Honorable Ronald Culpepper
Noting Date: August 27, 2014, 9:00 am
Civil Motions Calendar

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MMH, LLC, a Washington Limited liability company, Plaintiff, v. CITY OF FIFE, a Washington municipal corporation, Defendant.	No. 14-2-10487-7 AMICUS CURIAE BRIEF OF PIERCE COUNTY, LEWIS COUNTY, CITY OF YAKIMA, TOWN OF WILBUR

I. INTRODUCTION

Amici Pierce County, Lewis County, the City of Yakima, and the Town of Wilbur, hereby submit the following brief of amicus curiae in support of Defendant City of Fife's Motion for Summary Judgment.[1] In Washington, cities and counties have plenary constitutional authority to regulate by zoning. They may require a business to comply with state *and* federal law. Initiative 502 does not restrict the local authority to license and/or zone. But, if the Court concludes that state law (I-502) preempts the city's ordinance, it must then determine whether state law is preempted by federal drug laws.

[1] These entities each have enacted an ordinance that limits or bars the siting of recreational marijuana businesses in their jurisdictions, or have enacted a temporary moratorium on approvals of the same. *See*, collected ordinances in *Appendix A.* Joinder in this brief does not suggest the predetermination of any related issue which has not yet come before the governing body of the entity.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

II. STATEMENT OF FACTS

Marijuana Remains Illegal Under Federal Law. The use, possession and sale of marijuana are illegal under federal law. Pursuant to the *Comprehensive Drug Abuse, Prevention and Control Act of 1970,* 21 US C 801 et seq., marijuana is a Schedule I drug, illegal under virtually all circumstances. It remains a Schedule I drug in Washington. See, RCW 69.50.204(c)(22).

Initiative 502 Decriminalized Possession of Small Amounts of Marijuana, and Established a Regulatory Scheme for Production and Sales. In 2012, Washington voters enacted Initiative No. 502 ("I-502"), which accomplished two distinct things. First, it decriminalized the use and possession of small amounts (one ounce or less) of marijuana. *Initiative Measure No. 502,* now codified in Ch. 69.50 RCW. Second, it created a "tightly regulated, state-licensed system" for the production, processing, and retail sales of larger amounts of marijuana. *Id*., *Intent Section,* Sec. 1(3). *See*, RCW 69.50.360.

The U.S. Did <u>Not</u> Accede to Washington's Decriminalization of Marijuana Sales. Some, including Plaintiff, believe that the federal government has approved I-502. They operate under the mistaken belief that a recent decision of the US government (not to take action against the states of Washington or Colorado for disregarding federal drug law) means that the federal government endorses our experiment. *See First Amended Complaint* at ¶¶ 27-30 (citing the "Cole Memo"). This is not correct. The memorandum has no effect on state law. *Memorandum from James M. Cole, Guidance Regarding Marijuana Enforcement, 2013 ("Cole Memorandum"). Exhibit B to Marchant Decl.*

> ***This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law***. * * * Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

> priorities will subject that person or entity to federal enforcement action, based on the circumstances.

Cole Memo, at 4 (emphasis supplied).

Indeed, both before and after the Cole Memo was issued, the DEA *increased* its law enforcement activities in complete disregard of state laws decriminalizing marijuana:

- "Six weeks before the nation's first retail marijuana shops open in Colorado, federal authorities on Thursday raided more than a dozen Denver metro area marijuana facilities and two homes."
- "Federal agents have raided a number of medical marijuana dispensaries in the Puget Sound region."[2]

There is no preemption issue created by the US not enforcing lower-level marijuana violations based on its scarce resources.

III. ANALYSIS

A. The Constitutional Authority of a City to Exclude Illegal Activities By Regulation is Broad.

Cities are the first line of the regulators of the public good. The health and safety of a state's citizens "are primarily, and historically, matters of local concern." *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 67 (5th Cir. 1997) (quoting *Medtronic v. Lohr*, 518 U.S. 470, 475 (1996)). This municipal power is organic and located in our constitution. Article XI, section 11 of the Washington Constitution provides that "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." The Supreme Court has stated the regulatory powers of a city are coextensive with that of the state:

[2] "Feds raid Denver-area marijuana dispensaries, grow operations, 2 homes," *The Denver Post*, 21 November 2013, www.denverpost.com/breakingnews/ci_24570937/feds-involved-raid-at-denver-area-marijuana#ixzz2pkQYS1TU; and, "Federal agents raid marijuana dispensaries in Washington," *Fox News*, 25 July 2013, www.foxnews.com/us/2013/07/25/federal-agents-raid-marijuana-dispensaries-in-washington , *Appendix B.*

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

> This is a direct delegation of the police power ***as ample within its limits as that possessed by the legislature itself.*** It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with the general laws.

