

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
APPELLATE DIVISION OF THE	)	Nos. 9CJ00315, BR054851
SUPERIOR COURT OF THE	)	
STATE OF CALIFORNIA,	)	
COUNTY OF LOS ANGELES,	)	
	)	
Respondent,	)	
	)	
PEOPLE OF THE STATE OF	)	
CALIFORNIA,	)	
	)	
Real Party In Interest.	)	

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**PETITIONER'S REPLY BRIEF ON THE MERITS**

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**PETITIONER’S REPLY BRIEF ON THE MERITS**

TO THE HONORABLE PATRICIA GUERRERO, 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 Reply Brief On the Merits in response to real party in interest’s (“real party”) Answer Brief On the Merits (“AB”).

As argued below, the trial court acted well within its discretion when it dismissed the charges against petitioner based



on the trial court's authority under Penal Code section 1385.<sup>1</sup> In ordering the dismissal, the trial court relied on the uncontested facts regarding petitioner's age (she was 85 years old at the time and is now 88), she had no prior criminal history, she had never before been arrested, she lived an exemplary life, she had no contact or business position in running the illegal cannabis business, and she did not know about the operations of the cannabis business on the property.

Further, the local laws that real party in interest charged petitioner with violating seek to punish petitioner for the same conduct that a state statute is in place to punish. Real party asks this Court to ignore an "antiquated" set of state laws that fully occupies the field that the local ordinances seek to regulate. Instead, real party asks this Court to focus entirely on a newer set of laws that regulate cannabis. Petitioner argues below that real party's proposition is not in accord with this Court's precedents.

## 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

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<sup>1</sup>All statutory references are to the California Penal Code, unless otherwise noted.

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. ...” In the few instances in which the legislature has chosen to limit this authority, it has done so explicitly. (See, for example, Penal Code section 1385.1, which forbids a trial court from dismissing special enhancements admitted or found true by a jury.)

Real party in interest is proposing that this Court write into the broad language of section 1385 a limitation that an entire class of crimes—strict liability offenses—be categorically excluded from a trial court’s authority to dismiss the offense “in furtherance of justice” when the trial court bases its dismissal order in part on a lack of *mens rea* on the part of a defendant. (AB, pg. 52.) Adopting real party’s proposed rule would unnecessarily limit a trial court’s power to dismiss in appropriate cases pursuant to section 1385 and would usurp the legislature’s authority to modify and limit section 1385 as it sees fit.<sup>2</sup>

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<sup>2</sup> Petitioner notes that section 1385 has been extensively modified over the past few years. The legislature has added language listing factors describing what a trial court “shall consider and afford great weight to... .” (Penal Code § 1385(c)(2).) The listed factors give trial courts more specificity as to what mitigating evidence they may consider, and the statute maintains a trial court’s authority to dismiss charges for reasons that do not fall within the list of mitigating factors. (Penal Code § 1385(c)(4), “The circumstances listed in paragraph (2) are not exclusive and the court maintains authority to dismiss or strike an enhancement in accordance with subdivision (a).”) Importantly, none of the modifications limit the scope of a trial court’s authority to dismiss pursuant to this subdivision. These changes evince no effort on the part of the legislature to limit the scope of how section 1385 can be used by trial courts.

A. The record developed below was sufficient: petitioner's factual assertions made under penalty of perjury by her attorney were not contested by real party with any evidence, and real party agreed with the trial judge in open court that petitioner had no contact with or role in running the cannabis sales operation at issue in this case.

Real party's arguments that there was no proof supporting the trial court's stated reasons for its section 1385 dismissal order is a distraction and does not reflect the state of the record. The trial court based its ruling on *uncontested* evidence that was presented to it in the form of an affidavit from counsel: petitioner was 85 years old with no prior criminal history, 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. (See Exhibit A of the Petition for Writ of Mandate, Clerk's Transcript ("CT"), pg. 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 pg. 21 [declaration of counsel Alvin Yu].) <sup>3</sup>

Real party had ample opportunity to contest these factual assertions in the trial court. Petitioner’s motion to dismiss was filed in the trial court on October 7, 2019. (Exhibit A, CT, pg. 10.) Real party in interest filed an opposition to this motion on October 10, 2019. (Exhibit A, CT, pg. 24.) Real party in interest included a factual summary in their opposition, and none of their asserted facts dispute what petitioner’s counsel asserted in his October 7, 2019 motion and affidavit. (Exhibit A, CT, pg. 25.) Further, the hearing on petitioner’s motion to dismiss was held over a month later in court on November 19, 2019. (Exhibit B, Reporter’s Transcript (“RT”), pg. 102.) Real party in interest had enough time to lodge appropriate objections to the mitigating facts supporting petitioner’s motion to dismiss. Real party in interest also had enough time to properly produce any evidence that shows the mitigating facts asserted by petitioner were untrue.

