NO. 90780-3

SUPREME COURT OF THE STATE OF WASHINGTON

MMH, LLC and GRAYBEARD HOLDINGS, LLC,

Appellants,

and

DOWNTOWN CANNABIS CO., LLC; MONKEY GRASS FARMS, LLC; and JAR MGMT, LLC, d/b/a/ RAINIER ON PINE,

Intervenor-Appellants,

v.

CITY OF FIFE,

Respondent,

and

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

Intervenor-Respondent.

BRIEF OF ATTORNEY GENERAL AS INTERVENOR

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I. INTRODUCTION

Initiative 502 (I-502) markedly changed Washington's approach to marijuana, decriminalizing its use under state law and authorizing a state-regulated system for producing, processing, and selling it. I-502 is silent, however, as to its impact on the broad, preexisting authority of local governments, which comes directly from article XI, section 11 of the Washington Constitution. In applying this section, this Court has adopted a strong presumption against finding state preemption of local authority.

Nothing in I-502 expresses a clear intent to override local authority and require local governments to allow marijuana businesses. Plaintiffs cannot meet their heavy burden of proving otherwise. They admit that nothing in I-502 expressly preempts local authority to regulate or ban marijuana businesses. But they argue that I-502 preempts local bans by creating a "statutory right to obtain marijuana . . . through large-scale commercial production, processing, and retail operations." MMH Br. at 1.

This argument fails. Nothing in I-502 gives marijuana businesses a right to open in a location regardless of local law. That is the considered view of all five superior courts to consider this issue,[1] the Attorney

[1] Those five are Pierce County Superior Court in this case and *Green Collar, LLC v. Pierce County*, No. 14-2-11323-0 (appeal pending, Court of Appeals No. 47140-0-II); Chelan County Superior Court in *SMP Retail, LLC v. City of Wenatchee*, No. 14-2-00555-0 (appeal dismissed, Court of Appeals No. 32911-9-III); Benton County Superior Court in *Americanna Weed, LLC v. City of Kennewick*, No. 14-

General (2014 Op. Att'y Gen. No. 2), and the Liquor Control Board, the expert agency charged with implementing I-502 (WAC 314-55-020(11)).

Even Plaintiffs concede that I-502 creates no right to operate in violation of certain local laws. MMH Br. at 19-21. They ask this Court to invent a distinction and hold that I-502 allows cities to adopt "reasonable regulations" but not ban marijuana businesses. Nothing in I-502 draws that distinction or preempts either type of rule. By contrast, the State's medical marijuana law explicitly precludes bans on licensed dispensers while allowing other regulations. RCW 69.51A.140(1). I-502 easily could have included a similar rule, but did not. Plaintiffs ask this Court to add this rule after the fact. The Attorney General takes no position on such a rule as a policy matter, but as a legal matter respectfully asks this Court to affirm the trial court's holding that nothing in I-502 as written requires local governments to allow marijuana businesses.

If the Court concludes, however, that I-502 requires cities to allow marijuana businesses, the Court should reject Fife's claim that federal law preempts that requirement. There is a strong presumption against finding that federal law overrides state authority, and Fife cannot show that Congress intended to override any requirements I-502 imposes on cities.

2-02226-1 (appeal pending, Wash. Sup. Ct. No. 91127-4); and Cowlitz County Superior Court in *Emerald Enterprises, LLC, v. Clark County*, No. 14-2-00951-9 (appeal pending, Court of Appeals No. 47068-3-II).

II. COUNTERSTATEMENT OF ISSUES

1. Does I-502 impliedly preempt local ordinances that prohibit marijuana businesses within the local government's jurisdiction?

2. If I-502 does require local governments to allow marijuana businesses, is I-502 in turn preempted by federal law?[2]

III. STATEMENT OF THE CASE

Washington voters approved I-502 at the November 2012 general election. Laws of 2013, ch. 3 (*codified in* RCW 69.50). I-502 decriminalized under state law the possession of limited amounts of marijuana by persons twenty-one years or older. RCW 69.50.4013(3). It also established a licensing program for three types of marijuana businesses: producers, processors, and retailers. RCW 69.50.325. I-502 decriminalized producing, processing, and selling marijuana if done within the regulatory system established by the act, although these actions remain criminal outside that regulatory process. RCW 69.50.325; *see also* RCW 69.50.401(3).

I-502 authorized the Washington State Liquor Control Board (the Board) to issue licenses to marijuana producers and processors, and to a limited number of retail outlets. RCW 69.50.354. Nothing in I-502,

[2] This question will be presented only if Fife continues to maintain its alternative argument on appeal, i.e., that if I-502 requires Fife to allow marijuana businesses, then the initiative is preempted by federal law.

however, took away the preexisting authority of local governments to regulate businesses within their jurisdictions. Moreover, nothing in I-502 provides that a license from the Board gives a business a right to operate in violation of local law. The Board's own rules interpreting I-502 confirm this, saying: "The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements." WAC 314-55-020(11). The Board's authority includes setting *maximum* (but notably not *minimum*) numbers of retail licenses for each county. RCW 69.50.345(2).

The City of Fife has enacted a series of ordinances in recent years, first in contemplation of medical marijuana and more recently relating to I-502. CP at 629-41; CP at 649-57. Appellants MMH, LLC and Graybeard Holdings, LLC (collectively, MMH), are applicants for state licenses to sell marijuana at retail. CP at 196, 207.

MMH commenced these consolidated actions to challenge Fife's most recent ordinance, which bans marijuana production, processing, and retail businesses within the city. CP at 1-12. MMH contended that Fife's ordinance is preempted by state law. CP at 161-88. Fife responded that I-502 contains no provision expressly or impliedly displacing its local authority. Fife argued in the alternative that if I-502 were read to require

the City to allow marijuana businesses, then I-502 would be preempted by federal law. CP at 15-41. Several businesses that seek licenses to sell marijuana at other locations in Pierce County—Downtown Cannabis Co., Monkey Grass Farms, and Jar Mgmt. (collectively, Monkey Grass)—intervened to support MMH. CP at 1057-97.

The attorney general intervened to defend the will of the voters in enacting I-502. CP at 1437, 1897-1901. The attorney general took no position as to whether local ordinances like Fife's are good policy, but defended Fife's ordinance as within the City's legal power. The attorney general parted company with Fife as to its federal preemption argument. The attorney general first emphasized that if I-502 does not preempt Fife's ordinance, the court need not and should not reach Fife's contention that federal law preempts I-502. But the attorney general also argued that even if I-502 implicitly requires Fife to allow marijuana businesses, such a requirement would not be preempted by federal law. CP at 686-706.

The superior court granted summary judgment in favor of Fife and the attorney general, holding that I-502 does not preempt Fife's ordinance. Having reached this conclusion, the trial court declined to reach Fife's argument that federal law preempts I-502. CP at 1435-52. Both MMH and Monkey Grass (collectively, Plaintiffs) appealed. CP at 1463-83; 1484-97.

