No. 90780-3

SUPREME COURT
STATE OF WASHINGTON

DOWNTOWN CANNABIS COMPANY, LLC, MONKEY GRASS FARMS, LLC, AND JAR MGMT, LLC d/b/a Rainier on Pine,

Intervenor-Appellants
v.

CITY OF FIFE

Respondents

Intervenor-Appellants' Statement of Grounds for Direct Review

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I-502 allows marijuana retail operations to be located throughout the state. I-502 further authorizes the Washington State Liquor Control Board to issue licenses for retail operations throughout the state. In fact, the trial court reached those exact conclusions.

Yet the City of Fife has enacted an ordinance prohibiting marijuana retail operations within its jurisdiction. The trial court concluded that the City's ordinance did not violate Washington Constitution Art. XI, § 11 even though it prohibited what state law allows. The trial court erred.

Direct review by this Court under RAP 5.2(a)(4) is appropriate.

The voters, in passing I-502, established timeframes for retail operations to begin. The timeframes are important to achieve the express goals of the Act: to drive out the illegal and non-regulated sales of marijuana within the state and to generate tax revenues. Allowing local jurisdictions to ban marijuana retail outlets results in the goals not being achieved in the timeframe directed by the voters. In addition, all parties agree that direct review is appropriate. This case raises the issue of whether local jurisdictions prohibiting retail marijuana operations allowed by state law violates Art. XI, § 11 of the State Constitution that provides: "Any 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." This presents a fundamental and urgent issue of broad public import that requires this Court's prompt and ultimate determination.

Plaintiff-intervenors request this Court to accept direct review of this time-sensitive issue.

I.
NATURE OF THE CASE AND DECISION

In 2012 voters in Washington State passed Initiative 502 that provided for a legalized, highly regulated market for the in-state productions, distribution, and sale of marijuana. One of I-502's principal features was its grant of authority to establish retail operations to sell marijuana throughout the state to ensure that the regulated marketplace displaces the existing black market. To achieve that goal, I-502 authorized the Liquor Control Board to issue licenses throughout the state for retail operations.

In 2013 the City enacted Ordinance No. 1872 that prohibited the establishment of marijuana retail outlets within its jurisdiction.

The plaintiffs MMH, LLC and Graybeard Holdings, LLC brought this action challenging the validity of Ordinance No. 1872 on a variety of grounds including that Ordinance No. 1872 conflicted with, and was preempted by, I-502. The City argued that Ordinance No. 1872 did not

conflict with I-502 and also contended that federal law preempted I-502.

Downtown Cannabis Company, LLC, Monkey Grass Farms, LLC, and JAR MGMT, LLC d/b/a/ Rainier on Pine, moved to intervene in this lawsuit for the purpose of addressing the state and federal preemption issues. The trial court granted the motion.

The plaintiffs and the City both moved for summary judgment. The plaintiff-Intervenors opposed the City's motion. The trial court only ruled on the state preemption issue. The trial court concluded that while I-502 allows the retail sale of marijuana throughout the state the City's prohibition of activities that are allowed by state law does not violate Article XI, § 11 of the Washington Constitution. Rather, the trial court reasoned that the Constitution is only violated if state law specifically requires a particular local jurisdiction to do something that the local jurisdiction by ordinance has refused to do. In other words, the trial court would only find Fife Ordinance No. 1872 invalid if I-502 required the City to have retail operations. In its order, the trial court ruled:

> The Court concludes that Fife Ordinance No. 1872 does not violate Washington State Constitution Art. XI, § 11. The Court concludes that there is no irreconcilable conflict between state law and Fife Ordinance No. 1872. The Court finds that while I-502 permits retail cannabis operations to be located throughout the state, and

> allows the Liquor Control Board to grant permits throughout the state, I-502 does not require that retail marijuana stores be located in Fife.

The trial court erred. Here, I-502 authorized and required the creation of a comprehensive, pervasive, state-wide marijuana retail market in order to drive out illegal sellers and criminal organization from the market. The city's ordinance prohibits the creation of such a market within its borders. A local jurisdiction does not have the authority to enact an ordinance that forbids what state law permits.

II.
ISSUES PRESENTED FOR REVIEW

1. Does I-502 allow retail operations of marijuana throughout the state?

2. Does Fife Ordinance No. 1872 prohibit operations within its jurisdiction?

3. Is Fife Ordinance No. 1872 invalid under Art. XI, § 11 because it prohibits what state law allows?

4. Is Fife Ordinance No. 1872 invalid under Art. XI, § 11 because it thwarts the purpose of I-502?

III.
GROUNDS FOR DIRECT REVIEW

A. Direct review by this Court is appropriate because fulfilling the goals and objectives of I-502 throughout the state is an urgent issue of broad public import that requires a prompt resolution.

