person may stop serving as a designated provider to a given qualifying patient at any time. However, that person may not begin serving as a designated provider to a different qualifying patient until fifteen days have elapsed from the date the last qualifying patient designated him or her to serve as a provider.

NEW SECTION. **Sec. 405.** A qualifying patient or designated provider in possession of cannabis plants, useable cannabis, or cannabis product exceeding the limits set forth in RCW 69.51A.040(1) but otherwise in compliance with all other terms and conditions of this chapter may establish an affirmative defense to charges of violations

of state law relating to cannabis through proof at trial, by a preponderance of the evidence, that the qualifying patient's necessary medical use exceeds the amounts set forth in RCW 69.51A.040(1). An investigating peace officer may seize cannabis plants, useable cannabis, or cannabis product exceeding the amounts set forth in RCW 69.51A.040(1): PROVIDED, That in the case of cannabis plants, the qualifying patient or designated provider shall be allowed to select the plants that will remain at the location. The officer and his or her law enforcement agency may not be held civilly liable for failure to seize cannabis in this circumstance.

NEW SECTION. **Sec. 406.** A qualifying patient or designated provider who is not registered with the registry established in section 901 of this act or does not present his or her valid documentation to a peace officer who questions the patient or provider regarding his or her medical use of cannabis but is in compliance with all other terms and conditions of this chapter may establish 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 was a validly authorized qualifying patient or designated provider at the time of the officer's questioning. A qualifying patient or designated provider who establishes an affirmative defense under the terms of this section may also establish an affirmative defense under section 405 of this act.

***NEW SECTION.** Sec. 407. A nonresident who is duly authorized to engage in the medical use of cannabis under the laws of another state or territory of the United States may raise an affirmative defense to charges of violations of Washington state law relating to cannabis, provided that the nonresident:*

(1) Possesses no more than fifteen cannabis plants and no more than twenty-four ounces of useable cannabis, no more cannabis product than reasonably could be produced with no more than twenty-four ounces of useable cannabis, or a combination of useable cannabis and cannabis product that does not exceed a combined total representing possession and processing of no more than twenty-four ounces of useable cannabis;

(2) Is in compliance with all provisions of this chapter other than

requirements relating to being a Washington resident or possessing valid documentation issued by a licensed health care professional in Washington;

(3) Presents the documentation of authorization required under the nonresident's authorizing state or territory's law and proof of identity issued by the authorizing state or territory to any peace officer who questions the nonresident regarding his or her medical use of cannabis; and

(4) Does not possess evidence that the nonresident has converted cannabis produced or obtained for his or her own medical use to the nonresident's personal, nonmedical use or benefit.

****Sec. 407 was vetoed. See message at end of chapter.***

NEW SECTION. **Sec. 408.** A qualifying patient's medical use of cannabis as authorized by a health care professional may not be a sole disqualifying factor in determining the patient's suitability for an organ transplant, unless it is shown that this use poses a significant risk of rejection or organ failure. This section does not preclude a health care professional from requiring that a patient abstain from the medical use of cannabis, for a period of time determined by the health care professional, while waiting for a transplant organ or before the patient undergoes an organ transplant.

NEW SECTION. **Sec. 409.** A qualifying patient or designated provider may not have his or her parental rights or residential time with a child restricted solely due to his or her medical use of cannabis in compliance with the terms of this chapter absent written findings supported by evidence that such use has resulted in a long-term impairment that interferes with the performance of parenting functions as defined under RCW 26.09.004.

****NEW SECTION. Sec. 410. (1) Except as provided in subsection (2) of this section, a qualifying patient may not be refused housing or evicted from housing solely as a result of his or her possession or use of useable cannabis or cannabis products except that housing providers otherwise permitted to enact and enforce prohibitions against smoking in their housing may apply those prohibitions to smoking cannabis provided that such smoking prohibitions are applied and enforced***

equally as to the smoking of cannabis and the smoking of all other substances, including without limitation tobacco.

(2) Housing programs containing a program component prohibiting the use of drugs or alcohol among its residents are not required to permit the medical use of cannabis among those residents.

**Sec. 410 was vetoed. See message at end of chapter.*

**NEW SECTION. Sec. 411. In imposing any criminal sentence, deferred prosecution, stipulated order of continuance, deferred disposition, or dispositional order, any court organized under the laws of Washington state may permit the medical use of cannabis in compliance with the terms of this chapter and exclude it as a possible ground for finding that the offender has violated the conditions or requirements of the sentence, deferred prosecution, stipulated order of continuance, deferred disposition, or dispositional order. This section does not require the accommodation of any medical use of cannabis in any correctional facility or jail.*

**Sec. 411 was vetoed. See message at end of chapter.*

**Sec. 412. RCW 69.51A.050 and 1999 c 2 s 7 are each amended to read as follows:*

(1) The lawful possession, delivery, dispensing, production, or manufacture of ((~~medical marijuana~~)) cannabis for medical use as authorized by this chapter shall not result in the forfeiture or seizure of any real or personal property including, but not limited to, cannabis intended for medical use, items used to facilitate the medical use of cannabis or its production or dispensing for medical use, or proceeds of sales of cannabis for medical use made by licensed producers, licensed processors of cannabis products, or licensed dispensers.

(2) No person shall be prosecuted for constructive possession, conspiracy, or any other criminal offense solely for being in the presence or vicinity of ((~~medical marijuana~~)) cannabis intended for medical use or its use as authorized by this chapter.

(3) The state shall not be held liable for any deleterious outcomes from the medical use of ((~~marijuana~~)) cannabis by any qualifying patient.

**Sec. 412 was vetoed. See message at end of chapter.*

NEW SECTION. **Sec. 413.** 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.

PART V
LIMITATIONS ON PROTECTIONS FOR QUALIFYING PATIENTS AND DESIGNATED PROVIDERS

Sec. 501. RCW 69.51A.060 and 2010 c 284 s 4 are each amended to read as follows:

(1) It shall be a ((~~misdemeanor~~)) class 3 civil infraction to use or display medical ((~~marijuana~~)) cannabis in a manner or place which is open to the view of the general public.

(2) Nothing in this chapter ((~~requires any health insurance provider~~)) establishes a right of care as a covered benefit or requires any state purchased health care as defined in RCW 41.05.011 or other health carrier or health plan as defined in Title 48 RCW to be liable for any claim for reimbursement for the medical use of ((~~marijuana~~)) cannabis. Such entities may enact coverage or noncoverage criteria or related policies for payment or nonpayment of medical cannabis in their sole discretion.

(3) Nothing in this chapter requires any health care professional to authorize the medical use of ((~~medical marijuana~~)) cannabis for a patient.

(4) Nothing in this chapter requires any accommodation of any on-site medical use of ((~~marijuana~~)) cannabis in any place of employment, in any school bus or on any school grounds, in any youth center, in any correctional facility, or smoking ((~~medical marijuana~~)) cannabis in any public place ((~~as that term is defined in RCW 70.160.020~~)) or hotel or motel.

(5) Nothing in this chapter authorizes the use of medical cannabis by any person who is subject to the Washington code of military justice in chapter 38.38 RCW.

(6) Employers may establish drug-free work policies. Nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free work place.

(7) It is a class C felony to fraudulently produce any record purporting to be, or tamper with the content of any record for the

purpose of having it accepted as, valid documentation under RCW 69.51A.010((~~(7)~~)) (32)(a), or to backdate such documentation to a time earlier than its actual date of execution.

((~~(6)~~)) (8) No person shall be entitled to claim the ((~~affirmative defense provided in RCW 69.51A.040~~)) protection from arrest and prosecution under RCW 69.51A.040 or the affirmative defense under section 402 of this act for engaging in the medical use of ((~~marijuana~~)) cannabis in a way that endangers the health or well-being of any person through the use of a motorized vehicle on a street, road, or highway, including violations of RCW 46.61.502 or 46.61.504, or equivalent local ordinances.

PART VI
LICENSED PRODUCERS AND LICENSED PROCESSORS OF CANNABIS PRODUCTS

***NEW SECTION.** Sec. 601. A person may not act as a licensed producer without a license for each production facility issued by the department of agriculture and prominently displayed on the premises. Provided they are acting in compliance with the terms of this chapter and rules adopted to enforce and carry out its purposes, licensed producers and their employees, members, officers, and directors may manufacture, plant, cultivate, grow, harvest, produce, prepare, propagate, process, package, repackage, transport, transfer, deliver, label, relabel, wholesale, or possess cannabis intended for medical use by qualifying patients, including seeds, seedlings, cuttings, plants, and useable cannabis, and may not be arrested, searched, prosecuted, or subject to other criminal sanctions or civil consequences under state law, or have real or personal property searched, seized, or forfeited pursuant to state law, for such activities, notwithstanding any other provision of law.*

Sec. 601 was vetoed. See message at end of chapter.

***NEW SECTION.** Sec. 602. A person may not act as a licensed processor without a license for each processing facility issued by the department of agriculture and prominently displayed on the premises. Provided they are acting in compliance with the terms of this chapter and rules adopted to enforce and carry out its purposes, licensed processors of cannabis products and their employees, members, officers, and directors may possess useable cannabis and manufacture, produce,*

prepare, process, package, repackage, transport, transfer, deliver, label, relabel, wholesale, or possess cannabis products intended for medical use by qualifying patients, and may not be arrested, searched, prosecuted, or subject to other criminal sanctions or civil consequences under state law, or have real or personal property searched, seized, or forfeited pursuant to state law, for such activities, notwithstanding any other provision of law.

**Sec. 602 was vetoed. See message at end of chapter.*

**NEW SECTION. Sec. 603. The director shall administer and carry out the provisions of this chapter relating to licensed producers and licensed processors of cannabis products, and rules adopted under this chapter.*

**Sec. 603 was vetoed. See message at end of chapter.*

**NEW SECTION. Sec. 604. (1) On a schedule determined by the department of agriculture, licensed producers and licensed processors must submit representative samples of cannabis grown or processed to a cannabis analysis laboratory for grade, condition, cannabinoid profile, THC concentration, other qualitative measurements of cannabis intended for medical use, and other inspection standards determined by the department of agriculture. Any samples remaining after testing must be destroyed by the laboratory or returned to the licensed producer or licensed processor.*

(2) Licensed producers and licensed processors must submit copies of the results of this inspection and testing to the department of agriculture on a form developed by the department.

(3) If a representative sample of cannabis tested under this section has a THC concentration of three-tenths of one percent or less, the lot of cannabis the sample was taken from may not be sold for medical use and must be destroyed or sold to a manufacturer of hemp products.

**Sec. 604 was vetoed. See message at end of chapter.*

**NEW SECTION. Sec. 605. The department of agriculture may contract with a cannabis analysis laboratory to conduct independent inspection and testing of cannabis samples to verify testing results provided under section 604 of this act.*

**Sec. 605 was vetoed. See message at end of chapter.*

**NEW SECTION. Sec. 606. The department of agriculture may adopt rules on:*

(1) Facility standards, including scales, for all licensed producers and licensed processors of cannabis products;

(2) Measurements for cannabis intended for medical use, including grade, condition, cannabinoid profile, THC concentration, other qualitative measurements, and other inspection standards for cannabis intended for medical use; and

(3) Methods to identify cannabis intended for medical use so that such cannabis may be readily identified if stolen or removed in violation of the provisions of this chapter from a production or processing facility, or if otherwise unlawfully transported.

*Sec. 606 was vetoed. See message at end of chapter.

**NEW SECTION. Sec. 607. The director is authorized to deny, suspend, or revoke a producer's or processor's license after a hearing in any case in which it is determined that there has been a violation or refusal to comply with the requirements of this chapter or rules adopted hereunder. All hearings for the denial, suspension, or revocation of a producer's or processor's license are subject to chapter 34.05 RCW, the administrative procedure act, as enacted or hereafter amended.*

*Sec. 607 was vetoed. See message at end of chapter.

**NEW SECTION. Sec. 608. (1) By January 1, 2013, taking into consideration, but not being limited by, the security requirements described in 21 C.F.R. Sec. 1301.71-1301.76, the director shall adopt rules:*

(a) On the inspection or grading and certification of grade, grading factors, condition, cannabinoid profile, THC concentration, or other qualitative measurement of cannabis intended for medical use that must be used by cannabis analysis laboratories in section 604 of this act;

(b) Fixing the sizes, dimensions, and safety and security features required of containers to be used for packing, handling, or storing cannabis intended for medical use;

(c) Establishing labeling requirements for cannabis intended for medical use including, but not limited to:

(i) The business or trade name and Washington state unified business identifier (UBI) number of the licensed producer of the cannabis;

(ii) THC concentration; and

(iii) Information on whether the cannabis was grown using organic, inorganic, or synthetic fertilizers;

(d) Establishing requirements for transportation of cannabis intended for medical use from production facilities to processing facilities and licensed dispensers;

(e) Establishing security requirements for the facilities of licensed producers and licensed processors of cannabis products. These security requirements must consider the safety of the licensed producers and licensed processors as well as the safety of the community surrounding the licensed producers and licensed processors;

(f) Establishing requirements for the licensure of producers, and processors of cannabis products, setting forth procedures to obtain licenses, and determining expiration dates and renewal requirements; and

(g) Establishing license application and renewal fees for the licensure of producers and processors of cannabis products.

(2) Fees collected under this section must be deposited into the agricultural local fund created in RCW 43.23.230.

(3) During the rule-making process, the department of agriculture shall consult with stakeholders and persons with relevant expertise, to include but not be limited to qualifying patients, designated providers, health care professionals, state and local law enforcement agencies, and the department of health.

**Sec. 608 was vetoed. See message at end of chapter.*

**NEW SECTION. Sec. 609. (1) Each licensed producer and licensed processor of cannabis products shall maintain complete records at all times with respect to all cannabis produced, processed, weighed, tested, stored, shipped, or sold. The director shall adopt rules specifying the minimum recordkeeping requirements necessary to comply with this section.*

(2) The property, books, records, accounts, papers, and proceedings of every licensed producer and licensed processor of cannabis products shall be subject to inspection by the department of agriculture at any time during ordinary business hours. Licensed producers and licensed processors of cannabis products shall maintain adequate records and systems for the filing and accounting of crop production, product manufacturing and processing, records of weights and measurements,

product testing, receipts, canceled receipts, other documents, and transactions necessary or common to the medical cannabis industry.

(3) The director may administer oaths and issue subpoenas to compel the attendance of witnesses, or the production of books, documents, and records anywhere in the state pursuant to a hearing relative to the purposes and provisions of this chapter. Witnesses shall be entitled to fees for attendance and travel, as provided in chapter 2.40 RCW.

(4) Each licensed producer and licensed processor of cannabis products shall report information to the department of agriculture at such times and as may be reasonably required by the director for the necessary enforcement and supervision of a sound, reasonable, and efficient cannabis inspection program for the protection of the health and welfare of qualifying patients.

**Sec. 609 was vetoed. See message at end of chapter.*

**NEW SECTION. Sec. 610. (1) The department of agriculture may give written notice to a licensed producer or processor of cannabis products to furnish required reports, documents, or other requested information, under such conditions and at such time as the department of agriculture deems necessary if a licensed producer or processor of cannabis products fails to:*

(a) Submit his or her books, papers, or property to lawful inspection or audit;

(b) Submit required laboratory results, reports, or documents to the department of agriculture by their due date; or

(c) Furnish the department of agriculture with requested information.

(2) If the licensed producer or processor of cannabis products fails to comply with the terms of the notice within seventy-two hours from the date of its issuance, or within such further time as the department of agriculture may allow, the department of agriculture shall levy a fine of five hundred dollars per day from the final date for compliance allowed by this section or the department of agriculture. In those cases where the failure to comply continues for more than seven days or where the director determines the failure to comply creates a threat to public health, public safety, or a substantial risk of diversion of cannabis to unauthorized persons or purposes, the department of agriculture may, in lieu of levying further

fines, petition the superior court of the county where the licensee's principal place of business in Washington is located, as shown by the license application, for an order:

(a) Authorizing the department of agriculture to seize and take possession of all books, papers, and property of all kinds used in connection with the conduct or the operation of the licensed producer or processor's business, and the books, papers, records, and property that pertain specifically, exclusively, and directly to that business; and

(b) Enjoining the licensed producer or processor from interfering with the department of agriculture in the discharge of its duties as required by this chapter.

(3) All necessary costs and expenses, including attorneys' fees, incurred by the department of agriculture in carrying out the provisions of this section may be recovered at the same time and as part of the action filed under this section.

(4) The department of agriculture may request the Washington state patrol to assist it in enforcing this section if needed to ensure the safety of its employees.

**Sec. 610 was vetoed. See message at end of chapter.*

**NEW SECTION. Sec. 611. (1) A licensed producer may not sell or deliver cannabis to any person other than a cannabis analysis laboratory, licensed processor of cannabis products, licensed dispenser, or law enforcement officer except as provided by court order. A licensed producer may also sell or deliver cannabis to the University of Washington or Washington State University for research purposes, as identified in section 1002 of this act. Violation of this section is a class C felony punishable according to chapter 9A.20 RCW.*

(2) A licensed processor of cannabis products may not sell or deliver cannabis to any person other than a cannabis analysis laboratory, licensed dispenser, or law enforcement officer except as provided by court order. A licensed processor of cannabis products may also sell or deliver cannabis to the University of Washington or Washington State University for research purposes, as identified in section 1002 of this act. Violation of this section is a class C felony punishable according to chapter 9A.20 RCW.

**Sec. 611 was vetoed. See message at end of chapter.*

PART VII
LICENSED DISPENSERS

*NEW SECTION. Sec. 701. A person may not act as a licensed dispenser without a license for each place of business issued by the department of health and prominently displayed on the premises. Provided they are acting in compliance with the terms of this chapter and rules adopted to enforce and carry out its purposes, licensed dispensers and their employees, members, officers, and directors may deliver, distribute, dispense, transfer, prepare, package, repackage, label, relabel, sell at retail, or possess cannabis intended for medical use by qualifying patients, including seeds, seedlings, cuttings, plants, useable cannabis, and cannabis products, and may not be arrested, searched, prosecuted, or subject to other criminal sanctions or civil consequences under state law, or have real or personal property searched, seized, or forfeited pursuant to state law, for such activities, notwithstanding any other provision of law.

*Sec. 701 was vetoed. See message at end of chapter.

*NEW SECTION. Sec. 702. (1) By January 1, 2013, taking into consideration the security requirements described in 21 C.F.R. 1301.71-1301.76, the secretary of health shall adopt rules:

(a) Establishing requirements for the licensure of dispensers of cannabis for medical use, setting forth procedures to obtain licenses, and determining expiration dates and renewal requirements;

(b) Providing for mandatory inspection of licensed dispensers' locations;

(c) Establishing procedures governing the suspension and revocation of licenses of dispensers;

(d) Establishing recordkeeping requirements for licensed dispensers;

(e) Fixing the sizes and dimensions of containers to be used for dispensing cannabis for medical use;

(f) Establishing safety standards for containers to be used for dispensing cannabis for medical use;

(g) Establishing cannabis storage requirements, including security requirements;

(h) Establishing cannabis labeling requirements, to include information on whether the cannabis was grown using organic, inorganic, or synthetic fertilizers;

(i) Establishing physical standards for cannabis dispensing facilities. The physical standards must require a licensed dispenser to ensure that no cannabis or cannabis paraphernalia may be viewed from outside the facility;

(j) Establishing maximum amounts of cannabis and cannabis products that may be kept at one time at a dispensary. In determining maximum amounts, the secretary must consider the security of the dispensary and the surrounding community;

(k) Establishing physical standards for sanitary conditions for cannabis dispensing facilities;

(l) Establishing physical and sanitation standards for cannabis dispensing equipment;

(m) Establishing a maximum number of licensed dispensers that may be licensed in each county as provided in this section;

(n) Enforcing and carrying out the provisions of this section and the rules adopted to carry out its purposes; and

(o) Establishing license application and renewal fees for the licensure of dispensers in accordance with RCW 43.70.250.

(2)(a) The secretary shall establish a maximum number of licensed dispensers that may operate in each county. Prior to January 1, 2016, the maximum number of licensed dispensers shall be based upon a ratio of one licensed dispenser for every twenty thousand persons in a county. On or after January 1, 2016, the secretary may adopt rules to adjust the method of calculating the maximum number of dispensers to consider additional factors, such as the number of enrollees in the registry established in section 901 of this act and the secretary's experience in administering the program. The secretary may not issue more licenses than the maximum number of licenses established under this section.

(b) In the event that the number of applicants qualifying for the selection process exceeds the maximum number for a county, the secretary shall initiate a random selection process established by the secretary in rule.

(c) To qualify for the selection process, an applicant must demonstrate to the secretary that he or she meets initial screening criteria that represent the applicant's capacity to operate in compliance with this chapter. Initial screening criteria shall include, but not be limited to:

(i) Successful completion of a background check;

(ii) A plan to systematically verify qualifying patient and designated provider status of clients;

(iii) Evidence of compliance with functional standards, such as ventilation and security requirements; and

(iv) Evidence of compliance with facility standards, such as zoning compliance and not using the facility as a residence.

(d) The secretary shall establish a schedule to:

(i) Update the maximum allowable number of licensed dispensers in each county; and

(ii) Issue approvals to operate within a county according to the random selection process.

(3) Fees collected under this section must be deposited into the health professions account created in RCW 43.70.320.

(4) During the rule-making process, the department of health shall consult with stakeholders and persons with relevant expertise, to include but not be limited to qualifying patients, designated providers, health care professionals, state and local law enforcement agencies, and the department of agriculture.

*Sec. 702 was vetoed. See message at end of chapter.

NEW SECTION. Sec. 703. A licensed dispenser may not sell cannabis received from any person other than a licensed producer or licensed processor of cannabis products, or sell or deliver cannabis to any person other than a qualifying patient, designated provider, or law enforcement officer except as provided by court order. A licensed dispenser may also sell or deliver cannabis to the University of Washington or Washington State University for research purposes, as identified in section 1002 of this act. Before selling or providing cannabis to a qualifying patient or designated provider, the licensed dispenser must confirm that the patient qualifies for the medical use of cannabis by contacting, at least once in a one-year period, that patient's health care professional. Violation of this section is a class C felony punishable according to chapter 9A.20 RCW.

*Sec. 703 was vetoed. See message at end of chapter.

NEW SECTION. Sec. 704. A license to operate as a licensed dispenser is not transferrable.

*Sec. 704 was vetoed. See message at end of chapter.

*NEW SECTION. Sec. 705. The secretary of health shall not issue or renew a license to an applicant or licensed dispenser located within five hundred feet of a community center, child care center, elementary or secondary school, or another licensed dispenser.

*Sec. 705 was vetoed. See message at end of chapter.

PART VIII
MISCELLANEOUS PROVISIONS APPLYING TO ALL LICENSED PRODUCERS, PROCESSORS, AND DISPENSERS

*NEW SECTION. Sec. 801. All weighing and measuring instruments and devices used by licensed producers, processors of cannabis products, and dispensers shall comply with the requirements set forth in chapter 19.94 RCW.

*Sec. 801 was vetoed. See message at end of chapter.

*NEW SECTION. Sec. 802. (1) No person, partnership, corporation, association, or agency may advertise cannabis for sale to the general public in any manner that promotes or tends to promote the use or abuse of cannabis. For the purposes of this subsection, displaying cannabis, including artistic depictions of cannabis, is considered to promote or to tend to promote the use or abuse of cannabis.

(2) The department of agriculture may fine a licensed producer or processor of cannabis products up to one thousand dollars for each violation of subsection (1) of this section. Fines collected under this subsection must be deposited into the agriculture local fund created in RCW 43.23.230.

(3) The department of health may fine a licensed dispenser up to one thousand dollars for each violation of subsection (1) of this section. Fines collected under this subsection must be deposited into the health professions account created in RCW 43.70.320.

(4) No broadcast television licensee, radio broadcast licensee, newspaper, magazine, advertising agency, or agency or medium for the dissemination of an advertisement, except the licensed producer, processor of cannabis products, or dispenser to which the advertisement relates, is subject to the penalties of this section by reason of dissemination of advertising in good faith without knowledge that the advertising promotes or tends to promote the use or abuse of cannabis.

*Sec. 802 was vetoed. See message at end of chapter.

1 ***NEW SECTION.** Sec. 803. (1) A prior conviction for a cannabis or*
2 *marijuana offense shall not disqualify an applicant from receiving a*
3 *license to produce, process, or dispense cannabis for medical use,*
4 *provided the conviction did not include any sentencing enhancements*
5 *under RCW 9.94A.533 or analogous laws in other jurisdictions. Any*
6 *criminal conviction of a current licensee may be considered in*
7 *proceedings to suspend or revoke a license.*
8 *(2) Nothing in this section prohibits either the department of*
9 *health or the department of agriculture, as appropriate, from denying,*
10 *suspending, or revoking the credential of a license holder for other*
11 *drug-related offenses or any other criminal offenses.*
12 *(3) Nothing in this section prohibits a corrections agency or*
13 *department from considering all prior and current convictions in*
14 *determining whether the possession, manufacture, or delivery of, or for*
15 *possession with intent to manufacture or deliver, is inconsistent with*
16 *and contrary to the person's supervision.*
*Sec. 803 was vetoed. See message at end of chapter.

17 ***NEW SECTION.** Sec. 804. A violation of any provision or section of*
18 *this chapter that relates to the licensing and regulation of producers,*
19 *processors, or dispensers, where no other penalty is provided for, and*
20 *the violation of any rule adopted under this chapter constitutes a*
21 *misdemeanor.*
*Sec. 804 was vetoed. See message at end of chapter.

22 ***NEW SECTION.** Sec. 805. (1) Every licensed producer or processor*
23 *of cannabis products who fails to comply with this chapter, or any rule*
24 *adopted under it, may be subjected to a civil penalty, as determined by*
25 *the director, in an amount of not more than one thousand dollars for*
26 *every such violation. Each violation shall be a separate and distinct*
27 *offense.*
28 *(2) Every licensed dispenser who fails to comply with this chapter,*
29 *or any rule adopted under it, may be subjected to a civil penalty, as*
30 *determined by the secretary, in an amount of not more than one thousand*
31 *dollars for every such violation. Each violation shall be a separate*
32 *and distinct offense.*
33 *(3) Every person who, through an act of commission or omission,*
34 *procures, aids, or abets in the violation shall be considered to have*
35 *violated this chapter and may be subject to the penalty provided for in*
36 *this section.*
*Sec. 805 was vetoed. See message at end of chapter.

1 ***NEW SECTION.** Sec. 806. The department of agriculture or the*
2 *department of health, as the case may be, must immediately suspend any*
3 *certification of licensure issued under this chapter if the holder of*
4 *the certificate has been certified under RCW 74.20A.320 by the*
5 *department of social and health services as a person who is not in*
6 *compliance with a support order. If the person has continued to meet*
7 *all other requirements for certification during the suspension,*
8 *reissuance of the certificate of licensure shall be automatic upon the*
9 *department's receipt of a release issued by the department of social*
10 *and health services stating that the person is in compliance with the*
11 *order.*

*Sec. 806 was vetoed. See message at end of chapter.

12 ***NEW SECTION.** Sec. 807. The department of agriculture or the*
13 *department of health, as the case may be, must suspend the*
14 *certification of licensure of any person who has been certified by a*
15 *lending agency and reported to the appropriate department for*
16 *nonpayment or default on a federally or state-guaranteed educational*
17 *loan or service-conditional scholarship. Prior to the suspension, the*
18 *department of agriculture or the department of health, as the case may*
19 *be, must provide the person an opportunity for a brief adjudicative*
20 *proceeding under RCW 34.05.485 through 34.05.494 and issue a finding of*
21 *nonpayment or default on a federally or state-guaranteed educational*
22 *loan or service-conditional scholarship. The person's license may not*
23 *be reissued until the person provides the appropriate department a*
24 *written release issued by the lending agency stating that the person is*
25 *making payments on the loan in accordance with a repayment agreement*
26 *approved by the lending agency. If the person has continued to meet*
27 *all other requirements for certification or registration during the*
28 *suspension, reinstatement is automatic upon receipt of the notice and*
29 *payment of any reinstatement fee.*

*Sec. 807 was vetoed. See message at end of chapter.

30 **PART IX**
31 **SECURE REGISTRATION OF QUALIFYING PATIENTS, DESIGNATED PROVIDERS,**
32 **AND LICENSED PRODUCERS, PROCESSORS, AND DISPENSERS**

33 ***NEW SECTION.** Sec. 901. (1) By January 1, 2013, the department of*
34 *health shall, in consultation with the department of agriculture, adopt*

rules for the creation, implementation, maintenance, and timely upgrading of a secure and confidential registration system that allows:

(a) A peace officer to verify at any time whether a health care professional has registered a person as either a qualifying patient or a designated provider; and

(b) A peace officer to verify at any time whether a person, location, or business is licensed by the department of agriculture or the department of health as a licensed producer, licensed processor of cannabis products, or licensed dispenser.

(2) The department of agriculture must, in consultation with the department of health, create and maintain a secure and confidential list of persons to whom it has issued a license to produce cannabis for medical use or a license to process cannabis products, and the physical addresses of the licensees' production and processing facilities. The list must meet the requirements of subsection (9) of this section and be transmitted to the department of health to be included in the registry established by this section.

(3) The department of health must, in consultation with the department of agriculture, create and maintain a secure and confidential list of the persons to whom it has issued a license to dispense cannabis for medical use that meets the requirements of subsection (9) of this section and must be included in the registry established by this section.

(4) Before seeking a nonvehicle search warrant or arrest warrant, a peace officer investigating a cannabis-related incident must make reasonable efforts to ascertain whether the location or person under investigation is registered in the registration system, and include the results of this inquiry in the affidavit submitted in support of the application for the warrant. This requirement does not apply to investigations in which:

(a) The peace officer has observed evidence of an apparent cannabis operation that is not a licensed producer, processor of cannabis products, or dispenser;

(b) The peace officer has observed evidence of theft of electrical power;

(c) The peace officer has observed evidence of illegal drugs other than cannabis at the premises;

(d) The peace officer has observed frequent and numerous short-term visits over an extended period that are consistent with commercial activity, if the subject of the investigation is not a licensed dispenser;

(e) The peace officer has observed violent crime or other demonstrated dangers to the community;

(f) The peace officer has probable cause to believe the subject of the investigation has committed a felony, or a misdemeanor in the officer's presence, that does not relate to cannabis; or

(g) The subject of the investigation has an outstanding arrest warrant.

(5) Law enforcement may access the registration system only in connection with a specific, legitimate criminal investigation regarding cannabis.

(6) Registration in the system shall be optional for qualifying patients and designated providers, not mandatory, and registrations are valid for one year, except that qualifying patients must be able to remove themselves from the registry at any time. For licensees, registrations are valid for the term of the license and the registration must be removed if the licensee's license is expired or revoked. The department of health must adopt rules providing for registration renewals and for removing expired registrations and expired or revoked licenses from the registry.

(7) Fees, including renewal fees, for qualifying patients and designated providers participating in the registration system shall be limited to the cost to the state of implementing, maintaining, and enforcing the provisions of this section and the rules adopted to carry out its purposes. The fee shall also include any costs for the department of health to disseminate information to employees of state and local law enforcement agencies relating to whether a person is a licensed producer, processor of cannabis products, or dispenser, or that a location is the recorded address of a license producer, processor of cannabis products, or dispenser, and for the dissemination of log records relating to such requests for information to the subjects of those requests. No fee may be charged to local law enforcement agencies for accessing the registry.

(8) During the rule-making process, the department of health shall consult with stakeholders and persons with relevant expertise, to

include, but not be limited to, qualifying patients, designated providers, health care professionals, state and local law enforcement agencies, and the University of Washington computer science and engineering security and privacy research lab.

(9) The registration system shall meet the following requirements:

(a) Any personally identifiable information included in the registration system must be "nonreversible," pursuant to definitions and standards set forth by the national institute of standards and technology;

(b) Any personally identifiable information included in the registration system must not be susceptible to linkage by use of data external to the registration system;

(c) The registration system must incorporate current best differential privacy practices, allowing for maximum accuracy of registration system queries while minimizing the chances of identifying the personally identifiable information included therein; and

(d) The registration system must be upgradable and updated in a timely fashion to keep current with state of the art privacy and security standards and practices.

(10) The registration system shall maintain a log of each verification query submitted by a peace officer, including the peace officer's name, agency, and identification number, for a period of no less than three years from the date of the query. Personally identifiable information of qualifying patients and designated providers included in the log shall be confidential and exempt from public disclosure, inspection, or copying under chapter 42.56 RCW: PROVIDED, That:

(a) Names and other personally identifiable information from the list may be released only to:

(i) Authorized employees of the department of agriculture and the department of health as necessary to perform official duties of either department; or

(ii) Authorized employees of state or local law enforcement agencies, only as necessary to verify that the person or location is a qualified patient, designated provider, licensed producer, licensed processor of cannabis products, or licensed dispenser, and only after the inquiring employee has provided adequate identification. Authorized employees who obtain personally identifiable information

under this subsection may not release or use the information for any purpose other than verification that a person or location is a qualified patient, designated provider, licensed producer, licensed processor of cannabis products, or licensed dispenser;

(b) Information contained in the registration system may be released in aggregate form, with all personally identifying information redacted, for the purpose of statistical analysis and oversight of agency performance and actions;

(c) The subject of a registration query may appear during ordinary department of health business hours and inspect or copy log records relating to him or her upon adequate proof of identity; and

(d) The subject of a registration query may submit a written request to the department of health, along with adequate proof of identity, for copies of log records relating to him or her.

(11) This section does not prohibit a department of agriculture employee or a department of health employee from contacting state or local law enforcement for assistance during an emergency or while performing his or her duties under this chapter.

(12) Fees collected under this section must be deposited into the health professions account under RCW 43.70.320.

**Sec. 901 was vetoed. See message at end of chapter.*

**NEW SECTION. Sec. 902. A new section is added to chapter 42.56 RCW to read as follows:*

Records containing names and other personally identifiable information relating to qualifying patients, designated providers, and persons licensed as producers or dispensers of cannabis for medical use, or as processors of cannabis products, under section 901 of this act are exempt from disclosure under this chapter.

**Sec. 902 was vetoed. See message at end of chapter.*

PART X
EVALUATION

NEW SECTION. **Sec. 1001.** (1) By July 1, 2014, the Washington state institute for public policy shall, within available funds, conduct a cost-benefit evaluation of the implementation of this act and the rules adopted to carry out its purposes.

(2) The evaluation of the implementation of this act and the rules

adopted to carry out its purposes shall include, but not necessarily be limited to, consideration of the following factors:

(a) Qualifying patients' access to an adequate source of cannabis for medical use;

(b) Qualifying patients' access to a safe source of cannabis for medical use;

(c) Qualifying patients' access to a consistent source of cannabis for medical use;

(d) Qualifying patients' access to a secure source of cannabis for medical use;

(e) Qualifying patients' and designated providers' contact with law enforcement and involvement in the criminal justice system;

(f) Diversion of cannabis intended for medical use to nonmedical uses;

(g) Incidents of home invasion burglaries, robberies, and other violent and property crimes associated with qualifying patients accessing cannabis for medical use;

(h) Whether there are health care professionals who make a disproportionately high amount of authorizations in comparison to the health care professional community at large;

(i) Whether there are indications of health care professionals in violation of RCW 69.51A.030; and

(j) Whether the health care professionals making authorizations reside in this state or out of this state.

(3) For purposes of facilitating this evaluation, the departments of health and agriculture will make available to the Washington state institute for public policy requested data, and any other data either department may consider relevant, from which all personally identifiable information has been redacted.

NEW SECTION. **Sec. 1002.** A new section is added to chapter 28B.20 RCW to read as follows:

The University of Washington and Washington State University may conduct scientific research on the efficacy and safety of administering cannabis as part of medical treatment. As part of this research, the University of Washington and Washington State University may develop and conduct studies to ascertain the general medical safety and

efficacy of cannabis and may develop medical guidelines for the appropriate administration and use of cannabis.

PART XI
CONSTRUCTION

NEW SECTION. **Sec. 1101.** (1) No civil or criminal liability may be imposed by any court on the state or its officers and employees for actions taken in good faith under this chapter and within the scope of their assigned duties.

(2) No civil or criminal liability may be imposed by any court on cities, towns, and counties or other municipalities and their officers and employees for actions taken in good faith under this chapter and within the scope of their assigned duties.

NEW SECTION. **Sec. 1102.** (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.

(2) Counties may adopt and enforce any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction in locations outside of the corporate limits of any city or town: Zoning requirements, business licensing requirements, and health and safety requirements. Nothing in this act is intended to limit the authority of counties 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.

NEW SECTION. **Sec. 1103.** If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

***NEW SECTION. Sec. 1104. In the event that the federal government authorizes the use of cannabis for medical purposes, within a year of such action, the joint legislative audit and review committee shall conduct a program and fiscal review of the cannabis production and dispensing programs established in this chapter. The review shall consider whether a distinct cannabis production and dispensing system continues to be necessary when considered in light of the federal action and make recommendations to the legislature.**

***Sec. 1104 was vetoed. See message at end of chapter.**

NEW SECTION. **Sec. 1105.** (1)(a) The arrest and prosecution protections established in section 401 of this act may not be asserted in a supervision revocation or violation hearing by a person who is supervised by a corrections agency or department, including local governments or jails, that has determined that the terms of this section are inconsistent with and contrary to his or her supervision.

(b) The affirmative defenses established in sections 402, 405, 406, and 407 of this act may not be asserted in a supervision revocation or violation hearing by a person who is supervised by a corrections agency or department, including local governments or jails, that has determined that the terms of this section are inconsistent with and contrary to his or her supervision.

(2) The provisions of RCW 69.51A.040 and sections 403 and 413 of this act do not apply to a person who is supervised for a criminal conviction by a corrections agency or department, including local governments or jails, that has determined that the terms of this chapter are inconsistent with and contrary to his or her supervision.

(3) A person may not be licensed as a licensed producer, licensed processor of cannabis products, or a licensed dispenser under section 601, 602, or 701 of this act if he or she is supervised for a criminal conviction by a corrections agency or department, including local governments or jails, that has determined that licensure is inconsistent with and contrary to his or her supervision.

Sec. 1106. RCW 69.51A.900 and 1999 c 2 s 1 are each amended to read as follows:

This chapter may be known and cited as the Washington state medical use of ((~~marijuana~~)) cannabis act.

PART XII
MISCELLANEOUS

***NEW SECTION.** Sec. 1201. (1) The legislature recognizes that there are cannabis producers and cannabis dispensaries in operation as of the effective date of this section that are unregulated by the state and who produce and dispense cannabis for medical use by qualifying patients. The legislature intends that these producers and dispensaries become licensed in accordance with the requirements of this chapter and that this licensing provides them with arrest protection so long as they remain in compliance with the requirements of this chapter and the rules adopted under this chapter. The legislature further recognizes that cannabis producers and cannabis dispensaries in current operation are not able to become licensed until the department of agriculture and the department of health adopt rules and, consequently, it is likely they will remain unlicensed until at least January 1, 2013. These producers and dispensary owners and operators run the risk of arrest between the effective date of this section and the time they become licensed. Therefore, the legislature intends to provide them with an affirmative defense if they meet the requirements of this section.*

(2) If charged with a violation of state law relating to cannabis, a producer of cannabis or a dispensary and its owners and operators that are engaged in the production or dispensing of cannabis to a qualifying patient or who assists a qualifying patient in the medical use of cannabis is deemed to have established an affirmative defense to such charges by proof of compliance with this section.

(3) In order to assert an affirmative defense under this section, a cannabis producer or cannabis dispensary must:

(a) In the case of producers, solely provide cannabis to cannabis dispensaries for the medical use of cannabis by qualified patients;

(b) In the case of dispensaries, solely provide cannabis to qualified patients for their medical use;

(c) Be registered with the secretary of state as of May 1, 2011;

(d) File a letter of intent with the department of agriculture or the department of health, as the case may be, asserting that the producer or dispenser intends to become licensed in accordance with this chapter and rules adopted by the appropriate department; and

(e) File a letter of intent with the city clerk if in an incorporated area or to the county clerk if in an unincorporated area stating they operate as a producer or dispensary and that they comply with the provisions of this chapter and will comply with subsequent department rule making.

(4) Upon receiving a letter of intent under subsection (3) of this section, the department of agriculture, the department of health, and the city clerk or county clerk must send a letter of acknowledgment to the producer or dispenser. The producer and dispenser must display this letter of acknowledgment in a prominent place in their facility.

(5) Letters of intent filed with a public agency, letters of acknowledgement sent from those agencies, and other materials related to such letters are exempt from public disclosure under chapter 42.56 RCW.

(6) This section expires upon the establishment of the licensing programs of the department of agriculture and the department of health and the commencement of the issuance of licenses for dispensers and producers as provided in this chapter. The department of health and the department of agriculture shall notify the code reviser when the establishment of the licensing programs has occurred.

**Sec. 1201 was vetoed. See message at end of chapter.*

**NEW SECTION. Sec. 1202. A new section is added to chapter 42.56 RCW to read as follows:*

The following information related to cannabis producers and cannabis dispensers are exempt from disclosure under this section:

(1) Letters of intent filed with a public agency under section 1201 of this act;

(2) Letters of acknowledgement sent from a public agency under section 1201 of this act;

(3) Materials related to letters of intent and acknowledgement under section 1201 of this act.

**Sec. 1202 was vetoed. See message at end of chapter.*

1 ***NEW SECTION.** Sec. 1203. (1)(a) On July 1, 2015, the department of*
2 *health shall report the following information to the state treasurer:*
3 *(i) The expenditures from the health professions account related to*
4 *the administration of chapter 69.51A RCW between the effective date of*
5 *this section and June 30, 2015; and*
6 *(ii) The amounts deposited into the health professions account*
7 *under sections 702, 802, and 901 of this act between the effective date*
8 *of this section and June 30, 2015.*
9 *(b) If the amount in (a)(i) of this subsection exceeds the amount*
10 *in (a)(ii) of this subsection, the state treasurer shall transfer an*
11 *amount equal to the difference from the general fund to the health*
12 *professions account.*
13 *(2)(a) Annually, beginning July 1, 2016, the department of health*
14 *shall report the following information to the state treasurer:*
15 *(i) The expenditures from the health professions account related to*
16 *the administration of chapter 69.51A RCW for the preceding fiscal year;*
17 *and*
18 *(ii) The amounts deposited into the health professions account*
19 *under sections 702, 802, and 901 of this act during the preceding*
20 *fiscal year.*
21 *(b) If the amount in (a)(i) of this subsection exceeds the amount*
22 *in (a)(ii) of this subsection, the state treasurer shall transfer an*
23 *amount equal to the difference from the general fund to the health*
24 *professions account.*
**Sec. 1203 was vetoed. See message at end of chapter.*

25 NEW SECTION. **Sec. 1204.** RCW 69.51A.080 (Adoption of rules by the
26 department of health--Sixty-day supply for qualifying patients) and
27 2007 c 371 s 8 are each repealed.

28 NEW SECTION. **Sec. 1205.** Sections 402 through 411, 413, 601
29 through 611, 701 through 705, 801 through 807, 901, 1001, 1101 through
30 1105, and 1201 of this act are each added to chapter 69.51A RCW.

31 ***NEW SECTION.** Sec. 1206. Section 1002 of this act takes effect*
32 *January 1, 2013.*
**Sec. 1206 was vetoed. See message at end of chapter.*

Passed by the Senate April 21, 2011.
Passed by the House April 11, 2011.
Approved by the Governor April 29, 2011, with the exception of certain items that were vetoed.
Filed in Office of Secretary of State April 29, 2011.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to Sections 101, 201, 407, 410, 411, 412, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 701, 702, 703, 704, 705, 801, 802, 803, 804, 805, 806, 807, 901, 902, 1104, 1201, 1202, 1203 and 1206, Engrossed Second Substitute Senate Bill 5073 entitled:

"AN ACT Relating to medical use of cannabis."

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. The voters also provided patients' physicians and caregivers with defenses to state law prosecutions.

I fully support the purpose of Initiative 692, and in 2007, I signed legislation that expanded the ability of a patient to receive assistance from a designated provider in the medical use of marijuana, and added conditions and diseases for which medical marijuana could be used.

Today, I have signed sections of Engrossed Second Substitute Senate 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.

Our state legislature may remove state criminal and civil penalties for activities that assist persons suffering from debilitating or terminal conditions. While such activities may violate the federal Controlled Substances Act, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. However, absent congressional action, state laws will not protect an individual from legal action by the federal government.

Qualifying patients and designated providers can evaluate the risk of federal prosecution and make choices for themselves on whether to use or assist another in using medical marijuana. The United States Department of Justice has made the wise decision not to use federal resources to prosecute seriously ill patients who use medical marijuana.

However, the sections in Part VI, Part VII, and Part VIII of Engrossed Second Substitute Senate Bill 5073 would direct employees of the state departments of Health and Agriculture to authorize and license commercial businesses that produce, process or dispense cannabis. These sections would open public employees to federal prosecution, and the United States Attorneys have made it clear that state law would not provide these individuals safe harbor from federal prosecution. No state employee should be required to violate federal criminal law in order to fulfill duties under state law. For these reasons, I have vetoed Sections 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 701, 702, 703, 704, 705, 801, 802, 803, 804, 805, 806 and 807 of Engrossed Second Substitute Senate Bill 5073.

In addition, there are a number of sections of Engrossed Second Substitute Senate Bill 5073 that are associated with or dependent upon these licensing sections. Section 201 sets forth definitions of terms. Section 412 adds protections for licensed producers, processors and dispensers. Section 901 requires the Department of Health to develop a secure registration system for licensed producers,

processors and dispensers. Section 1104 would require a review of the necessity of the cannabis production and dispensing system if the federal government were to authorize the use of cannabis for medical purposes. Section 1201 applies to dispensaries in current operation in the interim before licensure, and Section 1202 exempts documents filed under Section 1201 from disclosure. Section 1203 requires the department of health to report certain information related to implementation of the vetoed sections. Because I have vetoed the licensing provisions, I have also vetoed Sections 201, 412, 901, 1104, 1201, 1202 and 1203 of Engrossed Second Substitute Senate Bill 5073.

Section 410 would require owners of housing to allow the use of medical cannabis on their property, putting them in potential conflict with federal law. For this reason, I have vetoed Section 410 of Engrossed Second Substitute Senate Bill 5073.

Section 407 would permit a nonresident to engage in the medical use of cannabis using documentation or authorization issued under other state or territorial laws. This section would not require these other state or territorial laws to meet the same standards for health care professional authorization as required by Washington law. For this reason, I have vetoed Section 407 of Engrossed Second Substitute Senate Bill 5073.

Section 411 would provide that a court may permit the medical use of cannabis by an offender, and exclude it as a ground for finding that the offender has violated the conditions or requirements of the sentence, deferred prosecution, stipulated order of continuance, deferred disposition or dispositional order. The correction agency or department responsible for the person's supervision is in the best position to evaluate an individual's circumstances and medical use of cannabis. For this reason, I have vetoed Section 411 of Engrossed Second Substitute Senate Bill 5073.

I am approving Section 1002, which authorizes studies and medical guidelines on the appropriate administration and use of cannabis. Section 1206 would make Section 1002 effective January 1, 2013. I have vetoed Section 1206 to provide the discretion to begin efforts at an earlier date.

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.

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.

I am also open to legislation that establishes a secure and confidential registration system to provide arrest and seizure protections under state law to qualifying patients and those who assist them. Unfortunately, the provisions of Section 901 that would provide a registry for qualifying patients and designated providers beginning in January 2013 are intertwined with requirements for

registration of licensed commercial producers, processors and dispensers of cannabis. Consequently, I have vetoed section 901 as noted above. Section 101 sets forth the purpose of the registry, and Section 902 is contingent on the registry. Without a registry, these sections are not meaningful. For this reason, I have vetoed Sections 101 and 902 of Engrossed Second Substitute Senate Bill 5073. 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.

With the exception of Sections 101, 201, 407, 410, 411, 412, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 701, 702, 703, 704, 705, 801, 802, 803, 804, 805, 806, 807, 901, 902, 1104, 1201, 1202, 1203 and 1206, Engrossed Second Substitute Senate Bill 5073 is approved."

APPENDIX C

87078-1

No. 41568-2-II

FILED
COURT OF APPEALS
DIVISION II

12 FEB 23 AM 11:42

STATE OF WASHINGTON
BY_____
DEPUTY

FILED
MAR 02 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ANDREW KURTZ,

Defendant/Appellant.

PETITION FOR REVIEW

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Rules

RAP 13.4(b)(4). 2

A. IDENTITY OF PETITIONER

Petitioner William Kurtz asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Kurtz seeks review of the January 31, 2012 unpublished decision affirming his conviction. *See* Exhibit 1, Slip Opinion, State v. Kurtz, # 41568-2-II.

C. ISSUES PRESENTED FOR REVIEW

Should this Court overrule *State v. Butler*, *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005)?

D. STATEMENT OF THE CASE

William A. Kurtz was charge with one count of manufacturing marijuana and one count of possession of marijuana with the intent to deliver. CP 24-41. Both counts were alleged to have occurred on March 1, 2010.

Prior to trial the State asked the Court to exclude any evidence of the medical marijuana or medical necessity defenses at trial. 10/25/10 RP at 1-22. The defense objected and stated that Kurtz had a qualifying

condition and an authorization for medical marijuana from Dr. Greg Carter. Exhibits 1 and 2, RP 22-38.

The trial judge ruled that neither defense could be presented to the jury. 10/25/10 RP at 69-72. She found that, because Kurtz did not have a signed authorization on the date that the he was arrested (he got the authorization after his arrest), he was not entitled to the statutory defense. In addition, she found that the decision in *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005) prevented Kurtz from presenting the medical necessity defense. *Id.*

In the Court of Appeals, Kurtz argued that *Butler* should be overturned. That Court refused to do so. See Slip Opinion at 2.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Is State v. Butler wrongly decided and should this Court overrule it?

This a question of substantial public importance. RAP 13.4(b)(4).

Division III recognized that "necessity" could be a defense to a prosecution for possession of marijuana in 1979. *State v. Diana,* 24 Wn. App. 908, 604 P.2d 1312 (1979). In that case, the defendant claimed that marijuana had an ameliorative effect on his symptoms of multiple sclerosis. That Court said:

> To summarize, medical necessity exists in this case if the court finds that (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. To support the defendant's assertions that he reasonably believed his actions were necessary to protect his health, corroborating medical testimony is required. In reaching its decision, the court must balance the defendant's interest in preserving his health against the State's interest in regulating the drug involved. Defendant bears the burden of proving the existence of necessity, an affirmative defense, by a preponderance of the evidence.

Id. at 916.

Division II adopted the reasoning of *Diana* in 1994 in *State v. Cole*, 74 Wn. App. 571, 874 P.2d 878 (1994). In that case, the defendant testified that he had suffered from intractable back pain for years. Although he had asked many doctors about medications including marijuana, he did not obtain a declaration from a doctor supporting his use of the drug until after his arrest. *Id.* at 574-75. For that reason, the trial judge questioned the doctor's credibility and forbid Cole from presenting the necessity defense to a jury. This Court reversed the trial court and found that, because Cole had presented some evidence to establish each of the elements of the necessity defense, he should have been allowed to present that defense to a jury. *Id.* at 578-79.The court stated:

> As noted in *Diana*, Cole's interest in preserving his health must be balanced against the State's interest in regulating the drug involved. It is for the trier of fact to determine by a preponderance of the evidence whether Cole's actions were justified by medical necessity.

Id. at 580.