IV. SUMMARY OF ARGUMENT

Article XI, section 11 of the Washington Constitution provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Under this provision, cities and counties have plenary authority to enact legislation unless the legislature takes that power away. *State v. City of Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461 (1980). Anyone challenging a local ordinance as preempted by state law carries a "heavy burden" of proving that the statute and the ordinance "directly and irreconcilably conflict[ ]." *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 477, 482, 61 P.3d 1141 (2003) (internal quotation marks omitted). This Court makes every effort to reconcile the two rather than invalidating local law. *Id.* at 477.

Plaintiffs have not met their burden of proving that Fife's ordinance directly and irreconcilably conflicts with I-502. There is no such conflict because I-502 creates no right to operate marijuana businesses without regard to local law. *See* 2014 Op. Att'y Gen. No. 2.

This Court has never held that the existence of a state license or permit for an activity alone requires local governments to allow that activity. *See, e.g., Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d 621 (1998) ("The fact that an activity may be licensed under state law

does not lead to the conclusion that it must be permitted under local law."); *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998) (holding that state system for licensing jet-skis did not preempt county's ban on jet-skis). Rather, the Court has looked to the specific language of the state permitting statute to determine whether it intended to displace local authority. *See, e.g., Weden,* 135 Wn.2d 678. Here, a careful examination of I-502 reveals no language or section showing a clear intent to displace local power.

MMH contends that I-502 "provides a statutory right to obtain marijuana" (MMH Br. at 1), but it does no such thing. I-502 authorizes the Board to license marijuana businesses, to set rules around such licenses, and to determine the *maximum* number of retailers locally. It includes no authorization for the Board to mandate minimum numbers or to require local governments to accept a marijuana business at a particular location.

Unable to point to anything in I-502's text preempting local authority, MMH next invokes its alleged purpose. But I-502's purposes include neither maximizing the availability of marijuana nor guaranteeing access to marijuana at particular locations. I-502 merely establishes a new regulatory system to ameliorate the harms of a product still viewed in law as capable of abuse. Laws of 2013, ch. 3, § 1.

Finally, if this Court agrees that I-502 does not preempt the Fife ordinance, the Court should not consider Fife's alternative argument that in such a case federal law would preempt I-502. But if this Court concludes that Fife's ordinance is preempted by state law, it should reject Fife's alternative argument. The federal controlled substances act only preempts state laws directly in conflict. 21 U.S.C. § 903. I-502 in no way compels Fife to violate federal law, so there is no direct conflict.

V. ARGUMENT

A. Standard of Review

When reviewing a grant of summary judgment, this Court engages in the same inquiry as the trial court. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). Here, the question is whether Fife Ordinance 1872 is preempted by state law and thus unconstitutional. In evaluating such claims, this Court has repeatedly held that "a heavy burden rests upon the party challenging" the local ordinance. *HJS Dev.*, 148 Wn.2d at 477. "'Every presumption will be in favor of constitutionality.'" *HJS Dev.*, 148 Wn.2d at 477 (quoting *Lenci v. City of Seattle*, 63 Wn.2d 664, 667-68, 388 P.2d 926 (1964)). Indeed, in general, "[a] statute will not be construed as taking away the power of a municipality to legislate unless this 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).

Thus, the burden is on Plaintiffs to overcome this "heavy burden" and convince this Court that I-502 expressed a "clear intent" to preempt local authority. They cannot.

B. I-502 Does Not Preempt Fife's Ordinance

Plaintiffs offer three arguments in support of their view that I-502 overrides Fife's ordinance. They claim that: (1) Fife's ordinance irreconcilably conflicts with I-502 because it prohibits what state law permits (MMH Br. at 12-21); (2) Fife's ordinance thwarts I-502's purpose (MMH Br. at 21-23); and (3) Fife's ordinance exercises power that I-502 did not confer on local governments, (MMH Br. at 24-25). *See also* Monkey Grass Br. at 9-17. Each of these arguments fails under the plain language of I-502 and this Court's case law.

1. Plaintiffs Have Failed to Prove That Fife's Ordinance Irreconcilably Conflicts With I-502

State statutes can preempt local ordinances by (1) expressly saying so, (2) occupying the field of regulation and leaving no room for local jurisdiction, or (3) creating a conflict such that state and local laws cannot be harmonized. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010); *see also* 2014 Op. Att'y Gen. No. 2, at 4 (discussing preemption in the context of I-502). Although Plaintiffs argued below that

all three forms of preemption apply here,[3] they now argue only conflict preemption. It is thus crucial to articulate properly this Court's test for when conflict preemption applies.

a. Irreconcilable Conflict Arises Only Where State Law Creates A Right to Engage in An Activity in Circumstances Prohibited By A Local Ordinance

An ordinance is invalid under conflict preemption if it directly and irreconcilably conflicts with state law such that the two cannot be harmonized. *Lawson*, 168 Wn.2d at 682; *Weden*, 135 Wn.2d at 693. Because "[e]very presumption will be in favor of constitutionality," courts make every effort to reconcile state and local law if possible. *HJS Dev.*, 148 Wn.2d at 477 (internal quotation marks omitted). Conflict preemption arises only "when an ordinance and statute cannot be harmonized." *Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't*, 153 Wn.2d 657, 663, 105 P.3d 985 (2005).

Throughout their briefs, MMH and Monkey Grass rely on a shorthand version of this test that this Court has sometimes used: "An

[3] Their argument relied on RCW 69.50.608, a preexisting section of the Controlled Substances Act, in which I-502 is codified, that provides that the Act "preempts the entire field of setting penalties for violations of the" Act. But as Plaintiffs now effectively concede, this section does not preempt ordinances like Fife's because such ordinances do not "set penalties for violations of" the Controlled Substances Act. Moreover, in interpreting this provision in *City of Tacoma v. Luvene*, 118 Wn.2d 826, 834, 827 P.2d 1374 (1992), this Court made clear that because "the statute expressly grants some measure of concurrent jurisdiction to municipalities," it expresses "[n]o intent to preempt local government authority to enact 'ordinances relating to controlled substances'" (quoting RCW 69.50.608).

ordinance conflicts with state law if it permits what state law forbids or forbids what state law permits." MMH Br. at 12 (citing *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004)); Monkey Grass Br. at 9. But they misunderstand how this Court has applied this test.

This Court has never held that any time state law permits an activity in some general sense, local governments must allow it. Indeed, this Court has held that even "[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law." *Rabon*, 135 Wn.2d at 292,

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

Similarly, in *Lawson*, state law imposed many regulations on mobile home tenancies, and it contemplated that such tenancies could include recreational vehicles (RVs). The City of Pasco, however, banned

RVs from mobile home parks. The plaintiff contended that "Pasco's ordinance conflicts with [state law] because it prohibits what [state law] permits: the placement of RVs in mobile home parks." *Lawson*, 168 Wn.2d at 682-83. The Court rejected this argument, concluding that state law did not "affirmatively authorize[ ] [RVs] on any mobile home lot in the state." *Id.* at 683. "The statute does not forbid recreational vehicles from being placed in the lots, nor does it create a right enabling their placement." *Id*. Because state law created no affirmative right to place an RV in a mobile home park, it did not prevent municipalities from barring them. *Id*. at 684.

