

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

EMILY WHEELER,	)	Supreme Court
	)	No. S272850
Petitioner,	)	2 <sup>nd</sup> District Court of Appeal
	)	No. B310024
vs.	)	Los Angeles County Superior
	)	Court
	)	Nos. 9CJ00315, BR054851
APPELLATE DIVISION OF THE	)	
SUPERIOR COURT OF THE	)	
STATE OF CALIFORNIA,	)	
COUNTY OF LOS ANGELES,	)	
	)	
Respondent,	)	
	)	
PEOPLE OF THE STATE OF	)	
CALIFORNIA,	)	
	)	
Real Party In Interest.	)	

---

**PETITIONER'S BRIEF ON THE MERITS**

**ERIKA ANZOATEGUI**  
**ALTERNATE PUBLIC DEFENDER**  
**OF LOS ANGELES COUNTY**

\*Brock Hammond, State Bar No. 215986  
Alvin Yu, State Bar No. 313758  
210 West Temple Street, 18<sup>th</sup> Floor  
Los Angeles, California 90012  
Telephone No. (213) 974-4901  
Fax No. (213) 626-3171

*Attorneys for Petitioner*  
Emily Wheeler

## TABLE OF CONTENTS

	Page
FACE PAGE.....	1
TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	4
PETITIONER’S BRIEF ON THE MERITS .....	8
ISSUE PRESENTED FOR REVIEW .....	9
ANSWER .....	9
STATEMENT OF FACTS AND THE CASE .....	10
STATEMENT OF PROCEDURE .....	12
ARGUMENT .....	15
I. A TRIAL COURT CAN DISMISS A STRICT LIABILITY OFFENSE PURSUANT TO PENAL CODE SECTION 1385 BASED IN PART ON THE DEFENDANT’S LACK OF KNOWLEDGE CONCERNING THE OFFENSE. ....	15
II. STATE LAW PREEMPTS A LOCAL ORDINANCE WHEN BOTH PROHIBIT THE SAME CONDUCT AND THE STATE	

LAW HAS A MENS REA COMPONENT THAT THE LOCAL  
ORDINANCE DOES NOT. .... 22

    a. Introduction. .... 22

    b. The laws at issue. .... 25

    c. Statement of the law of preemption. .... 28

    d. Long established case law shows that the Los Angeles  
Municipal Code ordinances should be preempted as  
applied to petitioner’s alleged conduct. .... 31

    e. LAMC section 12.21, subd. (a)(1)(A), should be  
preempted because it is being used to regulate conduct  
that is also specifically regulated by state law. .... 41

    f. Considering the LAMC severability ordinance and the  
LAMC provision which mandates that the ordinances be  
read in conjunction and in compliance with state law. 45

    g. Conclusion. .... 47

III. CONCLUSION..... 48

CERTIFICATE OF WORD COUNT COMPLIANCE ..... 48

PROOF OF SERVICE ..... 49

## TABLE OF AUTHORITIES

### CASES

	Page
<i>Abott v. City of Los Angeles</i> (1960) 53 Cal. 2d 674 .....	24
<i>California v. Brown</i> (1987) 479 U.S. 538 .....	21
<i>City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.</i> (2013) 56 Cal. 4 <sup>th</sup> 729 .....	23, 24, 29, 30, 35
<i>In re Portnoy</i> (1942) 21 Cal. 2d 237 .....	23, 24, 31, 32, 33, 34, 46
<i>In re Application of Mingo</i> (1923) 190 Cal. 769 .....	38, 39, 40, 41, 47
<i>In re Sic</i> (1887) 73 Cal. 142 .....	44, 45
<i>Jones v. City of Los Angeles</i> (1930) 211 Cal. 304 .....	42
<i>Kirby v. County of Fresno</i> (2015) 242 Cal.App.4 <sup>th</sup> 940 .....	31, 44
<i>O'Connell v. City of Stockton</i> (2007) 41 Cal. 4 <sup>th</sup> 1061 .....	29, 35, 36, 37, 38, 40, 41
<i>People v. Cooper</i> (1944) 64 Cal.App.2d Supp. 946 .....	41

<i>People v. Cluff</i> (2001) 87 Cal.App.4 <sup>th</sup> 991 .....	20
<i>People v. Gonzalez</i> (2020) 53 Cal.App.5 <sup>th</sup> Supp. 1 .....	43
<i>People v. Orabuena</i> (2004) 116 Cal.App.4 <sup>th</sup> 84 .....	20
<i>People v. Orin</i> (1975) 13 Cal. 3d 937 .....	19
<i>People v. Roberts</i> (1993) 2 Cal. 4 <sup>th</sup> 271 .....	21
<i>People v. S.M.</i> (2017) 9 Cal.App.5 <sup>th</sup> 210 .....	17, 18, 19, 20
<i>People v. Smith</i> (2016) 245 Cal.App.4 <sup>th</sup> 869 .....	16
<i>People v. Superior Court (Romero)</i> (1996) 13 Cal. 4 <sup>th</sup> 497 .....	21
<i>People v. Williams</i> (1989) 30 Cal. 3d 470 .....	21
<i>People v. Williams</i> (1998) 17 Cal. 4 <sup>th</sup> 148 .....	17
<i>People v. Vera</i> (1999) 69 Cal.App.4 <sup>th</sup> 1100 .....	29
<i>Wheeler v. Appellate Division</i> (2021) 72 Cal.App.5 <sup>th</sup> 824 .....	11, 15, 18, 19, 23, 29, 32, 39, 40

**STATUTES**

**BUSINESS AND PROFESSIONS CODE**

26032 ..... 40

**HEALTH AND SAFETY CODE**

11000 ..... 29, 36

11007 ..... 27

11018 ..... 27

11054 ..... 27

11366.5 ..... 11, 14, 23, 27, 28, 29, 31, 35, 37, 41, 43

**PENAL CODE**

373a ..... 14, 28, 41, 43

330a (1942 version) ..... 33

496 ..... 43

647 ..... 43

1385 ..... 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 48

1170 ..... 27

**VEHICLE CODE**

21 ..... 37

**LOS ANGELES MUNICIPAL CODE**

11.00 ..... 41

12.21 ..... 12, 25, 26, 41, 42, 43, 44

104.15 ..... 12, 25, 26, 31, 35, 42, 43

104.17 ..... 45

105.07 ..... 23, 46, 47

**STOCKTON MUNICIPAL CODE**

11.00 ..... 36

**OTHER AUTHORITIES**

2018 Cal. Legis. Serv. Ch. 1015 (S.B. 1437, sec. 1(d)) ..... 21

**CALIFORNIA RULES OF COURT**

Rule 4.413 ..... 21

Rule 4.423 ..... 21

Rule 8.520 ..... 43, 49

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

EMILY WHEELER,	)	Supreme Court
	)	No. S272850
Petitioner,	)	2 <sup>nd</sup> District Court of Appeal
	)	No. B310024
vs.	)	Los Angeles County Superior
	)	Court
	)	Nos. 9CJ00315, BR054851
APPELLATE DIVISION OF THE	)	
SUPERIOR COURT OF THE	)	
STATE OF CALIFORNIA,	)	
COUNTY OF LOS ANGELES	)	
	)	
Respondent,	)	
	)	
PEOPLE OF THE STATE OF	)	
CALIFORNIA,	)	
	)	
Real Party In Interest.	)	

---

**PETITIONER’S BRIEF ON THE MERITS**

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, by her attorney, Erika Anzoategui, Alternate Public Defender of Los Angeles County, respectfully files this Brief On the Merits in response to this Court’s granting of the Petition for Review filed in this matter.



## ISSUES PRESENTED FOR REVIEW

1. Can a trial court dismiss a strict liability offense pursuant to Penal Code section 1385<sup>1</sup> based in part on the defendant's lack of knowledge concerning the offense?

2. Does state law preempt a local ordinance when both prohibit the same conduct and the state law has a mens rea component that the local ordinance does not?

## ANSWER

1. Yes, the broad language of Penal Code section 1385, subdivision (a), and appellate courts' interpretation of this statute do not limit trial courts from using a defendant's lack of knowledge or intent as a factor in ordering the dismissal of a strict liability offense.

