NO. 70396-0-I

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

CANNABIS ACTION COALITION ET AL.,

Appellants,

v.

CITY OF KENT ET AL.,

Respondents.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

GARVEY SCHUBERT BARER
Jared Van Kirk, WSBA #37029
Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
206 464 3939

Attorneys for Amicus Curiae
American Civil Liberties Union
of Washington

ACLU OF WASHINGTON
FOUNDATION
Sarah A. Dunne, WSBA #34869
Mark M. Cooke, WSBA #40155
901 Fifth Avenue, Suite 630
Seattle, WA 98164
206 624 2184

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

I. INTRODUCTION

As a fallback alternative argument, the City of Kent's ("the City") two Response Briefs invite the Court to decide whether the federal Controlled Substances Act (CSA) preempts provisions of the Medical Use of Cannabis Act (MUCA) allowing qualifying patients and designated providers to participate in collective gardens. Brief of Respondent City of Kent, pp. 44-52; Brief of Respondent City of Kent (In Response to Late Brief of Appellant Sarich), pp. 40-45. The City argues that the Court should reach this issue only if the Court concludes that collective gardens are "lawful" under state law and/or that the City may not prohibit collective gardens within its borders.[1] *Id*.

Even if the Court decides that MUCA preempts the City's zoning regulations, the Court should not decide the City's fallback federal preemption claim because: (1) it was not decided or even discussed by the superior court, leaving critical policy and factual questions to be decided in the first instance on appellate review; (2) the relevant policies, facts, and legal issues have not been adequately or accurately briefed on appeal; (3) the City's claim is not based on a sufficient (or, indeed, any) factual record; (4) the Court will be required to make significant constitutional findings about the scope and validity of state and federal law; and (5)

[1] The City does not allege that any provisions of MUCA unrelated to collective gardens, including the use of medical cannabis by qualifying patients, are preempted by federal law.

because the City's claim necessarily compels the Court to intervene in and likely disrupt the ongoing political negotiation between Washington and the federal government to implement the MUCA and Initiative 502—which legalized certain production, processing, retailing, and possession of marijuana for any purpose and created the legal framework for a new regulated marijuana marketplace.

If the Court does reach the City's inadequately developed and presented federal preemption claim, it should decide that the MUCA provisions concerning collective gardens are not preempted by the CSA. Congress has expressly disclaimed all but the narrowest preemptive intent, MUCA does not directly conflict with the CSA or pose any practical obstacle to the federal government's accomplishment of the purposes and objectives of the CSA, and interpreting the CSA to preempt MUCA because the latter removes penalties for activity that federal law prohibits is unconstitutional under the Tenth Amendment.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization with over 20,000 members that is dedicated to the preservation and defense of constitutional and civil liberties. It has particular interest and expertise in the areas of drug policy reform and criminal justice, and has long had extensive involvement in the development of Washington law concerning medical marijuana. The

ACLU's interest in this matter is further detailed in the statement of interest contained in its Motion for Leave to File Amicus Curiae Brief filed herewith, which is hereby incorporated by reference.

III. ARGUMENT

A. The Court Should Not Decide the City of Kent's Fallback Claim that State Law Allowing Participation in Collective Cannabis Gardens May Be Preempted by Federal Law.

The superior court ruled that "Plaintiff's action under the Uniform Declaratory Judgments Act is Dismissed. The Kent City Council had authority to pass Ordinance 4036, Ordinance 4036 is not preempted by state law, and Ordinance 4036 does not violate any constitutional rights of Plaintiffs." CP 553-54. The superior court did not address federal preemption in any respect.

As discussed further below, the "obstacle" preemption claim argued by the City is not a question of pure law and must be decided based on a complex mix of facts, policy, and law. In general, to invalidate a state law under obstacle preemption a court must decide that "under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73, 120 S. Ct. 2288, 2294 (2000) (emphasis added and internal citation omitted). "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether

both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963). Thus, obstacle preemption requires a detailed understanding of all the purposes and objectives of the federal statute, how the federal government is endeavoring to accomplish these purposes and objectives, the practical effects of the state law, *and* whether in the circumstances presented those effects impede the federal government's efforts to accomplish its goals. Obstacle preemption does not arise simply because the goals of the state and federal laws are different. The superior court did not address any of these critical issues and, therefore, if this Court were to decide the City's federal preemption claim it would have to decide these overlapping issues of fact, policy, and law in the first instance.