As these cases illustrate, to show that local law "prohibits what state law permits," this Court has required more than that state law allow an activity generally. Rather, this Court has found that a local ordinance "forbids what state law permits" only when the state law creates an entitlement to engage in the activity in specific circumstances forbidden by the local legislation. *Id.* at 683-84; *Weden*, 135 Wn.2d at 694. As this Court has stated the matter, the real question is whether state law creates a "right" to do something that the ordinance specifically prohibits. *Id.* at 695 (finding no conflict because state law created no "right to operate [jet-skis] in all waters throughout the state"); *Lawson*, 168 Wn.2d at 683 (finding no conflict because the "statute does not . . . create a right enabling [RV]

placement"). The California Supreme Court has interpreted their state constitution, which contains language identical to article XI, section 11, in the same manner, holding that state law preempts a local ordinance only when "the ordinance directly requires what the state statute forbids or prohibits what the state enactment *demands*." *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 743, 300 P.3d 494, 156 Cal. Rptr. 3d 409 (2013) (emphasis added).

b. I-502 Does Not Create a Right for Marijuana Businesses to Operate Regardless of Local Law

Applying the proper test just articulated, I-502 does not irreconcilably conflict with Fife's ordinance because I-502 creates no right to operate a marijuana business regardless of local law. Thus, the ordinance does not prohibit anything that I-502 creates a right to do.

Examining the specific provisions of I-502 Plaintiffs cite confirms this conclusion. Although Plaintiffs claim that I-502 creates a "statutory right to obtain marijuana" anywhere in the state "through large-scale commercial production, processing, and retail operations" (MMH Br. at 1), the text of the initiative supports no such claim.

Plaintiffs cite three operative sections of I-502 that they claim preempt local authority: RCW 69.50.342, RCW 69.50.345, and RCW 69.50.354. None can bear the weight they assign to it.

The very first quote from I-502 in MMH's brief is emblematic of their troubling approach to the initiative's text. They claim that I-502 "requires the 'provision of adequate access to licensed sources of useable marijuana . . . to discourage purchases from the illegal market.'" MMH Br. at 1. They cite this as fact throughout their brief. *See, e.g.*, MMH Br. at 10, 19. But in none of these places do they provide a citation to the statute quoted. The reason, of course, is that the quote is entirely out of context. What the section actually says is that the Board

> must adopt rules by December 1, 2013, that establish the procedures and criteria necessary to implement the following:
>
> . . .
>
> (2) Determining, in consultation with the office of financial management, the maximum number of retail outlets that may be licensed in each county, taking into consideration: (a) Population distribution; (b) Security and safety issues; and (c) The provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market[.]

RCW 69.50.345.

Far from creating a statutory "right" to obtain marijuana, this section simply directs the Board to make rules, one of which is a *maximum* number of retail stores per county, and *one factor* to be considered in doing that is "the provision of adequate access." This is nowhere near the sort of clear statement of intent necessary to show preemption of local authority. And there is no irreconcilable conflict here:

the Board sets a maximum number of stores per county, not a minimum or fixed number of stores that local governments must allow.

The next statute MMH cites is RCW 69.50.342. MMH Br. at 4, 19-20. That provision authorizes the Board "to adopt rules regarding" a number of issues, including "retail outlet locations and hours of operation." RCW 69.50.342(6). This rulemaking power falls far short of showing clear and express intent to override local authority. Indeed, in adopting rules to implement this provision, the Board specified: "The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements." WAC 314-55-020(11). It turns the law on its head to argue that a rulemaking statute that the Board applied specifically to require compliance with local rules actually overrides such rules.

MMH's final citation is to RCW 69.50.354. MMH. Br. at 19-20. That provision states: "There may be licensed, in no greater number in each of the counties of the state than as the state liquor control board shall deem advisable, retail outlets established for the purpose of making marijuana . . . products available for sale to adults aged twenty-one and over." It goes on to say that retail sales by licensees in compliance with I-502 and Board rules "shall not be a criminal or civil offense under

Washington state law." MMH. Br. at 19-20. But this permissive provision is merely a grant of authority to the Board, not a clear statement of intent to displace local power. Indeed, in stating that "[t]here may be licensed," while later saying there "shall" be no penalty for compliant sales, the statute's phrasing suggests that even its directive to the Board is discretionary. *See, e.g., Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982) ("Where a provision contains both the words 'shall' and 'may,' it is presumed that the lawmaker intended to distinguish between them, 'shall' being construed as mandatory and 'may' as permissive."). If the statute does not even require the Board to do anything, how could it possibly evince a clear intent to override local authority?

Beyond the individual flaws with each of these arguments, there is a broader problem with MMH's position. Within the sections they cite, the *only* provisions related to the Board's authority to regulate where licensees may be located have to do with retail stores. *See* RCW 69.50.342(6) (Board may adopt rules as to "[r]*etail outlet* locations and hours of operation" (emphasis added)), .345(2) (Board must adopt rules to determine "the maximum number of *retail outlets* that may be licensed in each county"), .354 ("*Retail outlet* licenses" (emphasis added)). Yet MMH appears to be claiming that I-502 preempts local

authority to prohibit any type of business licensed by the Board, whether producer, processor, or retailer. MMH Br. at 1 (I-502 "provides a statutory right to obtain marijuana legally through large-scale commercial production, processing, and retail operations"). This position is untenable. MMH cannot even show that these provisions clearly stated an intent to preempt local authority as to retail outlets (*Schillberg*, 92 Wn.2d at 108), so how could they possibly state such an intent as to other licensees? And if MMH is arguing that these provisions preempt local regulatory authority only as to retail stores, that would just highlight the extent to which they ask this Court to invent a rule I-502 itself does not contain. If I-502 really preempted local regulation of marijuana retail stores but not growers and processors, doesn't that seem like the sort of detailed policy choice that would have been explicit in the initiative? *See, e.g.*, *Jenkins v. Bellingham Mun. Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981) (declining to read into statute a distinction not present in its text, because doing so would "invit[e] judicial legislation"); *id.* at 579 ("This court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission.").

In sum, nothing in I-502 creates an entitlement for licensees to operate regardless of local law. Instead, a license from the Board is a precondition to producing, processing, or selling marijuana without

violating state law. RCW 69.50.325 (creating exceptions to what would otherwise be criminal conduct). The initiative demonstrates no clear intent to take away local authority to prohibit marijuana businesses, and this Court should not read in such a provision.

c. Plaintiffs' Attempt to Distinguish Relevant Cases Fails

MMH urges this Court to distinguish *Weden* and *Lawson* on the basis that I-502 supposedly establishes a more detailed regulatory scheme than was at issue in those cases. MMH Br. at 16-19. That claimed distinction is both factually wrong and legally irrelevant.

