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NEWS RELEASE

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Herrera defends local regulation of medical marijuana dispensaries in Supreme Court brief

Legal validity of local ordinances at stake in potentially landmark California Supreme Court case, Pack v. City of Long Beach

SAN FRANCISCO (June 18, 2012)—City Attorney Dennis Herrera today strongly defended the right of local governments in California to issue permits authorizing medical cannabis collectives to serve their patients, urging the state Supreme Court to reverse a Court of Appeal holding that such regulation is substantially preempted by federal law. The amicus brief joined by Santa Cruz County Counsel Dana McRae argues that discretionary permitting, an integral element in planning and land use policy, is particularly essential for local regulation of medical marijuana dispensaries. The appellate court’s Oct. 4, 2011 ruling, Herrera and McRae contend, wrongly hinders the ability of local governments to protect public health and safety effectively, and to enact policy innovations tailored to local needs.

The potentially landmark case now before the state’s high court arose from a legal challenge to a City of Long Beach ordinance that sought to regulate medical cannabis collectives within city limits. Plaintiffs Ryan Pack and Anthony Gayle sued on August 30, 2010, seeking a preliminary injunction and court declaration that the Long Beach law was invalid and federally preempted. When the Superior Court declined to enjoin Long Beach, plaintiffs appealed to the California Court of Appeal, which ruled last October that the ordinance was in large part preempted by the federal Controlled Substances Act. The three judge appellate panel granted the injunction—effectively halting local permitting of medical marijuana collectives statewide, including in San Francisco and Santa Cruz. San Francisco resumed its permitting process when the California Supreme Court granted review on Jan. 18, 2012, while Santa Cruz’s moratorium on permitting remains in effect.

“What’s at stake in this case is more than just an ordinance in Long Beach,” said Herrera. “It’s about whether local governments will be allowed to fulfill the promise of California’s Compassionate Use Act, which voters enacted in 1996 to ensure the safe availability of medical marijuana to those in need. San Francisco’s model regulatory system has for many years carefully balanced the needs of patients and caregivers with neighborhood concerns over health and safety. Our ordinance works. But an unworkable interpretation of federal law, which would undercut local regulation, serves no public interest—not for patients, not for neighbors. I’m very grateful to Santa Cruz County Counsel Dana McRae for joining San Francisco in our amicus brief urging the California Supreme Court to reverse the appellate court’s ruling. I also applaud Assemblymember Tom Ammiano for his leadership on state legislation to regulate and protect safe access to medical cannabis throughout California.”

[MORE]

On May 31, 2012, the California Assembly passed AB 2312, the Medical Marijuana Regulation and Control Act, to create the first statewide regulatory framework for the medical cannabis industry in California. The legislation authored by Assemblymember Tom Ammiano (D-San Francisco) would establish the Board of Medical Marijuana Enforcement within the California Department of Consumer Affairs to oversee and regulate California's medical marijuana industry. It would also authorize local governments to impose an excise tax.

"Fifteen years after voters passed Proposition 215, with local governments like San Francisco and Long Beach making great progress, the California Legislature is finally taking responsibility to effectively regulate medical cannabis statewide," said Ammiano. "Now is not the time for the state Supreme Court to turn back the clock. With the continuing federal crackdown, we simply cannot afford to continue keeping our heads in the sand and pretend that everything is fine. The compassionate use of medical marijuana is supported by over 80 percent of Californians. I'm grateful to City Attorney Dennis Herrera and Santa Cruz County Counsel Dana McRae for their amicus brief, and I urge the Supreme Court to heed it."

The case is: *Pack v. Superior Court of Los Angeles County (City of Long Beach)*, California Supreme Court Case No. S197169.

###

SUPREME COURT OF THE STATE OF CALIFORNIA

RYAN PACK, and individual, and
ANTHONY GAYLE, an individual,

Petitioners/Appellees,

vs.

SUPERIOR COURT OF THE STATE
OF CALIFORNIA, FOR THE COUNTY
OF LOS ANGELES,

Respondent,

CITY OF LONG BEACH, a city
organized under the laws of the State of
California,

Appellant/Real Party in Interest.

Case Number S197169

Second Appellate District
Division Three
Case Number B228781

Superior Court of
Los Angeles County
Case Numbers
NC055010 and NC055053
Hon. Patrick T. Madden, Judge

**BRIEF OF *AMICI CURIAE* CITY AND
COUNTY OF SAN FRANCISCO AND
COUNTY OF SANTA CRUZ IN SUPPORT
OF REAL PARTY IN INTEREST
CITY OF LONG BEACH**

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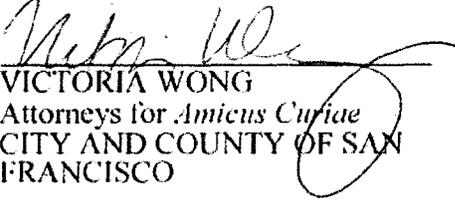
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amici curiae know of no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