Moreover, the Court would have to do so based on inadequate briefing and an insufficient factual record. Neither the parties' briefs nor the factual record the parties' rely on address the essential issues necessary to decide the City's obstacle preemption claim. First, the City's two response briefs wrongly discuss only a single purported objective of the CSA—nationwide uniformity of controlled substances laws at the federal, state, and local level. Brief of Respondent City of Kent, pp. 46-47; Brief of Respondent City of Kent (In Response to Late Brief of Appellant

Sarich), p. 41. Surprisingly, this is perhaps the only "objective" that Congress expressly rejected, affirmatively providing in the CSA that:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. In this provision, Congress made clear that it did not intend to require uniform drug laws in the states and that it does not intend to displace non-uniform state laws except in the narrow circumstance of a "positive conflict" such that "the two cannot consistently stand together." See *Gonzales v. Oregon*, 546 U.S. 243, 251, 126 S. Ct. 904 (2006) ("The CSA explicitly contemplates a role for the states in regulating controlled substances."). The magnitude of the City's error in claiming that national uniformity is the CSA's sole objective, and its erroneous analysis on this point, *see infra*, pp.18-19, highlights the inadequacy of the federal preemption briefing before the Court.

By contrast, the Supreme Court has held that "[t]he main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Gonzales v. Raich*, 545 U.S. 1, 12–

13, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). Neither the City nor any other party discussed these or any other objectives of the CSA in the parties' federal preemption briefing.

Second, no party offers any briefing or cites to any record evidence that describes how the government is endeavoring to accomplish the (unbriefed) objectives of the CSA, the practical effects of allowing qualifying patients and designated providers to participate in collective gardens in Washington, or how these effects might or might not impact the federal government's efforts to achieve the CSA's objectives.

No brief or citation to the record explains whether or not suppression of collective gardens is essential or even important to the federal government's efforts to achieve the CSA's goals. In fact, since at least October 2009, the federal government has made clear that small-scale production and use of cannabis for medical purposes consistent with state law is not an enforcement priority and not essential to the government's strategy for implementing the CSA. *See* Memo: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, David W. Ogden, Deputy Attorney General (October 19, 2009).[2] Moreover, no party discusses the federal government's express statement about the CSA enforcement objectives that it considers particularly important and that govern its efforts to achieve the objectives

[2] Available at http://www.justice.gov/opa/documents/medical-marijuana.pdf.

of the CSA:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Memo: Guidance Regarding Marijuana Enforcement, James M. Cole, Deputy Attorney General (August 29, 2013).[3]

Third, no brief or citation to the record addresses any facts pertinent to understanding the real-world effects of the MUCA provisions at issue or how they may impact federal enforcement objectives. How many gardens are there and how large or small are they? How much cannabis do they produce? Do participants successfully limit the cannabis to medical users or are the gardens abused for recreational purposes? Do the gardens contribute to or diminish transportation of cannabis across state lines? Do they increase or decrease medical or recreational use, or do they have no effect? Do they help or hinder youth access to marijuana,

[3] Available at http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

or do they have no effect? Do they limit or exacerbate the problem of driving under the influence of cannabis, or do they have no effect? Are the gardens operated for profit? Do the gardens contribute to disrupting the revenue of criminal enterprises? Is there any mechanism through which the gardens impede federal enforcement of the CSA and, if so, to what degree? In contrast with home growing or illegal purchase, do the gardens help or hinder federal enforcement, or do they have no effect? Overall, do the gardens have any positive or negative effect on controlling the use of cannabis prohibited by the CSA? None of these or other pertinent questions essential to determining obstacle preemption in the circumstances of this case are addressed in the record cited by the parties and none are so much as mentioned in any parties' briefs. Rather, the parties appear to have addressed federal preemption as a pure question of law, divorced from any essential policy analysis, factual inquiry, or judgment. This does not satisfy the rigorous analysis required by the obstacle preemption standard. *See Crosby*, 530 U.S. at 372-73.