The record of the hearing where the trial court dismissed the charges against petitioner also shows that the mitigating facts were not disputed by real party in interest. The trial court specifically asked real party in interest about this question of petitioner’s knowledge of illegal activity after the trial court stated a series of reasons supporting its dismissal order:

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<sup>3</sup> All citations to exhibits will be from the Petition for Writ of Mandate.

The Court: Okay, you're not suggesting that she has any contact with or any business position in running this illegal dispensary; is that correct?

[Attorney for real party in interest]: Right.

(Exhibit B, RT, pg. 109:24-27, see also pg. 108:10-25.)

When directly presented with an opportunity to refute the fact that petitioner had no knowledge of the illegal activities, real party in interest actually affirmed this important fact. Thus, the trial court did not abuse its discretion in relying on the facts asserted in petitioner's counsel's declaration and argued by both parties' counsel at the dismissal hearing.

The Evidence Code also has a provision which required real party's counsel to make timely objections and motions to strike, the absence of which forestalls review related to the admission of the evidence. Evidence Code section 353 states the following:

Effect of erroneous admission of evidence. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

- (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
- (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and

that the error or errors complained of resulted in a miscarriage of justice.

Real party in interest never objected to the above-mentioned facts asserted by petitioner's counsel in the form of an affidavit. Assuming, *arguendo*, that this was an improper admission of evidence, real party in interest never made a motion to exclude or strike the evidence, nor did they make clear any ground on which the evidence should not have been admitted. Therefore, real party in interest has waived any legal issues related to the trial court relying on these mitigating facts to support the court's dismissal order. Had real party in interest made such an objection, petitioner and the court could have sought to perfect the record and address any legal issue pertaining to the admissibility of the evidence. However, as the record stands, the facts supporting the trial court's dismissal order are uncontested.

The statements made by the trial court that supported its dismissal order make clear that the trial court was well within its discretion to dismiss the charges against petitioner. The trial court used uncontested facts and balanced the interests of justice in a rational way. (See Exhibit B, RT, pgs. 108:10-25, 109:4-15.)

Real party also misleadingly argued that petitioner's assertion of facts through the declaration of her counsel was a violation of the Rules of Professional Conduct, Rule 3.4(g).<sup>4</sup> Real

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<sup>4</sup> AB, pg. 62. Petitioner notes that after arguing that petitioner's counsel violated ethical rules by asserting facts through a declaration, real party argued on the next page of its brief that its counsel's assertion of fact in a trial court brief that was not

party's citation to this authority misleadingly excised the two words in this rule that show the rule's inapplicability to the proceedings below: "A lawyer shall not... (g) *in trial*, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of the accused." (Rules Prof. Conduct, Rule 3.4(g), emphasis added.) Petitioner's counsel did not assert facts in trial; rather, these facts were asserted as part of a declaration in a brief explaining mitigating reasons that could support an order of dismissal pursuant to section 1385. (See, Exhibit A, CT, pgs. 20-21.) Thus, petitioner's counsel's declaration did not violate this rule of professional conduct.

B. Real party's argument that an elderly and wheelchair bound defendant should have visited her property or used the internet makes a case for maintaining a trial court's wide discretion when it comes to section 1385.

As part of its argument that the charges against petitioner were improperly dismissed, real party appears to argue that the trial court abused its discretion in ordering the dismissal because petitioner could have checked online or examined the commercial property storefront to check on whether the business was properly licensed. (AB, pgs. 54-55.) Real party ignores the fact that its own attorney agreed that petitioner had no contact with or business position in running the illegal business. (Exhibit B,

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supported by a declaration is something the trial court and this Court should rely upon. (See, AB, pg. 63.)

RT, pg. 109:24-27.) Real party also assumes that petitioner had the wherewithal and access to search the internet for information on Los Angeles' licensing scheme, and that petitioner was mobile enough to be in regular contact with her property to look for a city license in the property's window.

