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Supreme Court of California
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In the

Supreme Court of California

EMILY WHEELER,

Petitioner,

v.

APPELLATE DIVISION OF THE
SUPERIOR COURT OF LOS ANGELES,

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest and Plaintiff.

Court of Appeal, 2d Dist., Div. 3, No. B310024
Superior Court, Los Angeles, Appellate Division, No. BR054851
Superior Court, Los Angeles, Trial Ct. No. 9CJ00315-02
The Honorable H. Elizabeth Harris, Judge Presiding

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND AMICI BRIEF IN SUPPORT OF RESPONDENT CITY OF LOS ANGELES

Jeffrey V. Dunn, Bar No. 131926
jeffrey.dunn@bbklaw.com
Carl C. Jones, Bar No. 340719
BEST BEST & KRIEGER LLP
18101 Von Karman Avenue
Suite 1000
Irvine, California 92612
Telephone: (949) 263-2600
Facsimile: (949) 260-0972
Attorneys for Amici Curiae
League of California Cities and
California State Association of Counties

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

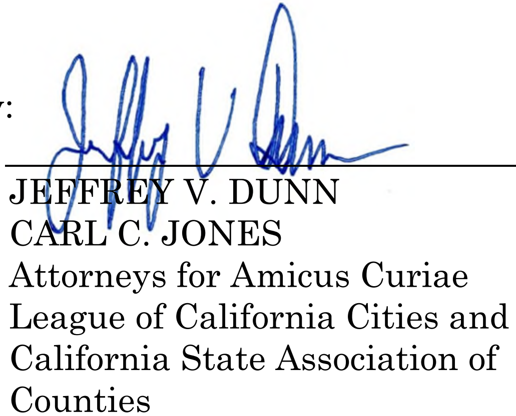
This is the initial certificate of interested entities or persons submitted on behalf of Amicus Curiae League of California Cities and California State Association of Counties in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

Dated: December 2, 2022

BEST BEST & KRIEGER LLP

By:



JEFFREY V. DUNN
CARL C. JONES
Attorneys for Amicus Curiae
League of California Cities and
California State Association of
Counties

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Pursuant to California Rules of Court, Rule 8.520, subdivision (f), the League of California Cities (Cal Cities) and the California State Association of Counties (CSAC) (collectively, "amici") respectfully apply to this Court for permission to file the amicus curiae brief accompanying this application in support of The People of the State of California.

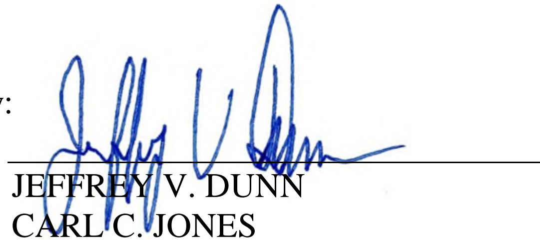
The brief of the amici will assist the Court by addressing the erosion of constitutional municipal police power authority that will likely result if the Court were to adopt Petitioner's preemption arguments. The brief concerns a local government's constitutional police power authority that municipalities and counties have to protect the public health, safety, and welfare, and that police power authority includes the power to enforce.

Well-established law holds that there is no state law preemption of the constitutional police power authority and its enforcement unless the Legislature has clearly indicated its intent to remove the authority. (*T-Mobile West LLC. v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1116–17 (*T-Mobile*).) This Supreme Court previously upheld this municipal police power authority against state law preemption arguments in *Inland Empire Patients Health & Wellness Center, Inc. v. City of Riverside*. ((2013) 56 Cal.4th 729 (*City of Riverside*).) The City of Los Angeles' criminal enforcement of its cannabis facility municipal code provisions is similarly not subject to state law preemption. The amici curiae brief advances arguments on why the City's enforcement of its cannabis prohibitions are not preempted by state law.

For the reasons stated in this application and further developed in the proposed amici brief, Cal Cities and CSAC respectfully request leave to file the amici curiae brief with this application.

The application and amicus curiae brief were authored by Jeffrey V. Dunn and Carl C. Jones. No person or entity made a monetary contribution to its preparation and submission.

Dated: December 2, 2022 Respectfully submitted,

By: 

JEFFREY V. DUNN
CARL C. JONES
Attorneys for Amici Curiae
League of California Cities and
California State Association of
Counties

INTEREST OF THE AMICI CURIAE

The amici are as follows:

The League of Cities (Cal Cities) is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this state law preemption case as having such significance because a finding of preemption would have a wide, sweeping effect on cities throughout the state.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsel's Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

While many cities and counties have chosen to ban cannabis activities outright, others have chosen to issue licenses but still prohibit unlicensed cannabis activities through their own municipal codes. A finding that state law preempts the Los Angeles Municipal Code (LAMC) provisions at issue would directly jeopardize local governments' ability to regulate cannabis

within their borders. It is vital that cities and counties maintain their constitutional police power authority to enforce their own laws regarding cannabis and this case is particularly important to the amici because local cannabis regulation varies. (*City of Riverside*, *supra*, 56 Cal.4th at p. 755 ["The presumption against preemption is additionally supported by the existence of significant local interests that may vary from jurisdiction to jurisdiction. Amici curiae League of California Cities et al. point out that 'California's 478 cities and 58 counties are diverse in size, population, and use.' As these amici curiae observe, while several California cities and counties allow medical marijuana facilities, it may not be reasonable to expect every community to do so."].)