2. Yes, the Los Angeles Municipal Code ("LAMC") ordinances duplicate state law provisions that apply to petitioner's alleged conduct. The LAMC ordinances conflict with the related state law provisions in that the LAMC ordinances do not require a defendant to have knowledge of the underlying offenses, while the state law provisions require a *mens rea* before a conviction. Finally, the LAMC ordinances enter into an area fully occupied the by the conflicting and duplicative state laws. Therefore, the state law provisions regulating the same conduct as the LAMC ordinances preempt the LAMC ordinances.

---

<sup>1</sup> All statutory references are to California law.

## **STATEMENT OF FACTS AND THE CASE**

These issues arose in a case involving petitioner, Mrs. Emily Wheeler, an 86-year-old woman with no prior criminal record who required a wheelchair to attend the trial court proceedings. The trial court exercised its discretion under Penal Code section 1385, subdivision (a), to dismiss the Los Angeles Municipal Code charges alleged against petitioner. The charges were related to petitioner being an owner of a commercial property that, without petitioner's knowledge, had been leased to a business that did not have the appropriate license to sell cannabis. When the trial court ordered petitioner's case dismissed, the trial court referenced petitioner's age, lack of criminal history, her exemplary life, and the fact that there was no showing that she knew anything about marijuana activity occurring on the property.

Respondent, the Appellate Division of the Los Angeles County Superior Court, reversed the trial court. Respondent held that while the trial court correctly considered petitioner's age, lack of criminal history, and exemplary life, it erred in considering the fact that there was no proof that petitioner was aware of the unlicensed cannabis activity on the property. Respondent held that when it comes to strict liability offenses, the trial court can consider a defendant's knowledge as an aggravating factor but not a mitigating factor when weighing a Penal Code section 1385 motion.

The Court of Appeal upheld respondent’s analysis and affirmed that the trial court improperly considered petitioner’s lack of knowledge when weighing whether to dismiss pursuant to Penal Code section 1385. Doing so ““was an improper dismissal based on the [trial] court’s disagreement with the law, or disapproval of the impact the provisions would have on [petitioner].”” (*Wheeler v. Appellate Division* (2021) 72 Cal.App.5<sup>th</sup> 824, 843 (*Wheeler*)). This holding is contrary to years of case law that addresses how trial court’s should weigh the competing interests involved in Penal Code section 1385 dismissals.

Other than the published opinion at issue in this case, there does not appear to be any case law on the question of whether a trial court may consider a defendant’s lack of knowledge when a strict liability offense is at issue and the trial court is considering a dismissal pursuant to section 1385. In its reasons supporting the holding, the Court of Appeal did not cite to any case law supporting its conclusion, either. (*Wheeler, supra*, 72 Cal.App.5<sup>th</sup> at p. 842-843.)

Petitioner’s case also raises the issue of state law preemption. The Los Angeles Municipal Code sections that real party in interest charged petitioner with should be preempted by a state law regulating the conduct at issue in this case. The LAMC ordinances duplicate Health and Safety Code section 11366.5 by criminalizing the use of a property for unlicensed marijuana sales. The ordinances conflict with Health and Safety Code section 11366.5 in that the ordinances are strict liability

offenses while the state provision requires a *mens rea*. The ordinances also enter a field fully occupied by state law. As argued more fully below, the result should be a finding that the relevant state laws preempt real party in interest's attempt to criminally prosecute petitioner with the duplicative and conflicting local ordinances.

### **STATEMENT OF PROCEDURE**

On June 26, 2018, petitioner—Mrs. Emily Wheeler—and her son, Aaron Wheeler, were charged with unlawfully establishing, operating, and participating in an unlicensed cannabis business in violation of LAMC, section 104.15, subdivision (a)(1); unlawfully leasing, renting to, or allowing an unlicensed Commercial Cannabis establishment on land in violation of LAMC, section 104.15, subdivision (b)(4); and maintaining or using a structure for purposes other than permitted in the zone, in violation of LAMC, section 12.21, subdivision (a)(1)(A). (Exhibit A of the Petition for Writ of Mandate, Clerk's Transcript ("CT"), pgs. 1-4.)<sup>2</sup> Omar Brown was arrested after he was found operating the cannabis shop on their property and he was also charged in the complaint. (Exhibit A, CT, pgs. 1-4.)

On October 7, 2019, petitioner's trial counsel filed a motion to dismiss on the grounds that the Los Angeles ordinances were unconstitutionally vague, and counsel also invited the trial court

---

<sup>2</sup> All citations to exhibits will be from the Petition for Writ of Mandate.

to exercise its discretion to dismiss the case under Penal Code section 1385. (Exhibit A, CT, pgs. 10-21.) As part of the motion, petitioner's trial counsel attached a declaration stating that petitioner was 85 years old, had never been arrested, was an upstanding member of the community, did not have any direct or indirect connection to or awareness of the presence of the cannabis on the property, and that she merely owned the property. (Exhibit A, CT, pg. 20.) Real party in interest filed an opposition to this motion which stated facts regarding a controlled purchase from Mr. Brown, and Mr. Brown's subsequent arrest at a later date on the property. (Exhibit A, CT, pgs. 24-25.) However, real party did not allege any facts that showed that petitioner was ever notified or ever had any knowledge of any cannabis sales activities, licensed or not, occurring on the property.

On November 19, 2019, petitioner appeared in the courtroom in her wheelchair and a hearing was held on the motion. (Exhibit B, Reporter's Transcript ("RT"), pg. 301.) The trial court denied the motion to dismiss based on the asserted unconstitutionality of the ordinances. (Exhibit B, RT, pg. 306.) The trial court then ordered the case against petitioner dismissed pursuant to Penal Code section 1385 based on the following: petitioner was a woman born in 1934 with no criminal history, petitioner had led an exemplary life, and there was no showing that petitioner had any awareness of the alleged illegal activity on her property. (Exhibit B, RT, pgs. 306-309.) Notably, the trial

court did not agree to dismiss co-defendant Aaron Wheeler's case pursuant to section 1385. (Exhibit B, RT, pg. 309.)

Real party in interest filed an appeal with respondent, the Appellate Division of the Los Angeles Superior Court. On November 20, 2020, respondent filed its opinion reversing the trial court's judgment. (Exhibit I, Slip Opinion.) Respondent held that the trial court's reliance on petitioner's lack of knowledge as a mitigating circumstance was improper. (Exhibit I, Slip Opinion, pg. 5.) Respondent also held that that the ordinances at issue were not preempted by state law. (Exhibit I, Slip Opinion, pg. 10.)

On December 3, 2020, petitioner filed a Petition for Rehearing and Application for Certification for Transfer with respondent. (Exhibit J, Petition for Rehearing and Application for Certification for Transfer.) Respondent denied this petition on December 9, 2020. (See Exhibit C, LASC Appellate Division Case Summary.)

On December 23, 2020, petitioner filed a Petition for Transfer with the Court of Appeal. (Exhibit K, Petition for Transfer, Case no. B309498.) On January 14, 2021, the Court of Appeal denied petitioner's Petition for Transfer. (Exhibit L, Order, Case no. B309498.)

On January 25, 2021, petitioner filed a Petition for Writ of Mandate with the Court of Appeal. (Second District Court of Appeal, Case no. B310024.) This petition argued that respondent exceeded its jurisdiction and erred in holding that the LAMC ordinances at issue were not preempted by Health and Safety Code section 11366.5 and Penal Code section 373a. The petition

also argued that respondent exceeded its jurisdiction and erred by holding that the trial court could not consider petitioner's lack of knowledge in weighing whether to dismiss the case pursuant to Penal Code section 1385.

On February 11, 2021, the Court of Appeal summarily denied the Petition for Writ of Mandate. (Second District Court of Appeal, Case no. B310024.)

On February 16, 2021, petitioner filed a Petition for Review with this Court. (Supreme Court, Case No. S267083.) On March 30, 2021, this Court granted the Petition for Review. (Supreme Court, Case No. S267083.)

After further briefing and oral argument, the Court of Appeal issued its written opinion on December 15, 2021, attached as Exhibit A to this Petition for Review. (See *Wheeler, supra*, 72 Cal.App.5<sup>th</sup> 824.)

On March 16, 2022, this Court granted petitioner's Petition for Review.