RAP 4.2(a)(4) allows a party to seek direct review by this Court if the case involves " a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." *See, e.g.,*

Alverdo v. WPPSS,, 111 Wn.2d 424, 429, 759 P.2d 427 (1988)(whether mandatory drug testing for workers to obtain security clearance access in nuclear facility was preempted by federal law issue meeting requirements of RAP 4.2(a)(4); *Cougar Mountain Associates v. King County,* 111 Wn.2d 742, 765 P.2d 264 (1988)(issue of what is a proper basis for an agency to deny plat approval based upon SEPA grounds satisfies requirements of RAP 4.2(a)(4). This appeal satisfies those requirements.

Washington state citizens were explicit in enacting I-502: they wanted to replace criminal sanctions with a tightly regulated market that:

> (1) Allows law enforcement resources to be focused on violent and property crimes;
>
> (2) Generates new state and local tax revenue for education, health care, research, and substance abuse prevention; and
>
> (3) Takes marijuana out of the hands of illegal drug organizations and bring it under regulation tightly regulated, state licensed system similar to that for controlling hard alcohol.

Laws of 2013, c 3 § 1.

One of I-502's primary objectives was to take marijuana out of the hands of illegal drug organizations. In order to accomplish that

goal, the Initiative ensured that retail operations could be located throughout the state so that a private market, that would be tightly regulated, could provide comprehensive, lawful access to marijuana instead of through the illegal unregulated market. The City has now prohibited retail sales within the regulated market established by I-502 which is contrary to this goal.

A second goal of I-502 was to generate new tax revenue for education, health care, and substance abuse prevention. Allowing local jurisdictions to enact bans on the sales of retail operations that are permitted under I-502 is diminishing the amount of tax revenue that the voters envisioned when enacting I-502.

This is an issue that is continuing to be raised throughout this state and one that needs a final prompt resolution. Since the trial court's ruling in this case, another ban has been similarly upheld by the Chelan County Superior Court, and similar issues have been raised in Benton County, Lewis County and unincorporated Pierce County courts.[1] In addition, according to the Municipal Research and Services Center, forty-four local jurisdictions have prohibited I-502 businesses

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[1] *SMP Retail LLC v. City of Wenatchee,* Chelan County Superior Court No. 14-2-00555-0, Order Granting Summary Judgment, 10-17-2014; *Americanna Weed, LLC v City of Kennewick,* Benton County Superior Court No. 14-2-02226-1; *Nelson v City of Centralia,* Lewis County Superior Court, No. 14-2-00630-4; *Green Collar, LLC v Pierce County,* Pierce County Superior Court No. 14-2-11323-0

and sixty-seven have moratoriums in place.[2] Direct review by this Court under RAP 4.2(a)(4) is appropriate.

B. The trial court erred by imposing an additional factor into whether a local ordinance is invalid under Art. XI, § 11.

The trial court found, correctly, that I-502 allows retail marijuana operations throughout the state. There is no dispute that Fife Ordinance No. 1872 prohibits retail marijuana operations. The trial court should have concluded that because Fife Ordinance No. 1872 prohibits what is permitted under state law that it was invalid. The trial court failed to do so. The trial court erred.

1. I-502 allows marijuana retail operations throughout the state.

None of the parties in this litigation dispute that I-502 permits retail marijuana operations to be located anywhere in this state where they are licensed by the Liquor Control Board. Indeed, I-502 directed the Liquor Control Board to ensure retail locations are well distributed across the state by determining how many retail licenses should be issued within each county. The Liquor Control Board determined that 31 licensees should be allowed to operate throughout Pierce County.

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[2] MRSC, Recreational Marijuana: A Guide for Local Governments, available at (http://www.mrsc.org/subjects/legal/502/recmarijuana.aspx), accessed on November 12, 2014.

(Trial Court's Order Granting Partial Summary Judgment, p. 7, paragraph 9.)

2. Fife Ordinance No. 1872 prohibits retail marijuana operations within the City of Fife.

None of the parties in this litigation dispute that Fife Ordinance No. 1872 prohibits retail marijuana operations within the City of Fife.

3. Because Fife Ordinance No. 1872 prohibits what is permitted by I-502, it is invalid under Art. XI, § 11.

The test under Art. XI, § 11 is straightforward: if a local ordinance prohibits what state law permits, it is invalid:

> A local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits. Where a conflict is found to exist, under the principle of conflict preemption, the local regulation is invalid.

Parkland Light and Water Co. v. Tacoma-Pierce County Bd. of Health, 151 Wn.2d 428, 433, 90 P.3d 37 (2004).