Dated: June 15, 2012

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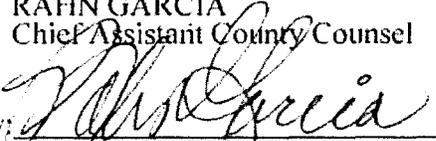
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INTRODUCTION

In rejecting Long Beach's permitting system for medical marijuana collectives, the Court of Appeal's decision strips cities of an essential tool for protecting public health and welfare. The decision prohibits local discretionary review to determine, on a case-by-case basis, whether a proposed medical marijuana facility is in the public interest and, if so, under what conditions. (See *Pack v. Superior Court* (2011) 199 Cal.App.4th 1070, 132 Cal.Rptr.3d 633, 653, 654, petn. for review granted January 18, 2012.)

Effective local regulation depends on discretionary review to supplement generally applicable ordinances. Ordinances are inherently inadequate regulatory tools because they are inevitably both over- and under-inclusive: they will impose unnecessary restrictions on some facilities while failing to adequately address adverse impacts arising from others. For that reason, zoning and other ordinances commonly set broad regulatory parameters and delegate discretionary permitting powers to administrative agencies. In reviewing individual permit applications, local agencies may either deny an application or impose specially tailored conditions beyond what local codes require, to ensure the proposed use or activity benefits the community. Thus, permitting enables local agencies to achieve more effective and responsive regulation than an ordinance standing alone can do.

As many cities and counties have discovered, discretionary permitting systems are particularly important in the land use context. Like other land uses, marijuana dispensaries and cultivation sites vary in size, scope of activities, number of clients served, characteristics of the

surrounding neighborhood, proximity to incompatible uses (such as schools), and characteristics of the buildings they occupy. The flexibility of a permitting system enables a local government to address and avoid the potential negative effects *that a particular facility* is likely to have on the surrounding community.

San Francisco developed its permitting procedures for dispensaries in response to the problems that flowed from one of the first dispensaries to open in the city. The city received a barrage of complaints from neighbors and others after the Green Cross dispensary opened and began to serve hundreds of clients daily from a tiny (350-square-foot) storefront location in a high-traffic, already congested area. Patrons spilled onto the street, blocked handicap ramps, driveways and streets, caused automobile traffic that endangered pedestrians, and generated noise and litter that disrupted and sullied the neighborhood. Ultimately, the city had little choice but to prosecute a nuisance abatement action. In that action, the city resolved neighbors' concerns by requiring the operator to provide parking spaces, to implement a traffic management plan, and to hire extra security staff to monitor patron activity. These site-specific requirements allowed the city to deal effectively with the unique challenges presented by this particular use at this particular location, including the large volume of patrons in relation to the size of the facility, the fact that many patrons arrived by car rather than public transit, patron and employee noise from the street and a rear patio, and a severe shortage of parking in the area. (See Request for Judicial Notice ["RJN"] Ex. 1 [Memorandum to San Francisco Board of Appeals re: Green Cross Medical Cannabis Dispensary and attached Complaint].)

Absent effective local regulation, dispensaries and cultivation sites have the potential to generate serious impacts on surrounding communities, including electrical fires, criminal activity, hazards to children's safety, pollution, harm to wildlife, traffic, noise, and odors. Through permitting mechanisms, cities and counties can avoid these dangers and other concerns by imposing specially tailored conditions that minimize or eliminate anticipated impacts, such as installation of security cameras, door locks and security personnel sufficient to protect against criminal activity; appropriate controls on water runoff disposal and pesticide use, depending on the size, extent and type of cultivation activities; adequate parking and traffic controls; restricted operating hours; and fire safety and disability access measures.

Without the ability to issue permits that are subject to particularized conditions, cities and counties that choose to exercise their option under the Medical Marijuana Program Act (Health & Saf. Code, §§ 11362.7 et seq., hereinafter "MMPA") to allow medical marijuana uses would be forced to rely solely on one-size-fits-all restrictions, which cannot address the unique circumstances of each facility. Courts uniformly recognize that such an approach is impractical and ineffective in a wide variety of other land use contexts, from billiard halls to gas stations, and routinely defer to local discretionary permitting decisions. A rigid one-size-fits-all approach to regulating dispensaries and cultivation facilities would unnecessarily subject the public to negative impacts and enforcement costs that could be avoided with a permit system.

In short, the impact of the Court of Appeal's decision would be to force local jurisdictions to choose between banning medical marijuana-

related uses altogether¹ and allowing those uses to exist subject to a lesser degree of regulation than other permitted uses. This result frustrates the purposes of the MMPA and ties the hands of cities and counties, which are charged with protecting the public's health, safety and welfare, through the exercise of their Constitutional police power. Furthermore, the Court of Appeal's decision would foreclose cities and counties from playing their traditional role as laboratories for experimentation with novel regulatory solutions to the complex challenge of regulating medical marijuana uses.