## ARGUMENT

### **I. A trial court can dismiss a strict liability offense pursuant to Penal Code section 1385 based in part on the defendant's lack of knowledge concerning the offense.**

Penal Code section 1385, subdivision (a), reads in relevant part: "The judge or magistrate may, either on motion of the court or upon the application of the prosecuting attorney, and in

furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. ...”

The trial court ordered the dismissal of petitioner’s case based on the facts that petitioner was a woman born in 1934 with no criminal history, petitioner had led an exemplary life, and there was no showing that petitioner had any awareness of the alleged illegal activity on her property. (Exhibit B, RT, pgs. 306-309.) In its dismissal order, the trial court stated the following:

“...[T]he court does grant on its own motion, as to Ms. Wheeler, a motion to dismiss. You have a woman born in 1934 with no prior criminal history. There is nothing to suggest she knows anything this, other than the fact that she owns the property, and the code says, ‘In the interests of justice;’ and I think justice can only be served if a person who has lived an exemplary life for 80 plus years, and finds herself, because she owns the property, and that property is leased to another individual, and that individual is operating a dispensary, that says to this court that justice would properly be served by dismissing the case in its entirety as to Ms. Emily Wheeler, and that is what this court is prepared to do at this moment.” (Exhibit B, RT, pg. 307.)

Real party in interest conceded to the trial court that petitioner did not “[have] any contact with or any business position in running” the cannabis business. (Exhibit B, RT, pg. 308.)



A trial court's dismissal of the charges in the interests of justice pursuant to Penal Code section 1385 is reviewed under the abuse of discretion standard. (*People v. Smith* (2016) 245 Cal.App.4<sup>th</sup> 869, 873.) A close review of the record and relevant caselaw shows that the trial court did not abuse its discretion in ordering the municipal code violations alleged against petitioner dismissed.

One of the first observations one can make after reviewing Penal Code section 1385, subdivision (a), is that there is no language limiting a court from using a defendant's lack of knowledge of the underlying crime as a reason supporting the dismissal of a strict liability offense. The phrase "in the interests of justice" is broad, and absent a limitation imposed on courts by the legislature, courts should be reluctant to narrow this broad authority granted to them by this statute.

A trial court has wide discretion to dismiss alleged offenses under section 1385, subdivision (a), and in applying its discretion the court should consider the nature and circumstances of the defendant's current crimes, whether the defendant has any prior criminal history, and the particulars of the defendant's background, character, and prospects. (*People v. Williams* (1998) 17 Cal. 4<sup>th</sup> 148, 162-163.) A defendant's knowledge and awareness of the underlying crime is also an appropriate part of the court's exercise of discretion under Penal Code section 1385, even when the alleged violation is a strict liability offense. That factor can be relevant to the court's examination of the "particulars of [the defendant's] background, character, and

prospects,” all of which are appropriate for a court to consider under Penal Code section 1385. (*People v. S.M.* (2017) 9 Cal.App.5<sup>th</sup> 210, 220, citing *People v. Williams, supra*, 17 Cal. 4<sup>th</sup> at p. 161.) “So long as the trial court balances the interests of justice in a rational way, appellate courts have, and will, give their imprimatur to such dismissals, even when the exercise of that judgment deprives the prosecutor of asserting enhanced penalties.” (*People v. S.M., supra*, 9 Cal.App.5<sup>th</sup> at p. 220 (citation omitted).)

In addition to the wide discretion given to trial courts in exercising their authority to dismiss pursuant to section 1385, the trial court based its ruling on uncontested evidence that was presented to it in the form of an affidavit from counsel: petitioner is 85 years old with no prior criminal history, petitioner had lived an exemplary life, petitioner was unaware that marijuana was present on her property, petitioner was not directly or indirectly connected to the marijuana on her property, and petitioner merely owned the property.<sup>3</sup>

*Wheeler* held that the trial court’s consideration of petitioner’s lack of knowledge of the strict liability offenses she was charged with was an improper fact to base the dismissal on:

---

<sup>3</sup> See, Exhibit B, RT, page 20 [“...Ms. Wheeler has no prior criminal history. In fact, Ms. Wheeler is 85 years old and has never been arrested. Ms. Wheeler is an upstanding member of the community. Ms. Wheeler did not have any direct or even indirect connection to the marijuana or had any idea of its presence on their property. She merely owned the property.”] and page 21 [declaration of counsel Alvin Yu].

“In this case, the ‘interests of society’ as expressed in the ordinances are to aid the City in enforcing its commercial cannabis licensing scheme, and to minimize incentives to undercut this scheme by operating unlicensed cannabis businesses, by imposing criminal liability on landlords who rent to cannabis businesses without ascertaining that such businesses are licensed. Given these societal interests, the appellate division did not err in concluding that ‘[f]inding that a person’s lack of knowledge called for the dismissal of offenses, when the offenses required no knowledge for conviction, in effect, was an improper dismissal based on the court’s disagreement with the law, or disapproval of the impact the provisions would have on defendant.’” (*Wheeler, supra*, 72 Cal.App.5<sup>th</sup> at p. 843.)

The Court of Appeal cited no authority for the holding that consideration of a defendant’s lack of knowledge when weighing a dismissal under section 1385 was improper. A long history of cases examining the issue of whether a trial court abused its discretion in ordering a charge dismissed pursuant to section 1385 have held that considering the impact of a conviction on the defendant is appropriate. These cases also establish that if the court’s consideration of the impact of a conviction on a defendant is improper, then no dismissal of a charge pursuant to section 1385 would ever be proper. (See, for example, *People v. S.M., supra*, 9 Cal.App.5<sup>th</sup> 210 (Court dismissed case based on the defendant’s age, no prior criminal history, and he did not reoffend in the four years since the case had been pending.))

Indeed, this has Court held that dismissing a charge under Penal Code section 1385 *without* showing a detriment to the defendant is an abuse of discretion. (*People v. Orin* (1975) 13 Cal. 3d 937, 947.) “Courts have recognized that society, represented by the People, has a legitimate interest in ‘the fair prosecution of crimes properly alleged.’ [Citations omitted.] “A dismissal which arbitrarily cuts those rights *without a showing of detriment to the defendant is an abuse of discretion.*”[Citations Omitted.]” (*Ibid.*, emphasis added.) Thus, a long line of cases has determined that a court not only can weigh the impact of the prosecution on an individual, but it should do so.

It is also worth noting that the trial court never expressed any antipathy for or disagreement with the laws that petitioner was charged with at any stage of the proceedings. The trial court notably declined to dismiss the same charges filed against petitioner’s son. (Exhibit B, RT, pg. 309.) This is further evidence that shows that antipathy to and disagreement with the law played no role in the trial court’s dismissal of petitioner’s case.

A trial court is entitled to consider the nature and circumstances of the offense and the defendant’s background—such as her age and lack of criminal record—in exercising its discretion under Penal Code section 1385. (See *People v. Orabuena* (2004) 116 Cal.App.4<sup>th</sup> 84, 99; *People v. S.M.*, *supra*, 9 Cal.App.5<sup>th</sup> at pp. 218-219.) Like many crimes, the LAMC ordinances charged in this case can be violated with a range of acts, degrees of personal involvement or participation, degrees of

moral blameworthiness, knowledge or lack thereof, and whether the accused person intended for the crime to happen.

A defendant's moral blameworthiness is specifically a part of the nature and circumstances of the crime which may support a dismissal under Penal Code section 1385. (See *People v. Cluff* (2001) 87 Cal.App.4<sup>th</sup> 991, 1001-1002 (The defendant's moral blameworthiness should be a factor guiding a motion to dismiss a strike prior.)) The principle that a court may consider a defendant's lack of moral culpability for a crime is a well settled principle in the law.<sup>4</sup> These considerations of the circumstances of the crime may be taken into account even if a defendant is criminally liable because the purpose of Penal Code section 1385 is to effectuate the decision that in the interests of justice a defendant should not be required to undergo the punishment dictated by statute. (See *People v. Superior Court (Romero)* (1996) 13 Cal. 4<sup>th</sup> 497, 524, fn. 11; *People v. Williams* (1989) 30 Cal. 3d 470, 482.)