As this Court has recognized, each city and county has a unique interest in regulating cannabis, and a holding of state law preemption of the Los Angeles Municipal Code provisions would, in effect, invalidate criminal penalties imposed in the municipal codes of all cities and counties throughout California.

Petitioner's legal arguments threaten to undermine local government constitutional police power authority to control cannabis distribution facilities. In reliance upon *City of Riverside* and other applicable law, cities and counties have enforced marijuana distribution facility regulations to protect the public safety, health, and welfare. By recognizing that there is no state law preemption of the City's criminal enforcement of the City's cannabis facility regulation, this Court has upheld constitutional, statutory, and case law supporting the amici's interest in ensuring the certainty of municipal police power authority. Therefore, the amici have a significant interest in the issues presented in the appeal.

SUMMARY OF ARGUMENT

Municipalities have constitutional police power enforcement authority unless the Legislature has clearly indicated its intent to remove that authority. Here, there is no such clear legislative intent and, instead, the Legislature has recognized that local governments have authority to enact and enforce ordinances regulating cannabis distribution facilities. (Bus. & Prof. Code, § 26200; *City of Riverside*, *supra*, 56 Cal.4th at p. 729.)

The city and county constitutional police power authority to regulate necessarily includes the power to enforce. (Cal. Const. art. XI, § 7.) Thus, a local government's civil or criminal enforcement of its land use authority is as broad as its exercise of the police power regulatory authority.

California's Controlled Substances Act (CSA) does not preempt the constitutional police power authority of cities and counties to enact and enforce, both civilly and criminally, municipal cannabis regulations. The CSA does not prohibit enforcement of city and county cannabis facility regulations. If the CSA were construed otherwise, cities and counties would be deprived of their ability to protect public health and safety.

If the California Legislature had intended to so usurp municipal police power authority, it would have spoken clearly on the subject, and no such clarity appears in either the CSA or in any of the subsequent marijuana statutes that allow for municipal regulation. On the contrary, the Legislature has repeatedly affirmed municipal police power authority to regulate cannabis facilities and enforce such regulations. Thus, there cannot be state law preemption in this case. (*See City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.4th 1078, 1078–82 ["Proposition 64 expressly provides that state

regulations do not 'limit the authority of a local jurisdiction to adopt **and enforce** local ordinances to regulate marijuana dispensaries "or to completely prohibit' their "establishment or operation'" quoting and citing Bus. & Prof. Code § 26200 [emphasis added].)

Petitioner's preemption contentions are inconsistent with this Court's decision in *City of Riverside,* and associated appellate case law, holding that there is no state law preemption of city and county police power authority to establish cannabis facility regulations and enforce to enforce the regulations. (*E.g*., *The Kind & Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116; *Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029; *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975; *Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534; *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704; *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861; *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153.)

The amici's members and constituents enact and enforce ordinances regulating cannabis facilities. The enforcement of these ordinances by criminal and civil means is needed for the protection of public health and safety. (*People v. Gonzalez* (2021) 53 Cal.App.5th Supp. 1.) This is especially true here with the City of Los Angeles (the City) and its enactment and enforcement of Los Angeles Municipal Code section 104.15 – the challenged municipal code provision in this case. (*Id*., at pp. 12–14.)

Local governments depend upon their ability to enforce their ordinances. If, as Petitioner contends, cities and counties cannot enforce their cannabis regulations in criminal court proceedings, then the ability of amici's members to protect public health and safety is significantly impaired.

ARGUMENT

I. THERE IS NO STATE LAW PREEMPTION OF THE CITY'S ENFORCEMENT OF ITS CANNABIS LAND USE REGULATIONS.

A. The Question as to Preemption is Whether the Legislature has Removed the Constitutional Police Power Authority to Regulate Cannabis Distribution Properties.

This Court set forth the principles governing state law preemption in *City of Riverside*, where it observed: "Under article XI, section 7 of the California Constitution '[a] county or city may make **and enforce** within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.'" (56 Cal.4th at pp. 743–44 [emphasis added].) It bears emphasis that this Court has held that a city's police powers under article XI, section 7 of the California Constitution are "as broad as the police powers exercisable by the Legislature itself." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140 [emphasis added].) If the Legislature has the power to regulate a certain area, municipalities have the power to regulate that same area. (*California Rifle & Pistol Assn v. City of West Hollywood* (1988) 66 Cal.App.4th 1302, 1310.) The issue then is not whether the City is constitutionally authorized to regulate cannabis distribution properties and enforce its regulations within its boundaries, but whether the Legislature has acted to remove that power from the City. (*See id.*; *also Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 722 (9th Cir. 2009) ["Thus, the threshold issue is not, as Sprint argues and the district court

apparently believed, whether the PUC authorizes the City to consider aesthetics in deciding whether to grant a WCF permit application, but is instead whether the PUC divests the City of its constitutional power to do so."].) As shown below, the Legislature has not removed the constitutional police power of cities and counties to regulate cannabis distribution properties; the Legislature has recognized that cities and counties have authority to enact and enforce their marijuana facility regulations.

B. Courts Have Repeatedly Held That There is No Preemption in an Area Where Local Government Traditionally Regulates Unless the Legislature Clearly Indicates That it is Taking Away the Police Power Authority

This Court has " 'recognized that a city's or county's power to control its own land use decisions derives from [its] inherent police power, not from the delegation of authority by the state.' " (*City of Riverside*, *supra*, 56 Cal.4th at p. 742 (quoting *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151).) In *City of Riverside*, this Court noted that, "[c]onsistent with this principle, 'when a local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute.'" (*Id.* at 742–43 (quoting *Big Creek Lumber Co.*, *supra,* 38 Cal.4th at p. 1149) [emphasis original].")