In sum, the facts, policies, and legal issues essential to the City's obstacle preemption claim have not been adequately or accurately developed and addressed by the superior court, in the factual record, or in the briefing to this Court. For these reasons, the Court should not decide this important issue in the first instance without essential information.

The Court should also not reach the City's federal preemption

claim because it would require the Court to decide substantial constitutional questions about the scope and validity of state and federal law. The City asks the Court to interpret the preemptive scope of the CSA to preempt a state law that allows (and may require local governments to allow) participation in collective gardens merely because the CSA renders this conduct illegal under federal law. This interpretation would require Washington to adopt the same prohibitions as the federal government. Even if this claim were adequately presented and correct, which it is not, this interpretation of the CSA would violate the Tenth Amendment under well established anti-commandeering principles. As discussed below, the federal government cannot constitutionally compel, and its acts cannot be interpreted to compel, the policy-making or enforcement apparatus of a state to either regulate the conduct of the state's citizens or to enforce a federal regulatory program against those citizens. *See infra*, pp.16-18. This Court should avoid reaching constitutional questions of this magnitude where the preemption claim inadequately presented.

Finally, the Court should not decide the City's federal preemption claim because it implicates the broader political negotiation currently unfolding between the federal government and several states, including Washington and Colorado, regarding the implementation of medical and recreational marijuana regulations in a manner that is not inconsistent with and even supports federal drug enforcement priorities under the CSA. As

noted above, for more than four years the federal government has recognized that its efforts to enforce the CSA are not well served by targeting small-scale medical use of marijuana that is consistent with state law. *See* Memo: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, David W. Ogden, Deputy Attorney General (October 19, 2009). In those four years these activities have largely been accepted by the federal government.[4]

In 2012 Colorado and Washington, through Initiative 502, have adopted laws decriminalizing possession, production, processing, and retailing of marijuana for recreational use under specified conditions. Initiative 502, §§ 15-17, 19-20.[5] I-502 further established a legal framework for a regulated marketplace for marijuana. *Id*, §§ 4-14, 18. For over a year the Washington State Liquor Control Board has engaged in an extensive rulemaking process to implement this regulated marketplace. *See generally* Washington State Liquor Control Board, I-502 Implementation at http://liq.wa.gov/marijuana/I-502. In conjunction with this state regulatory activity, political leaders of Washington and other states have engaged in active discussions with the federal Department of Justice to ensure that the Department views this new state regulation of recreational marijuana as consistent with its efforts to

[4] Twenty states and the District of Columbia now have state medical marijuana laws. *See* ProCon.org, 20 Legal Medical Marijuana States and DC at http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881.
[5] Available at http://www.liq.wa.gov/publications/Marijuana/I-502/i502.pdf.

enforce the CSA and to determine how to implement the state regulations in a manner that is acceptable to the federal government and consistent with its enforcement priorities. The present state of these political discussions is reflected in the August 29, 2013, Guidance Regarding Marijuana Enforcement from Deputy Attorney General James M. Cole. In that memorandum to all United States Attorneys Mr. Cole identifies the federal enforcement priorities listed above, and explains that:

> In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for.

Guidance Regarding Marijuana Enforcement, James M. Cole, Deputy Attorney General (August 29, 2013). Because marijuana activity under strong and effective state regulatory and enforcement regimes is less likely to impede federal efforts to enforce the CSA and may well be consistent with or enhance those efforts, the federal government has decided not to intervene in Washington's full implementation of I-502 and continued regulation of access to marijuana for medical purposes.