---

<sup>4</sup> See 2018 Cal. Legis. Serv. Ch. 1015 (S.B. 1437, sec. 1(d)) ("It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability."); *People v. Roberts* (1993) 2 Cal. 4<sup>th</sup> 271, 316 (Modern penal law is founded on moral culpability); *California v. Brown* (1987) 479 U.S. 538, 554 (Emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence); see also Calif. Rules of Court, Rule 4.413(b)(2) (Court may consider factors not amounting to a defense but reducing a defendant's culpability), Rule 4.423(a)(1) (The defendant was a passive participant), Rule 4.423(a)(4) (The defendant's conduct was partially excusable for a reason not amounting to a defense).

The policy served by section 1385 is that mandatory, arbitrary, or rigid sentencing procedures invariably lead to unjust results, and society receives maximum protection where the penalty, treatment, or disposition of the offender is tailored to the individual case. (*People v. Williams, supra*, 30 Cal. 3d at p. 482.) Consequently, the mere fact that a defendant is charged with a strict liability offense should not prevent the trial court from considering the circumstances of the offense as part of a Penal Code section 1385 determination, including a defendant's degree of knowledge or participation in the offense. If a trial court may consider a person's moral blameworthiness notwithstanding the person's conduct meeting the elements of the charged offense, then a trial court should be able to consider a defendant's lack of knowledge in a case alleging a strict liability offense when weighing a dismissal pursuant to section 1385.

Cases reviewing whether trial courts have abused their discretion in ordering dismissals pursuant to Penal Code section 1385 have maintained trial courts' broad discretion in applying the statute's "in the interests of justice" language. Petitioner respectfully asks this Court to do the same and hold that the language of Penal Code section 1385, subdivision (a), does not limit a trial court from using a defendant's lack of intent or knowledge of a crime as a factor in determining whether a strict liability offense should be dismissed.

**II. State law preempts a local ordinance when both prohibit the same conduct and the state law has a**

**mens rea component that the local ordinance does not.**

a. Introduction.

The Los Angeles Municipal Code (“LAMC”) sections that real party in interest charged petitioner with should be preempted by a state law regulating the same conduct at issue in this case. The LAMC ordinances duplicate Health and Safety Code section 11366.5 by criminalizing the use of a property for unlicensed marijuana sales. The ordinances conflict with Health and Safety Code section 11366.5 in that the ordinances are strict liability offenses while the state provision requires a *mens rea*. The ordinances also enter into a field fully occupied by the California Uniform Controlled Substances Act, of which Health and Safety Code section 11366.5 is a part.

In its opinion, the Court of Appeal drew a distinction between “preemption analysis of local land use and licensing ordinances, and preemption analysis of local ordinances that enter the area of criminal law...” (*Wheeler, supra*, 72 Cal.App.5<sup>th</sup> at p. 838.) The Court of Appeal held that the ordinances at issue are more in the nature of land use and licensing ordinances, and since the state has disavowed an intention to occupy the field of nuisance abatement, the ordinances are not preempted. (*Wheeler, supra*, 72 Cal.App.5<sup>th</sup> at pp. 840-841.)

In petitioner’s view, this holding does not properly weigh the impact of a criminal prosecution—as opposed to a civil proceeding—on individuals, as demonstrated in cases such as *In re Portnoy* (1942) 21 Cal. 2d 237 (*Portnoy*). Further, the opinion

did not consider the Los Angeles Municipal Code ordinance declaring that the ordinances affecting licensure of cannabis businesses shall not conflict with state law. (See LAMC, § 105.07 (“No conflict with state law.”)) Finally, the court’s opinion did not properly apply the holding of this Court in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal. 4<sup>th</sup> 729 (*Inland Empire*). As summarized by Justice Liu in his concurring opinion, the rule is that “state law may preempt local law when local law prohibits not only what a state law ‘demands’ but also what the state statute permits or authorizes.” (*Inland Empire, supra*, 56 Cal. 4<sup>th</sup> at p. 763 (conc. opin.), see also pp. 758, 760-761.)

The policy behind preemption is based on the necessity of preventing the uncertainty and confusion of dual regulations. (*Abott v. City of Los Angeles* (1960) 53 Cal. 2d 674, 682 (Preemption “is a rule of necessity, based upon the need to prevent dual regulations which could result in uncertainty and confusion.”)) The presence of local and state crimes prohibiting real property from being used for illegal cannabis sales, the local offense requiring no knowledge and the state offense requiring proof of knowledge of the illegal activity, raises confusion and uncertainty. The Court of Appeal’s opinion conflicts with this Court’s ruling in *Portnoy, supra*, 21 Cal. 2d at pp. 239-241 (local ordinance preempted when it has no *mens rea* requirement and partially duplicates a state criminal statute which requires *mens rea*). This Court has settled the law in the area of preemption of municipal regulation when the issues are whether state



“immunity statutes” such as the Compassionate Use Act (“CUA”) and the Medical Marijuana Program (“MMP”) preempt local regulation. (See *Inland Empire, supra*, 56 Cal. 4<sup>th</sup> 729.) However, the issue of whether state criminal law *mens rea* requirements preempt conflicting local regulation of illegal and unlicensed cannabis sales has not been settled.

The difference in these LAMC ordinances and state laws are not just academic. In this case, petitioner is being charged by the government for conduct occurring on her property that petitioner was not aware of. (See, for example, Exhibit A, CT, page 308:24-27.) Petitioner could not be convicted under state law for the same conduct due to her lack of *mens rea*. These ordinances are also punishable by up to six months in the county jail and a fine of \$1,000.00, so petitioner is facing significant criminal liability if convicted of the alleged LAMC violations. (LAMC, § 104.15, subd. (c) and (d).) Thus, the policy of congruity in laws that preemption is meant to further is implicated by this significant difference in mental state between the state and local provisions regulating the same conduct.

b. The laws at issue.

Petitioner is charged with unlawfully establishing, operating, and participating in an unlicensed cannabis business in violation of LAMC section 104.15, subdivision (a)(1); unlawfully leasing, renting to, or allowing an unlicensed Commercial Cannabis establishment on land in violation of LAMC section 104.15, subdivision (b)(4); and maintaining or

using a structure for purposes other than permitted in the zone, in violation of LAMC section 12.21, subdivision (a)(1)(A). (Exhibit A, CT, pgs. 1-4.)

LAMC section 104.15 is entitled “Enforcement and Penalties for Unlawful Cannabis Related Activities” and subsection (b)(4) provides, “Starting on January 1, 2018, it shall be unlawful to...(4) Lease, rent to, or otherwise allow an Unlawful Establishment to occupy any portion of parcel of land.” (LAMC, § 104.15, subd. (b)(4).) LAMC, section 104.15, subdivision (c) makes a violation of LAMC, section 104.15 punishable as a misdemeanor with a maximum jail sentence of six months and a maximum fine or \$1,000. (LAMC, § 104.15, subd. (c).) An “unlawful establishment” is defined in the LAMC as any person engaged in Commercial Cannabis Activity if the person does not have a city issued license. (See LAMC, § 104.01, subd. (a)(2).) “Commercial cannabis activity” includes the cultivation, possession, manufacture, distribution...delivery or sale of cannabis and cannabis products as provided for in Division 10 of California Business and Professional Code as implemented by the California Code of Regulations...” (LAMC, § 104.01, subd. (a)(7).)

LAMC section 104.15, subdivision (a)(1), criminalizes the establishment, operation, or participation in “any unlicensed Commercial Cannabis Activity in the City. (LAMC, § 104.15, subds. (a)(1) and (a)(3).) This prohibition includes “renting, leasing, or otherwise allowing any unlicensed Commercial Cannabis Activity...to occupy or use any portion of parcel of land.” (LAMC, § 104.15, subds. (a)(1) and (a)(3).)

LAMC section 12.21, subdivision (a)(1), states: “Permits and Licenses. No building or structure shall be erected, reconstructed structurally, altered, enlarged, moved or maintained, nor shall any building, structure, or land be used or designed to be used for any use other than is permitted in the zone in which such building, structure, or land is located and then only after applying for and securing all permits and licenses required by all laws and ordinances.”