The record shows that petitioner was 85 years old at the time of the dismissal and appeared in court in a wheelchair. (See, Exhibit B, RT, pg. 102:24.) Real party's concession that petitioner had no contact with the business and petitioner's wheelchair suggests mobility problems that would preclude regular visits to a commercial property. While many people of an advanced age regularly access the internet, many people also do not have the knowledge or access to conduct searches on the internet. Finally, real party's argument assumes that petitioner would have known that someone was selling cannabis from the property, and that petitioner would also have known that Los Angeles city runs an internet site which shows whether the cannabis sales were properly licensed.

Real party inadvertently makes the case for maintaining the wide judicial discretion that bench officers should have in determining what the "furtherance of justice" is due to the particulars of a defendant's circumstances. The totality of facts presented to the trial court supported the trial court's determination that petitioner's case should be dismissed, but that the case against the two codefendants should proceed. Far from abusing its discretion, the trial court wisely adduced that the



“interests of justice” mitigate in favor of a dismissal for petitioner.

C. Real party ignored the detriment that its criminal case caused petitioner.

Real party argues that there is no detriment to petitioner. In doing so, real party ignores overarching reasons why a criminal conviction and facing incarceration is detrimental. Living a legally blameless life is something most people in our society endeavor towards. The mark of a criminal conviction after petitioner’s 85 years of not being involved in the criminal justice system is a significant detriment. The trial court implicitly recognized this following its dismissal order when it observed, “I see no reason to give an 80-plus year old woman a criminal conviction... .” (Exhibit B, RT, pg. 110.)

Additionally, while real party characterizes the criminal charges as simply an attempt to regulate this property at issue, petitioner had been facing up to six months in jail and \$1,000 in fines (plus penalty assessments) for each violation. (See, Los Angeles Municipal Code (“LAMC”), § 11.00, subd. (m).) Real party minimizes the stress that facing such penalties incurs, especially for a person of advanced age. These significant consequences are a detriment petitioner faced. The fact that petitioner was unaware of and uninvolved in the criminal conduct that led to these criminal charges makes this exposure to criminal liability even less justifiable when measured against this detriment.

In petitioner's case, a criminal conviction of the alleged violations would have ended 85 years of living a legally blameless life. For many, that is a significant detriment. Additionally, in recognizing petitioner's advanced age, the trial court was implicitly recognizing the detriment that the stress of facing incarceration imposes on a person if convicted of a series of misdemeanors each with a maximum of six months in jail.

*People v. S.M.* (2017) 9 Cal.App.5th 210 (“*S.M.*”) is a case argued in petitioner's opening brief that illustrates the breadth of how much a trial court may consider in applying its discretion to determining whether the “interests of justice” are served by a dismissal. In *S.M.*, the trial court relied in part on the defendant's age and absence of criminal history in ordering the case against the defendant dismissed. (*S.M.*, *supra*, 9 Cal.App.5th at pp. 217-218.) This case and other cases cited in the opening brief have endorsed the idea that the broad language the legislature used in section 1385 warrants a broad range of reasons that a trial court can rely on to support a dismissal “in furtherance of justice.”

Finally, real party has overlooked the role a reviewing court has in deciding this issue. A trial court's ruling is reviewed under the “abuse of discretion” standard. (*S.M.*, *supra*, 9 Cal.App.5th at p. 218, citation omitted.) The *S.M.* court concluded its analysis by writing:

Surely not all judges would take the action employed by the trial court here. But, the question we must answer is whether any reasonable judge could do so in his or her

discretion. (Citation omitted.) Given the factors articulated by the court, we conclude the answer is in the affirmative, and we find no abuse of discretion.

(*S.M., supra*, 9 Cal.App.5<sup>th</sup> at p. 222.)

The trial court acted reasonably and stated more than adequate reasons to support dismissal of the charges against petitioner.

D. Real party has not been deprived of its ability to regulate the business at issue.

Real party argues that the trial court's dismissal deprived them of its prerogative to regulate the unlicensed sale of cannabis and evidences the trial court's antipathy towards the laws real party was trying to enforce. (AB, pgs. 59-60.) This argument ignores the fact that the trial court did not dismiss the case against petitioner's son. (Exhibit B, RT, pg. 110:19-21.) There is also nothing in the record before this Court that suggests the case against the other co-defendant was dismissed, either.