Accepting the City's federal preemption claim would disrupt this

evolving political resolution and artificially posit a conflict between federal and state law that the federal government does not currently believe exists. The City's preemption claim is broadly stated and arguably not limited to MUCA. If the Court reaches the question of whether state law "legalizing" or allowing medical marijuana activity is preempted because it supposedly conflicts with federal law prohibiting such activity then state law "legalizing" and allowing (under a regulatory framework) all marijuana activity, whether medical or non-medical in nature, is also potentially preempted. Accepting the City's federal preemption claim would threaten to upend the will of Washington's voters who passed I-502, undo Washington's extensive regulatory preparation, disrupt the developing political resolution between the state and federal government, and contradict the federal government's judgment that the Washington's regulated marketplace for marijuana should be allowed to continue because it is likely consistent with, or even beneficial to, federal efforts to enforce the CSA.[6]

[6] In an exchange with Senator Patrick Leahy, Chair of the U.S. Senate Judiciary Committee, during a Senate hearing Deputy Attorney General Cole also explained that federal law is unlikely to preempt marijuana decriminalization under MUCA and I-502, but that even if Washington's regulatory structure for the marijuana marketplace could be preempted, that action would undermine federal enforcement of the CSA:

> COLE: "It would be a very challenging lawsuit to bring to preempt the state's decriminalization law. We might have an easier time with the regulatory scheme and preemption, but then what you'd have is legalized marijuana and no enforcement mechanism within the state to try and regulate it. And that's probably not a good situation to have."
> LEAHY: "Kind of an incentive for a black market, isn't it?"

B. The Medical Use of Cannabis Act Is Not in Conflict with and Is Not an Obstacle to the Enforcement of the Federal Controlled Substances Act, and Is Not Preempted.

Participation in collective gardens as allowed by MUCA is not preempted by the federal CSA, even if the Court finds that the state law preempts local zoning regulations banning such activities. To find otherwise would force Washington to adopt the CSA's prohibition on marijuana use and cultivation in violation of the Tenth Amendment.

There is a strong presumption against finding that state laws are preempted by federal law, especially when the state legislates within its "historic police powers," including regulating the health and welfare of its citizens. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L.Ed. 1447 (1947); *Gonzales*, 546 U.S. at 270; (noting that the "structure and limitations of federalism … allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'"). State laws will not be preempted unless that was the "clear and manifest" intent of Congress. *Rice*, 331 U.S. at 230; *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011). Thus, the "ultimate touchstone" in every federal preemption case

---

> COLE: "Very much so, sir, and money going into organized criminal enterprises instead of going into state tax coffers and having the state regulate from a seed to sale basis what happens to it."

Senate Hearing Transcript, "Conflicts Between State and Federal Marijuana Laws," September 10, 2013 available at http://www.judiciary.senate.gov/hearings/hearing.cfm?id=094c28995d1f5bc4fe11d832f90218f9.

is whether Congress intended to preempt state law. *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)).

Congress's intent can be stated expressly or it can be implied. *Id*. Implied preemption comes in two forms: field preemption – in which Congress has regulated so extensively in an area that its intent was to exclude all other state regulation – and conflict preemption. Conflict preemption itself comes in two forms, direct or impossibility conflict and obstacle conflict. *Crosby*, 530 U.S. at 372-73.

In the CSA, Congress expressly addressed inconsistent state laws, and stated its clear intent <u>not</u> to preempt such laws except in narrow cases of an irreconcilable conflict:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Thus, Congress has disclaimed any intent to occupy the field of controlled substances regulation and, hence, field preemption is inapplicable. As a result, MUCA may only be preempted under a direct or obstacle conflict analysis.

A direct conflict exists only if compliance with both federal and state regulations is impossible because federal law prohibits activity that state law requires, or vice versa. *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 180 L. Ed. 2d 580, 79 (2011) ("The question for 'impossibility' is whether the private party could independently do under federal law what state law requires of it." (emphasis added); *Wyeth v. Levine*, 555 U.S. 555, 583, 129 S. Ct. 1187, 173 L.Ed. 2d 51 (2009); *Florida Lime & Avocado Growers*, 373 U.S. at 142–43. MUCA allows and, according to appellants, compels local jurisdictions to allow, qualifying patients and designated providers to participate in collective gardens, but it does not require any person or the City to take any action, let alone an action that is prohibited by federal law. No person is required to grow marijuana in a collective garden, possess, or use marijuana. Moreover, even if the City's local zoning ban is struck down, the City would not be required to take any action prohibited by federal law. State law, even if imposed on the City, simply does not require any activity prohibited by the CSA.