The "starting point" of a court's analysis is " 'the strong presumption that legislative enactments "must be upheld unless their unconstitutionality

clearly, positively, and unmistakably appears." ' " (*People v. Gonzalez* (2020) 53 Cal.App.5th Supp. 1, 7–8 (quoting *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568 [citations omitted]).) This is particularly true with local governments' enforcement of their regulations concerning marijuana distribution facilities. Per this Court's direction, there exists a presumption, absent a clear indication to the contrary, that city and county regulation and enforcement of cannabis regulations are not preempted by state law; there are significant local interests that could vary by jurisdiction, giving rise to the presumption against preemption. (*T-Mobile*, *supra*, 6 Cal.5th at p. 1123; *City of Riverside*, *supra,* 56 Cal.4th at p. 755.)

Here, the People are entitled to that presumption and, absent a clear indication to the contrary, the City of Los Angeles's cannabis regulations should be upheld, as they are not preempted by state law.

C. The Legislature Has Not Clearly Withdrawn City and County Police Power Authority to Make and Enforce Regulations Concerning Cannabis Distribution Facilities

In determining whether the Legislature has clearly withdrawn municipal authority to make and enforce regulations governing cannabis distribution facilities, an examination of California's cannabis laws shows no state law preemption post-*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061.

In 1996, California voters approved a ballot initiative, Proposition 215, referred to as the "Compassionate Use Act" (Health & Safety Code § 11362.5) (the "CUA").

The CUA was narrow in scope. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 929–30; *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1170).) The CUA provided a limited defense from prosecution for cultivation and possession of marijuana for purported medicinal uses. It did not create a statutory or constitutional right to obtain marijuana or allow the sale or nonprofit distribution of marijuana. (*Ross* at p. 926; *Kruse*, at pp. 1170–71; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773–74.)

In 2003, the Legislature enacted the Medical Marijuana Program ("MMP") (§§ 11362.7–11362.83). The MMP was to " '[promote] uniform and consistent application of the [Compassionate Use Act of 1996] among the counties within the state' and '[enhance] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.' [Citation.]" (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 864.)

Although the MMP provided a new affirmative defense to certain medical marijuana users for certain criminal liability, Health and Safety Code section 11362.768 of the MMP, as amended in 2011, clarifies that cities and counties have authority to enact and criminally enforce their local ordinances regulating marijuana distribution facilities: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing any of the following: [¶] (a) Adopting local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective. [¶] (b) *The civil and criminal enforcement of local ordinances* described in subdivision (a). [¶] (c) Enacting other laws consistent with this article." This section originally stated: "Nothing in this article shall prevent a city or other

local governing body from adopting and enforcing laws consistent with this article." (Stats. 2011, c. 196 (A.B. 1300) [emphasis added].)

In *County of Los Angeles v. Hill* ((2011) 192 Cal.App.4th 861, 867–68), the Court of Appeal stated that "[i]f there was any ever doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted section 11362.768, has made clear that local government may regulate dispensaries."

On November 8, 2016, California voters passed as an initiative measure the Control, Regulate and Tax Adult Use of Marijuana Act, more commonly known as Proposition 64. (*People v. Boatwright* (2019) 36 Cal.App.5th 848, 853.) Proposition 64 legalized adult, recreational use of marijuana and reduced the criminal penalties for various offenses involving marijuana, including its cultivation and possession for sale. (*Id.,* at p. 853.)

Proposition 64 added section 26200 to the Business and Professions Code which, in relevant part, provides additional and clear legislative intent to allow municipalities to enact and enforce by criminal proceedings local government marijuana facilities and operations:

> (a)(1) This division shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction.

> (2) This division shall not be interpreted to supersede or limit existing local authority for law enforcement activity, enforcement of local zoning requirements or local ordinances, or enforcement of local license, permit, or other authorization requirements.
>
> . . .
>
> (f) This division, or any regulations promulgated thereunder, shall not be deemed to limit the authority or remedies of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution.

The Legislature's clear intent to allow local governments to enact and enforce cannabis regulations under Business and Professions Code Section 26200 was recently recognized by the Court of Appeal in *City of Vallejo, supra*, 15 Cal.App.5th 1078, 1081–82:

> In 2016, the voters approved Proposition 64 legalizing marijuana for recreational use by adults, subject to various conditions. (See, e.g., Health & Saf. Code, §§ 11358-11359.) While permitting the use of marijuana, California law "does not thereby mandate that local governments authorize, allow, or accommodate the existence of" marijuana dispensaries. (*City of Riverside, supra*, 56 Cal.4th at p. 759, 156 Cal.Rptr.3d 409, 300 P.3d 494.) " 'Land use regulation in California historically has been a function of local government.' " (*Id.* at p. 742, 156 Cal.Rptr.3d 409, 300 P.3d 494.) "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) State law permitting

> medicinal marijuana use and distribution does not preempt the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions." (*City of Riverside, supra*, at p. 762, 156 Cal.Rptr.3d 409, 300 P.3d 494.)
>
> The same principle applies to recreational marijuana use, as Proposition 64 expressly provides that state regulations do not "limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate" marijuana dispensaries "or to completely prohibit" their "establishment or operation." (Bus. & Prof. Code, § 26200, subd. (a)(1).)