Division I has not directly addressed the question. But in *State v. Pittman*, 88 Wn. App. 188, 943 P.2d 713 (1997), the trial court gave a necessity instruction after Pittman presented evidence that she supplied marijuana to another person who used it to treat his glaucoma. The defense was presented to the jury but the jury rejected the defense. Pittman appealed and argued that the trial court's necessity instruction did not correctly state the law. The Court declined to reverse but had no quarrel with the opinion in *Diana*, supra.

In 1997, this Court decided *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). In that case, Seeley, a very ill cancer patient, filed a declaratory judgment action to challenge the Washington statute that placed marijuana on Schedule 1 of the controlled substances act. *Id.* at 785. Seeley was affected by that decision because, by placing marijuana on Schedule 1, doctors could not prescribe him marijuana. He framed his challenge under the state privileges and immunities clause and the state equal protection clause. The Supreme Court ultimately concluded only that:

> The challenged legislation involves conclusions concerning a myriad of complicated medical, psychological and moral issues of considerable controversy. We are not prepared on this limited record to conclude that the legislature could not reasonably conclude that marijuana should be placed in schedule I of controlled substances. It is clear not only from the record in this case but also from the long history of marijuana's treatment under the law that disagreement persists concerning the health effects of marijuana use and its effectiveness as a medicinal drug. The evidence presented by the Respondent is insufficient to convince this court that it should interfere with the broad judicially recognized prerogative of the legislature.

Id. at 805.

Following *Seeley*, this Division II decided *State v. Williams*, 93 Wn. App. 340, 968 P.2d 26 (1998). In that case, this Court determined that classification of marijuana as a Schedule I drug meant that it had "no accepted medical use." *Id.* at 347. Thus, its use could never form the basis of a medical marijuana defense. *Id.*

In 1998, however, the people passed Initiative 692 which authorized patients with terminal or debilitating illnesses to use marijuana for medical purposes based upon their treating physician's professional opinions. That Initiative is now codified at RCW 69.51A. The statute specifically states:

> 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. Some of the illnesses for which marijuana appears to be beneficial include chemotherapy-related

> nausea and vomiting in cancer patients; AIDS wasting syndrome; severe muscle spasms associated with multiple sclerosis and other spasticity disorders; epilepsy; acute or chronic glaucoma; and some forms of intractable pain.
>
> The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.
>
> Therefore, The people of the state of Washington intend that:
>
> Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;
>
> Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana; and
>
> Physicians also be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

RCW 69.51A.005. This legislation, thus, expressly adopted the fact that marijuana does have accepted medical uses, effectively overturned the *Williams* decision and should have revived the medical necessity defense with regard to marijuana.

In 2005, however, Division II disagreed. In *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005), that court was asked to review a trial

court order denying Butler funds for an expert regarding his use of medical marijuana. Citing *Williams*, the court was of the view that "Washington does not recognize a common law defense of medical necessity for the use of marijuana." *Id.* at 496. Paradoxically, the court also concluded that the Medical Marijuana Act was inconsistent with the common law and, thus, superceded the common law defense of medical necessity. *Id.* at 750. The court held that enactment of the Initiative meant that the *only* avenue for raising a medical marijuana defense was via the statute. Because Butler had not strictly complied with the Act, he could not raise the defense and was not entitled to funds to hire an expert.

Butler is incorrect in its conclusion that Washington does not recognize a common law defense of medical necessity for the use of marijuana. As discussed above, for many years Washington did recognize a common law medical marijuana defense. See *Diana*, *Cole* and *Pittman*, supra. The *Williams* court did not disagree. It simply held that after *Seeley,* no one could establish such a defense because the Legislature had determined that marijuana had no medicinal value.

The Medical Marijuana Act did not supercede the common law as described in *Diana*, *Cole* and *Pittman*. It actually reaffirmed the law by making it clear *legislatively* that marijuana has medicinal value. Thus, it

not only revived the common law, it provided another statutory defense that is entirely consistent with that common law.

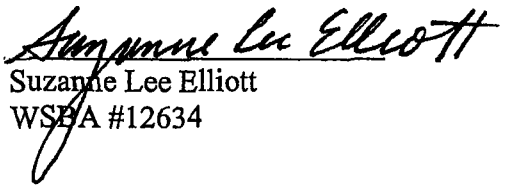
There is simply no reason why the statutory defense and common law defense cannot and do not co-exist. There is nothing in the statute that indicates the Initiative was designed to preempt the field. The Initiative was drafted and passed before this Court decided *Williams*. Thus, the common law defense was alive and well at the time. The drafters could have referenced the common law and superceded it had they intended to do so. But, they did not.

In short, this Court should reverse its *Butler* decision and hold that the both the statutory and common law defenses co-exist.

F. CONCLUSION

For the reasons stated above review should be granted.

Respectfully submitted this 27th day of February, 2012.



Suzanne Lee Elliott
WSBA #12634

FILED
COURT OF APPEALS
DIVISION II

12 FEB 28 AM 11:43

STATE OF WASHINGTON
BY
DEPUTY

Certification of Service by Mail

I declare under penalty of perjury that on February 27, 2012, I placed a copy of this document in the U.S. Mail, postage prepaid, to be served upon:

Mr. John Skinder
Thurston County Prosecutor's Office
2000 Lakeridge Drive SW, BLDG 2
Olympia WA 98502-6090

And to:

William Kurtz
11806 Champion Dr SW
Olympia, WA 98512

Suzanne Lee Elliott

Suzanne Lee Elliott

FILED
COURT OF APPEALS
DIVISION II

12 JAN 31 AM 9:09
STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM ANDREW KURTZ, Appellant.	No. 41568-2-II UNPUBLISHED OPINION

VAN DEREN, J.—William Kurtz appeals his convictions for manufacturing marijuana and for possessing more than 40 grams of marijuana. He also appeals the calculation of his offender score. We affirm his convictions but remand for resentencing.[1]

On March 1, 2010, police executed a search warrant at Kurtz's home. They located and seized growing and processed marijuana. They also located a marijuana growing operation.

The State charged Kurtz with manufacturing marijuana and possessing more than 40 grams of marijuana. Kurtz proffered medical authorizations for use of marijuana to establish an affirmative defense to the charges, as allowed by RCW 69.51A.040(2). But those authorizations were not signed until October 15, 2010, and October 21, 2010, respectively, after the date the marijuana was discovered and seized. The State moved to exclude those authorizations. The trial court granted the State's motion, relying on *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005).

[1] A commissioner of this court initially considered Kurtz's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

A jury found Kurtz guilty as charged. The trial court calculated his offender score for each conviction as one, using the other conviction as an "other current offense" under RCW 9.94A.525(1). Kurtz appeals from both his convictions and his sentence.

First, Kurtz argues that we should reverse our decision in *Butler* because we concluded incorrectly that the Medical Use of Marijuana Act, chapter 69.51A RCW, superseded the common law medical necessity defense established in *State v. Diana*, 24 Wn. App. 908, 916, 604 P.2d 1312 (1979), and *State v. Cole*, 74 Wn. App. 571, 578-79, 874 P.2d 878 (1994). But in *Seeley v. State,* 132 Wn.2d 776, 805, 940 P.2d 604 (1997), and *State v. Williams*, 93 Wn. App. 340, 347, 968 P.2d 26 (1998), the courts held that, as a schedule I controlled substance, marijuana had no accepted medical use and its use could not form the basis of a medical necessity defense. Thus, by the time the Act was passed, there was no common law medical necessity defense to a charge involving marijuana. *Butler* therefore correctly concluded that the Act was the controlling law on affirmative defenses to a charge involving marijuana. And under *Butler*, the trial court did not err in excluding the medical authorizations for Kurtz's use of marijuana because Kurtz had not obtained those authorizations before the marijuana was discovered and seized. *Butler*, 126 Wn. App. at 750-51.

Second, Kurtz argues that the trial court erred in not treating his conviction for possession and manufacture of marijuana as the same criminal conduct when calculating his offender score. *State v. Bickle*, 153 Wn. App. 222, 234-35, 222 P.3d 113 (2009). The State concedes that he is correct. We accept the State's concession and remand for resentencing.

We affirm Kurtz's conviction but remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Worswick, A.C.J.

Johanson, J.

87078-1

No. 41568-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ANDREW KURTZ,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

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3. Under this Court's reasoning in *State v. Bickle*, 153 Wash. App. 222, 222 P. 3rd, 113 (2009),were the two offenses the same criminal conduct. 9

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in prohibiting the defense from presenting a medical necessity defense.
2. The trial court erred in failing to treat possession of marijuana and manufacture of marijuana as the same criminal conduct?

Issues Pertaining to the Assignments of Error

1. Is *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005) wrongly decided?

2. Did the trial court err in failing to treat possession of marijuana and manufacture of marijuana as the same criminal conduct?

B. STATEMENT OF THE CASE

William A. Kurtz was charge with one count of manufacturing marijuana and one count of possession of marijuana. CP 24-41. Both counts were alleged to have occurred on March 1, 2010.

On March 1, 2010, the police obtained a warrant to search Kurtz's house. Inside they found both processed and growing marijuana. RP 117 to 191.

Prior to trial the State asked the Court to exclude any evidence of the medical marijuana or medical necessity defenses at trial. 10/25/10 RP at 1-22. The defense objected and stated that Kurtz had a qualifying

condition and an authorization for medical marijuana from Dr. Greg Carter. Exhibits 1 and 2, RP 22-38. Kurtz also submitted an offer of proof indicating that he would testify that he suffered from a progressive hereditary disorder. RP 207. He would have testified that he used marijuana to deal with his condition and that the marijuana he was growing was for this condition. Id.

The trial judge ruled that neither defense could be presented to the jury. 10/25/10 RP at 69-72. She found that, because Kurtz did not have a signed authorization on the date that the he was arrested (he got the authorization after his arrest), he was not entitled to the statutory defense. In addition, she found that the decision in *State v. Butler*, supra, prevented Kurtz from presenting the medical necessity defense. Id.

At sentencing, the trial court treated the two crimes and separate and distinct. C.P. 44-51. There was no request to treat the counts as the "same criminal conduct." 11/24/10 RP 1-18.

This timely appeal followed. CP 52-60.

C. ARGUMENT

1. Is State v. Butler wrongly decided and should this court overrule it?

Division III of this Court recognized that "necessity" could be a defense to a prosecution for possession of marijuana in 1979. *State v.*

Diana, 24 Wn. App. 908, 604 P.2d 1312 (1979). In that case, the defendant claimed that marijuana had an ameliorative effect on his symptoms of multiple sclerosis. That Court said:

> To summarize, medical necessity exists in this case if the court finds that (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. To support the defendant's assertions that he reasonably believed his actions were necessary to protect his health, corroborating medical testimony is required. In reaching its decision, the court must balance the defendant's interest in preserving his health against the State's interest in regulating the drug involved. Defendant bears the burden of proving the existence of necessity, an affirmative defense, by a preponderance of the evidence.

Id. at 916.

This Division adopted the reasoning of *Diana* in 1994 in *State v. Cole*, 74 Wn. App. 571, 874 P.2d 878 (1994). In that case, the defendant testified that he had suffered from intractable back pain for years. Although he had asked many doctors about medications including marijuana, he did not obtain a declaration from a doctor supporting his use of the drug until after his arrest. *Id.* at 574-75. For that reason, the trial judge questioned the doctor's credibility and forbid Cole from presenting the necessity defense to a jury. This Court reversed the trial court and found that, because Cole had presented some evidence to establish each of

the elements of the necessity defense, he should have been allowed to present that defense to a jury. *Id.* at 578-79.This Court stated:

> As noted in *Diana*, Cole's interest in preserving his health must be balanced against the State's interest in regulating the drug involved. It is for the trier of fact to determine by a preponderance of the evidence whether Cole's actions were justified by medical necessity.

Id. at 580.

Division I has not directly addressed the question. But in *State v. Pittman*, 88 Wn. App. 188, 943 P.2d 713 (1997), the trial court gave a necessity instruction after Pittman presented evidence that she supplied marijuana to another person who used it to treat his glaucoma. The defense was presented to the jury but the jury rejected the defense. Pittman appealed and argued that the trial court's necessity instruction did not correctly state the law. The Court declined to reverse but had no quarrel with the opinion in *Diana*, supra.

In 1997, the Supreme Court decided *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). In that case, Seeley, a very ill cancer patient, filed a declaratory judgment action to challenge the Washington statute that placed marijuana on Schedule 1 of the controlled substances act. *Id.* at 785. Seeley was affected by that decision because, by placing marijuana on Schedule 1, doctors could not prescribe him marijuana. He framed his challenge under the state privileges and immunities clause and

the state equal protection clause. The Supreme Court ultimately concluded only that:

> The challenged legislation involves conclusions concerning a myriad of complicated medical, psychological and moral issues of considerable controversy. We are not prepared on this limited record to conclude that the legislature could not reasonably conclude that marijuana should be placed in schedule I of controlled substances. It is clear not only from the record in this case but also from the long history of marijuana's treatment under the law that disagreement persists concerning the health effects of marijuana use and its effectiveness as a medicinal drug. The evidence presented by the Respondent is insufficient to convince this court that it should interfere with the broad judicially recognized prerogative of the legislature.

Id. at 805.

Following *Seeley*, this Court decided *State v. Williams*, 93 Wn. App. 340, 968 P.2d 26 (1998). In that case, this Court determined that classification of marijuana as a Schedule I drug meant that it had "no accepted medical use." *Id.* at 347. Thus, its use could never form the basis of a medical marijuana defense. *Id.*

In 1998, however, the people passed Initiative 692 which authorized patients with terminal or debilitating illnesses to use marijuana for medical purposes based upon their treating physician's professional opinions. That Initiative is now codified at RCW 69.51A. The statute specifically states:

> 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. Some of the illnesses for which marijuana appears to be beneficial include chemotherapy-related nausea and vomiting in cancer patients; AIDS wasting syndrome; severe muscle spasms associated with multiple sclerosis and other spasticity disorders; epilepsy; acute or chronic glaucoma; and some forms of intractable pain.
>
> The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.
>
> Therefore, The people of the state of Washington intend that:
>
> Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;
>
> Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana; and
>
> Physicians also be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

RCW 69.51A.005. This legislation, thus, expressly adopted the fact that marijuana does have accepted medical uses, effectively overturned the *Williams* decision and should have revived the medical necessity defense with regard to marijuana.

In 2005, however, this Court disagreed. In *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005), this Court was asked to review a trial court order denying Butler funds for an expert regarding his use of medical marijuana. Citing *Williams*, this Court was of the view that "Washington does not recognize a common law defense of medical necessity for the use of marijuana." *Id.* at 496. Paradoxically, this Court also concluded that the Medical Marijuana Act was inconsistent with the common law and, thus, superceded the common law defense of medical necessity. *Id.* at 750. The Court held that enactment of the Initiative meant that the *only* avenue for raising a medical marijuana defense was via the statute. Because Butler had not strictly complied with the Act, he could not raise the defense and was not entitled to funds to hire an expert.

Butler is incorrect in its conclusion that Washington does not recognize a common law defense of medical necessity for the use of marijuana. As discussed above, for many years Washington did recognize a common law medical marijuana defense. See *Diana*, *Cole* and *Pittman*, supra. The *Williams* court did not disagree. It simply held that after *Seeley,* no one could establish such a defense because the Legislature had determined that marijuana had no medicinal value.

The Medical Marijuana Act did not supercede the common law as described in *Diana*, *Cole* and *Pittman*. It actually reaffirmed the law by

making it clear *legislatively* that marijuana has medicinal value. Thus, it not only revived the common law, it provided another statutory defense that is entirely consistent with that common law.

There is simply no reason why the statutory defense and common law defense cannot and do not co-exist. There is nothing in the statute that indicates the Initiative was designed to preempt the field. The Initiative was drafted and passed before this Court decided *Williams*. Thus, the common law defense was alive and well at the time. The drafters could have referenced the common law and superceded it had they intended to do so. But, they did not.

In short, this Court should reverse its *Butler* decision and hold that the both the statutory and common law defenses co-exist.

2. *Assuming Butler is reversed, did Kurtz present some evidence of the common law defense?*

The State did not dispute in the trial court that Kurtz had sufficient evidence to go forward on the common law defense. The prosecutor did not dispute that: (1) Kurtz reasonably believed his use of marijuana was necessary to minimize his medical conditions; (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 was effective in minimizing the

effects of the disease. Kurtz submitted an offer of proof that demonstrated he had a qualified medical expert who would testify on his behalf.

Thus, the trial court erred in ordering that Kurtz was precluded from presenting this defense to the jury.

3. Under this Court's reasoning in State v. Bickle, 153 Wash. App. 222, 222 P. 3rd, 113 (2009),were the two offenses the same criminal conduct.

There was no objection to the To raise this issue on appeal, Kurtz must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. State v. Kirkman, 159 Wash.2d at 926, 155 P.3d 125. This showing of actual prejudice is what makes the error "manifest," allowing appellate review. Id. at 927, 155 P.3d 125.

The Fifth Amendment to the United States Constitution prohibits the government from putting any person in jeopardy twice for the same offense. See Const. art. I, § 9. This Court interprets the Washington Constitution's analogous double jeopardy clause in the same way that the United States Supreme Court interprets the Fifth Amendment. *State v. Gocken*, 127 Wash.2d 95, 107, 896 P.2d 1267(1995).

In *State v. Bickle*, supra, this Court held that, because the crimes of manufacturing marijuana and possessing marijuana "further" each other,

they are the same criminal conduct when they occur at the same time and place. Here, like Bickle, Kurtz both possessed and manufactured marijuana at his residence on the same date. And the victim in both offenses was the public.

Therefore, the principles of double jeopardy bar calculating Kurtz's offender score using both convictions.

D. CONCLUSION

For the reasons stated above, this Court should reverse and remand Kurtz's convictions for a new trial. In addition, this Court must reverse Kurtz's sentence and remand to the trial court for resentencing.

Respectfully submitted this 24th day of June, 2011.

Suzanne Lee Elliott, WSBA 12634
Attorney for Warren Helzer

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I declare under penalty of perjury that on June 24, 2011, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

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Suzanne Lee Elliott

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No. 41568-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM KURTZ

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable, Judge Carol Murphy
Cause No. 10-1-00914-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether State v. Butler was wrongly decided and should this Court overrule it.

2. Whether the two offenses constitute the same criminal conduct.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.

C. ARGUMENT.

1. State v. Butler was not wrongly decided and this Court should not overrule its own ruling.

A challenge to the trial court's determination of whether a defense exists as a question of law is reviewed de novo. State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010). The common law defense of medical necessity has three parts:

> (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 defense dealing with the specific situation involved; and
> (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

State v. Diana, 24 Wn. App. 908, 914, 604 P.2d 1312 (1979). In State v. Butler, 126 Wn. App. 741, 109 P.3d 493 (2005), this Court

held that the Medical Use of Marijuana Act superseded the medical necessity defense, if such defense existed.

The appellant asks this Court to overturn its ruling in Butler. The appellant argues that the Medical Use of Marijuana Act and the common law medical necessity defense are co-existing. However, the appellant's argument is misplaced because the common law medical necessity defense does not exist.

In Williams, this Court determined that an implied assumption to the common law medical necessity defense is that marijuana has accepted medical uses. Williams, 93 Wn. App. at 346, 968 P.2d 26. In Seeley v. State, 132 Wn.2d 776, 805-06, 940 P.2d 604 (1997), the Washington Supreme Court determined that our state constitution vested in the Legislature the task of determining whether there is an accepted medical use for particular drugs. In Williams, this Court, looking to the holding in Seeley, concluded that because marijuana is a Schedule I drug, the medical necessity defense did not exist. Williams, 93 Wn. App. at 347, 968 P.2d 26.[1] In reaching its decision[2], this Court reasoned:

---

1 This Court held in Williams that the ruling in Seeley, by implication, overrules both State v. Diana, 24 Wn. App. 908, 604 P.2d 1312 (1979) (recognizing the existence of medical necessity defense) and State v. Cole, 74 Wn. App. 571, 874 P.2d 878 (1994) (adoption of the ruling in Diana).

> "Because the debate over medical treatment belongs in the political arena, it makes no sense for the courts to fashion a defense whereby jurors weigh experts' testimony on the medical uses of Schedule I drug. Otherwise, each trial would become a battlefield of experts. But the Legislature has designated the battlefield as the Board of Pharmacy. The Washington Constitution has not enabled each individual to be the final arbiter of the medicine he is entitled to take—it is the Legislature that has been authorized to make laws to regulate the sale of medicines and drugs."

Id.

The appellant argues that the passing of the Medical Use of Marijuana Act suggests the existence of the medical necessity defense. However, the language in the Act states otherwise. When the Legislature enacted the statute, it specifically stated that it did not have the purpose or intent to "establish the medical necessity or medical appropriateness of cannabis for treating terminal or debilitating medical conditions. RCW 69.51A.005 (3). Additionally, after the passing of the Medical Use of Marijuana Act, this Court's ruling in Williams was appealed to the Washington Supreme Court. However, the Washington Supreme Court declined to review. State v. Williams, 138 Wn.2d 1002, 984 P.2d 1034 (1999). Thus, this Court's Williams rationale, analysis and

[2] When reaching its decision, this Court took into consideration the recent passing of initiative, No. 692 that legalized the use of marijuana for medical purposes under certain conditions.

holding that the medical necessity defense does not exist remain good law.

2. The State concedes that the two criminal offenses were the same criminal conduct.

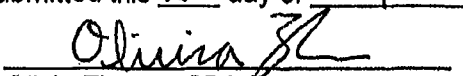
Offender score computations are reviewed de novo. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). A challenge to an offender score calculation is a sentencing error that can be raised for the first time on appeal. State v. Anderson, 92 Wn. App. 54, 61, 960 P.2d 975 (1998).

The State agrees with the appellant that manufacturing marijuana and unlawful possession of marijuana are the same criminal conduct for sentencing purposes. Thus, the appellant's offender score should have been "0" during sentencing.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests this court to affirm its prior holding in Butler and affirm the trial court's denial of the common law medical necessity defense. Additionally, the State requests the case be remanded for resentencing based on an offender score of zero.

Respectfully submitted this 20 day of September, 2011.



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THURSTON COUNTY PROSECUTOR

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ANDREW KURTZ,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 10-1-00914-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION.

This court has granted review of a Division Two Court of Appeals decision affirming William Kurtz's conviction for unlawful manufacture of marijuana and unlawful possession of marijuana—greater than 40 grams. That decision is reported at State v. Kurtz, No. 41568-2-II, 2012 WL 298153 (Wash. App. Div. 2. Jan. 31, 2012). In his petition for review, Kurtz asks this Court to overrule Butler, in which Division Two held that medical necessity defense does not exist for possession of marijuana and if it did, it was abrogated by the Medical Use of Marijuana Act. State v. Butler, 126 Wn. App. 741, 750, 109 P.3d 493 (2005). Kurtz argues that Butler should be overruled because the common law and statutory defense co-exist. The order of the Supreme Court is simply that review is granted.

II. ISSUES

1. Whether Division Two was correct in deciding that medical necessity defense did not exist for marijuana related crimes in Butler.

2. Whether the affirmative defense pursuant to the Medical Use of Marijuana Act superseded or abrogated the common law medical necessity defense.

3. Whether the medical necessity defense is applicable to Mr. Kurtz's case.

III. STATEMENT OF THE CASE.

The substantive and procedural facts of the case are set forth in the opinion of the Court of Appeals. Kurtz, 2012 WL 298153, at *1.

IV. ARGUMENT.

A. Division Two was correct in holding that medical necessity defense did not exist for marijuana related crimes.

A challenge to the trial court's determination of whether a defense exists as a question of law is reviewed de novo. State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010). In determining whether the medical necessity defense exists for possession of marijuana, the court must find the following:

> (1) The defendant reasonably believed his use of marijuana was necessary to minimize the effects of [the disease];
> (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.

State v. Diana, 24 Wn. App. 908, 916, 604 P.2d 1312 (1979). To show that he reasonably believed his actions were necessary, the defendant must proffer corroborating medical testimony. Id. In reaching its decision, the court must balance the defendant's

interest against the State's interest in regulating the drug involved. Id.

Washington statute lists marijuana in Schedule I of controlled substances. See RCW 69.50.204(c)(22). A substance is listed in Schedule I if it has (1) 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. RCW 69.50.203. In Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997), this Court concluded that the placement of marijuana as a Schedule I drug does not violate the Washington Constitution. In reaching its decision, this Court makes it clear that the state constitution has vested in the Legislature the task of determining whether there is an accepted medical use for particular drugs. Id. at 789. Additionally, this Court left the classification of marijuana to the Legislature since there were disagreements amongst experts regarding the seriousness of marijuana's effects. Id. at 799 (citing State v. Smith, 93 Wn.2d 329, 337, 610 P.2d 869 (1980)).

Although not a challenge on whether the common law medical necessity defense exists, this Court's previous rulings have suggested that marijuana has not been generally accepted for

medical use. See State v. Palmer, 96 Wn.2d 573, 637 P.2d 239 (1981) (holding that the state board of pharmacy did not abuse its discretion in declining to remove marijuana from schedule I); State v. Whitney, 96 Wn.2d 578, 637 P.2d 956 (1981) (concluding that the retention of marijuana in schedule I was reasonably related to a legitimate state purpose because the legislation did not manifest a finding that marijuana has an accepted medical use).

In the present case, at the time Butler was decided, common law medical necessity defense did not exist for marijuana related charges. Implicit in the medical necessity defense is the showing that marijuana has general accepted medical use.[1] However, this Court, as seen through its previously rulings, has continuously held that the ultimate determination of marijuana's accepted medical use and its classification is vested in the legislature. This was resonated in State v. Williams, 93 Wn. App. 340, 347, 968 P.2d 26 (1998), in which Division Two, looking to the holding in Seeley, concluded that with "respect to Schedule I drugs, there is not a

[1] The first element that a defendant has to establish is that he "reasonably believed his use of marijuana was necessary to minimize the effects of [the disease]." Diana, 24 Wn. App. at 916.

defense of medical necessity."[2] In reaching its decision,[3] Division Two reasoned:

> "Because the debate over medical treatment belongs in the political arena, it makes no sense for the courts to fashion a defense whereby jurors weigh experts' testimony on the medical uses of Schedule I drugs. Otherwise, each trial would become a battlefield of experts. But the Legislature has designated the battlefield as the Board of Pharmacy. The Washington Constitution has not enabled each individual to be the final arbiter of the medicine he is entitled to take—it is the legislature that has been authorized to make laws to regulate the sale of medicines and drugs."

Id.

Mr. Kurtz argues that the passing of the Medical Use of Marijuana Act (hereinafter the "Act") suggests that medical necessity defense is applicable to marijuana related crimes. However, the language in the Act states otherwise. According to its 2011 amendments, the Act specifically stated that it did not have the purpose or intent to "establish the medical necessity or medical appropriateness of cannabis for treating terminal or debilitating medical conditions." RCW 69.51A.005(3). In Seeley, this Court recognized that the constitutional history and preexisting state law

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[2] The appellant in Williams petitioned this Court for review of Division Two's opinion. However, this court denied review. State v. Williams, 138 Wn.2d 1002, 984 P.2d 1034 (1999).

[3] When reaching its decision, Division Two took into consideration the recent passing of Initiative, No. 692. Williams, 93 Wn. App. at 347 n. 1.

vests in the Legislature the authority to "protect the public health and safety through the regulation of drugs." Seeley, 132 Wn.2d at 789. Because the Legislature has already explicitly stated that the purpose of the Act was not to establish the medical necessity of marijuana, Division Two was correct in Butler to conclude that medical necessity does not exist as a defense for marijuana related crimes.

B. Even if the common law medical necessity defense does exist, the Medical Use of Marijuana Act supersedes the common law defense.

In general, our state is governed by the common law to the extent that it is "not inconsistent with the Constitution and laws of the United States, or of the state of Washington or incompatible with the institutions and condition of society." RCW 4.04.010. The legislature has the power to supersede, abrogate, or modify the common law. See State v. Estill, 50 Wn.2d 331, 334-35, 311 P.2d 667 (1957); State v. Mays, 57 Wn. 540, 542, 107 P. 363 (1910). This Court examined the doctrine of abrogation of common law by statutes in State ex rel. Madden v. Pub. Util. Dist. No. 1, 83 Wn.2d 219, 222, 517 P.2d 585 (1973). This Court observed that as a general rule, the Legislature is assumed to be aware of established

common law that is applicable to a statute's subject matter. Id. at 222.

A statute abrogates common law when the "provisions are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force. Id. For a statute to abrogate a common law, it is not necessary for a legislature to affirmatively proscribe in the statute the rule, but it must "speak directly" to the question addressed by that rule. City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 315, 101 S. Ct. 1784, 1791 (1981). A statute does not need to address every issue of the common law rule, but if it does speak directly to the question, courts may not supplement the legislature's statutory answer such that the statute is rendered meaningless. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26, 98 S. Ct. 2010, 2015 (1978), *overruled* on other grounds.

In Potter v. Washington State Patrol, 165 Wn.2d 67, 196 P.3d 691 (2008), this Court laid out the factors in the analysis of determining whether there is a statutory abrogation of common law. In Potter, this Court held that to determine whether a statutory remedy is exclusive, the court must first examine the language and provisions of the statute to see if there is language suggesting

exclusivity. Id. at 80 (citing Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 62, 821 P.2d 18 (1991)). If the statute does not contain an exclusivity clause, then the court needs to examine the language and provisions of the statute to determine whether it was the legislature's intent for the statute to be exclusive. Potter, 165 Wn.2d at 81; Wilmot, 118 Wn.2d at 54. Some factors to consider, among others, are "comprehensiveness of the remedy provided by the statute, the purpose of the statute, and the origin of the statutory right. Potter, 165 Wn.2d at 84; Wilmot, 118 Wn.2d at 61-65.

Assuming, *arguendo*, that common law medical necessity defense exists, the enactment of the Act abrogated the common law defense. In November 1998, voters passed Initiative 692. Medical Use of Marijuana Act, ch. 2, 1999 Wash. Sess. Laws 1-16. When the Legislature enacted the Act, it acknowledged that some patients with terminal or debilitating illnesses may benefit from the medical use of marijuana. Butler, 126 Wn. App. at 749. In enacting the statute, the Legislature explicitly stated its intent was to ensure that certain people would not be punished by the Controlled Substance Act:

> "Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana...Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana."

Ch. 2, 1999 Wash. Sess. Laws at 2. This section was later amended to read the following:

> "If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions."

RCW 69.51A.040 (2010).[4]

Beyond the clear statement of the statute's purpose and intent, the Legislature proceeds to carefully define diseases and conditions that constitute terminal or debilitating condition. Ch.2, 1999 Wash. Sess. Laws at 4. The statute also provides a way for

[4] This was the statutory language of RCW 69.51A.040 at the time Mr. Kurtz was arrested. RCW 69.51A.040 was later amended in 2011.

medical practitioners and patients to add terminal or debilitating conditions to those that are already included. Id. at 5.

In reading the Act, it is clear that when the Legislature enacted the statute, it intended to "speak directly" to the object and purpose of the defense that was provided under the common law of medical necessity. For example, the Act directly addresses the first element of the medical necessity defense. In Diana, Division Three Court of Appeals held that a defendant must provide medical testimony to show that he reasonably believed marijuana was necessary to treat the illness. Diana, 24 Wn. App. at 916. The Act adopts the first element by requiring a defendant to obtain an authorization for use of marijuana from a qualifying physician.

Additionally, the second element of the medical necessity defense requires that "the harm sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged." Diana, 24 Wn. App. at 916. The Act addresses this calculation by imposing a restriction on the maximum amount of marijuana a qualifying patient may possess. The restriction signifies that the Legislature has performed the balancing required by the second element of the medical necessity defense and determined that the harm derived from possession of

less than a 60-day supply of marijuana is not as great as the harm produced by the terminal or debilitating condition.

Finally, the last element of the medical necessity defense is adopted by the Act. Under the Act, an individual is not required to show that there are no other drugs that are as effective in treating the illness. The purpose and intent of the Act clarifies that for individuals who meet the requirements as listed within the Act, the medical justification for use of marijuana is absolute.

Although the Act addresses or adopts the elements listed under the medical necessity defense, there are still obvious inconsistencies between the common law defense and the affirmative defense as provided under the Act. While both defenses might be available to some patients, for many, only the medical necessity defense will justify their conduct. For example, an individual who obtains authorization by an "unqualified" physician would not satisfy the requirements under the Act even though he will qualify for the medical necessity defense. Additionally, an individual who possesses more than the 60-day supply will qualify for the medical necessity defense while protection under the Act is not available.

Additionally, when Division Three developed the rationale behind the medical necessity in Diana, it looked to the common law necessity defense for guidance, which had three parts:

> (1) 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
> (2) Neither the Code nor other law defining the offense provides exceptions or defense dealing with the specific situation involved; and
> (3) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Diana, 24 Wn. App. at 914 (citing Section 3.02 of the Model Penal Code (Proposed Official Draft A, 1962)). In light of these elements, it is clear that a "necessity" defense no longer applies to marijuana related crimes after the enactment of the Act.

Ultimately and most importantly, the affirmative defense provided under the Act is in line with what the Washington Constitution and this Court has already stated—that the Legislature is vested with the authority in the regulation of drugs. By defining terminal or debilitating condition, the Legislature acknowledges that *not all* conditions are suitable for treatment by the use of marijuana. Furthermore, by requiring a qualifying patient to obtain authorization and advisement about the risks of medical use of marijuana prior to legally possessing marijuana, the Legislature

provided the balance between the possible benefits of medical use of marijuana and the potential for abuse.

Therefore, in reading the Act, it is clear that it was the Legislature's intent to make the Act the *only* affirmative defense available for the medical use of marijuana. Because the Legislature is assumed to be aware of established common law applicable to a statute's subject matter,[5] it would have expressly saved the medical necessity defense from abrogation if it was the intent. However, it did not do so. Instead, the language of the statute contains detailed provisions that define the scope of the statutory affirmative defense. Allowing defendants the option to assert a medical necessity defense that is potentially applicable to a much broader range of individuals, illnesses, and amounts of marijuana would render the Act meaningless and defeat the purpose of the Initiative.

C. Medical necessity defense does not apply to Mr. Kurtz

Assuming, *arguendo*, this Court concludes that the medical necessity defense and the statutory defense under the Act are both available to defendants charged with marijuana related crimes, the medical necessity defense still does not apply to Mr. Kurtz as a

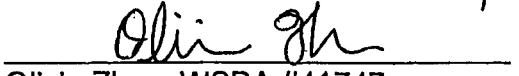
[5] Pub. Util. Dist. No. 1, 83 Wn.2d at 222

defense. In the present case, Mr. Kurtz was ultimately able to obtain authorization to use marijuana pursuant to the Act. He was not allowed to assert the affirmative defense to the Act because he obtained the authorization *after* his arrest. In order to show that his possession and manufacture of marijuana was out of necessity, Mr. Kurtz has to establish that "no other law provides exceptions or defenses" dealing with his specific situation. When Division Three applied the necessity defense in Diana, Initiative 692 was not adopted yet. But today, the Act is available as a defense for an individual, like Mr. Kurtz. Therefore, Mr. Kurtz cannot make a showing of the medical necessity defense.

V. CONCLUSION.

Division Two was correct in holding that the common law medical necessity defense does not exist for marijuana related crimes. Even if it did, the enactment of the Medical Marijuana Act abrogated the defense. Therefore, for the foregoing reasons, this Court should affirm Division Two's holding in Butler.

Respectfully submitted this 3rd day of July, 2012.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, on the date below as follows:

VIA ABC MESSENGER

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 3 day of July, 2012, at Olympia, Washington.

Caroline Jones

No. 87078-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

WILLIAM ANDREW KURTZ,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge

PETITIONER'S ~~APPELLANT'S~~ SUPPLEMENTAL BRIEF

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I. SUPPLEMENTAL STATEMENT OF THE CASE

William A. Kurtz was charged with one count of manufacturing marijuana and one count of possession of marijuana with the intent to deliver. CP 24-41. Both counts were alleged to have occurred on March 1, 2010.

Prior to trial the State asked the Court to exclude any evidence of the medical marijuana or medical necessity defenses at trial. 10/25/10 RP at 1-22. The defense objected and stated that Kurtz had a qualifying condition and an authorization for medical marijuana from Dr. Greg Carter. Exhibits 1 and 2, RP 22-38.

The trial judge ruled that neither defense could be presented to the jury. 10/25/10 RP at 69-72. She found that, because Kurtz did not have a signed authorization on the date that the he was arrested (he got the authorization after his arrest), he was not entitled to the statutory defense. In addition, she found that the decision in *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005), prevented Kurtz from presenting the medical necessity defense. *Id.*

In the Court of Appeals, Kurtz argued that *Butler* should be overturned. That Court refused to do so. *See* Slip Opinion at 2. Kurtz filed a petition for review which this Court granted.

II. IS *STATE V. BUTLER* WRONGLY DECIDED AND SHOULD THIS COURT OVERRULE IT?

A. HISTORICAL DEVELOPMENT OF MEDICAL NECESSITY AND MEDICAL MARIJUANA DEFENSES

Division III recognized that "necessity" could be a defense to a prosecution for possession of marijuana in 1979. *State v. Diana*, 24 Wn. App. 908, 604 P.2d 1312 (1979). In that case, the defendant claimed that marijuana had an ameliorative effect on his symptoms of multiple sclerosis. That Court said:

> To summarize, medical necessity exists in this case if the court finds that (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. To support the defendant's assertions that he reasonably believed his actions were necessary to protect his health, corroborating medical testimony is required. In reaching its decision, the court must balance the defendant's interest in preserving his health against the State's interest in regulating the drug involved. Defendant bears the burden of proving the existence of necessity, an affirmative defense, by a preponderance of the evidence.

Id. at 916.

Division II adopted the reasoning of *Diana* in 1994 in *State v. Cole*, 74 Wn. App. 571, 874 P.2d 878, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994). In that case, the defendant testified that he had suffered from intractable back pain for years. Although he had asked

many doctors about medications including marijuana, he did not obtain a declaration from a doctor supporting his use of the drug until after his arrest. *Id.* at 574-75. For that reason, the trial judge questioned the doctor's credibility and forbid Cole from presenting the necessity defense to a jury. This Court reversed the trial court and found that, because Cole had presented some evidence to establish each of the elements of the necessity defense, he should have been allowed to present that defense to a jury. *Id.* at 578-79. The court stated:

> As noted in Diana, Cole's interest in preserving his health must be balanced against the State's interest in regulating the drug involved. It is for the trier of fact to determine by a preponderance of the evidence whether Cole's actions were justified by medical necessity.

Id. at 580.

Division I has not directly addressed the question. But in *State v. Pittman*, 88 Wn. App. 188, 943 P.2d 713 (1997), the trial court gave a necessity instruction after Pittman presented evidence that she supplied marijuana to another person who used it to treat his glaucoma. The defense was presented to the jury but the jury rejected the defense. Pittman appealed and argued that the trial court's necessity instruction did not correctly state the law. The Court declined to reverse but had no quarrel with the opinion in *Diana*, supra.

In 1997, this Court decided *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). In that case, Seeley, a very ill cancer patient, filed a declaratory judgment action to challenge the Washington statute that placed marijuana on Schedule 1 of the controlled substances act. *Id.* at 785. Seeley was affected by that decision because, by placing marijuana on Schedule 1, doctors could not prescribe him marijuana. He framed his challenge under the state privileges and immunities clause and the state equal protection clause. The Supreme Court ultimately concluded only that:

> The challenged legislation involves conclusions concerning a myriad of complicated medical, psychological and moral issues of considerable controversy. We are not prepared on this limited record to conclude that the legislature could not reasonably conclude that marijuana should be placed in schedule I of controlled substances. It is clear not only from the record in this case but also from the long history of marijuana's treatment under the law that disagreement persists concerning the health effects of marijuana use and its effectiveness as a medicinal drug. The evidence presented by the Respondent is insufficient to convince this court that it should interfere with the broad judicially recognized prerogative of the legislature.

Id. at 805.

In 1998 the people passed Initiative 692 which authorized patients with terminal or debilitating illnesses to use marijuana for medical purposes based upon their treating physician's professional opinions. That Initiative is now codified at RCW 69.51A. The statute specifically states:

> 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. Some of the illnesses for which marijuana appears to be beneficial include chemotherapy-related nausea and vomiting in cancer patients; AIDS wasting syndrome; severe muscle spasms associated with multiple sclerosis and other spasticity disorders; epilepsy; acute or chronic glaucoma; and some forms of intractable pain.
>
> The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.
>
> Therefore, The people of the state of Washington intend that:
>
> Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;
>
> Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana; and
>
> Physicians also be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

RCW 69.51A.005. This legislation, thus, expressly adopted the fact that marijuana does have accepted medical uses, effectively overturned the

Williams[1] decision and should have revived the medical necessity defense with regard to marijuana.

B. THE MEDICAL NECESSITY DEFENSE FOR MARIJUANA WAS NOT ABOLISHED BY THE SEELEY DECISION

In *State v. Butler*, supra, that court was asked to review a trial court order denying Butler funds for an expert regarding his use of medical marijuana. Citing *Williams*, the court was of the view that "Washington does not recognize a common law defense of medical necessity for the use of marijuana." *Id.* at 496. Paradoxically, the court also concluded that the Medical Marijuana Act was inconsistent with the common law and, thus, superceded the common law defense of medical necessity. *Id.* at 750. The court held that enactment of the Initiative meant that the only avenue for raising a medical marijuana defense was via the statute. Because *Butler* had not strictly complied with the Act, he could not raise the defense and was not entitled to funds to hire an expert.

Butler is incorrect in its conclusion that Washington does not recognize a common law defense of medical necessity for the use of marijuana. As discussed above, for many years Washington did recognize a common law medical marijuana defense. *See Diana*, *Cole* and *Pittman*,

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[1] *State v. Williams*, 93 Wn. App. 340, 968 P.2d 216 (1998).

supra. In *Butler*, the court relied on *Williams* holding that: "*Seeley*, by implication, overrules both *Cole* and *Diana*." *Id.* at 347.

But, the *Seeley* Court specifically did not overrule *Diana*. Instead the Court recognized the medical necessity defense and stated:

> The only case law the Respondent cites to support his position is a Washington Court of Appeals decision, *State v. Diana*, 24 Wash. App. 908, 604 P.2d 1312 (1979). Respondent's reliance on *Diana*, however, is misplaced as the court did not address the constitutionality of marijuana's scheduling. The Court of Appeals in *Diana* recognized that, under limited circumstances, an individual may assert a medical necessity defense to a criminal marijuana possession charge. Id. at 913, 604 P.2d 1312. The recognition of a potential medical necessity defense for criminal liability of marijuana possession is not relevant in this equal protection analysis.

Seeley, 132 Wn.2d at 798.

C. THE MEDICAL MARIJUANA ACT DID NOT SUPERCEDE THE COMMON LAW AS DESCRIBED IN *DIANA*, *COLE* AND *PITTMAN*

"In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law." *State v. McCullum*, 98 Wn.2d 484, 493, 656 P.2d 1064, 1070 (1983) (citing *Neil F. Lampson Equip. Rental and Sales, Inc. v. West Pasco Water Sys., Inc.*, 68 Wn.2d 172, 175-76, 412 P.2d 106 (1966)); accord *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994) ("[T]he Legislature is

presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it." (citations omitted)).

> In general, our state is governed by the common law to the extent the common law is not inconsistent with constitutional, federal, or state law. RCW 4.04.010. The Legislature has the power to supersede, abrogate, or modify the common law. See *State v. Estill*, 50 Wn.2d 331, 334–35, 311 P.2d 667 (1957); *State v. Mays,* 57 Wn. 540, 542, 107 P. 363 (1910). 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. "It is a well-established principle of statutory construction that '[t]he common law ... ought not to be deemed repealed, unless the language of statute be clear and explicit for this purpose.'" *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35–36, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983) (alterations in original) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623, 3 L.Ed. 453 (1812)). A law 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." *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973). A statute in derogation of the common law "must be strictly construed and no intent to change that law will be found, unless it appears with clarity." *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980).

Potter v. Washington State Patrol, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008) (footnotes omitted). In *Potter*, this Court held that a statute related to procedures for challenging the impoundment of vehicles did not

abrogate the common law cause of action for unlawful conversion because the statute did not provide an exclusive remedy and did not contain a clear statement indicating a Legislative intent to abrogate the cause of action.

Butler is inconsistent with *Potter*. Division II's case law requires only that a statute be inconsistent with the common law to be deemed as having abrogated the common law. But this Court has required "either an explicit statement or clear evidence of the legislature's intent to abrogate the common law." *Potter*, 165 Wn.2d at 76. Mere inconsistency is not enough. Rather, the provisions of the statute must be so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force. *Potter*, 165 Wn.2d at 77. *See also Lord v. Pierce County*, 166 Wn. App. 812, 823-25, 271 P.3d 944, 950 (2012) (holding that local ordinances related to permits for permanent flood prevention structures did not abrogate "common enemy doctrine" land owners may rely on to defeat liability caused by temporary flood control measures that damage adjacent property).

This case is very similar to the statute the Supreme Court confronted in *Potter*. Like the statute at issue in that case, the Medical Use of Marijuana Act does not purport to be the only means by which a defendant may raise a medical necessity defense and the two defenses provide different procedures. Moreover, they are not so inconsistent that

the statute must be seen as abrogating the common law defense. Cf. *Potter,* at 80-84 (statute did not contain express statement of exclusivity or evidence of intent to abrogate because the statute and common law tort served different purposes and provided different remedies). In fact, in many ways the two defenses are quite parallel.

Rules of statutory construction apply to initiatives. *Seeber v. Wash. State Pub. Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981); *Gibson v. Dep't of Licensing*, 54 Wn. App. 188, 192, 773 P.2d 110, *review denied*, 113 Wn.2d 1020, 781 P.2d 1322 (1989). Thus, in determining the meaning of a statute enacted through the initiative process, the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure. *Wash. State Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973). Where the voters' intent is clearly expressed in the statute, the court is not required to look further. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 242, 943 P.2d 1358 (1997); *City of Tacoma v. State*, 117 Wn.2d 348, 356, 816 P.2d 7 (1991); *see Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992) (if statutory meaning is clear from plain and unambiguous language, that meaning must be accepted by the court). In determining intent from the language of the statute, the court focuses on the language as the average informed voter voting on the

initiative would read it. *State v. Brown*, 139 Wn.2d 20, 28, 983 P.2d 608 (1999); *Senate Republican Campaign Comm.*, 133 Wn.2d at 243.

Butler, *Diana* and *Seeley* had all been decided before the Initiative was passed in 1998. But nothing in the Initiative states that it is intended to overrule those cases. Thus, this Court cannot conclude that that is what the voters intended. If one reviews the *Diana* decision, it is clear that all the voters did was confirm the common law – not abolish it. The Initiative tracks and supplements these elements and, thus, is not "repugnant" to the common law. Thus, the two defenses can co-exist.

D. THE MEDICAL NECESSITY DEFENSE WOULD APPLY TO MR. KURTZ

The State does not dispute that Kurtz had testimony to support his medical necessity defense. But the State concludes by arguing that the common law defense requires Kurtz to show that "no other law provides exceptions or defenses" dealing with his specific situation. This argument is found on page 14 of the State's supplemental brief and there is no citation to support it on that page. The argument appears to have come from a citation on page 12 where the State references elements found in the Model Penal Code and referred to in *State v. Diana*. But those elements are *not* the common law elements of medical necessity in

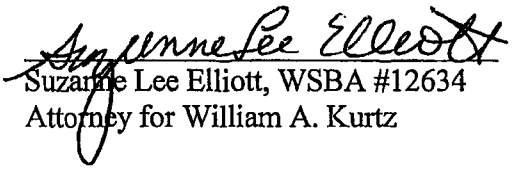
Washington as ultimately described in *Diana*. Thus, Kurtz is not required to show that "no other law" provides him with a defense.

III.
CONCLUSION

There is simply no reason why the statutory defense and common law defense cannot and do not co-exist. There is nothing in the statute that indicates the Initiative was designed to preempt the field. Thus, the common law defense was alive and well at the time.

DATED this 17 day of July 2012.

Respectfully submitted,



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I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

WILLIAM ANDREW KURTZ,

Appellant.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization with over 20,000 members that is dedicated to the preservation and defense of constitutional and civil liberties. It has particular interest and expertise in the areas of drug policy reform and criminal justice, and has long had extensive involvement in the development of Washington law concerning medical marijuana. The ACLU's interest in this matter is further detailed in the statement of interest contained in its Motion for Leave to File Amicus Curiae Brief filed herewith, which is hereby incorporated by reference.

II. INTRODUCTION

It is a fundamental and long-standing principle of law in Washington that a statute will not be interpreted as superseding the common law absent a clear and explicit expression of legislative intent in the statutory language or legislative history. Division Two's erroneous decision here that the common law medical necessity defense in marijuana cases was abrogated by statute, despite no indication of any such legislative intent, not only raises serious criminal justice and public health consequences but also threatens to erode this important tenet of statutory construction. The decision should be reversed.

In *State v. Butler*, Division Two summarily concluded – without any reasoning or analysis – that the Medical Use of Marijuana Act, RCW 69.51A.005 *et seq.* (the "Act"), superseded the common law medical

necessity defense that has been recognized in Washington for decades.[1] *See State v. Butler*, 126 Wn. App. 741, 750, 109 P.3d 494 (2005). In reliance on *Butler*, the trial court here excluded evidence of Defendant/Appellant William Kurtz's common law medical necessity defense at trial, and Division Two affirmed.

The decisions below (and the decision in *Butler*) were error because there is no legal basis for concluding that the Act superseded the common law defense. Critically, there is no indicia of any intent to supersede the common law medical necessity defense in the Act itself, and there was never any expression of any such intent by the voters who overwhelmingly passed the initiative that led to the original codification of the Act, or by the legislature that codified and has subsequently amended the Act on three separate occasions. To the contrary, the Act expressly provides that it does *not* address the medical necessity or medical appropriateness of marijuana use.

Nor is the Act inconsistent with the common law medical necessity defense such that it necessarily must be interpreted as abrogating the common law. Although certainly touching generally on the same subject matter (the use of substances for medicinal purposes), the statutory defense and the common law defense are not *contrary* or *repugnant* to one another; they can (and do) coexist. The common law provides a narrow

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

potential affirmative defense to a different and broader class of persons than those covered by the Act, which provides additional statutory protections to certain persons under the care of a licensed health care professional who have certain specified medical conditions (and is entirely silent as to whether other persons might have a medical necessity to use marijuana or whether they have a common law defense).

In the absence of any expression of intent for the Act to abrogate the common law defense – let alone the kind of clear and explicit statement of such intent that would be required for such abrogation by Washington law – the Court of Appeals erred in holding that the medical necessity defense had been abrogated and that Kurtz could not offer evidence to support his defenses. Accordingly, and for the reasons set forth herein, the ACLU as amicus curiae respectfully requests that this Court hold that the Act did not supersede the common law medical necessity defense, and reverse.

III. STATEMENT OF THE CASE

In 2010, police executed a search warrant at the home of Defendant/Appellant William Kurtz and found marijuana.[2] Kurtz contends that he used the marijuana to treat a serious medical condition. Kurtz was later charged with one count of manufacturing and one count of possession of marijuana with the intent to deliver.

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[2] This brief statement is based on the decision below and the briefing of the parties.

Before trial, the State sought to exclude any evidence supporting Kurtz's medical marijuana and medical necessity defenses. Kurtz objected based on his qualifying condition and his authorization for the use of marijuana from a medical doctor. Kurtz also submitted an offer of proof demonstrating that he suffered from a progressive hereditary disorder, that he used marijuana to treat his condition, and that the marijuana seized by the police was for this purpose. The trial court ruled that neither defense could be presented to the jury. The Court of Appeals (Division Two) affirmed. This appeal follows.