Weden v. San Juan County, 135 Wn.2d 678, 690-91, 958 P.2d 273, 279 (1998).[3] And, the Legislature itself recognizes the great breadth of municipal authority:

> The purpose and policy of this title is to confer upon two optional classes of cities created hereby ***the broadest powers of local self-government consistent with the Constitution of this state.*** * * * ***All grants of municipal power to municipalities*** electing to be governed under the provisions of this title, whether the grant is in specific terms or in general terms, ***shall be liberally construed in favor of the municipality.***

RCW 35A.01.010 (emphasis supplied).

These goals are often accomplished through zoning. "[Z]oning is, in general, a proper exercise of police power which can permissibly limit an individual's property rights," so long as it is not it unreasonable. *Norco Const., Inc. v. King County*, 97 Wn. 2d 680, 684-85, 649 P.2d 103 (1982) (citations omitted).

In sum, the City of Fife has the undeniable constitutional right to enact police power regulations prohibiting illegal business activities within its boundaries.

STATE LAW PREEMPTION

B. Initiative 502 Does Not Preempt the City's Ordinance.

The City of Fife's ordinance is valid. The Washington Constitution expressly allows cities and counties to enact local laws -- even in the same field as statewide ("general") laws. Any county, city, or town may make and enforce any local police, sanitary and other regulations "as are not in conflict with general laws." WA CONST., Art. 11, § 11.

[3] (quoting *Hass v. City of Kirkland*, 78 Wash.2d 929, 932, 481 P.2d 9 (1971) (quoting *Detamore v. Hindley*, 83 Wash. 322, 326, 145 P. 462 (1915) (emphasis supplied)).

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

Amici recognize that "the plenary police power in regulatory matters accorded municipalities by Const. Art. 11, § 11, ceases when the state enacts a general law upon the particular subject, unless there is room for concurrent jurisdiction." *Lenci v. Seattle*, 63 Wn.2d 664, 669, 388 P.2d 926 (1964). But, there are only two circumstances when state law preempts local laws. The tests are "Field" preemption, and "Conflict" preemption:

> The rule applicable to resolve a preemption issue provides that [1] a state statute preempts an ordinance on the same subject if the statute occupies the field, leaving no room for concurrent jurisdiction, or [2] if a conflict exists such that the statute and the ordinance may not be harmonized.

Lawson v. City of Pasco, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010).

1. Neither Express Nor Implied "Field" Preemption Applies.

There are two types of "field" preemption: express and implied. The former requires a specific statutory bar of all local regulation; the latter applies if legislative intent to bar such regulation is clear. Neither variety applies here, as the Initiative neither expressly nor impliedly preempts local authority.

a. Legislative Intent to Preempt Must Be Clearly Expressed.

"Under Washington law, there is a strong presumption against finding that state law preempts local ordinances." *AGO* 2014, No. 2, at 4. "A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated." *State ex rel. Schillberg v. Everett Dist. Justice Court*, 92 Wn. 2d 106, 108, 594 P.2d 448 (1979). The courts "will not interpret a statute to deprive a municipality of the power to legislate on particular subjects unless that clearly is the legislative intent." *Southwick, Inc. v. City of Lacey*, 58 Wn.App. 886, 891-92, 795 P.2d 712 (1990).

i. The 2014 Legislature Failed to Enact a Bill that Would Have Preempted Local Control of Marijuana.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

Perhaps no better evidence of I-502's lack of a preemption clause is the fact that the Legislature considered—and rejected—a bill containing a preemption clause. The bill failed to get out of committee. *House Bill 2322* ("Cities, counties, and towns are prohibited from enacting any ordinance or other regulation pertaining to business licensing, zoning, or land use that has the effect of preventing or impeding the establishment of a recreational marijuana business licensed under RCW 69.50.325."). *Appendix C* (HB 2322, Bill Digest, Bill History).[4] This is significant as "[t]he Legislature is presumed to know the existing state of the case law in those areas in which it is legislating." *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). This bill was introduced because the Legislature was aware that I-502 does not contain preemption language.

ii. The WSLCB Recognizes Federal Law Restricts Initiative 502 Activities, and Cities Can Ban Employee's Marijuana Use.