(See also *County of Kern v. Alta Sierra Holistic Exchange Service* (2020) 46 Cal.App.5th 82, 106 [upholding local government police power authority to enact and enforce cannabis regulations under Business and Professions Code Section 26200].)[1]

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[1] After the passage of Proposition 64, the Governor signed the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), Business and Professions Code section 2600 et seq., as amended by Stats 2017, ch. 27, section 4, into law on June 27, 2017. It repealed the Medical Marijuana Regulation and Safety Act and created one regulatory system for both medicinal and adult use marijuana. The new act explicitly authorized local jurisdictions "to completely prohibit the establishment or operation of one more types of businesses licensed under [MAUCRSA] within the local jurisdiction." (Bus. & Prof. Code, § 26200,

D. The Constitutional Police Power Authority to Regulate Necessarily Includes the Power to Enforce by Criminal and Civil Means in Order to Protect Public Health and Safety

Cities and counties have traditionally regulated land uses and more recently cannabis distribution facilities including prohibiting their operation. With the power to regulate comes the power to enforce and local governments have enforced their police power authority by both civil and criminal means. (*People v. Gonzalez*, *supra*, 53 Cal.App.5th Supp. at pp. 11–13.)

"[I]t is commonly the case that with regard to public welfare offenses, a legislative body will intend guilt can be proved without any proof of scienter or wrongful intent." (*Id*. at p. 12 (quoting *In re Jorge M*. (2000) 23 Cal.4th 866, 872).) "Such offenses are based upon the violation of statutes which are purely regulatory in nature and involve widespread injury to the public." (*Ibid*.) "Under many statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulation, criminal sanctions are relied upon even if there is no wrongful intent." (*Ibid*. (quoting *In re Jennings* (2004) 34 Cal.4th 254, 267).)

Here, section 1 of City of Los Angeles Ordinance No. 185,343 provides: "Without comprehensive (cannabis) regulations, consumers in the

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subd. (a)(1); see *County of Kern v. Alta Sierra Holistic Exchange Service*, *supra*, 46 Cal.App.5th at p. 106.)

City were vulnerable to the dangers in ingesting and using a substance that was not subject to basic rules of safety for ingestible substances. . . . Further, *unregulated cannabis businesses remain a source of danger for unsuspecting neighbors when fires or other catastrophes were intended to be an integral part of a comprehensive regulatory scheme involving cannabis establishments in the City*." (L.A. Ord. No. 185,343, § 1. [emphasis added]; *see also People v. Gonzalez*, *supra*, 53 Cal.App.5th Supp. at p. 12 [same upholding LAMC § 104.15's strict liability provision as against constitutional vagueness challenges.].)

Cities regularly rely on their police power to ensure the health and safety of their residents through the adoption and enforcement of housing and building codes. Among other things, localities enforce against housing conditions like hazardous electrical wiring or plumbing, inadequate heat, or lack of fire extinguishers and smoke detectors. (*See, e.g. City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1306 [enumerating the many violations of state and local building and housing codes that resulted in an enforcement action].) By seeking civil and criminal penalties for violations of housing and building codes, cities protect vulnerable tenants from abusive, profit-driven landlords, and encourage compliance with the building codes. (*Sainez*, *supra,* 77 Cal.App.4th at p. 1315.) Such criminal penalties not only serve the purpose of curtailing the culpable conduct of violators, but also provide cities with funding to continue to enforce the housing and building codes. (*Sainez*, *supra,* 77 Cal.App.4th at p. 1315 [noting that the penalty "of course, is paid to the City's treasury and in part funds code enforcement efforts"].)

E. Cities and Counties Must be Able to Enforce Their Police Power Authority as Against Cannabis Facilities in Violation of Their Municipal Code Regulations

In *County of Oakland v. Superior Court* ((1996) 45 Cal.App.4th 740, 767), the Court of Appeal held that many local government regulatory ordinances have a direct impact on the enforcement of state laws that have been enacted to preserve the health, safety, and welfare of state and local citizens, but that deprive a local entity of the power to enact them:

> As the California Supreme Court has ruled, local governments have a legitimate need to address problems generated by business involvement in activities that may be inimical to the health, welfare and safety of the community. (*Cohen v. Board of Supervisors*, *supra*, 40 Cal.3d at p. 298.) State requirements may be inadequate to meet the demands of densely populated cities. Thus, it became proper and necessary for local government to act according to its unique needs. (*Ibid*.; *Daniel v. Board of Police Commissioners, supra*, 190 Cal.App.2d at p. 571; see *Bravo Vending v. City of Rancho Mirage, supra*, 16 Cal.App.4th at p. 411.) For this reason, a local entity may properly determine that a particular business fosters, profits from and provides an environment for activities proscribed by state law. For example, an ordinance is not transformed into a statute prohibiting crime simply because the city uses its police powers to discourage illegal activities associated with certain businesses. Many regulatory ordinances have a direct impact on the enforcement of state laws that have been enacted to preserve the

> health, safety and welfare of state and local citizens. This fact does not deprive a local entity of the power to enact them. (See *Cohen v. Board of Supervisors, supra*, at pp. 298–299 [licensing ordinance case].)"

Here, the case involves a prosecution of Los Angeles Municipal Code section 104.15, subdivision (b)(4), which, in part, states that it is unlawful to lease, rent to, or otherwise allow an "Unlawful Establishment" to occupy any portion of a land parcel. "Unlawful Establishment" is defined as "any Person engaged in Commercial Cannabis Activity if the Person does not have a City issued Temporary Approval or License." (LAMC § 104.01, subd. (a)(49).)

