Case No. S197169

IN THE SUPREME COURT

OF

THE STATE OF CALIFORNIA

RYAN PACK AND ANTHONY GAYLE,

PETITIONERS AND APPELLEES,

V.

SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES,

RESPONDENT,

AND

CITY OF LONG BEACH,

REAL PARTY IN INTEREST AND APPELLANT.

Hon. Walter Croskey
Court of Appeal of the State of California, Second Appellate District
No. B228781

Hon. Patrick Madden
Superior Court of Los Angeles County
Nos. 055053 & 055010

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE PROFESSORS OF CONSTITUTIONAL AND CRIMINAL LAW ALAN BROWNSTEIN, ERWIN CHEMERINSKY, SAM KAMIN, ALEX KREIT, BERTRALL ROSS, MARGARET RUSSELL AND JONATHAN SIMON IN SUPPORT OF REAL PARTY IN INTEREST

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APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST AND STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court 8.520(f), amici curiae hereby respectfully apply for leave to file an amicus curiae brief in support of Real Party in Interest. The Court of Appeal held that provisions of Long Beach Municipal Code Chapter 5.87—which regulated medical marijuana dispensaries—were preempted by the federal Controlled Substances Act ("CSA"). Long Beach has subsequently repealed Chapter 5.87. While this Court may dismiss review, as the repeal of Chapter 5.87 constitutes "a supervening event render[ing] the case moot" (Cal. Rules of Court, rule 8.528(b), Advisory Com. com.), amici submit this brief in the event this Court reaches the preemption issue. Amici respectfully argue that the CSA does not preempt local regulation of medical marijuana dispensaries authorized under California law.

Amici are all professors of constitutional law, criminal law or both in either California or Colorado (which like California has state laws allowing some medical use of marijuana). Amici include nationally recognized constitutional law scholars and the authors of major casebooks, treatises and other scholarly works on constitutional law, federal jurisdiction, civil procedure and criminal law related to the issues before this Court.

As constitutional and criminal law scholars, amici have a substantial interest in the federal preemption issue before this Court. Amici are extremely familiar with California and U.S. constitutional and criminal law history, legislation, case law, and policy as they apply to this case. Amici believe that their expertise and perspective as legal scholars can help the Court understand more fully the federal preemption issues presented in this case.

Amici Curiae include:

- **Alan E. Brownstein**, Professor of Law, Boochever and Bird Chair for the Study and Teaching of Freedom and Equality, is a nationally recognized Constitutional Law scholar. He teaches Constitutional Law, Law and Religion, and Torts at UC Davis School of Law. While the primary focus of his scholarship relates to church-state issues and free exercise and establishment clause doctrine, he has also written extensively on other constitutional law subjects.
- **Erwin Chemerinsky** is the founding dean and distinguished professor of law at the University of California, Irvine School of Law, with a joint appointment in Political Science. His areas of expertise are constitutional law, federal practice, civil rights and civil liberties, and appellate litigation. He is the author of seven books, including textbooks and treatises on constitutional law and federal jurisdiction and nearly 200 articles in top law reviews. He frequently argues cases before the

nation's highest courts, and also serves as a commentator on legal issues for national and local media.

- **Sam Kamin** is a professor of Criminal Law and Procedure and Constitutional Law and the Director of Constitutional Rights & Remedies Program at the University Of Denver Sturm College of Law. Professor Kamin is active in the Law and Society Association and in the field of law and social science generally. Professor Kamin's research interests include state medical marijuana laws and their intersection with federal law, criminal procedure, death penalty jurisprudence, federal courts, and constitutional remedies.
- **Alex Kreit** is an Associate Professor of Law and the Director of the Center of Law & Social Justice at Thomas Jefferson School of Law. He teaches courses on controlled substances and criminal law, among others. His research focuses on the intersection of state and federal law in the context of drug policy. He is the author of a forthcoming book on controlled substances, Controlled Substances: Crime, Regulation, and Policy, Carolina Academic Press (forthcoming 2012).
- **Bertrall Ross** is an Assistant Professor of Law and Executive Committee Member, Thelton E. Henderson Center for Social Justice at the University of California, Berkeley, Boalt Hall School of Law. He teaches courses on legislation and constitutional law, among others.