ARGUMENT

I. DISCRETIONARY PERMITTING IS ESSENTIAL TO REGULATE MEDICAL MARIJUANA.

The MMPA contemplates reasonable, enforceable limits on marijuana cultivation and distribution to accommodate both patients' needs and those of the greater community. The MMPA delegates the bulk of these regulatory responsibilities to local governments. (See Health & Saf. Code § 11362.83 ["Nothing in this article shall prevent a city or other local governing body from adopting ... local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective" *or* "[e]nacting other laws consistent with this article."].) These regulations take many forms. While some local jurisdictions have prohibited medical marijuana facilities outright, others have established regulations for their operation.

As many cities and counties have recognized, effective regulation of medical marijuana requires a specialized discretionary permitting system that allows them to monitor compliance with local and state laws, and to

¹ Whether the MMPA authorizes local jurisdictions to ban medical marijuana facilities altogether is itself an open question of law. (See *City of Riverside v. Inland Empire Patient's Health and Wellness Center* (2011) 200 Cal.App.4th 885, ptn. for review granted Jan. 18, 2012.)

prevent potential violations. (See, e.g., RJN Ex. 2 [San Francisco Ord. No. 275-05]; Ex. 3 [Stockton Ord. No. 013-10 C.S.]; Ex. 4 [Alameda County Code of Ords. ch. XXX, art. 1, § 30-5.15]; Ex. 5 [West Hollywood Ord. No. 09-833]; Ex. 6 [Cotati Ord. No. 787]; Ex. 7 [Sacramento City Code ch. 5.150]; Ex. 8 [Eureka Code tit. 15, §158].) Many of these jurisdictions have made findings identifying potential impacts of unregulated dispensaries and cultivation facilities. (See, e.g., RJN Ex. 8 [Eureka Code tit. 15, §158.001(A)] [marijuana cultivation, processing and distribution may result in “damage to buildings containing indoor grows, including improper and dangerous electrical alterations and use, inadequate ventilation leading to mold and mildew, increased frequency of home-invasion, robberies and similar crimes”]; Exs. 9 & 10 [Mendocino Ord. Nos. 4275 (repealed) & 4291] [“strong smell of marijuana may create an attractive nuisance,” increasing risk of burglary, robbery and armed robbery, noting several such incidents have occurred, “some including acts of violence resulting in injury or death”; finding that indoor marijuana cultivation “may overload standard electrical systems creating an unreasonable risk of fire. If indoor grow lighting systems are powered by diesel generators, improper maintenance of the generators and fuel lines and the improper storage and disposal of diesel fuel and waste oil may create an unreasonable risk of fire and pollution.”].) Some of the adverse effects, such as damage to buildings and fire risk, are associated specifically with cultivation of marijuana, which is a feature of some, but not all, dispensaries. Others, such as criminal activity, may be affected by the adequacy of a facility’s security measures. Still others, such as noise, litter, and traffic problems, may depend not only on neighborhood characteristics

such as available parking and level of traffic congestion, but also on the number of patrons served and the size of the particular facility.

A. Local Governments Cannot Adequately Regulate Dispensaries Without Discretionary Permits.

In cities and counties with medical marijuana dispensaries, local governments need discretion to deny the establishment of or, if appropriate, place limitations on dispensaries that, depending on their location, size, clientele, cultivation practices, and other factors, have the potential to cause negative impacts. Generally applicable restrictions cannot effectively address the specific impacts of a particular facility. Without individualized permit restrictions, the broad general rules would leave local agencies in the position of having to address problems, including health and safety hazards, *after* they occurred, compromising the public welfare. Furthermore, the taxpayer costs of remedying those problems after the fact—by holding lengthy public hearings, responding to complaints, conducting additional inspections, and using enforcement personnel to halt undesirable or harmful conduct—would impose an unnecessary burden on local agencies’ limited resources.

The City and County of San Francisco’s experience bears this out. In 2005, the San Francisco Board of Supervisors found that there were approximately thirty-five medical marijuana dispensaries operating within its jurisdiction, with another ten scheduled to open later that year, and that “[t]he proliferation of medical cannabis dispensaries has had attendant health, safety and welfare consequences that were not anticipated at the time that zoning determinations were made permitting medical cannabis dispensaries to operate subject to a conditional use permit in some areas of the City, and as of right in others.” (RJN Ex. 11 [S.F. Board of Supervisors

Ord. 262-05].) The Board cited numerous public complaints related to dispensaries, including increased crime; alleged resale of medical marijuana by dispensary patrons to non-patrons; odors associated with smoking at dispensaries or on adjacent sidewalks; loitering and queuing on sidewalks; and double parking and the blocking of driveways. (RJN Ex. 12 [S.F. Board of Supervisors Mo. M05-69].)