Petitioner is challenging section 104.15 by claiming that Health and Safety Code section 11366.5 preempts the Los Angeles Municipal Code. However, that Health and Safety Code section prohibits renting or leasing a building or room for the purpose of, *inter alia*, **unlawfully** manufacturing or selling **any** controlled substances (including, but not limited to, cannabis).

Petitioner fails to allege facts demonstrating that enforcement of the City's ordinance is arbitrary or so lacking in purpose so as to overcome the presumption of constitutionality. Criminal enforcement of Municipal Code section 105.14 by the City of Los Angeles is plainly in furtherance of public safety and protection against crime. (*People v. Gonzalez, supra*, 53 Cal.App.5th Supp. 1, p. 7–8).

Further, marijuana continues to be a Schedule 1 controlled substance and federal law "continues to prohibit possession, cultivation, and distribution of marijuana notwithstanding modifications of drug laws in individual states." (*City of San Jose v. MediMarts, Inc.* (2016) 1 Cal.App.5th 842, 848; *see City of Riverside, supra,* 56 Cal.4th at pp. 737–39; Controlled

Substances Act (CSA), title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 801 et seq.) Under federal law, marijuana is a drug with " 'no currently accepted medical use in treatment in the United States' . . . ." (*City of Riverside*, *supra*, 56 Cal.4th at p. 739 (quoting CSA § 812(b)(1)(B)).) There is no medical necessity exception under federal law. (*Id.* at pp. 738–39; *The Kind & Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116, 120; *MediMarts*, *supra*, 1 Cal.App.5th at p. 848.) The prohibitions outlined in federal law are fully enforceable in California and are unaffected by state marijuana laws. (*City of Riverside*, *supra*, 56 Cal.4th at p. 740.) The fact that marijuana continues to be illegal under federal law defeats any contention that City's enforcement action is unconstitutional.

F. There Is No State Law Preemption

1. Petitioner Has Not Met Its Burden To Establish State Law Preemption

Petitioner, the party claiming state law preempts local law, has the burden of demonstrating preemption. (*Kruse, supra*, 177 Cal.App.4th at p. 1168.) Petitioner has not met this burden.

The general principles governing state statutory preemption of local land use regulation are well settled. (*Big Creek Lumber Co., supra,* 38 Cal.4th at p. 1150); *Kruse, supra*, 177 Cal.App.4th at p. 1168.) Under article XI, section 7 of the California Constitution, " '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.' " But " '[i]f otherwise valid local legislation conflicts with state law, it is preempted by such law

and is void.' " (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 (*Sherwin-Williams*), quoting *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) Three types of conflict give rise to state law preemption: a local law (1) contradicts state law, (2) duplicates state law, or (3) enters an area fully occupied by state law, either expressly or by legislative implication. (*Kruse, supra*, 177 Cal.App.4th at p. 1168; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242.)

Petitioner has failed to color a preemption claim under any of these three theories. For one, Petitioner fails to show that Los Angeles Municipal Code section 104.15 "contradicts," state law (here Health and Safety Code section 11366.5). The Court of Appeal noted that preemption of local legislation by contradiction only arises when the local legislation " 'is inimical or cannot be reconciled with state law,' such that it is impossible to comply with both." (*See Wheeler v. Appellate Division* (2021) 72 Cal.App.5th 824, 835 (*Wheeler*).) The plain text of section 104.15 can be complied with without violating that Health and Safety Code section; it does not authorize activity prohibited by the Health and Safety Code, nor does it prohibit activity authorized by the Health and Safety Code. An individual is obligated under the Health and Safety Code to not **knowingly** make a space available "for the purpose of **unlawfully** manufacturing, storing, or distributing **any controlled substance** for sale or distribution . . . ." (Health and Safety Code, § 11366.5(a) [emphasis added].) Meanwhile, Los Angeles Municipal Code section 104.15 merely prohibits making a space available (whether knowingly or unknowingly) for Commercial Cannabis Activity to take place on a site for which an applicable City Temporary Approval or

License has not been issued. (LAMC §§ 104.15, 104.01(a)(49).) An inattentive landlord could violate the City ordinance without violating the state law by unknowingly allowing an illegal cannabis operation to exist on their property; a defendant could violate the state law without violating the City ordinance by making their apartment available for the manufacture of controlled substances other than cannabis. Petitioner aims to conflate two very different types of conduct in order to invent a contradiction where none exists. The Court of Appeal recognized the distinction between the state statute and the City regulation, illustrated in part by the difference in each prohibition's differing knowledge element. (*See Wheeler*, *supra*, 72 Cal.App.5th at pp. 833, 840–41.)

In addition, Petitioner has failed to demonstrate that the City's ordinance is duplicative of state law. Local legislation only "duplicates" state law if it is "coextensive therewith," regulating or prohibiting exactly the same conduct. (*Wheeler*, *supra*, 72 Cal.App.5th at p. 834.) As discussed above, Los Angeles Municipal Code section 104.15 does not prohibit the same activity prohibited by Health and Safety Code section 11366.5(a). It is not enough for Petitioner to argue that the two sections regulate similar activity; a passing resemblance is not a wholesale duplication. It is certainly not enough to overcome the presumption of constitutionality that the City and the People enjoy.