Interestingly, the Liquor Control Board recognizes that federal law still has a direct impact on state-licensed marijuana businesses. The WSLCB recently began issuing a "Notice to Licensees on Firearms." *Appendix D.* The July 7, 2014 Notice provides in part:

> *CAUTION: Federal law prohibits the possession of firearms by any person on premises where marijuana is present or being transported.*

Similarly, Washington employers may enforce federal marijuana laws and may lawfully terminate an employee who uses the drug. *Roe v. TeleTech Customer Care Mgmt. LLC,* 171 Wn.2d 736, 742, 257 P.3d 586 (2011) (rejecting civil cause of action for wrongful termination of medical marijuana patient). In fact, it is mandatory for cities and county to discipline such employees. *See*, 41 U.S.C. §8104 (requiring employment action, including termination, for a drug conviction). The *Drug-Free Workplace Act of 1988* requires some federal contractors and all federal grantees to provide a drug-free workplace as a

[4] Two bills clarifying that cities do have this authority met a similar fate. HB 2509 and HB 2510.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

precondition to receiving federal monies. 41 U.S.C. §81. Thus, federal law still plays a significant role in Washington's marijuana regulatory scheme.

b. Express Preemption Does Not Apply: *I-502 Contains No Bar of Local Jurisdiction.*

The Attorney General recently concluded that I-502 does not preempt local controls of commercial marijuana activities:

> Although Initiative 502 (I-502) establishes a licensing and regulatory system for marijuana producers, processors, and retailers in Washington State, it includes no clear indication that it was intended to preempt local authority to regulate such businesses. We therefore conclude that I-502 left in place the normal powers of local governments to regulate within their jurisdictions.

AGO 2014, No. 2, at 4.

Not only are attorney general opinions "are generally 'entitled to great weight,' *Five Corners Family Farmers v. State*, 173 Wn. 2d 296, 308-09, 268 P.3d 892 (2011) (citations omitted), but the court must "presume that the legislature is aware of formal opinions issued by the attorney general and…"

> … a failure to amend the statute in response to the formal opinion may, in appropriate circumstances, be treated as a form of legislative acquiescence in that interpretation.

Id. Here, we have legislative acquiescence in the AG's opinion on preemption. The opinion was issued on January 16, 2014. Two weeks later, the bill creating preemption (HB 2322) received a hearing in the House. It died there on January 30th. The Legislature can be said to have agreed with the Attorney General that cities may regulate on this issue.

c. The UCSA's Preemption Section Applies to *Criminal* Penalties Only.

While I-502 itself is silent on this topic, many years ago the Legislature did expressly preempt the field of "setting penalties for violations" of criminal drug violations of the *Uniform Controlled Substances Act* ("UCSA"), Ch. 69.50 RCW. But this statute does

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

not affect licensing, zoning or other police power authority in any manner. It only prevents local government from setting greater *criminal* penalties for drug violations:

> The state of Washington fully occupies and preempts the entire field of ***setting penalties for violations*** of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter. ***Such local ordinances shall have the same penalties*** as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of the city, town, county, or municipality.

RCW 69.50.608 (emphasis supplied).

This section has no application here for two reasons. First, it does not apply on its face. The Fife business license ordinance does not "set penalties for violations of the controlled substances act." Rather, it merely precludes issuing an approval for the manufacture and sale of a product that is illegal under federal law. Thus, Fife's ordinance is a ***civil*** zoning regulation that is not at all inconsistent with the UCSA's criminal "penalties."

Other courts have reached this very conclusion in a similar context. Washington's Firearms Act contains a preemption clause that is even more forceful than that of the UCSA. There, the state "fully occupies and preempts *the entire field of firearms regulation*…." RCW 9.41.290 (emphasis supplied). *Compare*, RCW 69.50.608 ("The state of Washington fully occupies and preempts *the entire field of setting penalties for violations* of the controlled substances act….").[5] However, the Supreme Court held that despite this strong preemption language on firearms, local jurisdictions *may* enact civil regulations:

[5] Much stronger preemption language than in the UCSA also appears in a statute relating to traffic laws. "No local authority shall enact or enforce any law, ordinance, rule or regulation ***in conflict with the provisions of this title*** except and unless expressly authorized by law to do so …." RCW 46.08.020 (emphasis supplied).

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

> We hold that the Legislature, in amending RCW 9.41.290, sought to eliminate a multiplicity of local laws relating to firearms and to advance uniformity in ***criminal*** firearms regulation. The Legislature did not intend to interfere with public employers in establishing workplace rules. The "laws and ordinances" preempted are laws of application to the general public, not internal rules for employee conduct.

Cherry v. Seattle, 116 Wn.2d 794, 801, 808 P.2d 746 (1991) (emphasis supplied).