In September of 2005, San Francisco officials were forced to undertake a lengthy and costly administrative proceeding to impose regulations on a dispensary that had created a public nuisance. The Green Cross dispensary, one of the first dispensaries in San Francisco, generated close to 900 complaints, due in part to the fact that it was only 350 square feet in size but was serving 200 to 300 patients and caregivers per day. The surrounding streets were narrow and congested, with little available parking. Its patrons arrived from all over the Bay Area, endangering pedestrians and motorists as cars blocked driveways, streets and handicap ramps, and patrons congregated on sidewalks and on a rear patio. The city also determined that there was an approximate 280% increase in nuisance-related police calls in the immediate area after the dispensary began operating. As a result, city officials identified severe pedestrian safety, parking, and traffic problems, as well as excessive litter and noise, despite the dispensary's efforts to address these issues voluntarily. (See RJN Ex. 1 [Memorandum to San Francisco Board of Appeals re: Green Cross Medical Cannabis Dispensary and attached Complaint].)

The San Francisco Planning Department made extensive efforts to remedy the problems caused by the dispensary, including holding a lengthy public hearing that included comments from 80 speakers; reviewing 130 letters and 3600 petition signatures both supporting and opposing the

dispensary's activities; suspending the operative building permit; and issuing a formal nuisance complaint. The Zoning Administrator determined that, although the dispensary constituted a nuisance, it was in the community's best interests for the dispensary to continue to operate, provided it could satisfy thirty-three conditions to abate the nuisance. These conditions included, among other things, the hiring of three additional security guards to direct pedestrian and automobile traffic and to clean up litter; the development of an adequate traffic management plan; and the provision of ten off-street parking spaces. (*Ibid.*) The city's Board of Appeals upheld the Zoning Administrator's decision and imposed the recommended conditions. (RJN Ex. 13 [San Francisco Board of Appeals Decision, Appeal Nos. 05-111 & 05-197].)² The dispensary's negative impacts on the community, as well as the costs of remedying those impacts, could largely have been avoided through a dispensary permitting process, which would have allowed San Francisco to review the dispensary's planned operations, determine whether it was appropriate at that location, and, if so, to impose necessary restrictions *before* any of the code violations had occurred.

San Francisco subsequently adopted a dispensary permitting system to avoid the need for this type of after-the-fact regulation. The city's

² It is unclear to what extent the Court of Appeal's reasoning would bar a city or county's ability to place requirements not unique to medical marijuana uses on a permit, where the permit relates to the operation of a medical marijuana-related use. For example, in San Francisco, issuance of virtually all permits, including building permits, is discretionary, and those permits must specify the proposed use for which the permit is being issued (e.g., medical marijuana dispensary). (RJN Ex. 14 [S.F. Bus. Tax & Regs. Code § 26(a)].) The Court of Appeal's decision arguably can be read to prohibit a locality from issuing generally applicable permits like electrical and building permits that verify compliance with generally applicable local codes, because those permits "authorize" work to be done to prepare the site for use as a medical marijuana dispensary or cultivation site. The consequence of such a limitation would be to exempt medical marijuana collectives and cooperatives from most local regulatory powers, leading to potentially significant and unintended health and safety risks.

Medical Cannabis Act sets forth operating requirements for dispensaries and provides a process for obtaining a dispensary permit and any related building permits. Under this system, the city's Department of Public Health, Planning Department, Fire Department and Mayor's Office on Disability review each permit application and recommend whether it should be approved, and if so under what conditions. (RJN Ex. 15 [S.F. Health Code § 3305(b); § 3307(b)]; § 3308(x).) Any interested party can appeal a permit decision to the City's Board of Appeals, which can exercise its own discretion as to whether to approve the permit. (RJN Ex. 14 [S.F. Bus. & Tax Regs. Code § 26(a)].)

This process enables the city to engage neighborhood residents in the planning process; to identify and address community concerns in order to avoid after-the-fact complaints; to protect neighborhood character and existing uses; and to provide certainty to dispensary operators that their business will be integrated with existing uses. (See *ibid.*; RJN Ex. 16 [S.F. Planning Comm'n Res. No. 17103, adopted Sept. 15, 2005] ["The thorough public process established by the proposed Ordinance alongside comprehensive proximity criteria—which . . . preclude[s] location on inappropriate sites—[also] ensure[s] that existing housing and neighborhood character [will] not be adversely impacted."].)

San Francisco's permitting system has drastically reduced code violations and, accordingly, negative impacts on communities where dispensaries operate. In contrast to the hundreds of complaints associated with the Green Cross dispensary and other dispensaries established before San Francisco's Medical Cannabis Act, since San Francisco began permitting dispensaries, it has received far fewer complaints. (RJN Ex. 17 ["S.F. Medical Marijuana Dispensaries Generate Only 11 Complaints in

Five Years,” SFWeekly.com, July 15, 2011; Ex. 18 [S.F. Planning Department Complaint Log, showing fifty-four pre-ordinance complaints, in addition to Green Cross complaints, and seventeen post-ordinance complaints].)