Nor has Petitioner shown that section 104.15 enters an area "fully occupied" by general law. Such field preemption may be express or implied, though here Petitioner fails to suggest either result. (*See Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898.) Here, there has been no express field preemption, as the Legislature has not declared as such, and instead has endorsed local

governments' authority to enact and enforce ordinances regulating cannabis distribution facilities. (*See* Bus. & Prof. Code, § 26200; *City of Riverside*, *supra*, 56 Cal.4th at p. 729.) In addition, a local regulation only runs afoul of implied field preemption when certain legislative "indicia of intent" are present and sufficient to overcome the presumption in favor of a regulation's constitutionality. (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898.) Such indicia must satisfy one of the three-part test set forth in *Sherwin-Williams*:

> " '(1) [T]he 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.* (quoting *In re Hubbard* (1964) 62 Cal.2d 119, 128 [overruled on other grounds]).) In light of the decisive authority of this Court in *City of Riverside* and the Legislature's failure to withdraw the City's police powers in this area, Petitioner has failed to demonstrate that the Legislature has "so fully and completely covered" the arena of cannabis facility regulation so as to "clearly indicate that it has become exclusively a matter of state concern."

(*Ibid.*; Bus. & Prof. Code, § 26200; *City of Riverside*, *supra*, 56 Cal.4th at p. 729.) Indeed, the Court of Appeal noted that "[d]espite the broad sweep of MAUCRSA, its licensing scheme explicitly contemplates that municipalities may also have their own regulations and licensing requirements for cannabis businesses." (*Wheeler*, *supra*, 72 Cal.App.5th at p. 832.) The Court of Appeal cited Business and Professions Code section 26030(f), which "includes, as a basis for disciplinary action, 'Failure to comply with the requirement of a local ordinance regulating commercial cannabis activity.' " (*Ibid.*) The appellate court further reflected that, while MAUCRSA includes a provision shielding landlords from prosecution, it only applies if the tenant business complies "with state *and local* licensing requirements . . . . ." (*Ibid.* [emphasis original].) Finally, the Court of Appeal noted that MAUCRSA explicitly declares:

> "[T]hat '[t]his division shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, ... or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction. [¶] ... This division shall not be interpreted to supersede or limit existing local authority for law enforcement activity, enforcement of local zoning

> requirements or local ordinances, or enforcement of local license, permit, or other authorization requirements.' "

(*Id.* at p. 833.) It is clear from the foregoing that the Legislature has not expressed an intent to wholly occupy the field of local cannabis land use and business regulation. Just the opposite is true: the Legislature has expressly acknowledged the existence of the role to be played by localities in regulating cannabis businesses and land uses. (*See ibid.*)

The foregoing also highlights Petitioner's failure to demonstrate any "paramount" state concern that would be frustrated by local regulation of this subject matter.

Finally, Petitioner has not demonstrated that transient state citizens passing through the City are in any way burdened by Municipal Code section 104.15, much less to an extent that outweighs the decisive health and safety benefits to local residents.

Petitioner's inability to demonstrate preemption under any of these theories fails to overcome the presumption that Municipal Code section 104.15 is constitutional. As this Court has held, courts must presume, absent a clear indication to the contrary, that local cannabis regulation and its enforcement is not preempted by state law, because there exist significant local interests that could vary by jurisdiction, giving rise to a presumption against preemption. (*T-Mobile West LLC*, *supra*, 6 Cal.5th at p. 1123; *City of Riverside*, 56 Cal.4th at p. 743.)

Here, there is no clear indication the Legislature intended for state law to preempt local restrictions and enforcement against cannabis facilities – just the opposite. (*See Wheeler*, 72 Cal.App.5th at p. 832.) The Los Angeles

Municipal Code provisions are not preempted by state law because there is no clear indication that the Legislature intended to remove local governments' constitutional police power authority to enact and enforce cannabis land use regulations.

Amici Cal Cities and CSAC's members are cities and counties with local municipal code provisions that provide that the violation of the municipal code provisions is a nuisance per se under state law and that enforcement is subject to both criminal and civil remedies. These cities and counties are directly responsible for local public safety for tens of millions of Californians. Petitioner's preemption arguments fundamentally erode the municipal police power authority to enforce cannabis regulations as recognized by the Legislature and the courts.

2. Petitioner Provides No Applicable Legal Authority for its Preemption Claims

Petitioner relies upon inapposite cases involving state law preemption generally and case law predating current statutory and case law upholding municipal police power authority to regulate cannabis facilities. A few cases are described below to illustrate Petitioner's misplaced reliance.

Petitioner relies heavily upon *O'Connell v. City of Stockton* ((2007) 41 Cal.4th 1061), but (1) it has nothing to do with cannabis regulation; (2) it does not concern those California statutes reaffirming municipal authority to regulate and ban cannabis facilities; (3) it pre-dates our this Court's decision in *City of Riverside*, holding that the state constitutional police power authority to regulate and enforce applies to municipal cannabis regulations;

and (4) it has nothing to do with the body of cases so holding in the fifteen years since *O'Connell* was decided.

In any event, *O'Connell* is "readily distinguishable" because it does not apply to local governments' recognized police power authority to regulate marijuana distribution facilities. (*City of Riverside*, 56 Cal.4th at p. 756.) As this Court rightly observed in *City of Riverside*:

> The *O'Connell* majority concluded, "[t]he comprehensive nature of the UCSA in defining drugs 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 forfeiture ordinance" calling for forfeiture of vehicles involved in the acquisition or attempted acquisition of drugs related under the UCSA. The majority explained that the "Legislature's comprehensive enactment of penalties for crimes involving controlled substances, but exclusion from that scheme any provision for vehicle forfeiture for simple possessory drug offenses, manifests a clear intent to reserve that severe penalty for serious drug crimes involving the manufacture, sale or possession for sale of specified amounts of certain controlled substances.
>
> **As indicated above there is no similar evidence in this case of the Legislature's intent to preclude local regulation of facilities that dispense medical marijuana**.
>
> . . .