Real party has attacked the judgment of the trial judge and claimed that the trial judge's actions amount to an "antipathy towards the law." The fact that the trial court did not dismiss the case against petitioner's son shows that the trial court was not expressing an antipathy towards the law. This fact shows that the trial court was expressing its judgment that the furtherance of justice is served by dismissing the case against petitioner based on the specific factors cited by the court. (See Exhibit B, RT, pg. 110:4-28.)

The lack of judgment in this case is entirely real party's: real party exercised its prosecutorial discretion and charged an 85-year-old, wheelchair bound person with no criminal history and no connection to the alleged illegal activities, while real party is still able to regulate the alleged activities through a defendant who operated the property and another defendant who did have knowledge of the illegal activities. The trial court's application of section 1385 to dismiss the case against petitioner was entirely reasonable and rational. (See *S.M.*, *supra*, 9 Cal.App.5<sup>th</sup> at p. 220 (citation omitted) ("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.").)

**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.**

The preemption question presented is whether 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. As argued below, real party's arguments claiming that the local ordinances do not prohibit the same conduct make the case that they do. Additionally, real party's arguments that there is no duplication or conflict between the

state and local laws do not appear to focus on the appropriate analytical framework developed by this Court in analyzing preemption issues. Instead, real party argues that the state’s “antiquated” set of laws found in the Uniform Controlled Substances Act (“UCSA”) should take a back seat to the more recently enacted Medicinal and Adult-use Cannabis Regulation and Safety Act<sup>5</sup> (“MAUCRSA”).

A. State law fully occupies the field of controlled substances regulation that the local ordinances at issue also seek to regulate.

Real party began its argument by writing, “State law does not fully occupy the field of commercial cannabis regulations such as Los Angeles Municipal Code (“LAMC”) section 104.15.” (AB, pg. 23.) The relevant question is whether the local ordinances at issue are in conflict with the state laws at issue—Health and Safety Code section 11366.5 and Penal Code section 373a—and whether the state laws fully occupy the field of controlled substances regulation and nuisance that the local ordinances also seek to regulate. Real party partly acknowledged this: “Under the California Constitution, a local ordinance ‘*in conflict with*’ a state statute is void.” (AB, pg. 23, citing *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal. 4<sup>th</sup> 729, p. 742, emphasis added.)

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<sup>5</sup> MAUCRSA is codified at Business and Professions Code section 26000, et seq.

When real party stated that “[s]tate law does not fully occupy the field of commercial cannabis regulations” (AB, pg. 23), real party is also not acknowledging this Court’s holding that the UCSA—of which Health and Safety Code section 11366.5 is a part—does fully occupy the field of narcotics offenses. State law does fully occupy the field of narcotic offenses contained in the UCSA. (*O’Connell v. City of Stockton* (2007) 41 Cal. 4<sup>th</sup> 1061, pp. 1070-1071 (“*O’Connell*”).) Health and Safety Code section 11366.5 is a part of the UCSA. (See Health and Saf. Code, § 11366.5.) Cannabis is one of the controlled substances regulated by Health and Safety Code section 11366.5. (See Health and Saf. Code, § 11007 of the UCSA (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).) Therefore, the UCSA *does* fully occupy the field which LAMC sections 104.15 and 12.21 also seek to regulate.

When real party refers to “commercial cannabis regulation,” real party is attempting to create a false dichotomy between “commercial cannabis” and “drug offenses.” Part of the confusion lies in the use of the word “commercial.” All sales of narcotics that the UCSA regulates can be described as engaging in commerce in that there is an exchange of something of value: narcotics for money. Thus, real party’s equivocation of the terms is legally meaningless. The activity regulated by Health and

Safety Code section 11366.5 is as commercial as the activity regulated by LAMC section 104.15.