- **Margaret Russell** is a professor at the Santa Clara University School of Law. Her areas of expertise are constitutional law, civil procedure, and civil rights. Her publications focus on the nexus of civil liberties and civil rights issues. She is a member of the American Law Institute, and a founding member of the Equal Justice Society.
- **Jonathan Simon** is the Adrian A. Kragen Professor of Law at the University of California, Berkeley, Boalt Hall School of Law, where he teaches courses on criminal law, criminal justice, and socio-legal studies, among others. He is also a faculty associate of the Berkeley Center for Criminal Justice. He is a member of the Law & Society Association where he has served on the Board of Trustees and the Executive Committee. He is also a member of the American Society of Criminology and the American Sociological Association.

INTRODUCTION

In *Pack v. Superior Court (City of Long Beach)* (2011) 132 Cal.Rptr.3d 633, 650, 654 [slip op. at pp. 26, 33], Petitioners[1] argued, and the Court of Appeal held, that parts of Long Beach Ordinance No. 10-0007 (codified as Chapter 5.87 of the Long Beach Municipal Code ["LBMC"])—which regulated medical marijuana dispensaries—were preempted by the federal Controlled Substances Act ("CSA"). After this Court granted the City's petition for review, the City repealed the challenged ordinance, Chapter 5.87 (Long Beach Ordinance No. 12-0004, § 3), and replaced it with an ordinance prohibiting the operation of medical marijuana dispensaries within the City. (LBMC, ch. 5.89, § 5.89.030.)

The ordinance that is effective now, Chapter 5.89, does not implicate issues of federal preemption, and neither party argues otherwise. Therefore, the federal preemption issue has been rendered moot " 'by an amendment which [] repeal[ed] . . . the portion of the ordinance to which the challenge [was] directed.' " (*Colony Cove Properties, LLC v. City of Carson* (2010) 187 Cal.App.4th 1487, 1509 [quoting *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 393]; see also *Wilson & Wilson v. City*

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[1] Petitioners below, Pack and Gayle, prevailed in the Court of Appeal. Real Party in Interest, the City of Long Beach petitioned this Court for review. Yet Pack and Gayle have styled themselves "Petitioners" in their briefing before this Court, and the Court's docket appears to accede to that designation. Amici will therefore refer to Pack and Gayle as "Petitioners" here.

Council of Redwood City (2011) 191 Cal.App.4th 1559, 1574 [explaining that "[t]he pivotal question in determining if a case is moot is [] whether the court can grant the plaintiff any effectual relief"].) Indeed, Petitioners have abandoned the issue of federal preemption that they raised in the lower court. Petitioners' Answer Brief filed with this Court does not address federal preemption, and in a letter dated May 15, 2012, Petitioners informed the Court that they no longer intend to argue in favor of preemption.

Amici therefore believe that this Court should vacate its grant of review, at least on the issue of federal preemption.[2] Since the de-publication of the Second Appellate District opinion in this case, there is no conflict among California's courts of appeal regarding the CSA's preemptive effect on state and local laws regulating medical marijuana. (*Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 760-763; *County of San Diego v. San Diego NORML* (2008)165 Cal.App.4th 798, 824, 826; *City of Garden Grove v. Superior Court* (2007)157 Cal.App.4th 355, 386, cert. den., (2008) 129 S.Ct. 623.)

Amici respectfully urge the Court to avoid an " '[u]nnecessary decision[]' " that " 'dissipate[s] judicial energies better conserved for litigants who have a real need for official assistance.' " (*In re I.A.* (2011)

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[2] Amici take no position on whether this Court should address the issues raised in Petitioners' Answer Brief.