The distinction is wrong because both *Lawson* and *Weden* involved highly detailed statutory schemes. *Lawson* concerned the Mobile Home Landlord Tenant Act, RCW 59.20. That Act contains 42 separate sections (RCW 59.20.010-.902), one *more* than I-502 contains (Laws of 2013, ch. 3), and it regulates everything from who may live in a mobile unit (RCW 59.20.145), to what form of arbitration is allowed if disputes arise, (RCW 59.20.250-.290). Indeed, in *Lawson* itself, this Court described that act and other statutes regulating mobile homes as "broad" and "comprehensive regulation." *Lawson*, 168 Wn.2d at 680. Similarly, in *Weden* the plaintiffs argued that San Juan County's ban on jet-skis conflicted with RCW 88.02, regulating vessel registration; former RCW

88.12, regulating recreational vessels; RCW 90.58, the Shoreline Management Act of 1971; and former RCW 43.99, the Marine Recreation land Act of 1964 (now codified in RCW 79A.25). *Weden*, 135 Wn.2d at 694-97. Those detailed chapters extensively regulated use of vessels and state waters, but the Court found no intent to preempt. *Id.*

More importantly, MMH's point is legally irrelevant because the question in analyzing conflict preemption is not how detailed a state law is, but rather whether it is possible to reconcile the state law—detailed or not—with the local ordinance. *See, e.g.*, *Entm't Indus. Coal.*, 153 Wn.2d at 663 (conflict preemption arises only "when an ordinance and statute cannot be harmonized"). And where, as here, state law creates no right to engage in an activity in the circumstances prohibited by the local ordinance, there is no irreconcilable conflict. *See, e.g.*, *Lawson*, 168 Wn.2d at 683 (finding no preemption because state law "contains no language creating a right to place RVs in mobile home parks anywhere in the state"); *Weden*, 135 Wn.2d at 694 (finding no preemption because state law did not "grant [jet-ski] owners the right to operate their [jet-skis] anywhere in the state"). Indeed, here, one of the detailed regulatory provisions in which MMH places so much stock actually rejects their position. WAC 314-55-020(11) ("The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of

local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements."). Detail is a double-edged sword.

d. The Cases Plaintiffs Cite Fail to Prove Their Point

Unable to cite any section of I-502 clearly expressing an intent to preempt local rules, Plaintiffs instead devote much of their argument to describing a number of preemption cases. MMH Br. at 12-15; Monkey Grass Br. at 9-17. But these cases do little to support them.

MMH starts by describing at length this Court's decisions in *State v. Kirwin*, 165 Wn.2d 818, 203 P.3d 1044 (2009), and *City of Seattle v. Eze*, 111 Wn.2d 22, 759 P.2d 366 (1988). But in both cases the Court held that state law *did not* conflict with the local ordinance. MMH seems to think that these cases support their position because one reason the Court found no preemption in each case was that the state laws and local ordinances at issue regulated the same conduct in similar ways. But the Court never indicated that this was a dispositive preemption test. If it were, then *Weden*, *Lawson*, and many other cases would have had to come out differently, because in each the local ordinance prohibited conduct that state law did not. *See also, e.g.*, *Schillberg*, 92 Wn.2d 106 (upholding local ordinance prohibiting motorized boats on certain lakes even though state

law contained no similar prohibition). Moreover, in other cases this Court has suggested that a local ordinance *would be preempted* if it regulated the same conduct as state law. *See, e.g., Luvene*, 118 Wn.2d at 835 ("Because the Tacoma ordinance *does not* prohibit the same conduct as the controlled substance statutes, no 'direct, irreconcilable' conflict with the controlled substance statutes exists." (Emphasis added.)).

MMH next discusses *Entertainment Industry Coalition* and *Parkland Light & Water Co*. Those cases at least found preemption, but they did so based on statutory language far different from that at issue here—language that created a right to engage in activity specifically forbidden by the challenged local ordinance.

In *Parkland Light & Water*, state law "expressly provide[d] that water districts ha[d] the authority to decide whether to fluoridate their water systems." *Parkland Light & Water*, 151 Wn.2d 428, 432, 90 P.3d 37 (2004) (citing RCW 57.08.012). Nonetheless, the Tacoma-Pierce County Health Department passed an ordinance requiring all water districts in the county to fluoridate their water. This Court held that this requirement conflicted with the right specifically granted to water districts to decide whether to fluoridate their water. *Id.* at 433 (finding that the ordinance "irreconcilably conflicts with the authority granted to water districts under RCW 57.08.012").

Similarly, in *Entertainment Industry Coalition*, state law at the time banned smoking in public places, but it explicitly entitled "certain business owners . . . to designate smoking . . . locations in their establishments." *Entm't Indus.*,153 Wn.2d at 664 (discussing former RCW 70.160.040(1) (2004), *repealed by* Laws of 2006, ch. 2, § 7(2) (Initiative Measure 901)). The Court struck down a local ordinance that prohibited smoking in all public places because the state law explicitly gave certain business owners a right to designate smoking areas, but the ordinance prohibited this. *Id.*

Unlike in both *Parkland Light & Water* and *Entertainment Industry Coalition*, I-502 contains no specific language creating a right that Fife's ordinance denies. I-502 authorizes the Board to issue licenses to producers, processors, and retailers of marijuana, who thereby escape state criminal liability for conduct that would otherwise be illegal. RCW 69.50.325. But it says nothing about local zoning and regulatory authority, and it certainly does not say that such a license grants a right to operate regardless of local law. Indeed, the Board itself does not interpret a license issued under I-502 as creating such a right. *See* WAC 314-55-020(11).

Finally, both MMH and Monkey Grass rely extensively on a recent Court of Appeals decision, *Dep't of Ecology v. Wahkiakum County*, 184

Wn. App. 372, 337 P.3d 364 (2014), *petition for review pending*, Wash. Sup. Ct. No. 91156-8. But that case, too, involves a statute and regulatory scheme quite different from I-502. At issue there is a Wahkiakum County ordinance that prohibits application of "class B biosolids" (treated municipal sewage) anywhere within the county. The Court of Appeals held that this ordinance conflicted with the state bio-solids statute. That statute directs the Department of Ecology to establish a program to manage biosolids so that, "to the maximum extent possible, . . . municipal sewage sludge is reused as a beneficial commodity." RCW 70.95J.005(2). Applying that legislative directive, "Ecology adopted a regulatory scheme that specifically grants permits for land application of class B biosolids and . . . *created a right to land application of class B biosolids when a permit is acquired*." *Wahkiakum County*, 184 Wn. App. at 381 (emphasis added). Because the statutory and permitting scheme "created a right to land application of class B biosolids when a permit is acquired" (*id.*), and because the ordinance precluded Ecology from meeting its mandate under state law to maximize the beneficial use of biosolids, the Court found irreconcilable conflict with state law (*id.* at 374).