The trial court found that I-502 does not require the City of Fife to have retail marijuana operations within its city. (That is correct. I-502 does not require any local jurisdiction to recruit retail operations to exist within its borders. Instead, retail operations are allowed to operate anywhere in the area for which the Liquor Control Board has granted a permit.) The trial court ruled that because Fife was not required to have retail operations within its jurisdiction, it could

prohibit them from its jurisdiction. That analysis was flawed and incorrect. The test is straightforward: does the local ordinance prohibit what is allowed by state law. Ordinance 1872 prohibits what is allowed by I-502. Therefore, the Ordinance is invalid.

A case recently decided in the Court of Appeals held, in a similar situation, that a local jurisdiction's ordinance was invalid because it conflicted with state law was *State of Washington, Dep't of Ecology v. Wahkiakum Cy.*, _____ Wn.App.2d ____, _____ P.3d. ____, 2014 WL 5652318 (Nov. 14, 2014). The case involved RCW 70.95J that established a biosolids program. Under the statute, Class A biosolids may be used for land applications that are accessible to the public. Class B biosolids are restricted to land applications that are not accessible to the public. Class A biosolids make up 12% of the biosolids produced in Washington. Class B biosolids make up 88% of biosolids produced in this state.

In 2011 Wahkiakum passed Ordinance No. 151-11 that prohibited any Class B biosolids from being applied to any land within the county. The Department of Ecology brought suit against the County arguing that the ordinance violated Article XI, § 11 of the Washington Constitution. Both parties moved for summary judgment. The trial court ruled in favor of the County finding no violation. On appeal, the

Court of Appeals reversed on three bases, two of which apply here. First, the ordinance conflicted with state law and second, the ordinance thwarted the legislature's purpose.

The Court of Appeals concluded that the ordinance conflicted with state law because it prohibited what was allowed under state law. The Dept. of Ecology had the authority to issue permits for land application of class B biosolids provided that the application for the permit met certain standards. Wahkiakum's ordinance, however, prohibited any use of Class B biosolids within the county. The Court ruled:

> Even if the County had authority to more strictly regulate land application of biosolids, it does not have the authority to prohibit the land application of class B biosolids when such application is allowed under a comprehensive regulatory scheme that has been enacted in accordance with legislative directive. [Citation omitted.]
>
> ...
>
> The legislature specifically directed Ecology to adopt rules to implement a biosolids management program that "to the maximum extent possible" ensures that biosolids are "reused as a beneficial commodity. [Citation omitted.] Under that directive, Ecology adopted a regulatory scheme that specifically grants permits for land application of class B biosolids and, thus, created a right to land application of

> class B biosolids when a permit is acquired.

(*Id.* at 7-8.)

The same is true here. The City's ordinance prohibits what is allowed under state law. I-502 directed the Liquor Control Board to adopt rules to implement the statewide production, distribution, and sale of marijuana. While the City may impose reasonable land use restrictions that are imposed on other businesses it cannot completely ban retail marijuana outlets.

The Court of Appeals also concluded the Wahkiakum's Ordinance thwarted the legislature's purpose. The purpose of the statute was to reuse biosolids to the maximum extent possible. The Court agreed with Ecology that

> [I]f local governments have the power to ban land application of biosolids, land application of biosolids could be banned throughout the state, clearly thwarting the legislature's purpose of recycling biosolids through land application rather than landfill disposal or incineration.

Id. at 9. The Court rejected Wahkiakum's argument that Ecology could not show that all counties would ban the application of Class B biosolids:

> The County responds that Ecology's argument must fail because Ecology cannot show that all counties would ban

> the land application. But, the County fails to recognize the salient point in Ecology's argument – if all counties had the power to determine whether to ban land application of class B biosolids, then the entire statutory and regulatory scheme enacted to maximize the safe land application of biosolids would be rendered meaningless. [Citations omitted.] The County's ordinance thwarts the legislature's purpose by usurping state law and replacing it with local law. Therefore, we hold that the County's ordinance is unconstitutional under article XI, § 11.

Id. at 10-11. The same is true here. Under the trial court's analysis, each local jurisdiction has the ability to ban marijuana retail outlets – this would give the local jurisdictions the ability ban marijuana retail outlets statewide thwarting the voter's intent and rendering I-502 meaningless.

CONCLUSION

All parties to this action are requesting this Court to take direct review of this appeal. Whether local jurisdictions have the authority to ban retail outlets for marijuana is an issue that is of urgent concern to the voters and to local governments. Accordingly, Plaintiff-Intervenors request this Court to accept direct review.

Dated this _____ day of November, 2014.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Gina A. Mitchell, declare that on November 13, 2014, I caused the following pleadings:

1. Intervenor-Appellants' Statement of Grounds for Direct Review

together with this Declaration of Service, to be served on counsel for all parties as follows:

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

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