201 Cal.App.4th 1484, 1489-1490.) Waiting until a more appropriate case presents the federal preemption issue squarely in a ripe controversy would also allow the issue, should a future litigant raise it, to percolate in the lower courts and benefit from complete briefing by fully-engaged and opposing parties.

However, recognizing that this Court retains the discretion to entertain issues that are technically moot, amici respectfully submit this brief to address why federal law did not preempt Chapter 5.87's repealed permit scheme regulating medical marijuana dispensaries. In the event that the Court does elect to hear oral argument concerning the federal preemption issue, amici respectfully request permission to present such argument to assist the Court in resolving the issue.

SUMMARY OF ARGUMENT

The U.S. Supreme Court has made clear that there is a general presumption against finding state law preempted by federal law. The Court has furthermore articulated circumstances which dictate an even stronger than usual presumption against preemption, including when the Congressional intent to preempt must be implied because there is no express statutory preemption language, and when the federal law at issue legislates in a field traditionally left to the states. Both of these circumstances are present here. Long Beach's now-repealed ordinance, Chapter 5.87, was a local government's attempt to implement a state law

decriminalizing some medical marijuana activities prohibited by federal law, thus implicating areas traditionally regulated by the states and their subdivisions: public health and medical care, land use, and state and local government's power to criminalize (or not) conduct. The strong presumption against federal preemption has not been overcome here. Under fundamental tenants of federalism embodied in the Tenth Amendment, the State of California clearly may choose not to criminalize medical marijuana cultivation, distribution and use. By the same token, political subdivisions of the state may enact regulations to implement those valid state medical marijuana laws. Moreover, Chapter 5.87 imposed additional limits and restrictions upon access to marijuana beyond those created by state law. Long Beach's local ordinance was therefore consistent with, rather than an obstacle to, the primary purpose of the federal CSA—combating drug abuse and limiting the use of controlled substances. Chapter 5.87 was therefore not preempted by the CSA.

ARGUMENT

I. THERE IS A STRONG PRESUMPTION AGAINST THE IMPLIED PREEMPTIVE EFFECT OF FEDERAL STATUTES, PARTICULARLY WHERE SUCH STATUTES OPERATE IN A FIELD WITHIN WHICH STATES HAVE TRADITIONALLY REGULATED.

This Court has " 'identified four ways in which Congress may preempt state [or local] law: express, conflict, obstacle, and field

preemption.' " (*Martinez v. Regents of Univ. of Cal.* (2010) 50 Cal.4th 1277, 1288.)[3]

Congress has clearly not occupied the field of controlled substances regulation, nor is there any question here of express or conflict preemption; the CSA includes an *anti*-preemption provision expressly disclaiming preemptive intent in all but a narrow set of circumstances in which there is a "positive conflict" between state and federal law "such that the two cannot consistently stand together." (21 U.S.C. § 903.) It would not have been physically impossible to comply with both the CSA and Chapter 5.87, since, with one minor exception, nothing in Chapter 5.87 required anyone to act contrary to the CSA.[4] Therefore, the only preemption inquiry this case could reasonably have presented was one of implied preemption: whether Chapter 5.87 stood as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA.[5]

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[3] The U.S. Supreme Court has recognized "that the categories of preemption are not 'rigidly distinct.'" (*Crosby v. Nat'l Foreign Trade Council* (2000) 530 U.S. 363, fn. 6 [quoting *English v. Gen. Elec., Co.* (1990) 496 U.S. 72, 79, fn. 5].)

[4] The only exception identified by the court below was Chapter 5.87's provision requiring permitted collectives to have samples of their medical marijuana tested at an independent laboratory. (*Pack v. Superior Court (City of Long Beach)* (2011) 132 Cal.Rptr.3d 633, 650 [slip op. at p. 26].) The court held that conflict preemption applied to this provision because it required permitted collectives to distribute marijuana in violation of the CSA. (*Ibid.*) Amici do not contest this aspect of the holding of the court below.