The UCSA preemption section at issue, RCW 69.50.608, does not preclude a municipality from enacting civil zoning regulations. It only limits "setting [criminal] penalties for violations" of drug laws. Here, the city's ordinance does not criminalize marijuana use or possession -- it only precludes marijuana production and sales operations from receiving zoning approval.

d. Implied Field Preemption Does Not Apply: *I-502 Specifically Recognized Local Zoning and Licensing Authority, and Created a Concurrent Jurisdiction Scheme.*

Implied preemption cannot apply because I-502 specifically reserved to local government the power of zoning and other regulation. In fact, I-502 created a concurrent jurisdiction scheme. Preemption will be inferred only when "the purpose of the statute and the facts and circumstances under which it was intended to operate" clearly show legislative intent. *Lawson*, supra at 679.

I-502 contains no preemption language. Quite the contrary, the Initiative creates a *concurrent* jurisdiction scheme. It expressly reserves to counties and cities authority to control business activities. The Liquor Control Board has pronounced that its approval of a license has no impact on local regulation:

> The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

WAC 314-55-020 (11).[6] The Initiative's concurrent jurisdiction scheme is further established by its other sections allowing cities to impose sales taxes.[7]

Conversely, nothing in I-502 *requires* local jurisdictions to allow the manufacturing or sale of marijuana. In fact, as to retail licenses, the Initiative says no more than the state "may" license them, not that it "shall." RCW 69.50.354 ("There may be licensed...").

The Supreme Court of California recently issued a significant opinion on a city's ability to exercise its zoning power to ban marijuana stores. In *City of Riverside v. Inland Empire Patients Health and Welfare Center*, 300 P.3d 494 (2013), the court ruled "[t]he issue in this case is whether California's medical marijuana statutes preempt a local ban on facilities that distribute medical marijuana. We conclude they do not." *Id*. at 737.[8]

> ***Nothing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land,*** including the authority to provide that facilities for the distribution of medical marijuana will not be permitted to operate within its borders. We must therefore reject defendants' preemption argument ….

City of Riverside, supra at 737-38, 762-63 (footnotes omitted) (emphasis supplied).

In Washington, just because the state regulates in an area does *not* mean its power is exclusive. The Court of Appeals considered whether a city could ban RVs from a mobile

---

[6] "The interpretation given an ambiguous statute by the agency or department charged with its application may also provide useful guidance. Accordingly, this court gives "'great weight'" to an agency's interpretation of an ambiguous statute within its area of "'special expertise.'" *Densley v. Dep't of Ret. Sys.*, 162 Wn. 2d 210, 221, 173 P.3d 885, 890 (2007) (citations omitted). "[T]he agency's interpretation of the law it is charged with administering is entitled to great weight with the court." *Belgarde v. Brooks*, 19 Wn. App. 571, 578, 576 P.2d 447, 451 (1978).

[7] I-502 reserves other powers to local jurisdictions, including the ability to levy sales taxes above and beyond the state "marijuana excise tax." RCW 69.50.535(3) The excise tax is "is separate and in addition to general state and local sales and use taxes that apply to retail sales of tangible personal property, and is part of the total retail price to which general state and local sales and use taxes apply." *Id.*

[8] "In the exercise of its inherent land use power, the City of Riverside (City) has declared, by zoning ordinances, that a "[m]edical marijuana dispensary"—"[a] facility where marijuana is made available for medical purposes in accordance with" the CUA (Riverside Municipal Code (RMC), § 19.910.140)—is a prohibited use of land within the city and may be abated as a public nuisance. (RMC, §§ 1.01.110E, 6.15.020Q, 19.150.020 & table 19.150.020 A.) The City's ordinance also bans, and declares a nuisance, any use that is prohibited by federal or state law. (RMC, §§ 1.01.110E, 6.15.020Q, 9.150.020.)" *Id.*

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

home park (despite a state statute that allowed such). It observed that "certain provisions of the [statute] expressly contemplate some local regulation of manufactured/mobile home tenancies." *Lawson, supra* at 680. The Court stated "Pasco's ordinance was not preempted because the legislature explicitly conferred on local governments concurrent jurisdiction over mobile home regulation." *Id.* at 679. Initiative 502 does the same.

e. **Local Government May Ban That Which the State Allows.**

Local ordinances may validly forbid that which state law allows. In one very similar case, the plaintiff argued that a city ordinance that criminalized the knowing or reckless possession of a dangerous dog, when the state statute expressly allowed such possession. The Court rejected the preemption challenge holding:

> The fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law.

Rabon v. City of Seattle, 135 Wn. 2d 278, 292-93, 957 P.2d 621, 627 (1998) *(quoting Lenci v. City of Seattle*, 63 Wash.2d 664, 671, 388 P.2d 926 (1964).