IV. ARGUMENT

As discussed below, it is a well-settled tenet of statutory construction in Washington that a statute does not supersede the common law unless there is an express and clear indication of an intent to do so in the statute itself or in the legislative history. This rule is premised in part on Washington's fundamental respect for and commitment to the common law – a commitment that has existed as law in Washington since long before it became a state.

Here, there is no evidence whatsoever that the Act was intended to supersede the common law. To begin with, nothing in the language of the Act itself suggests that it was intended to supersede the common law medical necessity defense. To the contrary, if anything the text and purpose of the Act suggest that it was *not* intended to supersede common law rights. Nor is there any indication that the people who voted for the initiative that was codified as the Act or the legislature that codified and

amended the Act on three occasions ever intended the Act to abrogate common law rights. Moreover, the Act and the common law are not contradictory to one another so as to preclude them from coexisting. In the absence of any such proof, and consistent with long-standing Washington law, it is clear that the Act did not supersede the common law medical necessity defense.

A. The Common Law Defense of Necessity and the Medical Use of Marijuana Act

Washington has long recognized the common law defense of necessity. *See, e.g., State v. Diana*, 24 Wn. App. 908, 917, 604 P.2d 1312 (1979) (collecting common law necessity defense cases); *see also, e.g., State v. Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995) (recognizing necessity as a defense to the crime of unlawful possession of a firearm). The defense was first articulated in a case involving marijuana more than thirty years ago in *State v. Diana*, 24 Wn. App. 908, 604 P.2d 1312 (1979), and was thereafter repeatedly recognized and applied in similar matters by Washington trial and appellate courts. *See, e.g., State v. Pittman*, 88 Wn. App. 188, 193-97, 943 P.2d 713 (1997); *State v. Cole*, 74 Wn. App. 571, 578, 874 P.2d 878 (1994), *overruled by State v. Williams*, 93 Wn. App. 340, 347, 968 P.2d 26 (1998).

In 1998, nearly twenty years after the courts of this state began applying the medical necessity defense in marijuana cases, the voters of Washington passed Initiative 692 ("I-692"), which authorizes the medical use of marijuana by "qualifying patients" in certain instances. RCW

69.51A. The text of I-692 explained that the People enacted the initiative out of compassion for those with terminal or debilitating illnesses, stating:

> The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

I-692, Sec. 2 (previously codified at RCW 69.51A.005 (1999)). The Act has since been amended on three occasions – in 2007, 2010, and 2011. Laws of 2011, ch. 181, eff. July 22, 2011; Laws of 2010, ch. 284, eff. June 10, 2010; Laws of 2007, ch. 371, eff. July 22, 2007. The Act ensures that certain individuals who use marijuana for medical purposes are not found criminally liable for doing so. It is entirely silent as to the existing common law medical necessity defense, and nothing in I-692 or the Act itself indicates that the statute was intended to supersede any common law rights.

B. Absent Express Legislative Intent, a Statute Does Not Supersede Common Law.

For more than 150 years, it has been the settled law of Washington that the common law is binding unless inconsistent with and repugnant to constitutional or statutory law.[3] The modern version of this rule is now codified at RCW 4.04.010, which provides:

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[3] *See* Laws of 1873, Civil Practice Act, ch. 1, §1 (stating that "the common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States and the organic act and laws of Washington Territory, shall be the rule of decision in all the courts of this Territory"); Laws of 1856, Act to Repeal the Laws of Oregon Territory, §1 (stating that "the common law, in all civil cases, except where otherwise provided by law, shall be in force").

> The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

RCW 4.04.010.

In accord with this fundamental principle of Washington law, "[i]t is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be *clear and explicit* for this purpose." *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008) (internal quotation omitted) (emphasis added); *see also, e.g.*, *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994) ("[A] statute will not be construed in derogation of the common law unless the Legislature has *clearly expressed* its intention to vary it.") (emphasis added). As this Court has explained, "the Legislature is presumed to know the existing state of the case law in those areas in which it is legislating[.]" *Price*, 125 Wn.2d at 463. Accordingly, the "legislature will not be presumed to intend to overturn long-established legal principles of law . . . unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication." *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 26, 380 P.2d 730 (1963); *see also, e.g.*, *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982) ("In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be

presumed to be in line with the prior judicial decisions in a field of law.") (emphasis added); *In re Marriage of Williams*, 115 Wn.2d 202, 208, 796 P.2d 421 (1990) (same). These rules of construction apply to both statutes and initiatives. *See Roe v. Teletech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 746, 257 P.3d 586 (2011).

This Court has consistently applied these principles to hold that statutory enactments have not superseded the common law in the absence of an express statement in the statutory language or legislative history that the common law was to be abrogated. For example, in *Van Dyke v. Thompson*, 95 Wn.2d 726, 630 P.2d 420 (1981), this Court found that a statute did not supersede common law where "[n]othing in the legislative history indicates such an intention" and the statute itself was silent on the issue. *Id.* at 730. This Court reasoned: "If the legislature had intended the departure from the common law urged by defendants, it could have chosen clear, unambiguous language." *Id.* Likewise, in *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982), this Court held that a statute did not supersede common law because no "expression of intent to change the case law is contained in the statutory language." *Id.* at 888. Numerous other decisions of this Court are in accord. *See, e.g., McNeal v. F.F. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980) (upholding trial court's finding that a statute did not supersede common law because the statute "reveals no legislative intent to abrogate the common law"); *State v. Fischer*, 23 Wn. App. 756, 759, 598 P.2d 742 (1979) (finding that "the provisions of the new criminal code were not intended to abrogate

common law self-defense requirements"); *Green Mountain Sch. Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 161, 351 P.2d 525 (1960) ("There is no statutory provision which in any way expresses an intention to substitute it for [the common law]."); *see also, e.g.*, *Williams*, 115 Wn.2d at 208; *State v. Calderon*, 102 Wn.2d 348, 351, 685 P.2d 1293 (1984).

C. There Is No Evidence Overcoming the Presumption that the Act Did Not Abrogate the Common Law Medical Necessity Defense.

There is no indicia of any intent for the Act to supersede the common law medical necessity defense, let alone the kind of express, clear, and unambiguous statement of such an intent that would be sufficient to overcome the legal presumption that the defense continues to exist. The Act itself contains absolutely no statement even remotely indicative of any intent to abrogate the medical necessity defense. Indeed, to the contrary, the Act indicates that it simply does not speak to the issue of medical necessity, providing: "Nothing 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."[4] RCW 69.51A.005 (emphasis added). Although the legislative history is silent as to the intent behind this provision, its plain language appears contradictory to the notion that the Act was intended to abrogate the defense of medical necessity. Moreover, there is no

[4] Notably, this statutory language was added in the 2011 amendments to the Act and is not found in the original initiative or original codification by the legislature of the initiative. Laws of 2011, ch. 181, § 102, eff. July 22, 2011.

indication whatsoever in the legislative history, committee reports, or floor debates that the Act was intended to supersede the common law. Nor is there evidence of any such intent in the original I-692, and in fact the purpose of the initiative – compassion for those with serious medical conditions who use marijuana medicinally – is inconsistent with the notion that the Act would secretly (without any express statement it was doing so) impose new limitations on the existing common law rights of such individuals.[5]

In summary, there is absolutely no evidence that the legislature or the voters who passed I-692 intended for the Act to supersede the common law medical necessity defense, and the legal presumption in favor of common law rights continuing to exist has not been overcome. Consistent with well-established principles of statutory construction, the Act did not supersede the common law.

D. The Common Law is Not Contradictory to the Act.

Notwithstanding the lack of any evidence that the Act was intended to abrogate the common law medical necessity defense, Division Two concluded in *State v. Butler* and here that the defense no longer exists

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[5] Division Two has reasoned in an unpublished decision that the Act was silent as to any intent to overrule the medical necessity defense because this Court had already ruled in *Seeley v. State*, 132 Wn.2d 776, 798, 940 P.2d 604 (1997), that the defense no longer existed. *See State v. Stephens*, No. 38412-4-II, 2010 Wash. App. Lexis 567, at *20 (Mar. 16, 2010) (this case is listed for reference only and not as precedent). But this Court has never made any such ruling and in fact the medical necessity defense was not even at issue in *Seeley*. In *Seeley*, this Court recognized that *State v. Diana* had established "a medical necessity defense to a criminal marijuana possession charge," but did not overturn *Diana* or otherwise hold that the defense no longer existed. *See Seeley*, 132 Wn.2d at798.

because it was somehow inconsistent with the Act. *Butler*, 126 Wn. App. at 750. This conclusion was reached without any reasoning or analysis, and is wrong. The Act and the common law can (and do) coexist.

Under Washington law, a statute will not be interpreted as necessarily abrogating the common law unless its provisions are "*so inconsistent with and repugnant to* the prior common law that both *cannot* simultaneously be in force." *Potter*, 165 Wn.2d at 77 (emphasis added). In other words, the statute and common law will be found to coexist unless they "cannot" coexist – i.e., unless they are so contradictory to one another that no possible interpretation would allow Washington courts to enforce both. *Id.*; *see also* Black's Law Dictionary 689 (5th ed. 1979) (defining "inconsistent" as "mutually repugnant or contradictory").

Importantly, the mere fact that a statute and the common law touch on the same subject matter is not a basis for concluding that the statute supersedes the common law. Indeed, a statute almost always addresses an issue that was previously addressed by common law and Washington law requires that the common law be allowed to stand so long as there is some way to interpret it consistently with the statute. As this Court long ago explained and has repeatedly affirmed:

> No statute enters a field which was before entirely unoccupied. . . . Whether the statute affirms the rule of the common law upon the same subject, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law; for in this way alone is it possible to reach a just appreciation of its purpose and effect. Again, the *common*

> *law must be allowed to stand unaltered as far as is consistent with the reasonable interpretation of the new law.*

In re Tyler's Estate, 140 Wn. 679, 689, 250 P. 456 (1926) (emphasis added), *superseded by statute on other grounds as stated in In re Welch's Estate*, 200 Wn. 686, 94 P.2d 758 (1939); *see also, e.g., Green Mountain*, 56 Wn.2d at 161 (stating the "settled rule" that "the common law must be allowed to stand unaltered as far as is consistent with the reasonable interpretation of the new law") (citation omitted).

Here, the Act did not abrogate the common law medical necessity defense because, although touching on the same subject matter, the Act and the common law defense are not inconsistent or contradictory. Indeed, even the State recognizes here that the defenses afforded by the medical necessity defense and the Act are not contradictory. Supplemental Brief of Respondent at 11. The Act provides additional, clear statutory protections for "qualified patients," defined in part as those using marijuana under the care of a licensed health care professional who have been diagnosed by that health care professional as having a certain defined "terminal or debilitating medical condition." RCW 69.51A.010 (defining "qualified patient") & RCW 69.51A.040 (setting forth the affirmative defense). The common law medical necessity defense, by contrast, provides a potential affirmative defense to a broader class of people. The common law defense could apply to all persons (not just statutorily defined patients) who are using a medicinal substance (not just

marijuana) to treat any number of medical conditions (not just statutorily defined conditions), assuming they are able to satisfy their burden of establishing the elements of the narrow affirmative defense. *See Pittman*, 88 Wn. App. at 193-96 (discussing elements of medical necessity defense); *Jeffrey*, 77 Wn. App. at 225 (discussing elements of necessity defense generally). It does not contradict the Act that such persons may also have a defense to criminal conviction (particularly given that the Act was enacted out of compassion for those with medical conditions and without any indication of an intent to limit common law rights).

For these reasons, the Act is not so inconsistent with or repugnant to the common law medical necessity defense so as to render the common law defense necessarily abrogated. *See Cushman v. Cushman*, 80 Wn. 615, 619-20, 142 P. 26 (1914) ("[T]his statute, being merely cumulative or supplementary to the common law, does not displace that law any further than is clearly necessary."); *cf. Bundrick v. Stewart*, 128 Wn. App. 11, 17, 114 P.3d 1204 (2005) (finding statute and common law not inconsistent where they each protected "different values"). The continued existence of the defense should be confirmed.

V. CONCLUSION

For the reasons set forth herein, the ACLU as amicus curiae respectfully requests that this Court hold that the Medical Use of Marijuana Act, RCW 69.51A.005 et seq., did not supersede the common law medical necessity defense.

Respectfully submitted this 13th day of September, 2012.

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DATED this 13th day of September, 2012.

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I. INTRODUCTION.

This court has granted review of a Division Two Court of Appeals decision affirming William Kurtz's conviction for unlawful manufacture of marijuana and unlawful possession of marijuana—greater than 40 grams. That decision is reported at State v. Kurtz, No. 41568-2-II, 2012 WL 298153 (Wash. App. Div. 2. Jan. 31, 2012). In his supplemental brief, the petitioner argued that the medical necessity defense was not abolished by Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997). Additionally, he argued that the Medical Use of Marijuana Act (MUMA) did not supersede the common law medical necessity defense. Subsequent to the petitioner's filing of his supplemental brief, the American Civil Liberties Union of Washington (ACLU) filed an amicus curiae brief in which it further argued that the common law medical necessity defense was not abrogated by MUMA.

II. ISSUES

> Whether MUMA superseded or abrogated the common law medical necessity defense for marijuana related crimes.

III. STATEMENT OF THE CASE.

The substantive and procedural facts of the case are set forth in the opinion of the Court of Appeals. State v. Kurtz, 2012 WL 298153, at *1.

IV. ARGUMENT.

A. MUMA superseded or abrogated the common law medical necessity defense for marijuana related crimes.

It has been the rule of this State that common law "shall be the rule of decision in all the courts" as long as "it is not inconsistent with the...Constitution and laws of the state of Washington nor incompatible with the institutions and conditions of society..." RCW 4.04.010.

In determining whether common law is abrogated by a statute, the court must determine whether the provisions of the statute "speak directly" to the question addressed by the common law. City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 101 S. Ct. 1784 (1981). Common law is abrogated by a statute when the "provisions [of the statute] are so inconsistent with and repugnant to the common law that both cannot simultaneously be in force. State ex rel. Madden v. Pub. Util. Dist. No. 1, 83 Wn.2d 219,

222, 517 P.2d 585 (1973). A statute does not need to address every issue of the common law, but if it does speak directly to the question, courts may not supplement the legislature's statutory answer such that the statute is rendered meaningless. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26, 98 S. Ct. 2010, 2015 (1978), *overruled* on other grounds.

Typically, the intent of the Legislature to abrogate common law is explicitly stated in the language of the statute. Potter v. Wash. State Patrol, 165 Wn.2d 67, 77, 196 P.3d 691 (2008). However, when the intent of the Legislature is silent in the statute, the court must look to the statutory language and the legislative history. Wash. Water Power Company v. Graybar Electric Company, 112 Wn.2d 847, 774 P.2d 1199 (1989).

In Wash. Water Power Company, one of the issues that the Washington Supreme Court was asked to determine was whether the Washington Product Liability Act (WPLA) preempted common law remedies for product-related harms. Id. at 851. In finding that there was statutory preemption of common law, the Court acknowledged that the plaintiff, WWP, would want to bring a claim under common law theories since the provisions of the WPLA proposed obstacles and limitations that were not present under the

common law theory. Id. Although the Court acknowledged that the Legislature did not explicitly state its intent to preempt common law product liability claims in the statute, it held that the statutory language and the legislative history left "no doubt about the WPLA's preemptive purpose." Id. The Court went on to state that even though there was no provision in the WPLA expressly stating the statute's preemptory effect... "overriding all technical rules of statutory construction must be the rule of reason upholding the obvious purpose that the Legislature was attempting to achieve." Id. at 855 (quoting State v. Coffey,77 Wn.2d 630, 637, 465 P.2d 665 (1970), superseded on other grounds by statute as stated in Linda D. v. Fritz C., 38 Wn. App. 288, 687 P.2d 223 (1984)). Finally, the Court noted that if there was no preemption, then the WPLA would "accomplish little if it were a measure plaintiffs could choose or refuse to abide at their pleasure." Id.

Although MUMA does not contain a provision explicitly stating its intent to preempt or abrogate the common law medical necessity defense, the language in the statute is clear that its purpose was to provide the *only* affirmative defense for individuals who may benefit from the use of marijuana. When the statute was first adopted, the purpose 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 (1999). Additionally, the statute went on to say that the intent was for "qualifying patients with terminal or debilitating illnesses who...would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law..." Id.

When reading a statute, the court's purpose in determining the meaning of the statute enacted by an initiative process is "to determine the intent of the voters who enacted the measure. This court focuses on the language of the statute 'as the average informed voter voting on the initiative would read it.'" Roe v. Teletech Customer Care Management, 171 Wn.2d 736, 746, 257 P.3d 586, (2011) quoting Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 205, 11 P.3d 762 (2001). In reading the statute, it is clear that Initiative 692 did not legalize marijuana, but rather "provided an authorized user with an affirmative defense if the user shows compliance with the requirements for medical marijuana possession." State v. Fry, 168 Wn.2d 1, 10, 228 P.3d 1, (2010).

The analysis as to whether MUMA supersedes or abrogates the common law medical necessity defense is similar to Wash. Water Power Company. Similar to Wash. Water Power Company, MUMA does not have a provision explicitly stating the Legislature's intent to supersede the common law medical necessity defense. However, in Wash. Water Power Company, the Court concluded that the statute preempted common law due to the "obvious purpose that the Legislature was attempting to achieve." Wash. Water Power Company, 112 Wn.2d at 855. In this case, it is obvious that the purpose of MUMA, as seen through the language of the statute and the initiative, was to provide an affirmative defense for certain individuals with terminal or debilitating illnesses in marijuana-related crimes.

The ACLU in their amicus curiae brief asks this Court to look to intent of the people in proposing Initiative 692. In doing so, the ACLU acknowledges that MUMA only provides protections for "qualified patients" while the common law medical necessity defense provides an affirmative defense to a broader class of people—such as non "qualified patients" who can use marijuana for potential medicinal purposes. Thus, MUMA and the common law medical necessity defense cannot co-exist due to the

inconsistencies in the provisions of the two affirmative defenses. MUMA provides protections to qualified individuals while the common law medical necessity defense can also provide protection to people that are not considered a "qualified individual."

Furthermore, under the common law medical necessity defense, an individual is not limited to a statutorily set amount of marijuana. Under MUMA, however, a "qualified patient" is only allowed to possess a 60 day supply of marijuana. Former RCW 69.51A.080 (2007). Under the new law, a qualified individual is allowed no more than fifteen cannabis plants and:

> "(1) no more than twenty-four ounces of useable cannabis;
> (2) no more cannabis product than what could reasonably be produced with no more than twenty-four ounces of useable cannabis; or
> (3) a combination of useable cannabis and cannabis product that does not exceed a combined total representing possession and processing of no more than twenty-four ounces of useable cannabis.

RCW 69.51A.040.

Finally, the ACLU asks the Court to uphold the common law medical necessity defense on the basis that it can provide protection to individuals who are not considered "qualified patients" under the Act. However, in the present case, Mr. Kurtz was a "qualified patient" since he was eventually able to obtain a

marijuana authorization card. He was not allowed the affirmative defense pursuant to the Act since he only obtained the authorization card *after* being arrested. If the medical necessity defense were to apply to even "qualified individuals" like Mr. Kurtz, then they would be allowed to freely abide by or refuse to follow the provisions of the statute. Because MUMA provides for more strict requirements than the common law medical necessity defense, individuals like Mr. Kurtz would then rather assert the common law medical necessity defense, thus rendering the purpose of MUMA meaningless.

V. CONCLUSION.

For the foregoing reasons, it is clear that the intent of the people and the Legislature in enacting MUMA was to provide the only affirmative defense for individuals who may benefit from the use of marijuana. Therefore, the State respectfully asks this Court to hold that MUMA abrogated the common law medical necessity defense for marijuana related crimes.

Respectfully submitted this 1st day of October, 2012.

for Carol LaVerne 19229
Olivia Zhou, WSBA #41747
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Answer to Amicus Curiae Brief, on the date below as follows:

VIA US MAIL

TO: SUSAN L. CARLSON
SUPREME COURT DEPUTY CLERK
SUPREME COURT OF THE STATE OF WASHINGTON
TEMPLE OF JUSTICE
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--AND--

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 1 day of October, 2012, at Olympia, Washington.

Caroline Jones

APPENDIX D

CITY OF RIVERSIDE, Plaintiff and Respondent, v. INLAND EMPIRE PATIENTS HEALTH AND WELLNESS CENTER, INC., et al., Defendants and Appellants.

S198638

SUPREME COURT OF CALIFORNIA

56 Cal. 4th 729; 300 P.3d 494; 156 Cal. Rptr. 3d 409; 2013 Cal. LEXIS 4003; 28 Am. Disabilities Cas. (BNA) 144

May 6, 2013, Filed

SUBSEQUENT HISTORY: Reported at *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc., 2013 Cal. LEXIS 5332 (Cal., May 6, 2013)*

PRIOR HISTORY:

Superior Court of Riverside County, No. RIC10009872, John D. Molloy, Judge. Court of Appeal, Fourth Appellate District, Division Two, No. E052400. *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc., 200 Cal. App. 4th 885, 133 Cal. Rptr. 3d 363, 2011 Cal. App. LEXIS 1406 (Cal. App. 4th Dist., 2011)*

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A city brought a nuisance action against a medical marijuana dispensary operated by defendants. The trial court found that defendants' dispensary constituted a public nuisance and issued a preliminary injunction against the distribution of marijuana from the facility. (Superior Court of Riverside County, No. RIC10009872, John D. Molloy, Judge.) The Court of Appeal, Fourth Dist., Div. Two, No. E052400, affirmed the injunction order, holding that the city's zoning prohibition of medical marijuana facilities was not preempted by state law.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that the Compassionate Use Act of 1996 (CUA) (*Health & Saf. Code, § 11362.5*, and the Medical Marijuana Program (MMP) (*Health & Saf. Code, § 11362.7 et seq.*), did not expressly or impliedly preempt the city's zoning provisions declaring a medical marijuana dispensary to be a prohibited use, and a public nuisance, anywhere within the city limits. The CUA and the MMP are but incremental steps toward freer access to medical marijuana, and the scope of these statutes is limited and circumscribed. They merely declare that the conduct they describe cannot lead to arrest or conviction, or be abated as a nuisance, as violations of enumerated provisions of the Health and Safety Code. The CUA and the MMP do not establish a comprehensive state system of legalized medical marijuana; or grant a "right" of convenient access to marijuana for medicinal use; or override the zoning, licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries. Therefore, the court rejected defendants' preemption argument. (Opinion by Baxter, J., with Cantil-Sakauye, C. J., Kennard, Werdegar, Chin, Corrigan, and Liu, JJ., concurring. Concurring opinion by Liu, J. (see p. 763).)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Drugs and Narcotics § 2--Marijuana--Controlled Substances Act--Medical Use.--The federal Controlled Substances Act (CSA) (*21 U.S.C.* [*730] *§ 801 et seq.*) prohibits, except for certain research purposes, the possession, distribution, and manufacture of marijuana (*21 U.S.C. §§ 812(c), 841(a), 844(a)*). Under the CSA, marijuana is a drug with no currently accepted medical use in treatment in the United States (*21 U.S.C. § 812(b)(1)(B)*), and there is no medical necessity exception to prosecution and conviction under the federal act.

(2) Drugs and Narcotics § 2--Marijuana--Abatement of Nuisance.--California statutes specify that, except as authorized by law, the possession (*Health & Saf. Code, § 11357*), cultivation, harvesting, or processing (*Health & Saf. Code, § 11358*), possession for sale (*Health & Saf. Code, § 11359*), and transportation, administration, or furnishing (*Health & Saf. Code, § 11360*) of marijuana are state criminal violations. State law further punishes one who maintains a place for the purpose of unlawfully selling, using, or furnishing, or who knowingly makes available a place for storing, manufacturing, or distributing, certain controlled substances (*Health & Saf. Code, §§ 11366, 11366.5*). The so-called "drug den" abatement law additionally provides that every place used to unlawfully sell, serve, store, keep, manufacture, or give away certain controlled substances is a nuisance that shall be enjoined, abated, and prevented, and for which damages may be recovered (*Health & Saf. Code, § 11570*). In each instance, the controlled substances in question include marijuana (*Health & Saf. Code, §§ 11007, 11054, subd. (d)(13)*).

(3) Drugs and Narcotics § 2--Marijuana--Compassionate Use Act--Personal Medical Purposes.--California's voters and legislators have adopted limited exceptions to the sanctions of the state's criminal and nuisance laws in cases where marijuana is possessed, cultivated, distributed, and transported for medical purposes. In 1996, the electorate enacted the Compassionate Use Act (*Health & Saf. Code, § 11362.5*). This initiative statute provides that the state law proscriptions against possession and cultivation of marijuana (*Health & Saf. Code, §§ 11357, 11358*) shall not apply to a patient, or the patient's designated primary caregiver, who possesses or cultivates marijuana for the patient's personal medical purposes upon the written or oral recommendation or approval of a physician (*§ 11362.5, subd. (d)*).

(4) Drugs and Narcotics § 2--Marijuana--Controlled Substances Act.--The Compassionate Use Act of 1996 (*Health & Saf. Code, § 11362.5*) and the Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) have no effect on the federal enforceability of the federal Controlled Substances Act (CSA) (*21 U.S.C. § 801 et seq.*) in California. The CSA's prohibitions on the possession, distribution, or manufacture of marijuana remain fully enforceable in California. [*731]

(5) Zoning and Planning § 18--Prohibited Uses--Medical Marijuana Dispensary.--Riverside ordinances declare as a "prohibited use" within any city zoning classification (1) a "medical marijuana dispensary"--defined as a facility where marijuana is made available in accordance with the Compassionate Use Act of 1996 (CUA) (*Health & Saf. Code, § 11362.5*), and (2) any use prohibited by state or federal law (Riverside Mun. Code, §§ 19.910.140, 19.150.020 & table 19.150.020A). The Riverside Municipal Code further provides that any condition caused or permitted to exist in violation of the ordinance is a public nuisance which may be abated by the city (Riverside Mun. Code, §§ 1.01.110E, 6.15.020Q).

(6) Zoning and Planning § 9--Police Power--Preemption--Conflict with State Law.--Land use regulation in California historically has been a function of local government under the grant of police power contained in *Cal. Const., art. XI, § 7*. A city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state. Consistent with this principle, when local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute. However, local legislation that conflicts with state law is void. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.

(7) Municipalities § 55--Ordinances--Preemption--Conflict with State Law.--Local legislation that conflicts with state law is void. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.

(8) Municipalities § 55--Ordinances--Preemption--Duplicative of General Law.--Local legislation is duplicative of general law when it is coextensive therewith.

(9) Municipalities § 55--Ordinances--Preemption--Contradictory to General Law.--Local legislation is contradictory to general law when it is inimical thereto.

(10) Municipalities § 55--Ordinances--Preemption--Area Fully Occupied by General Law.--Local legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested [*732] its intent to "fully occupy" the area, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter

has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

(11) Municipalities § 55--Ordinances--Preemption--Contradictory to General Law--Significant Local Interest.--The "contradictory and inimical" form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands. Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws. In addition, the courts have been particularly reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.

(12) Drugs and Narcotics § 2--Marijuana--Compassionate Use Act--Medical Use--Qualified Patients--Caregivers.--In its substantive provisions, the Compassionate Use Act of 1996 (CUA) (*Health & Saf. Code, § 11362.5*) simply declares that (1) no physician may be punished or denied any right or privilege under state law for recommending medical marijuana to a patient (*§ 11362.5, subd. (c)*), and (2) two specific state statutes prohibiting the possession and cultivation of marijuana (*Health & Saf. Code, §§ 11357, 11358*) respectively, "shall not apply" to a patient, or the patient's designated primary caregiver, who possesses or cultivates marijuana for the patient's personal medical use upon a physician's recommendation or approval (*§ 11362.5, subd. (d)*). When it later adopted the Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*), the Legislature declared this statute was intended, among other things, to clarify the scope of the application of the CUA and facilitate the prompt identification of qualified medical marijuana patients and their designated primary caregivers in order to protect them from unnecessary arrest and prosecution for marijuana offenses, to promote uniform and consistent application of the CUA among the counties within the state, and to enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects. [*733]

(13) Drugs and Narcotics § 2--Medical Marijuana Program--Qualified Patients--Caregivers--Identification Card--Arrest.--The Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) established a program for issuance of medical marijuana identification cards to those qualified patients and designated primary caregivers who wish to carry them, and required responsible county agencies to cooperate in this program (*Health & Saf. Code, §§ 11362.71, subds. (a)-(d), 11362.715, 11362.72, 11362.735, 11362.74, 11362.745, 11362.755*). The holder of an identification card is not subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana, within the amounts specified by the statute, except upon reasonable cause to believe the card is false or invalid or the holder is in violation of statute (*Health & Saf. Code, §§ 11362.71, subd. (e)*).

(14) Drugs and Narcotics § 2--Medical Marijuana Program--Qualified Patients--Caregivers--Identification Card--Criminal Liability.--The Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) specifies that certain persons, including (1) a qualified patient, or the holder of a valid identification card, who possesses or transports marijuana for personal medical use, or (2) a designated primary caregiver who transports, processes, administers, delivers, or gives away, in amounts no greater than those specified by statute, marijuana for medical purposes to or for a qualified patient or valid cardholder shall not be subject, on that sole basis, to criminal liability under *Health & Saf. Code, § 11357* (possession of marijuana), *§ 11358* (cultivation of marijuana), *§ 11359* (possession of marijuana for sale), *§ 11360* (sale, transportation, importation, or furnishing of marijuana), *§ 11366* (maintaining place for purpose of unlawfully selling, furnishing, or using controlled substance), *§ 11366.5* (knowingly providing place for purpose of unlawfully manufacturing, storing, or distributing controlled substance), or *§ 11570* (place used for unlawful selling, furnishing, storing, or manufacturing of controlled substance as nuisance) (*Health & Saf. Code, § 11362.765, subd. (a)*).

(15) Drugs and Narcotics § 2--Medical Marijuana Program--Qualified Patients--Caregivers--Identification Card--Criminal Liability.--The Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) declares that qualified patients, persons with valid identification cards, and the designated primary caregivers of such persons, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under *Health & Saf. Code, § 11357, 11358, 11359, 11360, 11366, 11366.5*, or *11570* (*Health & Saf. Code, § 11362.775*). However, an amendment adopted in 2010 declares that no medical marijuana cooperative, collective, dispensary, operator, [*734] establishment, or provider, other than a licensed

residential or elder medical care facility, that is authorized by law to possess, cultivate, or distribute medical marijuana, and that has a storefront or mobile retail outlet which ordinarily requires a local business license, shall be located within 600 feet of a school (*Health & Saf. Code, § 11362.768, subds. (b)-(e)*).

(16) Drugs and Narcotics § 2--Medical Marijuana Program--Applicability.--While the Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be charged with cultivation or possession for sale. That is, the immunities conveyed by *Health & Saf. Code, § 11362.765*, have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws.

(17) Drugs and Narcotics § 2--Medical Marijuana Program--Qualified Patients--Caregivers--Criminal Liability.--*Health & Saf. Code, § 11362.765*, declares only that the specified groups of people engaged in the specified conduct shall not on that sole basis be subject to criminal liability under the specified laws. Hence, *§ 11362.765, subd. (b)(3)*, which grants immunity from certain state marijuana laws to one who provides assistance to a qualified patient or primary caregiver, in administering medical marijuana to the patient or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the patient, affords the specified criminal immunities only for providing the described forms of assistance. This subdivision does not mean a defendant may not be charged with cultivation or possession for sale on any basis. On the contrary, to the extent the defendant goes beyond the immunized range of conduct, i.e., administration, advice, and counseling, the defendant would subject himself or herself to the full force of the criminal law.

(18) Drugs and Narcotics § 2--Medical Marijuana Program--Qualified Patients--Caregivers--Identification Card--Criminal Liability.--*Health & Saf. Code, § 11362.775*, provides only that when particular described persons engage in particular described conduct, they enjoy, with respect to that conduct, a limited immunity from specified state marijuana laws. *Section 11362.775* simply declares that qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, [*735] who associate in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions for the possession, furnishing, sale, cultivation, transportation, or possession for sale of marijuana, or for providing or maintaining a place for the manufacture, processing, storage, or distribution of marijuana.

(19) Drugs and Narcotics § 2--Compassionate Use Act--Medical Marijuana Program--Preemption of Local Laws--Nuisance.--The Compassionate Use Act of 1996 (*Health & Saf. Code, § 11362.5*) and the Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) did not expressly or impliedly preempt a city's zoning provisions declaring a medical marijuana dispensary to be a prohibited use, and a public nuisance, anywhere within the city limits.

[*Cal. Forms of Pleading and Practice (2013) ch. 391, Nuisance, § 391.52.*]

(20) Drugs and Narcotics § 2--Marijuana--Compassionate Use Act--Preemption of Local Laws--Nuisance.--There is no basis to conclude that the Compassionate Use Act of 1996 (*Health & Saf. Code, § 11362.5*) expressly preempts local ordinances prohibiting, as a nuisance, the use of property to cooperatively or collectively cultivate and distribute medical marijuana.

(21) Municipalities § 55--Local Bans--Preemption.--A state law does not "authorize" activities, to the exclusion of local bans, simply by exempting those activities from otherwise applicable state prohibitions.

(22) Drugs and Narcotics § 2--Medical Marijuana Program--Preemption of Local Laws.--The Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) merely exempts the cooperative or collective cultivation and distribution of medical marijuana by and to qualified patients and their designated caregivers from prohibitions that would otherwise apply under state law. The state statute does not thereby mandate that local governments authorize, allow, or accommodate the existence of such facilities.

(23) Drugs and Narcotics § 2--Medical Marijuana Program--Preemption of Local Laws.--The Medical Marijuana Program (MMP) (*Health & Saf. Code, § 11362.7 et seq.*) creates no comprehensive scheme for the protection or promotion of facilities that dispense medical marijuana. The sole effect of the statute's substantive terms is to exempt specified [*736] medical marijuana activities from enumerated state criminal and nuisance statutes. Those provisions do not mandate that local jurisdictions permit such activities. Local decisions to prohibit them do not frustrate the MMP's operation.

(24) Zoning and Planning § 18--Police Power--Abatement of Nuisance.--Nuisance law is not defined exclusively by what the state makes subject to, or exempt from, its own nuisance statutes. Unless exercised in clear conflict with general law, a city's or county's inherent, constitutionally recognized power to determine the appropriate use of land within its borders (*Cal. Const., art. XI, § 7*), allows it to define nuisances for local purposes, and to seek abatement of such nuisances.

(25) Drugs and Narcotics § 2--Medical Marijuana Program--Preemption of Local Laws--Abatement of Nuisance.--*Health & Saf. Code, § 11362.775*, part of the Medical Marijuana Program (MMP) (*Health & Saf. Code, § 11362.7 et seq.*), merely removes state law criminal and nuisance sanctions from the conduct described therein. By this means, the MMP has signaled that the state declines to regard the described acts as nuisances or criminal violations, and that the state's enforcement mechanisms will thus not be available against these acts. Accordingly, localities in California are left free to accommodate such conduct, if they choose, free of state interference. However, the MMP's limited provisions neither expressly or impliedly restrict or preempt the authority of individual local jurisdictions to choose otherwise for local reasons, and to prohibit collective or cooperative medical marijuana activities within their own borders. A local jurisdiction may do so by declaring such conduct on local land to be a nuisance, and by providing means for its abatement.

(26) Drugs and Narcotics § 2--Compassionate Use Act--Medical Marijuana Program--Preemption of Local Laws--Nuisance.--Neither the Compassionate Use Act of 1996 (*Health & Saf. Code, § 11362.5*) nor the Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) expressly or impliedly preempts the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions.

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Burke, Williams & Sorensen, Thomas B. Brown and Stephen A. McEwen for League of California Cities and California State Association of Counties as Amici Curiae on behalf of Plaintiff and Respondent.

JUDGES: Opinion by Baxter, J., with Cantil-Sakauye, C. J., Kennard, Werdegar, Chin, Corrigan, and Liu, JJ., concurring. Concurring opinion by Liu, J.

OPINION BY: Baxter

OPINION

[**496] [***411] **BAXTER, J.**--The issue in this case is whether California's medical marijuana statutes preempt a local ban on facilities that distribute medical marijuana. We conclude they do not.

Both federal and California laws generally prohibit the use, possession, cultivation, transportation, and furnishing of marijuana. However, California statutes, the Compassionate Use Act of 1996 (CUA; *Health & Saf. Code, § 11362.5*, [1] added by initiative, Prop. 215, as approved by voters, Gen. Elec. (Nov. 5, 1996)) and the more recent Medical Marijuana Program (MMP; *§ 11362.7 et seq.*, added by Stats. 2003, ch. 875, § 2, p. 6424) have removed certain state law obstacles from the ability of qualified patients to obtain and use marijuana for legitimate medical purposes. Among other things, these statutes exempt the "collective[] or cooperative[] ... cultiva[tion]" of medical marijuana by qualified patients and their designated caregivers from prosecution or abatement under specified state criminal and nuisance laws that would otherwise prohibit those activities. (*§ 11362.775.*)

1 All unlabeled statutory references are to the Health and Safety Code.

The California Constitution recognizes the authority of cities and counties to make and enforce, within their borders, "all local, police, sanitary, and [*738] other ordinances and regulations not in conflict with general

laws." (*Cal. Const., art. XI, § 7.*) This inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed.

In the exercise of its inherent land use power, the City of Riverside (City) has declared, by zoning ordinances, that a "[m]edical marijuana dispensary" (boldface omitted)--"[a] facility where marijuana is made available for medical purposes in accordance with" the CUA (Riverside Mun. Code (RMC), § 19.910.140) [2]--is a prohibited use of land within the city and may be abated [***412] as a public nuisance. (RMC, §§ 1.01.110E, 6.15.020Q, 19.150.020 & table 19.150.020A.) The City's ordinance also bans, and declares a nuisance, any use that is prohibited by federal or state law. (RMC, §§ 1.01.110E, 6.15.020Q, 19.150.020.)

2 The RMC can be examined at <http://www.riversideca.gov/municode> (as of May 6, 2013).

Invoking these provisions, the City brought a nuisance action against a facility operated by defendants. The trial court issued a preliminary injunction against the distribution of marijuana from the facility. The Court of Appeal affirmed the injunctive order. Challenging the injunction, defendants urge, as they did below, that the City's total ban on facilities that cultivate and distribute medical marijuana in compliance with the CUA and the MMP is invalid. Defendants insist the local ban is in conflict with, and thus preempted by, those state statutes.

As we will explain, we disagree. We have consistently maintained that the CUA and the MMP are but incremental steps toward freer access to medical marijuana, and the scope of these statutes is limited and circumscribed. They merely declare that the conduct they describe cannot lead to arrest or conviction, or be abated as a nuisance, as violations of enumerated provisions of the Health and Safety Code. Nothing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medical marijuana will not be permitted to operate within its borders. We must therefore reject defendants' preemption argument, and must affirm the judgment of the Court of Appeal.

LEGAL AND FACTUAL BACKGROUND

A. *Medical marijuana laws.*

(1) The federal Controlled Substances Act (CSA; *21 U.S.C. § 801 et seq.*) prohibits, except for certain research purposes, the possession, distribution, [*739] and manufacture of marijuana. (*Id., §§ 812(c)* (*Schedule I, par. (c)(10)*), *841(a), 844(a).*) [**497] The CSA finds that marijuana is a drug with "no currently accepted medical use in treatment in the United States" (*21 U.S.C. § 812(b)(1)(B)*), and there is no medical necessity exception to prosecution and conviction under the federal act (*United States v. Oakland Cannabis Buyers' Cooperative (2001) 532 U.S. 483, 490 [149 L. Ed. 2d 722, 121 S. Ct. 1711]*).

(2) California statutes similarly specify that, except as authorized by law, the possession (*§ 11357*), cultivation, harvesting, or processing (*§ 11358*), possession for sale (*§ 11359*), and transportation, administration, or furnishing (*§ 11360*) of marijuana are state criminal violations. State law further punishes one who maintains a place for the [*740] purpose of unlawfully selling, using, or furnishing, or who knowingly makes available a place for storing, manufacturing, or distributing, certain controlled substances. (*§§ 11366, 11366.5.*) The so-called "drug den" abatement law additionally provides that every place used to unlawfully sell, serve, store, keep, manufacture, or give away certain controlled substances is a nuisance that shall be enjoined, abated, and prevented, and for which damages may be recovered. (*§ 11570.*) In each instance, the controlled substances in question include marijuana. (See *§§ 11007, 11054, subd. (d)(13).*)

(3) However, California's voters and legislators have adopted limited exceptions to the sanctions of this state's criminal and nuisance laws in cases where marijuana is possessed, cultivated, distributed, and transported for medical purposes. In 1996, the electorate enacted the CUA. This initiative statute provides that the state [***413] law proscriptions against possession and cultivation of marijuana (*§§ 11357, 11358*) shall not apply to a patient, or the patient's designated primary caregiver, who possesses or cultivates marijuana for the patient's personal medical purposes upon the written or oral recommendation or approval of a physician. (*§ 11362.5, subd. (d).*)

In 2004, the Legislature adopted the MMP. One purpose of this statute was to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875, § 1(b)(3), pp. 6422, 6423.) Accordingly, the MMP provides, among other things, that "[q]ualified patients ... and the designated primary caregivers of qualified patients ... , who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under *[s]ection 11357* [(possession)], *11358* [(cultivation, harvesting, and processing)], *11359* [(possession for

sale)], *11360* [(transportation, sale, furnishing, or administration)], *11366* [(maintenance of place for purpose of unlawful sale, use, or furnishing)], *11366.5* [(making place available for purpose of unlawful manufacture, storage, or distribution)], or *11570* [(place used for unlawful sale, serving, storage, manufacture, or furnishing as statutory nuisance)]." (*§ 11362.775.*)

(4) The CUA and the MMP have no effect on the federal enforceability of the CSA in California. The CSA's prohibitions on the possession, distribution, or manufacture of marijuana remain fully enforceable in this jurisdiction. (*Gonzales v. Raich (2005) 545 U.S. 1 [162 L. Ed. 2d 1, 125 S. Ct. 2195].*)

B. *Riverside's ordinances.*

(5) As noted above, the Riverside ordinances at issue declare as a "prohibited use" within any city zoning classification (1) a "[m]edical marijuana dispensary" (boldface omitted)--defined as "[a] facility where marijuana is made available ... in accordance with" the CUA--and (2) any use prohibited by state or federal law. (RMC, §§ 19.910.140, 19.150.020 & table 19.150.020A.) The RMC further provides that any condition caused or permitted to exist in violation of the ordinance is a public nuisance which may be abated by the city. (RMC, §§ 1.01.110E, 6.15.020Q.)

C. *The instant litigation.*

Since 2009, defendant Inland Empire Patients Health and Wellness Center, Inc. (Inland Empire), has operated a medical marijuana distribution facility in Riverside. Defendants Meneleo Carlos and Filomena Carlos (the Carloses) are the owners and lessors of the Riverside property on which Inland Empire's facility is located. Their [**498] mortgage on the property is financed by defendant East West Bancorp, Inc. (Bancorp). Defendant Lanny Swerdlow is the lessee of the property, and defendant Angel City West, Inc. (Angel), provides the property with management services. Swerdlow is also a registered nurse and the manager of an immediately adjacent medical clinic doing business as THCF Health and Wellness Center (THCF). Though THCF has no direct legal link to Inland Empire, the two facilities are closely associated, and THCF provides referrals to Inland Empire upon patient request. Defendant William Joseph Sump II is a board member of Inland Empire and the general manager of Inland Empire's Riverside facility.

In January 2009, the planning division of Riverside's Community Development Department notified Swerdlow by letter that the definition of "medical marijuana dispensary" in Riverside's zoning ordinances [***414] "is an all-encompassing definition, referring to all three types of medical marijuana facilities, a dispensary, a collective and a cooperative," and that, as a consequence, "all three facilities are banned in the City of Riverside." In May 2010, the City filed a complaint against the Carloses, Bancorp, Swerdlow, [*741] Angel, THCF, Sump, and various Doe defendants for injunctive relief to abate a public nuisance. Inland Empire was later substituted by name for one of the Doe defendants. The complaint alleged that defendants were operating a "medical marijuana distribution facility" in violation of the zoning provisions of the RMC. [3]

3 The complaint asserted that defendants' facility was being operated within the City's business and manufacturing park zone, and that a "medical marijuana distribution facility" was a prohibited use within that zone. But the RMC in fact makes a "[m]edical marijuana dispensary" (boldface omitted)--the broadly defined phrase used in the ordinance--a prohibited use in *every* zone within the city (see RMC provisions cited above), and Riverside has never denied that such a facility is banned everywhere within the city.

Thereafter, the City moved for a preliminary injunction against operation of Inland Empire's facility. [4] After a hearing, the trial court granted the preliminary injunction, prohibiting defendants and all persons associated with them, during the pendency of the action, from using, or allowing use of, the subject property to conduct "any activities or operations related to the distribution of marijuana."

4 In its briefs, Inland Empire describes itself as "a not for profit California Mutual Benefit Corporation established for the sole purpose of forming an association of qualified individuals who collectively cultivate medical marijuana and redistribute [it] to each other." No party disputes this description. Moreover, all parties further appear to assume that Inland Empire distributed medical marijuana from an established business address. But the record contains few details about Inland Empire's actual operations. The only real clues appear in declarations supporting and in opposition to the motion for preliminary injunction. In support of the motion, Riverside Police Officer Darren Woolley declared as follows: He visited the THCF clinic at 647 North Main Street, suite 1B, in Riverside, where he received a medical marijuana authorization. Thereafter, THCF's receptionist provided him with a list of "collective storefronts" in Riverside County. Inland Empire headed the list, and its address was stated as 647 North Main Street, suite 2A, in Riverside. Woolley asked if he was already at that address. The receptionist directed him to a location "right

across the lot" and said he could "purchase [his] medicine" there. Woolley walked to suite 2A, presented his authorization, passed through security, and was directed to a room "with a large counter displaying marijuana food and drink products." He was introduced to a "runner" who said she would keep track of his selections and take them to the checkout area where he would pay for and receive his purchases. He was then "led to the rear of the [facility] that was separated into small stalls. Each of these stalls was manned by a different seller of marijuana products." Woolley purchased $ 40 worth of marijuana from one seller and $ 25 worth of hashish from another. He also bought an $ 8 marijuana brownie. On another occasion, he attended the "Farmer's Market" at Inland Empire, when "individual growers sell their product." On this latter day, Woolley purchased marijuana from two separate vendors.

In opposition to the motion, defendant Swerdlow insisted that THCF and Inland Empire were not connected. However, Swerdlow's declaration did not dispute Inland Empire's basic method of operation, as observed by Woolley. Indeed, Swerdlow stated that Inland Empire chose its location, coincidentally adjacent to THCF, "because of its low cost, large size, central location with plenty of parking and [because] it was located in an Industrial Warehouse zone and was not near any schools, churches, etc. ..."

[*742]

The trial court found the case was controlled by *City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153* [**499] *[100 Cal. Rptr. 3d 1]* (*Kruse*), which held that cities may abate, as nuisances, uses in violation of their zoning and licensing regulations, [***415] and that neither the CUA nor the MMP preempts local zoning and licensing regulation of facilities that furnish, distribute, or make available medical marijuana--including, in *Kruse* itself, a moratorium on all such facilities within city boundaries. Moreover, though the court insisted it was not holding that federal prohibitions on the possession, distribution, or cultivation of marijuana preempted state medical marijuana laws, it nonetheless concluded that Riverside "[could] use its ... zoning regulations to prohibit the activity [of dispensing medical marijuana] especially given the conflict between state and federal laws."

The Court of Appeal affirmed the order. The appellate court agreed with defendants that the City could not assert *federal* preemption of *state* law as authority for its total ban on medical marijuana dispensing facilities. However, the court rejected defendants' argument that Riverside's zoning prohibition of such facilities was preempted by state law, the CUA and the MMP. In the Court of Appeal's view, Riverside's provisions do not duplicate or contradict the state statutes concerning medical marijuana, nor do they invade a field expressly or impliedly occupied by those laws.

We granted review. We now conclude the Court of Appeal's judgment must be affirmed.

DISCUSSION [5]

5 An amicus curiae brief on behalf of defendants has been submitted by Americans For Safe Access. Amicus curiae briefs on behalf of the City have been submitted by (1) the League of California Cities and the California State Association of Counties (League of California Cities et al.), (2) the California State Sheriffs' Association, the California Police Chiefs Association, and the California Peace Officers' Association (California State Sheriffs' Association et al.), and (3) the City of Los Angeles.

A. *Principles of preemption.*

(6) As indicated above, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (*Cal. Const., art. XI, § 7.*) "Land use regulation in California historically has been a function of local government under the grant of police power contained in *article XI, section 7* ... . 'We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state.' " (*Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1151 [45 Cal. Rptr. 3d 21, 136 P.3d 821]*, fn. omitted [*743] (*Big Creek Lumber Co.*).) Consistent with this principle, "when local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." (*Id., at p. 1149*; see *IT Corp. v. Solano County Bd. of Supervisors (1991) 1 Cal.4th 81, 93 [2 Cal. Rptr. 2d 513, 820 P.2d 1023].*)

(7) However, local legislation that conflicts with state law is void. (E.g., *Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 897 [16 Cal. Rptr. 2d 215, 844 P.2d 534]* (*Sherwin-Williams Co.*).) " 'A conflict exists if the local legislation " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' [Citations.]" (*Ibid.*)

(8) "Local legislation is 'duplicative' of general law when it is coextensive therewith. [Citation.]

(9) "Similarly, local legislation is 'contradictory' to general law when it is inimical thereto. [Citation.]

[***416] **(10)** "Finally, local legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area [citation], or when it has impliedly done so in light of one of the following indicia of intent: '(1) the subject [**500] matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality. [Citations.]" (*Sherwin-Williams Co., supra, 4 Cal.4th 893, 897-898*; see *Great Western Shows, Inc. v. County of Los Angeles (2002) 27 Cal.4th 853, 860-861 [118 Cal. Rptr. 2d 746, 44 P.3d 120]* (*Great Western Shows*); *California Grocers Assn. v. City of Los Angeles (2011) 52 Cal.4th 177, 188 [127 Cal. Rptr. 3d 726, 254 P.3d 1019]*.)

(11) The "contradictory and inimical" form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands. (*Big Creek Lumber Co., supra, 38 Cal.4th 1139, 1161*; *Great Western Shows, supra, 27 Cal.4th 853, 866*; *Sherwin-Williams Co., supra, 4 Cal.4th 893, 902*.) Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws.

[*744] In addition, "[w]e have been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.' " (*Big Creek Lumber Co., supra, 38 Cal.4th 1139, 1149*, quoting *Fisher v. City of Berkeley (1984) 37 Cal.3d 644, 707 [209 Cal. Rptr. 682, 693 P.2d 261]*.) " 'The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption.' " (*Big Creek Lumber Co., supra, at p. 1149*, quoting *Gluck v. County of Los Angeles (1979) 93 Cal. App. 3d 121, 133 [155 Cal. Rptr. 435]*.)

B. *The CUA and the MMP do not preempt Riverside's ban.*

When they adopted the CUA in 1996, the voters declared their intent "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" upon a physician's recommendation (*§ 11362.5, subd. (b)(1)(A)*), "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction" (*id., subd. (b)(1)(B)*), and "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need" of the substance (*id., subd. (b)(1)(C)*).