Health and Safety Code section 11366.5(a) is part of the California Uniform Controlled Substances Act (“UCSA”). (See Health and Saf. Code, § 11366.5.) The statute provides, “Any person who has under his management of control any building, room, space or enclosure either as an owner, lessee, or agent *who knowingly* rents, leases, or makes available for use, with or without compensation, the building, room, space...for purposes of unlawfully manufacturing, storing, or distributing any controlled substance for sale or distribution shall be punished by imprisonment in county jail for not more than one year, or pursuant to subdivision (h) of section 1170 of the Penal Code.” (Health and Saf. Code, § 11366.5, emphasis added.)

For the purpose of Health and Safety Code section 11366.5, cannabis is a “controlled substance”. (See Health and Saf. Code, § 11007 of the CUCSA (defining “controlled substance” to include substances on a schedule contained in Health and Saf. Code, § 11054 list); Health and Saf. Code, § 11054, subd. (d)(13) including “cannabis” in a list of Schedule 1 substances; Health and Saf. Code, § 11018 (defining “cannabis” to include all parts of the

Cannabis Sativa L plant).) Thus, by its clear terms, Health and Safety Code section 11366.5 criminalizes a property owner's renting, leasing, or making available for use a building or space for the illegal sale or distribution of cannabis.

The state also has a general nuisance statute which can also apply to the conduct that petitioner is accused of. Penal Code section 373a makes it a misdemeanor to “maintain, permit, or allow a public nuisance to exist upon his or her property ... after reasonable notice from a ... city attorney ... to remove, discontinue, or abate the public nuisance has been served on the person ....” Thus, petitioner could be found guilty of violating this statute only after being given notice by the city attorney that the business operating on her property lacks a license and is a nuisance. Due to this notice requirement, petitioner would also need to have knowledge of the underlying nuisance violation before being convicted of this offense.

c. Statement of the law of preemption.

Petitioner contends that the local ordinances at issue are preempted because they are being used to prosecute petitioner in criminal court as strict liability offenses which require no knowledge of the underlying criminality in order to be proven, while the state laws that govern the same conduct require either knowledge (in the case of Health and Safety Code section 11366.5) or notice of abatement and knowledge (in the case of

Penal Code section 373a). In this way, the local ordinances duplicate and conflict with state law.<sup>5</sup>

Additionally, the ordinances enter into an area fully occupied by state law. As argued below, Health and Safety Code section 11366.5 is part of the Controlled Substances Act. (See Health and Saf. Code, § 11000 et seq.; Health and Saf. Code, § 11366.5; *Wheeler, supra*, 72 Cal.App.5<sup>th</sup> at 833.) This Court has held that this act fully occupies the area of law that it covers to the exclusion of local regulation. (*O’Connell v. City of Stockton* (2007) 41 Cal. 4<sup>th</sup> 1061, 1069, 1073 (*O’Connell*).

If otherwise valid local legislation is in conflict with state law, it is preempted by such law and is void. (*O’Connell, supra*, 41 Cal. 4<sup>th</sup> at p. 1067. See also Cal. Const. Art. 11, Sec. 7.) Conflict exists if local regulation duplicates, contradicts, or enters

---

<sup>5</sup> The other difference of note between the ordinances and Health and Safety Code section 11366.5 is that the ordinances are punishable by up to six months in jail, while Health and Safety Code section 11366.5 is punishable as a misdemeanor for up to one year, or as a felony for sixteen months, two years, or three years.<sup>5</sup> This difference inures to the benefit of petitioner in the present case because her criminal liability is less than what it would be under state law. However, this is yet another significant difference between the local and state laws and the inconsistency is another reason why the state law should preempt enforcement of the local laws for the same conduct.

Petitioner also notes that a violation of Health and Safety Code section 11366.5, subd. (a), is a crime of moral turpitude. *People v. Vera* (1999) 69 Cal.App.4<sup>th</sup> 1100, 1102-1103. A violation of the ordinances at issue here would probably not be a crime of moral turpitude under the reasoning in *Vera* because the ordinances lack a *mens rea* and Health and Safety section 11366 necessarily involves an “intent to corrupt others.” *People v. Vera, supra*, 69 Cal.App.4<sup>th</sup> at 1103.

an area fully occupied by state law, either expressly or by implication. (*O'Connell, supra*, 41 Cal. 4<sup>th</sup> at p. 1067.)

The contradictory form of preemption applies when the local law is “inimical” to the state law. (*Inland Empire, supra*, 56 Cal. 4<sup>th</sup> at 743.) This form of preemption applies when “the ordinance directly requires what the state statute forbids or prohibits what the state statute demands.” (*Ibid.*)

The duplicative form of preemption applies when the local and state laws are “coextensive” in that the laws regulate or prohibit the same conduct. (*Ibid.*)

Local laws enter into an area “fully occupied” by state laws when either the Legislature has expressed its intent to fully occupy the area or when the Legislature has impliedly done so in light of one of the following: “(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.” (*Ibid.*, citations omitted.)

This Court has expressed a reluctance to “infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.” (*Inland Empire, supra*, 56 Cal. 4<sup>th</sup>

at 744, citations omitted.) If “there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against the attack of state preemption.” (*Ibid.*, citations omitted.)

Finally, adding to these layers of analysis is another rule that applies to “crimes and penalties involving controlled substances.” This “is an area of law traditionally addressed at the state level. Thus, the presumption against preemption that applies to local land use regulations does not apply in the area of criminal law.” (*Kirby v. County of Fresno* (2015) 242 Cal.App.4<sup>th</sup> 940, 957.)

- d. Long established case law shows that the Los Angeles Municipal Code ordinances should be preempted as applied to petitioner’s alleged conduct.

While LAMC sections 104.15, subd.(b)(4), and 104.15, subd. (a)(1), criminalize a property owner’s renting, leasing, or making available for use a building or space for the illegal sale or distribution of cannabis, there is no provision in this or related LAMC sections requiring proof that the owner who is charged with violating these provisions has an awareness of the illegal activities on her or his property. Consequently, LAMC sections 104.15, subd. (b)(4), and 104.15, subd. (a)(1), both duplicates and contradicts Health and Safety Code section 11366.5, which has a *mens rea* requirement. To the extent that LAMC section 104.15, subd. (b)(4), and 104.15, subd. (a)(1), are used to extend criminal liability to unknowing property owners who were unaware of and

had no notice of illegal cannabis activity on their property, the ordinances should be deemed to be preempted by state law. (See *Portnoy, supra*, 21 Cal. 2d at pp. 239-241.)

In *Portnoy*, this Court held that when a local ordinance purports to even partially regulate acts which are already made criminal by state statute but conflicts with them by omitting a *mens rea* requirement, the ordinances are preempted and invalid as conflicting with the state statutes they duplicate. (*Ibid.*)

A close look at the laws involved in *Portnoy* shows parallels to the present case and another reason that *Wheeler* should have followed the holding in *Portnoy*. The local ordinance at issue in *Portnoy* read as follows:

“It shall be unlawful for any person, either as owner, lessee, principal, agent, employee, servant clerk, waiter, cashier, or dealer to establish, lease, open, maintain, keep, or carry on or work in any building, house or room or any other place where any game, device, scheme, gaming or gambling is permitted, allowed, or carried on in violation of any of these provisions of this Ordinance or in violation of the law of the State of California.” (*Portnoy, supra*, 21 Cal. 2d at p. 239.)

The second ordinance at issue in the complaint read as follows:

“...it shall be unlawful for any person to own or have in his possession or under his custody or control any slot machine, upon the result of the action of which money or other valuable thing is staked or hazarded and which is or may



be operated or played by placing or depositing therein any coins, checks, or slugs, or as a result of the operation of which any money or other representative of value is or may be won or lost, when the result of the action or operation of said slot machine is dependent in whole or in part upon hazard or chance.” (*Ibid.*)

The state law provision at issue involved Penal Code section 330a (note that the following is taken directly from the case and is therefore as section 330a existed at the time):

“Every person who has either in his possession or under his control either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained or kept, in any room, space, inclosure or building owned . . . by him, or under his management or control, any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable thing *is staked* or hazarded, and which *is operated*, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money, representative or articles of value, checks, or tokens, redeemable in, or exchangeable for money or any other thing of value, *is won* or lost, or taken from or obtained from such machine, when the result of action or operation of such machine, contrivance, appliance, or mechanical device is dependent

upon hazard or chance . . . is guilty of a misdemeanor...."  
(*Portnoy, supra*, 21 Cal. 2d at p. 240 (emphasis in original).)