Illustrating the benefits of permit-based regulation, San Francisco’s Department of Building Inspection issued a building permit for a dispensary based, in part, on its Planning Department’s determination that the dispensary would be located at least 1000 feet from a school, community facility or recreation building, as required by the Planning Code. Local community organizations appealed the issuance of the permit to the Board of Appeals, voicing concerns that the dispensary would pose a safety risk to children because it would be located near a number of youth-serving facilities that fell outside the statutory restrictions for dispensary locations. Facilities near the proposed dispensary included tutoring centers, children’s dance and music schools, a daycare center, a children’s residential and day treatment facility, and a church that sponsored youth and family programs. In addition, the dispensary would be near three middle and high schools, whose students travel along the commercial corridor where the dispensary would be located and frequent the convenience store across the street from the dispensary. In light of these unique circumstances, the Board of Appeals denied the building permit for the dispensary, determining that, even if it complied with the Planning Code, it would not be in the best interests of the community. (See RJN Ex. 19 [S.F. Board of Appeals Decision, Appeal Nos. 10-105 & 10-106].) The San Francisco Superior Court upheld this decision. (See RJN Ex. 20 [Judgment].)

As these examples demonstrate, the ability to review and control proposed activities before they take place, including the ability to deny the right to an otherwise allowable use, is an effective and necessary element of local regulation. A permitting system is the mechanism that makes this effective regulation possible.

B. Permits Are Essential to Regulation of Medical Marijuana Cultivation.

Although the instant case addresses a permitting system for medical marijuana dispensaries, the Court of Appeal's reasoning applies equally to permitting systems for marijuana cultivation activities. Numerous localities have identified serious negative impacts of unpermitted cultivation, including water pollution, fires caused by fuel used to power grow lights, increased burglary and robbery, and violent crime, as well as nuisances such as odors. (See, e.g., RJN Ex. 10 [Mendocino Ord. No. 4291, finding that marijuana cultivation increases the risk of burglary, robbery and armed robbery, that violent crimes have occurred as a result; and that indoor marijuana cultivation may create fire hazards and pollution due to substandard electrical systems and generator fuel spills]; Ex. 8 [Eureka Code tit. 15, § 158.001(A), finding that medical marijuana cultivation, processing and distribution cause "damage to buildings containing indoor grows, including improper and dangerous electrical alterations and use, inadequate ventilation leading to mold and mildew, increased frequency of home-invasions, robberies and similar crimes"].) These jurisdictions have enacted permitting ordinances to address public safety and environmental concerns related to cultivation. (See, e.g., RJN Ex. 9 [Mendocino County

Ord. No. 4275, § 9.31.110(C)³, requiring applicants to describe proposed source of power for cultivation, to be reviewed by the Department of Building and Planning and the Fire Department; describe proposed methods of storage, delivery and containment of diesel fuel for generators, to be reviewed by local environmental agencies; confirm no illegal diversion of water would occur; describe measures to prevent erosion and contaminated runoff; and comply with sustainability standards to promote natural growing practices to protect patient health and the environment]; Ex. 8 [Eureka Code tit. 15, § 158.010, for larger cultivation sites, requiring review of materials storage, handling and disposal plan].)

The dangers that these localities have identified are real. In the last several months alone, numerous fires linked to unpermitted marijuana cultivation in California have occurred. At least two house fires within the past three months in the City of Vallejo have been attributed to illegal electrical wiring used for cultivating marijuana. (See RJN Ex. 22 [*Jones, Vallejo Police Confiscate Over 300 Marijuana Plants After Fire*, Crime Voice (May 30, 2012)]; Ex. 23 [*York, Vallejo houses converted into marijuana grows pose new dangers*, TimesHeraldOnline.com (Apr. 15, 2012)].) And at least four similar fires have occurred in Riverside, Fresno and Mendocino Counties in the past six months. (RJN Ex. 24 [*McMillan, Scorched IE home housed marijuana-growing operation*, www.abclocal.go.com (Jan. 6, 2012)]; Ex. 25 [*House Fires Leads to Discovery of Marijuana Growhouses, Mortgage Fraud Scheme: Results in Guilty Pleas*, U.S. Drug Enforcement Administration News Release (Apr.

³ Subsequently, in response to federal government opposition, Mendocino County repealed its permitting ordinance. (See RJN Ex. 10 [Mendocino County Ord. No. 4291; Ex. 21 [Montgomery, *Mendocino Snuffing Medical Marijuana Experiment*, www.npr.org (Feb. 13, 2012)].)

9, 2012)].) Electrical wiring requirements vary depending on the number of plants being cultivated, the capacity of available power sources, the type of structure housing the cultivation, and other factors, making a generally applicable ordinance inadequate to prevent cultivation-related fires such as these.