The central premise of real party's argument, however, is that "[petitioner's] claim relies on an antiquated view of cannabis law, disregarding the current state statutory regime that permits the decriminalization and local regulation of cannabis", whereas the MAUCRSA regime is newer. (AB, pg. 23.) That is, real party argued that if this Court concludes that Health and Safety Code section 11366.5 regulates the same conduct that the local laws also seek to regulate or that the UCSA fully occupies the field local laws also seek to regulate, this Court should ignore Health and Safety Code section 11366.5 and the UCSA in favor of a newer set of laws, MAUCRSA. Real party's argument that this Court should focus its attention only on a more recently passed set of laws and ignore previously passed laws ignores the fact that the "antiquated" and "archaic" UCSA is still a valid set of laws that is consistently used by law enforcement authorities. Real party is subtly asking this Court to step into the role of the legislature by asking this Court to bypass the UCSA and only focus on MAUCRSA.

B. LAMC section 104.15 does duplicate and contradict Health and Safety Code section 11366.5.

Real party maintains that Health and Safety Code section 11366.5 and LAMC section 104.15 do not duplicate or contradict each other. A close look at real party's arguments against a finding that the two provisions duplicate each other actually

supports a finding that they do. The following is an example of real party in interest's reasoning supporting duplication:

“[Health and Safety Code section 11366.5] prohibits renting structures for the purpose of unlawfully manufacturing, storing, or distributing *any* controlled substance for sale or distribution. This includes cannabis, but it also includes *hundreds* or other controlled substances. (See Health and Saf. Code, §§ 11054-11058.)

LAMC 104.15, on the other hand, regulates only commercial cannabis activities in the City of Los Angeles. ...”

(Answer to Petition for Review, pgs. 14-15, emphasis in original.)

Real party argued that Health and Safety Code section 11366.5 regulates the same activity as LAMC section 104.15, but that Health and Safety Code section 11366.5 also regulates many other controlled substances. In many ways, this is not an argument against duplication of these laws; it is a concession that the local ordinance regulates the same conduct as the state law.

Health and Safety Code section 11366.5 regulates the same conduct that LAMC section 104.15 regulates in that both criminalize a property owner's renting, leasing, or making available for use a building or space for the illegal sale or distribution of cannabis. When it comes to LAMC section 12.21, it is being used to regulate the same conduct under the guise of zoning regulation. Therefore, the local ordinances do duplicate



the aims of the state law by seeking to criminalize the same conduct described in Health and Safety Code section 11366.5.

Real party also disputes whether the state law and LAMC section 104.15 contradict each other. (AB, pgs. 37-41.) In doing so, real party disputes the significance of this Court's holding in *In re Portnoy* (1942) 21 Cal. 2d 237 ("*Portnoy*"). *Portnoy* held that the local laws both duplicated and conflicted with the state ordinances which regulated the same conduct: "Insofar as the provisions of Ordinance No. 248 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 (citations omitted).)

Part of *Portnoy's* examination of the local and state ordinances focused on the differences between section 2 of the ordinance and Penal Code section 331. (*Portnoy, supra*, 21 Cal. 2d at pp. 241-242.) One of the key differences between these two provisions is that the state statute had a "knowing" requirement that the local provision did not. (See *Ibid.*) The differences between the state and local laws caused this Court to conclude that the local provisions exceeded the normal bounds of "supplementary legislation" and both duplicated and contradicted the state law. (*Portnoy, supra*, 21 Cal. 2d at p. 242.) The duplication between the local and state provisions was found in the way that each provision sought to regulate similar conduct.

The contradiction between the provisions was based on the differences in the way that each sought to regulate that conduct. The mens rea requirement in the state law that was absent in the local ordinance was a significant difference leading to this finding of a conflict between the two sets of laws. (*Portnoy, supra*, 21 Cal. 2d at pp. 241-242 (comparing the differences between section 2 of the ordinance and Penal Code section 331.)

Real party also disputed this Court's holding in *Portnoy* by citing to an Arizona law review article. (AB, pg. 37.) Real party pointed to the article's discussion of a Missouri Supreme Court case and cited this authority for the proposition that "[r]educing the culpable mental state required for liability, or eliminating it altogether, saves the local offense from being invalidated by conflict preemption." (AB, pg. 37, citing to Binder & Fissell, *Judicial Application of Strict Liability Ordinances* (2021) 53 Ariz. St. L. J. 425, 445.) The Missouri case this law review article relied on—*Kansas City v. LaRose* (Mo. 1975) 524 S.W.2d 112—has not been good law for over forty-five years. (See, *City of St. Louis v. Jones* (Mo. 2018) 536 S.W.3d 794, fn. 2 (*Kansas City v. LaRose* superseded by statute in 1977).) Additionally, the preemption analysis applied in *Kansas City v. LaRose* reflects an outdated and much different approach to preemption than California law's approach. *LaRose* held that a local ordinance prohibiting interference with the police without a knowing or willful element did not conflict with state law regulating the same conduct simply because violating the local ordinance would also violate the state law. (*Kansas City v. LaRose, supra*, 524