As here, the state dog law specifically recognized local licensing and regulation in the area. The statute "provides that cities and counties may charge an annual fee for registering dogs in addition to a regular license fee." *Id*. at 290. Significantly, the statute did not allow a local ban. Yet the *Rabon* court held that a mandatory licensing system (similar to the WSLCB rules) is prohibitory in nature and thus are not inconsistent with a local ban of the same conduct. If the state can restrict the conduct, a city can eliminate it. "Rather than a permit to own a dangerous dog, this [RCW] provision requires that at a minimum if one owns a dangerous dog the registration requirements must be followed, and thus it is prohibitory in nature." *Id*.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

Marijuana possession, production and sales remain illegal, subject to certain tight controls. Possession remains illegal over a certain amount. And sales are strictly regulated; any commercial activity outside of this structure would result in jail time. Thus, I-502 is "prohibitory in nature" and provides ample room for local regulation, even prohibition.

The Washington Supreme Court also addressed a similar argument when it reviewed a Snohomish County ordinance that prohibited the use of internal combustion motors on lakes in Snohomish County, even though the state statute contained no such restriction. The Court upheld the ordinance in the face of a preemption argument. *"There being no express statement nor words from which it could be fairly inferred that motor boats are permitted on all waters of the state, no conflict exists and the ordinance is valid." State ex rel. Schillberg v. Everett Dist. Justice Court*, 92 Wash.2d 106, 108, 594 P.2d 448 (1979) (emphasis supplied).

In yet another very similar case, the Court more recently held that a state vessel registration statute did not grant personal water craft owners the right to operate their crafts anywhere in the state. The state system of registering PWC did not mean that counties were forced to allow them. As with I-502, "[t]he statute was enacted to raise tax revenues and to create a title system for boats." The court reasoned:

> Nowhere in the language of the statute can it be suggested that the statute creates an unabridged right to operate PWC in all waters throughout the state. Registration of a vessel is nothing more than a precondition to operating a boat. No unconditional right is granted by obtaining such registration. Statutes often impose preconditions which do not grant unrestricted permission to participate in an activity.

Weden v. San Juan County, 135 Wn.2d 678, 694-95, 958 P.2d 273 (1998) (citations omitted).

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

As in *Weden*, the issuance of a WSLCB license to produce, process or retail marijuana is a precondition to such use. It does not then automatically allow such use anywhere in the state. Thus, cities and counties retain their ability to ban sales and manufacturing. (Note that the city ordinance does not criminalize this conduct, or possession and use.)

f. Cities Can Criminalize Conduct That Is Legal Under State Law.

While this is not at issue here (because the Fife ordinance is civil in nature), cities can define conduct as illegal even when it is lawful under state law. If this is true, *a fortiori*, a city can refuse on civil grounds to license the same conduct.

The most direct analysis of the issue comes from a case involving a passenger in a truck who threw a beer can out the window. He was arrested for littering, a crime under the Olympia city ordinance. *State v. Kirwin,* 165 Wn.2d 818, 826-27, 203 P.3d 1044 (2009). However, this act was *not* a crime under state law but merely a civil infraction. The Supreme Court upheld the arrest and search incident to arrest which uncovered methamphetamine. The defendant argued the ordinance was preempted as it set a "penalty" not authorized by state law. The Court rejected this argument even though the ordinance criminalized behavior that was not so under state law.

> Kirwin correctly observes the ordinance designates littering as an offense subject to arrest while the state statute does not. This difference, however, does not create an impermissible direct conflict; the focus of the article XI, section 11 inquiry is on the conduct proscribed by the two laws (a question of substance), not their attendant punishments (a question of magnitude). The two laws coexist because, although the degree of punishment differs, their substance is nearly identical and therefore an irreconcilable conflict does not arise. Because there is no direct conflict, unless the state littering statute expresses intent to preempt local entities from either proscribing littering or setting their own degrees of punishment for littering, then the ordinance will survive scrutiny under article XI, section 11.

State v. Kirwin, at 826-27.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

Thus, if a city can criminalize acts that Washington law does not, clearly a city or county can refuse to issue a civil business license for marijuana sales.

2. "Conflict" Preemption Does Not Preclude Local Regulation.

This Court need not address "conflict" preemption because of I-502's specific reservation of local jurisdiction and its creation of concurrent jurisdiction. As the Supreme Court has explained an "irreconcilable conflict" must exist. "An ordinance is constitutionally invalid if it 'directly and irreconcilably conflicts with the statute.' If the two may be harmonized, however, no conflict will be found." *Lawson, supra* at 682 (citations omitted).

In conclusion, there is no legislative intent to preempt local law. The Initiative and the ordinance can be harmonized as there is no indication that the Legislature intended to prevent cities and counties from enacting regulations in this area.

FEDERAL LAW PREEMPTION

D. To The Extent That I-502 Mandates City Approval of Activities That Are Illegal Under Federal Law, Its Provisions Are *Preempted By Federal Law*.