Environmental damage is another casualty of unregulated marijuana cultivation. Contamination of streams, riverbanks and forests, poisoning of wildlife from uncontrolled fertilizer and pesticide use, destruction of plant life, and other severe environmental damage due to unregulated marijuana cultivation are alarmingly common. (See, e.g., Kelly, *Bringing the Green to Green: Would the Legalization of Marijuana in California Prevent the Environmental Destruction Caused by Illegal Farms?* (2012) 18 Hastings W.-N.W. J. Envtl. L. & Pol'y 95; Eth, *Up in Smoke: Wholesale Marijuana Cultivation Within the National Parks and Forests, and the Accompanying Extensive Environmental Damage* (2008) 16 Penn State Envtl. L. Rev. 451, 471-479; RJN Ex. 26 [Morehouse, *Mendocino County Fights Illegal Pot Growers*, www.californiareport.org (Apr. 5, 2012)].) In addition, the California Department of Fish and Game has identified the impacts of unregulated marijuana cultivation on at least one protected wildlife species. The Department found that water diversion, illegal dams, stream bank trampling, and the use of herbicides, pesticides and kerosene related to unregulated marijuana cultivation may harm the mountain yellow-legged frog, which is a candidate for endangered or threatened species status. (See RJN Ex. 27 [Cal. Natural Resources Agency, Dept. of Fish and Game, *Report to the Fish and Game Commission: A Status Review of the Mountain Yellow-Legged Frog* (2011) p. 33].) The design and size of each cultivation site, its proximity to streams and other bodies of water, and the

types of irrigation systems and chemicals used are important factors in allowing a local agency to determine, on a case-by-case basis, what environmental controls are necessary. Only a permitting system allows this type of site-specific determination.

As these examples demonstrate, unregulated marijuana cultivation can pose severe threats to public safety and the environment. Without comprehensive regulation, including permits that local agencies can utilize to require appropriate power sources, handling of pesticides and fertilizers, and environmentally sound cultivation techniques, these dangers will persist.

II. COURTS RECOGNIZE THE IMPORTANCE OF DISCRETIONARY PERMITTING.

Discretionary permitting is rooted in the California Constitution's grant of police powers to local governments to regulate for the public health, safety and welfare. (Cal. Const. Article XI, section 7 [a "county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws"].) Courts have uniformly affirmed the power of local governments to regulate land use through discretionary permits. *Amici* are aware of no case, other than the Court of Appeal's decision in the instant case, in which a court has singled out a particular use as subject to local zoning restrictions but not to permitting. This is not surprising, given that the power to enact ordinances and the power to issue discretionary permits are inextricably intertwined.

While land use regulation is not the only context for controlling medical marijuana uses, it is an important aspect of that control. Many of the restrictions localities place on dispensaries and cultivation sites, such as location, scope and method of operation, and electrical power use are tied

to the facility's site.⁴ Courts recognize that land use regulation is built on a combination of local zoning ordinances and discretionary permitting, two distinct mechanisms that serve separate and complementary purposes. Zoning laws are not intended to function in the absence of discretionary permitting, nor can they do so effectively. "A zoning amendment normally provides for a general change in a zoning regulation and is applicable to an entire zoning district; it is a legislative act requiring the adoption of an ordinance. On the other hand, a conditional use permit normally applies to a specific parcel of property allowing a specific use for a specific purpose and under specific conditions; like a variance, it is a quasi-judicial, administrative action." (Longtin's California Land Use § 3.71, p. 361.)⁵

As courts have repeatedly stated, discretionary permitting is crucial to address the multitude and variety of considerations specific to any proposed use.

To devise standards to cover all possible situations that could be exceptions, that is, which would warrant the granting of a conditional use permit or a variance permit, would be a formidable task and one that would tax the imagination.... There would be no discretion whatever and anyone meeting the detailed and definite standards would be entitled to a permit without question as his proposed use would be authorized by the ordinance just as much as the uses permitted under the basic zoning ordinance. *All of which goes to point up our belief that if the purposes of zoning are to be accomplished, the master zoning restrictions or standards must be definite while the provisions pertaining to a conditional use or a variance, designed to relieve against uncertain eventualities, must of*

⁴ Courts recognize that the police power includes the power to issue permits for other purposes outside the land use context, such as public health. (See *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 492 [county regulation of pesticides, including permitting requirement, is within scope of police power].) Indeed, many local agencies issue public health permits for medical marijuana-related activities.

⁵ The term "conditional use permit" is used in this brief to refer generally to a discretionary permit on which conditions of approval may be placed.

necessity be broad and permit an exercise of discretion.

(Tustin Heights Ass'n v. Board of Sup'rs of Orange County (1959) 170 Cal.App.2d 619, 634-35 [emphasis added]; see also Hunt v. City of Whittier (1989) 209 Cal.App.3d 588, 596-97 [citing Tustin Heights]; Garavatti v. Fairfax Planning Commission (1971) 22 Cal.App.3d 145, 150 [same].)