S.W.2d at p.117.) “In that regard, [the state and local laws] are entirely consistent. The ordinance has simply gone further and prohibited interference in cases where willfulness is not shown.” (*Ibid.*) This holding would contradict this Court’s holdings regarding duplication, contradiction, and field preemption that have been discussed at length in both parties’ briefs. Thus, real party’s statement of preemption law through this Arizona law review article does not reflect the law of preemption in California.

Real party criticized petitioner’s citations to *O’Connell v. City of Stockton* (2007) 41 Cal. 4<sup>th</sup> 1061, pp. 1069, 1073 (*O’Connell*) and *In re Application of Mingo* (1923) 190 Cal. 769 (*Mingo*) but overlooked petitioner’s discussion about how this Court has closely examined the *scope* of how a locality’s ordinances need to be closely tailored to the specific state law authorizing regulation. (AB, pgs. 27-30. Petitioner’s discussion of this issue is in her Opening Brief on the Merits (OB), pgs. 38-41.) *O’Connell* and *Mingo* both involved an analysis of state law granting localities authority to pass local regulations in a particular area. In both cases this Court ultimately held that the local ordinances at issue exceeded the scope of the state’s authorization. (*O’Connell, supra*, 41 Cal. 4<sup>th</sup> at pp. 1069, 1074; *Mingo, supra*, 190 Cal. at pp. 772-773.)

Even if this Court accepts real party’s request to ignore the UCSA and focus only on the scope of MAUCRSA’s authorizations for local regulation, MAUCRSA presumes that the local regulations will require a landlord to act with “good faith” and to

“allow” someone to use their property for cannabis sales. Real party pointed out that MAUCRSA’s immunity provisions are based on a landlord’s “good faith” permission to “allow” someone to use their property for cannabis sales. (AB, pg. 18, citing Bus. & Prof. Code, §§ 26032, subd. (b) and 26037, subd. (b) (both sections begin by stating “[t]he actions of a person who, in good faith, allows its property to be used by a licensee...”).) By using the words “good faith” and “allow”, the legislature has limited the scope of this state authorization to include a requirement that the landlord have knowledge of the underlying purpose and use of the property. One cannot allow something they have no awareness of. Good faith is defined as “[a] a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.” (*Miller v. Superior Court* (2002) 101 Cal.App.4<sup>th</sup> 728, p. 744, citation omitted.) Thus, “good faith” also inherently requires awareness and intent. It follows from this that even if this Court were to follow real party’s request that the Court ignore the UCSA and only focus on MAUCRSA, the scope of MAUCRSA’s authorization for local regulation contemplates a knowledge requirement for any local cannabis regulations.

C. As LAMC section 12.21 was being used against petitioner in the prosecution below, that section duplicates and contradicts state law in the same ways that LAMC section 104.15 does.

Real party argued that “as applied challenges are based on specific facts presented to the trial court.” (AB, pg. 43.) Real party also cited a Fifth Amendment takings clause case to support its argument that petitioner’s claim that LAMC section 12.21 is preempted by state law has been forfeited because it was not raised in the trial court. (AB, pg. 43, citing *People v. Gonzalez* (2020) 57 Cal.App.5<sup>th</sup> 960, p. 975.) The authority cited by real party does not forestall petitioner’s claim that LAMC section 12.21 is being used to criminally prosecute petitioner for conduct already covered by state law.

Additionally, real party offers no suggestion as to what additional facts need to be established to address petitioner’s claim. Real party does not dispute real party’s theory of liability articulated by petitioner: real party is attempting to use LAMC section 12.21 to extend liability to property owners with no knowledge that their property is being used for illegal cannabis sales. (OB, pg. 41.)

Real party also misquoted petitioner’s argument to set up a straw person fallacy. Real party wrote: “Defendant similarly claims that section 12.21 is not ‘regulating land use’ because it ‘is being used to criminally prosecute [her]. (PBM, p. 42.)” The accurate quote from petitioner’s brief is as follows: “The way that LAMC section 12.21, subd. (a)(1)(A), is being used to criminally

prosecute petitioner shows how real party in interest stretches this notion of regulating land use.” (OB, page 42.)