[5] Division One of the Fourth District Court of Appeal has held that the CSA's anti-preemption provision forecloses an obstacle preemption

The federal preemption doctrine stems from the Supremacy Clause, U.S. Const., art. VI, cl. 2, and the "fundamental principle of the Constitution that Congress has the power to preempt state law." (*Crosby v. Nat'l Foreign Trade Council* (2000) 530 U.S. 363, 372.) The doctrine is limited, however, and every preemption case starts "with a presumption that the state statute is valid" and asks whether the party arguing for preemption "has shouldered the burden of overcoming that presumption." (*Pharm. Research and Mfrs. of Am. v. Walsh* (2003) 538 U.S. 644, 661-662 (conc. opn. of Stevens, J.).) All preemption analyses:

> must be guided by two cornerstones of [the U.S. Supreme Court's] pre-emption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' [courts] 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "

(*Wyeth v. Levine* (2009) 555 U.S. 555, 565; *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 938, 939.)

The presumption against preemption is particularly strong in cases where implied preemption is asserted. Just last term, the U.S. Supreme

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analysis. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 822-825.) Amici assume, arguendo, that obstacle preemption analysis is applicable here in spite of the express anti-preemption provision specifying Congress' intent that only "positive conflicts" would trigger preemption.

Court reiterated that its "precedents 'establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.' " (*Chamber of Commerce of U.S. v. Whiting* (2011)131 S.Ct. 1968, 1985 (plur. opn. of Roberts, J.) [quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n* (1992) 505 U.S. 88, 110 (conc. opn. of Kennedy, J .)].) "Implied preemption analysis," the Supreme Court cautioned, "does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.' " (*Ibid.* [quoting *Gade, supra*, 505 U.S. at p. 111].) Indeed, the requisite congressional intent to impliedly preempt state law may be inferred only "to the extent [the state law] actually conflicts with federal law." (*Cal. Fed. Sav. & Loan Ass'n v. Guerra* (1987) 479 U.S. 272, 281.) Moreover, "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.' " (*Wyeth, supra*, 555 U.S. at p. 575 [quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* (1989) 489 U.S. 141, 166–167].)

As noted above, Congress specifically left a significant role for the states in regulating controlled substances. (See 21 U.S.C. § 903.) The CSA addresses areas traditionally regulated by the states and their subdivisions: public health and medical care (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815-816), land use (*Lake Country Estates, Inc. v. Tahoe*

Regional Planning Agency (1979) 440 U.S. 391, 402), and state and local government's power to criminalize conduct. (*In re Jose C.* (2009) 45 Cal.4th 534, 544; *County of San Diego*, *supra*, 165 Cal.App.4th at pp. 822-823.) Since the country's founding, it has been chiefly state and local governments—not the federal government—that have taken responsibility for crafting and enforcing laws designed to promote health and protect safety. In the field of drug control, specifically, states have long experimented with laws and policies aimed at reducing the harms caused by the misuse of controlled substances while maximizing their social and medicinal benefits.

The analysis here, then, must begin with a very substantial presumption against finding that Long Beach's now-repealed local ordinance regulating in an area traditionally left to state and local governments was impliedly preempted by the CSA. Applying this strong presumption against preemption to Chapter 5.87, it is clear that Long Beach's ordinance did not stand as an obstacle to the accomplishment of the purpose of the CSA.

II. APPLYING THE STRONG PRESUMPTION AGAINST PREEMPTION HERE, CHAPTER 5.87 WAS NOT PREEMPTED BY THE CSA BECAUSE IT FURTHERED RATHER THAN OBSTRUCTED THE CSA'S PURPOSE.

A. The CSA's purpose is to prevent drug abuse, not to oust states and localities from regulation that limits the availability of drugs.