> **[T]here is no preemption where state law expressly or implicitly allows local regulation.**

(*City of Riverside*, 56 Cal.4th at pp. 756–58 [citations omitted and emphasis added].)

Stated simply, municipal cannabis regulation and enforcement is necessarily consistent with Health and Safety Code section 11362.83 and Business and Professions Code section 26200, which permit local governments to regulate the location and establishment of cannabis facilities. Both statutory provisions recognize local governments' interests in exercising their police powers in regulating cannabis distribution facilities in furtherance of maintaining a safe and law-abiding community. The statutes allow local governments to regulate cannabis facilities in accordance with the unique characteristics, needs, and public preferences of each city and county. Taking this into account, the legislation allows a local government to regulate cannabis facilities within its own jurisdiction, with cannabis regulations inevitably differing among communities, but remaining consistent with the general provisions of state law. Thus, the City's ordinance, restricting the operation of cannabis facilities, is consistent with and does not conflict with the provisions or purpose of state cannabis law or California's Controlled Substances Act.

Petitioner contends the holding in *Kirby v. County of Fresno* ((2015) 242 Cal.App.4th 940 (*Kirby*)) applies to the instant case and supports state law preemption of the City's ability to employ criminal enforcement against violations of its local cannabis facility ordinance. Petitioner is incorrect.

In *Kirby*, the plaintiff filed a declaratory relief action asserting that a county ban on possession and cultivation of marijuana was preempted by

state law that permitted her to cultivate medical marijuana for personal use. (*Kirby, supra*, 242 Cal.App.4th at p. 947.) "The *Kirby* court concluded that a very narrow portion of the county ordinance at issue was preempted; specifically, the county's absolute ban on individual cultivation, punishable as a misdemeanor, was preempted by that portion of the [Medical Marijuana Program Act (MMPA)] which protects qualified patients with valid medical marijuana identification cards from arrest for possession or cultivation of medical marijuana. [Citations.] The MMPA's protection of those individuals against arrest prohibits prosecutions under local ordinances for the same conduct. [Citation.]" (*Safe Life Caregivers*, *supra*, 243 Cal.App.4th at p. 1050 n.26.)

Kirby is also distinguishable from the instant case. The ordinance at issue in *Kirby* was a ban on marijuana *cultivation*, and expressly conflicted with the Medical Marijuana Program Act (MMPA; Health & Saf. Code, § 11362.7 et seq.), which provided immunity from arrest and prosecution for *medical cultivation*. Unlike the ordinance in *Kirby*, Los Angeles Municipal Code section 104.15 does not criminalize personal use or cultivation; it regulates illegal cannabis distribution facilities.

Moreover, this Court has made clear that municipalities have the authority to prohibit the distribution of medical marijuana within their jurisdictions "by declaring such conduct on local land to be a nuisance, and by providing means for its abatement." (*City of Riverside*, *supra*, 56 Cal.4th at p. 762, fn. omitted.) The MMP specifically authorizes local regulation of the establishment, operation, and location of marijuana distribution facilities. (Health & Saf. Code, § 11362.83.) "The legislature amended [the MMPA], effective January 1, 2012, to read ...: [¶] 'Nothing in this article shall prevent

a city or other local governing body from adopting and enforcing any of the following: [¶] (a) Adopting local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective. [¶] (b) *The civil and criminal enforcement of local ordinances described in subdivision (a)* . . . .' [Citations.]" (*Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1545–46 [emphasis in original].)

Indeed, the Court of Appeal in *Kirby* acknowledged that " 'local governments may regulate or ban the cultivation of medical marijuana because land use regulations are not preempted by the ... MMP[A].'" (*Kirby, supra*, 242 Cal.App.4th at p. 970.; *also People v. Onesra Ent, Inc.* (2016) 7 Cal.App.5th Supp. 7.) Further, the Court of Appeal has noted that *Kirby* did not entirely foreclose local criminal penalties for cannabis-related activity, instead characterizing Section 104.15 of the Los Angeles Municipal Code as "an example of a type of criminal law 'often referred to as [a] public welfare offense[]." (*Wheeler*, *supra*, 72 Cal.App.5th at p. 839.) Such penalties, although nominally criminal, amount to indirect criminal sanctions that are not preempted by state law. (*See ibid.*)

None of the cases relied upon by Petitioner concern the voters' passage of Proposition 64 and the enactment of Business and Professions Code section 26200. It is axiomatic that cases do not stand for propositions of law that were not specifically raised, and that is equally true for *O'Connell v. City Stockton*, *Kirby v. County of Fresno*, and all the other cases upon which Petitioner relies in attempting to color its state law preemption arguments.

