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PERSPECTIVE

California Supreme Court Review: February 2023



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This month's column examines the possible implications of the California Supreme Court's forthcoming decision in *Wheeler v. Appellate Division (People)*, which has been fully briefed but oral argument has not been scheduled. The Court's decision could impact the authority local governments have to enforce their cannabis regulations and other municipal ordinances more generally.

This case involves Emily Wheeler, an octogenarian co-owner of a commercial building in Los Angeles, whose tenant began to illegally sell cannabis from the building. In June 2019, Wheeler, the building's co-owner, and their tenant were charged criminally under Los Angeles Municipal Code (LAMC) Section 104.15 (a) 1 and (b) 4 (which makes it a misdemeanor to lease or rent property to an unlicensed cannabis business and is a strict liability offense, meaning the landlord need not have knowledge of the tenant's unlicensed business) and LAMC Section 12.21A.1. (a) (which makes it unlawful to use

a building in violation of zoning permits). Wheeler sought dismissal of the prosecution based on two arguments: that the court had the discretion under Penal Code (PC) Section 1385 to dismiss the charges "in the interest of justice" or, in the alternative, that the LAMC provisions were unconstitutionally vague. The trial court granted the dismissal pursuant to PC Section 1385, pointing to her lack of knowledge of her tenant's illegal activity as a reason to exercise discretion "in the interest of justice," and did not address Wheeler's constitutional argument. The State appealed.

The Appellate court reversed the trial court's decision. And, for the first time, addressed a new argument raised by Wheeler: that LAMC Sections 104.15(a)1, (b)4, and 12.21A.1.(a) were preempted by Health and Safety Code (HSC) Section 11366.5, subdivision (a), which makes it a misdemeanor to knowingly lease or rent a building "for the purpose of unlawfully manufacturing, storing, or distributing any controlled substance." *Wheeler v. App. Div. (People)*, 72 Cal. App.5th 824, 840 (2021). Wheeler argued that if the HSC preempted the LAMC, then she could not be

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found liable because she lacked knowledge of the unlicensed cannabis activities engaged in by her tenant as required by the HSC, whereas the LAMC has no such knowledge requirement. The Court of Appeals rejected Wheeler's argument, holding that the local ordinances were not preempted by state law. *Id.* at 842. Emphasizing that state preemption is "not lightly presumed," particularly where "home rule" or charter cities such as Los Angeles are involved, the Court of Appeals also relied on a growing body of caselaw specific to local cannabis regulation that finds local ordinances are not preempted by

state law. *Id.* at 836-840. The California Supreme Court granted review to resolve the question of preemption.

California is home to the nation's largest state-legal cannabis market, but the illicit cannabis market is still prevalent in many parts of the State. Given the pervasiveness of illegal cannabis operations throughout California, the Court's upcoming decision in Wheeler is one to watch for many commercial landlords. If the Court finds that state law preempts the local ordinances, then Los Angeles commercial building owners, and other owners in municipalities with similar ordinances, would no longer face criminal li-

ability under a strict liability standard. Landlords would only face criminal penalties for the illegal cannabis activities of their tenants if they have knowledge that such activities are being conducted on their properties. The downside of such a ruling is that some landlords may turn a blind eye to the conduct of their tenants to preserve a defense, and diminish efforts by municipalities to "combat the negative impact of unlicensed commercial cannabis activity on the health, safety, and welfare" of their residents. *Id.* at 841.

More broadly, the Court's decision in this case will impact – one

way or another – the ability of California municipalities to enforce their ordinances regulating cannabis businesses. By instituting a strict liability standard, municipalities are not required to litigate whether a violator possessed the requisite knowledge when violating an ordinance. Municipalities and local governments sometimes choose a strict liability standard believing such a standard best protects their residents' health, safety, and welfare and is easier for law enforcement to prosecute. But if the Court finds preemption, municipalities would be required to follow a more burdensome, higher liability standard.