Here, by contrast, the Board itself does not consider a license issued under I-502 a right to operate regardless of local law. WAC 314-55-020(11). And even Plaintiffs concede that a license under

I-502 creates no such right. Moreover, unlike the state law at issue in *Wahkiakum County*, which directed the Department of Ecology to regulate biosolids such that, "to the maximum extent possible, . . . municipal sewage sludge is reused as a beneficial commodity" (RCW 70.95J.005(2)), I-502 contains no similar directive to the Board to maximize marijuana use or sales. On the contrary, I-502 directs the Board to limit the number of marijuana retailers, tightly restricts marijuana advertising, and directs some of the taxes generated by marijuana sales to advertising campaigns aimed at reducing marijuana abuse. RCW 69.50.354, .357, .540(5)(b). Far from setting forth the kind of state mandate at issue in *Wahkiakum County*, I-502 merely provides that when licensed marijuana businesses produce, process, and sell marijuana, their actions "shall not be a criminal or civil offense under Washington state law." RCW 69.50.325.

In short, *Wahkiakum County* provides no support for Plaintiffs because the statute and regulatory scheme at issue there differs so dramatically from I-502. *Wahkiakum County*, 184 Wn. App. at 380-81.

e. Plaintiffs' Invented Distinction Between Reasonable Regulations and Prohibitions Finds No Support in I-502

Attempting to make their position more palatable, MMH admits that I-502 does not override all local ordinances that apply to marijuana

businesses. MMH Br. at 19-20. In their view, I-502 leaves local governments with authority to apply to marijuana businesses "local rules that apply to retail businesses in general," but takes away local authority to ban marijuana businesses. MMH Br. at 20. MMH points to no section in I-502 drawing this distinction, and there is none. This omission is particularly telling because the legislature has expressly drawn a distinction between regulating and banning marijuana businesses in the medical marijuana context, an approach that easily could have been copied here. *See* RCW 69.51A.140(1) (allowing local governments to enforce zoning and other regulations against "licensed dispensers, so long as such requirements do not preclude the possibility of siting licensed dispensers within the jurisdiction").

Unable to point to similar language in I-502, MMH defends this invented distinction on the basis that "nothing in I-502 . . . or the regulations promulgated by [the Board] expressly state that a city or county may ban I-502 businesses from their jurisdiction." MMH. Br. at 20. But as detailed below in Part V.B.3., this gets the law exactly backwards, because cities and counties possess plenary authority to pass laws unless the legislature takes such power away. *City of Seattle*, 94 Wn.2d at 165.

Ultimately, MMH's invented distinction highlights the extent to which they ask this Court to make a policy choice, not to interpret the law adopted by the people. Their view is that although I-502 does not expressly prohibit bans while allowing generally applicable regulations, that must be what the voters intended. But in all three of the other states that have enacted marijuana reforms like Washington's, voters allowed local governments to ban marijuana businesses,[4] demonstrating that it is eminently possible for voters to intend such a result. Moreover, it is far from obvious that voters intended the rule MMH proposes. How could the Court be sure that voters intended to limit cities to applying to marijuana businesses "rules that apply to retail businesses in general," when marijuana businesses might raise new concerns even for cities that want to allow them, from electricity consumption to odors to safety issues? To avoid "judicial legislation," this Court has long been careful not to read into statutes distinctions absent from their text. *Jenkins*, 95 Wn.2d at 579. The Court should apply that same care here and recognize that I-502 as enacted draws no such distinction, leaving local governments the discretion to regulate or ban marijuana businesses.

MMH's proposed rule is particularly underwhelming because it would not even achieve the result they seek. They say that I-502 allows

[4] Colo. Const. amend. 64, § 16(1)(b)(iv); Alaska Measure 2, § 17.38.110; Oregon Measure 91, § 60.

local governments to require marijuana businesses to "comply with local rules that apply to retail businesses in general." MMH Br. at 20. But many local governments in Washington have rules requiring *all* businesses to comply with local, state, and federal law as a condition of their business licenses.[5] Businesses growing, processing, and selling marijuana obviously cannot comply with current federal law, so even under MMH's test, marijuana businesses would be prohibited in many jurisdictions. The Court certainly should not adopt an invented rule to achieve an alleged statutory purpose when the rule doesn't even achieve that purpose.

In sum, Plaintiffs have failed to show that Fife's ordinance irreconcilably conflicts with I-502, and their challenge on this basis fails.

2. Plaintiffs Have Failed to Prove That Fife's Ordinance Thwarts I-502's Purpose

Unable to demonstrate that Fife's ordinance conflicts with I-502's text, MMH next contends that the ordinance conflicts with I-502 by thwarting the initiative's purpose. They claim that because I-502 aimed to take marijuana sales out of the black market and into a state-regulated system, every jurisdiction in Washington must allow marijuana businesses. Their premise is correct—one of I-502's goals was to move marijuana sales out of the shadows and into a state-regulated system. But

[5] *See, e.g.*, Enumclaw Mun. Code § 5.02.070(A)(6); Pacific Mun. Code § 5.02.135(A)(3); 5.08.060(a)(3); Waterville Mun. Code § 5.06.040(F).

their conclusion does not follow. The initiative's alleged intent cannot overcome the lack of preemptive effect in I-502's operative sections.

To begin with, it is beyond dispute that the "intent" section of a law—whether passed by initiative or by the legislature—has no operative effect. This Court has compared such statements of intent to "dicta in judicial opinions," saying: "A preface or preamble stating the motives and inducement to the making of the law . . . is without force in a legislative sense . . . . It is no part of the law." *Pierce County v. State*, 150 Wn.2d 422, 434, 78 P.3d 640 (2003) (quoting *State ex rel. Berry v. Superior Court for Thurston County*, 92 Wash. 16, 30-32, 159 P. 92 (1916)). While an intent section can provide guidance in interpreting the operative sections of a law (*State v. Alvarez*, 74 Wn. App. 250, 258, 872 P.2d 1123 (1994)), here those operative sections come nowhere close to "clearly and expressly" stating an intent to override local authority, as explained above (*Schillberg*, 92 Wn.2d at 108). *See also City of Riverside*, 56 Cal. 4th 729, 753 (holding that initiative "stat[ing] an aim to 'ensure' a 'right' of seriously ill persons to 'obtain and use' medical marijuana" did not override local bans on medical marijuana dispensaries absent an operative section carrying out that intent).