As noted above, obstacle preemption occurs only if a state law "stands as obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime & Avocado Growers*, 373 U.S. at 141. "Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is

Congress rather than the courts that preempts state law. Our precedents establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. __, 131 S. Ct. 1968, 1985 (2011) (internal citations omitted).

As discussed above, this claim has not been adequately or accurately developed or briefed to the Court. However, if the Court nevertheless reaches the issue, it seems clear that merely allowing collective gardens at the state and local level poses no "obstacle" to the accomplishment of the purposes and objectives of federal law. Importantly, the federal government remains completely free to enforce its prohibition on marijuana activities at any time, notwithstanding Washington's law. Nothing in MUCA even purports to authorize the violation of federal law. Moreover, MUCA creates no practical impediment to federal enforcement of the CSA or prosecution of qualifying patients or designated providers participating in collective gardens. If anything, MUCA would facilitate federal accomplishment of its stated enforcement priorities by allowing low-priority medical use to occur through collective gardens segregated from the higher priority activity in illicit commercial black markets. At most, MUCA merely reflects a tension between the goals of the CSA and MUCA with respect to medical uses of marijuana, which is insufficient to establish obstacle

preemption. *Whiting*, 563 U.S. __.

Finally, obstacle preemption is confined by the limits of federal authority over sovereign state governments under the Tenth Amendment. It is well established that the Tenth Amendment prohibits the federal government from requiring Washington to enact the policies of the CSA or to enforce the CSA. *Reno v. Condon*, 528 U.S. 141, 149, 120 S. Ct. 666, 671 (2000); *Printz v. United States*, 521 U.S. 898, 925–31, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."); *New York v. United States*, 505 U.S. 144, 161–69, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."). Thus, to avoid invalidity under the Tenth Amendment, the CSA may not (and may not be interpreted or applied though preemption doctrine to) compel states to prohibit marijuana activity. Preempting state laws that simply exempt from state punishment activities that the federal government prohibits is the same thing as requiring states to adopt federal prohibitions and is unconstitutional. *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) ("If the federal government could make it illegal

under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal.").

In its briefs the City erroneously conflates Congress's constitutional authority to enact the CSA under the Commerce Clause and the scope of the CSA's preemption under Congress's express language and the Supremacy Clause. This confusion leads the City to make several critical errors. First, the City erroneously relies on *Gonzales v. Raich*, which addressed only whether the Controlled Substances Act was a valid exercise of Congress's Commerce Clause power. 545 U.S. 1 (2005). It did not address federal preemption. Second, the City attempts to support its claim that "uniformity" between the states and federal government is the only purpose of the CSA by citing the findings and declarations section of 21 U.S.C. § 801. As is readily apparent, however, these findings make no mention of uniformity and are, in fact, merely Congress's justification for why the CSA is a valid exercise of Congress's Commerce Clause authority.

The City also relies on *Seeley v. State* as evidence that the CSA's purpose was to create uniform federal and state laws, but the City's analysis is wholly mistaken. *Seeley v. State*, 132 Wn. 2d 776, 790, 940 P.2d 604 (1997). That case, and the portion quoted by the City, concerns

the intent of the Uniform Controlled Substances Act and Washington's version of that uniform act, not the purpose of the federal CSA. *Id*. It may be that at the time it adopted the Uniform Controlled Substances Act Washington desired to create a statutory scheme similar to other states and the federal statute. However, as noted above, that is expressly not the intent of the federal act, which disclaims field preemption and preemption of state laws except in narrow cases of irreconcilable conflicts. 21 U.S.C. § 903. Indeed, the federal government could not require uniform state laws under the anti-commandeering principles discussed above.[7]