After analyzing the local and state provisions, this Court concluded that “[i]nsofar as the provisions of [the local ordinances] purport to prohibit acts which already are made criminal by the Penal Code, it is clear that they exceed the proper limits of supplementary regulation and must be held invalid because in conflict with the statutes which they duplicate.” (*Portnoy, supra*, 21 Cal. 2d at p. 240.) The difference in the *mens rea* requirements between the state and local provisions resulted in a finding that the local laws both conflict and duplicate the state laws.

The conflict between the laws at issue in *In re Portnoy* is similar to the one presented in this case. The local laws do not match the verbiage of the state laws, but the local laws are being used to prosecute the same conduct forbidden by the state laws. In this sense, the state and local laws duplicate each other. The significant difference—and the genesis of the inconsistency and confusion that preemption is meant to avoid—is that the state laws require an awareness of the forbidden activity to prove a conviction of the state laws, and the local laws do not.

The arguments made by the government in *In re Portnoy* mirror the contemporary arguments made by real party in interest. For example, the government argued that the language of the ordinance is broader than the language in the Penal Code provision. (*Portnoy, supra*, 21 Cal. 2d at p. 240-241.) There is no preemption, they argued, because the ordinance supplemented,

rather than duplicated, existing statutes. (*Ibid.*) This Court rejected these arguments and observed that the proscribed conduct is essentially identical between the local and state statutes, and therefore the duplicative local statutes are preempted by the state law. (*Ibid.*)

When it comes to the issue of preemption through contradiction, the focus is on whether the state and local laws have differing requirements in what they “prohibit” or “demand.” (*Inland Empire, supra*, 56 Cal. 4<sup>th</sup> at pp. 743, 754-755.) With LAMC section 104.15, the government has less of a burden in that they need not prove that the defendant had knowledge of the underlying illegal activity. With Health and Safety Code section 11366.5, subd. (a), the government has a higher burden in that they need to prove that the defendant had knowledge of the illegal activity.

Justice Liu wrote a concurring opinion in *Inland Empire* which summarizes and clarifies the preemption analysis in this area: “...[S]tate law may preempt local law when local law prohibits not only what a state statute ‘demands’ but also what the state statute permits or authorizes.” (*Inland Empire, supra*, 56 Cal. 4<sup>th</sup> at p. 763 (concurring opin.). See also *Inland Empire, supra*, 56 Cal. 4<sup>th</sup> at pp. 758, 760-761.) Here, the state statute authorizes a property owner to unknowingly permit its lessee to operate a business illegally selling a controlled substance, marijuana. The city ordinance prohibits a property owner from unknowingly permitting its lessee to operate a business illegally selling the same controlled substance.

In addition to the ordinances at issue being duplicative of and conflicting with state law, the area covered by the ordinances is fully occupied by state law. In *O’Connell, supra*, 41 Cal. 4<sup>th</sup> 1061, this Court analyzed a local ordinance that allowed for the city government to seize vehicles in a way that was more expansive and provided less due process than the state law provisions regulating seizures. The local ordinance provided for the forfeiture by a preponderance of evidence that a vehicle was used to solicit an act of prostitution or used to acquire or attempt to acquire any controlled substance. (*O’Connell, supra*, 41 Cal. 4<sup>th</sup> at p. 1066.) The California Uniform Controlled Substances Act (“UCSA”), located at Health and Safety Code section 11000 et seq., only authorizes forfeiture by proof beyond a reasonable doubt that the vehicle was “used as an instrument to facilitate the manufacture of, or possession for sale or sale” of specified amount of controlled substances. (*O’Connell, supra*, 41 Cal. 4<sup>th</sup> at p. 1070.) This Court observed:

“The comprehensive nature of the UCSA in defining drug crimes and specifying penalties (including forfeiture) is so thorough and detailed as to manifest the Legislature’s intent to preclude local regulation. The UCSA accordingly occupies the field of penalizing crimes involving controlled substances, thus impliedly preempting the City’s forfeiture ordinance to the extent it calls for the forfeiture of vehicles used “to acquire or attempt to acquire” (Stockton Muni. Code, Sec. 5-1000) controlled substances regulated under

the UCSA.” (*O’Connell, supra*, 41 Cal. 4<sup>th</sup> at p. 1071, citation omitted.)

This Court focused on the whole of the UCSA, and not just the forfeiture provisions of the UCSA, to come to this conclusion. (*O’Connell, supra*, 41 Cal. 4<sup>th</sup> at 1073.)

This Court also held that the city’s forfeiture provisions for soliciting an act of prostitution were expressly preempted by state law. (*Ibid.*) Vehicle Code section 21 expressly states that no locality may “enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein.” (*Ibid.*, quoting Veh. Code, § 21.) Vehicle Code section 22659.5, subd. (a), also provided for a pilot program which allowed municipalities to declare vehicles used in specified crimes a public nuisance. (*O’Connell, supra*, 41 Cal. 4<sup>th</sup> at p. 1074.) Violations of the state’s prostitution laws could qualify under this program. (*Ibid.*) However, there was no provision that authorized the seizure of the vehicles. (*Ibid.*)

This Court rejected the city’s arguments that its interests in regulating trafficking in controlled substances and regulating vice should allow it to enforce this ordinance. (*O’Connell, supra*, 41 Cal. 4<sup>th</sup> at pp. 1069, 1076.) “Although traffic congestion is a local problem that cities ordinarily are authorized to address, they may not do so by means of an ordinance that, by allowing forfeiture of a vehicle used to commit a specific state law violation, impinges on an area fully occupied or exclusively covered by state law.” (*Ibid.*)

The holdings and analysis in *O'Connell* are helpful in examining the issues in petitioner's case. First, the holding establishes that the UCSA—of which Health and Safety Code section 11366.5 is a part—“is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation.” (*O'Connell, supra*, 41 Cal. 4<sup>th</sup> at p. 1071.) Thus, Health and Safety Code section 11366.5 is a part of a body of laws that fully occupies the field and no locality can enforce an ordinance that interferes with this state provision.

Second, real party in interest has argued that their localized interests should override any preemption due to duplication, contradiction, or by entering an area that is fully occupied by state law. *O'Connell* recognized the localized interests by acknowledging that the city's need to regulate traffic congestion is normally an issue that a city is authorized to address. (*O'Connell, supra*, 41 Cal. 4<sup>th</sup> at p. 1076.) Nevertheless, when the attempt at regulating a local interest enters into an area fully occupied by state law, the attempt at regulation will be preempted. (*Ibid.*) In the same way, this Court can acknowledge that real party in interest has a localized interest in ensuring that businesses are not illegally selling controlled substances. However, the way that real party in interest is criminally prosecuting petitioner enters into an area fully occupied by state law and should also be preempted.

Finally, *O'Connell* discussed a provision of state law that expressly allowed municipalities to declare vehicles used in specified crimes a public nuisance. (*O'Connell, supra*, 41 Cal. 4<sup>th</sup>

at p. 1074.) This Court focused on the *scope* of this provision. The state law provision expressly left the door open for local regulation allowing localities to treat vehicles used in soliciting prostitution as a public nuisance, but there was no authorization in this provision which allowed localities to subject the vehicles to forfeiture. (*O'Connell, supra*, 41 Cal. 4<sup>th</sup> at pp. 1069, 1074.)

*In re Application of Mingo* (1923) 190 Cal. 769 (*Mingo*), is another case issued by this Court that has also examined the issue of preemption in criminal prosecutions and the effect of a state law provision allowing for local regulation. *Mingo* resolved a dispute between a state law and an ordinance that forbade the possession of alcohol. The ordinance punished the offense through a fine and up to ninety days in jail, and a state law that went into effect after the ordinance punished this offense only through a fine. (*Mingo, supra*, 190 Cal. at p. 771.) State law also had a provision which expressly allowed for localities to prohibit various activities related to the possession, transportation, and manufacture of intoxicating liquor through fines and forfeitures. (*Mingo, supra*, 190 Cal. at p. 772.) However, nothing in this state law provision allowed for localities to impose jail time for these prohibited activities. (*Ibid.*) Given that the state laws occupied this field so completely, and the state provision allowing for local regulation in specified areas but did not allow for the imposition of jail time, this Court held that the local law adding jail to the offenses was preempted. (*Mingo, supra*, 190 Cal. at pp. 772-773.)