Congressional intent is, "the ultimate touchstone in every pre-emption case." (*Wyeth*, *supra*, 555 U.S. at p. 565; *Viva*, *supra*, 41 Cal.4th at p. 939.) The fundamental goal of the CSA is to reduce harmful drug abuse. The legislation's stated purpose is "to provide increased research into, and *prevention of, drug abuse and drug dependence*; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse." (Pub.L. No. 91-513 (1970) 84 Stat. 1236 [preamble] (codified at 21 U.S.C. §§ 801-904), italics added.) Indeed, the Supreme Court has characterized the CSA as "a statute combating recreational drug abuse. ... " (*Gonzales v. Oregon* (2006) 546 U.S. 243, 272.) The statute's anti-preemption provision makes clear, however, that what Congress did *not* intend to do in enacting the CSA is displace state and local regulation of controlled substances. (21 U.S.C. § 903 ["No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field . . . to the exclusion of any State law . . . which would otherwise be within the authority of the State ... ."].)

In the nearly 16 years since California decriminalized medical marijuana, 16 states and the District of Columbia have followed its lead.[6]

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[6] The following jurisdictions currently decriminalize medical marijuana use by specified individuals: Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island,

Congress could have at any point during this time amended the CSA to fully occupy the field, or to otherwise expand the federal law's preemptive reach in the face of ever more states decriminalizing medical marijuana. Instead, Congress has chosen not to revise the CSA's anti-preemption provision, which can reasonably be understood as a signal that Congress does not regard such laws as posing an irreconcilable threat to the fundamental goals of the CSA. At the very least, Congress's longstanding choice not to expand the preemptive force of the CSA means that courts must exercise extreme caution in considering the legislation's preemptive scope. (Cf. *In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088 ["We apply this presumption [against preemption] to the *existence* as well as the *scope* of preemption."]; *Viva*, *supra*, 41 Cal.4th at p. 945 [where Congress expressly identifies scope of the state law it intends to preempt, court will infer Congress intended to preempt no more than that]; *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 957].) Because Congress has "decided to . . . tolerate whatever tension there" is between the CSA and state medical marijuana decriminalization, "[t]he case for federal pre-emption is particularly weak." (*Wyeth, supra*, 555 U.S. at p. 575 [quoting *Bonito Boats, supra,* 489 U.S. at pp. 166–167 [internal quotation marks omitted].)

Vermont, and Washington. (http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881.)

B. Chapter 5.87 did not pose an obstacle to the accomplishment and execution of the full objectives of the CSA because it restricted access to medical marijuana otherwise permissible under state law and thus narrowed the scope of state medical marijuana decriminalization.

The effect of Long Beach's repealed ordinance must be analyzed within the context of California's state laws decriminalizing some medical uses of marijuana which remain prohibited under federal law. As a preliminary matter, the federal preemption doctrine is clearly not implicated when a state decriminalizes activities involving controlled substances that are criminal under federal law.[7] (See *Qualified Patients*, *supra*, 187 Cal.App.4th at p. 762; *County of San Diego*, *supra*, 165 Cal.App.4th at pp. 827-828.) This is so because the Tenth Amendment prevents the federal government from overreaching into the sphere of independent state sovereignty. (See *New York v. United States* (1992) 505 U.S. 114, 162 [observing that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"]; *Printz v. United States* (1997) 521 U.S. 898, 912.) In short, "[n]o matter how powerful the federal interest involved, the Constitution

[7] For example, Alaska has largely decriminalized marijuana. (Alaska Stat., §§ 11.71.190, subd. (b) [placing marijuana in schedule VIA, which is for controlled substances with "the lowest degree of danger or probable danger to a person or the public], 11.71.160, subds. (a) & (f) [placing certain marijuana compounds in schedule IIIA for controlled substances with a greater degree of danger or probable danger to the public]; *Ravin v. State* (Alaska 1995) 537 P.2d 494, 511 [holding article I, section 22 of Alaska's constitution protects rights of adults to possess marijuana in their home for personal use without state criminal sanction].)

simply does not give Congress the authority to require the States to regulate." (*New York*, *supra*, 505 U.S. at p. 178.)