Moreover, MMH's claim that a desire to take marijuana out of the black market and create statewide reform is inherently inconsistent with

local governments retaining their normal zoning authority does not follow. Like Washington, three other states have now passed initiatives allowing licensed recreational marijuana sales under state law. As in Washington, all three initiatives stated an intent to take marijuana sales out of the black market and into a state-regulated system. *See* Colorado Const. amend. 64, § 16(1)(b)(iv); Oregon Measure 91, § 1, 2; Alaska Measure 2, § 17.38.010(b)(2). Yet all three also allow local governments to prohibit marijuana businesses. Colo. Const. amend. 64, § 16(1)(b)(iv); Alaska Measure 2, § 17.38.110; Oregon Measure 91, § 60. I-502 is the only one not to address this issue explicitly. These examples make clear that it is quite possible for voters to pass statewide reform intended to suppress the black market while also intending to leave local governments with their normal regulatory power.

In addition, as a practical matter, it is far from obvious that allowing local governments to retain their normal zoning authority will defeat this goal of I-502. For example, while Fife has barred marijuana stores, its next-door neighbor, Tacoma, has not. And the Board has issued licenses to several marijuana stores in Tacoma just minutes from Fife.[6] Meanwhile, the location restrictions in I-502 itself create far greater hurdles for some Washingtonians than does Fife's ban. For example, huge

[6] List of approved licensees is available at: http://www.liq.wa.gov/publications/Public_Records/2014-MJ%20Applicants/MarijuanaApplicants081914.xls.

swaths of Seattle are off-limits to marijuana businesses because I-502 prohibits them from locating within 1,000 feet "of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library."[7] RCW 69.50.331(9). And the Board has limited certain geographically large counties to just one retail store, potentially requiring residents to drive far longer distances than are at issue here.[8] Given that Fife's ordinance imposes a smaller practical hurdle than many hurdles imposed by the initiative itself, there is no basis to conclude that it thwarts the initiative's purpose.

In any event, I-502 had multiple goals, and the Court should not let MMH pick one to prioritize over all others, thereby creating substantive rules the initiative does not contain. While suppressing the illicit market was one goal of I-502, another was to restrict the locations where marijuana businesses could be located to minimize local opposition[9] and avoid conflict with the federal government.[10] Nothing in the initiative

[7]Dominic Holden, *Under I-502, Pot Stores Banned Almost Everywhere in Seattle*, The Stranger (Jan. 25, 2013), *available at*: http://slog.thestranger.com/slog/archives/2013/01/25/under-i-502-pot-stores-banned-almost-everywhere-in-seattle.

[8] *See* http://lcb.wa.gov/publications/Marijuana/I-502/I-502-Retail-Store-Locations-II-9-03-13.xlsx.

[9] *See, e.g.*, RCW 69.50.331(9) (prohibiting marijuana businesses within 1,000 feet "of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library").

[10]Dominic Holden, *Under I-502, Pot Stores Banned Almost Everywhere in Seattle*, The Stranger (Jan. 25, 2013), *available at*: http://slog.thestranger.com/slog/archives/2013/01/25/under-i-502-pot-stores-banned-almost-everywhere-in-seattle

suggests a single-minded focus on opening as many stores in as many places as possible. Indeed, one of the drafters of the initiative has stated that "getting stores open is a bigger priority than making them convenient."[11] This tension highlights the danger in inferring rules nowhere stated in the initiative's text based on one of the initiative's goals—it ignores other goals the public had in passing the initiative.

Plaintiffs claim support for their statutory purpose argument in the Court of Appeals' recent decision in *Wahkiakum County*, but again it provides them no help. There, one reason the Court of Appeals found conflict was that if one county could ban use of biosolids, then every county could, which would thwart "the entire statutory and regulatory scheme enacted *to maximize* the safe land application of biosolids." *Wahkiakum County*, 184 Wn. App. at 382-83 (emphasis added). But as already explained, here there is no similar intent to maximize marijuana sales. To the extent Plaintiffs' point is that local governments can never prohibit something licensed by state law because then every local government could do so, this Court has already rejected that view. *See, e.g.*, *Rabon*, 135 Wn.2d at 292 ("The fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted

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(initiative sponsor stating: "In drafting Initiative 502, a primary goal was minimizing friction with federal marijuana enforcement policy.").

[11] *Id.*

under local law."). Indeed, in *Weden* the dissent made the exact point Plaintiffs makes here, saying: "Where a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders but they may not prohibit the same outright." *Weden*, 135 Wn.2d at 720, (Sanders, J., dissenting). But this was a *dissent*, and the majority rejected this view. Here, given that I-502 states no intent to maximize marijuana sales, the possibility that other local governments will enact ordinances like Fife's is insufficient to show any thwarting of I-502's purpose.

MMH's reliance upon *Diamond Parking* is similarly misplaced. MMH Br. at 23 (citing *Diamond Parking, Inc., v. City of Seattle*, 78 Wn.2d 778, 781, 479 P.2d 47(1971)). *Diamond Parking* dealt with the corporate merger of three parking lot operators. A city ordinance required the surviving corporation to obtain new city licenses, even though state law provided that the corporation surviving the merger succeeded to all the rights of the former corporations. *Diamond Parking*, at 779-80 (describing former RCW 23.01.490(1965)). This Court's unremarkable conclusion was that the ordinance irreconcilably conflicted with state law; it did not suggest an independent basis for finding preemption based solely on the intent of state law. *Id.* at 781.

In short, MMH and Monkey Grass have failed to show that Fife's ordinance even conflicts with, much less thwarts, I-502's purpose.

3. Plaintiffs Have Failed to Prove That Fife Lacks Authority to Enact the Ordinance

MMH's final argument is that Fife's ordinance conflicts with I-502 because it exercises power that I-502 and its implementing regulations did not confer upon local governments. MMH Br. at 24. But cities' power to regulate marijuana businesses does not come from I-502 or from the Washington Administrative Code, it comes from the same source as cities' other legislative powers: article XI, section 11 of the Washington Constitution: "[A]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

Under this provision, "[t]he scope of [a city's] police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people." *City of Seattle*, 94 Wn.2d at 165. "Municipal police power is as extensive as that of the legislature, so long as the subject matter is local and the regulation does not conflict with general laws." *Id.* Thus, the validity of Fife's ordinance turns not on whether I-502 *granted* Fife any power, but rather on whether I-502 *removed* Fife's preexisting authority.