Here, Petitioner does not and cannot reasonably contend that cities and counties do not have constitutional police power authority to regulate

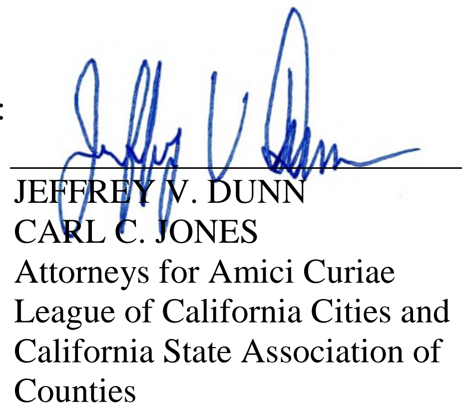
and even ban cannabis facilities and to enforce the regulations. Petitioner instead erroneously contends that state law preempts the constitutional police power authority to criminally enforce the regulations. But the power to regulate necessary includes the power to enforce; there is nothing in the cannabis statutes and cases post-*O'Connell v. City of Stockton* that suggests the withdrawal of the City's enforcement power, let alone clearly indicates the Legislature's intent to do so.

II. CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court follow its previous precedent set in *Riverside* and find that the City's ordinance is not preempted.

Dated: December 2, 2022

BEST BEST & KRIEGER LLP

By: 

JEFFREY V. DUNN
CARL C. JONES
Attorneys for Amici Curiae
League of California Cities and
California State Association of
Counties

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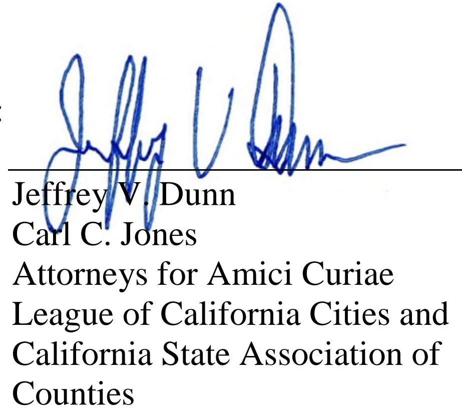
By: 

Jeffrey V. Dunn
Carl C. Jones
Attorneys for Amici Curiae
League of California Cities and
California State Association of
Counties

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I, Wendy Hoffman, am a citizen of the United States, employed in the City of Manhattan Beach in Los Angeles County, California. My business address is Best Best & Krieger LLP, 300 S. Grand Avenue, 25th Floor, Los Angeles, California 90071. I am over the age of 18 years and not a party to the above-entitled action. On December 5, 2022, I served the following:

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND AMICI BRIEF IN SUPPORT OF RESPONDENT CITY OF LOS ANGELES

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Wendy Hoffman

____
Wendy Hoffman

SERVICE LIST

Emily Wheeler - Petitioner
Reid Shigeo Honjiyo
Alternate Public Defenders Office
210 W. Temple Street, Suite 18-709
Los Angeles, CA 90012

Presiding Judge
Los Angeles Superior Court
210 W. Temple St., Dept. 1
Los Angeles, CA 90012
*Via U.S. Mail

Frederick Bennett
Superior Court of Los Angeles
County
111 North Hill Street, Room 546
Los Angeles, CA 90012

Hon. H. Elizabeth Harris -
Respondent
Clara Shortridge Foltz Criminal
Justice
Center, Dept. 047
210 W. Temple St.
Los Angeles, CA 90012
*Via U.S. Mail

The People of the State of California –
Real Party In Interest
Office of the Attorney General
300 So. Spring St., 1st Floor
Los Angeles, CA 90013

Office of the District Attorney
320 W. Temple St., #540
Los Angeles, CA 90012
*Via U.S. Mail

Meredith Symonds
25835 Railroad Ave., Ste. 45
Santa Clarita, CA 91350
*Via U.S. Mail

Sydney M. Mehringer
Hannah Marie Barker
Office of the City Attorney
200 N. Main Street
Los Angeles, CA 90012

Taylor Ann Chase-Wagniere
Office of the Los Angeles City Attorney
221 N. Figueroa St., Ste. 1245
Los Angeles, CA 90012
*Via U.S. Mail

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/18/2023 by Tayuan Ma, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

Case Name: **WHEELER v. APPELLATE DIVISION (PEOPLE)**
Case Number: **S272850**
Lower Court Case Number: **B310024**

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Hannah Barker Los Angeles City Attorney's Office 325597	hannah.barker@lacity.org	e-Serve	12/5/2022 4:06:19 PM
Julieta Reyes Office of the Los Angeles City Attorney	julieta.reyes@lacity.org	e-Serve	12/5/2022 4:06:19 PM
Attorney Attorney General - Los Angeles Office Court Added	docketinglaawt@doj.ca.gov	e-Serve	12/5/2022 4:06:19 PM
Office Office Of The District Attorney Court Added	truefiling@da.lacounty.gov	e-Serve	12/5/2022 4:06:19 PM
John Prosser Los Angeles City Attorney 279747	john.prosser@lacity.org	e-Serve	12/5/2022 4:06:19 PM
Frederick Bennett Superior Court of Los Angeles County 47455	fbennett@lacourt.org	e-Serve	12/5/2022 4:06:19 PM
Sydney Mehringer Los Angeles City Attorney's Office 245282	sydney.mehringer@lacity.org	e-Serve	12/5/2022 4:06:19 PM
Zachary Fanselow Los Angeles City Attorney's Office	zachary.fanselow@lacity.org	e-Serve	12/5/2022 4:06:19 PM

274129			
Carl Jones 340719	carl.jones@bbklaw.com	e-Serve	12/5/2022 4:06:19 PM

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

12/5/2022

Date

/s/Carl Jones

Signature

Jones, Carl (340719)

Last Name, First Name (PNum)

Best Best & Krieger

Law Firm