Thus, states can decriminalize conduct that the federal government criminalizes without running afoul of the preemption doctrine. (See, e.g., *Hyland v. Fukuda* (9th Cir. 1978) 580 F.2d 977, 980-981 [holding that Hawaii law exempting state employees from Hawaii law prohibiting possession of a firearm by certain felons was not preempted by federal law with no such exemption].) If federal law's criminalization of certain conduct could preempt a state's decriminalization of that same conduct, federal law would *force* states to enact matching criminal prohibitions. The Tenth Amendment forbids this. (*Printz*, *supra*, 521 U.S. at p. 912 ["state legislatures are not subject to federal direction"] [*citing New York*, *supra*].) Therefore, the federal CSA cannot be construed as preventing state decriminalization of marijuana entirely.

Rather than decriminalizing all marijuana use under state law, California has taken the much more moderate step of decriminalizing the medical use of marijuana under specific, limited circumstances. The regulatory framework enacted by the state is merely the mechanism by which the state continues to enforce its otherwise applicable laws prohibiting marijuana use and identifies those persons and activities that are exempted from those prohibitions. Because the federal government cannot require California to criminalize medical marijuana use, the state medical

marijuana regulatory provisions removing some, but not all, state sanctions for marijuana use (Health & Saf. Code, §§ 11362.5, 11362.775) cannot be deemed preempted as an "obstacle" to the federal CSA.[8]

Similarly, local ordinances enacted by political subdivisions of the state which merely implement state medical marijuana laws are likewise not preempted by federal law. Long Beach's now-repealed Chapter 5.87 was even more clearly than state law not an obstacle to the objectives of the CSA because Chapter 5.87 limited the availability of marijuana by creating *additional restrictions* on medical marijuana activity, criminalizing under local ordinance activity that was otherwise *permissible* under state law.

The Court of Appeal correctly acknowledged that state law does not present an obstacle to Congress's purposes simply by not criminalizing conduct that Congress has criminalized. (*Pack*, *supra*, 132 Cal.Rptr.3d at 651, [slip op. at p. 9].) The Court of Appeal nonetheless found Chapter 5.87 preempted, based upon a distinction the court drew between a state or local government "decriminalizing" versus "authorizing" conduct. This

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[8] Such a construction of the CSA would raise serious constitutional questions under the Tenth Amendment that should be avoided where another reasonable construction is available. (See *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.* (2009) 556 U.S. 502, 516 ["The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts."]; see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council* (1988) 485 U.S. 568, 575.)

distinction elevates semantics over function, and misconstrues the sort of "authorization" that triggers federal preemption.[9]

Of course, no state or local law can "authorize" conduct prohibited by federal law, in the sense of erecting a state shield that protects against federal enforcement of federal criminal law. (*Howlett v. Rose* (1990) 496 U.S. 356, 375 ["The elements of, and the defenses to, a federal cause of action are defined by federal law."].) Any state or local law purporting to create such a shield would be preempted by federal law under the Supremacy Clause. But Chapter 5.87 expressly stated that it did not "purport[] to permit activities that are otherwise illegal under federal, state, or local law," (LBMC, ch. 5.87, § 5.87.010, subd. (A)), and it did not interfere with federal enforcement of federal law. Federal law provides the federal government with the tools to enforce the CSA, and these tools