In arguing to the contrary, MMH relies on a misunderstanding of this Court's decision in *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 699, 169 P.3d 14 (2007). MMH Br. at 10. The plurality opinion in *Biggers*, upon which MMH relies, commanded the votes of only four members of this Court. A majority of this Court in *Biggers* explained that no explicit grant of statutory authority to a city is required in light of article XI, section 11. *Id.* at 704 (Chambers, J., concurring); *id.* at 707 (Fairhurst, J., dissenting); *see also Kitsap Alliance of Property Owners v. Central Puget Sound Growth Mgmt. Hr'gs Bd.*, 152 Wn. App. 190, 195-96, 217 P.3d 365 (2009) (recognizing this feature of *Biggers*).[12]

MMH also claims that Fife's ordinance depends on power granted by the Board in WAC 314-55-020(11): "The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing

[12] Prior opinions have sometimes characterized local authority in conflicting terms. In some contexts, cases describe municipal power expansively, while in others it is described restrictively. Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 Wash. L. Rev. 495, 496 (2000) (noting that Washington cases on municipal powers sometimes fail "to address adequately the differences between distinct types of municipal authority and as a result, are very much at odds"). As Professor Spitzer observes: "The failure to focus on the source of power under consideration and a misunderstanding of the mode under which a local government is operating in any given circumstance results in this confusion." *Id.* In this instance, local authority derives directly from the constitution and is not dependent upon statute. Wash. const. art. XI, § 11. And the local government acted legislatively, and not in a proprietary or other capacity. *See Cannabis Action Coal. v. City of Kent*, 180 Wn. App. 455, 478, 322 P. 3d 1246.

requirements." In MMH's view, this regulation requires only that licensees "comply with local rules that apply to retail businesses in general," so cities cannot require more. MMH Br. at 24. But that is not what the regulation says, and more importantly, that regulation is not the source of Fife's authority, which comes directly from the constitution. Rather, the regulation simply states the Board's view of what rights are granted by a license and confirms that a license grants no right to operate in "violation[ ] of local rules or ordinances." WAC 314-55-020(11).

Finally, MMH cites a California case for the proposition that when a state statute "seeks to promote a certain activity, . . . local regulation cannot be used to completely ban the activity." MMH Br. at 24 (citing *Great W. Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853, 867-68, 44 P.3d 120, 118 Cal. Rptr. 2d 746(2002)). But that case, which addressed whether California law preempted local regulation of gun shows, found no preemption in part because state law did not actually "promote" gun shows. *Great W. Shows, Inc.*, 27 Cal. 4th at 868. Similarly here, I-502 creates a new regulatory system for marijuana, but it does not "promote" the sale or use of marijuana. Moreover, in the much more relevant context of medical marijuana regulation, the California Supreme Court held that an initiative "stat[ing] an aim to 'ensure' a 'right' of seriously ill persons to 'obtain and use' medical marijuana" did not

override local bans on medical marijuana dispensaries absent an operative section carrying out that intent. *City of Riverside*, 300 P.3d at 506.

In short, MMH has failed to prove that Fife's ordinance goes beyond its legislative power.

C. Federal Law Does Not Preempt I-502

If the Court agrees with the Attorney General that I-502 preserves the normal zoning and business licensing authority of local governments regarding marijuana businesses, then the Court need not and should not decide whether I-502 conflicts with federal law. *See Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007) ("'Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented.'") (quoting *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000))). That result would not require the City of Fife to do anything at all, so there would be no occasion to consider whether state law requires the city to do anything that is prohibited by federal law. Even if I-502 requires Fife to allow marijuana businesses, however, such a requirement is not preempted by federal law.

1. Overview of Federal Preemption Rules

Just as there is a strong presumption that state law does not supersede local ordinances, there is a strong presumption that Congress does not intend to override state laws. "'State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress." *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 78, 896 P.2d 682 (1995) (quoting *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wn.2d 243, 265, 884 P.2d 592 (1994)). The burden of proof is on the City to prove "beyond a reasonable doubt" that Congress intended to preempt I-502 as applied here. *See, e.g., State v. Quintero Morelos*, 133 Wn. App. 591, 600, 137 P.3d 114 (2006).

Federal preemption of state law can take three forms: express preemption, field preemption, or conflict preemption. *Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996) (citing *Progressive Animal Welfare Soc'y*, 125 Wn.2d at 265). Express preemption occurs where "Congress passes a statute that expressly preempts state law." *Stevedoring Servs. of Am., Inc.*, 129 Wn.2d at 23. Field preemption occurs where "Congress occupies the entire field of regulation." *Id* at 23. Conflict preemption occurs when "state law conflicts with federal law" (*id.*), and it takes two forms: (a) impossibility preemption, "when compliance with both federal and state laws is

physically impossible," or (b) obstacle preemption, "when state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives." *Dep't of Ecology v. Pub. Util. Dist. 1*, 121 Wn.2d 179, 195, 849 P.2d 646 (1993), *aff'd sub nom. Pub. Util. Dist. 1 v. Dep't of Ecology*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994).

2. I-502 Is Not Preempted by Federal Law

Fife claims that the federal Controlled Substance Act of 1970 (CSA) preempts any requirement that Fife zone for or grant business licenses to businesses licensed under I-502. The CSA does no such thing.

The CSA contains a clause expressly describing its preemptive scope:

> 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 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 U.S.C. § 903.

This statute significantly narrows the range of federal preemption issues relevant here. Because Congress made clear that it only intended to preempt state laws that create a "positive conflict" with the CSA (21

U.S.C. § 903), Congress did not "occupy the field" of regulating controlled substances. Field preemption is thus inapplicable under the CSA. Express preemption also effectively becomes irrelevant because it overlaps completely with conflict preemption here, i.e., the statute expressly preempts only state laws that create a "positive conflict." *See, e.g.*, *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 819, 81 Cal. Rptr. 3d 461 (2008) ("numerous courts have concluded[ ] that . . . 21 U.S.C. § 903 [ ] demonstrates Congress intended to reject express and field preemption of state laws concerning controlled substances"). Moreover, as to conflict preemption, because the statute limits preemption to state laws where "there is a positive conflict between . . . [the CSA and] State law so that the two cannot consistently stand together," obstacle preemption is irrelevant under the CSA, because the only form of conflict the CSA is concerned with is "a positive conflict." 21 U.S.C. § 903; *See, e.g.*, *San Diego NORML*, 165 Cal. App. 4th at 825; *People v. Crouse*, __ Cal. Rptr. __, 2013 WL 6673708, at *4 (same). Indeed, other federal statutes specify that both impossibility and obstacle preemption apply, demonstrating that Congress knows how to write such a clause if that is its intent. *See, e.g.*, 21 U.S.C. § 350e(e).[13]

[13] But even if obstacle preemption were to apply, "[i]mplied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress

Thus, the only type of preemption ultimately at issue under the CSA is the "impossibility preemption" aspect of conflict preemption. *See, e.g.*, *San Diego NORML*, 165 Cal. App. 4th at 825 ("Because Congress provided that the CSA preempted only laws positively conflicting with the CSA so that the two sets of laws could not consistently stand together, and omitted any reference to an intent to preempt laws posing an obstacle to the CSA, we interpret title 21 United States Code section 903 as preempting only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible."); *Crouse*, 2013 WL 6673708, at *4 (same); *cf. S. Blasting Servs., Inc. v. Wilkes County, NC*, 288 F.3d 584, 591 (4th Cir. 2002) (reaching same conclusion as to substantively identical preemption clause in 18 U.S.C. § 848).