This examination of the scope of a state law's express authority allowing for localities to regulate some areas, while not

expressly allowing for regulation in other areas that conflict with state law, can assist this Court in examining petitioner’s preemption claim. *Wheeler* noted that the California voters passed the Medicinal and Adult-Use Cannabis Regulation and Safety Act (“MAUCRSA”), codified at Business and Professions Code section 26000 to 26260, and that it explicitly contemplates that local governments may have their own regulations and licensing requirements for cannabis related businesses. (*Wheeler, supra*, 72 Cal.App.5<sup>th</sup> at 832.) “MAUCRSA includes a provision protecting landlords who rent to cannabis business from prosecution, but only if they rent to businesses that comply with state *and local* licensing requirements: ‘The actions of a person who, in good faith, allows his or her property to be used by a licensee ... as permitted pursuant to a state license, and, if required by the applicable local ordinances, a local license or permit, are not unlawful under state law.’” (*Wheeler, supra*, 72 Cal.App.5<sup>th</sup> at 832, quoting Bus. And Prof. Code, § 26032, subd. (b).)

Applying the same reasoning this Court used in *O’Connell* and *Mingo*, MAUCRSA contains provisions allowing for local action in clearly delineated areas. However, there is no provision in the state law allowing for a local government to enforce conduct covered by state laws in a way that removes the *mens rea* element contained in the state laws. The scope of the provisions that *Wheeler* relied upon to support the idea that state laws allow for local regulation and enforcement in the area of cannabis regulation do not expressly allow for the real party in interest’s



attempt at enforcement in petitioner's case. In *O'Connell*, localities were given state authority to declare that vehicles used in soliciting prostitution a nuisance, but there was no provision allowing for local governments to seize the vehicles through forfeiture proceedings. (*O'Connell, supra*, 41 Cal. 4<sup>th</sup> at pp. 1069, 1074.) In *Mingo*, state law gave local governments the authority to regulate and fine alcohol activities, but no authority to impose jail time. (*Mingo, supra*, 190 Cal. at pp. 772-773.) In petitioner's case, state law has given local governments the option to regulate and license cannabis businesses, but no authority to make a violation of the state laws covering these regulated actions an offense lacking a *mens rea* as an element. Preemption was found in *O'Connell* and *Mingo*, and preemption should similarly be found in petitioner's case.

- e. LAMC section 12.21, subd. (a)(1)(A), should be preempted because it is being used to regulate conduct that is also specifically regulated by state law.

To the extent that LAMC section 12.21, subdivision (a)(1)(A), is being interpreted to extend misdemeanor criminal liability to property owners with no knowledge that their property is being used to illegally sell cannabis, this ordinance also contradicts and is in conflict with the UCSA, Health and Safety Code section 11366.5, and Penal Code section 373a.<sup>6</sup> This

---

<sup>6</sup> Penal Code section 373a requires notice to a property owner by the city attorney before prosecution for leasing property to another who maintains, permits, or allows a nuisance to exist on

is because Penal Code section 373a requires notice to a property owner before prosecution (and therefore proof of knowledge), and Health and Safety Code section 11366.5 requires proof that the accused knew of the illegal activity on her or his property before criminal liability can be imposed on a person for illegal cannabis activity occurring on the property.

Real party in interest's claim that the action against petitioner is an attempt by the locality to regulate land use belies the fact that they are seeking criminal penalties against petitioner for alleged conduct covered by a state criminal law. There is no "zone" for the unlicensed sale of cannabis anywhere in the city of Los Angeles. The ordinances at issue are being used to criminally penalize petitioner for unknowingly allowing the illegal sale of cannabis on her property. (See *Jones v. City of Los Angeles* (1930) 211 Cal. 304, 309 (discussing the distinction between zoning and nuisance ordinances—zoning ordinances are future looking and used for planning purposes).)

The way that LAMC section 12.21, subdivision (a)(1)(A), is being used to criminally prosecute petitioner shows how real party in interest stretches this notion of regulating land use. This broadly worded ordinance deems any use of land or a building "other than is permitted in the zone in which such building, structure, or land is located" a criminal offense. (LAMC, § 12.21,

---

the property. See also *People v. Cooper* (1944) 64 Cal.App.2d Supp. 946, 949 (Under section 373a, it is the omission to abate the nuisance after notice to the property owner that offends the law.); LAMC, section 104.15, subd. (c) (violation of the ordinance is a nuisance); LAMC, section 11.00, subd. (l) (violation of zoning ordinance is a nuisance).

subd. (a)(1)(A).) As applied to petitioner, real party in interest's theory is that because petitioner's tenant used the property for selling cannabis without authorization from the city, petitioner is therefore liable for the tenant's illegal conduct because the tenant's illegality violates the purpose of the zone that petitioner's building sits on. This is true even though petitioner was unaware of the tenant's illegality because it appears that the ordinance states a strict liability crime.<sup>7</sup>

Following the logic of real party in interest's application of this ordinance to petitioner, a property owner could be convicted of violating this ordinance if a tenant receives stolen property in violation of Penal Code section 496, subdivision (a). Similarly, a property owner could be convicted of this ordinance if her tenant used the premises to engage in an act of prostitution in violation of Penal Code section 647, subdivision (b). In these hypotheticals, the tenant is using the landlord's building for a use "other than is

---

<sup>7</sup> See *People v. Gonzalez* (2020) 53 Cal.App.5<sup>th</sup> Supp. 1, 11, holding that LAMC section 104.15, subds. (a)(1) and (b)(2), are strict liability offenses. Petitioner is unaware of any published case holding that LAMC, section 12.21, subd. (a)(1)(A), is also a strict liability offense. The question of whether these offenses should be treated as strict liability offenses is important considering a defendant faces up to six months in jail if convicted of violating one of these ordinances. Petitioner is limiting this brief to the issues stated in the petition for review and issues fairly included in them. See Calif. Rules of Court, Rule 8.520(b)(3). Petitioner is willing to briefing this question of whether these ordinances are appropriately considered strict liability offenses should this Court order further briefing on this question.

permitted in the zone in which such building, structure, or land is located.”

While the wording of LAMC section 12.21, subdivision (a)(1)(A), does not match Health and Safety Code section 11366.5 or Penal Code sections 373a, the effect is the same: this local ordinance is being used to regulate conduct that is already regulated by state law. Real party in interest characterizing their prosecution as a way to regulate land use belies this reality.

Petitioner is unaware of a case that has decided whether preemption applies to a broadly worded local law being used to regulate conduct that a specific state statute covers. Petitioner suggests that in addition to the cases that carefully compare the words of the local and state laws to see if preemption applies, this Court should consider a preemption analysis that also takes into account *how* the local authority is applying a broadly worded ordinance like LAMC section 12.21, subdivision (a)(1)(A). It may be inappropriate to find preemption if, for example, the local government uses this ordinance to enforce a bona fide zoning issue. However, it may be appropriate to find preemption when the local authority applies the ordinance in a such a way that attempts to regulate an area already covered by state criminal laws, as it does in petitioner’s case. In other words, in some circumstances, a local ordinance may survive preemption when applied in certain ways, and it may be preempted when applied in a criminal proceeding regulating conduct that is already regulated by state law.

This type of analysis would be justified based on the idea that criminal prosecutions do not involve the typical deference to localities that courts give when deciding preemption questions. (See *Kirby v. County of Fresno*, supra, 242 Cal.App.4<sup>th</sup> at 957 (“the presumption against preemption that applies to local land use regulations does not apply in the area of criminal law.”) *In re Sic* (1887) 73 Cal. 142, examined a conflict between state and local laws and used broad terms in its analysis of how the competing laws should be compared: “The section [local law] plainly covers the same ground as the Penal Code.” (*In re Sic*, supra, 73 Cal. at p. 146, emphasis added.) This broader focus on the way the local ordinance is being used to enforce conduct is also warranted because to do otherwise could encourage localities to use broadly worded ordinances to prosecute conduct governed by state law in an effort to circumvent the closer scrutiny involved in comparing the wording of the local and state provisions.