Cities and counties regulate businesses through conditional use permits and other regulatory devices. The Fife Municipal Code provides that marijuana production and sales is a "prohibited use." The state cannot mandate a city to approve zoning for illegal activities. To the extent that I-502 requires Fife to issue a license for activities that violate federal law, or other state and city employees to facilitate the violation of federal law, it is preempted.

When Federal Preemption Applies, State Law Must Give Way.

Under the Supremacy Clause, the laws of the United States are "the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

notwithstanding." U.S. Const., Art. VI, cl. 2. [9] State law that conflicts with federal is "without effect." *M'Culloch v. Maryland*, 17 U.S. 316, 427 (1819).

a. The Federal CSA Does Not *Expressly* Preempt State Law.

Congressional intent to preempt may be found expressly or by implication. The intent to preempt state law may be explicitly set out in the language of the statute. However, the federal Controlled Substances Act ("CSA") does not contain any express preemption language. In fact, Congress has disclaimed any intent to occupy the drug regulation field. *See*, 21 U.S.C. § 903 ("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…").

b. I-502 is Invalid Under Two *Implied* Preemption Tests.

Turning to implied preemption, there are three tests. One test is "field" preemption, where "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). As set out above however, Congress explicitly denied any intent to occupy the field. Thus, we turn to the two other forms of implied preemption:

> ***Obstacle.*** Where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52 (1941).
>
> ***Impossibility.*** Where the state law actually conflicts with the federal law, such as when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963); and,

[9] Washington's Constitution recognizes this authority. "The Constitution of the United States is the supreme law of the land." WA Const., Art. 1, Sec. 2.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

***Obstacle* Preemption Renders I-502 Invalid Because It Allows and Even Encourages Activities That Are Illegal Under Federal Law.**

In a case that offers significant guidance here, the US Supreme Court addressed conflicting farming laws. *Michigan Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984). "In conclusion, because the Michigan Act authorizes producers' associations to engage in conduct that the federal Act forbids, it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. The Michigan Act was preempted because it "empowers producers' associations to do precisely what the federal Act forbids them to do." *Id.* at 477-78. That is just the case here. The conduct is not just "allowed." Here, the state has made itself a major player in the pot industry. The State of Washington is affirmatively promoting the creation of a market, the recruitment of licensees and the establishment of an industry.

The Oregon Supreme Court followed *Michigan Canners* when it invalidated a section of Oregon's medical marijuana act based on "obstacle" preemption. The court framed the constitutional question as "whether, under the doctrine of implied preemption, a state law authorizing the use of medical marijuana 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159, 180-81, 230 P.3d 518 (2010).[10] The Court held that it did so. "[T]o the extent that ORS 475.306(1) authorizes the use of medical marijuana, the Controlled Substances Act preempts that subsection." *Id.* at 190. The Oregon Court went on to explain that while Congress cannot compel the states to criminalize certain conduct, it may prevent the states' from authorizing conduct that is

[10] A District Court in the Ninth Circuit has recognized the soundness of the Oregon Supreme Court's decision, and referred to that state's preempted medical marijuana law as "a law that is without effect." *Butler v. Douglas County*, 2010 WL 3220199 (D. Or. Aug. 10, 2010), *aff'd*, 457 F. App'x 674 (9th Cir. 2011).

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

illegal under federal law. "When, however, a state affirmatively authorizes [illegal] conduct, Congress has the authority to preempt that law and did so here." *Id.* at 186.

A Minnesota court has held likewise:

> In the event that appellant's proposed charter amendment directing the Minneapolis City Council to "authorize, license, and regulate a reasonable number of medical marijuana distribution centers in the City of Minneapolis" were to pass, it would be, at least for now, in conflict with current federal law and would thus be "without effect."

Haumant v. Griffin, 699 N.W.2d 774, 781 (Minn. Ct. App.), *review denied*, (2005).

I-502 is similar to those invalidated in *Emerald Steel Fabricators.* State regulations "affirmatively authorize" illegal conduct, just as the one struck down in Oregon. *See*, RCW 69.50.360, .363,.366, and RCW 69.50.4013(3) (possession, production, delivery and sale are not criminal violations). The WSLCB has pronounced that a state license "allows" the violation of federal law. WAC 314-55-077; and, WAC 314-55-079(1). State law also *requires* third parties to violate federal possession laws by mandating quality assurance testing. WAC 314-55-102. Many testing labs are violating federal law, as are banks, landlords, insurance companies, and even suppliers of services such as water. *Feds don't want irrigation water used to grow pot*, Seattle Times, May 20, 2014.