The question here, then, is solely whether I-502 renders Fife's "compliance with both federal and state laws [ ] physically impossible." *Dep't of Ecology*, 121 Wn.2d at 195. It does not, for at least two reasons.

First, Fife cannot explain what it is that state law requires it to do that would allegedly violate federal law. I-502 itself certainly imposes no requirement that Fife do anything affirmative to facilitate the opening of

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rather than the courts that preempts state law." *Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968, 1985, 179 L. Ed. 2d 1031 (2011) (internal quotation marks omitted). Thus, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Id.* (internal quotation marks omitted).

I-502 licensees. And Fife has cited no other state statute requiring it to do anything to affirmatively assist I-502 licensees. In short, Fife has not shown the sort of positive obligation that the CSA could preempt.

Second, even if I-502 requires Fife to take some action, Fife provides no evidence that it is required to violate federal law. Fife cited below a number of provisions of the CSA in making its preemption argument, including 21 U.S.C. § 841 (making it illegal to manufacture, distribute, or possess with intent to distribute any controlled substance), § 856 (making it illegal to "knowingly open, lease, rent, use, or maintain any place . . . for the purpose of manufacturing, distributing, or using any controlled substance"), § 860 (making it illegal to distribute or manufacture controlled substances within specified distances from certain facilities), and § 843 (making it illegal to use communication facilities to violate the CSA). CP at 35-36. Notably lacking from Fife's argument, however, is any allegation that I-502 requires Fife itself to violate these provisions. For example, nothing in I-502 requires Fife to manufacture, distribute, or possesses marijuana; to own, lease, or maintain property used to grow or sell marijuana; or to use any communication facility to accomplish these objectives itself.

Instead, Fife's claim appears to be that I-502 requires it to "aid and abet" violations of the CSA, or to participate in a conspiracy to violate the CSA. CP at 36-39. Neither allegation holds water.

For Fife to be liable for aiding and abetting a violation of the CSA, four elements would have to be established: "'(1) that [Fife] had the specific intent to facilitate the commission of a crime by another, (2) that [Fife] had the requisite intent of the underlying substantive offense, (3) that [Fife] assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense.'" *United States v. Ching Tang Lo*, 447 F.3d 1212, 1227 (9th Cir. 2006) (quoting *United States v. Garcia*, 400 F.3d 816, 818 n.2 (9th Cir. 2005)). Here, it is obvious that Fife has no "specific intent to facilitate the commission of" or intent itself to commit "the underlying substantive offense." If Fife grants permits to I-502 licensees, it would only be because state law is interpreted to require it to do so. More generally, in granting a business license, there is no reason to think a city affirmatively intends to help a business succeed—it is merely making it possible for the business to open and suggests no intent as to whether the business succeeds or fails. Under these circumstances, there is no plausible argument that Fife is aiding or abetting a violation of the CSA.

City of Garden Grove v. Superior Court, 157 Cal. App. 4th 355, 68 Cal. Rptr. 3d 656 (2007), provides helpful guidance on this issue. There, the city argued that state law could not require it to return marijuana to a medical marijuana patient because doing so would require the city to aid and abet a violation of the CSA. The court disagreed, stating:

> To be liable as an aider and abettor, a defendant must not only know of the unlawful purpose of the perpetrator, he must also have the specific intent to commit, encourage or facilitate the commission of the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 561, 199 Cal. Rptr. 60, 674 P.2d 1318.) Stated differently, the defendant must associate himself with the venture and participate in it as in something that he wishes to bring about and seek by his actions to make it succeed. (*Central Bank v. First Interstate Bank* (1994) 511 U.S. 164, 190, 114 S. Ct. 1439, 128 L. Ed. 2d 119.) Even though Kha would be in violation of federal law by possessing marijuana, it is rather obvious the City has no intention to facilitate such a breach.

City of Garden Grove, 157 Cal. App. 4th at 368.

Similarly, in *San Diego NORML*, local governments in California argued that a state law requiring them to issue identification cards to medical marijuana patients was preempted by federal law. The law at issue there "require[d] counties to provide applications to applicants, to receive and process the applications, verify the accuracy of the information contained on the applications, approve the applications of persons meeting the state qualifications and issue the state identification

cards to qualified persons, and maintain the records of the program." *San Diego NORML*, 165 Cal. App. 4th at 811. Nonetheless, the California Court of Appeals held that the CSA did not preempt these requirements because the counties failed to show that any of these requirements forced them to violate the CSA. *Id.* at 825 ("Counties do not identify any provision of the CSA necessarily violated when a county complies with its obligations under the state identification laws.").

Just as Fife cannot show that granting a business license or permit to an I-502 licensee would amount to aiding or abetting a CSA violation, it also cannot show that such actions would subject it to liability for conspiring to violate the CSA. The Ninth Circuit has defined the elements of a drug conspiracy as "(1) an agreement to accomplish an illegal objective, and (2) the intent to commit the underlying offense." *United States v. Herrera-Gonzalez*, 263 F.3d 1092, 1095 (9th Cir. 2001). In zoning for or issuing a permit to an I-502 licensee, Fife would not be agreeing to accomplish an illegal objective or adopting any intent to commit a drug offense; it would simply be complying with state law as interpreted by state courts. This is insufficient to make it a conspirator, for "'simple knowledge, approval of, or acquiescence in the object or purpose of a conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient.'" *United States*

v. Lennick, 18 F.3d 814, 818 (9th Cir. 1994) (quoting *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir.1980)).

In short, Fife cannot show that I-502 would require it to violate federal law, and thus cannot show that it is impossible for it to comply with both I-502 and federal law. Accordingly, there is no basis for a finding of federal preemption here.

VI. CONCLUSION

Because I-502 creates no right for a marijuana business to operate regardless of local law, Plaintiffs cannot meet their burden of proving that I-502 irreconcilably conflicts with Fife's ordinance. This Court should therefore affirm the decision of the Superior Court and hold that I-502 does not preempt the authority of cities and counties to prohibit marijuana businesses within their jurisdictions. If the Court reaches this conclusion, it should not consider Fife's alternative argument that federal law preempts I-502. Alternatively, this Court should find no federal preemption of I-502.

RESPECTFULLY SUBMITTED this 12th day of March 2015.

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I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, by agreement of the parties, a true and correct copy of the foregoing document, upon the following:

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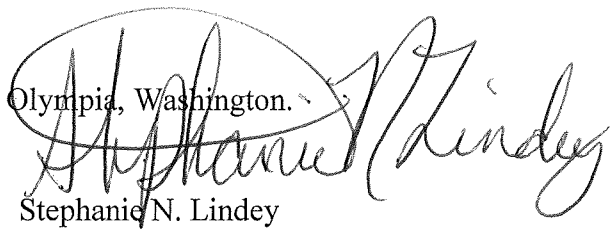

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