(12) But the operative steps the electorate took toward these goals were modest. In its substantive provisions, the CUA simply declares that (1) no physician may be punished or denied any right or privilege under state law for recommending medical marijuana to a patient (*§ 11362.5, subd. (c)*), and (2) two specific state statutes prohibiting the possession and cultivation [***417] of marijuana, *sections 11357* and *11358* respectively, "shall not apply" to a patient, or the patient's designated primary caregiver, who possesses or cultivates marijuana for the patient's personal medical use upon a physician's recommendation or approval (*§ 11362.5, subd. (d)*).

When it later adopted the MMP, the Legislature declared this statute was intended, among other things, to "[c]larify the scope of the application of the [CUA] and facilitate the prompt identification of qualified [medical marijuana] patients and their designated primary caregivers" in order to protect them from unnecessary arrest and prosecution for marijuana offenses, to "[p]romote uniform and consistent application of the [CUA] among the counties within the state," and to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" (Stats. 2003, ch. 875, § 1(b), pp. 6422, 6423). [*745]

(13) Again, however, the steps the MMP took in pursuit of these objectives were limited and specific. The MMP established a program for issuance of medical marijuana identification [**501] cards to those qualified patients and designated primary caregivers who wish to carry them, and required responsible county agencies to cooperate in this program. (*§§ 11362.71, subds. (a)-(d), 11362.715, 11362.72, 11362.735, 11362.74, 11362.745, 11362.755*.) It provided that the holder of an identification card shall not be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana, within the amounts specified by the statute, except upon reasonable cause to believe the card is false or invalid or the holder is in violation of statute. (*§ 11362.71, subd. (e)*; see *§ 11362.77, subd. (a)*.)

(14) The MMP further specified that certain persons, including (1) a qualified patient, or the holder of a valid identification card, who possesses or transports marijuana for personal medical use, or (2) a designated primary caregiver who transports, processes, administers, delivers, or gives away, in amounts no greater than those specified by statute, marijuana for medical purposes to or for a qualified patient or valid cardholder "shall not be subject, on that sole basis, to criminal liability" under *section 11357* (possession of marijuana), *11358* (cultivation of marijuana), *11359* (possession of marijuana for sale), *11360* (sale, transportation, importation, or furnishing of marijuana), *11366* (maintaining place for purpose of unlawfully selling, furnishing, or using controlled substance), *11366.5* (knowingly providing place for purpose of unlawfully manufacturing, storing, or distributing controlled substance), or *11570* (place used for unlawful selling, furnishing, storing, or manufacturing of controlled substance as nuisance). (*§ 11362.765, subd. (a).*)

(15) Finally, as indicated above, the MMP declared that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of [such persons], who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not *solely on the basis of that fact* be subject to *state criminal sanctions* under *Section 11357, 11358, 11359, 11360, 11366, 11366.5*, or *11570*." (*§ 11362.775*, italics added.) However, an amendment adopted in 2010 declares that no medical marijuana "cooperative, collective, dispensary, operator, establishment, or provider," other than a licensed residential or elder medical care facility, that is "authorized by law" to possess, cultivate, or distribute medical marijuana, and that "has a storefront or mobile retail outlet which ordinarily requires a local business license," shall be located within 600 feet of [***418] a school. (*§ 11362.768, subds. (b)-(e)*, as added by Stats. 2010, ch. 603, § 1.)

Our decisions have stressed the narrow reach of these statutes. Thus, in *Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal.4th 920 [70* [*746] *Cal. Rptr. 3d 382, 174 P.3d 200]* (*Ross*), a telecommunications company discharged an employee from his supervisory position after an employer-mandated drug test disclosed the presence of tetrahydrocannabinol, a chemical found in marijuana. The employee sued, urging that his termination for this reason violated both the California Fair Employment and Housing Act (FEHA; *Gov. Code, § 12900 et seq.*) and public policy. The employee's complaint alleged that he ingested medical marijuana, as a qualified patient under the CUA, to alleviate his chronic back pain, but was nonetheless able to perform his duties satisfactorily. Hence, the complaint asserted, the employer was obliged, under the FEHA, to accommodate his disability by accepting his use of medical marijuana. The trial court sustained the employer's demurrer without leave to amend and dismissed the action.

The Court of Appeal affirmed, and we upheld the Court of Appeal's judgment. We noted that neither the CUA's findings and declarations, nor its substantive provisions, mention employment rights, except in their protection of physicians who recommend medical marijuana to patients.

The employee urged that such rights were implied in the voters' declaration of their intent in the CUA "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes." (*§ 11362.5, subd. (b)(1)(A).*) We rejected this notion. As we observed, "[p]laintiff would read [this declaration] as if it created a broad right to use marijuana without hindrance or inconvenience, enforceable against [**502] private parties such as employers." (*Ross, supra, 42 Cal.4th 920, 928.*) On the contrary, we stated, "the only 'right' to obtain and use marijuana created by the [CUA] is the right of 'a patient, or ... a patient's primary caregiver, [to] possess[] or cultivate[] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician' without thereby becoming subject to punishment under *sections 11357* and *11358 of the Health and Safety Code.* [Citation.]" (*Ross, supra, at p. 929.*)

In reaching this conclusion, we emphasized the CUA's "modest objectives" (*Ross, supra, 42 Cal.4th 920, 930*), pointing out that the initiative's proponents had "consistently described the proposed measure to the voters as motivated" only "by the desire to create a narrow exception to the criminal law" for medical marijuana possession and use under the circumstances specified. (*Id., at p. 929.*) We endorsed the observation that " 'the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not.' " (*Id., at p. 930*, quoting *People v. Galambos (2002) 104 Cal.App.4th 1147, 1152 [128 Cal. Rptr. 2d 844].*) [*747]

In *People v. Mentch (2008) 45 Cal.4th 274 [85 Cal. Rptr. 3d 480, 195 P.3d 1061]* (*Mentch*), a defendant charged with cultivation and possession for sale of marijuana sought to raise the defense, among others, that he was immune from conviction as a "primary caregiver" protected by the CUA. Two witnesses testified they had medical marijuana recommendations and obtained their marijuana from the defendant, paying him in cash for their supplies. [***419] The defendant testified that he himself had a medical marijuana recommendation; had studied how to grow marijuana; had thereafter

opened a "caregiving and consultancy business" to give people safe access to medical marijuana; and supplied medical marijuana to five patients. The defendant also stated that he took "a 'couple' " of patients to medical appointments "on a 'sporadic' basis," and that he provided shelter to one patient during a brief part of the time he was selling her marijuana. (*Mentch, at p. 280.*)

Finding insufficient evidence on the point, the trial court declined to provide a "primary caregiver" instruction, and the defendant was convicted as charged. The Court of Appeal reversed the convictions. The appellate court concluded that evidence the defendant grew medical marijuana for qualified patients, counseled them on how to grow and use medical marijuana, and occasionally took them to medical appointments was sufficient to warrant a "primary caregiver" instruction. (*Mentch, supra, 45 Cal.4th 274, 281-282.*)

We reversed the Court of Appeal. We first examined the CUA's definition of a "primary caregiver" as "the individual designated by [a qualified medical marijuana patient] who has *consistently* assumed responsibility for the *housing, health, or safety* of that person." (*§ 11362.5, subd. (e)*, italics added.) This language, we reasoned, "impl[ied]" an ongoing "caretaking relationship directed at the core survival needs of a seriously ill patient, not just one single pharmaceutical need." (*Mentch, supra, 45 Cal.4th 274, 286.*) Further, we observed, the ballot arguments for Proposition 215, which became the CUA, suggested that a patient would be primarily responsible for noncommercially supplying his or her own medical marijuana, but that a "primary caregiver" should be allowed to act for a seriously or terminally afflicted patient who was too ill or bedridden to do so. Accordingly, we held that a person cannot establish "primary caregiver" status simply by showing he or she was chosen and used by a qualified patient to assist the patient in obtaining and ingesting medical marijuana. Instead, we concluded, a "primary caregiver" must prove, at a minimum, that he or she consistently provided care in such areas as housing, health, and safety, independent of any help with medical marijuana, and undertook such general caregiving duties before assuming responsibility for assisting with medical marijuana.

[**503] Alternatively, the defendant urged that the MMP, specifically *section 11362.765*, provides a defense against charges of cultivation and possession [*748] for sale to those who assist patients and primary caregivers in administering, or learning how to cultivate or administer, medical marijuana. By failing to so advise his jury, the defendant insisted, the trial court breached its sua sponte duty to instruct on any affirmative defense supported by the evidence.

(16) We responded that the defendant's reading of the MMP was too broad. We explained that while the MMP "does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be charged with cultivation or possession for sale. That is, the immunities conveyed by *section 11362.765* have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws." (*Mentch, supra, 45* [***420] *Cal.4th 274, 290.*)

(17) Moreover, we noted, *section 11362.765* declares only that the specified groups of people engaged in the specified conduct shall not "on that sole basis" be subject to criminal liability under the specified laws. Hence, we determined, *section 11362.765, subdivision (b)(3)*, which grants immunity from certain state marijuana laws to one who "provides assistance to a qualified patient or ... primary caregiver, in administering medical marijuana to the ... patient or ... acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the ... patient," affords the specified criminal immunities *only* for providing the described forms of assistance. This subdivision, we said, "does not mean [the defendant] could not be charged with cultivation or possession for sale on *any* basis ... ." (*Mentch, supra, 45 Cal.4th 274, 292*, original italics.) On the contrary, "to the extent he went beyond the immunized range of conduct, i.e., administration, advice, and counseling, he would, once again, subject himself to the full force of the criminal law." (*Ibid.*) Because it was undisputed that the defendant "did much more than administer, advise, and counsel," we said, the MMP afforded him no defense, and no instruction was required. (*Mentch, at p. 292.*)

(18) Similarly, the MMP provision at issue here, *section 11362.775*, provides only that when particular described persons engage in particular described conduct, they enjoy, with respect to that conduct, a limited immunity *from specified state marijuana laws*. As previously noted, *section 11362.775* simply declares that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate ... in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not *solely on the basis of that fact* be subject to *state* criminal sanctions ..." for the possession, furnishing, sale, cultivation, transportation, [*749] or possession for sale of marijuana, or for providing or maintaining a place for the manufacture, processing, storage, or distribution of marijuana. (Italics added; see *People v. Urziceanu (2005)*

132 Cal.App.4th 747, 785 [33 Cal. Rptr. 3d 859] (*Urziceanu*).)

Recognizing the limited reach of the CUA and the MMP, Court of Appeal decisions have consistently held that these statutes, by exempting certain medical marijuana activities--including the collective cultivation and distribution of medical marijuana under specified circumstances--from the sanctions otherwise imposed by particular state antimarijuana laws, do not preempt local land use regulation of medical marijuana collectives, cooperatives, and dispensaries, even when such regulation amounts to a total ban on such facilities within a local jurisdiction's borders.

Thus, in *Kruse, supra, 177 Cal.App.4th 1153*, the defendant's application for a business license to operate a medical marijuana dispensary was denied by Claremont's city manager in September 2006. The grounds cited were that such a facility was not a permitted use under Claremont's land use and development code. The [**504] denial letter advised the defendant he could appeal to the city council, and could also seek an amendment to the code. He did not seek such an amendment, and he began operating his facility on the day his permit was denied. Meanwhile, he filed an administrative appeal. Therein he urged that a code amendment was unnecessary because state law (i.e., the CUA and the MMP) rendered " '[a] medical marijuana caregivers collective [***421] ... a legal but not conforming business anywhere in the state where it is not regulated.' " (*Kruse, supra, at p. 1160.*) He further alleged that, before beginning operations, he had given the city notice and opportunity to adopt such regulations if it chose.

In late September 2006, while the administrative appeal was pending, the city adopted a 45-day moratorium on the issuance of any permit, variance, license, or other entitlement for operation of a medical marijuana dispensary within its boundaries. The city manager promptly advised the defendant that adoption of the moratorium rendered his appeal moot. Thereafter, the city extended the moratorium several times, ultimately for a period ending on September 10, 2008.

Defendant continued to operate his facility. After he ignored two cease and desist orders, he was cited, tried, convicted, and fined for operating without a business license in violation of city ordinances. Thereafter, he continued to operate despite the issuance of yet another cease and desist order and a succession of administrative citations. Accordingly, in January 2007, the city sued for injunctive relief to abate a public nuisance. The trial court issued a temporary restraining order, a preliminary injunction, and ultimately, in May [*750] 2008, a permanent injunction. Among its other conclusions of law, the court determined that the CUA did not preempt the city's moratorium on medical marijuana dispensaries, "because 'there is nothing in the text or history of the [CUA] that suggests that the voters intended to mandate that municipalities allow [such facilities] to operate within their city limits.' " (*Kruse, supra, 177 Cal.App.4th 1153, 1162.*)

On appeal, the defendant urged, inter alia, that the CUA and the MMP preempted the city's moratorium on medical marijuana dispensaries and precluded the city from denying permission to operate such a facility. The Court of Appeal rejected this and the defendant's other claims and affirmed the judgment.

On the issue of preemption, the appellate court first found no *express* conflict between the state medical marijuana statutes and the city's action. By their terms, the Court of Appeal observed, the CUA and the MMP do no more than exempt specific groups and specific conduct from liability under particular criminal statutes.

Second, the Court of Appeal concluded, there was no *implied* preemption under either state statute. The court reasoned as follows: Neither provision addresses, much less covers, the areas of zoning, land use planning, and business licensing. The city's moratorium ordinance was not "inimical" to the state statutes, in that it did not conflict with those laws by requiring what they forbid or prohibiting what they require. Nor does the CUA or the MMP impose a comprehensive regulatory scheme "demonstrating that the availability of medical marijuana is a matter of 'statewide concern,' thereby preempting local zoning and business licensing laws." (*Kruse, supra, 177 Cal.App.4th 1153, 1175.*) In particular, the CUA's statement of intent " '[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes' " (*Kruse, at p. 1175*) does not demonstrate a matter of preemptive statewide concern, for that declaration by the voters "[did] not create 'a broad right to use marijuana without hindrance or inconvenience' [citation], or to dispense marijuana without regard to local zoning and business licensing laws" (*ibid.*). Additionally, there is no partial state coverage of medical marijuana in terms indicating clearly that a paramount state concern will not tolerate further [***422] or additional local action. Indeed, the CUA expressly states that it does not preclude legislation prohibiting conduct that endangers others, and the MMP explicitly provides that it does not prevent a local jurisdiction from adopting and enforcing [**505] laws that are consistent with its provisions. [*751]

In sum, the Court of Appeal concluded, "[n]either the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The [c]ity's enforcement of its licensing and

zoning laws and its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP." (*Kruse, supra, 177 Cal.App.4th 1153, 1176.*)

Though it did not involve a complete moratorium or ban, the Court of Appeal in *County of Los Angeles v. Hill (2011) 192 Cal.App.4th 861 [121 Cal. Rptr. 3d 722]* (*Hill*) similarly concluded that the CUA and the MMP do not preempt a local jurisdiction from applying its zoning and business licensing powers to regulate medical marijuana dispensaries. In particular, the *Hill* court observed, the "collective cultivation" provision of the MMP, *section 11362.775*, "does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose." (*Hill, supra, at p. 869.*)

The county ordinance at issue in *Hill* placed various restrictions on the establishment and operation of medical marijuana dispensaries: it provided that such a facility could operate in a C-1 zone, but it required the operator to obtain a conditional use permit and a business license, and it prohibited the location of a dispensary within 1,000 feet of a school, playground, park, public library, place of worship, childcare facility, or youth facility. [6] County ordinances declared generally that any use of property in violation of zoning laws was a public nuisance. (*Hill, supra, 192 Cal.App.4th 861, 864-865.*)

6 The Court of Appeal took judicial notice that in December 2010, while the *Hill* appeal was pending, the county's board of supervisors had enacted a complete ban on medical marijuana dispensaries. (*Hill, supra, 192 Cal.App.4th 861, 866, fn. 4.*) The court indicated that the validity of the 2010 ordinance was not at issue, and would not be addressed, in the pending appeal. (*Ibid.*)

The county brought a nuisance action alleging that the defendants were violating the ordinance by operating a medical marijuana dispensary in an unincorporated area of the county without obtaining a business license, a conditional use permit, and a zoning variance to allow operation within 1,000 feet of a public library. The defendants did not deny they were operating next to a public library without the required authorizations. Instead, they urged that the ordinance's requirements were unconstitutional and preempted by state law. The trial court disagreed. It issued a temporary restraining order and a preliminary injunction against operation of the defendants' facility without the necessary permits. (*Hill, supra, 192 Cal.App.4th 861, 865.*) [*752]

The defendants appealed, and the Court of Appeal affirmed. The appellate court rejected the defendants' claims that the county's regulations were inconsistent with the MMP, and thus preempted. The defendants acknowledged that *section 11362.83* as then in effect (added by Stats. 2003, ch. 875, § 2, pp. 6424, 6434; former *§ 11362.83*) expressly authorized "a city or other local governing body [to] adopt[] and enforc[e] laws consistent with" the MMP. However, the defendants insisted this provision only permitted local restrictions that were " 'the same as' " those [***423] imposed by the MMP. (*Hill, supra, 192 Cal.App.4th 861, 867.*) The Court of Appeal disagreed, indicating that former *section 11362.83* showed the Legislature "expected and intended that local governments adopt additional ordinances." (*Hill, supra, at p. 868.*) The defendants also conceded that *section 11362.768*, then recently adopted to impose a minimum 600-foot distance between a medical marijuana facility and a school (*id., subd. (b)*, added by Stats. 2010, ch. 603, § 1), explicitly permits a local jurisdiction to "adopt[] ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider" (*id., subd. (f)*). Nonetheless, the defendants insisted, the 600-foot limit established by *subdivision (b)*, added by Stats. 2010, ch. 603, § 1, impliedly preempted a local jurisdiction from imposing greater distance [**506] restrictions. The Court of Appeal dismissed this argument, noting the plain words of *subdivision (f)*.

Finally, the Court of Appeal found no merit in the defendants' contention that because *section 11362.775* affords qualified collective cultivation projects a limited immunity from nuisance prosecution under the state's "drug den" abatement law, *section 11570*, the county was precluded from applying its own nuisance laws to enjoin operation of a medical marijuana dispensary in violation of its zoning ordinance. Noting that the immunity provided by *section 11362.775* only applies where the state law nuisance prosecution is premised "solely on the basis" of the collective activities described in that section, the Court of Appeal concluded that the MMP "does not prevent the [c]ounty from applying its nuisance laws to [medical marijuana dispensaries] that do not comply with its valid ordinances." (*Hill, supra, 192 Cal.App.4th 861, 868.*)

(19) We now agree, for the reasons expressed below, that the CUA and the MMP do not expressly or impliedly preempt Riverside's zoning provisions declaring a medical marijuana dispensary, as therein defined, to be a prohibited use, and a public nuisance, anywhere within the city limits. We set forth our conclusions in detail. [*753]

1. *No express preemption.*

As indicated above, the plain language of the CUA and the MMP is limited in scope. It grants specified persons and groups, when engaged in specified conduct, immunity from prosecution under specified state crimi-

nal and nuisance laws pertaining to marijuana. (*Mentch, supra, 45 Cal.4th 274, 290*; *Kruse, supra, 177 Cal.App.4th 1153, 1175.*) The CUA makes no mention of medical marijuana cooperatives, collectives, or dispensaries. It merely provides that state laws against the possession and cultivation of marijuana shall not apply to a qualified patient, or the patient's designated primary caregiver, who possesses or cultivates marijuana for the patient's personal medical use upon a physician's recommendation. (*§ 11362.5, subd. (d).*)

(20) Though the CUA broadly states an aim to "ensure" a "right" of seriously ill persons to "obtain and use" medical marijuana as recommended by a physician (*§ 11362.5, subd. (b)(1)(A)*), the initiative statute's actual objectives, as presented to the voters, were "modest" (*Ross, supra, 42 Cal.4th 920, 930*), and its substantive provisions created no "broad right to use [medical] marijuana without hindrance or inconvenience" (*id., at p. 928*; see *Kruse, supra, 177 Cal.App.4th 1153, 1163-1164*; [***424] *Urziceanu, supra, 132 Cal.App.4th 747, 773* [CUA created no constitutional right to obtain medical marijuana]). There is no basis to conclude that the CUA expressly preempts local ordinances prohibiting, as a nuisance, the use of property to cooperatively or collectively cultivate and distribute medical marijuana.

The MMP, unlike the CUA, does address, among other things, the collective or cooperative [*754] cultivation [**507] and distribution of medical marijuana. But the MMP is framed in similarly narrow and modest terms. As pertinent here, it specifies only that qualified patients, identification cardholders, and their designated primary caregivers are exempt from prosecution and conviction under enumerated state antimarijuana laws "solely" on the ground that such persons are engaged in the cooperative or collective cultivation, transportation, and distribution of medical marijuana among themselves. (*§ 11362.775.*)

The MMP's language no more creates a "broad right" of access to medical marijuana "without hindrance or inconvenience" (*Ross, supra, 42 Cal.4th 920, 928*) than do the words of the CUA. No provision of the MMP explicitly guarantees the availability of locations where such activities may occur, restricts the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning within their borders, or requires local zoning and licensing laws to accommodate the cooperative or collective cultivation and distribution of medical marijuana. [7] Hence, there is no ground to conclude that Riverside's ordinance is expressly preempted by the MMP. [8]

7 The MMP imposes only two obligations on local governments. It specifies the duties of a county health department or other designated county agency with respect to the establishment and implementation of the voluntary medical marijuana identification card program. (*§§ 11362.72, 11362.74.*) And it prohibits a local law enforcement agency or officer from refusing to accept an identification card as protection against *arrest* for the possession, transportation, delivery, or cultivation of specified amounts of medical marijuana, except upon "reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently." (*§ 11362.78*; see *§ 11362.71, subd. (e).*)

8 The City claims *sections 11362.768*, as added in 2010, and *11362.83*, as amended in 2011, *expressly authorize* total local bans on medical marijuana facilities. *Section 11362.768* specifies that a "medical marijuana cooperative, collective[, or] dispensary" with "a storefront or mobile retail outlet which ordinarily requires a local business license" may not be located within 600 feet of a school (*id., subds. (b), (e)*), but further provides that "[n]othing in this *section* shall prohibit a city [or] county ... from adopting ordinances or policies that further restrict the location *or establishment* of" such a facility (*id., subd. (f)*, italics added; see also *id., subd. (g)*). *Section 11362.83* now declares that nothing in the MMP shall prevent a city or other local governing body from "[a]dopting local ordinances that regulate the location, operation, *or establishment* of a medical marijuana cooperative or collective" (*id., subd. (a)*, italics added) or from "[t]he civil and criminal enforcement" of such ordinances (*id., subd. (b)*). The City urges that by granting local jurisdictions express authority to regulate the very "establishment" of such facilities, the MMP plainly sanctions ordinances that preclude such "establishment" within local boundaries. Our review of the language and legislative history of these provisions does not persuade us the Legislature necessarily intended them to provide affirmative authority for total bans. But we need not resolve the point. Local authority to regulate land use for the public welfare is an inherent *preexisting* power, recognized by the California Constitution, and limited only to the extent exercised "in conflict with general laws." (*Cal. Const., art. XI, § 7.*) As we otherwise conclude herein, the CUA and the MMP, by their substantive terms, grant limited exemptions from certain *state* criminal and nuisance laws, but they do not expressly or impliedly *restrict* the authority of local jurisdictions to decide whether local land

may be used to operate medical marijuana facilities.

[***425] 2. *No implied preemption.*

The considerations discussed above also largely preclude any determination that the CUA or the MMP *impliedly* preempts Riverside's effort to "de-zone" facilities that dispense medical marijuana. At the outset, there is no duplication between the state laws, on the one hand, and Riverside's ordinance, on the other, in that the two schemes are coextensive. The CUA and the MMP "decriminalize," for state purposes, specified activities pertaining to medical marijuana, and also provide that the *state's* antidrug nuisance statute cannot be used to abate or enjoin these activities. On the other hand, the Riverside ordinance finds, for local purposes, that the use of property for certain of those activities *does* constitute a *local* nuisance.

Nor do we find an "inimical" contradiction or conflict between the state and local laws, in the sense that it is impossible simultaneously to comply [*755] with both. Neither the CUA nor the MMP *requires* the cooperative or collective cultivation and distribution of medical marijuana that Riverside's ordinance deems a prohibited use of property within the city's boundaries. Conversely, Riverside's ordinance requires no conduct that is forbidden by the state statutes. Persons who refrain from operating medical marijuana facilities in Riverside are in compliance with both the local and state enactments. (Cf., e.g., *Great Western Shows, supra, 27 Cal.4th 853, 866* [ordinance banning sale of firearms or ammunition on county property was not "inimical" to state statutes contemplating lawful existence of gun shows; ordinance did not require what state law forbade or prohibit what state law demanded].)

Further, there appears no attempt by the Legislature to fully occupy the field of medical marijuana regulation as a matter of statewide concern, or to partially occupy this field under circumstances indicating that further local regulation will not be tolerated. On the contrary, as discussed in detail above, the CUA and the MMP take limited steps toward recognizing marijuana as a medicine by [**508] exempting particular medical marijuana activities from state laws that would otherwise prohibit them. In furtherance of their provisions, these statutes require local agencies to do certain things, and prohibit them from doing certain others. But the statutory terms describe no comprehensive scheme or system for authorizing, controlling, or regulating the processing and distribution of marijuana for medical purposes, such that no room remains for local action.

The presumption against preemption is additionally supported by the existence of significant local interests that may vary from jurisdiction to jurisdiction. Amici curiae League of California Cities et al. point out that "California's 482 cities and 58 counties are diverse in size, population, and use." As these amici curiae observe, while several California cities and counties allow medical marijuana facilities, it may not be reasonable to expect every community to do so.

For example, these amici curiae point out, "[s]ome communities are predominantly residential and do not have sufficient commercial or industrial space to accommodate" facilities that distribute medical marijuana. Moreover, these facilities deal in a substance which, except for legitimate medical use by a qualified patient under a physician's authorization, is illegal under both federal and state law to possess, use, [***426] furnish, or cultivate, yet is widely desired, bought, sold, cultivated, and employed as a recreational drug. Thus, facilities that dispense medical marijuana may pose a danger of increased [*756] crime, congestion, blight, and drug abuse, [9] and the extent of this danger may vary widely from community to community.

9 For example, when considering the 2011 amendment to *section 11362.83*, as proposed by Assembly Bill No. 1300 (2011-2012 Reg. Sess.), the Senate Committee on Public Safety noted the bill author's assertions about the " 'controversial picture of dispensaries,' " as revealed in " '[a] scan of headlines.' " As reported by the committee, the bill author recounted that some dispensaries "have been caught selling marijuana to people not authorized to possess it, many intentionally operate in the shadows without any business licensure or under falsified documentation, and some have been the scene of violent robberies and murder." (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1300 (2011-2012 Reg. Sess.), as amended June 1, 2011, p. F.) Courts of Appeal dealing with local regulation of medical marijuana dispensaries have cited similar concerns. (See, e.g., *Hill, supra, 192 Cal.App.4th 861, 871* [because of evidence that the " 'cash only' " nature of most medical marijuana dispensary operations presents a disproportionate target for robberies and burglaries, and that such facilities affect neighborhood quality of life by attracting loitering and marijuana smoking on or near the premises, they are not similarly situated to pharmacies for public health purposes and need not be treated equally]; *Kruse, supra, 177 Cal.App.4th 1153, 1161* [noting local findings of a correlation between medical marijuana dispensaries and increased crime].)

Thus, while some counties and cities might consider themselves well suited to accommodating medical marijuana dispensaries, conditions in other communities might lead to the reasonable decision that such facilities within their borders, even if carefully sited, well managed, and closely monitored, would present unacceptable local risks and burdens. (See, e.g., *Great Western Shows, supra, 27 Cal.4th 853, 866-867* [noting, in support of holding that state gun show regulations did not occupy field, so as to preclude Los Angeles County's complete ban of gun shows on county property, that firearms issues likely require different treatment in urban, as opposed to rural, areas].) Under these circumstances, we cannot lightly assume the voters or the Legislature intended to impose a "one size fits all" policy, whereby each and every one of California's diverse counties and cities must allow the use of local land for such purposes. [10]

10 Nor, under these circumstances, can we find implied preemption on grounds that a local ban on medical marijuana facilities would so impede the ability of transient citizens to obtain access to medical marijuana as to outweigh the possible benefit to the locality imposing the ban.

O'Connell v. City of Stockton (2007) 41 Cal.4th 1061 [63 Cal. Rptr. 3d 67, 162 P.3d 583] (*O'Connell*), on which defendants rely, is readily distinguishable. There, a state law, the California Uniform Controlled Substances Act (UCSA; *§ 11000*), established a comprehensive scheme for the treatment of such substances, specifying offenses and corresponding penalties in detail. Included among the sanctions provided by the UCSA was a defined program for forfeiture of particular categories of property, [**509] including vehicles, used to commit drug crimes. Under this system, vehicles were subject to forfeiture if they had been employed to facilitate the *manufacture*, *possession*, or *possession for sale* of *specified felony-level* amounts, as *explicitly* set forth, of [*757] *particular* controlled substances. Vehicle forfeiture under the UCSA required *proof beyond reasonable doubt* that the subject property had been so used. Provisions of the UCSA stated that law enforcement, not revenue, was the principal aim of forfeiture, that forfeiture had [***427] potentially harsh consequences for property owners, and that law enforcement officials should protect innocent owners' interests by providing adequate notice and due process in forfeiture proceedings.

The City of Stockton adopted an ordinance providing for *local* forfeiture of vehicles used simply to *acquire or attempt to acquire any amount of any controlled substance*, even if the offense at issue was a low-grade misdemeanor warranting only a $ 100 fine and no jail time, and was not eligible for forfeiture under the UCSA. Stockton's ordinance permitted forfeiture upon proof by a *preponderance of evidence* that the vehicle had been used for the described purpose. Forfeited vehicles were to be sold at auction, with net proceeds payable to local law enforcement and prosecutorial agencies.

Under these circumstances, the *O'Connell* majority concluded, "[t]he comprehensive nature of the UCSA in defining drug crimes and specifying penalties (including forfeiture) is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation. The UCSA accordingly occupies the field of penalizing crimes involving controlled substances, thus impliedly preempting the City's forfeiture ordinance ..." calling for forfeiture of vehicles involved in the acquisition or attempted acquisition of drugs regulated under the UCSA. (*O'Connell, supra, 41 Cal.4th 1061, 1071.*) The majority explained that "the Legislature's comprehensive enactment of penalties for crimes involving controlled substances, but exclusion from that scheme of any provision for vehicle forfeiture for simple possessory drug offenses, manifests a clear intent to reserve that severe penalty for very serious drug crimes involving the manufacture, sale, or possession for sale of specified amounts of certain controlled substances." (*Id., at p. 1072.*)

As indicated above, there is no similar evidence in this case of the Legislature's intent to preclude local regulation of facilities that dispense medical marijuana. The CUA and the MMP create no all-encompassing scheme for the control and regulation of marijuana for medicinal use. These statutes, both carefully worded, do no more than exempt certain conduct by certain persons from certain state criminal and nuisance laws against the possession, cultivation, transportation, distribution, manufacture, and storage of marijuana. [11]

11 Defendants also cite *Northern Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal. App. 3d 90 [223 Cal. Rptr. 609]*, which struck down, as preempted by state law, a local ordinance banning the administration of electroconvulsive, or electric shock, therapy (ECT) within the city. The Court of Appeal found that, after expressly considering the benefits, risks, and invasive nature of ECT, a therapy recognized by the medical and psychiatric communities as useful in certain cases, the Legislature had indicated its intent that the right of every psychiatric patient to choose or refuse this therapy be " 'fully recognized and protected' " (*id., at p. 105*), and had "enacted detailed legislation extensively regulating the administration of ECT, and requiring, among other things, stringent safeguards designated to insure that psychiatric patients have the

right to refuse ECT." (*Id., at p. 99.*) Under these circumstances, the Court of Appeal concluded that the state had occupied the field, thus precluding a locality from prohibiting the availability of ECT within its borders. By contrast, the MMP simply removes otherwise applicable state sanctions from certain medical marijuana activities, and exhibits no similar intent to occupy the field of medical marijuana regulation.

[*758]

The gravamen of defendants' argument throughout is that the MMP "authorizes" the existence of facilities for the collective or cooperative cultivation and distribution of medical marijuana, and that a local ordinance prohibiting such facilities thus cannot [***428] be tolerated. But defendants' reliance on such decisions as *Cohen v. Board of Supervisors (1985) 40 Cal.3d 277 [219 Cal. Rptr. 467, 707 P.2d 840]* (*Cohen*) and *City of Torrance v.* [**510] *Transitional Living Centers for Los Angeles, Inc. (1982) 30 Cal.3d 516 [179 Cal.Rptr. 907, 638 P.2d 1304]* (*City of Torrance*) for this proposition is misplaced.

Cohen, addressing a local ordinance that closely regulated escort services, stated that "[i]f the ordinance ... attempted to prohibit conduct proscribed or permitted by state law[,] either explicitly or implicitly, it would be preempted." (*Cohen, supra, 40 Cal.3d 277, 293.*) However, *Cohen* made clear there is no preemption where state law expressly or implicitly allows local regulation. (*Id., at pp. 294-295.*) As indicated, the MMP implicitly permits local regulation of medical marijuana facilities.

Similarly, in *City of Torrance, supra, 30 Cal.3d 516*, a state statute promoting the local community care of mental patients *specifically provided* that local zoning rules or use permit denials could not be used to exclude psychiatric care facilities from areas in which hospitals or nursing homes were otherwise allowed. By contrast, the MMP imposes no similar limits, express or implicit, on local zoning and permit rules.

(21) More fundamentally, we have made clear that a state law does not "authorize" activities, to the exclusion of local bans, simply by exempting those activities from otherwise applicable state prohibitions. Thus, as discussed in *Nordyke v. King (2002) 27 Cal.4th 875 [118 Cal. Rptr. 2d 761, 44 P.3d 133]* (*Nordyke*), a state statute, *Penal Code section 171b*, made it a crime to possess firearms in any state or local public building, but exempted a person who, for the purpose of sale or trade, brought an otherwise lawfully possessed firearm into a gun show conducted in compliance with state law. Under an Alameda County ordinance, it was a misdemeanor to bring any [*759] firearm onto county property. The ordinance specified certain exceptions, but these did not include gun shows. Hence, a principal effect of the ordinance was to forbid the presence of firearms at gun shows on county property, thus making such shows impractical.

Gun show promoters challenged the ordinance, arguing, inter alia, that *Penal Code section 171b* prohibited the outlawing of guns at gun shows on public property, and thus preempted the ordinance's contrary provisions. We disagreed. As we explained, *section 171b* "merely exempts gun shows from the *state* criminal prohibition on possessing guns in public buildings, thereby permitting local government entities to authorize such shows. It does not *mandate* that local government entities permit such a use ... ." (*Nordyke, supra, 27 Cal.4th 875, 884*, first italics added.)

(22) Similarly here, the MMP merely exempts the cooperative or collective cultivation and distribution of medical marijuana by and to qualified patients and their designated caregivers from prohibitions that would otherwise apply under state law. The state statute does not thereby *mandate* that local governments authorize, allow, or accommodate the existence of such facilities.

Defendants emphasize that among the stated purposes of the MMP, as originally enacted, are to "[p]romote uniform and consistent application of the [CUA] among the counties within the state" and to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" (Stats. 2003, ch. 875, § 1(b), pp. 6422, 6423). Hence, they insist, the encouragement of [***429] medical marijuana dispensaries, under *section 11362.775*, is a matter of statewide concern, requiring the uniform allowance of such facilities throughout California, and leaving no room for their exclusion by individual local jurisdictions.

We disagree. As previously indicated, though the Legislature stated it intended the MMP to "promote" uniform application of the CUA and to "enhance" access to medical marijuana through collective cultivation, the MMP itself adopts but limited means of addressing these ideals. Aside from requiring local cooperation in the voluntary medical marijuana patient identification card program, the MMP's substantive provisions simply remove specified state law sanctions from certain marijuana activities, including the cooperative or collective cultivation of medical marijuana by qualified patients and their [**511] designated caregivers. (*Mentch, supra, 45 Cal.4th 274, 290.*) The MMP has never expressed or implied any actual limitation on local land use or police power regulation of facilities used for the cultivation and [*760] distribution of marijuana. We cannot employ the Legislature's expansive declaration of aims to stretch the

MMP's effect beyond a reasonable construction of its substantive provisions.

Defendants acknowledge that the MMP expressly recognizes local authority to "regulate" medical marijuana facilities (*§§ 11362.768, subds. (f), (g), 11362.83*), but they rely heavily on a passage from our decision in *Great Western Shows, supra, 27 Cal.4th 853*, for their claim that local governments, even if granted regulatory authority, may not wholly exclude activities that are sanctioned or encouraged by state law. On close examination, however, the premise set forth in *Great Western Shows* is not applicable here.

In *Great Western Shows*, we described several federal decisions under the federal Resource Conservation and Recovery Act of 1976 (RCRA; *42 U.S.C. § 6901 et seq.*), including *Blue Circle Cement, Inc. v. Board of County Commissioners (10th Cir. 1994) 27 F.3d 1499* (*Blue Circle Cement*), as "stand[ing] broadly for the proposition that when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." (*Great Western Shows, supra, 27 Cal.4th at p. 868.*)

But there are important distinctions between the RCRA and the California statutes at issue in this case. As explained in *Blue Circle Cement*, the RCRA "is the comprehensive federal hazardous waste management statute governing the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment." (*Blue Circle Cement, supra, 27 F.3d 1499, 1505.*) The federal statute aims "to assist states and localities in the development of improved solid waste management techniques to facilitate resource recovery and conservation." (*Ibid.*) It "enlists the states and municipalities to participate in a 'cooperative effort' with the federal government to develop waste management practices that facilitate the recovery of 'valuable materials and energy from solid waste.' " (*Id., at p. 1506.*) Under these circumstances, the court in *Blue Circle Cement*, like other federal courts, concluded that a complete local ban on the processing, recycling, and disposal of industrial waste, imposed without consideration of specific and legitimate local health and safety concerns, would frustrate the RCRA's overarching purpose to encourage state and local cooperation in furtherance of the efficient [***430] treatment, use, and disposal of such material. (*Blue Circle Cement, 27 F.3d 1499, 1506-1509* & cases cited.)

(23) The MMP, by contrast, creates no comprehensive scheme for the protection or promotion of facilities that dispense medical marijuana. The sole effect of the statute's substantive terms is to exempt specified medical [*761] marijuana activities from enumerated state criminal and nuisance statutes. Those provisions do not mandate that local jurisdictions permit such activities. (See *Nordyke, supra, 27 Cal.4th 875, 883-884.*) Local decisions to prohibit them do not frustrate the MMP's operation. Accordingly, we are not persuaded that the premise of *Blue Circle Cement, supra, 27 F.3d 1499*, as paraphrased in *Great Western Shows, supra, 27 Cal.4th 853*, is applicable here. [12]

12 Defendants also cite *Big Creek Lumber Co., supra, 38 Cal.4th 1139*, in support of their assertion that local regulation of an activity sanctioned and encouraged by state law cannot include a total ban. But this decision, too, is distinguishable. In *Big Creek Lumber Co.*, the plaintiffs argued that a county ordinance specifying the zones where timber harvesting could occur was preempted by comprehensive state forestry statutes enacted to encourage the sound and prudent exploitation of timber resources. The principal statute at issue, the Z'berg-Nejedly Forest Practice Act of 1973 (FPA; *Pub. Resources Code, § 4511 et seq.*), forbade counties from " 'regulat[ing] the conduct of timber operations.' " (*Big Creek Lumber Co., supra, at p. 1147.*) Among other things, we found no "inimical" state-local conflict, because it was not impossible for timber operators to comply simultaneously with both the state and county enactments. We also concluded, in essence, that by limiting the locations within the county where timber harvesting was permitted, the ordinance did not impermissibly "regulate" the "conduct" of such operations. (*Id., at p. 1157.*) Addressing the plaintiffs' "overriding concern" that unless preempted, counties could use locational zoning to entirely prohibit timber harvesting (*id., at p. 1160*), we simply observed that "[t]he ordinance before us does not have that effect, nor does it appear that any county has attempted such a result." (*Id., at pp. 1160-1161.*)

Here, as we have noted, the MMP is a limited measure, not a comprehensive scheme for the regulation and encouragement of medical marijuana facilities. As in *Big Creek Lumber Co.*, the local ordinance at issue here does not stand in "inimical" conflict with state statutes by making simultaneous compliance impossible. And unlike the FPA at issue in *Big Creek Lumber Co.*, the MMP includes provisions *recognizing* the regulatory authority of local jurisdictions. For these reasons, nothing we said in *Big Creek Lumber Co.* persuades us that Riverside's ordinance is preempted.

[**512] **(24)** Finally, defendants urge that by exempting the collective or cooperative cultivation of medical marijuana by qualified patients and their designated caregivers from treatment as a nuisance under the *state's* drug abatement laws (*§ 11362.775*; see *§ 11570 et seq.*), the MMP bars local jurisdictions from adopting and enforcing ordinances that treat these very same activities as nuisances subject to abatement. But for the reasons set forth at length above, we disagree. Nuisance law is not defined exclusively by what the *state* makes subject to, or exempt from, its own nuisance statutes. Unless exercised in clear conflict with general law, a city's or county's inherent, constitutionally recognized power to determine the appropriate use of land within its borders (*Cal. Const., art. XI, § 7*) allows it to define nuisances for local purposes, and to seek abatement of such nuisances. (See *Golden Gate Water Ski Club v. County of Contra Costa (2008) 165 Cal.App.4th 249, 255-256 [80 Cal. Rptr. 3d 876]*.) [*762]

(25) No such conflict exists here. In *section 11362.775*, the MMP merely removes *state law* criminal and nuisance [***431] sanctions from the conduct described therein. By this means, the MMP has signaled that the *state* declines to regard the described acts as nuisances or criminal violations, and that the *state's* enforcement mechanisms will thus not be available against these acts. Accordingly, localities in California are left free to accommodate such conduct, if they choose, free of state interference. As we have explained, however, the MMP's limited provisions neither expressly or impliedly restrict or preempt the authority of individual local jurisdictions to choose otherwise for local reasons, and to prohibit collective or cooperative medical marijuana activities within their own borders. A local jurisdiction may do so by declaring such conduct on local land to be a nuisance, and by providing means for its abatement. [13]

13 As defendants note, the court in *Qualified Patients Assn. v. City of Anaheim (2010) 187 Cal.App.4th 734 [115 Cal. Rptr. 3d 89]* suggested that, "at first glance," it seemed "incongruous" and "odd" to conclude the CUA and the MMP, which exempt specified medical marijuana activities from *state* criminal and nuisance laws, might leave local jurisdictions free to use nuisance abatement procedures to prohibit the same activities. (*Id., at p. 754.*) However, this issue was not presented or decided in *Qualified Patients Assn.* There the court conceded the answer "remain[ed] to be determined" and was "by no means clear cut or easily resolved on first impressions." (*Ibid.*) After careful review, and for the reasons expressed at length herein, we are not persuaded by the tentative view expressed in *Qualified Patients Assn.*

(26) We thus conclude that neither the CUA nor the MMP expressly or impliedly preempts the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions. Accordingly, we reject defendants' challenge to Riverside's medical marijuana dispensary ordinances. [14]

14 Our analysis makes it unnecessary to address the City's argument that, were the CUA and the MMP construed to require local jurisdictions to accommodate medical marijuana facilities, it would be preempted by the federal CSA. Nor need we confront the related argument of amici curiae California State Sheriffs' Association et al. that a state law, *Government Code section 37100, forbids* a city to adopt ordinances authorizing the use of local land for operation of medical marijuana facilities because such ordinances would "conflict with the ... laws of ... the United States," i.e., the CSA.

[**513] As we have noted, the CUA and the MMP are careful and limited forays into the subject of medical marijuana, aimed at striking a delicate balance in an area that remains controversial, and involves sensitivity in federal-state relations. We must take these laws as we find them, and their purposes and provisions are modest. They remove state-level criminal and civil sanctions from specified medical marijuana activities, but they do not establish a comprehensive state system of legalized medical marijuana; or grant a "right" of convenient access to marijuana for medicinal use; or override the zoning, [*763] licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries.

Of course, nothing prevents future efforts by the Legislature, or by the People, to adopt a different approach. In the meantime, however, we must conclude that Riverside's ordinances are not preempted by state law.

The judgment of the Court of Appeal is affirmed.

Cantil-Sakauye, C. J., Kennard, J., Werdegar, J., Chin, J., Corrigan, J., and Liu, J., concurred. [***432]

CONCUR BY: Liu

CONCUR

LIU, J., Concurring.--I join the court's opinion and write separately to clarify the proper test for state preemption of local law.

As the court says, "[L]ocal legislation that conflicts with state law is void. [Citation.] ' "A conflict exists if the local legislation ' "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." ' " [Citations.]' " (Maj. opn., *ante*, at p. 743.)

The court further states: "The 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands. [Citations.] Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (Maj. opn., *ante*, at p. 743.)

The first sentence of the above statement should not be misunderstood to improperly limit the scope of the preemption inquiry. As the court's opinion makes clear elsewhere, state law may preempt local law when local law prohibits not only what a state statute "demands" but also what the statute permits or authorizes. (See maj. opn., *ante*, at pp. 758, 760-761, discussing *Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 293 [219 Cal. Rptr. 467, 707 P.2d 840]* (*Cohen*); *Great Western Shows, Inc. v. County of Los Angeles (2002) 27 Cal.4th 853, 867-868 [118 Cal. Rptr. 2d 746, 44 P.3d 120]* (*Great Western Shows*).

In a similar vein, the second sentence of the above statement--"no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws" (maj. opn., *ante*, at p. 743)--also should not be misunderstood. If state law authorizes or promotes, but does not require or demand, a certain activity, and if local law prohibits the activity, then an entity or individual can comply with both state and local law by not engaging in the activity. But that obviously does not resolve the preemption question. [*764] To take an example from federal law, the Federal Arbitration Act (FAA; *9 U.S.C. § 1 et seq.*) promotes arbitration, and a state law prohibiting arbitration of employment disputes would be preempted. (See *AT&T Mobility LLC v. Concepcion (2011) 563 U. S. ___, ___ [179 L.Ed.2d 742, 131 S. Ct. 1740, 1747].*) Such preemption obtains even though an employer can comply with both the FAA, which does not *require* employers to enter into arbitration agreements, and the state law simply by choosing not to arbitrate employment disputes.

Accordingly, in federal preemption law, we find a more complete statement of conflict preemption: " 'We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and [**514] federal requirements," [citation], *or* where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' " (*Sprietsma v. Mercury Maine (2002) 537 U.S. 51, 64-65 [154 L.Ed.2d 466, 123 S.Ct. 518]*, italics added.) This more complete statement no doubt applies to California law. Local law that prohibits an activity that state law intends to promote is preempted, even though it is possible for a private party to comply with both state and local law by refraining from that activity. (See *Great Western Shows, supra, 27 Cal.4th at pp. 867-868*; *Cohen, supra, 40 Cal.3d at p. 293.*)

I do not understand today's opinion to hold otherwise. In this case, defendants argue that the Medical Marijuana Program [***433] (MMP) authorizes and intends to promote what the City of Riverside prohibits: the operation of medical marijuana dispensaries. If such legislative authorization were clear, then the ordinance in question might well be preempted. But I agree with my colleagues that although the MMP provides medical marijuana cooperatives and collectives with a limited exemption from state criminal liability, "state law does not 'authorize' activities, to the exclusion of local bans, simply by exempting those activities from otherwise applicable state prohibitions." (Maj. opn., *ante*, at p. 758.) As the court's opinion makes clear, notwithstanding some language in the MMP regarding the promotion of medical marijuana cooperatives and collectives, "the MMP itself adopts but limited means of addressing these ideals. Aside from requiring local cooperation in the voluntary medical marijuana patient identification card program, the MMP's substantive provisions simply remove specified state-law sanctions from certain marijuana activities, including the cooperative or collective cultivation of medical marijuana by qualified patients and their designated caregivers. [Citation.] The MMP has never expressed or implied any actual limitation on local land use or police power regulation of facilities used for the cultivation and distribution of marijuana." (Maj. opn., *ante*, at p. 759.) [*765]

Because state law does not clearly authorize or intend to promote the operation of medical marijuana dispensaries, I agree that the City of Riverside's prohibition on such dispensaries is not preempted.

APPENDIX E

ALBERTO R. GONZALES, ATTORNEY GENERAL, et al., Petitioners v. ANGEL McCLARY RAICH et al.

No. 03-1454

SUPREME COURT OF THE UNITED STATES

545 U.S. 1; 125 S. Ct. 2195; 162 L. Ed. 2d 1; 2005 U.S. LEXIS 4656; 73 U.S.L.W. 4407; 18 Fla. L. Weekly Fed. S 327

November 29, 2004, Argued
June 6, 2005, Decided

SUBSEQUENT HISTORY:
On remand at *Raich v. Gonzales, 500 F.3d 850, 2007 U.S. App. LEXIS 5834 (9th Cir. Cal., Mar. 14, 2007)*

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.
Raich v. Ashcroft, 352 F.3d 1222, 2003 U.S. App. LEXIS 25317 (9th Cir. Cal., 2003)

DISPOSITION: Vacated and remanded.

DECISION:

[***1] Controlled Substances Act's (*21 U.S.C.S. §§ 801 et seq.*) prohibition of marijuana manufacture and possession, as applied to intrastate manufacture and possession for medical purposes under California law, held not to exceed Congress' power under Federal Constitution's commerce clause (Art. I, § 8, cl. 3).

SUMMARY:

The federal Controlled Substances Act (CSA) (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (*21 U.S.C.S. §§ 801 et seq.*) generally criminalized the manufacture, distribution, or possession of marijuana. Although marijuana sale or possession also was generally prohibited under California criminal law, California enacted in 1996 a statute that created an exemption from criminal prosecution for marijuana possession under state law for (1) physicians who recommended marijuana to patients for medical purposes; and (2) patients, and their primary caregivers, who possessed or cultivated marijuana for patients' personal medical purposes upon recommendation or approval by a physician.

Two medical patients--California residents who used physician-recommended marijuana for serious medical conditions--brought, in the United States District Court for the Northern District of California, an action seeking injunctive and declaratory relief prohibiting the enforcement of the CSA to the extent that it prevented the patients from possessing, obtaining, or manufacturing marijuana for their personal medical use, on the asserted grounds that enforcing the CSA against the patients would violate the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3) and other constitutional provisions.

The District Court denied patients' motion for a preliminary injunction (*248 F. Supp. 2d 918*). However, the United States Court of Appeals for the Ninth Circuit reversed the District Court's judgment and ordered the [***2] District Court to enter a preliminary injunction, as the Court of Appeals concluded that the patients had demonstrated a strong likelihood of success on their claim that the CSA--as applied to the intrastate, noncommercial cultivation and possession of marijuana for personal medical purposes as recommended by a patient's physician pursuant to valid California law--exceeded Congress' authority under the *commerce clause* (*352 F. 3d 1222*).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ., it was held that the CSA's categorical prohibition of the manufacture and possession of marijuana, did not, as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to the Califor-

nia statute, exceed Congress' authority under the *commerce clause*, as (1) Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would affect interstate price and market conditions, where production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market for marijuana; (2) findings in the CSA's introductory sections explained why Congress had deemed it appropriate to encompass local activities within the CSA's scope; and (3) the circumstance that the CSA ensnared some purely intrastate activity was of no moment.