- f. Considering the LAMC severability ordinance and the LAMC provision which mandates that the ordinances be read in conjunction and in compliance with state law.

Los Angeles has two ordinances regarding severability and a declaration that the LAMC cannabis regulatory provisions be interpreted in a way that does not conflict with state law. Petitioner brings these provisions to the Court’s attention

because they may also have an impact on this Court's preemption analysis.

The Los Angeles Municipal Code contains a severability clause that would maintain the enforceability of the rest of the cannabis regulatory framework should this Court find that parts of the framework are preempted:

LAMC 104.17. SEVERABILITY. If any section, subsection, subdivision, clause, sentence, phrase, or portion of this article is held unconstitutional or invalid or unenforceable by any court or tribunal of competent jurisdiction, the remaining sections, subsections, subdivisions, clauses, sentences, phrases, or portions of this measure shall remain in full force and effect, and to this end the provisions of this article are severable. Notwithstanding anything to the contrary in the prior sentence, if any State of City licensure requirement is held unconstitutional or invalid or unenforceable by any court or tribunal of competent jurisdiction, the Commercial Cannabis Activity subject to such licensure requirement shall be prohibited in the City.

Thus, the particular sections that this court deems to be in conflict with state law, if any, can be severable from the entire regulatory framework enacted by the city. (See *Portnoy, supra*, 21 Cal. 2d at p. 242 (analyzing the ordinance's severability clause and concluding that its provisions "are so inseparably connected that it is impossible to sustain any part of the section after the

invalidation of the part in conflict with the provisions of the Penal Code.”))

The Los Angeles Municipal Code also contains another provision in an article entitled “Commercial Cannabis Activity” which evinces an intent that its provisions comply with state law:

LAMC 105.07. NO CONFLICT WITH STATE LAW. This article is not intended to conflict with State law. This article shall be interpreted to be compatible with State enactments and in furtherance of the public purpose that those enactments encompass.

The language of this provision is entirely in alignment with petitioner’s contentions: the provisions that petitioner is charged with are regulating conduct that state law already regulates and are thus in conflict. The provisions conflict with state law, and LAMC section 105.07 directs a reviewing body to interpret the LAMC provisions to be compatible with state law. Thus, a finding of preemption is warranted because the LAMC provisions at issue here are not compatible with state law. (See *Mingo, supra*, 190 Cal. at p. 772 (“The constitutional and statutory power of the board of supervisors is limited to the enactment of such police regulations as are not inconsistent with the general law. When the state law and the county ordinance are in conflict the situation is not changed by the legislative declaration that the act shall be construed as though there was no conflict.”))

g. Conclusion.

The result of this analysis has a practical effect on petitioner's life. Because petitioner was unaware of the alleged criminal law violations occurring on her property, petitioner could not be criminally liable under the state's laws but could be liable pursuant to the local provisions. Because the ordinances that real party in interest is charging petitioner with violating duplicate, contradict, and enter into a field fully occupied by state law, petitioner respectfully asks that this Court find that the local ordinances are preempted by state law.

### **III. Conclusion**

For the reasons stated herein, petitioner respectfully requests that this Court to hold that the local ordinances be preempted by the state laws regulating the same conduct. Additionally, petitioner respectfully asks this Court to hold that a judicial officer may take into account a person's lack of knowledge as a mitigating factor when considering whether a dismissal pursuant to Penal Code section 1385 is "in the interests of justice."

Respectfully submitted,

ERIKA ANZOATEGUI

Alternate Public Defender, Los Angeles County

By: \_\_\_\_\_

Brock Hammond

Deputy Alternate Public Defender



**CERTIFICATE OF WORD COUNT COMPLIANCE**

Counsel of Record hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the attached brief, entitled, PETITIONER’S BRIEF ON THE MERITS, is produced using 13-point Century Schoolbook type including footnotes and contains approximately 11,073 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 1, 2022.

By: \_\_\_\_\_

Brock Hammond,  
Deputy Alternate Public Defender  
Attorney for Petitioner, Emily Wheeler

## PROOF OF SERVICE

I, the undersigned, declare:

I am over age 18 years of age and not a party to this action; my business address is 210 West Temple Street, Suite 18-709, Los Angeles, California 90012.

On July 1, 2022, I served the within PETITIONER'S OPENING BRIEF ON THE MERITS, EMILY L. WHEELER, on each of the persons named below by serving a true copy thereof, via the TrueFiling e-filing system as follows:

By True Filing

On July 1, 2022, I served Via TrueFiling, and no error was reported, a copy of the document identified above on to the following entities:

ROB BONTA  
ATTORNEY GENERAL  
STATE OF CALIFORNIA  
DEPARTMENT OF JUSTICE  
300 SOUTH SPRING STREET  
LOS ANGELES, CA 90013  
[docketinglaawt@doj.ca.gov](mailto:docketinglaawt@doj.ca.gov)

GEORGE GASCON  
DISTRICT ATTORNEY  
APPELLATE DIVISION  
320 WEST TEMPLE STREET  
SUITE 540  
LOS ANGELES, CA 90012  
[TrueFiling@da.lacounty.gov](mailto:TrueFiling@da.lacounty.gov)

On July 1, 2022, following ordinary business practices, I placed for collection and mailing at the Law Offices of the Alternate Public Defender, located at 210 West Temple Street, Suite 18-709, Los Angeles, California 90012, a copy of the attached PETITIONER'S OPENING BRIEF ON THE MERITS, EMILY L. WHEELER, in a sealed envelope, with postage fully prepaid, addressed to the following persons:

HON. H ELIZABETH HARRIS, COM.  
LA SUPERIOR COURT DEPT. 47  
CDF-CJC  
210 W. TEMPLE ST.  
LOS ANGELES, CA 90012

LA SUPERIOR COURT CLERK  
111 N. HILL ST., RM 105E  
LOS ANGELES, CA 90012

LOS ANGELES SUPERIOR COURT  
APPELLATE DIVISION  
111 N. HILL ST. RM 607  
LOS ANGELES, CA 90012

MRS. EMILY L. WHEELER  
2626 BILLINGS ST.  
COMPTON, CA 90220  
(Defendant)

HANNAH M. BARKER, DCA  
LA CITY ATTORNEY'S OFC.  
200 N. MAIN STREET  
966 CITY HALL EAST  
LOS ANGELES, CA 90012

COURT OF APPEAL  
STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE  
300 SOUTH SPRING STREET  
LOS ANGELES, CA 90013

I declare under penalty of perjury that the above is true and correct and that I have signed an original, printed paper copy of this declaration and it is available for inspection per CRC 8.75. Executed on July 1, 2022, at Los Angeles, California.

  
\_\_\_\_\_  
SUSANA COVIAN

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

Case Name: **WHEELER v. APPELLATE DIVISION (PEOPLE)**

Case Number: **S272850**

Lower Court Case Number: **B310024**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **bhammond@apd.lacounty.gov**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S272850_OBM_Wheeler

Service Recipients:

Person Served	Email Address	Type	Date / Time
Laurel Mend Los Angeles Public Defender ) - 165735	lmend@pubdef.lacounty.gov	e-Serve	7/1/2022 2:23:28 PM
Brock Hammond Office of the Alternate Public Defender 215986	bhammond@apd.lacounty.gov	e-Serve	7/1/2022 2:23:28 PM
Hannah Barker Los Angeles City Attorney's Office 325597	hannah.barker@lacity.org	e-Serve	7/1/2022 2:23:28 PM
Attorney Attorney General - Los Angeles Office Court Added	docketinglaawt@doj.ca.gov	e-Serve	7/1/2022 2:23:28 PM
Office Office Of The District Attorney Court Added	truefiling@da.lacounty.gov	e-Serve	7/1/2022 2:23:28 PM
Frederick Bennett Superior Court of Los Angeles County 47455	fbennett@lacourt.org	e-Serve	7/1/2022 2:23:28 PM
Sydney Mehringer Los Angeles City Attorney's Office 245282	sydney.mehringer@lacity.org	e-Serve	7/1/2022 2:23:28 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

7/1/2022

Date

/s/Susana Covian

Signature

Hammond, Brock (215986)

---

Last Name, First Name (PNum)

Los Angeles County Alternate Public Defender

---

Law Firm