Finally, the City relies on semantics to argue for federal preemption. It states that if the Court rules that cities "must allow" collective gardens under state law, that nothing could be "more contrary" to the intent and purposes of the CSA. This is merely a semantic distinction since under federal preemption analysis it makes no difference whether a state law "allows" something, compels local governments to "allow" something, "decriminalizes" something, and/or "legalizes" something.[8] What matters are the practical issues that arise between the federal law and the state law: Does MUCA require conduct prohibited by

[7] Moreover, *Seeley v. State* predates the MUCA. With respect to medical marijuana, Washington's intent is clearly no longer complete uniformity with federal law.

[8] Even the Oregon Supreme Court—which the City cites in support of the proposition that "allowing" marijuana related activities requires a finding of preemption—has retreated from this shallow analysis. *Willis v. Winters*, 253 P.3d 1058, 1064 n.6 (Or. 2011) (explaining that "*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted.")

the CSA? Do collective gardens under MUCA impede the federal government's accomplishment of the purposes and objectives of the CSA? The answer is no on both counts. But more appropriately, these complicated factual and legal issues have not been fully developed or addressed by the superior court or the parties, directing the Court to decline to reach or reject the City's federal preemption claim.

IV. CONCLUSION

For the foregoing reasons, ACLU respectfully requests that the Court decline to decide the City's inadequately developed and presented federal preemption claim but, if the Court does reach this question, it should decide that the collective garden provisions of MUCA are not preempted by the federal CSA.

DATED this 24th day of January, 2014.

GARVEY SCHUBERT BARER

By_____

Jared Van Kirk, WSBA # 37029
Sarah A. Dunne, WSBA #34869
Mark M. Cooke, WSBA #40155
Attorneys for Amicus Curiae
American Civil Liberties Union
of Washington

DECLARATION OF SERVICE

I, Lori A. Druss, declare as follows:

I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness herein, and have personal knowledge of the facts stated below.

On January 24, 2014, I caused to be filed the foregoing Brief of Amicus Curiae American Civil Liberties Union of Washington, on behalf of the American Civil Liberties Union, with the Clerk of the Court via Legal Messenger. On this same date, and in the manner indicated below, I caused the American Civil Liberties Union's Brief and this appended Declaration of Service to be served upon:

David Scott Mann
Gendler & Mann LLP
1424 4th Avenue, Ste 715
Seattle, WA 98101-2297
[X] Legal Messenger; and
[X] Email: mann@gendlermann.com

Joseph L. Broadbent, Attorney at Law
P.O. Box 1222
Stanwood, W A 98292-1222
[X] Regular U.S. Mail

Douglas Hiatt, Attorney at Law
119 1st Avenue S., Ste 260
Seattle, W A 98104-3450
[X] Legal Messenger; and
[X] Email: douglas@douglashiatt.net

Arthur "Pat" Fitzpatrick
Thomas C. Brubarker
220 Fourth Avenue S.
Kent, W A 98032
[X] Legal Messenger
[X] Email: PFitzpatrick@kentwa.gov

John Worthington
4500 S.E. 2nd Place
Renton, W A 98059
[X] Regular U.S. Mail; and
[X] Email: Worthingtonjw2u@hotmail.com

Tim Donaldson
15 N. Third Avenue
Walla Walla, WA 99362
[X] Regular U.S. Mail; and
[X] Email: tdonaldson@wallawallawa.gov

J. Preston Frederickson
15 N. Third Avenue
Walla Walla, WA 99362
[X] Regular U.S. Mail; and
[X] Email: pfred@wallawallawa.gov

Tim Reynolds
Porter Foster Rorick LLP
601 Union Street, Suite 800
Seattle, WA 98101-4027
[X] Regular U.S. Mail; and
[X] Email: tim@pfrwa.com

Kathleen Haggard
Porter Foster Rorick LLP
601 Union Street, Suite 800
Seattle, WA 98101-4027
[X] Regular U.S. Mail; and
[X] Email: Kathleen@pfrwa.com

_____
Lori A. Druss
Legal Assistant