Scalia, J., concurring in the judgment, expressed the view that (1) activities that merely substantially affect interstate commerce are not part of interstate commerce, and thus the power to regulate them cannot come from the *commerce clause* alone; (2) Congress' regulatory authority over intrastate activities that are not part of interstate commerce derives from the Constitution's necessary and proper clause (Art. I, § 8, cl. 18); and (3) where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not substantially affect interstate commerce.

O'Connor, J., joined in pertinent part by Rehnquist, Ch. J., and Thomas, J., dissenting, expressed the view that (1) the Supreme Court's decision in the instant case sanctioned an application of the CSA that extinguished California's experiment without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, had a substantial effect on interstate commerce and was therefore an appropriate subject of federal regulation; (2) in so doing, the court announced a rule that gave Congress an incentive to legislate broadly pursuant to the *commerce clause*, rather than with precision; and (3) that rule and the result it produced in the instant case were irreconcilable with prior Supreme Court decisions.

Thomas, J., dissenting, expressed the view that (1) the local cultivation and consumption of marijuana by the two patients was not commerce among the several states; (2) the CSA, as applied to the patients' conduct in question, was not necessary and proper for carrying into execution Congress' restrictions on the interstate drug trade; and (3) therefore, neither the *commerce clause* [***3] nor the necessary and proper clause granted Congress the power to regulate the patients' conduct in question.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

COMMERCE §206

-- marijuana -- local cultivation and use -- medicinal purposes -- state law

Headnote: [1A][1B][1C][1D][1E][1F][1G]

The categorical prohibition, under the Controlled Substances Act (CSA) (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (*21 U.S.C.S. §§ 801 et seq.*), of the manufacture and possession of marijuana, did not--as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to a state statute--exceed Congress' authority under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3), as:

(1) Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would affect interstate price and market conditions, for (a) it was likely that the high demand for marijuana in the interstate market would draw homegrown marijuana into that market; (b) the diversion of homegrown marijuana would tend to frustrate the federal interest in entirely eliminating commercial transactions in the interstate market; and (c) production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market for marijuana.

(2) Findings in the CSA's introductory sections explained why Congress had deemed it appropriate to encompass local activities within the CSA's scope.

(3) The circumstance that the CSA ensnared some purely intrastate activity was of no moment.

(Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN2]

COMMERCE §61

COMMERCE §66

-- regulation -- protection

Headnote: [2]

The *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3) authorizes Congress to (1) regulate the channels of interstate commerce; (2) regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) regulate activities that substantially affect interstate commerce. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN3]

COMMERCE §64

-- regulation -- economic effect

Headnote: [3]

Even if a party's activity is local and though it may not be regarded as commerce, such activity may, whatever its nature, be reached by Congress under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3) if the activity exerts a substantial economic effect on interstate commerce. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN4]

COMMERCE §64

-- general regulation -- de minimis instances

Headnote: [4]

With respect to Congress' power under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3), the United States Supreme Court has never required Congress to legislate with scientific exactitude. When Congress decides that the total incidence of a practice poses a threat to a national market, Congress may regulate the entire class. In this [***4] vein, the court has reiterated that when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN5]

COMMERCE §108

-- undercutting interstate market

Headnote: [5]

Under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3), Congress can regulate purely intrastate activity that is not itself "commercial," in that the commodity involved in the activity is not produced for sale, if Congress concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN6]

COMMERCE §66

-- prohibition

Headnote: [6A][6B]

Congress' power under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3) to regulate commerce includes the power to prohibit commerce in a particular commodity. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN7]

COMMERCE §72

STATUTES §145.4

-- congressional findings -- authority to legislate

Headnote: [7]

For purposes of determining whether a federal statutory scheme is within Congress' power under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3)--while congressional findings are helpful in reviewing the substance of such a scheme (particularly when the connection to commerce is not self-evident), and while the United States Supreme Court will consider congressional findings in the court's analysis when such findings are available--the absence of particularized findings does not call into question Congress' authority to legislate. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN8]

COMMERCE §206

-- marijuana -- substantial effect

Headnote: [8]

For purposes of determining whether the categorical prohibition, under the Controlled Substances Act (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (*21 U.S.C.S. §§ 801 et seq.*), of the manufacture and possession of marijuana--as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to a state statute--exceeded Congress' authority under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3), the United States Supreme Court did not need not determine whether the activities of the two medical-marijuana users in the case at hand, taken in the aggregate, substantially affected interstate commerce in fact, but only whether a rational basis existed for so concluding. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN9]

COMMERCE §206

-- marijuana -- economic activities

Headnote: [9A][9B][9C]

For purposes of determining whether the categorical prohibition, under the Controlled Substances Act (CSA) (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (*21 U.S.C.S. §§ 801 et seq.*), of the manufacture and possession of marijuana--as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to a state statute--exceeded Congress' authority under the *Federal*

Constitution's commerce clause (Art. I, § 8, cl. 3) to regulate interstate [***5] economic activities, the activities regulated by the CSA were quintessentially economic, as:

(1) "Economics" referred to the production, distribution, and consumption of commodities.

(2) The CSA regulated the production, distribution, and consumption of commodities for which there was an established and lucrative interstate market.

(3) The United States Supreme Court concluded that Congress had acted rationally in determining that none of the characteristics of the class of activities exempted from prosecution under the state statute, whether viewed individually or in the aggregate, compelled an exemption from the CSA. Rather, this class of activities was an essential part of the larger regulatory scheme.

(4) The mere fact that marijuana, like virtually every other controlled substance regulated by the CSA, was used for medicinal purposes could not serve (a) to distinguish marijuana from the core activities regulated by the CSA; or (b) as an "objective marker" or "objective factor" to arbitrarily narrow the relevant class.

(5) If personal cultivation, possession, and use of marijuana for medicinal purposes were beyond the limits of Congress' *commerce-clause* authority, then such personal use of marijuana (or any other homegrown drug) for recreational purposes also would be beyond those limits, regardless of whether a state elected to authorize or even regulate such use.

(Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN10]

COMMERCE §82

-- drug reclassification -- regulation

Headnote: [10A][10B]

The possibility that marijuana might be reclassified in the future under the Controlled Substances Act (CSA) (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (*21 U.S.C.S. §§ 801 et seq.*)--which classified drugs under several schedules, each of which called for different treatment under the CSA--had no relevance to the question, in the case at hand, whether Congress currently had the power under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3) to regulate the production and distribution of marijuana. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN11]

EVIDENCE §382.5

-- congressional judgment -- presumption of validity

Headnote: [11]

For purposes of determining whether the categorical prohibition, under the Controlled Substances Act (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (*21 U.S.C.S. §§ 801 et seq.*), of the manufacture and possession of marijuana, as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to a state statute, exceeded Congress' authority under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3) to regulate interstate commerce--where a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would have included use by friends, neighbors, and family members) might have a substantial impact on the interstate market for this extraordinarily popular substance--the congressional judgment that an exemption for a significant segment of the total market for marijuana would have undermined the orderly enforcement of the entire regulatory scheme was entitled to a strong presumption of validity. [***6] (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN12]

STATES, TERRITORIES, AND POSSESSIONS §36

-- marijuana -- possession and cultivation -- federal supremacy

Headnote: [12]

For purposes of determining whether the categorical prohibition, under the Controlled Substances Act (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (*21 U.S.C.S. §§ 801 et seq.*), of the manufacture and possession of marijuana--as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to a state statute--exceeded Congress' authority under the *Federal Constitution's commerce clause* (Art I, § 8, cl 3), the state statute's limiting of the activities to marijuana possession and cultivation "in accordance with state law" could not place the activities of the two medical-marijuana users in the case at hand beyond congressional reach, as the *Constitution's supremacy clause* (*Art. VI, cl. 2*) provided that federal law prevailed in any conflict between federal and state law. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN13]

COMMERCE §96

-- federal and state powers

Headnote: [13]

Federal power over commerce is superior to the states' power to provide for the welfare or necessities of the states' inhabitants, regardless of how legitimate or dire those necessities may be. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN14]

COMMERCE §101

-- federal power -- state acquiescence or action

Headnote: [14]

Just as state acquiescence to federal regulation cannot expand the bounds of the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3), state action cannot circumscribe Congress' plenary commerce power under the *commerce clause.* (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN15]

COMMERCE §101

-- medical marijuana -- state controls

Headnote: [15A][15B]

For purposes of determining whether the categorical prohibition, under the Controlled Substances Act (CSA) (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (*21 U.S.C.S. §§ 801 et seq.*), of the manufacture and possession of marijuana--as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to a state statute--exceeded Congress' authority under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3), the state's decision, made 34 years after the CSA was enacted (and 8 years after the state statute was enacted), to impose "stric[t] controls" on the "cultivation and possession of marijuana for medical purposes," could not retroactively divest Congress of its authority under the *commerce clause.* (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN16]

COMMERCE §206

-- medical marijuana -- exemption from state prohibition -- market impact

Headnote: [16]

For purposes of determining whether the categorical prohibition, under the Controlled Substances Act (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (*21 U.S.C.S. §§ 801 et seq.*), of the manufacture and possession of marijuana--as applied to the intrastate manufacture and possession of marijuana [***7] for medical purposes pursuant to a state statute that exempted such activities from the state's general prohibition of marijuana sale and possession--exceeded Congress' authority under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3) to regulate interstate commerce, the state exemptions had a significant impact on both the supply and demand sides of the market for marijuana, as:

(1) The exemption for physicians provided them with an economic incentive to grant their patients permission to use the drug.

(2) In contrast to most prescriptions for legal drugs, which limited the dosage and duration of the usage, a physician's permission under the state statute to recommend marijuana use was open-ended.

(3) The authority under the state statute to grant permission whenever the physician determined that a patient was afflicted with "any other illness for which marijuana provides relief" was broad enough to allow even the most scrupulous physician to conclude that some recreational uses would be therapeutic.

(4) The United States Supreme Court's cases had taught the court that there were some unscrupulous physicians who overprescribed when it was sufficiently profitable to do so.

(5) The exemption for cultivation by patients and caregivers could only increase the supply of marijuana in the state's market.

(6) The danger that excesses would satisfy some of the admittedly enormous demand for recreational use seems obvious.

(7) The circumstance that the national and international narcotics trade had thrived in the face of vigorous criminal enforcement efforts suggested that no small number of unscrupulous people would use the state's exemptions to serve their commercial ends whenever it was feasible to do so.

(8) Taking into account that the state in question was only one of at least nine states to have authorized the medical use of marijuana, Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision was substantial.

(Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[***LEdHN17]

APPEAL §1662.2

-- theories not reached below

Headnote: [17]

In a case in which the United States Supreme Court, on certiorari to review a Federal Court of Appeals' judgment, held that the categorical prohibition, under the Controlled Substances Act (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (*21 U.S.C.S. §§ 801 et seq.*), of the manufacture and possession of marijuana--as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to a state statute--did not exceed Congress' authority under the *Federal Constitution's commerce clause* (Art. I, § 8, cl. 3), the Supreme Court did not address the question whether judicial relief was available to the two medical-marijuana users involved in the case on alternative bases raised by the users, where (1) the users (a) raised a substantive due process claim, and (b) sought to avail themselves of the medical-necessity defense; and (2) these theories of relief (a) had been set forth in the users' [***8] complaint, but (b) had not been reached by the Court of Appeals. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

SYLLABUS

California's Compassionate Use Act authorizes limited marijuana use for medicinal purposes. Respondents Raich and Monson are California residents who both use doctor-recommended marijuana for serious medical conditions. After federal Drug Enforcement Administration (DEA) agents seized and destroyed all six of Monson's cannabis plants, respondents brought this action seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. Respondents claim that enforcing the CSA against them would violate the *Commerce Clause* and other constitutional provisions. The District Court denied respondents' motion for a preliminary injunction, but the Ninth Circuit reversed, [***9] finding that they had demonstrated a strong likelihood of success on the claim that the CSA is an unconstitutional exercise of Congress' *Commerce Clause* authority as applied to the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law. The court relied heavily on *United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624*, and *United States v. Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740*, to hold that this separate class of purely local activities was beyond the reach of federal power.

Held:

Congress' *Commerce Clause* authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

(a) For the purposes of consolidating various drug laws into a comprehensive statute, providing meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthening law enforcement tools against international and interstate drug trafficking, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II of which is the CSA. To effectuate the statutory goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA. *21 U.S.C. §§ 841(a)(1), 844(a)*. All controlled substances are classified into five schedules, *§ 812*, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body, *§§ 811, 812*. Marijuana is classified as a Schedule I substance, *§ 812(c)*, based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment, *§ 812(b)(1)*. This classification renders the manufacture, distribution, or possession of marijuana a criminal offense. *§§ 841(a)(1), 844(a)*.

(b) Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce is firmly established. See, *e.g., Perez v. United States, 402 U.S. 146, 151, 28 L. Ed. 2d 686, 91 S. Ct. 1357*. If Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate the entire class. See, *e.g., id., at 154-155, 28 L. Ed. 2d 686, 91 S. Ct. 1357*. Of particular relevance here is *Wickard v. Filburn, 317 U.S. 111, 127-128, 87 L. Ed. 122, 63 S. Ct. 82*, where, in rejecting the appellee farmer's contention that Congress' admitted power to regulate the production of wheat for commerce did not authorize federal regulation of wheat production intended wholly for the appellee's own consumption, the Court established that Congress can regulate purely intrastate activity that is not itself "commercial," *i.e.*, not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity. The similarities between this case and *Wickard* are striking. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity. [***10] In assessing the scope of Congress' *Commerce Clause* authority, the Court need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but

only whether a "rational basis" exists for so concluding. *E.g., Lopez, 514 U.S., at 557, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, *21 U.S.C. § 801(5)*, and concerns about diversion into illicit channels, the Court has no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.

(c) Respondents' heavy reliance on *Lopez* and *Morrison* overlooks the larger context of modern-era *Commerce Clause* jurisprudence preserved by those cases, while also reading those cases far too broadly. The statutory challenges at issue there were markedly different from the challenge here. Respondents ask the Court to excise individual applications of a concededly valid comprehensive statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for the Court has often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez, 402 U.S., at 154, 28 L. Ed. 2d 686, 91 S. Ct. 1357.* Moreover, the Court emphasized that the laws at issue in *Lopez* and *Morrison* had nothing to do with "commerce" or any sort of economic enterprise. See *Lopez, 514 U.S., at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; *Morrison, 529 U.S., at 610, 146 L. Ed. 2d 658, 120 S. Ct. 1740.* In contrast, the CSA regulates quintessentially economic activities: the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational means of regulating commerce in that product. The Ninth Circuit cast doubt on the CSA's constitutionality by isolating a distinct class of activities that it held to be beyond the reach of federal power: the intrastate, noncommercial cultivation, possession, and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law. However, Congress clearly acted rationally in determining that this subdivided class of activities is an essential part of the larger regulatory scheme. The case comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the CSA's findings and the undisputed magnitude of the commercial market for marijuana, *Wickard* and its progeny foreclose that claim.

352 F.3d 1222, vacated and remanded.

COUNSEL: Paul D. Clement argued the cause for petitioners.

Randy E. Barnett argued the cause for respondents.

JUDGES: Stevens, J., delivered the opinion of the Court, in which Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Scalia, J., filed an opinion concurring in the judgment. O'Connor, J., filed a dissenting opinion, [***11] in which Rehnquist, C. J., and Thomas, J., joined as to all but Part III. Thomas, J., filed a dissenting opinion.

OPINION BY: STEVENS

OPINION

[*5] [**2198] Justice **Stevens** delivered the opinion of the Court.

[***LEdHR1A] [1A] California is one of at least nine States that authorize the use of marijuana for medicinal purposes. [1] The question presented [**2199] in this case is whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

1 See *Alaska Stat. §§ 11.71.090, 17.37.010-17.37.080* (Lexis 2004); *Colo. Const., Art. XVIII, § 14, Colo. Rev. Stat. § 18-18-406.3* (Lexis 2004); *Haw. Rev. Stat. §§ 329-121 to 329-128* (2004 Cum. Supp.); *Me. Rev. Stat. Ann., Tit. 22, § 2383-B(5)* (West 2004); *Nev. Const., Art. 4, § 38, Nev. Rev. Stat. §§ 453A.010-453A.810* (2003); *Ore. Rev. Stat. §§ 475.300-475.346* (2003); *Vt. Stat. Ann., Tit. 18, §§ 4472-4474d* (Supp. 2004); *Wash. Rev. Code §§ 69.51.010-69.51.080* (2004); see also *Ariz. Rev. Stat. Ann. § 13-3412.01* (West Supp. 2004) (voter initiative permitting physicians to prescribe Schedule I substances for medical purposes that was purportedly repealed in 1997, but the repeal was rejected by voters in 1998). In November 2004, Montana voters approved Initiative 148, adding to the number of States authorizing the use of marijuana for medical purposes.

I

California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana, [2] and at the end of the century, California became the first State

to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996. [3] The proposition was designed [*6] to ensure that "seriously ill" residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need. [4] The Act creates an exemption from criminal prosecution [***12] for physicians, [5] as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician. [6] A "primary caregiver" is a person who has consistently assumed responsibility for the housing, health, or safety of the patient. [7]

2 1913 Cal. Stats. ch. 324, § 8*a* see also Gieringer, The Origins of Cannabis Prohibition in California, Contemporary Drug Problems, 21-23 (rev. 2005).

3 *Cal. Health & Safety Code Ann. § 11362.5* (West Supp. 2005). The California Legislature recently enacted additional legislation supplementing the Compassionate Use Act. *§§ 11362.7-11362.9* (West Supp. 2005).

4 "The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: "(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. "(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction. "(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." *§ 11362.5(b)(1)* (West Supp. 2005).

5 "Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes." *§ 11362.5(c)* (West Supp. 2005).

6 "*Section 11357*, relating to the possession of marijuana, and *Section 11358*, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." *§ 11362.5(d)* (West Supp. 2005).

7 *§ 11362.5(e)* (West Supp. 2005).

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to [**2200] the terms of the Compassionate Use [*7] Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as "John Does," to provide her with locally grown marijuana at no charge. These caregivers also process the cannabis into hashish or keif, and Raich herself processes some of the marijuana into oils, balms, and foods for consumption.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA), 84 Stat. 1242, *21 U.S.C. § 801 et seq.*, to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. In their complaint and supporting affidavits, Raich and Monson described the severity of their afflictions, their repeatedly futile attempts [*8] to obtain [***13] relief with conventional medications, and the opinions of their doctors concerning their need to use marijuana. Respondents claimed that enforcing the CSA against them would violate the *Commerce Clause*, the *Due Process Clause of the Fifth Amendment*, the *Ninth*

and *Tenth Amendments of the Constitution*, and the doctrine of medical necessity.

The District Court denied respondents' motion for a preliminary injunction. *Raich v. Ashcroft, 248 F. Supp. 2d 918 (ND Cal. 2003).* Although the court found that the federal enforcement interests "wane[d]" when compared to the harm that California residents would suffer if denied access to medically necessary marijuana, it concluded that respondents could not demonstrate a likelihood of success on the merits of their legal claims. *Id., at 931.*

A divided panel of the Court of Appeals for the Ninth Circuit reversed and ordered the District Court to enter a preliminary injunction. [8] *Raich v. Ashcroft, 352 F.3d 1222 (2003).* The court found that respondents had "demonstrated a strong likelihood [**2201] of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' *Commerce Clause* authority." *Id., at 1227.* The Court of Appeals distinguished prior Circuit cases upholding the CSA in the face of *Commerce Clause* challenges by focusing on what it deemed to be the "*separate and distinct class of activities*" at issue in this case: "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law." *Id., at 1228.* The [*9] court found the latter class of activities "different in kind from drug trafficking" because interposing a physician's recommendation raises different health and safety concerns, and because "this limited use is clearly distinct from the broader illicit drug market--as well as any broader commercial market for medicinal marijuana--insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." *Ibid.*

8 On remand, the District Court entered a preliminary injunction enjoining petitioners "'from arresting or prosecuting Plaintiffs Angel McClary Raich and Diane Monson, seizing their medical cannabis, forfeiting their property, or seeking civil or administrative sanctions against them with respect to the intrastate, non-commercial cultivation, possession, use, and obtaining without charge of cannabis for personal medical purposes on the advice of a physician and in accordance with state law, and which is not used for distribution, sale, or exchange.'" Brief for Petitioners 9.

The majority placed heavy reliance on our decisions in *United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995),* and *United States v. Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000)*, as interpreted by recent Circuit precedent, to hold that this separate class of purely local activities was beyond the reach of federal power. In contrast, the dissenting judge concluded that the CSA, as applied to respondents, was clearly valid under *Lopez* and *Morrison;* moreover, he thought it "simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in *Wickard* v. *Filburn.*" *352 F.3d, at 1235* [***14] (Beam, J., dissenting) (citation omitted).

[***LEdHR1B] [1B] The obvious importance of the case prompted our grant of certiorari. *542 U.S. 936, 542 U.S. 936, 159 L. Ed. 2d 811, 124 S. Ct. 2909 (2004).* The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. We accordingly vacate the judgment of the Court of Appeals.

[*10] II

Shortly after taking office in 1969, President Nixon declared a national "war on drugs." [9] As the first campaign of that war, Congress set out to enact legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs. [10] That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236.

9 See D. Musto & P. Korsmeyer, The Quest for Drug Control 60 (2002) (hereinafter Musto & Korsmeyer).

10 H. R. Rep. No. 91-1444, pt. 2, p 22 (1970) (hereinafter H. R. Rep.); 26 Congressional Quarterly Almanac 531 (1970) (hereinafter Almanac); Musto & Korsmeyer 56-57.

[**2202] This was not, however, Congress' first attempt to regulate the national market in drugs. Rather, as early as 1906 Congress enacted federal legislation imposing labeling regulations on medications and prohibiting the manufacture or shipment of any adulterated or misbranded drug traveling in interstate commerce. [11] Aside from these labeling restrictions, most domestic drug regulations prior to 1970 generally came in the

guise of revenue laws, with the Department of the Treasury serving as the Federal Government's primary enforcer. [12] For example, the primary drug control law, before being repealed by the passage of the CSA, was the Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970). The Harrison Act sought to exert control over the possession and sale of narcotics, specifically cocaine and opiates, by requiring producers, distributors, and purchasers to register with the Federal Government, by assessing taxes against [*11] parties so registered, and by regulating the issuance of prescriptions. [13]

11 Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768, repealed by Act of June 25, 1938, ch 675, § 902(a), 52 Stat. 1059.

12 See *United States v. Doremus, 249 U.S. 86, 63 L. Ed. 493, 39 S. Ct. 214 (1919)*; *Leary v. United States, 395 U.S. 6, 14-16, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969).*

13 See *Doremus, 249 U.S., at 90-93, 63 L. Ed. 493, 39 S. Ct. 214.*

Marijuana itself was not significantly regulated by the Federal Government until 1937 when accounts of [***15] marijuana's addictive qualities and physiological effects, paired with dissatisfaction with enforcement efforts at state and local levels, prompted Congress to pass the Marihuana Tax Act, Pub. L. 75-238, 50 Stat. 551 (repealed 1970). [14] Like the Harrison Act, the Marihuana Tax Act did not outlaw the possession or sale of marijuana outright. Rather, it imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana, and required the payment of annual taxes in addition to transfer taxes whenever the drug changed hands. [15] Moreover, doctors wishing to prescribe marijuana for medical purposes were required to comply with rather burdensome administrative requirements. [16] Noncompliance exposed traffickers to severe federal penalties, whereas compliance would often subject them to prosecution under state law. [17] Thus, while the Marihuana Tax Act did not declare the drug illegal *per se*, the onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade.

14 R. Bonnie & C. Whitebread, The Marijuana Conviction 154-174 (1999); L. Grinspoon & J. Bakalar, Marihuana, the Forbidden Medicine 7-8 (rev. ed. 1997) (hereinafter Grinspoon & Bakalar). Although this was the Federal Government's first attempt to regulate the marijuana trade, by this time all States had in place some form of legislation regulating the sale, use, or possession of marijuana. R. Isralowitz, Drug Use, Policy, and Management 134 (2d ed. 2002).

15 *Leary, 395 U.S., at 14-16, 23 L. Ed. 2d 57, 89 S. Ct. 1532.*

16 Grinspoon & Bakalar 8.

17 *Leary, 395 U.S., at 16-18, 23 L. Ed. 2d 57, 89 S. Ct. 1532.*

Then in 1970, after declaration of the national "war on drugs," federal drug policy underwent a significant transformation. A number of noteworthy events precipitated [*12] this policy shift. First, in *Leary v. United States, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969)*, this Court held certain provisions of the Marihuana Tax Act and other narcotics legislation unconstitutional. Second, at the end of his term, President Johnson fundamentally reorganized the federal drug control agencies. The Bureau [**2203] of Narcotics, then housed in the Department of Treasury, merged with the Bureau of Drug Abuse Control, then housed in the Department of Health, Education, and Welfare (HEW), to create the Bureau of Narcotics and Dangerous Drugs, currently housed in the Department of Justice. [18] Finally, prompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act. [19]

18 Musto & Korsmeyer 32-35; 26 Almanac 533. In 1973, the Bureau of Narcotics and Dangerous Drugs became the Drug Enforcement Administration (DEA). See *Reorg. Plan No. 2 of 1973, § 1, 28 CFR § 0.100 (1973).*

19 The Comprehensive Drug Abuse Prevention and Control Act of 1970 consists of three titles. Title I relates to the prevention and treatment of narcotic addicts through HEW (now the Department of Health and Human Services). 84 Stat. 1238. Title II, as discussed in more detail above, addresses drug control and enforcement as administered by the Attorney General and the DEA. *Id.*, at 1242. Title III concerns the import and export of controlled substances. *Id.*, at 1285.

Title II of that Act, the CSA, repealed most of the earlier antidrug laws in favor of a comprehensive [***16] regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. [20] Congress was particularly concerned with the [*13] need to prevent the diversion of drugs from legitimate to illicit channels. [21]

20 In particular, Congress made the following findings: "(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain

the health and general welfare of the American people. "(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people. "(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because-- "(A) after manufacture, many controlled substances are transported in interstate commerce, "(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and "(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession. "(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances. "(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate. "(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." *21 U.S.C. §§ 801(1)-(6).*

21 See *United States v. Moore, 423 U.S. 122, 135, 46 L. Ed. 2d 333, 96 S. Ct. 335 (1975)*; see also H. R. Rep., at 22.

To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. *21 U.S.C. §§ 841(a)(1), 844(a).* The CSA categorizes all controlled substances into five schedules. *§ 812.* The drugs are grouped together based on their accepted medical uses, the potential for abuse, and [**2204] their psychological and physical effects on the body. [*14] *§§ 811, 812.* Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. *§§ 821-830.* The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping. *Ibid.* 21 CFR § 1301 *et seq.* (2004).

In enacting the CSA, Congress classified marijuana as a Schedule I drug. *21 U.S.C. § 812(c).* This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW "that marihuana be retained within schedule I at least until the completion of certain studies now underway." [22] Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised [***17] treatment. *§ 812(b)(1).* These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. *§ 812(b)(2).* By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study. *§§ 823(f), 841(a)(1), 844(a)*; see also *United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 490, 149 L. Ed. 2d 722, 121 S. Ct. 1711 (2001).*

22 H. R. Rep., at 61 (quoting letter from Roger E. Egeberg, M. D. to Hon. Harley O. Staggers (Aug. 14, 1970)).

The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between [*15] schedules. *§ 811.* Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug. [23]

23 Starting in 1972, the National Organization for the Reform of Marijuana Laws (NORML) began its campaign to reclassify marijuana. Grinspoon & Bakalar 13-17. After some fleeting success in 1988 when an Administrative Law Judge (ALJ) declared that the DEA would be acting in an "unreasonable, arbitrary, and capricious" manner if it continued to deny marijuana access to seriously ill patients, and concluded that it should be reclassified as a Schedule III substance, *Grinspoon v. DEA, 828 F.2d 881, 883-884 (CA1 1987)*, the campaign has proved unsuccessful. The DEA Administrator did not endorse the ALJ's findings, *54 Fed. Reg. 53767 (1989)*, and since that time has routinely denied petitions to reschedule the drug, most recently in 2001. *66 Fed. Reg. 20038 (2001).* The Court of Appeals for the District of Columbia Circuit

has reviewed the petition to reschedule marijuana on five separate occasions over the course of 30 years, ultimately upholding the Administrator's final order. See *Alliance for Cannabis Therapeutics v. DEA, 304 U.S. App. D.C. 400, 15 F.3d 1131, 1133 (1994).*

III

[***LEdHR1C] [1C] Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Brief for Respondents 22, 38. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession [**2205] of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the *Commerce Clause.*

In assessing the validity of congressional regulation, none of our *Commerce Clause* cases can be viewed in isolation. As charted in considerable detail in *United States* v. *Lopez*, our understanding of the reach of the *Commerce Clause*, as well as Congress' assertion of authority thereunder, has [*16] evolved over time. [24] The *Commerce Clause* emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under [***18] the Articles of Confederation. [25] For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible. [26] Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress "ushered in a new era of federal regulation under the commerce power," beginning with the enactment of the Interstate Commerce Act in 1887, 24 Stat. 379, and the Sherman Antitrust Act in 1890, 26 Stat. 209, as amended, *15 U.S.C. § 2 et seq.* [27]

24 *United States v. Lopez, 514 U.S. 549, 552-558, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995)*; *id., at 568-574, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring); *id., at 604-607, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Souter, J., dissenting).

25 See *Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 224, 6 L. Ed. 23 (1824)* (opinion of Johnson, J.); Stern, That Commerce Which Concerns More States Than One, 47 Harv. L. Rev. 1335, 1337, 1340-1341 (1934); G. Gunther, Constitutional Law 127 (9th ed. 1975).

26 See *Lopez, 514 U.S., at 553-554, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; *id., at 568-569, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring); see also *Granholm v. Heald, 544 U.S. __, __, 544 U.S. 460, 161 L. Ed. 2d 796, 125 S. Ct. 1885 (2005).*

27 *Lopez, 514 U.S., at 554, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; see also *Wickard v. Filburn, 317 U.S. 111, 121, 87 L. Ed. 122, 63 S. Ct. 82 (1942)* ("It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the *Commerce Clause* in the light of an actual exercise by Congress of its power thereunder" (footnotes omitted)).

[***LEdHR2] [2] Cases decided during that "new era," which now spans more than a century, have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. *Perez v. United States, 402 U.S. 146, 150, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971).* Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate [*17] commerce. *Ibid.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Ibid.; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615 (1937).* Only the third category is implicated in the case at hand.

[***LEdHR3] [3] [***LEdHR4] [4] Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. See, *e.g., Perez, 402 U.S., at 151, 28 L. Ed. 2d 686, 91 S. Ct. 1357*; *Wickard v. Filburn, 317 U.S. 111, 128-129, 87 L. Ed. 122, 63 S. Ct. 82 (1942).* As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if [**2206] it exerts a substantial economic effect on interstate commerce." *Id., at 125, 87 L. Ed. 122, 63 S. Ct. 82.* We have never required Congress to legislate with scientific exactitude. When Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate the entire class. See *Perez, 402 U.S., at 154-155, 28 L. Ed. 2d 686, 91 S. Ct. 1357* (quoting *Westfall v. United States, 274 U.S. 256, 259,*

71 L. Ed. 1036, 47 S. Ct. 629 (1927) ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so")). In this vein, we have reiterated [***19] that when "'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *E.g., Lopez, 514 U.S., at 558, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (emphasis deleted) (quoting *Maryland v. Wirtz, 392 U.S. 183, 196, n. 27, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968))*.

[***LEdHR5] [5] Our decision in *Wickard, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82*, is of particular relevance. In *Wickard*, we upheld the application of regulations promulgated under the *Agricultural Adjustment Act of 1938*, 52 Stat. 31, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. The regulations established an allotment of 11.1 acres for Filburn's 1941 wheat crop, but he sowed 23 acres, intending to use the excess by consuming it on his own farm. Filburn [*18] argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize "federal regulation [of] production not intended in any part for commerce but wholly for consumption on the farm." *Wickard, 317 U.S., at 118, 87 L. Ed. 122, 63 S. Ct. 82*. Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote:

> "The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id., at 127-128, 87 L. Ed. 122, 63 S. Ct. 82*.

Wickard thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

[***LEdHR1D] [1D] The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. [28] Just as the Agricultural Adjustment Act was designed "to [*19] control the volume [of wheat] moving in interstate and foreign commerce in order [**2207] to avoid surpluses . . ." and consequently control the market price, *id., at 115, 87 L. Ed. 122, 63 S. Ct. 82*, a primary purpose of the CSA is to control the [***20] supply and demand of controlled substances in both lawful and unlawful drug markets. See nn 20-21, *supra*. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

> 28 Even respondents acknowledge the existence of an illicit market in marijuana; indeed, Raich has personally participated in that market, and Monson expresses a willingness to do so in the future. App. 59, 74, 87. See also *Department of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 770, 774, n. 12, and 780, n. 17, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994)* (discussing the "market value" of marijuana); *id., at 790, 128 L. Ed. 2d 767, 114 S. Ct. 1937* (Rehnquist, C. J., dissenting); *id., at 792, 128 L. Ed. 2d 767, 114 S. Ct. 1937* (O'Connor, J., dissenting); *Whalen v. Roe, 429 U.S. 589, 591, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977)* (addressing prescription drugs "for which there is both a lawful and an unlawful market"); *Turner v. United States, 396 U.S. 398, 417, n. 33, 24 L. Ed. 2d 610, 90 S. Ct. 642 (1970)* (referring to the purchase of drugs on the "retail market").

[***LEdHR1E] [1E] [***LEdHR6A] [6A] More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. *Wickard, 317 U.S., at 128, 87 L. Ed. 122, 63 S. Ct. 82*. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the

commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity. [29]

29 [***LEdHR6B] [6B] To be sure, the wheat market is a lawful market that Congress sought to protect and stabilize, whereas the marijuana market is an unlawful market that Congress sought to eradicate. This difference, however, is of no constitutional import. It has long been settled that Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity. *Lopez, 514 U.S., at 571, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring) ("In the *Lottery Case, 188 U.S. 321 [47 L. Ed. 492, 23 S. Ct. 321] (1903)*, the Court rejected the argument that Congress lacked [the] power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit"); see also *Wickard, 317 U.S., at 128, 87 L. Ed. 122, 63 S. Ct. 82* ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon").

[*20] Nonetheless, respondents suggest that *Wickard* differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a "quintessential economic activity"--a commercial farm--whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court's reasoning.

The fact that Wickard's own impact on the market was "trivial by itself" was not a sufficient reason for removing him from the scope of federal regulation. *317 U.S., at 127, 87 L. Ed. 122, 63 S. Ct. 82.* That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court's analysis. Moreover, even though Wickard was indeed a commercial [***21] farmer, the activity he was engaged in--the cultivation of wheat for home consumption--was not treated by the Court as part of his commercial farming operation. [30] And while it [**2208] is true that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect.

30 See *Wickard, 317 U.S., at 125, 87 L. Ed. 122, 63 S. Ct. 82* (recognizing that Wickard's activity "may not be regarded as commerce").

[***LEdHR1F] [1F] [***LEdHR7] [7] Findings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA. See n 20, *supra.* The [*21] submissions of the parties and the numerous *amici* all seem to agree that the national, and international, market for marijuana has dimensions that are fully comparable to those defining the class of activities regulated by the Secretary pursuant to the 1938 statute. [31] Respondents nonetheless insist that the CSA cannot be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market. Be that as it may, we have never required Congress to make particularized findings in order to legislate, see *Lopez, 514 U.S., at 562, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; *Perez, 402 U.S., at 156, 28 L. Ed. 2d 686, 91 S. Ct. 1357*, absent a special concern such as the protection of free speech, see, *e.g., Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664-668, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)* (plurality opinion). While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate. [32]

31 The Executive Office of the President has estimated that in 2000 American users spent $10.5 *billion* on the purchase of marijuana. Office of Nat. Drug Control Policy, Marijuana Fact Sheet 5 (Feb. 2004), available at http://www.whitehousedrugpolicy.gov/publications/factsht/marijuana/index.html (all Internet materials as visited June 2, 2005, and available in Clerk of Court's case file).

32 Moreover, as discussed in more detail above, Congress did make findings regarding the effects of intrastate drug activity on interstate commerce. See n 20, *supra.* Indeed, even the Court of Appeals found that those findings "weigh[ed] in favor" of upholding the constitutionality of the CSA. *352 F.3d 1222, 1232 (CA9 2003)* (case below). The dissenters, however, would impose a new and heightened burden on Congress (unless the litigants can garner evidence sufficient to cure Congress' perceived "inadequa[cies]")--that legislation must contain

detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme. *Post, at ____ - ____, 162 L. Ed. 2d, at 43* (O'Connor, J., dissenting); *post, at ____, 162 L. Ed. 2d, at 49-50* (Thomas, J., dissenting). Such an exacting requirement is not only unprecedented, it is also impractical. Indeed, the principal dissent's critique of Congress for "not even" including "declarations" specific to marijuana is particularly unpersuasive given that the CSA initially identified 80 other substances subject to regulation as Schedule I drugs, not to mention those categorized in Schedules II-V. *Post, at ____, 162 L. Ed. 2d, at 43-44* (O'Connor, J., dissenting). Surely, Congress cannot be expected (and certainly should not be required) to include specific findings on each and every substance contained therein in order to satisfy the dissenters' unfounded skepticism.

[*22] [***LEdHR1G] [1G] [***LEdHR8] [8] In assessing the scope of Congress' authority under the *Commerce Clause* [***22] , we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. *Lopez, 514 U.S., at 557, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; see also *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276-280, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)*; *Perez, 402 U.S., at 155-156, 28 L. Ed. 2d 686, 91 S. Ct. 1357*; [**2209] *Katzenbach v. McClung, 379 U.S. 294, 299-301, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)*; *Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-253, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)*. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, *21 U.S.C. § 801(5)*, and concerns about diversion into illicit channels, [33] we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

33 See n 21, *supra* (citing sources that evince Congress' particular concern with the diversion of drugs from legitimate to illicit channels).

[*23] IV

To support their contrary submission, respondents rely heavily on two of our more recent *Commerce Clause* cases. In their myopic focus, they overlook the larger context of modern-era *Commerce Clause* jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly.

Those two cases, of course, are *Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624*, and *Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740*. As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez, 402 U.S., at 154, 28 L. Ed. 2d 686, 91 S. Ct. 1357* (emphasis deleted) (quoting *Wirtz, 392 U.S., at 193, 20 L. Ed. 2d 1020, 88 S. Ct. 2017*); see also *Hodel, 452 U.S., at 308, 69 L. Ed. 2d 1, 101 S. Ct. 2352*.

At issue in *Lopez, 514 U.S. 549,* [***23] *131 L. Ed. 2d 626, 115 S. Ct. 1624*, was the validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. 104 Stat. 4844-4845, *18 U.S.C. § 922(q)(1)(A)*. The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity. Distinguishing our earlier cases holding that comprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce, we held the statute invalid. We explained:

> [*24] "*Section 922(q)* is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. *Section 922(q)* is not an essential part of a larger regulation of economic activity, in which the regulatory

> scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities [**2210] that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *514 U.S., at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624.*

The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. As explained above, the CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242-1284, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." Most of those substances--those listed in Schedules II through V--"have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." *21 U.S.C. § 801(1).* The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project.

While the statute provided for the periodic updating of the five schedules, Congress itself made the initial classifications. It identified 42 opiates, 22 opium derivatives, and 17 hallucinogenic substances as Schedule I drugs. 84 Stat. 1248. Marijuana was listed as the 10th item in the third subcategory. That classification, unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many "essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut [*25] unless the intrastate activity were regulated." *Lopez, 514 U.S., at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* [34] Our opinion in *Lopez* [***24] casts no doubt on the validity of such a program.

> 34 The principal dissent asserts that by "[s]eizing upon our language in *Lopez*," *post, at ____, 162 L. Ed. 2d, at 37* (opinion of O'Connor, J.), *i.e.*, giving effect to our well-established case law, Congress will now have an incentive to legislate broadly. Even putting aside the political checks that would generally curb Congress' power to enact a broad and comprehensive scheme for the purpose of targeting purely local activity, there is no suggestion that the CSA constitutes the type of "evasive" legislation the dissent fears, nor could such an argument plausibly be made. *Post, at ____, 162 L. Ed. 2d, at 38* (O'Connor, J., dissenting).

Nor does this Court's holding in *Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740.* The Violence Against Women Act of 1994, 108 Stat. 1902, created a federal civil remedy for the victims of gender-motivated crimes of violence. *42 U.S.C. § 13981.* The remedy was enforceable in both state and federal courts, and generally depended on proof of the violation of a state law. Despite congressional findings that such crimes had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*, and that our prior cases had identified a clear pattern of analysis: "'Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'" [35] *Morrison, 529 U.S., at 610, 146 L. Ed. 2d 658, 120 S. Ct. 1740.*

> 35 *Lopez, 514 U.S., at 560, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; see also *id., at 573-574, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring) (stating that *Lopez* did not alter our "practical conception of commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy").

[***LEdHR9A] [9A] [**2211] Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International [*26] Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. [36] Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

> 36 See *16 U.S.C. § 668(a)* (bald and golden eagles); *18 U.S.C. § 175(a)* (biological weapons);

§ 831(a) (nuclear material); *§ 842(n)(1)* (certain plastic explosives); *§ 2342(a)* (contraband cigarettes).

The Court of Appeals was able to conclude otherwise only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." *352 F.3d at 1229.* The court characterized this class as "different in kind from drug trafficking." *Id., at 1228.* The differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting [***25] the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, *i.e.*, its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court [*27] of Appeals was an essential part of the larger regulatory scheme.

[***LEdHR9B] [9B] [***LEdHR10A] [10A] First, the fact that marijuana is used "for personal medical purposes on the advice of a physician" cannot itself serve as a distinguishing factor. *352 F.3d at 1229.* The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses. Moreover, the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner. Indeed, most of the substances classified in the CSA "have a useful and legitimate medical purpose." *21 U.S.C. § 801(1).* Thus, even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug, [37] the CSA would still [**2212] impose controls beyond what is required by California law. The CSA requires manufacturers, physicians, pharmacies, and other handlers of controlled substances to comply with statutory and regulatory provisions mandating registration with the DEA, compliance with specific production quotas, security controls to guard against diversion, recordkeeping and reporting obligations, and prescription requirements. See [*28] *21 U.S.C. §§ 821-830*; 21 CFR § 1301 *et seq.* (2004). Furthermore, the dispensing of new drugs, even when doctors approve their use, must await federal approval. *United States v. Rutherford, 442 U.S. 544, 61 L. Ed. 2d 68, 99 S. Ct. 2470 (1979).* Accordingly, the mere fact that marijuana--like virtually every other controlled substance regulated by the CSA--is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.

37 [***LEdHR10B] [10B] We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I. See, *e.g.*, Institute of Medicine, Marijuana and Medicine: Assessing the Science Base 179 (J. Joy, S. Watson, & J. Benson eds. 1999) (recognizing that "[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC [Tetrahydrocannabinol] for pain relief, control of nausea and vomiting, and appetite stimulation"); see also *Conant v. Walters, 309 F.3d 629, 640-643 (CA9 2002)* (Kozinski, J., concurring) (chronicling medical studies recognizing valid medical uses for marijuana and its derivatives). But the possibility that the drug may be reclassified in the future has no relevance to the question whether Congress now has the power to regulate its production and distribution. Respondents' submission, if accepted, would place all homegrown medical substances beyond the reach of Congress' regulatory jurisdiction.

[***LEdHR9C] [9C] [***LEdHR11] [11] Nor can it serve as an "objective marke[r]" or "objective facto[r]" to arbitrarily narrow the relevant class as the dissenters suggest, *post, at ____, 162 L. Ed. 2d, at 38* (O'Connor, J., dissenting); *post, at ____, 162 L. Ed. 2d, at 52* (Thomas, J., dissenting). More fundamentally, if, as the principal dissent contends, [***26] the personal cultivation, possession, and use of marijuana for medicinal purposes is beyond the "'outer limits' of Congress' *Commerce Clause* authority," *post, at ____, 162 L. Ed. 2d, at 35* (O'Connor, J., dissenting), it must also be true that such personal use of marijuana (or any other homegrown drug) for recreational purposes is also beyond those "'outer limits,'" whether or not a State elects to authorize or even regulate such use. Justice Thomas' separate dissent suffers from the same sweeping implications. That is, the dissenters' rationale logically extends to place *any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the "'outer limits'" of Congress' *Commerce Clause* authority. One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated

for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but "visible to the [*29] naked eye," *Lopez, 514 U.S., at 563, 131 L. Ed. 2d 626, 115 S. Ct. 1624*, under any commonsense appraisal of the probable consequences of such an open-ended exemption.

[***LEdHR12] [12] [***LEdHR13] [13] [***LEdHR14] [14] [***LEdHR15A] [15A] Second, limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The *Supremacy Clause* unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "'superior to that of the States to provide for the welfare or necessities of their inhabitants,'" however legitimate or dire those necessities may be. [**2213] *Wirtz, 392 U.S., at 196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017* (quoting *Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 426, 69 L. Ed. 352, 45 S. Ct. 176 (1925))*. See also *392 U.S., at 195-196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017*; *Wickard, 317 U.S., at 124, 87 L. Ed. 122, 63 S. Ct. 82* ("'[N]o form of state activity can constitutionally thwart the regulatory power granted by the *commerce clause* to Congress'"). Just as state acquiescence to federal regulation cannot expand the bounds of the *Commerce Clause*, see, *e.g.*, *Morrison, 529 U.S., at 661-662, 146 L. Ed. 2d 658, 120 S. Ct. 1740* (Breyer, J., dissenting) (noting that 38 States requested federal intervention), so too state action cannot circumscribe Congress' plenary commerce power. See *United States v. Darby, 312 U.S. 100, 114, 85 L. Ed. 609, 61 S. Ct. 451 (1941)* ("That power can neither be enlarged nor diminished by the exercise or non-exercise of state power"). [38]

38 [***LEdHR15B] [15B] That is so even if California's current controls (enacted eight years after the Compassionate Use Act was passed) are "[e]ffective," as the dissenters would have us blindly presume, *post, at ____, 162 L. Ed. 2d, at 44* (O'Connor, J., dissenting); *post, at ____, ____, 162 L. Ed. 2d, at 48, 52* (Thomas, J., dissenting). California's decision (made 34 years after the CSA was enacted) to impose "stric[t] controls" on the "cultivation and possession of marijuana for medical purposes," *post, at ____, 162 L. Ed. 2d, at 48* (Thomas, J., dissenting), cannot retroactively divest Congress of its authority under the *Commerce Clause*. Indeed, Justice Thomas' urgings to the contrary would turn the *Supremacy Clause* on its head, and would resurrect limits on congressional power that have long since been rejected. See *post, at ____, 162 L. Ed. 2d, at 34* (Scalia, J., concurring in judgment) (quoting *McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 424, 4 L. Ed. 579 (1819))* ("'To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution'"). Moreover, in addition to casting aside more than a century of this Court's *Commerce Clause* jurisprudence, it is noteworthy that Justice Thomas' suggestion that States possess the power to dictate the extent of Congress' commerce power would have far-reaching implications beyond the facts of this case. For example, under his reasoning, Congress would be equally powerless to regulate, let alone prohibit, the intrastate possession, cultivation, and use of marijuana for *recreational* purposes, an activity which all States "strictly contro[l]." Indeed, his rationale seemingly would require Congress to cede its constitutional power to regulate commerce whenever a State opts to exercise its "traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens." *Post, at ____ - ____, 162 L. Ed. 2d, at 50-51* (dissenting opinion).

[*30] Respondents acknowledge this [***27] proposition, but nonetheless contend that their activities were not "an essential part of a larger regulatory scheme" because they had been "isolated by the State of California, and [are] policed by the State of California," and thus remain "entirely separated from the market." Tr. of Oral Arg. 27. The dissenters fall prey to similar reasoning. See n. 38, *supra this page, 162 L. Ed. 2d, at 26*. The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.

[***LEdHR16] [16] Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just "plausible" as the principal dissent concedes, *post, at ____, 162 L. Ed. 2d, at 44* (O'Connor, J., dis-

senting), it is readily apparent. The exemption for physicians provides them with an economic incentive to grant their patients permission to use the drug. In contrast to most prescriptions for legal drugs, which limit the dosage and duration of the usage, under California law the doctor's permission to [*31] recommend marijuana use is open-ended. [**2214] The authority to grant permission whenever the doctor determines that a patient is afflicted with "any other illness for which marijuana provides relief," *Cal. Health & Safety Code Ann. § 11362.5(b)(1)(A)* (West Supp. 2005), is broad enough to allow even the most scrupulous doctor to conclude that some recreational uses would be therapeutic. [39] And our cases have taught us that there are some unscrupulous physicians who overprescribe [***28] when it is sufficiently profitable to do so. [40]

39 California's Compassionate Use Act has since been amended, limiting the catchall category to "[a]ny other chronic or persistent medical symptom that either: . . . [s]ubstantially limits the ability of the person to conduct one or more major life activities as defined" in the *Americans with Disabilities Act of 1990*, or "[i]f not alleviated, may cause serious harm to the patient's safety or physical or mental health." *Cal. Health & Safety Code Ann. §§ 11362.7(h)(12)(A) to (12)(B)* (West Supp. 2005).

40 See, *e.g., United States v. Moore, 423 U.S. 122, 46 L. Ed. 2d 333, 96 S. Ct. 335 (1975); United States v. Doremus, 249 U.S. 86, 63 L. Ed. 493, 39 S. Ct. 214 (1919).*

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. [41] The likelihood that all such production will [*32] promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious. [42] Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so. [43] Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, a fact Justice O'Connor's dissent conveniently disregards in arguing that the demonstrated [**2215] effect on commerce while admittedly "plausible" is ultimately "unsubstantiated," *post, at ____, ____, 162 L. Ed. 2d, at 43, 45*, Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

41 The state policy allows patients to possess up to eight ounces of dried marijuana, and to cultivate up to 6 mature or 12 immature plants. *Cal. Health & Safety Code Ann. § 11362.77(a)* (West Supp. 2005). However, the quantity limitations serve only as a floor. Based on a doctor's recommendation, a patient can possess whatever quantity is necessary to satisfy his medical needs, and cities and counties are given *carte blanche* to establish more generous limits. Indeed, several cities and counties have done just that. For example, patients residing in the cities of Oakland and Santa Cruz and in the counties of Sonoma and Tehama are permitted to possess up to 3 pounds of processed marijuana. Reply Brief for United States 19 (citing Proposition 215 Enforcement Guidelines). Putting that quantity in perspective, 3 pounds of marijuana yields roughly 3,000 joints or cigarettes. Executive Office of the President, Office of National Drug Control Policy, What America's Users Spend on Illegal Drugs 24 (Dec. 2001), http://www.whitehousedrugpolicy.gov/publications/pdf/american_users_spend_200 2.pdf. And the street price for that amount can range anywhere from $900 to $24,000. DEA, Illegal Drug Price and Purity Report (Apr. 2003) (DEA-02058).

42 For example, respondent Raich attests that she uses 2.5 ounces of cannabis a week. App. 82. Yet as a resident of Oakland, she is entitled to possess up to 3 pounds of processed marijuana at any given time, nearly 20 times more than she uses on a weekly basis.