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[9] In its obstacle preemption analysis, the court below focused on whether state law (the CUA or MMPA) or local law (the City's ordinance) authorizes what federal law (the CSA) prohibits, relying on the Oregon Supreme Court's reasoning in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.* (Or. 2010) 230 P.3d 518. (*Pack v. Superior Court (City of Long Beach)* (2011) 132 Cal.Rptr.3d 633, 651-652, 653-654 [slip op. at pp. 29-30, 32-33].) However, this Court has noted that reliance on these kinds of distinctions is "myopic and oversimplified" and that the "crucial question is, instead, whether the state rule would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 992-993.) Furthermore, the Oregon Supreme Court has since clarified that "*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted." (*Willis v. Winters* (Or. 2011) 253 P.3d 1058, 1064, fn. 60.)

remain intact notwithstanding the medical marijuana laws enacted, or repealed, by states and localities. (See *Qualified Patients*, *supra*, 187 Cal.App.4th at p. 759 ["the high court's decision in *Gonzales* demonstrated the absence of any conflict preventing coexistence of the federal and state regimes since '[e]nforcement of the CSA can continue as it did prior to [California's medical marijuana decriminalization]' "]; *City of Garden Grove*, *supra*, 157 Cal.App.4th at p. 385 [holding that no conflict arises from Congress's decision to prohibit the possession of medical marijuana while California has decided not to prohibit it and noting "California's statutory framework has no impact on the legality of medical marijuana under federal law"].) Indeed, the establishment of the City of Long Beach's permit scheme could actually have served to *assist* the federal government, were it so inclined, in detecting and prosecuting individuals for CSA violations:

> Federal authorities [may be able to] gain access to local government records to identify and shut down dispensary cultivation sites that California has determined are lawful[, or identify] by their nonparticipation in the permit process[] rogue sources of illicit marijuana against whom federal, state, and local authorities may join forces, or otherwise cooperate as contemplated by the people in enacting the [state Compassionate Use Act (Prop. 215)].

(*City of Lake Forest v. Evergreen Holistic Collective* (2012) 138 Cal.Rptr.3d 332, 361, fn. 12 [slip op. at p. 45, fn. 12], review granted May 16, 2012.)

The "authorization" the Court of Appeal here found objectionable was in fact a set of locally imposed and enforced limitations *restricting* medical marijuana activities that were otherwise permissible—that is, not subject to state criminal sanction—under state medical marijuana laws. Because Chapter 5.87 prohibited marijuana cultivation and distribution that was otherwise allowed under state law, it furthered rather than obstructed the purposes of the CSA, namely combating recreational drug use.

Given that the Tenth Amendment permits California to decriminalize all medical marijuana activities, it defies reason to suggest that Congress intended to preempt localities from limiting the production, limiting the proliferation, and reducing the potential abuse of marijuana—all of which would serve to narrow the scope of a state policy that differs from federal policy. Chapter 5.87's effect was to reign in California's more permissive law; these additional local restrictions were consistent with, not inimical to, the CSA's stated goal of reducing drug abuse. For instance, under state law, qualified patients and primary caregivers may "collectively or cooperatively [] cultivate marijuana for medical purposes" without being subject to state criminal liability or nuisance abatement proceedings solely on that basis. (Health & Saf. Code, § 11362.775.) State law does not place a limit on the number of collectives or dispensaries that may form to provide medical marijuana to qualified patients. State law provides no requirement that collectives obtain any permit or local government permission in order

to operate, places no restrictions upon where collectives may cultivate and distribute marijuana, and imposes no requirements that collectives maintain records. In contrast, the City's now-repealed ordinance, Chapter 5.87, made it, "unlawful for any person or entity to engage in, operate, conduct or carry on, in or upon any premises, a Medical Marijuana Collective ... unless that person or entity first obtains and continues to maintain in full force and effect a Medical Marijuana Collective Permit issued by the City as required by this Chapter." (LBMC, ch. 5.87, § 5.87.020). The City required medical marijuana dispensaries to compete "in a lottery for a limited number of permits." (*Pack*, *supra*, 132 Cal.Rptr.3d at p. 643, [slip op. at p.13]), significantly restricting the number of dispensaries that could lawfully operate within the City. Chapter 5.87 restricted the places where collectives could operate, e.g., prohibiting them from any areas zoned for residential use only. (LBMC, ch. 5.87, § 5.87.040, subd. A.) Chapter 5.87 also made it unlawful for any collective to operate in the City unless it maintained certain detailed records about its members and its operations. (LBMC, ch. 5.87, § 5.87.060.) While under state law, members of medical marijuana collectives can cultivate and access medical marijuana without participating in the state's identification card program (Health & Saf. Code, § 11362.71, subd. (a)(1)), Chapter 5.87's permit application process required collectives to provide the City with operation details such as the names and contact