LAMC section 12.21 is so broadly worded that it allows prosecutors to argue that a landlord is criminally liable any time someone commits a violation of a state law while on the landlord’s property. (See OB, pgs. 43-44, for more on this argument.)

Petitioner is alleged to have violated LAMC section 12.21 because her tenant illegally sold cannabis on the property. As articulated in petitioner’s opening brief, this conduct is regulated by state law (Health and Safety Code section 11366.5 and Penal Code section 373a) and local law (LAMC section 104.15). All of the policies that support preemption analysis of a specifically worded ordinance support the same analysis of a broadly worded ordinance being used to regulate conduct also regulated by state law even more so. To do otherwise would allow local authorities to use a broadly worded ordinance like LAMC section 12.21 to avoid the scrutiny of preemption analysis applied to more specifically worded ordinances.

D. The severability and “no conflict with state law” provisions of the Los Angeles Municipal Code are cited by petitioner to rebut amici curiae’s claims that a finding of preemption will cause the commercial cannabis regulatory scheme to fail.

Real party complained that petitioner only raised the issue of the severability and “no conflict” provisions for the first time in

petitioner’s reply brief filed with the Court of Appeal. (AB, pgs. 50-51.)

Petitioner raised the issue of the severability and “no conflict with state law provisions” of the relevant LAMC sections in response to a series of amici briefs filed in the Court of Appeal which made similar arguments: “If the [Controlled Substances Act] were construed [to prohibit enforcement of city and county cannabis facility regulations], cities and counties would be deprived of their ability to protect public health and safety.” (Amicus Curiae Brief In Support of Respondent City of Los Angeles, filed by the League of California Cities and California State Association of Counties, *Wheeler v. Appellate Division*, 2<sup>nd</sup> Dist. Ct. of Appeal Case No. B310024, pg. 12.) “Holding that there is state cannabis criminal enforcement field preemption would have sweeping destructive implications.” (Amicus Curiae Brief of City of Sacramento In Support of the People of the State of California, *Wheeler v. Appellate Division*, 2<sup>nd</sup> Dist. Ct. of Appeal Case No. B310024, pg. 14.) “A finding of preemption may undermine California voters’ decision to legalize and regulate cannabis.” (Amicus Curiae Brief of the Los Angeles Department of Cannabis Regulation in Support of Plaintiff and Real Party In Interest the People of the State of California, *Wheeler v. Appellate Division*, 2<sup>nd</sup> Dist. Ct. of Appeal Case No. B310024, pg. 18.)

As argued in petitioner’s opening brief, the Los Angeles Municipal Code contains a severability clause—LAMC section 104.17—that would maintain the enforceability of the rest of the cannabis regulatory framework should this Court find that one

section is preempted. Los Angeles Municipal Code section 105.07 declares that the city’s “commercial cannabis activity’s” laws are not intended to conflict with state law and that the article “shall be interpreted to be compatible with State enactments and in furtherance of the public purpose that those enactments encompass.”

Petitioner brought these local code sections to this Court’s attention to show that a finding by this Court that the particular code sections that petitioner is charged with are preempted by state laws regulating the same conduct will do none of what amici express concern about. These provisions are important to the overall analysis of the preemption issue in this case as part of the consideration of the effect a finding of preemption can have on the city’s enforcement scheme.

### **III. Conclusion**

For the reasons stated herein, petitioner respectfully requests that this Court hold that the local ordinances at issue are 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 of a strict liability offense pursuant to section 1385 is “in the interests of justice” and that the trial court did not abuse its discretion in ordering petitioner’s case dismissed pursuant to section 1385.

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 REPLY BRIEF ON THE MERITS, is produced using 13-point Century Schoolbook type including footnotes and contains approximately 6,905 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: January 12, 2023.

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 January 12, 2023, I served the within PETITIONER'S REPLY 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:

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STATE OF CALIFORNIA

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(Defendant)

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 January 12, 2023, at Los Angeles, California.



SUSANA COVIAN

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
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1/12/2023

Date

/s/Susana Covian

Signature

Hammond, Brock (215986)

Last Name, First Name (PNum)

Los Angeles County Alternate Public Defender

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