43 See, *e.g., People ex rel. Lungren v. Peron, 59 Cal. App. 4th 1383, 1386-1387, 70 Cal. Rptr. 2d 20 (1997)* (recounting how a Cannabis Buyers' Club engaged in an "indiscriminate and uncontrolled pattern of sale to thousands of persons among the general public, including persons who had not demonstrated any recommendation or approval of a physician and, in fact, some of whom were not under the care of a physician, such as undercover officers," and noting that "some persons who had purchased marijuana on respondents' premises were reselling it unlawfully on the street").

So, from the "separate and distinct" class of activities identified by the Court of Appeals (and adopted by the dissenters), we are left with "the intrastate, noncommercial cultivation, possession and use of marijuana." *352 F.3d at 1229.* Thus the case for the exemption

comes down to the claim that a locally cultivated product that is used domestically [*33] rather than sold on the open market is not subject to federal regulation. [***29] Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard* v. *Filburn* and the later cases endorsing its reasoning foreclose that claim.

V

[***LEdHR17] [17] Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases. We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: SCALIA

CONCUR

Justice **Scalia,** concurring in the judgment.

I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

Since *Perez v. United States, 402 U.S. 146, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)*, our cases have mechanically recited that the *Commerce Clause* permits congressional regulation of three categories: (1) the [*34] channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Id., at 150, 28 L. Ed. 2d 686, 91 S. Ct. 1357*; see *United States v. Morrison, 529 U.S. 598, 608-609, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000)*; *United States v. Lopez, 514 U.S. 549, 558-559, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995)*; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276-277, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)*. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. See *Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 189-190, 6 L. Ed. 23 (1824)*. The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is *misleading* because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate [**2216] them cannot come from the *Commerce Clause* alone. Rather, as this Court has acknowledged since at least *United States v. Coombs, 37 U.S. 72, 12 Pet. 72, 9 L. Ed. 1004 (1838)*, Congress's regulatory [***30] authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. *Id., at 78, 9 L. Ed. 1004*; *Katzenbach v. McClung, 379 U.S. 294, 301-302, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)*; *United States v. Wrightwood Dairy Co., 315 U.S. 110, 119, 86 L. Ed. 726, 62 S. Ct. 523 (1942)*; *Shreveport Rate Cases, 234 U.S. 342, 353, 58 L. Ed. 1341, 34 S. Ct. 833 (1914)*; *United States v. E. C. Knight Co., 156 U.S. 1, 39-40, 39 L. Ed. 325, 15 S. Ct. 249 (1895)* (Harlan, J., dissenting). [1] And the category of "activities that substantially affect interstate commerce," *Lopez, supra, at 559, 131 L. Ed. 2d 626, 115 S. Ct. 1624*, is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws [*35] governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

1 See also *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 584-585, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)* (O'Connor, J., dissenting) (explaining that it is through the Necessary and Proper Clause that "an intrastate activity 'affecting' interstate commerce can be reached through the commerce power").

I

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. See *NLRB v. Jones &*

Laughlin Steel Corp., 301 U.S. 1, 36-37, 81 L. Ed. 893, 57 S. Ct. 615 (1937). That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce. See, *e.g., Hodel, supra, at 281, 69 L. Ed. 2d 1, 101 S. Ct. 2352* (surface coal mining); *Katzenbach, supra, at 300, 13 L. Ed. 2d 290, 85 S. Ct. 377* (discrimination by restaurants); *Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)* (discrimination by hotels); *Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 237, 92 L. Ed. 1328, 68 S. Ct. 996 (1948)* (intrastate price-fixing); *Board of Trade of Chicago v. Olsen, 262 U.S. 1, 40, 67 L. Ed. 839, 43 S. Ct. 470 (1923)* (activities of a local grain exchange); *Stafford v. Wallace, 258 U.S. 495, 517, 524-525, 66 L. Ed. 735, 42 S. Ct. 397 (1922)* (intrastate transactions at stockyard). *Lopez* and *Morrison* recognized the expansive scope of Congress's authority in this regard: "[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez, supra, at 560, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; *Morrison, supra, at 610, 146 L. Ed. 2d 658, 120 S. Ct. 1740* (same).

This principle is not without limitation. In *Lopez* and *Morrison*, the Court--conscious of the potential of the "substantially affects" test to [***31] "'obliterate the distinction between what is national and what is local,'" *Lopez, supra, at 566-567, 131 L. Ed. 2d 626, 115 S. Ct. 1624* [*36] (quoting *A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554, 79 L. Ed. 1570, 55 S. Ct. 837 (1935))*; see also [**2217] *Morrison, supra, at 615-616, 146 L. Ed. 2d 658, 120 S. Ct. 1740* --rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences. *Lopez, supra, at 564-566, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; *Morrison, supra, at 617-618, 146 L. Ed. 2d 658, 120 S. Ct. 1740.* "[I]f we were to accept [such] arguments," the Court reasoned in *Lopez*, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate. " *Lopez, supra, at 564, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; see also *Morrison, supra, at 615-616, 146 L. Ed. 2d 658, 120 S. Ct. 1740.* Thus, although Congress's authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to "pile inference upon inference," *Lopez, supra, at 567, 131 L. Ed. 2d 626, 115 S. Ct. 1624*, in order to establish that noneconomic activity has a substantial effect on interstate commerce.

As we implicitly acknowledged in *Lopez*, however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *514 U.S., at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* This statement referred to those cases permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power." *Wrightwood Dairy Co., 315 U.S., at 119, 86 L. Ed. 726, 62 S. Ct. 523*; see also *United States v. Darby, 312 U.S. 100, 118-119, 85 L. Ed. 609, 61 S. Ct. 451 (1941)*; *Shreveport Rate Cases, 234 U.S., at 353, 58 L. Ed. 1341, 34 S. Ct. 833.* As the Court put it in *Wrightwood Dairy*, where Congress has the authority to enact a regulation of interstate commerce, "it possesses every power needed to make that regulation effective." *315 U.S., at 118-119, 86 L. Ed. 726, 62 S. Ct. 523.*

[*37] Although this power "to make . . . regulation effective" commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, [2] and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. [***32] Moreover, as the passage from *Lopez* quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. See *Lopez, supra, at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* The relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power. See *Darby, supra, at 121, 85 L. Ed. 609, 61 S. Ct. 451.*

2 *Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*, presented such a case. Because the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market, the Court said, it carried with it the potential to disrupt Congress's price regulation by driving down prices in the market. *Id., at 127-129, 87 L. Ed. 122, 63 S. Ct. 82.* This potential disruption of Congress's interstate regulation, and not only the effect that personal consumption of wheat had on interstate commerce, justified Congress's regulation of that conduct. *Id., at 128-129, 87 L. Ed. 122, 63 S. Ct. 82.*

In *Darby*, for instance, the Court explained that "Congress, having . . . adopted the policy of excluding

from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards," [**2218] *312 U.S., at 121, 85 L. Ed. 609, 61 S. Ct. 451*, could not only require employers engaged in the production of goods for interstate commerce to conform to wage and hour standards, *id., at 119-121, 85 L. Ed. 609, 61 S. Ct. 451*, but could also require those employers to keep employment records in order to demonstrate compliance with the regulatory scheme, *id., at 125, 85 L. Ed. 609, 61 S. Ct. 451*. While the Court sustained the former regulation on the alternative ground that the activity it regulated could have a "great effect" on interstate commerce, *id., at 122-123, 85 L. Ed. 609, 61 S. Ct. 451*, it affirmed the latter on the sole ground that "[t]he requirement [*38] for records even of the intrastate transaction is an appropriate means to a legitimate end," *id., at 125, 85 L. Ed. 609, 61 S. Ct. 451*.

As the Court said in the *Shreveport Rate Cases*, the Necessary and Proper Clause does not give "Congress . . . the authority to regulate the internal commerce of a State, as such," but it does allow Congress "to take all measures necessary or appropriate to" the effective regulation of the interstate market, "although intrastate transactions . . . may thereby be controlled." *234 U.S., at 353, 58 L. Ed. 1341, 34 S. Ct. 833*; see also *Jones & Laughlin Steel Corp., 301 U.S., at 38, 81 L. Ed. 893, 57 S. Ct. 615* (the logic of the *Shreveport Rate Cases* is not limited to instrumentalities of commerce).

II

Today's principal dissent objects that, by permitting Congress to regulate activities necessary to effective interstate regulation, the Court reduces *Lopez* and *Morrison* to "little more than a drafting guide." *Post, at ____, 162 L. Ed. 2d, at 38* (opinion of O'Connor, J.). I think that criticism unjustified. Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could . . . undercut" its regulation of interstate commerce. See *Lopez, supra, at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; *ante, at ____, ____, ____, 162 L. Ed. 2d, at 19, 23, 24*. This is not a power that threatens to obliterate the line between "what is truly national and what is truly local." *Lopez, supra, at 567-568, 131 L. Ed. 2d 626, 115 S. Ct. 1624*.

Lopez and *Morrison* affirm that [***33] Congress may not regulate certain "purely local" activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond [*39] the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation; *Lopez* expressly disclaimed that it was such a case, *514 U.S., at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624*, and *Morrison* did not even discuss the possibility that it was. (The Court of Appeals in *Morrison* made clear that it was not. See *Brzonkala v. Virginia Polytechnic Inst., 169 F.3d 820, 834-835 (CA4 1999)* (en banc).) To dismiss this distinction as "superficial and formalistic," see *post, at ____, 162 L. Ed. 2d, at 38* (O'Connor, J., dissenting), is to misunderstand the nature of the Necessary and Proper Clause, which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation. See *McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 421-422, 4 L. Ed. 579 (1819)*.

And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch* [**2219] v. *Maryland*, even when the end is constitutional and legitimate, the means must be "appropriate" and "plainly adapted" to that end. *Id., at 421, 4 L. Ed. 579*. Moreover, they may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." *Ibid.* These phrases are not merely hortatory. For example, cases such as *Printz v. United States, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997)*, and *New York v. United States, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)*, affirm that a law is not "'*proper* for carrying into Execution the *Commerce Clause*'" "[w]hen [it] violates [a constitutional] principle of state sovereignty." *Printz, supra, at 923-924, 138 L. Ed. 2d 914, 117 S. Ct. 2365*; see also *New York, supra, at 166, 120 L. Ed. 2d 120, 112 S. Ct. 2408*.

III

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The *Commerce Clause* unquestionably permits this. The power to regulate interstate commerce "extends not only to those regulations which aid, [*40] foster and protect the commerce, but embraces those which prohibit it." *Darby, 312 U.S., at 113, 85 L. Ed. 609, 61 S. Ct. 451*. See also *Hipolite Egg Co. v. United States, 220 U.S. 45, 58, 55 L. Ed. 364, 31 S. Ct. 364 (1911)*; *Lottery Case, 188 U.S. 321, 354, 47 L. Ed. 492, 23 S. Ct. 321 (1903)*. To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I sub-

stances--both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). See *21 U.S.C. §§ 841(a), 844(a)*. That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority to enact all of these prohibitions [***34] of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market--and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. [3] [*41] See [**2220] *ante, at ____ - ____, 162 L. Ed. 2d, at 24-29*. Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market. See *id., at ____ - ____, 162 L. Ed. 2d, at 26-27*, and n 38. "To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." *McCulloch, supra, at 424, 4 L. Ed. 579.*

3 The principal dissent claims that, if this is sufficient to sustain the regulation at issue in this case, then it should also have been sufficient to sustain the regulation at issue in *United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995)*. See *post, at ____ - ____, 162 L. Ed. 2d, at 42* (arguing that "we could have surmised in *Lopez* that guns in school zones are 'never more than an instant from the interstate market' in guns already subject to federal regulation, recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun-Free School Zones Act"). This claim founders upon the shoals of *Lopez* itself, which made clear that the statute there at issue was "*not* an essential part of a larger regulation of economic activity." *Lopez, supra, at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (emphasis added). On the dissent's view of things, that statement is inexplicable. Of course it is in addition difficult to imagine what intelligible scheme of regulation of the interstate market in guns could have as an appropriate means of effectuation the prohibition of guns within 1000 feet of schools (and nowhere else). The dissent points to a federal law, *18 U.S.C. § 922(b)(1)*, barring licensed dealers from selling guns to minors, see *post, at ____, 162 L. Ed. 2d, at 42*, but the relationship between the regulatory scheme of which *§ 922(b)(1)* is a part (requiring all dealers in firearms that have traveled in interstate commerce to be licensed, see *§ 922(a)*) and the statute at issue in *Lopez* approaches the nonexistent--which is doubtless why the Government did not attempt to justify the statute on the basis of that relationship.

Finally, neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation "inappropriate," *id., at 421, 4 L. Ed. 579* --except to argue that the CSA regulates an area typically left to state regulation. See *post, at ____ - ____, ____, 162 L. Ed. 2d, at 38-39, 41* (opinion of O'Connor, J.); *post, at ____ - ____, 162 L. Ed. 2d, at 50* (opinion of Thomas, J.); Brief for Respondents 39-42. That is not enough to render federal regulation an inappropriate means. The Court has repeatedly recognized that, if authorized by the commerce power, Congress may regulate private endeavors "even when [that regulation] may pre-empt express state-law determinations contrary to the result which has commended [***35] itself to the collective wisdom of Congress." *National League of Cities v. Usery, 426 U.S. 833, 840, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976)*; see *Cleveland v. United States, 329 U.S. 14, 19, 91 L. Ed. 12, 67 S. Ct. 13 (1946)*; *McCulloch, supra, at 424, 4 L. Ed. 579*. At bottom, respondents' [*42] state-sovereignty argument reduces to the contention that federal regulation of the activities permitted by California's Compassionate Use Act is not sufficiently necessary to be "necessary and proper" to Congress's regulation of the interstate market. For the reasons given above and in the Court's opinion, I cannot agree.

* * *

I thus agree with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market "could be undercut" if those activities were excepted from its general scheme of regulation. See *Lopez, 514 U.S., at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624*. That is sufficient to authorize the application of the CSA to respondents.

DISSENT BY: O'CONNOR; THOMAS

DISSENT

Justice **O'Connor,** with whom the **Chief Justice** and Justice **Thomas** join as to all but Part III, dissenting.

We enforce the "outer limits" of Congress' *Commerce Clause* authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. *United States v. Lopez, 514 U.S. 549, 557, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995)*; *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615 (1937).* One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 (1932)* (Brandeis, J., dissenting).

[**2221] This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. *Brecht v. Abrahamson, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)*; *Whalen v. Roe, 429 U.S. 589, 603, n. 30, 51 L. Ed. 2d 64, 97 S. Ct. 869* [*43] *(1977).* Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the *Commerce Clause* --nestling questionable assertions of its authority into comprehensive regulatory schemes--rather than with precision. That rule and the result it produces in this case are irreconcilable [***36] with our decisions in *Lopez, supra,* and *United States v. Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000).* Accordingly I dissent.

I

In *Lopez*, we considered the constitutionality of the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm . . . at a place the individual knows, or has reasonable cause to believe, is a school zone," *18 U.S.C. § 922(q)(2)(A).* We explained that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . ., *i.e.*, those activities that substantially affect interstate commerce." *514 U.S., at 558-559, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (citation omitted). This power derives from the conjunction of the *Commerce Clause* and the Necessary and Proper Clause. *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 585-586, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)* (O'Connor, J., dissenting) (explaining that *United States v. Darby, 312 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451 (1941), United States v. Wrightwood Dairy Co., 315 U.S. 110, 86 L. Ed. 726, 62 S. Ct. 523 (1942)*, and *Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942),* [*44] based their expansion of the commerce power on the Necessary and Proper Clause, and that "the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce"); *ante, at ____, 162 L. Ed. 2d, at 30* (Scalia, J., concurring in judgment). We held in *Lopez* that the Gun-Free School Zones Act could not be sustained as an exercise of that power.

Our decision about whether gun possession in school zones substantially affected interstate commerce turned on four considerations. *Lopez, supra, at 559-567, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; see also *Morrison, supra, at 609-613, 146 L. Ed. 2d 658, 120 S. Ct. 1740.* First, we observed that our "substantial effects" cases generally have upheld federal regulation of economic activity that affected interstate commerce, but that *§ 922(q)* was a criminal statute having "nothing to do with 'commerce' or any sort of economic enterprise." *Lopez, 514 U.S., at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* In this regard, we also noted that "*[s]ection 922(q)* is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations [**2222] of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Ibid.* Second, we noted that the statute contained no express jurisdictional requirement establishing its connection to interstate commerce. *Ibid.*

Third, we found telling the absence of legislative findings about the regulated conduct's impact on interstate commerce. We explained that while express legislative findings are neither required nor, when provided, dispositive, findings "enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such sub-

stantial effect [is] visible to the naked eye." *Id.,* [***37] *at 563, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* Finally, we rejected as too attenuated the Government's argument that firearm possession in school zones could result in violent crime which in turn could [*45] adversely affect the national economy. *Id., at 563-567, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* The Constitution, we said, does not tolerate reasoning that would "convert congressional authority under the *Commerce Clause* to a general police power of the sort retained by the States." *Id., at 567, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* Later in *Morrison, supra,* we relied on the same four considerations to hold that § 40302 of the Violence Against Women Act of 1994, *42 U.S.C. § 13981*, exceeded Congress' authority under the *Commerce Clause.*

In my view, the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account.

II

A

What is the relevant conduct subject to *Commerce Clause* analysis in this case? The Court takes its cues from Congress, applying the above considerations to the activity regulated by the Controlled Substances Act (CSA) in general. The Court's decision rests on two facts about the CSA: (1) Congress chose to enact a single statute providing a comprehensive prohibition on the production, distribution, and possession of all controlled substances, and (2) Congress did not distinguish between various forms of intrastate noncommercial cultivation, possession, and use of marijuana. See *21 U.S.C. §§ 841(a)(1), 844(a).* Today's decision suggests that the federal regulation of local activity is immune to *Commerce Clause* challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal. In my view, allowing Congress to set the terms of the constitutional debate in this way, *i.e.*, by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the *Commerce Clause.*

The Court's principal means of distinguishing *Lopez* from this case is to observe that the Gun-Free School Zones Act of 1990 was a "brief, single-subject statute," *ante, at ____, 162 L. Ed. 2d, at 22,* see also *ante, at ____, 162 L. Ed. 2d, at 21,* [*46] whereas the CSA is "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances,'" *ibid.* Thus, according to the Court, it was possible in *Lopez* to evaluate in isolation the constitutionality of criminalizing local activity (there gun possession in school zones), whereas the local activity that the CSA targets (in this case cultivation and possession of marijuana for personal medicinal use) cannot be separated from the general drug control scheme of which it is a part.

Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity [**2223] is essential (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme. Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "not an essential part of a larger regulation [***38] of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," *514 U.S., at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624*, the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. *Ante, at ____ - ____, 162 L. Ed. 2d, at 23.* If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation"--thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones. Furthermore, today's decision suggests we would readily sustain a congressional decision to attach the regulation of intrastate activity to a pre-existing comprehensive (or even not-so-comprehensive) scheme. If so, the Court invites increased federal regulation of local activity even if, as it suggests, Congress would not enact a *new* interstate [*47] scheme exclusively for the sake of reaching intrastate activity, see *ante, at ____, n. 34, 162 L. Ed. 2d, at 23*; *ante, at ____, 162 L. Ed. 2d, at 32* (Scalia, J., concurring in judgment).

I cannot agree that our decision in *Lopez* contemplated such evasive or overbroad legislative strategies with approval. Until today, such arguments have been made only in dissent. See *Morrison, 529 U.S., at 657, 146 L. Ed. 2d 658, 120 S. Ct. 1740* (Breyer, J., dissenting) (given that Congress can regulate "'an essential part of a larger regulation of economic activity,'" "can Congress save the present law by including it, or much of it, in a broader 'Safe Transport' or 'Worker Safety' act?"). *Lopez* and *Morrison* did not indicate that the constitutionality of federal regulation depends on superficial and formalistic distinctions. Likewise I did not understand our discussion of the role of courts in enforcing outer limits of the *Commerce Clause* for the sake of maintaining the federalist balance our Constitution requires, see *Lopez, 514 U.S., at 557, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; *id., at 578, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring), as a signal to Congress to en-

act legislation that is more extensive and more intrusive into the domain of state power. If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers.

The hard work for courts, then, is to identify objective markers for confining the analysis in *Commerce Clause* cases. Here, respondents challenge the constitutionality of the CSA as applied to them and those similarly situated. I agree with the Court that we must look beyond respondents' own activities. Otherwise, individual litigants could always exempt themselves from *Commerce Clause* regulation merely by pointing to the obvious--that their personal activities do not have a substantial effect on interstate commerce. See *Maryland v. Wirtz, 392 U.S. 183, 193, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)*; *Wickard, 317 U.S., at 127-128, 87 L. Ed. 122, 63 S. Ct. 82*. The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its [***39] litigants) and less than everything (by declining to let Congress set the [*48] terms of analysis). The analysis may not be the same in every case, for it depends on the regulatory scheme at issue and the federalism concerns implicated. See generally [**2224] *Lopez, 514 U.S., at 567, 131 L. Ed. 2d 626, 115 S. Ct. 1624*; *id., at 579, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring).

A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation--including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation--recognize that medical and nonmedical (*i.e.*, recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. See *21 U.S.C. § 812*; *Cal. Health & Safety Code Ann. § 11362.5* (West Supp. 2005); *ante, at ____, 162 L. Ed. 2d, at 11* (opinion of the Court). Respondents challenge only the application of the CSA to medicinal use of marijuana. Cf. *United States v. Raines, 362 U.S. 17, 20-22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)* (describing our preference for as-applied rather than facial challenges). Moreover, because fundamental structural concerns about dual sovereignty animate our *Commerce Clause* cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where "States lay claim by right of history and expertise." *Lopez, supra, at 583, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring); see also *Morrison, supra, at 617-619, 146 L. Ed. 2d 658, 120 S. Ct. 1740*; *Lopez, supra, at 580, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring) ("The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required"); cf. *Garcia, 469 U.S., at 586, 83 L. Ed. 2d 1016, 105 S. Ct. 1005* (O'Connor, J., dissenting) ("[S]tate autonomy is a relevant factor in assessing the means by which Congress exercises its powers" under the *Commerce Clause*). California, like other States, has drawn on its reserved powers to distinguish the regulation of medicinal marijuana. To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.

[*49] B

Having thus defined the relevant conduct, we must determine whether, under our precedents, the conduct is economic and, in the aggregate, substantially affects interstate commerce. Even if intrastate cultivation and possession of marijuana for one's own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme.

The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture [***40] or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. Putting to one side the problem endemic to the Court's opinion--the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates, see *Lopez, supra, at 565, 131 L. Ed. 2d 626, 115 S. Ct. 1624* ("depending on the level of generality, any activity can be looked upon as commercial")--the Court's definition of economic activity for purposes of *Commerce Clause* jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between "what is national and what is local," [**2225] *Jones & Laughlin Steel, 301 U.S., at 37, 81 L. Ed. 893, 57 S. Ct. 615*. It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care [*50] substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the su-

permarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow--a federal police power. *Lopez, supra, at 564, 131 L. Ed. 2d 626, 115 S. Ct. 1624.*

In *Lopez* and *Morrison*, we suggested that economic activity usually relates directly to commercial activity. See *Morrison, 529 U.S., at 611, n. 4, 146 L. Ed. 2d 658, 120 S. Ct. 1740* (intrastate activities that have been within Congress' power to regulate have been "of an apparent commercial character"); *Lopez, 514 U.S., at 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (distinguishing the Gun-Free School Zones Act of 1990 from "activities that arise out of or are connected with a commercial transaction"). The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it. (Marijuana is highly unusual among the substances subject to the CSA in that it can be cultivated without any materials that have traveled in interstate commerce.) *Lopez* makes clear that possession is not itself commercial activity. *Ibid.* And respondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value. Cf. *id., at 583, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring) ("The statute now before us forecloses the States from experimenting . . . and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term").

The Court suggests that *Wickard*, which we have identified as "perhaps the most far reaching example of *Commerce Clause* authority over [***41] intrastate activity," *Lopez, supra, at 560, 131 L. Ed. 2d 626, 115 S. Ct. 1624*, established federal regulatory power over any home consumption of a commodity for which a national market exists. [*51] I disagree. *Wickard* involved a challenge to the Agricultural Adjustment Act of 1938 (AAA), which directed the Secretary of Agriculture to set national quotas on wheat production, and penalties for excess production. *317 U.S., at 115-116, 87 L. Ed. 122, 63 S. Ct. 82.* The AAA itself confirmed that Congress made an explicit choice not to reach--and thus the Court could not possibly have approved of federal control over--small-scale, noncommercial wheat farming. In contrast to the CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers. When Filburn planted the wheat at issue in *Wickard*, the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres. *Id., at 130, n. 30, 87 L. Ed. 122, 63 S. Ct. 82. Wickard,* then, did not extend *Commerce Clause* authority to something as modest as the home cook's herb garden. This is not to say that Congress may never regulate small quantities of commodities possessed or produced for personal use, or to deny that it sometimes needs to enact a zero tolerance regime for such commodities. It is merely to say that *Wickard* did not hold or imply that small-scale [**2226] production of commodities is always economic, and automatically within Congress' reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of "substantial effects" at issue (*i.e.*, whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress' excursion into the traditional domain of States be justified.

That is why characterizing this as a case about the Necessary and Proper Clause does not change the analysis significantly. [*52] Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. *Garcia, 469 U.S., at 585, 83 L. Ed. 2d 1016, 105 S. Ct. 1005* (O'Connor, J., dissenting) ("It is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution"). As Justice Scalia recognizes, see *ante, at ____, 162 L. Ed. 2d, at 33* (opinion concurring in judgment), Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the *Tenth Amendment. Ibid.* Likewise, that authority must be used in a manner consistent with the notion of enumerated powers--a structural principle that is as much part of the Constitution as the *Tenth Amendment's* explicit textual command. Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an intrastate market is not self-evident. [***42] Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation. Cf. *Printz v. United States, 521 U.S. 898, 923, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997)* (the Necessary and Proper Clause is "the last, best hope of those who defend ultra vires congressional action"). Indeed, if it were enough in "substantial effects" cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in

Lopez that guns in school zones are "never more than an instant from the interstate market" in guns already subject to extensive federal regulation, *ante, at ____, 162 L. Ed. 2d, at 34* (Scalia, J., concurring in judgment), recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun-Free School Zones Act of 1990. (According to the Court's and the concurrence's logic, for example, the *Lopez* court should have reasoned that the prohibition on gun possession in school zones could be an appropriate means of effectuating a related prohibition on "sell[ing]" or "deliver[ing]" firearms or ammunition to "any individual who the licensee knows or has reasonable cause to believe is less than [*53] eighteen years of age." *18 U.S.C. § 922(b)(1) (1988 ed., Supp. II).*)

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market--or otherwise to threaten the CSA regime. Explicit evidence is helpful when substantial effect is not "visible to the naked eye." See *Lopez, 514 U.S., at 563, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* And here, in part because common sense suggests that medical marijuana users may be limited in number and that California's Compassionate Use Act and similar state legislation may well isolate activities relating to medicinal marijuana [**2227] from the illicit market, the effect of those activities on interstate drug traffic is not self-evidently substantial.

In this regard, again, this case is readily distinguishable from *Wickard.* To decide whether the Secretary could regulate local wheat farming, the Court looked to "the actual effects of the activity in question upon interstate commerce." *317 U.S., at 120, 87 L. Ed. 122, 63 S. Ct. 82.* Critically, the Court was able to consider "actual effects" because the parties had "stipulated a summary of the economics of the wheat industry." *Id., at 125, 87 L. Ed. 122, 63 S. Ct. 82.* After reviewing in detail the picture of the industry provided in that summary, the Court explained that consumption of homegrown wheat was the most variable factor in the size of the national wheat crop, and that on-site consumption could have the effect of varying the amount of wheat sent to market by as much as 20 percent. *Id., at 127, 87 L. Ed. 122, 63 S. Ct. 82.* With real numbers at hand, the *Wickard* Court could easily conclude that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions" nationwide. *Id., at 128, 87 L. Ed. 122, 63 S. Ct. 82*; see also *id., at 128-129, 87 L. Ed. 122, 63 S. Ct. 82* ("This record leaves us in no doubt" about substantial effects).

The Court recognizes that "the record in the *Wickard* case itself established the causal connection [***43] between the production [*54] for local use and the national market" and argues that "we have before us findings by Congress *to the same effect.*" *Ante, at ____, 162 L. Ed. 2d, at 21* (emphasis added). The Court refers to a series of declarations in the introduction to the CSA saying that (1) local distribution and possession of controlled substances causes "swelling" in interstate traffic; (2) local production and distribution cannot be distinguished from interstate production and distribution; (3) federal control over intrastate incidents "is essential to effective control" over interstate drug trafficking. *21 U.S.C. §§ 801(1)-(6).* These bare declarations cannot be compared to the record before the Court in *Wickard.*

They amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute. They are asserted without any supporting evidence--descriptive, statistical, or otherwise. "[S]imply because Congress may conclude a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 311, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)* (Rehnquist, J., concurring in judgment). Indeed, if declarations like these suffice to justify federal regulation, and if the Court today is right about what passes rationality review before us, then our decision in *Morrison* should have come out the other way. In that case, Congress had supplied numerous findings regarding the impact gender-motivated violence had on the national economy. *529 U.S., at 614, 146 L. Ed. 2d 658, 120 S. Ct. 1740*; *id., at 628-636, 146 L. Ed. 2d 658, 120 S. Ct. 1740* (Souter, J., dissenting) (chronicling findings). But, recognizing that """[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question,""" we found Congress' detailed findings inadequate. *Id., at 614, 146 L. Ed. 2d 658, 120 S. Ct. 1740* (quoting *Lopez, supra, at 557, n. 2, 131 L. Ed. 2d 626, 115 S. Ct. 1624*, in turn quoting *Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)* (Black, J., concurring)). If, as the Court claims, today's decision does not [*55] break with precedent, how can it be that voluminous findings, documenting extensive hearings about the specific topic of violence against women, did not pass constitutional muster in *Morrison*, while the CSA's abstract, unsubstantiated, [**2228] generalized findings about controlled substances do?

In particular, the CSA's introductory declarations are too vague and unspecific to demonstrate that the federal statutory scheme will be undermined if Congress cannot exert power over individuals like respondents. The declarations are not even specific to marijuana. (Facts about substantial effects may be developed in litigation

to compensate for the inadequacy of Congress' findings; in part because this case comes to us from the grant of a preliminary injunction, there has been no such development.) Because here California, like other States, has carved out a limited class of activity for distinct regulation, the inadequacy of the CSA's findings is especially glaring. The California Compassionate Use Act exempts from other state drug laws patients and their caregivers [***44] "who posses[s] or cultivat[e] marijuana for the *personal* medical purposes of the patient upon the written or oral recommendation of a physician" to treat a list of serious medical conditions. *Cal. Health & Safety Code Ann. §§ 11362.5(d), 11362.7(h)* (West Supp. 2005) (emphasis added). Compare *ibid.* with, *e.g., § 11357(b)* (West 1991) (criminalizing marijuana possession in excess of 28.5 grams); *§ 11358* (criminalizing marijuana cultivation). The Act specifies that it should not be construed to supersede legislation prohibiting persons from engaging in acts dangerous to others, or to condone the diversion of marijuana for nonmedical purposes. *§ 11362.5(b)(2)* (West Supp. 2005). To promote the Act's operation and to facilitate law enforcement, California recently enacted an identification card system for qualified patients. *§§ 11362.7-11362.83.* We generally assume States enforce their laws, see *Riley v. National Federation of Blind of N. C., Inc., 487 U.S. 781, 795, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988)*, and have no reason to think otherwise here.

[*56] The Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime. Nor has it shown that Compassionate Use Act marijuana users have been or are realistically likely to be responsible for the drug's seeping into the market in a significant way. The Government does cite one estimate that there were over 100,000 Compassionate Use Act users in California in 2004, Reply Brief for Petitioners 16, but does not explain, in terms of proportions, what their presence means for the national illicit drug market. See generally *Wirtz, 392 U.S., at 196, n. 27, 20 L. Ed. 2d 1020, 88 S. Ct. 2017* (Congress cannot use "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"); cf. General Accounting Office, Marijuana: Early Experience with Four States' Laws That Allow Use for Medical Purposes 21-23 (Rep. No. 03-189, Nov. 2002), http://www.gao.gov/new.items/d03189.pdf (as visited June 3, 2005 and available in Clerk of Court's case file) (in four California counties before the identification card system was enacted, voluntarily registered medical marijuana patients were less than 0.5 percent of the population; in Alaska, Hawaii, and Oregon, statewide medical marijuana registrants represented less than 0.05 percent of the States' populations). It also provides anecdotal evidence about the CSA's enforcement. See Reply Brief for Petitioners 17-18. The Court also offers some arguments about the effect of the Compassionate Use Act on the national market. It says that the California statute might be vulnerable to exploitation by unscrupulous physicians, that Compassionate Use Act patients may overproduce, and that the history of the narcotics trade [**2229] shows the difficulty of cordoning off any drug use from the rest of the market. These arguments are plausible; if borne out in fact they could justify prosecuting Compassionate Use Act patients under the federal CSA. But, without substantiation, [*57] they add little to the CSA's conclusory statements about diversion, essentiality, and market effect. Piling assertion upon assertion does not, in my view, satisfy the substantiality test of *Lopez* and *Morrison.*

[***45] III

We would do well to recall how James Madison, the father of the Constitution, described our system of joint sovereignty to the people of New York: "The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp 292-293 (C. Rossiter ed. 1961).

Relying on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our *Commerce Clause* cases require that room for experiment be protected in this case. For these reasons I dissent. Justice **Thomas,** dissenting.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate [*58] this under the *Commerce Clause*, then it can regulate virtually anything--and the Federal Government is no longer one of limited and enumerated powers.

I

Respondents' local cultivation and consumption of marijuana is not "Commerce . . . among the several States." *U.S. Const., Art. I, § 8, cl. 3.* By holding that Congress may regulate activity that is neither interstate nor commerce under the *Interstate Commerce Clause*, the Court abandons any attempt to enforce the Constitution's limits on federal power. The majority supports this conclusion by invoking, without explanation, the Necessary and Proper Clause. Regulating respondents' conduct, however, is not "necessary and proper for carrying into Execution" Congress' restrictions on the interstate drug trade. Art. I, § 8, cl. 18. Thus, neither the *Commerce Clause* nor the Necessary and Proper Clause grants Congress the power to regulate respondents' conduct.

A

As I explained at length in *United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995)*, the *Commerce Clause* empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. *Id., at 586-589, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (concurring opinion). The Clause's text, structure, and history all [**2230] indicate that, at the time of the founding, the term "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Id., at 585, 131 L. Ed. 2d* [***46] *626, 115 S. Ct. 1624* (Thomas, J., concurring). Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture. *Id., at 586-587, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Thomas, J., concurring). Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term "commerce" is consistently used to mean trade or exchange--not all economic or gainful activity that has some attenuated connection to trade or exchange. *Ibid.* (Thomas, [*59] J., concurring); Barnett, The Original Meaning of the *Commerce Clause, 68 U. Chi. L. Rev. 101, 112-125 (2001).* The term "commerce" commonly meant trade or exchange (and shipping for these purposes) not simply to those involved in the drafting and ratification processes, but also to the general public. Barnett, New Evidence of the Original Meaning of the *Commerce Clause, 55 Ark. L. Rev. 847, 857-862 (2003).*

Even the majority does not argue that respondents' conduct is itself "Commerce among the several States." Art. I, § 8, cl. 3. *Ante, at ____, 162 L. Ed. 2d, at 22.* Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California--it never crosses state lines, much less as part of a commercial transaction. Certainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.

On this traditional understanding of "commerce," the Controlled Substances Act (CSA), *21 U.S.C. § 801 et seq.*, regulates a great deal of marijuana trafficking that is interstate and commercial in character. The CSA does not, however, criminalize only the interstate buying and selling of marijuana. Instead, it bans the entire market--intrastate or interstate, noncommercial or commercial--for marijuana. Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely intrastate and noncommercial.

B

More difficult, however, is whether the CSA is a valid exercise of Congress' power to enact laws that are "necessary and proper for carrying into Execution" its power to regulate interstate commerce. Art. I, § 8, cl. 18. The Necessary and Proper Clause [*60] is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power. [1] Nor is it, however, a command to Congress to enact only laws that are absolutely indispensable [***47] to the exercise of an enumerated power. [2]

1 *McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 419-421, 4 L. Ed. 579 (1819)*; Madison, The Bank Bill, House of Representatives (Feb. 2, 1791), in 3 The Founders' Constitution 244 (P. Kurland & R. Lerner eds. 1987) (requiring "direct" rather than "remote" means-end fit); Hamilton, Opinion on the Constitutionality of the Bank (Feb. 23, 1791), in *id.*, at 248, 250 (requiring "obvious" means-end fit, where the end was "clearly comprehended within any of the specified powers" of Congress).

2 *McCulloch, supra, at 413-415, 4 L. Ed. 579*; D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888, p 162 (1985).

In *McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819)*, this Court, speaking through Chief Justice Marshall, set forth a test for determining when an Act [**2231] of Congress is permissible under the Necessary and Proper Clause:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which

are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id., at 421, 4 L. Ed. 579.*

To act under the Necessary and Proper Clause, then, Congress must select a means that is "appropriate" and "plainly adapted" to executing an enumerated power; the means cannot be otherwise "prohibited" by the Constitution; and the means cannot be inconsistent with "the letter and spirit of the [C]onstitution." *Ibid.;* D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888, pp 163-164 (1985). The CSA, as applied to respondents' conduct, is not a valid exercise of Congress' power under the Necessary and Proper Clause.

1

Congress has exercised its power over interstate commerce to criminalize trafficking in marijuana across state [*61] lines. The Government contends that banning Monson and Raich's intrastate drug activity is "necessary and proper for carrying into Execution" its regulation of interstate drug trafficking. Art. I, § 8, cl. 18. See *21 U.S.C. § 801(6).* However, in order to be "necessary," the intrastate ban must be more than "a reasonable means [of] effectuat[ing] the regulation of interstate commerce." Brief for Petitioners 14; see *ante, at ____, 162 L. Ed. 2d, at 22* (majority opinion) (employing rational-basis review). It must be "plainly adapted" to regulating interstate marijuana trafficking--in other words, there must be an "obvious, simple, and direct relation" between the intrastate ban and the regulation of interstate commerce. *Sabri v. United States, 541 U.S. 600, 613, 158 L. Ed. 2d 891, 124 S. Ct. 1941 (2004)* (Thomas, J., concurring in judgment); see also *United States v. Dewitt, 76 U.S. 41, 9 Wall. 41, 44, 19 L. Ed. 593 (1870)* (finding ban on intrastate sale of lighting oils not "appropriate and plainly adapted means for carrying into execution" Congress' taxing power).

On its face, a ban on the intrastate cultivation, possession and distribution of marijuana may be plainly adapted to stopping the interstate flow of marijuana. Unregulated local growers and users could swell both the supply and the demand sides of the interstate marijuana market, making the market more difficult to regulate. *Ante, at ____ - ____, ____, 162 L. Ed. 2d, at 15-16, 22* (majority opinion). But respondents do not challenge the CSA on its face. Instead, they challenge it as applied to their conduct. The question is thus whether the intrastate ban is "necessary and proper" as applied to medical [***48] marijuana users like respondents. [3]

3 Because respondents do not challenge on its face the CSA's ban on marijuana, *21 U.S.C. §§ 841(a)(1), 844(a),* our adjudication of their as-applied challenge casts no doubt on this Court's practice in *United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995),* and *United States v. Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000).* In those cases, we held that Congress, in enacting the statutes at issue, had exceeded its Article I powers.

Respondents are not regulable simply because they belong to a large class (local growers and users of marijuana) that [*62] Congress might need to reach, if they also belong to a distinct and separable subclass (local growers and users of state-authorized, medical marijuana) that does not undermine the CSA's interstate ban. *Ante, at ____ - ____, 162 L. Ed. 2d, at 38-39* (O'Connor, J., dissenting). The Court of Appeals found that respondents' "limited use is distinct [**2232] from the broader illicit drug market," because "th[eir] medicinal marijuana . . . is not intended for, nor does it enter, the stream of commerce." *Raich v. Ashcroft, 352 F.3d 1222, 1228 (CA9 2003).* If that is generally true of individuals who grow and use marijuana for medical purposes under state law, then even assuming Congress has "obvious" and "plain" reasons why regulating intrastate cultivation and possession is necessary to regulating the interstate drug trade, none of those reasons applies to medical marijuana patients like Monson and Raich.

California's Compassionate Use Act sets respondents' conduct apart from other intrastate producers and users of marijuana. The Act channels marijuana use to "seriously ill Californians," *Cal. Health & Safety Code Ann. § 11362.5(b)(1)(A)* (West Supp. 2005), and prohibits "the diversion of marijuana for nonmedical purposes," *§ 11362.5(b)(2).* [4] California strictly controls the cultivation and possession of marijuana for medical purposes. To be eligible for its program, California requires that a patient have an illness that cannabis can relieve, such as cancer, AIDS, or arthritis, *§ 11362.5(b)(1)(A),* and that he obtain a physician's recommendation or approval, *§ 11362.5(d).* Qualified patients must provide personal and medical information to obtain medical identification cards, and there is a statewide registry of cardholders. *§§ 11362.715-.76.* Moreover, the Medical Board of California has issued guidelines for physicians' cannabis recommendations, and it sanctions physicians who do not comply with the guidelines. [*63] See, *e.g., People v. Spark, 121 Cal. App. 4th 259, 263, 16 Cal.Rptr. 3d 840, 843 (2004).*

4 Other States likewise prohibit diversion of marijuana for nonmedical purposes. See, *e.g.,*

Colo. Const., Art. XVIII, § 14(2)(d); *Nev. Rev. Stat. §§ 453A.300(1)(e)-(f)* (2003); *Ore. Rev. Stat. §§ 475.316(1)(c)-(d)* (2003).

This class of intrastate users is therefore distinguishable from others. We normally presume that States enforce their own laws, *Riley v. National Federation of Blind of N. C., Inc., 487 U.S. 781, 795, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988)*, and there is no reason to depart from that presumption here: Nothing suggests that California's controls are ineffective. The scant evidence that exists suggests that few people--the vast majority of whom are aged 40 or older--register to use medical marijuana. General Accounting Office, Marijuana: Early Experiences [***49] with Four States' Laws That Allow Use for Medical Purposes 22-23 (Rep. No. 03-189, Nov. 2002), http://www.gao.gov/new.items/d01389.pdf (all Internet materials as visited on June 3, 2005, and available in Clerk of Court's case file). In part because of the low incidence of medical marijuana use, many law enforcement officials report that the introduction of medical marijuana laws has not affected their law enforcement efforts. *Id.*, at 32.

These controls belie the Government's assertion that placing medical marijuana outside the CSA's reach "would prevent effective enforcement of the interstate ban on drug trafficking." Brief for Petitioners 33. Enforcement of the CSA can continue as it did prior to the Compassionate Use Act. Only now, a qualified patient could avoid arrest or prosecution by presenting his identification card to law enforcement officers. In the event that a qualified patient is arrested for possession or his cannabis is seized, he could seek to prove as an affirmative defense that, in conformity with state law, he possessed or cultivated small quantities of marijuana intrastate solely for personal medical use. *People v. Mower, 28 Cal. 4th 457, 469-470, 122 Cal. Rptr. 2d 326, 49 P. 3d 1067, 1073-1075 (2002)*; [**2233] *People v. Trippet, 56 Cal. App. 4th 1532, 1549, 66 Cal. Rptr. 2d 559 (1997)*. Moreover, under the CSA, certain drugs that present a high risk of abuse and addiction but that nevertheless have an accepted medical use--drugs like morphine [*64] and amphetamines--are available by prescription. *21 U.S.C. §§ 812(b)(2)(A)-(B)*; *21 CFR § 1308.12 (2004)*. No one argues that permitting use of these drugs under medical supervision has undermined the CSA's restrictions.

But even assuming that States' controls allow some seepage of medical marijuana into the illicit drug market, there is a multibillion-dollar interstate market for marijuana. Executive Office of the President, Office of Nat. Drug Control Policy, Marijuana Fact Sheet 5 (Feb. 2004), http://www.whitehousedrugpolicy.gov/publications/facts ht/marijuana/index.html . It is difficult to see how this vast market could be affected by diverted medical cannabis, let alone in a way that makes regulating intrastate medical marijuana obviously essential to controlling the interstate drug market.

To be sure, Congress declared that state policy would disrupt federal law enforcement. It believed the across-the-board ban essential to policing interstate drug trafficking. *21 U.S.C. § 801(6)*. But as Justice O'Connor points out, Congress presented no evidence in support of its conclusions, which are not so much findings of fact as assertions of power. *Ante, at ____ - ____, 162 L. Ed. 2d, at 43* (dissenting opinion). Congress cannot define the scope of its own power merely by declaring the necessity of its enactments.

In sum, neither in enacting the CSA nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate [***50] even the intrastate possession and use of marijuana.

2

Even assuming the CSA's ban on locally cultivated and consumed marijuana is "necessary," that does not mean it is [*65] also "proper." The means selected by Congress to regulate interstate commerce cannot be "prohibited" by, or inconsistent with the "letter and spirit" of, the Constitution. *McCulloch, 4 Wheat., at 421, 4 L. Ed. 579*.

In *Lopez*, I argued that allowing Congress to regulate intrastate, noncommercial activity under the *Commerce Clause* would confer on Congress a general "police power" over the Nation. *514 U.S., at 584, 600, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (concurring opinion). This is no less the case if Congress ties its power to the Necessary and Proper Clause rather than the *Commerce Clause*. When agents from the Drug Enforcement Administration raided Monson's home, they seized six cannabis plants. If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers--as expanded by the Necessary and Proper Clause --have no meaningful limits. Whether Congress aims at the possession of drugs, guns, or any number of other items, it may continue to "appropria[te] state police powers under the guise of regulating commerce." *United States v. Morri-*

son, 529 U.S. 598, 627, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000) (Thomas, J., concurring).

Even if Congress may regulate purely intrastate activity when essential to exercising [**2234] some enumerated power, see *Dewitt, 9 Wall., at 44, 19 L. Ed. 593*; but see Barnett, The Original Meaning of the Necessary and Proper Clause, *6 U. Pa. J. Const. L. 183, 186 (2003)* (detailing statements by Founders that the Necessary and Proper Clause was not intended to expand the scope of Congress' enumerated powers), Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty. *Printz v. United States, 521 U.S. 898, 923-924, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997)*; *Alden v. Maine, 527 U.S. 706, 732-733, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)*; *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 585, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)* (O'Connor, J., dissenting); The Federalist No. 33, pp 204-205 (J. Cooke ed. 1961) (A. Hamilton) (hereinafter The Federalist).

[*66] Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. [5] *Brecht v. Abrahamson, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)*; *Hillsborough* [***51] *County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985)*. Further, the Government's rationale--that it may regulate the production or possession of any commodity for which there is an interstate market--threatens to remove the remaining vestiges of States' traditional police powers. See Brief for Petitioners 21-22; cf. Ehrlich, The Increasing Federalization of Crime, *32 Ariz. St. L. J. 825, 826, 841 (2000)* (describing both the relative recency of a large percentage of federal crimes and the lack of a relationship between some of these crimes and interstate commerce). This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a "pretext . . . for the accomplishment of objects not intrusted to the government." *McCulloch, supra, at 423, 4 L. Ed. 579.*

5 In fact, the Anti-Federalists objected that the Necessary and Proper Clause would allow Congress, *inter alia*, to "*constitute new Crimes*, . . . and extend [its] Power as far as [it] shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights." Mason, Objections to the Constitution Formed by the Convention (1787), in 2 The Complete Anti-Federalist 11, 12-13 (H. Storing ed. 1981) (emphasis added). Hamilton responded that these objections were gross "misrepresentation[s]." The Federalist No. 33, at 204. He termed the Clause "perfectly harmless," for it merely confirmed Congress' implied authority to enact laws in exercising its enumerated powers. *Id.*, at 205; see also *Lopez, 514 U.S., at 597, n. 6, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Thomas, J., concurring) (discussing Congress' limited ability to establish nationwide criminal prohibitions); *Cohens v. Virginia, 19 U.S. 264, 6 Wheat. 264, 426-428, 5 L. Ed. 257 (1821)* (finding it "clear that [C]ongress cannot punish felonies generally," except in areas over which it possesses plenary power). According to Hamilton, the Clause was needed only "to guard against cavilling refinements" by those seeking to cripple federal power. The Federalist No. 33, at 205; *id.*, No. 44, at 303-304 (J. Madison).

[*67] II

The majority advances three reasons why the CSA is a legitimate exercise of Congress' authority under the *Commerce Clause*: First, respondents' conduct, taken in the aggregate, may substantially affect interstate commerce, *ante, at ____, 162 L. Ed. 2d, at 22*; second, regulation of respondents' conduct is essential to regulating the interstate marijuana market, *ante, at ____ - ____, 162 L. Ed. 2d, at 23*; and, third, regulation of respondents' conduct is incidental to regulating the interstate marijuana market, *ante, at ____ - ____, 162 L. Ed. 2d, at 21-23*. Justice O'Connor explains why the majority's reasons cannot be reconciled with our recent *Commerce Clause* jurisprudence. [**2235] The majority's justifications, however, suffer from even more fundamental flaws.

A

The majority holds that Congress may regulate intrastate cultivation and possession of medical marijuana under the *Commerce Clause*, because such conduct arguably has a substantial effect on interstate commerce. The majority's decision is further proof that the "substantial effects" test is a "rootless and malleable standard" at odds with the constitutional design. *Morrison, supra, at 627, 146 L. Ed. 2d 658, 120 S. Ct. 1740* (Thomas, J., concurring).

The majority's treatment of the substantial effects test is rootless, because it is not tethered to either the *Commerce Clause* or the Necessary and Proper Clause. Under the *Commerce Clause*, Congress may regulate interstate commerce, not activities that substantially affect interstate commerce--any more than Congress may regulate activities that do not fall within, but that affect, the subjects of its other Article I powers. *Lopez, supra, at 589, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Thomas, J., concurring). Whatever additional latitude the Necessary

and Proper Clause affords, *supra, at ____ - ____, 162 L. Ed. 2d, at 50-51*, the question is whether Congress' legislation is essential to [***52] the regulation of interstate commerce itself--not whether the legislation extends only to economic [*68] activities that substantially affect interstate commerce. *Supra, at ____, 162 L. Ed. 2d, at 47*; *ante, at ____, 162 L. Ed. 2d, at 32* (Scalia, J., concurring in judgment).

The majority's treatment of the substantial effects test is malleable, because the majority expands the relevant conduct. By defining the class at a high level of generality (as the intrastate manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market. *Supra, at ____ - ____, 162 L. Ed. 2d, at 49*. The majority ignores that whether a particular activity substantially affects interstate commerce--and thus comes within Congress' reach on the majority's approach--can turn on a number of objective factors, like state action or features of the regulated activity itself. *Ante, at ____ - ____, 162 L. Ed. 2d, at 38-39* (O'Connor, J., dissenting). For instance, here, if California and other States are effectively regulating medical marijuana users, then these users have little effect on the interstate drug trade. [6]

6 Remarkably, the majority goes so far as to declare this question irrelevant. It asserts that the CSA is constitutional even if California's current controls are effective, because state action can neither expand nor contract Congress' powers. *Ante, at ____, n 38, 162 L. Ed. 2d, at 26*. The majority's assertion is misleading. Regardless of state action, Congress has the power to regulate intrastate economic activities that substantially affect interstate commerce (on the majority's view) or activities that are necessary and proper to effectuating its commerce power (on my view). But on either approach, whether an intrastate activity falls within the scope of Congress' powers turns on factors that the majority is unwilling to confront. The majority apparently believes that even if States prevented any medical marijuana from entering the illicit drug market, and thus even if there were no need for the CSA to govern medical marijuana users, we should uphold the CSA under the *Commerce Clause* and the *Necessary* and Proper Clause. Finally, to invoke the *Supremacy Clause*, as the majority does, *ibid.*, is to beg the question. The CSA displaces California's Compassionate Use Act if the CSA is constitutional as applied to respondents' conduct, but that is the very question at issue.