information of the managing members and the location of the cultivation and distribution sites. (LBMC, ch. 5.87, § 5.87.030, subd. A.)

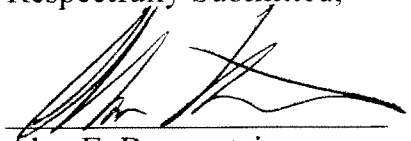
In sum, the crux of Chapter 5.87 was to create new restrictions not present under state law which made it more difficult for members of medical marijuana collectives to cultivate, distribute and access marijuana within the City—an effect that is consistent, not in conflict, with the central purpose of the CSA. Because Chapter 5.87's purpose and effect furthered the CSA in the face of California's more far-reaching state-wide medical marijuana decriminalization, and because Congress has not expressed a clear and manifest intent to rebut the presumption against preemption, amici respectfully urge this Court (should it reach the issue) to hold that Long Beach's repealed regulation did not stand as an obstacle to the CSA and thus would not have been preempted.

CONCLUSION

For the foregoing reasons, if this Court reaches the moot issue of federal preemption, it should vacate the portions of the decision below finding certain sections of the Long Beach municipal code preempted by federal law.

Date: June 18, 2012

Respectfully Submitted,



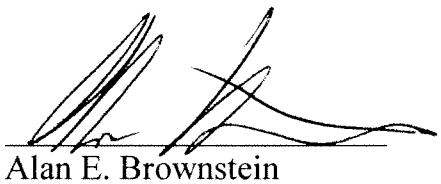
Alan E. Brownstein
Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of the Court 8.204(c)(1), I certify that the text in the attached Amicus Brief was prepared in Microsoft Word, is proportionally spaced, and contains __5,062__ words, including footnotes but not the caption, the table of contents, the table of authorities, or the application.

Date: June 18, 2012

Respectfully Submitted,



Alan E. Brownstein
Attorney for Amici Curiae

PROOF OF SERVICE

Pack v. Superior Court (City of Long Beach)
Superior Court Case Nos. NC055010 and NC055053
Court of Appeal Case No. B228781
Supreme Court Case No. S197169

I, Justin Plue, declare that I am employed in the City and County of San Francisco, over the age of 18 years, and not a party to the within action or cause. My business address is 2126 Folsom Street, San Francisco, CA 94110.

On June 18, 2012, I served a copy of the foregoing:

- APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE PROFESSORS OF CONSTITUTIONAL AND CRIMINAL LAW ALAN BROWNSTEIN, ERWIN CHEMERINSKY, SAM KAMIN, ALEX KREIT, BERTRALL ROSS, MARGARET RUSSELL AND JONATHAN SIMON IN SUPPORT OF REAL PARTY IN INTEREST

on each of the following in the following manner:

Matthew Pappas
Charles M. Farano
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David Welch
22641 Lake Forest Drive, Suite B5-107
Lake Forest, CA 92630

Via first class US Mail

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Attn: Hon. Judge Patrick Madden
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Attn: Hon. Judge Walter Croskey
California Court of Appeal, Second Appellate
District, Division 3
300 South Spring Street
Second Floor, North Tower
Los Angeles, CA 90013

Via first class US Mail

Court of Appeal

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 18, 2012, at San Francisco, California.

_____

Justin Plue