In sum, State law affirmatively authorizes (even promotes) the violation of federal law, and creates an obstacle to its enforcement. To the extent that I-502 can be read to force counties and cities to allow or even require the violation of federal law, it is invalid. Washington Initiative creates a positive conflict with the federal CSA as it is impossible to comply with both.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

Impossibility Preemption Invalidates I-502 Because It Requires Government Employees To Allow the Violation of Federal Law, and Even to Violate the Law Themselves to Comply with State Law.

In 2011, Governor Gregoire vetoed parts of the medical marijuana bill because of preemption concerns. In April 2011, she sent a letter to US Attorney General Holder seeking guidance on the federal position on a pending bill creating a marijuana regulatory scheme. *Appendix E*. Her concern was it would involve state employees in the commission of federal crimes. She asked for guidance on the DOJ's so-called "Odgen Memo."

> Also, it would be helpful if the guidance addressed whether state employees involved in inspecting the premises, auditing the records or collecting fees from the licensed dispensers, producers or processors would be immune from arrest or liability when engaged in the enforcement of this licensing law.

Id. She received a quick and ominous answer. The next day, Washington's US Attorneys Ormsby and Durkin responded, listing the numerous criminal violations that would be committed by those involved in marijuana production, distribution and sales. They also noted *third parties* would be committing criminal violations:

> Others who knowingly facilitate the actions of the licensees, including property owners, landlords, and financiers should also know that their conduct violates federal law. ***In addition, state employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the CSA.***

Exhibit A to Coombs Decl. (emphasis supplied) ("As the Attorney General has repeatedly stated, the Department of Justice remains firmly committed to enforcing the CSA in all states."). In response, Governor Gregoire vetoed much of ESSSB 5073, explaining:

> These sections [directing state employees to "authorize and license" commercial cannabis businesses] would open public employees to federal prosecution, and the United States Attorneys have made it clear that state law would not provide these individuals safe harbor from federal prosecution. ***No state employee should be required to violate federal criminal law in order to fulfill duties under state law.***

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

Veto Message, *supra* at 3 (emphasis supplied), *Exhibit B to Coombs Decl.* Her legal analysis was accepted across the country. [11]

Congress itself has recognized that Section 903 of the CSA preempts states' attempts to legalize marijuana, and has twice unsuccessfully tried to correct this. Legislation has been proposed twice to allow the states to conduct marijuana legalization experiments. Each time it failed. *See, Respect States' and Citizens' Rights Act of 2013*, H.R. 964, 113th Cong. (1st Sess. 2013) (amending CSA to provide that it shall not be construed to preempt any state law pertaining to marijuana); and, *Respect States' and Citizens' Rights Act of 2012*, H.R. 6606, 112th Cong. (2d Sess. 2012) (same). *Appendix F* These failed attempts demonstrate that Congress has preempted state law.

In sum, impossibility preemption applies for the simple reason that it is *not possible* to comply with both state and federal law -- they are inherently in conflict. First and foremost, under Plaintiff's theory, Initiative 502 *requires* local government to issue approvals for the manufacturing and sales of illegal drugs. As the US attorneys, our governor and several attorneys general have concluded, this "require[s government employees] to violate federal criminal law in order to fulfill duties under state law." *Veto*

[11] Other state officials also concluded that state marijuana decriminalization laws are preempted by the CSA because they require government employees to violate federal law. The Oregon Attorney General concluded that the act of a police officer in "[r]eturning marijuana to users would constitute distribution of a controlled substance under the Controlled Substances Act," which might subject them to federal prosecution. *Opinion Oregon Attorney General*, No. OP-2012-1 (Jan. 19, 2012) at 10. *See also, Opinion Michigan Attorney General*, No. 7262 (Nov. 10, 2011) (concluding that the provision of Michigan law that requires police to return marijuana seized from qualified medical marijuana patients poses a direct conflict with and is preempted by the CSA); *and, Opinion Arizona Attorney General*, No. I12-001 (Aug. 6, 2012) (concluding that to the extent that an identification card for medical marijuana patients purports to authorize an individual to cultivate marijuana or otherwise violate federal law, such language is preempted). The Michigan Supreme Court recently held that the CSA did not preempt that state's medical marijuana laws. However, its analysis was grounded on the odd notion that a state law that allowed marijuana production did not *require* residents to violate federal law. "Section 4(a) of the MMMA does not require anyone to commit that offense, however, nor does it prohibit punishment of that offense under federal law." *Ter Beek v. City of Wyoming*, 495 Mich. 1 (2014). Thus, the court reasoned that preemption is avoided if a single person can comply with both state and federal law *by simply avoiding the challenged conduct altogether.* This seems to miss the fundamental preemption question raised by the fact that thousands of people do and will violate federal law under Washington law. It is no answer to simply ignore that basic fact.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

Message, supra. Secondly, I-502 requires city employees to facilitate the commission of federal crimes. State and federal laws are hopelessly in conflict. State law must fall to the extent it allows, authorizes or even requires the violation of federal law.