The substantial effects test is easily manipulated for another reason. This Court has never held that Congress can [*69] regulate noneconomic activity that substantially affects interstate commerce. *Morrison, 529 U.S., at 613, 146 L. Ed. 2d 658, 120 S. Ct. 1740* [**2236] ("[T]hus far in our Nation's history our cases have upheld *Commerce Clause* regulation of intrastate activity only where that activity is *economic* in nature" (emphasis added)); *Lopez, supra, at 560, 131 L. Ed. 2d 626, 115 S. Ct. 1624*. To evade even that modest restriction on federal power, the majority defines economic activity in the broadest possible terms as "'the production, distribution, and consumption of commodities.'" [7] *Ante, at ____, 162 L. Ed. 2d, at 24* (quoting Webster's Third New International Dictionary 720 (1966) (hereinafter Webster's 3d). This carves out a vast swath of activities that are subject to federal regulation. See *ante, at ____ - ____,* [***53] *162 L. Ed. 2d, at 39-40* (O'Connor, J., dissenting). If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined, " while those of the States are "numerous and indefinite." The Federalist No. 45, at 313 (J. Madison).

7 Other dictionaries do not define the term "economic" as broadly as the majority does. See, *e.g.*, The American Heritage Dictionary of the English Language 583 (3d ed. 1992) (defining "economic" as "[o]f or relating to the production, development, and management of *material wealth*, as of a country, household, or business enterprise" (emphasis added)). The majority does not explain why it selects a remarkably expansive 40-year-old definition.

Moreover, even a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of words that are actually in the document. Congress is authorized to regulate "Commerce," and respondents' conduct does not qualify under any definition of that term. [8] The majority's opinion [*70] only illustrates the steady drift away from the text of the *Commerce Clause*. There is an inexorable expansion from "'commerce, '" *ante, at ____, 162 L. Ed. 2d, at 11*, to "commercial" and "economic" activity, *ante, at ____, 162 L. Ed. 2d, at 22*, and finally to all "production, distribution, and consumption" of goods or services for which there is an "established . . . interstate market," *ante, at ____, 162 L. Ed. 2d, at 24*. Federal power expands, but never contracts, with each new locution. The majority is not interpreting the *Commerce Clause*, but rewriting it.

8 See, *e.g., id.*, at 380 ("[t]he buying and selling of goods, especially on a large scale, as between cities or nations"); The Random House Dictionary of the English Language 411 (2d ed. 1987) ("an interchange of goods or commodities, esp. on a large scale between different countries . . . or between different parts of the same country"); Webster's 3d 456 ("the exchange or buying and selling of commodities esp. on a large scale and involving transportation from place to place").

The majority's rewriting of the *Commerce Clause* seems to be rooted in the belief that, unless the *Commerce Clause* covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively. *Ante, at ____ - ____, 162 L. Ed. 2d, at 19-20*; *Lopez, 514 U.S., at 573-574, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring). The interconnectedness of economic activity is not a modern phenomenon unfamiliar to the Framers. *Id., at 590-593, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Thomas, J., concurring); Letter from J. Madison to S. Roane (Sept. 2, 1819), in 3 The Founders' Constitution 259-260 (P. Kurland & R. Lerner eds. 1987). Moreover, the Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government. This Court has carefully avoided stripping Congress of its ability to regulate *inter*state commerce, but it has casually allowed the Federal Government to strip States of their ability to regulate *intra*state commerce--not to mention a host of local activities, [**2237] like mere drug possession, that are not commercial.

One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States. Yet this Court knows that "'[t]he Constitution created a Federal Government of limited powers.'" *New York v. United States, 505 U.S. 144, 155, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)* (quoting *Gregory v. Ashcroft,* [*71] *501 U.S. 452, 457, 115 L.* [***54] *Ed. 2d 410, 111 S. Ct. 2395 (1991))*. That is why today's decision will add no measure of stability to our *Commerce Clause* jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the *Tenth Amendment* a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of "Commerce among the several States." Congress may regulate interstate commerce--not things that affect it, even when summed together, unless truly "necessary and proper" to regulating interstate commerce.

B

The majority also inconsistently contends that regulating respondents' conduct is both incidental and essential to a comprehensive legislative scheme. *Ante, at ____ - ____, ____ - ____, 162 L. Ed. 2d, at 21-22, 23.* I have already explained why the CSA's ban on local activity is not essential. *Supra, at ____ - ____, 162 L. Ed. 2d, at 49.* However, the majority further claims that, because the CSA covers a great deal of interstate commerce, it "is of no moment" if it also "ensnares some purely intrastate activity." *Ante, at ____, 162 L. Ed. 2d, at 22.* So long as Congress casts its net broadly over an interstate market, according to the majority, it is free to regulate interstate and intrastate activity alike. This cannot be justified under either the *Commerce Clause* or the Necessary and Proper Clause. If the activity is purely intrastate, then it may not be regulated under the *Commerce Clause*. And if the regulation of the intrastate activity is purely incidental, then it may not be regulated under the Necessary and Proper Clause.

Nevertheless, the majority terms this the "pivotal" distinction between the present case and *Lopez* and *Morrison*. *Ante, at ____, 162 L. Ed. 2d, at 22.* In *Lopez* and *Morrison*, the parties asserted facial challenges, claiming "that a particular statute or provision fell outside Congress' commerce power in its entirety." *Ante, at 20, 162 L. Ed. 2d, at 22.* Here, by contrast, respondents claim only that the CSA falls outside Congress' commerce power as applied [*72] to their individual conduct. According to the majority, while courts may set aside whole statutes or provisions, they may not "excise individual applications of a concededly valid statutory scheme." *Ante, at 20-21, 162 L. Ed. 2d, at 22*; see also *Perez v. United States, 402 U.S. 146, 154, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)*; *Maryland v. Wirtz, 392 U.S. 183, 192-193, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968).*

It is true that if respondents' conduct is part of a "class of activities . . . and that class is within the reach of federal power," *Perez, supra, at 154, 28 L. Ed. 2d 686, 91 S. Ct. 1357* (emphasis deleted), then respondents may not point to the *de minimis* effect of their own personal conduct on the interstate drug market, *Wirtz, supra, at 196, n. 27, 20 L. Ed. 2d 1020, 88 S. Ct. 2017. Ante, at 6, 162 L. Ed. 2d, at 38* (O'Connor, J., dissenting). But that begs the question at issue: whether respondents' "class of activities" is "within the reach of federal power," which depends in turn on whether the class is defined at a low or a high level of generality. *Supra, at 5, 162 L. Ed. 2d, at 47.* If medical marijuana patients like Monson and [***55] Raich largely stand outside the interstate drug market, then courts must excise them from the CSA's coverage. Congress expressly provided that if "a provision [of the CSA] is held invalid in one of more of [**2238] its *applications*, the provision shall remain in effect in all its valid applications that

are severable." *21 U.S.C. § 901* (emphasis added); see also *United States v. Booker, 543 U.S. ___, ___, n.9, 543 U.S. 220, 160 L. Ed. 2d 621, 698, 125 S. Ct. 738 (2005)* (Thomas, J., dissenting in part).

Even in the absence of an express severability provision, it is implausible that this Court could set aside entire portions of the United States Code as outside Congress' power in *Lopez* and *Morrison*, but it cannot engage in the more restrained practice of invalidating particular applications of the CSA that are beyond Congress' power. This Court has regularly entertained as-applied challenges under constitutional provisions, see *United States v. Raines, 362 U.S. 17, 20-21, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)*, including the *Commerce Clause*, see *Katzenbach v. McClung, 379 U.S. 294, 295, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)*; *Heart of Atlanta* [*73] *Motel, Inc. v. United States, 379 U.S. 241, 249, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)*; *Wickard v. Filburn, 317 U.S. 111, 113-114, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*. There is no reason why, when Congress exceeds the scope of its commerce power, courts may not invalidate Congress' overreaching on a case-by-case basis. The CSA undoubtedly regulates a great deal of interstate commerce, but that is no license to regulate conduct that is neither interstate nor commercial, however minor or incidental.

If the majority is correct that *Lopez* and *Morrison* are distinct because they were facial challenges to "particular statute[s] or provision[s]," *ante, at 20, 162 L. Ed. 2d, at 22*, then congressional power turns on the manner in which Congress packages legislation. Under the majority's reasoning, Congress could not enact--either as a single-subject statute or as a separate provision in the CSA--a prohibition on the intrastate possession or cultivation of marijuana. Nor could it enact an intrastate ban simply to supplement existing drug regulations. However, that same prohibition is perfectly constitutional when integrated into a piece of legislation that reaches other regulable conduct. *Lopez, 514 U.S., at 600-601, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Thomas, J., concurring).

Finally, the majority's view--that because *some* of the CSA's applications are constitutional, they must *all* be constitutional--undermines its reliance on the substantial effects test. The intrastate conduct swept within a general regulatory scheme may or may not have a substantial effect on the relevant interstate market. "[O]ne *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Id., at 600, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Thomas, J., concurring). The breadth of legislation that Congress enacts says nothing about whether the intrastate activity substantially affects interstate commerce, let alone whether it is necessary to the scheme. Because medical marijuana users in California and elsewhere are not placing substantial amounts of cannabis [*74] into the stream of interstate commerce, Congress may not regulate them under the substantial effects [***56] test, no matter how broadly it drafts the CSA.

* * *

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern," *id., at 583, 131 L. Ed. 2d 626, 115 S. Ct. 1624* (Kennedy, J., concurring). The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal [**2239] Union." *United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 502, 149 L. Ed. 2d 722, 121 S. Ct. 1711 (2001)* (Stevens, J., concurring in judgment). Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals. I respectfully dissent.

REFERENCES

15A Am Jur 2d, Commerce §§ 22, 33-35, 41, 49, 100, 103; 25 Am Jur 2d, Drugs and Controlled Substances § 24

U.S.C.S., Constitution, Art. I, § 8, cl. 3; 21 U.S.C.S. §§ 801 et seq.

L Ed Digest, Commerce § 206

L Ed Index, Commerce; Marijuana

Annotation References

Validity of delegation to Drug Enforcement Administration of authority to schedule or reschedule drugs subject to Controlled Substances Act (*21 U.S.C.S. §§ 801 et seq.*). 47 A.L.R. Fed. 869.

Federal criminal liability of unlicensed physician for unlawfully prescribing or dispensing "controlled substance" or drug in violation of the Controlled Substances Act (*21 U.S.C.S. §§ 801 et seq.*). 33 A.L.R. Fed. 220.

Physician's liability for causing patient to become addicted to drugs. 16 A.L.R. 4th 999.

APPENDIX F

EMERALD STEEL FABRICATORS, INC., Petitioner on Review, v. BUREAU OF LABOR AND INDUSTRIES, Respondent on Review.

CA A130422; SC S056265

SUPREME COURT OF OREGON

348 Ore. 159; 2010 Ore. LEXIS 272; 14 Accom. Disabilities Dec. (CCH) P14-081; 23 Am. Disabilities Cas. (BNA) 1; 159 Lab. Cas. (CCH) P60,980; 230 P.3d 518

March 6, 2009, Argued and Submitted, at University of Oregon School of Law, Eugene, Oregon
April 14, 2010, Filed

PRIOR HISTORY: [**1]
BOLI 3004. On review from the Court of Appeals. *

* Appeal from Revised Order on Reconsideration dated July 13, 2006, of the *Bureau of Labor and Industries. 220 Ore. App. 423, 186 P3d 300 (2008).*

Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 220 Ore. App. 423, 186 P.3d 300, 2008 Ore. App. LEXIS 795 (2008)

DISPOSITION: The decision of the Court of Appeals and the revised order on reconsideration of the Commissioner of the Bureau of Labor and Industries are reversed.

COUNSEL: Terence J. Hammons, of Hammons & Mills, Eugene, argued the cause and filed the brief for petitioner on review.

Janet A. Metcalf, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. With her on the brief were John R. Kroger, Attorney General, and Erika L. Hadlock, Acting Solicitor General.

Paula A. Barran, of Barran Liebman LLP, Portland, filed the brief for amicus curiae Associated Oregon Industries.

James N. Westwood, of Stoel Rives LLP, Portland, filed the brief for amici curiae Pacific Legal Foundation and National Federation of Independent Business. With him on the brief was Deborah J. La Fetra.

JUDGES: KISTLER, J. Walters, J., dissented and filed an opinion, in which Durham, J., joined.

OPINION BY: KISTLER

OPINION

[*161] En Banc

KISTLER, J.

The Oregon Medical Marijuana Act authorizes persons holding a registry identification card to use marijuana [**2] for medical purposes. *ORS 475.306(1).* It also exempts those persons from state criminal liability for manufacturing, delivering, and possessing marijuana, provided that certain conditions are met. *ORS 475.309(1).* The Federal Controlled Substances Act, *21 USC § 801 et seq.,* prohibits the manufacture, distribution, dispensation, and possession of marijuana even when state law authorizes its use to treat medical conditions. *Gonzales v. Raich, 545 U.S. 1, 29, 125 S Ct 2195, 162 L Ed 2d 1 (2005); see United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 486, 121 S Ct 1711, 149 L Ed 2d 722 (2001)* (holding that there is no medical necessity exception to the federal prohibition against manufacturing and distributing marijuana).

The question that this case poses is how those state and federal laws intersect in the context of an employment discrimination claim; specifically, employer argues that, because marijuana possession is unlawful under federal law, even when used for medical purposes, state law does not require an employer to accommodate an employee's use of marijuana to treat a disabling medical

condition. The Court of Appeals declined to reach that question, reasoning [**3] that employer had not preserved it. *Emerald Steel Fabricators, Inc. v. BOLI, 220 Ore. App. 423, 186 P3d 300 (2008).* We allowed employer's petition for review and hold initially that employer preserved the question that it sought to raise in the Court of Appeals. We also hold that, under Oregon's employment discrimination laws, employer was not required to accommodate employee's use of medical marijuana. Accordingly, we reverse the Court of Appeals decision.

Since 1992, employee has experienced anxiety, panic attacks, nausea, vomiting, and severe stomach cramps, all of which have substantially limited his ability to eat. Between January 1996 and November 2001, employee used a variety of prescription drugs in an attempt to alleviate that condition. None of those drugs proved effective for an extended period of time, and some had negative effects. In 1996, [*162] employee began using marijuana to self-medicate his condition.

In April 2002, employee consulted with a physician for the purpose of obtaining a registry identification card under the Oregon Medical Marijuana Act. The physician signed a statement that employee has a "debilitating medical condition" and that "[m]arijuana may mitigate the [**4] symptoms or effects of this patient's condition." The statement added, however, "This is not a prescription for the use of medical marijuana." The statement that employee's physician signed tracks the terms of the Oregon Medical Marijuana Act. That act directs the state to issue registry identification cards to persons when a physician states that "the person has been diagnosed with a debilitating medical condition and that the medical use of marijuana may mitigate the symptoms or effects" of that condition. *ORS 475.309(2).* [1] No prescription is required as a prerequisite for obtaining a registry identification card. *See id.*

1 The 2001 version of the applicable statutes was in effect at the time of the events that gave rise to this proceeding. Since 2001, the legislature has amended those statutes but not in ways that affect our decision, and we have cited to the 2009 version of the statutes.

Based on the physician's statement, employee obtained a registry identification card in June 2002, which he renewed in 2003. [2] That card authorized employee to "engage in * * * the medical use of marijuana" subject to certain restrictions. *ORS 475.306(1).* Possession of the card also exempted him from [**5] state criminal prosecution for the possession, distribution, and manufacture of marijuana, provided that he met certain conditions. *ORS 475.309(1).*

2 *ORS 475.309(7)(a)(C)* requires a person possessing a registry identification card to submit annually "[u]pdated written documentation from the cardholder's attending physician of the person's debilitating medical condition and that the medical use of marijuana may mitigate the symptoms or effects" of that condition. If the person fails to do so, the card "shall be deemed expired." *ORS 475.309(7)(b).*

Employer manufactures steel products. In January 2003, employer hired employee on a temporary basis as a drill press operator. While working for employer, employee used medical marijuana one to three times per day, although not at work. Employee's work was satisfactory, and employer was considering hiring him on a permanent basis. Knowing [*163] that he would have to pass a drug test as a condition of permanent employment, employee told his supervisor that he had a registry identification card and that he used marijuana for a medical problem; he also showed his supervisor documentation from his physician. In response to a question from his supervisor, [**6] employee said that he had tried other medications but that marijuana was the most effective way to treat his condition. Neither employee's supervisor nor anyone else in management engaged in any other discussion with employee regarding alternative treatments for his condition. One week later, the supervisor discharged employee.

Two months later, employee filed a complaint with the Bureau of Labor and Industries (BOLI), alleging that employer had discriminated against him in violation of *ORS 659A.112.* That statute prohibits discrimination against an otherwise qualified person because of a disability and requires, among other things, that employers "make reasonable accommodation" for a person's disability unless doing so would impose an undue hardship on the employer. *ORS 659A.112(2)(e).* Having investigated employee's complaint, BOLI filed formal charges against employer, alleging that employer had discharged employee because of his disability in violation of *ORS 659A.112(2)(c)* and *(g)* and that employer had failed to reasonably accommodate employee's disability in violation of *ORS 659A.112(2)(e)* and *(f).* Employer filed an answer and raised seven affirmative defenses.

After hearing the [**7] parties' evidence, an administrative law judge (ALJ) issued a proposed order in which he found that employee was a disabled person within the meaning of ORS chapter 659A but that employer had not discharged employee because of his disability. The ALJ found instead that employer had discharged employee because he used marijuana and ruled that discharging employee for that reason did not violate *ORS 659A.112(2)(c)* or *(g).* The ALJ went on to rule, however, that employer had violated *ORS*

659A.112(2)(e) and *(f)*, which prohibit an employer from failing to reasonably accommodate the "known physical or mental limitations of an otherwise qualified disabled person," and from denying employment opportunities to an otherwise [*164] qualified disabled person when the denial is based on the failure "to make reasonable accommodation to the physical or mental impairments of the employee."

Among other things, the ALJ ruled that employer's failure to engage in a "meaningful interactive process" with employee, standing alone, violated the obligation set out in *ORS 659A.112(2)(e)* and *(f)* to reasonably accommodate employee's disability. The ALJ also found that employee had suffered damages as a result of those [**8] violations, and the commissioner of BOLI issued a final order that adopted the ALJ's findings in that regard.

Employer sought review of the commissioner's order in the Court of Appeals. As we understand employer's argument in the Court of Appeals, it ran as follows: Oregon law requires that *ORS 659A.112* be interpreted consistently with the federal Americans with Disabilities Act (ADA), *42 USC § 12111 et seq. Section 12114(a) of the ADA* provides that the protections of the ADA do not apply to persons who are currently engaged in the illegal use of drugs, and the federal Controlled Substances Act prohibits the possession of marijuana without regard to whether it is used for medicinal purposes. It follows, employer reasoned, that the ADA does not apply to persons who are currently engaged in the use of medical marijuana. Like the ADA, *ORS 659A.124* provides that the protections of *ORS 659A.112* do not apply to persons who are currently engaged in the illegal use of drugs. Employer reasoned that, if *ORS 659A.112* is interpreted consistently with the ADA, then *ORS 659A.112* also does not apply to persons who are currently engaged in medical marijuana use. Employer added that, in any event, the [**9] United States Supreme Court's opinion in *Raich* and the *Supremacy Clause* required that interpretation.

The Court of Appeals did not reach the merits of employer's argument. It concluded that employer had not presented that argument to the agency and thus had not preserved it. Accordingly, we begin with the question whether employer preserved the issues before BOLI that it sought to raise in the Court of Appeals.

Employer raised seven affirmative defenses in response to BOLI's complaint. The fifth affirmative defense alleged:

> [*165] "Oregon law prescribes that *ORS 659A.112* be construed to the extent possible in a manner that is consistent with any similar provisions of the Federal Americans with Disabilities Act of 1990, as amended. That Act does not permit the use of marijuana because marijuana is an illegal drug under Federal Law."

That affirmative defense is broad enough to encompass the argument that employer made in the Court of Appeals. To be sure, employer's fifth affirmative defense does not refer specifically to *ORS 659A.124*. However, it alleges that the ADA does not apply to persons who use marijuana, a proposition that necessarily depends on both *42 USC § 12114(a)*, the federal counterpart [**10] to *ORS 659A.124*, and the Controlled Substances Act. And the fifth affirmative defense also states that *ORS 659A.112* should be construed in the same manner as the ADA. Although employer could have been more specific, its fifth affirmative defense is sufficient to raise the statutory issue that it sought to argue in the Court of Appeals. [3]

> 3 BOLI points to nothing in its rules that suggests that more specificity was required. *Cf. OAR 839-050-0130* (providing only that affirmative defenses must be raised or waived).

Ordinarily, we would expect that employer would have developed the legal arguments in support of its fifth affirmative defense more fully at the agency hearing. However, the Court of Appeals issued its decision in *Washburn v. Columbia Forest Products, Inc., 197 Ore. App. 104, 104 P3d 609 (2005)*, two weeks before the hearing in this case, and employer concluded that the reasoning in *Washburn* foreclosed its fifth affirmative defense. The Court of Appeals held in *Washburn* that an employer's failure to accommodate an employee's use of medical marijuana violated *ORS 659A.112*. In reaching that holding, the Court of Appeals decided two propositions that bore on the validity of employer's [**11] fifth affirmative defense. First, it reasoned that the requirement in *ORS 659A.139* to interpret *ORS 659A.112* consistently with the ADA does not require absolute symmetry between state and federal law. *Id. at 109-10*. Second, it held that, as a matter of state law, the employee's medical use of marijuana was "not unlawful" for the purposes of a federal statute that prohibits the use of illegal drugs in the workplace. *Id. at 114-15*. The court noted that the question "[w]hether medical use of marijuana is unlawful under federal law is an open question" [*166] and that the United States Supreme Court had granted the government's petition for certiorari in *Raich* to decide that question. *Id. at 115 n 8*.

At the hearing in this case, employer told the ALJ that five of its affirmative defenses (including the fifth affirmative defense) were "foreclosed by the *Washburn*

decision" but that it was "not withdrawing them." Employer did not explain the basis for that position. We note, however, that the Court of Appeals' conclusion in *Washburn* that *ORS 659A.139* does not require absolute symmetry between the state and federal antidiscrimination statutes and its conclusion that medical marijuana use is "not [**12] unlawful" under state law effectively foreclosed reliance on *ORS 659A.139* and *ORS 659A.124* as a basis for employer's fifth affirmative defense. There would be little point in arguing before the ALJ that employee was currently engaged in the illegal use of drugs if, as the Court of Appeals had just stated in *Washburn,* the use of medical marijuana is not illegal. [4] The ALJ issued a proposed order in which it ruled that the Court of Appeals decision in *Washburn* controlled, among other things, employer's fifth affirmative defense.

4 To be sure, the Court of Appeals reserved the question in *Washburn* whether the use of medical marijuana is unlawful under federal law, but that did not detain it from holding that the employer in that case had an obligation under *ORS 659A.112* to accommodate the employee's use of medical marijuana. Given *Washburn*'s holding, employer reasonably conceded its controlling effect until, as noted below, the Supreme Court issued its decision in *Raich.*

After the ALJ filed his proposed order, the United States Supreme Court issued its decision in *Raich* and held that Congress had acted within its authority under the Commerce Clause in prohibiting the possession, manufacture, [**13] and distribution of marijuana even when state law authorizes its use for medical purposes. *545 U.S. at 33. Raich* addressed the question that the Court of Appeals had described in *Washburn* as open -- whether using marijuana, even for medical purposes, is unlawful under federal law. Employer filed a supplemental exception based on *Raich* and alternatively a request to reopen the record to consider *Raich.* Employer argued that, as a result of *Raich,* "states may not authorize the use of marijuana for medicinal purposes" and that "[t]he impact of this decision is that [*167] [employer] should prevail on its Fourth and Fifth Affirmative Defenses."

BOLI responded that the ALJ should not reopen the record. It reasoned that *Raich* did not invalidate Oregon's medical marijuana law and that, in any event, employer could have raised a preemption argument before the Court issued its decision in *Raich.* Employer replied that, as it read *Raich,* the "Supreme Court has ruled that legalization of marijuana is preempted by federal law. This obviously invalidates the Oregon Medical Marijuana Act." Employer also explained that it had raised this issue in its fourth and fifth affirmative defenses, which "recite[d] [**14] that marijuana is an illegal drug under federal law, and that state law deferred to federal law." After considering the parties' arguments, the ALJ allowed employer's motion to reopen the record, stating that "[t]he forum will consider the Supreme Court's ruling in *Raich* to the extent that it is relevant to [employer's] case." Later, the Commissioner ruled that the Controlled Substances Act, which was at issue in *Raich,* did not preempt the Oregon Medical Marijuana Act.

As we read the record, employer took the position before the agency that, like the protections of the federal ADA, the protections of *ORS 659A.112* do not apply to a person engaged in the use of illegal drugs, a phrase that, as a result of controlling federal law, includes the use of medical marijuana. We conclude that employer's arguments were sufficient to preserve the issue that it sought to raise on judicial review in the Court of Appeals. To be sure, employer's fifth affirmative defense, as pleaded, turned solely on a question of statutory interpretation. Employer did not raise the preemption issue or argue that federal law required a particular reading of Oregon's statutes until employer asked the ALJ to reopen the [**15] record to consider *Raich.* Perhaps the ALJ could have declined to reopen the record. However, once the ALJ chose to reopen the record and the Commissioner chose to address employer's preemption arguments based on *Raich,* then employer's federal preemption arguments were also properly before the agency. [5]

5 After the Commissioner issued his final order in this case, this court reversed the Court of Appeals decision in *Washburn. Washburn v. Columbia Forest Products, Inc., 340 Ore. 469, 480, 134 P3d 161 (2006).* This court held that the employee in *Washburn* was not a disabled person within the meaning of ORS chapter 659A. *Id. at 479.* Given that holding, this court did not reach the other issues that the Court of Appeals had addressed in *Washburn.* After this court's decision in *Washburn,* the commissioner withdrew the final order and issued a revised order on reconsideration, adhering to his earlier resolution of employer's affirmative defenses in this case.

[*168] As noted, the Court of Appeals reached a different conclusion regarding preservation, and we address its reasoning briefly. The Court of Appeals reasoned that, in telling the ALJ that *Washburn* foreclosed its affirmative defenses, employer [**16] adopted the specific defenses that the employer in *Washburn* had asserted and that employer was now limited to those defenses. *220 Ore. App. at 437.* The difficulty, the Court of Appeals explained, was that the statutory issues that employer had raised in its affirmative defenses and sought

to raise on judicial review differed from the issues that the employer had raised in *Washburn. Id.*

In our view, the Court of Appeals misperceived the import of what employer told the ALJ. Employer reasonably acknowledged that the reasoning in *Washburn* controlled the related but separate defenses that it was raising in this case. Employer did not say that it was advancing the same issues that the employer had asserted in *Washburn,* and the Court of Appeals erred in holding otherwise.

The Court of Appeals also concluded that employer had not preserved its argument regarding the preemptive effect of the Controlled Substances Act, as interpreted in *Raich. Washburn, 220 Ore. App. at 437-38.* It noted that, on judicial review, employer argued that federal law required its interpretation of Oregon's antidiscrimination statutes while it had argued before the agency that federal law preempted the Oregon Medical [**17] Marijuana Act. *Id.* We read the record differently. As explained above, employer made both arguments before the agency. [6]

6 As noted, employer moved to reopen the record on the ground that, as a result of *Raich,* "states may not authorize the use of marijuana for medicinal purposes" and that "[t]he impact of this decision is that [employer] should prevail on its Fourth and Fifth Affirmative Defenses." Employer thus told the agency that the Controlled Substances Act, as interpreted in *Raich,* compelled its interpretation of Oregon's antidiscrimination statutes. Additionally, in response to BOLI's arguments, employer contended that the Controlled Substances Act preempted the Oregon Medical Marijuana Act.

[*169] Having concluded that employer preserved the issues it sought to raise on judicial review, we turn to the merits of those issues. [7] Employer's statutory argument begins with *ORS 659A.124(1),* which provides that "the protections of *ORS 659A.112* do not apply to any * * * employee who is currently engaging in the illegal use of drugs if the employer takes action based on that conduct." [8] It follows, employer reasons, that it had no obligation under *ORS 659A.112(2)(e)* and *(f)* to reasonably accommodate [**18] employee's medical marijuana use. In responding to that argument on the merits, BOLI does not dispute that employee was currently engaged in the use of medical marijuana, nor does it dispute that employer discharged employee for that reason. Rather, BOLI advances two arguments why *ORS 659A.124* does not support employer's position.

7 We note that both California and Washington have considered whether their state medical marijuana laws give medical marijuana users either a claim under California's fair employment law or an implied right of action under Washington law against an employer that discharges or refuses to hire a person for off-work medical marijuana use. *See Roe v. Teletech Customer Care Management, 152 Wash App 388, 216 P3d 1055 (2009); Ross v. Ragingwire Telecommunications, Inc., 42 Cal 4th 920, 70 Cal. Rptr. 3d 382, 174 P3d 200 (2008).* Both the California and Washington courts have held that, in enacting their states' medical marijuana laws, the voters did not intend to affect an employer's ability to take adverse employment actions based on the use of medical marijuana. *Roe, 216 P3d at 1058-61; Ross, 174 P3d at 204.* Accordingly, in both Washington and California, employers do not have to accommodate [**19] their employees' off-site medical marijuana use. We reach the same conclusion, although our analysis differs because Oregon has chosen to write its laws differently.

8 *ORS 659A.124* lists exceptions to that rule, none of which applies here. *See ORS 659A.124(2)* (recognizing exceptions for persons who either are participating in or have successfully completed a supervised drug rehabilitation program and are no longer engaging in the illegal use of drugs).

As we understand BOLI's first argument, it contends that, because the commissioner found that employer had violated *ORS 659A.112(2)(e)* and *(f)* by failing to engage in a "meaningful interactive process," *ORS 659A.124* is inapposite. We reach precisely the opposite conclusion. The commissioner explained that engaging in a "meaningful interactive process" is the "mandatory first step in the process of reasonable accommodation" that *ORS 659A.112(2)(e)* and *(f)* require. However, *ORS 659A.124* provides that "the protections of *ORS 659A.112* do not apply" to an employee who is currently engaged in the illegal use of drugs, if the employer [*170] takes an adverse action based on that use. Under the plain terms of *ORS 659A.124,* if medical marijuana use is [**20] an illegal use of drugs within the meaning of *ORS 659A.124,* then *ORS 659A.124* excused employer from whatever obligation it would have had under *ORS 659A.112* to engage in a "meaningful interactive process" or otherwise accommodate employee's use of medical marijuana.

BOLI advances a second, alternative argument. It argues that "employee's use of medical marijuana was entirely legal under state law" and thus not an "illegal use of drugs" within the meaning of *ORS 659A.124.* BOLI recognizes, as it must, that the federal Controlled Substances Act prohibits possession of marijuana even

when used for medical purposes. BOLI's argument rests on the assumption that the phrase "illegal use of drugs" in *ORS 659A.124* does not include uses that are legal under state law even though those same uses are illegal as a matter of federal law. BOLI never identifies the basis for that assumption; however, a state statute defines the phrase "illegal use of drugs," as used in *ORS 659A.124*, and we turn to that statute for guidance in resolving BOLI's second argument.

ORS 659A.122 provides, in part:

> "As used in this section and *ORS 659A.124*, 659A.127 and *659A.130*:
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> "* * * *
>
> "(2) 'Illegal use of drugs' means any use [**21] of drugs, the possession or distribution of which is unlawful under state law or under the federal Controlled Substances Act, *21 U.S.C.A. 812*, as amended, but does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized under the Controlled Substances Act or under other provisions of state or federal law." [9]

9 Before 2009, *former ORS 659A.100(4)* (2001) defined the phrase "illegal use of drugs." In 2009, the legislature renumbered that definition as *ORS 659A.122(2)*.

The definition of "illegal use of drugs" divides into two parts. The first part defines the drugs that are included within the definition -- all drugs whose use or possession is unlawful under state or federal law. Marijuana clearly falls within the [*171] first part of the definition. The second part of the definition excludes certain uses of what would otherwise be an illegal use of a drug. Two exclusions are potentially applicable here: (1) the exclusion for "uses authorized under * * * other provisions of state * * * law" and (2) the exclusion for "the use of a drug taken under supervision of a licensed health care professional." [**22] We consider each exclusion in turn.

We begin with the question whether employee's use of medical marijuana is a "us[e] authorized under * * * other provisions of state * * * law." We conclude that, as a matter of statutory interpretation, it is an authorized use. The Oregon Medical Marijuana Act affirmatively authorizes the use of medical marijuana, in addition to exempting its use from state criminal liability. Specifically, *ORS 475.306(1)* provides that "[a] person who possesses a registry identification card * * * may engage in * * * the medical use of marijuana" subject to certain restrictions. *ORS 475.302(10)*, in turn, defines a registry identification card as "a document * * * that identifies a person authorized to engage in the medical use of marijuana." Reading those two subsections together, we conclude that *ORS 475.306(1)* affirmatively authorizes the use of marijuana for medical purposes [10] and, as a statutory matter, brings the use of medical marijuana within one of the exclusions from the "illegal use of drugs" in *ORS 659A.122(2)*. [11]

10 The ballot title for the Oregon Medical Marijuana Act confirms that interpretation of the act. *See State v. Gaines, 346 Ore. 160, 172, 206 P3d 1042 (2009)* [**23] (looking to legislative history to confirm text). The caption, "yes" vote result statement, and summary of the ballot title focused on the fact that the measure, if enacted, would allow permit-holders to use medical marijuana and referred to the exemption from criminal laws only at the end of the summary. Official Voters' Pamphlet, Nov 3, 1998, 148. The caption stated that the measure "[a]llows medical use of marijuana within limits; establishes permit system." The "yes" vote result statement was to the same effect, and the summary stated that current law prohibits the possession and manufacture of marijuana but that the measure "allows engaging in, assisting in, medical use of marijuana." *Id.* Only at the end of the summary did the ballot title add that the measure "excepts permit holder or applicant from marijuana criminal statutes." *Id.*

11 The Oregon Medical Marijuana Act also exempts medical marijuana use from state criminal liability. *See ORS 475.309(1)* (excepting persons holding registry identification cards from certain state criminal prohibitions); *ORS 475.319* (creating an affirmative defense to certain criminal prohibitions for persons who do not hold registry identification [**24] cards but who have complied with the conditions necessary to obtain one). Because *ORS 659A.122(2)* excludes from the definition of illegal use of drugs only those uses authorized by state law, the provisions of the Oregon Medical Marijuana Act that are relevant here are those provisions that affirmatively authorize the use of medical marijuana, as opposed to those provisions that exempt its use from criminal liability.

[*172] Employer argues, however, that the *Supremacy Clause of the United States Constitution* requires that we interpret Oregon's statutes consistently with the federal Controlled Substances Act. We under-

stand employer's point to be that, to the extent that *ORS 475.306(1)* affirmatively authorizes the use of medical marijuana, federal law preempts that subsection and that, without any effective state law authorizing the use of medical marijuana, employee's use of that drug was an "illegal use of drugs" within the meaning of *ORS 659A.124.* [12] We turn to that question and begin by setting out the general principles that govern preemption. We then discuss the federal Controlled Substances Act and finally turn to whether the Controlled Substances Act preempts the Oregon Medical Marijuana [**25] Act to the extent that state law affirmatively authorizes the use of medical marijuana.

12 The only issue that employer's preemption argument raises is whether federal law preempts *ORS 475.306(1)* to the extent that it authorizes the use of medical marijuana. In holding that federal law does preempt that subsection, we do not hold that federal law preempts the other sections of the Oregon Medical Marijuana Act that exempt medical marijuana use from criminal liability. We also express no opinion on the question whether the legislature, if it chose to do so and worded Oregon's disability law differently, could require employers to reasonably accommodate disabled employees who use medical marijuana to treat their disability. Rather, our opinion arises from and is limited to the laws that the Oregon legislature has enacted.

The United States Supreme Court recently summarized the general principles governing preemption:

> "Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that '"[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case.' *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S Ct 2240, 135 L Ed 2d 700 (1996)* (quoting *Retail Clerks v. Schermerhorn, 375 U.S. 96, 103, 84 S Ct 219, 11 L Ed 2d 179 (1963)).* [**26] Congress may indicate a pre-emptive intent through a statute's express language or through its structure and purpose. *See Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S Ct 1305, 51 L Ed 2d 604 (1977).* * * * Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and [*173] federal law. *Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S Ct 1483, 131 L Ed 2d 385 (1995).*
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> "When addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S Ct 1146, 91 L Ed 1447 (1947).*"

Altria Group, Inc. v. Good, US , , 129 S Ct 538, 543, 172 L Ed 2d 398 (2008).

With those principles in mind, we turn to the Controlled Substances Act. The central objectives of that act "were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the [**27] need to prevent the diversion of drugs from legitimate to illicit channels." *Raich, 545 U.S. at 12-13* (footnotes omitted). To accomplish those objectives, Congress created a comprehensive, closed regulatory regime that criminalizes the unauthorized manufacture, distribution, dispensation, and possession of controlled substances classified in five schedules. *Id. at 13.*

The Court has explained that:

> "Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. [*21 USC] § 812(b)(1).* These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. [*21 USC] § 812(b).*"

Id. at 14. Consistent with Congress's determination that the controlled substances listed in Schedule II through V have currently accepted medical uses, the Controlled Substances Act authorizes physicians to prescribe those substances for medical [**28] use, provided that they do so within the bounds of professional practice. *See United States v. Moore, 423 U.S. 122, 142-43, 96 S Ct 335, 46 L Ed 2d 333 (1975).* [13] By contrast, [*174] because Schedule I controlled substances lack any accepted medical use, federal law prohibits *all* use of those drugs "with the sole exception being use of [Schedule I]

drug[s] as part of a Food and Drug Administration pre-approved research project." *Raich, 545 U.S. at 14*; *see 21 USC § 823(f)* (recognizing that exception for the use of Schedule I drugs).

13 Two subsections of the Controlled Substances Act accomplish that result. *Section 823(f)* directs the Attorney General to register physicians and other practitioners to dispense controlled substances listed in Schedule II through V. *21 USC § 823(f). Section 822(b)* authorizes persons registered with the Attorney General to dispense controlled substances "to the extent authorized by their registration and in conformity with the other provisions of this subchapter." *21 USC § 822(b).*

Congress has classified marijuana as a Schedule I drug, *21 USC § 812(c)*, and federal law prohibits its manufacture, distribution, and possession, *21 USC § 841(a)(1)*. Categorizing marijuana [**29] as a Schedule I drug reflects Congress's conclusion that marijuana "lack[s] any accepted medical use, and [that there is an] absence of any accepted safety for use in medically supervised treatment." *Raich, 545 U.S. at 14* (citing *21 USC § 812(b)(1)*). Consistently with that classification, the Court has concluded that the Controlled Substances Act does not contain a "medical necessity" exception that permits the manufacture, distribution, or possession of marijuana for medical treatment. *Oakland Cannabis Buyers' Cooperative, 532 U.S. at 494* and n 7. [14] Despite efforts to reclassify marijuana, it has remained a Schedule I drug since the enactment of the Controlled Substances Act. *See Raich, 545 U.S. at 14-15* and n 23 (summarizing "considerable efforts," ultimately unsuccessful, to reschedule marijuana).

14 The specific question in *Oakland Cannabis Buyers' Cooperative* was whether there was a medical necessity exception for manufacturing and distributing marijuana. The Court explained, however, that, "[l]est there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing [**30] and the other prohibitions in the Controlled Substances Act." *532 U.S. at 494 n 7.*

Section 903 of the Controlled Substances Act addresses the relationship between that act and state law. It provides:

> "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same [*175] subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

21 USC § 903. Under the terms of *section 903*, states are free to pass laws "on the same subject matter" as the Controlled Substances Act unless there is a "positive conflict" between state and federal law "so that the two cannot consistently stand together."

When faced with a comparable preemption provision, the Court recently engaged in an implied preemption analysis to determine whether a federal statute preempted state law. *Wyeth v. Levine, US , , 129 S Ct 1187, 1196-1200, 173 L Ed 2d 51 (2009).* [15] That is, the Court asked whether [**31] there is an "actual conflict" between state and federal law. An actual conflict will exist either when it is physically impossible to comply with both state and federal law or when state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp., 514 U.S. at 287* (quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).*

15 The provision at issue in *Wyeth* provided that the federal statute did not preempt state law unless there was a "direct and positive" conflict between state and federal law. *Wyeth, 129 S Ct at 1196.* At first blush, one might think that the Court would have looked to the standard that Congress had expressly provided -- whether there is a "direct and positive conflict" between the state and federal laws -- to determine the extent to which federal law preempts state law. *See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517, 112 S Ct 2608, 120 L Ed 2d 407 (1992)* (holding that the preemptive effect of a federal act is "governed entirely" by an express preemption provision). Implied preemption, however, addresses a similar issue, and the Court used an implied preemption [**32] analysis in *Wyeth* without any discussion. *129 S Ct at 1196-1200.* Given *Wyeth,* we follow a similar course here.

The Court has applied the physical impossibility prong narrowly. *Wyeth, 129 S Ct at 1199* (so stating); *id. at 1209* (Thomas, J., concurring in the judgment). [16] For example, in *Barnett Bank v. Nelson, 517 U.S. 25, 116 S Ct 1103, 134 L Ed 2d 237* [*176] *(1996)*, the question

was whether "a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so." *Id. at 27.* Although the two statutes were logically inconsistent, the Court held that it was not physically impossible to comply with both. *Id. at 31.* A national bank could simply refrain from selling insurance. *See Wyeth, 129 S Ct at 1209* (Thomas, J., concurring in the judgment) (explaining physical impossibility test).

> 16 Justice Thomas noted that the Court had used different formulations to explain when it would be physically impossible to comply with both state and federal laws and questioned whether the Court had applied that standard too strictly. *Wyeth, 129 S Ct at 1208-09* (opinion concurring in the judgment). In his view, the physical impossibility test is too narrow, [**33] and asking whether state law stands as an obstacle to the purposes of the federal law too amorphous. He would have asked whether the state and federal law are in direct conflict. *Id.; see* Caleb Nelson, *Preemption, 86 Va L Rev 225, 260-61 (2000)* (reasoning that historically and practically preemption reduces to a "logical contradiction" test).

Under that reasoning, it is not physically impossible to comply with both the Oregon Medical Marijuana Act and the federal Controlled Substances Act. To be sure, the two laws are logically inconsistent; state law authorizes what federal law prohibits. However, a person can comply with both laws by refraining from any use of marijuana, in much the same way that a national bank could comply with state and federal law in *Barnett Bank* by simply refraining from selling insurance.

Because the "physical impossibility" prong of implied preemption is "vanishingly narrow," Caleb Nelson, *Preemption, 86 Va L Rev 225, 228 (2000)*, the Court's decisions typically have turned on the second prong of implied preemption analysis -- whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines, 312 U.S. at 67* [**34] (stating test). In *Barnett Bank,* for example, the Court stated, as a self-evident proposition, that a state law that prohibited national banks from selling insurance when federal law permitted them to do so would stand as an obstacle to the full accomplishment of Congress's purpose, but it then added "unless, of course, that federal purpose is to grant [national] bank[s] only a very *limited* permission, that is, permission to sell insurance *to the extent that state law also grants permission to do so.*" *Barnett Bank, 517 U.S. at 31* (emphasis in original). Having considered the text and history of the federal statute and finding no basis for implying such a limited permission, the Court held that the state statute was preempted. *Id. at 35-37.*

[*177] The Court has reached the same conclusion when, as in this case, state law permits what federal law prohibits. *Michigan Canners & Freezers v. Agricultural Bd., 467 U.S. 461, 104 S Ct 2518, 81 L Ed 2d 399 (1984).* In *Michigan Canners,* federal law prohibited food producers' associations from interfering with an individual food producer's decision whether to bring that individual's products to the market on his or her own or to sell them through the association. [**35] *Id. at 464-65.* Michigan law on this issue generally tracked federal law; however, Michigan law permitted food producers' associations to apply to a state board for authority to act as the exclusive bargaining agent for all producers of a particular commodity. *Id. at 466.* When the state board gave a producer's association that authority, all producers of a commodity had to adhere to the terms of the contracts that the association negotiated with food processors, even when the producer had declined to join the association. *Id. at 467-68.*

In considering whether federal law preempted the Michigan law, the Court held initially that it was physically possible to comply with both state and federal law. The Court reasoned that, because the "Michigan Act is cast in permissive rather than mandatory terms -- an association *may,* but need not, act as exclusive bargaining representative -- this is not a case in which it is [physically] impossible for an individual to comply with both state and federal law." *Id. at 478 n 21* (emphasis in original). The Court went on to conclude, however, that "because the Michigan Act authorizes producers' associations to engage in conduct that the federal Act forbids, [**36] it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id. at 478* (quoting *Hines, 312 U.S. at 67*).

The preemption issue in this case is similar to the issue in *Michigan Canners* and *Barnett Bank.* In this case, *ORS 475.306(1)* affirmatively authorizes the use of medical marijuana. The Controlled Substances Act, however, prohibits the use of marijuana without regard to whether it is used for medicinal purposes. As the Supreme Court has recognized, by classifying marijuana as a Schedule I drug, Congress has expressed its judgment that marijuana has no recognized medical use. *See Raich, 545 U.S. at 14.* Congress did not intend to enact a limited prohibition on the use of [*178] marijuana -- *i.e.,* to prohibit the use of marijuana unless states chose to authorize its use for medical purposes. *Cf. Barnett Bank, 517 U.S. at 31-35* (reaching a similar conclusion regarding the scope of the national bank act). Rather, Congress imposed a blanket federal prohibition on the use of marijuana without regard to state permission to use mariju-

ana for medical purposes. *Oakland Cannabis Buyers' Cooperative, 532 U.S. at 494 & n 7.*

Affirmatively authorizing a [**37] use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act. *Michigan Canners, 467 U.S. at 478.* To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so. But the state law at issue in *Michigan Canners* did not prevent the federal government from seeking injunctive and other relief to enforce the federal prohibition in that case. Rather, state law stood as an obstacle to the enforcement of federal law in *Michigan Canners* because state law affirmatively authorized the very conduct that federal law prohibited, as it does in this case.

To the extent that *ORS 475.306(1)* affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it "without effect." *See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S Ct 2608, 120 L Ed 2d 407 (1992)* ("[S]ince our decision in *McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 427, 4 L. Ed. 579 (1819)*, it has been settled that state law that conflicts with federal law is 'without effect.'") Because *ORS 475.306(1)* was [**38] not enforceable when employer discharged employee, no enforceable state law either authorized employee's use of marijuana or excluded its use from the "illegal use of drugs," as that phrase is defined in *ORS 659A.122(2)* and used in *ORS 659A.124.* It follows that BOLI could not rely on the exclusion in *ORS 659A.122(2)* for "uses authorized * * * under other provisions of state * * * law" to conclude that medical marijuana use was not an illegal use of drugs within the meaning of *ORS 659A.124.*

[*179] The commissioner reached a different conclusion regarding preemption, as would the dissenting opinion. We address the commissioner's reasoning before turning to the dissent. The commissioner, for his part, adopted the reasoning from an informal Attorney General opinion, dated June 17, 2005, which concluded that the Controlled Substances Act does not invalidate the Oregon Medical Marijuana Act. Letter of Advice dated June 17, 2005, to Susan M. Allan, Public Health Direction, Department of Human Services. In reaching that conclusion, the Attorney General focused on those parts of the Oregon Medical Marijuana Act that either exempt medical marijuana users from state criminal liability or provide an affirmative [**39] defense to criminal charges. *Id.* at 2. [17] In concluding that those exemptions from state criminal liability were valid, the Attorney General relied on a line of federal cases holding that "Congress cannot compel the States to enact or enforce a federal regulatory program." *See Printz v. United States, 521 U.S. 898, 935, 117 S Ct 2365, 138 L Ed 2d 914 (1997)* (so stating); *New York v. United States, 505 U.S. 144, 162, 112 S Ct 2408, 120 L Ed 2d 120 (1992)* (stating that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions"). The Attorney General concluded that Oregon was free, as a matter of state law, to exempt medical marijuana use from criminal liability because Congress lacks the authority to require Oregon to prohibit that use.

> 17 The Attorney General's opinion stated that the Oregon Medical Marijuana Act "protects users who comply with its requirements from state criminal prosecution for production, possession, or delivery of a controlled substance." Letter Opinion at 2. In support of that statement, the opinion cited *former ORS 475.306(2)* (2003), which provided an affirmative defense for [**40] persons who possessed excess amounts of marijuana if possession of that amount of marijuana were medically necessary. *See* Or Laws 2005, ch 822, § 2 (repealing that provision). The opinion also cited *ORS 475.319* and *ORS 475.309(9)*, which provides an affirmative defense to criminal liability for persons who have applied for but not yet received a registry identification card.

The Attorney General's opinion has no bearing on the issue presented in this case for two reasons. First, as noted, one subsection of the Oregon Medical Marijuana Act affirmatively authorizes the use of medical marijuana. [*180] *ORS 475.306(1).* Other provisions exempt its use from state criminal liability. *See, e.g., ORS 475.309(1); ORS 475.319.* In this case, only the validity of the authorization matters. *ORS 659A.122(2)* excludes medical marijuana use from the definition of "illegal use of drugs" for the purposes of the state employment discrimination laws if state law authorizes that use. The Attorney General's opinion, however, addresses only the validity of the exemptions; it does not address the validity of the authorization found in *ORS 475.306(1).* It thus does not address the issue that is central to the resolution [**41] of this case.

Second, and more importantly, the validity of the exemptions and the validity of the authorization turn on different constitutional principles. The Attorney General reasoned that the exemptions from criminal liability are valid because "Congress cannot compel the States to enact or enforce a federal regulatory program" -- a restriction that derives from Congress's limited authority under the federal constitution. *See Printz, 521 U.S. at 935* (stating limited authority); *New York, 505 U.S. at 161-66* (describing the sources of that limitation). Under

the Attorney General's reasoning and the United States Supreme Court decisions on which his opinion relies, Congress lacks authority to require states to criminalize conduct that the states choose to leave unregulated, no matter how explicitly Congress directs the states to do so.

By contrast, there is no dispute that Congress has the authority under the *Supremacy Clause* to preempt state laws that affirmatively authorize the use of medical marijuana. Whether Congress has exercised that authority turns on congressional intent: that is, did Congress intend to preempt the state law? *See Cipollone, 505 U.S. at 516* (describing preemption [**42] doctrine). More specifically, the constitutional question in this case is whether, under the doctrine of implied preemption, a state law authorizing the use of medical marijuana "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines, 312 U.S. at 67* (stating that test). Nothing in the Attorney General's opinion addresses that question, and the commissioner erred in finding an answer in the Attorney [*181] General's opinion to a question that the Attorney General never addressed.