Discretionary permitting is essential because even where a proposed land use is allowed by zoning law, the use may be inappropriate or harmful to the particular community affected by a proposed project. In *Van Sicklen v. Browne* (1971) 15 Cal.App.3d 122, 126-128, disapproved of on other grounds by *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, the Court of Appeal upheld the denial of a permit to operate a gas station in an area zoned for that use, where the city determined the gas station would have negative effects on the surrounding neighborhood. “We observe that the traditional purpose of the conditional use permit is to enable a municipality to exercise some measure of control over the extent of certain uses, such as service stations, which, although desirable in limited numbers, could have a detrimental effect on the community in large numbers.” (*Id.*)

Similarly, in *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1248, the Court of Appeal upheld a city’s denial of a conditional use permit to a billiards hall based on the city’s determination that the hall would result in inappropriate noise, increased police calls, and a change from a youth-oriented business to an adult-serving business that served alcohol. The city concluded that these impacts were incompatible with the public interest. “Decisions such as this—literally, where to draw the line—are best left to the local zoning agencies; they are in the best position to exercise sound judgment as to appropriate uses for sites within the zoning classifications which they establish.” (*Ibid.*; see also

Neighborhood Action Group v. County of Calaveras (1984) 156 Cal.App.3d 1176, 1183 [zoning laws allow for the issuance of discretionary permits because some uses “cannot be said to be always compatible in some zones while always incompatible in others uses that should not be allowed as of course, but could be allowed subject to conditions”] [citation omitted]; *Upton v. Gray* (1969) 269 Cal.App.2d 352, 357 [“The device of providing for the issuance of a special use permit is well recognized as legitimate zoning procedure. It permits the inclusion in the zoning pattern of uses considered by the legislative body to be essentially desirable to the community, but which because of the nature thereof or their concomitants (noise, traffic, congestion, effect on values, etc.), militate against their existence in every location in a zone, or in any location without restrictions tailored to fit the special problems which the uses present.”] [citation and internal quotation marks omitted].)

California courts give great deference to local discretionary permitting decisions. (See *Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 361 [“Where a zoning ordinance authorizes the planning commission or city council to grant a conditional use permit upon finding the existence of certain facts, their action will not be disturbed by the courts in the absence of a clear and convincing showing of the abuse of the power of discretion vested in them.”] [citation omitted].) “If the need for a particular regulation is a matter upon which reasonable minds can differ judicial intervention is precluded.” (*Groch v. City of Berkeley* (1981) 118 Cal.App.3d 518, 522 [citation omitted].) This deference reflects the importance courts place on local agencies’ exercise of police powers. Accordingly, courts do not limit the use of discretionary permitting in local regulation. To the contrary, courts have upheld discretionary permitting to regulate a diverse set of uses,

including religious institutions (*Stoddard v. Edelman* (1970) 4 Cal.App.3d 544), grocery stores (*Garavatti v. Fairfax Planning Commission, supra*, 22 Cal.App.3d 145), gas stations (*Van Sicklen, supra*, 15 Cal.App.3d 122), pawnbrokers (*Iscoff v. Police Commission of City and County of San Francisco* (1963) 222 Cal.App.2d 395, 401), retail stores (*Wesley Investment Co. v. County of Alameda* (1984) 151 Cal.App.3d 672, 678), and liquor stores (*Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 387).

The Court of Appeal decision disregards local governments' experience and extensive case law, both of which affirm the importance of permitting to regulate land uses and associated activities. The decision, if upheld, would have the unprecedented effect of subjecting certain land uses—those related to medical marijuana—to local non-discretionary ordinances, while exempting them from discretionary permitting that would tailor regulation to the circumstances of each facility. As a result, medical marijuana-related uses would be subject to *less* regulation than most other uses. That result makes no practical sense. Moreover, the state's voters and the Legislature did not intend such a result. (See *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1546 [California's medical marijuana laws were not intended to create an "open sesame" of unregulated activity].)

III. THE COURT OF APPEAL DECISION STIFLES LOCAL SOCIAL AND ECONOMIC EXPERIMENTATION.

The impacts of the Court of Appeal's decision in the instant case reach far beyond the City of Long Beach and, indeed, California. In *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 826, the Court of Appeal concluded that "21 United States Code section 903 signifies Congress's intent to maintain the power of the states to elect

to ‘serve as a laboratory’ in the trial of ‘novel social and economic experiments without risk to the rest of the country’ ... by preserving all state laws that do not positively conflict with the CSA.” (Quoting *United States v. Oakland Cannabis Buyers’ Cooperative* (2001) 532 U.S. 483, 502 [conc. opn. of Stevens, J.]; see also *City of Garden Grove v. Super. Ct.* (2007) 157 Cal.App.4th 355, 382 [affording the states broad authority to exercise their police powers “promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country”] [quoting *Gonzales v. Raich* (2005) 545 U.S. 1, 42 [dis. opn. of O’Connor, J.] [internal quotation marks omitted].) By effectively prohibiting meaningful regulation of medical marijuana, the decision under review by this Court stifles the ability of not only cities and counties, but also the State itself, to undertake just this sort of innovative problem-solving.