IV. CONCLUSION

In sum, this Court should grant Fife's motion for summary judgment. First, I-502 contains no express or implied intent to preempt the City's plenary constitutional authority to regulate. And second, if this Court finds that state law preempts the city ordinance, it must move to a federal law analysis. And, under the Supremacy Clause, I-502 is invalid under both the Obstacle and Impossibility standards.

RESPECTFULLY SUBMITTED this 19th day of August 2014

PIERCE COUNTY

KEATING, BUCKLIN & McCORMACK, INC., P.S.

By: *s/Stewart Estes*
Stewart A. Estes, WSBA #15535
Attorneys for Pierce County
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
Phone: (206) 623-8861

CITY OF YAKIMA

By: _____
Jeff Cutter, WSBA#22904
City Attorney
200 S. 3rd Street
Yakima, WA 98901-2830
Phone: (509) 575-6030

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

Message, supra. Secondly, I-502 requires city employees to facilitate the commission of federal crimes. State and federal laws are hopelessly in conflict. State law must fall to the extent it allows, authorizes or even requires the violation of federal law.

IV. CONCLUSION

In sum, this Court should grant Fife's motion for summary judgment. First, I-502 contains no express or implied intent to preempt the City's plenary constitutional authority to regulate. And second, if this Court finds that state law preempts the city ordinance, it must move to a federal law analysis. And, under the Supremacy Clause, I-502 is invalid under both the Obstacle and Impossibility standards.

RESPECTFULLY SUBMITTED this ___ day of August 2014

PIERCE COUNTY

KEATING, BUCKLIN & McCORMACK, INC., P.S.

By: _____
Stewart A. Estes, WSBA #15535
Attorneys for Pierce County
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
Phone: (206) 623-8861

CITY OF YAKIMA

By: _____
Jeff Cutter, WSBA#22904
City Attorney
200 S. 3rd Street
Yakima, WA 98901-2830
Phone: (509) 575-6030

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

LEWIS COUNTY

By: _____

Jonathan Meyer, WSBA #28238
Glenn Carter, WSBA#33863
Lewis County Prosecutor's Office
Law & Justice Center, 2nd Floor
Chehalis, WA 98532
Phone: (360) 740-1240

TOWN OF WILBUR

By: _____

Cindy McMullen, WSBA #9027
Town Attorney
McMullen Law Office, P.S.
112 N. University Rd, Suite 300
Spokane Valley, WA 99206-5295
Phone: (509) 924-9816

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

LEWIS COUNTY

By: _____

Jonathan Meyer, WSBA #28238
Glenn Carter, WSBA#33863
Lewis County Prosecutor's Office
Law & Justice Center, 2nd Floor
Chehalis, WA 98532
Phone: (360) 740-1240

TOWN OF WILBUR

By: Cynthia E. McMullen

Cindy McMullen, WSBA #9027
Town Attorney
McMullen Law Office, P.S.
112 N. University Rd, Suite 300
Spokane Valley, WA 99206-5295
Phone: (509) 924-9816

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-0423

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on August 19, 2014, a true and correct copy of the foregoing document was served upon the parties listed below via the method indicated:

Attorneys for Plaintiff

Mark D. Nelson
Michael Terence Oates
Davies Pearson
920 Fawcett Avenue
Tacoma, WA 98402
mnelson@dpearson.com
moates@dpearson.com

√ E-mail
☑ United States Mail
☐ Legal Messenger
☐ Other Agreed E-Service

Attorneys for City of Fife

Jennifer Combs
Greg Amann
Loren D. Combs
VSI Law Group, PLLC
3600 Port of Tacoma Road, Suite 311
Tacoma, WA 98424
jbc@vsilawgroup.com
gfa@vsilawgroup.com
ldc@vsilawgroup.com

√ E-mail
☑ United States Mail
☐ Legal Messenger
☐ Other Agreed E-Service

Attorneys for Intervenor OAG

Jeffrey Even
Deputy Solicitor General
PO Box 40100
Olympia, WA 98504-0100
Jeff.even@atg.wa.gov

√ E-mail
☑ United States Mail
☐ Legal Messenger
☐ Other Agreed E-Service

DATED this 19th day of August, 2014, at Seattle, Washington.

s/Staci Black
Staci Black, Legal Assistant
Keating Bucklin & McCormack, Inc., P.S.
sblack@kbmlawyers.com

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423