The dissent addresses the issue that the Attorney General's opinion did not and would hold for alternative reasons that *ORS 475.306(1)* does not stand as an obstacle to the full accomplishment of Congress's purposes in enacting the Controlled Substances Act. The dissent reasons that, because *ORS 475.306(1)* does not "giv[e] permission to violate the Controlled Substances Act or affec[t] its enforcement, [that subsection] does not pose an obstacle to the federal act necessitating a finding of implied preemption." Ore. at (Walters, J., dissenting) (slip op at 9). [18] In the dissent's view, the fact that a state law affirmatively authorizes conduct that [**43] federal law explicitly forbids is not sufficient to find that the state law poses an obstacle to the full accomplishment of the purposes of the federal law and is thus preempted. The dissent also advances what appears to be an alternative basis for its position. It reasons that the Oregon Medical Marijuana Act, as a whole, exempts medical marijuana use from state criminal liability and that *ORS 475.306(1)* is merely one part of that larger exemption. It appears to draw two different legal conclusions from that alternative proposition. It suggests that, to the extent *ORS 475.306(1)* merely exempts medical marijuana use from criminal liability, then Congress lacks power to require states to criminalize that conduct under the line of cases that the Attorney General cited. Alternatively, it suggests that, because authorization is merely the other side of the coin from exemption, authorizing medical marijuana use poses no more of an obstacle to the accomplishment of the purposes of the Controlled Substances Act than exempting that use from state criminal liability and thus that use is not preempted. We begin with the test that the dissent would employ in obstacle preemption cases.

18 The dissent [**44] phrases the test it would apply in various ways throughout its opinion. For instance, it begins its opinion by stating that the Oregon Medical Marijuana Act neither "permits [n]or requires the violation of the Controlled Substances Act." Ore. at (Walters, J., dissenting) (slip op at 1). Because the Oregon Medical Marijuana Act permits (and indeed authorizes) conduct that violates the Controlled Substances Act, we understand the dissent to use the word "permits" to mean expressly purports to "giv[e] permission," as it later rephrases its test. We also note that, if the Oregon Medical Marijuana Act "required" a violation of federal law, then the physical impossibility prong of implied preemption would apply.

[*182] As noted, the dissent would hold that a state law stands as an obstacle to the execution and accomplishment of the full purposes of a federal law (and is thus preempted) if the state law purports to override federal law either by giving permission to violate the federal law or by preventing the federal government from enforcing its laws. We do not disagree that such a law would be an obstacle. But it does not follow that anything less is not an obstacle. Specifically, we disagree [**45] with the dissent's view that a state law that specifically authorizes conduct that a federal law expressly forbids does not pose an obstacle to the full accomplishment of the purposes of the federal law and is not preempted.

If Congress chose to prohibit anyone under the age of 21 from driving, states could not authorize anyone over the age of 16 to drive and give them a license to do so. The state law would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress (keeping everyone under the age of 21 off the road) and would be preempted. Or, to use a different example, if federal law prohibited all sale and possession of alcohol, a state law licensing the sale of alcohol and authorizing its use would stand as an obstacle to the full accomplishment of Congress's purposes. *ORS 475.306(1)* is no different. To the extent that *ORS 475.306(1)* authorizes persons holding medical marijuana licenses to engage in conduct that the Controlled Substances Act explicitly prohibits, it poses the same obstacle to the full accomplishment of Congress's purposes (preventing all use of marijuana, including medical uses).

The dissent, however, reasons that one state case and [**46] four federal cases support its view of obstacle preemption. It reads *State v. Rodriguez, 317 Ore. 27, 854*

P2d 399 (1993), as providing direct support for its view. *See* Ore. at (Walters, J., dissenting) (slip op at 9). In *Rodriguez,* federal Immigration and Naturalization Service (INS) agents obtained evidence pursuant to a federal administrative warrant that was valid under federal law but not under the Oregon Constitution, and the question was whether suppressing evidence obtained pursuant to that warrant in a [*183] state criminal proceeding was an obstacle to the accomplishment of the full purposes and objectives of the federal immigration laws. This court held that it was not. Suppressing evidence in the state criminal proceeding was completely unrelated to the INS's ability to carry out its separate mission of enforcing the federal immigration laws in a federal administrative proceeding. This court did not hold in *Rodriguez,* as the dissent appears to conclude, that state law will be an obstacle to the full accomplishment of the purposes of the federal law only if state law interferes with the federal government's ability to enforce its laws.

The dissent also relies on four United [**47] States Supreme Court cases "for the proposition that states may impose standards of conduct different from those imposed by federal law without creating an obstacle to the federal law." Ore. at (Walters, J., dissenting) (slip op at 12). It follows, the dissent reasons, that the mere fact that state law authorizes conduct that federal law forbids does not mean that state law is an obstacle to the accomplishment of the purposes of the federal law. The four cases on which the dissent relies stand for a narrower proposition than the dissent draws from them. In interpreting the applicable federal statute in each of those cases, the Court concluded that Congress intended to leave states free to impose complementary or supplemental regulations on a person's conduct. None of those cases holds that states can authorize their citizens to engage in conduct that Congress explicitly has forbidden, as *ORS 475.306(1)* does.

In *Wyeth,* one of the cases on which the dissent relies, the defendant argued that permitting state tort remedies based on a drug manufacturer's failure to warn would "interfere with 'Congress's purpose to entrust an expert agency to make drug labeling decisions that strike [**48] a balance between competing objectives.'" *129 S Ct at 1199* (quoting the defendant's argument). After considering the history of the federal statute, the Court concluded that "Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness." *Id. at 1200.* The Court concluded instead that Congress intended to allow complementary state tort remedies. *Id.* Given that interpretation of the federal law, the Court determined that the state tort remedy [*184] was consistent with, and not an obstacle to, Congress's purpose in requiring warnings in the first place. Put differently, the state law was not an obstacle to Congress's purpose because Congress intended to permit states to continue enforcing complementary tort remedies.

The Court's opinion in *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S Ct 1210, 10 L Ed 2d 248 (1963)*, on which the dissent also relies, is to the same effect. In that case, the Court determined that a federal marketing order setting minimum standards for picking, processing, and transporting avocados did not reflect a congressional intent to prevent states from enacting laws governing "the distribution and retail sale [**49] of those commodities." *373 U.S. at 145.* As the Court explained, "[c]ongressional regulation at one end of the stream of commerce does not, *ipso facto,* oust all state regulation at the other end." *Id.* The Court accordingly concluded that there was "no irreconcilable conflict with the federal regulation [that] require[d] a conclusion that [the state law] was displaced." *Id. at 146.* [19] The Court's reasoning implies that, when, as in this case, there is an irreconcilable conflict between state and federal law, that conflict "requires a conclusion that [the state law] [i]s displaced." *See id.*

19 The dissenting opinion quotes the dissent in *Florida Lime & Avocado* for the proposition that the conflict between state and federal law in that case was unmistakable. *See* Ore. at (Walters, J., dissenting) (slip op at 13-14) (quoting *Florida Lime & Avocado, 373 U.S. at 173* (White, J., dissenting)). The majority, however, disagreed on that point, *373 U.S. at 145-46*, and its conclusion that federal law left room for complementary state law was pivotal to its conclusion that the federal marketing order did not preempt California law.

In both *Florida Lime & Avocado* and *Wyeth* and the other two cases [**50] the dissent cites, the Court interpreted the applicable federal statute to permit complementary or supplementary state law. [20] None of those cases considered state [*185] laws that authorized conduct that the federal law specifically prohibited, as is present in this case, and none of those cases stands for the proposition that such a law would not be an obstacle to the accomplishment of the full purposes of Congress. Rather, the Court's opinion in *Florida Lime & Avocado* points in precisely the opposite direction; it teaches that when, as in this case, the state and federal laws are in "irreconcilable conflict," federal law will displace state law. *See 373 U.S. at 146.*

20 The other two United States Supreme Court cases on which the dissent relies are to the same effect. Neither case involved a federal statute that, as the Court interpreted it, prohibited what

the state law authorized. *See California v. ARC America Corp., 490 U.S. 93, 103, 109 S Ct 1661, 104 L Ed 2d 86 (1989)* (explaining that nothing in an earlier decision that only direct purchasers may bring an action under *section 4* of the Clayton Act "suggests that it would be contrary to congressional purposes for States to allow indirect [**51] purchasers to recover under their own antitrust laws"); *Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256, 104 S Ct 615, 78 L Ed 2d 443 (1984)* (holding that, even though Congress "was well aware of the NRC's exclusive authority to regulate safety matters," Congress also had "assumed that state law remedies, in whatever form they might take, were available to those injured in nuclear incidents").

As noted, the dissent also advances what appears to be an alternative ground for its position. The dissent reasons that *ORS 475.306(1)* does not affirmatively authorize the use of medical marijuana; it views that subsection instead as part of a larger exemption of medical marijuana use from state criminal laws. The dissent's reasoning is difficult to square with the text of *ORS 475.306(1)*. That subsection provides that a person holding a registry identification card "may engage" in the limited use of medical marijuana. Those are words of authorization, not exemption. Beyond that, if *ORS 475.306(1)* were merely part of a larger exemption, then no provision of state law would authorize the use of medical marijuana. If that were true, medical marijuana use would not come within one of the exclusions [**52] from the "illegal use of drugs," as that phrase is defined in ORS 659A.122, and the protections of *ORS 659A.112* would not apply to employee. *See ORS 659A.124* (so providing). [21]

21 There is a suggestion in the dissent that *ORS 475.306(1)* is integral to the goal of exempting medical marijuana use from state criminal liability and cannot be severed from the remainder of the Oregon Medical Marijuana Act. That act, however, contains an express severability clause, and it is not apparent why the provisions exempting medical marijuana use from state criminal liability cannot "be given full effect without [the authorization to use medical marijuana found in *ORS 475.306(1)*]." *See* Or Laws 1999, ch 4, § 18 (providing the terms for severing any part of the act held invalid).

Another thread runs through the dissent. It reasons that, as a practical matter, authorizing medical marijuana use is no different from exempting that use from criminal liability. It concludes that, if exempting medical marijuana use from criminal liability is not an obstacle to the accomplishment of the purposes of the Controlled Substances Act and is [*186] thus not preempted, then neither is a state law authorizing medical marijuana [**53] use. The difficulty with the dissent's reasoning is its premise. It presumes that a law exempting medical marijuana use from liability is valid because it is not preempted. As the Attorney General's opinion explained, however, Congress lacks the authority to compel a state to criminalize conduct, no matter how explicitly it directs a state to do so. When, however, a state affirmatively authorizes conduct, Congress has the authority to preempt that law and did so here. The dissent's reasoning fails to distinguish those two analytically separate constitutional principles.

In sum, whatever the wisdom of Congress's policy choice to categorize marijuana as a Schedule I drug, the *Supremacy Clause* requires that we respect that choice when, as in this case, state law stands as an obstacle to the accomplishment of the full purposes of the federal law. Doing so means that *ORS 475.306(1)* is not enforceable. Without an enforceable state law authorizing employee's use of medical marijuana, that basis for excluding medical marijuana use from the phrase "illegal use of drugs" in *ORS 659A.122(2)* is not available.

As noted, a second possible exclusion from the definition of "illegal use of drugs" exists, [**54] which we also address. The definition of "illegal use of drugs" also excludes from that phrase "the use of a drug taken under supervision of a licensed health care professional." [22] *ORS 659A.122(2)*. On that issue, as noted above, employee's physician signed a statement that employee had been diagnosed with a debilitating condition, that marijuana may mitigate the symptoms or effects of that condition, but that the physician's statement was not a prescription to use marijuana. That statement was sufficient under the Oregon Medical Marijuana Act to permit [*187] employee to obtain a registry identification card, which then permitted him to use marijuana to treat his condition. Employee's physician recommended that employee use marijuana five to seven times daily by inhalation. However, without a prescription, employee's physician had no ability to control either the amount of marijuana that employee used or the frequency with which he used it, if employee chose to disregard his physician's recommendation.

22 The commissioner did not consider whether this exclusion applied, in part because the Court of Appeals had stated in *Washburn* that the use of marijuana for medical purposes was "not [**55] unlawful," which the parties and the commissioner concluded was sufficient to answer employer's reliance on *ORS 659A.124*. Although we could remand this case to the commissioner to permit him to address whether this exclusion ap-

plies, its application in this case turns solely on an issue of statutory interpretation, an issue on which we owe the commissioner no deference. In these circumstances, we see no need to remand and unnecessarily prolong the resolution of this case.

The question thus posed is whether employee used marijuana "under supervision of a licensed health care professional." The answer to that question turns initially on what a person must show to come within that exclusion. As explained below, we conclude that two criteria must be met to come within the exclusion. As an initial matter, the phrase "taken under supervision" of a licensed health care professional implies that the health care professional is monitoring or overseeing the patient's use of what would otherwise be an illegal drug. *See Webster's Third New Int'l Dictionary* 2296 (unabridged ed 2002) (defining supervise as "coordinate, direct, and inspect continuously and at first hand the accomplishment of" a task); [**56] *cf. Moore, 423 U.S. at 143* (holding that a physician who prescribed methadone, a Schedule II controlled substance, without regulating his patients' dosage and with no precautions against his patients' misuse of methadone violated *section 841* of the Controlled Substances Act).

Beyond supervision, when a health care professional administers a controlled substance, the exclusion requires that the Controlled Substances Act authorize him or her to do so. That follows from the text and context of the definition of illegal use of drugs set out in *ORS 659A.122(2)*. After providing that the illegal use of drugs does not include "the use of a drug taken under supervision of a licensed health care professional," the legislature added "or other uses authorized under the Controlled Substances Act." The phrase "or other uses authorized by the Controlled Substances Act" is telling. The words "other uses" imply that the preceding use (the use of drugs taken under supervision of a licensed health care professional) also refers to a use authorized by the Controlled Substances Act. *See Webster's* at 1598 (defining "other" as "being the one (as of two or more) left").

[*188] Not only does the text of *ORS 659A.122(2)* [**57] imply that the use of controlled substances taken under supervision of a licensed health care professional refers to uses that the Controlled Substances Act authorizes, but the context leads to the same conclusion. *See Stevens v. Czerniak, 336 Ore. 392, 401, 84 P3d 140 (2004)* (explaining that context includes "'the preexisting common law and the statutory framework within which the law was enacted'") (quoting *Denton and Denton, 326 Ore. 236, 241, 951 P2d 693 (1998))*. As noted, the Controlled Substances Act both authorizes physicians and other health care professionals to administer controlled substances for medical and research purposes and defines the scope of their authority to do so. *See Moore, 423 U.S. at 138-40* (so holding). We infer that, in excluding "the use of a drug taken under supervision of licensed health care professionals" from the phrase "illegal use of drugs," the legislature intended to refer to those medical and research uses that, under the Controlled Substances Act, physicians and other health care professionals lawfully can put controlled substances.

Another contextual clue points in the same direction. The exclusion in *ORS 659A.122(2)* for the use of a drug taken [**58] under supervision of a licensed health care professional is virtually identical to an exclusion in the definition of illegal use of drugs found in the ADA. *See 42 USC § 12111(6)(A)* (excluding "the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act"). The federal exclusion contemplates medical and research uses that the Controlled Substances Act authorizes, and there is no reason to think that, in adopting the same exclusion, the Oregon legislature had any different intent in mind. *Cf. Stevens, 336 Ore. at 402-03* (looking to the federal counterpart to *ORCP 36* to determine Oregon legislature's intent). Given the text and context of *ORS 659A.122(2)*, we conclude that, when a health care professional administers a controlled substance, the exclusion for the "use of a drug taken under supervision of a licensed health care professional" refers to those medical and research uses that the Controlled Substances Act authorizes.

[*189] In sum, two criteria are necessary to come within the exclusion for the use of a controlled substance taken under supervision of a licensed health care professional: (1) the Controlled [**59] Substances Act must authorize a licensed health care professional to prescribe or administer the controlled substance and (2) the health care professional must monitor or supervise the patient's use of the controlled substance. In this case, we need not decide whether the evidence was sufficient to prove the second criterion -- *i.e.*, whether employee's physician monitored or oversaw employee's use of marijuana. Even if it were, the Controlled Substances Act did not authorize employee's physician to administer (or authorize employee to use) marijuana for medical purposes. As noted, under the Controlled Substances Act, physicians may not prescribe Schedule I controlled substances for medical purposes. At most, a physician may administer those substances only as part of a Food and Drug Administration preapproved research project. [23] Because there is no claim in this case that employee and his physician were participating in such a project, employee's use of marijuana was not taken under supervision of a licensed health care professional, as that phrase is used in *ORS 659A.122(2)*.

23 *Gonzales v. Oregon, 546 U.S. 243, 126 S Ct 904, 163 L Ed 2d 748 (2006)*, addressed a different issue from [**60] the one presented here. The Controlled Substances Act provides that Schedule II controlled substances have accepted medical uses, and the issue in *Gonzales* was whether the Attorney General had exceeded his statutory authority in defining which uses of Schedule II controlled substances were legitimate medical uses. In this case, by contrast, the Controlled Substances Act provides that Schedule I controlled substances, such as marijuana, have no accepted medical use. That congressional policy choice both addresses and conclusively resolves the issue that the Attorney General lacked statutory authority to address in *Gonzales*.

Because employee did not take marijuana under supervision of a licensed health care professional and because the authorization to use marijuana found in *ORS 475.306(1)* is unenforceable, it follows that employee was currently engaged in the illegal use of drugs and, as the commissioner found, employer discharged employee for that reason. Under the terms of *ORS 659A.124*, "the protections of *ORS 659A.112* do not apply" to employee. The commissioner's final order on reconsideration rests, however, on the premise [*190] that the protections of *ORS 659A.112* -- specifically, the [**61] requirement for employer to engage in a "meaningful interactive process" as an aspect of reasonable accommodation -- do apply to employee. Under *ORS 659A.124*, that premise is mistaken, and the commissioner's revised order on reconsideration cannot stand. Both the commissioner's order and the Court of Appeals decision affirming that order on procedural grounds must be reversed.

Given the number of the issues discussed in this opinion, we summarize the grounds for our decision briefly. First, employer preserved its challenge that, as a result of the Controlled Substances Act, the use of medical marijuana is an illegal use of drugs within the meaning of *ORS 659A.124*. Second, two potentially applicable exclusions from the phrase "illegal use of drugs" -- the use of drugs authorized by state law and the use of drugs taken under the supervision of a licensed health care professional -- do not apply here. Third, regarding the first potentially applicable exclusion, to the extent that *ORS 475.306(1)* authorizes the use of medical marijuana, the Controlled Substances Act preempts that subsection. We note that our holding in this regard is limited to *ORS 475.306(1)*; we do not hold that the Controlled [**62] Substances Act preempts provisions of the Oregon Medical Marijuana Act that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability. Fourth, because employee was currently engaged in the illegal use of drugs and employer discharged him for that reason, the protections of *ORS 659A.112*, including the obligation to engage in a meaningful interactive discussion, do not apply. *ORS 659A.124*. It follows that BOLI erred in ruling that employer violated *ORS 659A.112*.

The decision of the Court of Appeals and the revised order on reconsideration of the Commissioner of the Bureau of Labor and Industries are reversed.

DISSENT BY: WALTERS

DISSENT

WALTERS, J., dissenting.

Neither the Oregon Medical Marijuana Act nor any provision thereof permits or requires the violation of the Controlled Substances Act or affects or precludes its enforcement. Therefore, neither the Oregon act nor any provision thereof stands as an obstacle to the federal act. Because the [*191] majority wrongly holds otherwise, and because, in doing so, it wrongly limits this state's power to make its own laws, I respectfully dissent.

The United States Constitution establishes a system of dual sovereignty in which [**63] state and federal governments exercise concurrent authority over the people. *Printz v. United States, 521 U.S. 898, 920, 117 S Ct 2365, 138 L Ed 2d 914 (1997)*. Each government is supreme within its own sphere. *Id. at 920-21*. In enacting the federal Controlled Substances Act, which prohibits all use of marijuana, Congress acted pursuant to its authority under the Commerce Clause. *Gonzales v. Raich, 545 U.S. 1, 5, 125 S Ct 2195, 162 L Ed 2d 1 (2005)*. In enacting the Oregon Medical Marijuana Act, which permits the circumscribed use of medical marijuana, Oregon acted pursuant to its historic power to define state criminal law and to protect the health, safety, and welfare of its citizens. *Whalen v. Roe, 429 U.S. 589, 603, 603 n 30, 97 S Ct 869, 51 L Ed 2d 64 (1977)*; *Robinson v. California, 370 U.S. 660, 664, 82 S Ct 1417, 8 L Ed 2d 758 (1962)*.

In enacting the Controlled Substances Act, Congress did not have the power to require Oregon to adopt, as state criminal law, the policy choices represented in that federal act. Congress does not have the power to commandeer a state's legislative processes by compelling it to enact or enforce federal laws. *New York v. United States, 505 U.S. 144, 149, 112 S Ct 2408, 120 L Ed 2d 120 (1992)*. [**64] "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id. at 166*.

Because it had authority to enact the Controlled Substances Act, Congress did, however, have the power to expressly preempt state laws that conflict with the Controlled Substances Act. A cornerstone of the Supreme Court's Supremacy Clause analysis is that "[i]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded [*192] by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine, US , , 129 S Ct 1187, 1194-95, 173 L Ed 2d 51 (2009)* (internal ellipsis and quotation marks omitted). The Court relies on that presumption out of "respect for the States as independent sovereigns in our federal system." *Id. at 1195 n 3* (internal quotation marks omitted).

As the majority recognizes, the Controlled Substances Act does not include an express preemption [**65] provision. Ore. at (slip op at 17-18). It contains, instead, "a saving clause" intended to "preserve state law." *See Wyeth, 129 S Ct at 1196* (so construing nearly identical provision in Federal Food, Drug, and Cosmetic Act). Thus, the majority should begin its analysis "with the assumption that the historic police powers [exercised by the State of Oregon] were not to be superseded by the Federal Act * * *." *Id. at 1194-95.*

The majority does not do so. It instead implies, from the federal policy choice that the Controlled Substances Act represents, a Congressional intent to preempt provisions of Oregon law that makes a different policy choice. Ore. at (slip op at 30). To understand the majority's error in applying the "obstacle" prong of the United States Supreme Court's implied preemption analysis, it is important to understand the purposes and effects of the federal and state laws that are at issue in this case.

Congress enacted the federal Controlled Substances Act, as the majority explains, to "conquer drug abuse" and "control" traffic in controlled substances. Ore. at (slip op at 15-16). In listing marijuana as a Schedule I drug, Congress decided that marijuana [**66] has no recognized medical use. Therefore, "Congress imposed a blanket federal prohibition" on the use of marijuana. Ore. at (slip op at 21). As noted, Congress did not expressly indicate, however, that states could not enact their own criminal drug laws or make different decisions about the appropriate use of marijuana.

Oregon did in fact enact its own criminal drug laws, including the state Uniform Controlled Substances Act [*193] (*ORS 475.005 to 475.285* and *ORS 475.840 to 475.980*). That act controls and punishes, as state criminal law, the use of all substances that the federal government classifies as Schedule I drugs, including marijuana. *ORS 475.840*; *ORS 475.856 - 475.864.* Oregon also enacted the Oregon Medical Marijuana Act. That act exempts certain medical marijuana users from the *state* criminal drug laws, including from the *state* Uniform Controlled Substances Act. The Oregon Medical Marijuana Act does not permit Oregonians to violate the federal Controlled Substances Act or bar the federal government from continuing to enforce the federal Controlled Substances Act against Oregonians. The Oregon Attorney General described the purpose and reach of the Oregon Medical Marijuana [**67] Act in a letter ruling:

> "The Act protects medical marijuana users who comply with its requirements from *state* criminal prosecution for production, possession, or delivery of a controlled substance. *See, e.g., ORS 475.306(2), 475.309(9)* and *475.319.* However, *the Act neither protects marijuana plants from seizure nor individuals from prosecution if the federal government chooses to take action* against patients or caregivers under the federal [Controlled Substances Act]. The Act is explicit in its scope: 'Except as provided in *ORS 475.316* and *475.342*, a person engaged in or assisting in the medical use of marijuana [in compliance with the terms of the Act] is excepted from the criminal laws *of the state* for possession, delivery or production of marijuana, aiding and abetting another in the possession, delivery or production of marijuana or any other criminal offense in which possession, delivery or production of marijuana is an element * * *.' *ORS 475.309(1).*"

Letter of Advice dated June 17, 2005, to Susan M. Allen, Public Health Director, Department of Human Services, 2 (first emphasis in original; later emphases added). [1] The Oregon Attorney General also concluded in that letter ruling [*194] [**68] that the decision of the Supreme Court in *Raich* -- that Congress had authority to enact the blanket prohibitions in the Controlled Substances Act -- had no effect on the validity of Oregon's statute:

> "*Raich* does *not* hold that state laws regulating medical marijuana are invalid nor does it require states to repeal existing medical marijuana laws. Additionally, the case does not oblige states to enforce federal laws. * * * The practical effect of *Raich* in Oregon is to affirm what we have understood to be the law since the adoption of the Act." [2]

Id. (emphasis in original).

1 Consistent with the Attorney General's letter opinion, *ORS 475.300(4)* provides that *ORS 475.300 to 475.346* -- the entirety of the Oregon Medical Marijuana Act -- is "intended to make only those changes to existing *Oregon laws* that are necessary to protect patients and their doctors from criminal and civil penalties[.]" (Emphasis added.)

2 The question that the Oregon Attorney General answered in the letter opinion was "Does *Gonzales v. Raich, 545 US [1, 125 S. Ct. 2195, 162 L. Ed. 2d 1] (2005)*, * * * invalidate the Oregon statutes authorizing the operation of the Oregon Medical Marijuana Program?" The Attorney General said, "No." The Attorney General explained [**69] that "[t]he Act protects medical marijuana users who comply with its requirements from state criminal prosecution for production, possession, or delivery of a controlled substance," and cited *ORS 475.309*, *ORS 475.319*, and *ORS 475.306(2)*. At the time of the Attorney General opinion, *ORS 475.306(2)* (2003) provided:

"If the individuals described in subsection (1) of this section possess, deliver or produce marijuana in excess of the amounts *allowed* in subsection (1) of this section, such individuals are not excepted from the criminal laws of the state but may establish an affirmative defense to such charges, by a preponderance of the evidence that the greater amount is medically necessary to mitigate the symptoms or effects of the person's debilitating medical condition."

ORS 475.306(2) (2003), *amended by* Or Laws 2005, ch 822, § 2 (emphasis added). Thus, one of the subsections of the Oregon Medical Marijuana Act that the Attorney General cited used words of authorization very similar to those used in *ORS 475.306(1)*.

Throughout the opinion, the Attorney General discussed the continued validity of the Oregon Medical Marijuana Act as a whole and did not in any way differentiate between provisions [**70] of the act that authorize medical marijuana use and those that create an exemption from state prosecution. In fact, the Attorney General specifically opined that the state is entitled to continue to issue registry identification cards -- cards that, by definition, are documents that identify persons "*authorized* to engage in the medical use of marijuana." *ORS 475.302(10)* (emphasis added).

The majority seems to accept that the Oregon Medical Marijuana Act does not bar the federal government from enforcing the Controlled Substances Act. The majority acknowledges that "state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so." Ore. at (slip op at 21-22). The majority also seems to accept, as a result, that provisions of the Oregon Medical [*195] Marijuana Act that exempt persons from state criminal liability do not pose an obstacle to the Controlled Substances Act. [3] However, in the majority's view, one subsection of the Oregon Medical Marijuana Act, *ORS 475.306(1)*, presents an obstacle to the Controlled Substances Act and does so solely because it includes words of authorization. [**71] *Id.* at (slip op at 23).

3 The majority expressly leaves that question open, however. Ore. at n 12 (slip op at 14-15 n 12).

As I will explain in more detail, I believe that the majority is incorrect in reaching that conclusion. First, the words of authorization used in *ORS 475.306(1)* and other subsections of the Oregon Medical Marijuana Act serve only to make operable the exceptions to and exemptions from state prosecution provided in the remainder of the act. The words of authorization used in those subsections do not grant authorization to act that is not already inherent in the exceptions or exemptions, nor do they permit the violation of federal law. Second, in instances in which state law imposes standards of conduct that are different than the standards of conduct imposed by federal law, but both laws can be enforced, the Supreme Court has not held the state laws to be obstacles to the federal laws, nor discerned an implied Congressional intent to preempt the state laws from the different policy choices made by the federal government. Thus, the majority is incorrect in finding that the standard of conduct and policy choice represented by the Controlled Substances Act [**72] prohibits a different state standard of conduct and policy choice. Both the Oregon Medical Marijuana Act and the Controlled Substances Act can be enforced, and this state court should not interpret the federal act to impliedly preempt the state act.

The Oregon Medical Marijuana Act contains a number of subsections that use words of authorization. Those subsections are interwoven with the subsections of the act that except and exempt medical marijuana users from criminal liability. For instance, *ORS 475.309*, which the majority cites as a provision that excepts persons who use medical marijuana from state criminal liability, Ore. at (slip op at 24), provides that a

person engaged in or assisting in the medical use of marijuana "is *excepted* from the criminal laws of the state" *if* [*196] certain conditions, including holding a "*registry identification card,*" are satisfied. (Emphases added.) *ORS 475.302(10)* defines "registry identification card" as follows:

"a document issued by the department that identifies a person *authorized* to engage in the medical use of marijuana and the person's designated primary caregiver, if any."

(Emphasis added.)

Consider also *ORS 475.306(1)*, the section of the [**73] act that the majority finds offending. That subsection references both *ORS 475.309*, the exception section, and the registry identification card necessary to that exception. *ORS 475.306(1)* provides:

> "A person who possesses a *registry identification card* issued *pursuant to ORS 475.309* may engage in, and a designated primary caregiver of such person may assist in, the medical use of marijuana only as justified to mitigate the symptoms or effects of the person's debilitating medical condition." [4]

(Emphasis added.) Reading those three provisions together, it is clear that *ORS 475.306(1)* serves as a *limitation* on the use of medical marijuana that the registry identification card and *ORS 475.309* together permit. Under *ORS 475.306(1)*, a person who possesses a registry identification card issued pursuant to *ORS 475.309* may engage in the use the card permits "*only* as justified to mitigate the symptoms or effects of the person's debilitating medical condition." (Emphasis added.)

4 The majority recognizes that it is essential to read *ORS 475.306(1)* and *ORS 475.302(10)* together to find an affirmative authorization to use marijuana for medicinal purposes. Ore. at (slip op at 13). However, the [**74] majority does not explain why it finds *ORS 475.306(1)* and not *ORS 475.302(10)* preempted.

ORS 475.319, another section of the act that the majority cites as creating an exemption from criminal liability, also depends on words of permission for its operation. Ore. at (slip op at 24). *ORS 475.319* creates an affirmative defense to a criminal charge of possession of marijuana, but only for persons who possess marijuana "in amounts *permitted* under *ORS 475.320*." (Emphasis added.) *ORS 475.320(1)(a)* provides: "A *registry identification cardholder* * * * *may possess* [*197] up to six mature marijuana plants and 24 ounces of usable marijuana." (Emphasis added.)

The words of authorization used in *ORS 475.306(1)* are no different from the words of authorization that are used in other sections of the act and that are necessary to effectuate *ORS 475.309* and *ORS 475.319* and the exceptions to and exemptions from criminal liability that they create. Those words of authorization do not grant permission that would not exist if those words were eliminated or replaced with words of exception or exclusion. Even if it did not use words of permission, the Oregon Medical Marijuana Act would permit, for purposes [**75] of Oregon law, the conduct that it does not punish. Furthermore, the statutory sections that provide that citizens may, for state law purposes, engage in the conduct that the state will not punish have no effect on the Controlled Substances Act that is greater than the effect of the sections that declare that the state will not punish that conduct.

Because neither the Oregon Medical Marijuana Act nor any subsection thereof gives permission to violate the Controlled Substances Act or affects its enforcement, the Oregon act does not pose an obstacle to the federal act necessitating a finding of implied preemption. In *State v. Rodriguez, 317 Ore. 27, 854 P2d 399 (1993)*, this court recognized that state and federal laws can prescribe different standards, each acting within its own authority, without affecting the other's authority, and without offending the *Supremacy Clause*. In that case, the defendant had been arrested by federal immigration agents on a warrant that the state conceded did not satisfy the oath or affirmation requirement of *Article I, section 9, of the Oregon Constitution*. The state argued, however, that, because the warrant was valid under federal law, "the *Supremacy Clause* [**76] render[ed] *Article I, section 9*, inapplicable to the arrest * * *." *Id. at 34*. The court rejected that argument and concluded that preemption was not at issue because the application of the state constitutional requirements for an arrest warrant did not "affect the ability of the federal government to administer or enforce its * * * laws." *Id. at 36*. Because the court interpreted the state constitution not to impose requirements on arrests by federal officers, the state and the federal law did not conflict:

> [*198] "Because this court's interpretation of Article I, section 9, in this context, cannot and will not interfere with the federal government in immigration matters, the *Supremacy Clause* has no bearing on this case and this court is not 'preempted' from applying Article I, section 9, to defendant's arrest."

Id. Similarly, the Oregon Medical Marijuana Act "cannot and will not interfere with" the federal government's enforcement of the Controlled Substances Act and does not offend the *Supremacy Clause*.

Instead of following *Rodriguez,* [**77] the majority relies on two United States Supreme Court cases for the proposition that state law that permits what federal law prohibits is impliedly preempted. Ore. at (slip op at 21). The majority then concludes that, "[t]o the extent that *ORS 475.306(1)* affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it 'without effect.'" Ore. at (slip op at 22). I disagree with the majority's analysis for two reasons. First, the cases that the majority cites stand only for the proposition that when federal law bestows an unlimited power or right, state law cannot preclude the exercise of that power or right. The Controlled Substances Act does not create a right; it prohibits certain conduct. Second, other Supreme Court cases hold that when a federal law does not create powers or rights but, instead, sets standards for conduct, state law may set different standards for the same conduct without offending the *Supremacy Clause*, as long as both sets of laws may be enforced. By deciding not to punish the medical use of marijuana, the Oregon Medical Marijuana Act authorizes, for state law purposes, conduct that the Controlled Substances [**78] Act prohibits. The Oregon Medical Marijuana Act does not, however, offend the *Supremacy Clause* because it does not affect enforcement of the Controlled Substances Act.

In the first of the two cases on which the majority relies, *Barnett Bank v. Nelson, 517 U.S. 25, 116 S Ct 1103, 134 L Ed 2d 237 (1996)*, a federal statute explicitly granted national banks the unlimited power to sell insurance in small towns. A state statute forbade and impaired the exercise of that power, and the court held that it was preempted.

[*199] *Michigan Canners & Freezers v. Agricultural Bd., 467 U.S. 461, 104 S Ct 2518, 81 L Ed 2d 399 (1984)*, the second case on which the majority relies, concerned a conflict between the federal Agricultural Fair Practices Act, which protects the rights of producers of agricultural goods to remain independent and to bring their products to market on their own without being required to sell those products through an association, and a Michigan statute. *Id. at 473.* As the court explained in *Massachusetts Medical Soc. v. Dukakis, 815 F2d 790, 796 (1st Cir), cert den, 484 U.S. 896, 108 S. Ct. 229, 98 L. Ed. 2d 188 (1987)*, the Agricultural Fair Practice Act creates a "right [**79] to refrain from joining an association of producers[.]" (Ellipses omitted.) The Michigan statute at issue prevented the exercise of the right conferred by the act by precluding an agricultural producer "from marketing his goods himself" and "impos[ed] on the producer the same incidents of association membership with which Congress was concerned * * *." *Michigan Canners, 467 U.S. at 478.* The Court held that under those circumstances, the state statute was preempted.

Neither *Barnett* nor *Michigan Canners* stands for the proposition that a state statute that permits conduct that the federal government punishes is preempted. In those cases, the federal statutes did not punish conduct; they created powers or rights. The Court therefore struck down state statutes that forbade, impaired or prevented exercise of those powers or rights. Because the Controlled Substances Act does not create a federal power or right and the Oregon Medical Marijuana Act does not forbid, impair, or prevent the exercise of a federal power or right, *Barnett* and *Michigan Canners* are inapposite. The more relevant Supreme Court cases are those that consider the circumstance that exists when federal and state laws impose [**80] different standards of conduct. Those cases stand for the proposition that states may impose standards of conduct different from those imposed by a federal law without creating an obstacle to the federal law.

In *California v. ARC America Corp., 490 U.S. 93, 109 S Ct 1661, 104 L Ed 2d 86 (1989)*, the Court considered, under the "obstacle prong" of its "actual conflict" implied preemption analysis, the conflict between *Section 4* of the federal [*200] Clayton Act, which authorizes only direct purchasers to recover monopoly overcharges, and a state statute, which expressly permits recovery by indirect purchasers. The Supreme Court held that, even if the state statute directly conflicted with the goals of the federal law, as the Ninth Circuit had held, the state statute was not preempted. The Supreme Court reasoned that states are not required to pursue federal goals when enacting their own laws:

> "It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do [**81] under their own antitrust law."

Id. at 103.

Other Supreme Court cases also illustrate the Court's refusal to imply preemption, under the "obstacle" prong of its implied preemption analysis, where state and federal statutes set contrary standards or pursue contrary objectives. In *Silkwood v. Kerr-McGee Corp., 464 U.S.*

238, 246, 104 S Ct 615, 78 L Ed 2d 443 (1984), a case that the court in *ARC America* cited as authority, the jury had awarded the plaintiff a judgment of $ 10 million in punitive damages against the defendant, a nuclear power company. The defendant asserted that a conflict existed between the state law that permitted the judgment and a federal law regulating nuclear power plants, with which the defendant had complied. Despite an earlier ruling that the Nuclear Regulatory Commission had exclusive authority to regulate the safety of nuclear power plants, [5] and even though the Court accepted that "there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability," *id. at 256*, the Court refused to invalidate the state law.

5 *Pacific Gas & Elec. v. Energy Resources Comm'n, 461 U.S. 190, 211-13, 103 S Ct 1713, 75 L Ed 2d 752 (1983).*

In [**82] *Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S Ct 1210, 10 L Ed 2d 248 (1963)*, a federal [*201] statute authorized the marketing of Florida avocados on the basis of weight, size, and picking date; California, however, regulated the marketing of avocados sold in the state on the basis of oil content. As a result of the differing standards, about six percent of Florida avocados that were deemed mature under federal standards were rejected from California markets. The plaintiffs argued that the federal standard for regulating Florida avocados preempted California's conflicting regulation. As the dissent argued:

> "The conflict between federal and state law is unmistakable here. The Secretary asserts certain Florida avocados are mature. The state law rejects them as immature. And the conflict is over a matter of central importance to the federal scheme. The elaborate regulatory scheme of the marketing order is focused upon the problem of moving mature avocados into interstate commerce. The maturity regulations are not peripheral aspects of the federal scheme."

373 U.S. at 173 (White, J., dissenting). The majority, however, concluded that the test of whether an actual conflict [**83] existed was not whether the laws adopted contrary standards, but whether both laws could be enforced:

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is *whether both regulations can be enforced* without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

Id. at 142 (emphasis added).

The Court's most recent case on the issue, *Wyeth v. Levine, ___ U.S. ___, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)*, is in accord. In that case, the court was presented with a conflict between state and federal law that the dissent characterized as follows: "The FDA told Wyeth that Phenergan's label renders its use 'safe.' But the State of Vermont, through its tort law said: 'Not so.'" [6] *Id., 129 S Ct at 1231* (Alito, J. dissenting). Nevertheless, the majority upheld the state law. Although [*202] the two laws imposed contradictory standards, the state law was not preempted.

6 The FDA had also adopted a regulation declaring that "certain state law actions, such as those involving failure-to-warn claims, 'threaten FDA's statutorily prescribed role as the expert Federal agency responsible for evaluating [**84] and regulating drugs.'" *Id. at 1200.*

The cases that I have reviewed demonstrate that the Supreme Court requires more as a basis for implying a congressional intent to preempt a state law than a Congressional purpose that is at odds with the policy that a state selects. The Court has permitted state laws that impose standards of conduct different than those set by federal laws to stand unless the state laws preclude the enforcement of the federal laws or have some other demonstrated effect on their operation. The Court has found state laws that forbid, impair or prevent the exercise of federally granted powers or rights to be preempted.

The majority does not contend, in accordance with those cases, that *ORS 475.306(1)* or the Oregon Medical Marijuana Act as a whole precludes enforcement of the Controlled Substances Act or has any other demonstrated effect on its "accomplishment and execution." The only obstacles to the federal act that the majority identifies are Oregon's differing policy choice and the lack of respect that it signifies. Ore. at (slip op at 31).

As an example of the way it believes the *Supremacy Clause* to operate, the majority posits that, if Congress were to pass [**85] a law prohibiting persons under the age of 21 from driving, a state law authorizing persons over the age of 16 to drive and giving them a license to do so would be preempted. [7] Ore. at (slip op at 26). The majority would be correct *if* Congress had authority to make such a law and *if* Congress expressly

preempted state laws allowing persons under the age of 21 to drive or indicated an intent to occupy the field. However, without such statement of Congressional intent, implied preemption does not necessarily follow. As a sovereign state, Oregon has authority to license its drivers and to choose its own age requirements. If Oregon set at 16 years the minimum age for its drivers then, the Oregon driver licenses it issued would give 16-year-olds only state permission to drive. [*203] The Oregon law would not be preempted, but neither would it protect 16-year-olds from federal prosecution and liability.

7 As I read the majority opinion, a state law providing that Oregon would not punish drivers between the ages of 16 and 21, as opposed to permitting those persons to drive, *would* withstand a Supremacy Clause challenge.

As a result, an Oregon legislature considering whether to enact such a law [**86] could decide, as a practical matter, that it would not be in the interest of its citizens to grant licenses that could result in federal prosecution. Suppose, however, that Congress had passed the federal law that the majority posits, but that federal officers were not enforcing it. Or suppose further that the federal government had announced a federal policy decision not to enforce the federal law against "individuals whose actions are in clear and unambiguous compliance with existing state laws" permitting minors to drive. Could Oregon not serve as a laboratory allowing minors to drive on its roads under carefully circumscribed conditions to permit them to acquire driving skills and giving Congress important information that might assist it in determining whether its policy should be changed? Is not one of federalism's chief virtues that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"? *See New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S Ct 371, 76 L Ed 747 (1932)* (Brandeis, J., dissenting) (so contending).

In the case of medical marijuana, the federal government [**87] in fact has announced that it will not enforce the Controlled Substances Act against "individuals whose actions are in clear and unambiguous compliance with existing state laws permitting the medical use of marijuana." [8] Oregon is not the only state that permits the use of medical marijuana, and at least one state is considering rules to "identify requirements for the licensure of producers and cannabis production facilities." New Mexico's "Lynn and Erin Compassionate Use Act," 2007 New Mexico Laws ch 210, § 7 (SB 523). [9]

8 Memorandum from David W. Ogden, Deputy Attorney General for Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct 19, 2009) (available at http://blogs.usdoj.gov/blog/archives/192) (accessed Apr 6, 2010) (emphasis in original).

9 New Mexico's "Lynn and Erin Compassionate Use Act," 2007 New Mexico Laws ch 210, § 7 (SB 523), requires relevant state agencies to develop rules that "identify requirements for the licensure of producers and cannabis production facilities and set forth procedures to obtain licenses," as well as "develop a distribution system for medical cannabis" that comports with certain [**88] requirements. The New Jersey "Compassionate Use Medical Marijuana Act," S119, Approved PL 2009, c 307, § 7, provides for the creation of "alternate treatment centers, each of which

> "shall be authorized to acquire a reasonable initial and ongoing inventory, as determined by the department, of marijuana seeds or seedlings and paraphernalia, possess, cultivate, plant, grow, harvest, process, display, manufacture, deliver, transfer, transport, distribute, supply, sell, or dispense marijuana, or related supplies to qualifying patients or their primary caregivers who are registered with the department pursuant to section 4 of [PL, c (C)(pending before the Legislature as this bill)] this act."

The Maine Medical Marijuana Act provides for the creation of "nonprofit dispensaries" which are authorized to dispense up to two and one-half ounces of marijuana to qualified patients. *Me Rev Stat title 22, § 2842-A.* In Rhode Island, "The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act," provides for the creation of "compassion centers," which "may acquire, possess, cultivate, manufacture, deliver, transfer, transport, supply or dispense marijuana * * * to registered qualifying patients and [**89] their registered primary caregivers." *RI Gen Laws § 21-28.6-12.*

[*204] As I explained at the outset, the federal government has no power to require that the Oregon legislature pass state laws to implement or give effect to

federal policy choices. One sovereign may make a policy choice to prohibit and punish conduct; the other sovereign may make a different policy choice not to do so and instead to permit, for purposes of state law only, other circumscribed conduct. Absent express preemption, a particular policy choice by the federal government does not alone establish an implied intent to preempt contrary state law. A different choice by a state is just that -- different. A state's contrary choice does not indicate a lack of respect; it indicates federalism at work.

The consequence of the majority's decision that the Controlled Substance Act invalidates *ORS 475.306(1)* is that petitioner is disqualified from the benefits of *ORS 659A.124*, which imposes a requirement of reasonable accommodation. The majority states that it does not decide "whether the legislature, if it chose to do so and worded Oregon's disability law differently, could require employers to reasonably accommodate otherwise qualified [**90] disabled employees who use medical marijuana to treat their disabilities." Ore. at n 12 (slip op at 14-15 n 12). Indeed, different words could be used for that purpose. For instance, the legislature could state expressly in ORS chapter 659A that disabled persons who would be entitled to the [*205] affirmative defense set forth in *ORS 475.319* (a provision the majority does not find preempted) are not disqualified from the protections of the Oregon Disability Act, including the requirement of reasonable accommodation. Or, to be even more careful, the legislature could state, in chapter 659A, the conditions that a medical marijuana user must meet to be entitled to the protections of the Oregon Disability Act without any reference to the Oregon Medical Marijuana Act. If the legislature took either of those actions, reasonable accommodation would not be tied to the provision of the Oregon Medical Marijuana Act that the majority finds to be of "no effect."

Although such changes could secure the right of reasonable accommodation for disabled persons who use medical marijuana in compliance with Oregon law, the changes would not eliminate the questions that the majority's analysis raises about [**91] the validity of other provisions of the Oregon Medical Marijuana Act that use words of authorization or about the reach of Oregon's legislative authority. If the majority decision simply represents a formalistic view of the *Supremacy Clause* that permits Oregon to make its own choices about what conduct to punish (and thereby to permit) as long as it phrases its choices carefully, perhaps my concern is overstated. But as I cannot imagine that Congress would be concerned with the phrasing, rather than the effect, of state law, I not only think that the majority is wrong, I fear that it wrongly limits the legislative authority of this state. If it does, it not only limits the state's authority to make its own medical marijuana laws, it limits the state's authority to enact other laws that set standards of conduct different than the standards set by the federal government. Consider just one statute currently on the books -- Oregon's Death with Dignity Act.

Oregon's Death with Dignity Act affirmatively authorizes physicians to use controlled substances to assist suicide. [10] In *Gonzales v. Oregon, 546 U.S. 243, 126 S Ct 904,* [*206] *163 L Ed 2d 748 (2006)*, the Supreme Court considered the validity [**92] of a federal Interpretive Rule that provided that "using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the [Controlled Substances Act]." *Id. at 249*. The Supreme Court decided that the Interpretive Rule was invalid and did not decide whether the federal rule preempted the Oregon act. But if the federal government were to adopt a statute or a valid rule to the same effect, would this court hold that, because the Oregon Death with Dignity Act grants physicians permission to take actions that federal law prohibits, the state statute is preempted and of no effect? If so, the court would invalidate a state law using an analysis that at least three members of the Supreme Court have recognized to be faulty:

> "[T]he [Interpretive Rule] does not purport to pre-empt state law in any way, not even by conflict pre-emption -- unless the Court is under the misimpression that some States *require* assisted suicide."

Gonzales, 546 U.S. at 290 (Scalia, J., joined by Roberts, C.J. and Thomas, J., dissenting) (emphasis in original).

10 *ORS 127.815(1)(l)(A)* authorizes physicians to dispense medications for [**93] the purpose of ending a patient's life in a humane and dignified manner when that patient has a terminal illness and has satisfied the written request requirements that the Act provides. *ORS 127.805(1)* authorizes a terminally ill patient to "make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with [the Act]."

I do not understand why, in our system of dual sovereigns, Oregon must fly only in federal formation and not, as Oregon's motto provides, "with her own wings." *ORS 186.040*. Therefore, I cannot join in a decision by which we, as state court judges, enjoin the policies of our own state and preclude our legislature from making its own independent decisions about what conduct to criminalize. With respect, I dissent.

Durham, J., joins in this opinion.

APPENDIX G

PIERRE PICHETTE, ALAN YARKIN, and GAYTAN MAYRAND TORRES, Appellants, v. CITY OF NORTH MIAMI and PERFORMING ARTS MANAGEMENT OF NORTH MIAMI, INC., Appellees.

CASE No. 94-102

COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

642 So. 2d 1165*; *1994 Fla. App. LEXIS 9287*; *19 Fla. L. Weekly D 2056

September 28, 1994, Filed

SUBSEQUENT HISTORY: [**1] Released for Publication October 14, 1994.

PRIOR HISTORY: An appeal from the Circuit Court of Dade County, Harold Solomon, Judge.

DISPOSITION: Affirmed.

COUNSEL: John G. Fletcher, for appellants.

Davis, Scott, Weber & Edwards and Laura Besvinick; David M. Wolpin, for appellees.

JUDGES: Before HUBBART and BASKIN and GREEN, JJ.

OPINION BY: PER CURIAM

OPINION

[*1165] PER CURIAM.

The final summary judgment under review is affirmed upon a holding that the appellants herein have no legally recognized interest which will be adversely affected by the zoning ordinance of the City of North Miami which appellants challenged below, and therefore they lacked any standing to bring the declaratory judgment action because (1) the appellant Allan Yarkin lives in the City of Bay Harbor Islands, more than a mile across Biscayne Bay from the rezoned site under [*1166] attack, and there is no genuine issue raised by this record that he would be affected by noise, traffic impact, land value diminution, or in any other respect by the subject zoning ordinance; and (2) the appellants Pierre Pichette and Gaytan Torres live in the City of North Miami Beach, separated by a 57-acre buffer area from the rezoned tract of land, 3,000 and 2,800 feet, respectively, [**2] away from said tract, and there is no genuine issue raised by this record that they would be affected by noise, traffic impact, land value diminution, or in any other respect by the subject zoning ordinance, *Renard v. Dade County, 261 So. 2d 832 (Fla. 1972)*; *see § 163.3215(2), Fla. Stat.* (1993); *Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, Inc., 450 So. 2d 204, 208 (Fla. 1984)*; *compare Southwest Ranches Homeowners Ass'n v. Broward County, 502 So. 2d 931* (Fla. 4th DCA)(adjoining landowners with potential pollution, flood problems had standing), *rev. denied, 511 So. 2d 999 (Fla. 1987)*. This being so, it was entirely proper for the trial court to enter the summary judgment under review on the basis that there was no genuine issue of material fact and the defendants were entitled to judgment as a matter of law, given the appellants' lack of standing to challenge the subject zoning ordinance. *See Ennis v. Warm Mineral Springs, Inc., 203 So. 2d 514, 517 (Fla. 2d DCA 1967), cert. denied* [**3] , *210 So. 2d 870 (Fla. 1968)*.

Affirmed.