While California has never chosen to create a statewide permit system for medical marijuana, its Legislature and citizens have considered authorizing medical marijuana activities no less than nine times in the past three years. (See RJN Exs. 28-36 [Assembly Bill 2312 (2011-2012 Reg. Sess.); Assembly Bill 390 (2009-2010 Reg. Sess.); Assembly Bill 2254 (2009-2010 Reg. Sess.); Senate Bill 1131 (2009-2010 Reg. Sess.); Assembly Bill 9 (2009-2010 6th Ex. Sess.); Senate Bill 17 (2009-2010 6th Ex. Sess.); Senate Bill 53 (2009-2010 8th Ex. Sess.); Senate Bill 676 (2011-2012 Reg. Sess.); Proposition 19 (2010 state ballot initiative).) These pieces of legislation have explored different models for medical marijuana regulation. The most recent bill, AB 2312, which has passed in the Assembly and is now under consideration by the Senate, would create a

state regulatory board to address significant public health and safety issues, such the security measures for medical marijuana facilities; use of toxic chemicals in the cultivation process that may harm patients and damage the environment; and the attractiveness of marijuana product packaging to minors. (*Ibid.*) The Court of Appeal's rationale in the instant case, however, may call into question the State's ability to enact these types of legislation.

On the local level, affirmance of the Court of Appeal would have an equally dramatic impact. As discussed above, meaningful regulation requires that local governments have the authority to consider, on an individualized basis, whether a proposed use will benefit the public, and whether any conditions should be imposed to protect the community. Without that power, the limited regulatory options available may make it infeasible to allow medical marijuana land uses at all.

Indeed, the impact of the Court of Appeal's decision on local governments has been immediate. Already, in reaction to that decision, at least twelve local jurisdictions have taken formal action to suspend or repeal their permit systems. (See RJN Ex. 37 [Napa County]; Ex. 38 [Santa Cruz County]; Ex. 39 [Humboldt County]; Ex. 40 [City of El Centro]; Ex. 41 [City of Eureka]; Ex. 42 [City of Albany]; Ex. 43 [City of Redding]; Ex. 44 [City of Sacramento]; Ex. 45 [City of Whittier]; Ex. 46 [Mt. Shasta]; Ex. 47 [Union City].) The medical marijuana ordinances of numerous cities and counties would likely be invalidated if the Court of Appeal's decision were upheld.

Moreover, affirmance of the Court of Appeal's decision would also place California law at odds with that of at least eight other states and the District of Columbia, raising the potential for conflict with the courts of

those jurisdictions. To date, Colorado, Connecticut, Delaware, Maine, New Jersey, New Mexico, Rhode Island, Vermont, and the District of Columbia have enacted medical marijuana permitting systems. (See, e.g., Colo. Rev. Stat. §§ 12-43.3-104(1)(c), 12-43.3-202 & 12-43.3-306; Conn. Public Act 12-55, enacted June 1, 2012; Del. Code Ann. tit. 16, § 4914A; Me. Rev. Stat. Ann. tit. 22, § 2428; N.J. Stat. Ann. § 24:6I-7; New Mexico Stat. Ann. §§ 26-2B-3, subd. (D), 26-2B-7, subd. (a)(5); Rhode Island Gen. Laws § 21-28.6-12; Vt. Stat. Ann. tit. 18, § 4474f; D.C. Code tit. 7, subtit. G-II, ch. 16B §§ 7-1671.05 & 7-1671.06.)

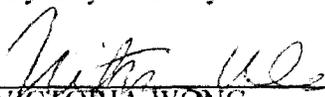
Thus, the importance of this issue is obvious, and state and local governments' ability to develop innovative and effective regulatory solutions to the sensitive issue of medical marijuana hangs in the balance.

CONCLUSION

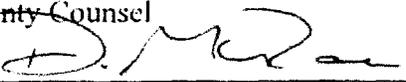
For these reasons, *amici* respectfully request that the Court reverse the judgment of the Court of Appeal.

Dated: June 15, 2012

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 5,871 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 15, 2012.

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PROOF OF SERVICE

I, REYNA LOPEZ, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

On June 18, 2012, I served the following document(s):

BRIEF OF AMICI CURIAE CITY AND COUNTY OF SAN FRANCISCO AND COUNTY OF SANTA CRUZ IN SUPPORT OF REAL PARTY IN INTEREST CITY OF LONG BEACH

on the following persons at the locations specified:

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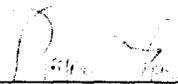
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in the manner indicated below:

- BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed June 18, 2012, at San Francisco, California.



REYNA LOPEZ