DUAL SOVEREIGNTY — PREEMPTION — CALIFORNIA SUPREME COURT UPHOLDS LOCAL ZONING BAN ON MEDICAL MARIJUANA DISPENSARIES. — *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 300 P.3d 494 (Cal. 2013).

In 1996, the citizens of California voted to enact Proposition 215 and become one of the first states in the nation to decriminalize medical marijuana.[1] The result was the Compassionate Use Act of 1996[2] (CUA), expanded and clarified by the legislature in 2003 with the Medical Marijuana Program[3] (MMP). Recently, in *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*,[4] the California Supreme Court upheld a local zoning ban on medical marijuana dispensaries, despite these state laws. The court read both the state laws and the state preemption test narrowly, avoiding the more delicate question of whether California's decriminalization of medical marijuana is preempted by the federal Controlled Substances Act[5] (CSA). Thus, by allowing Riverside to restrict its own residents' medical marijuana access, the California Supreme Court may have forestalled more significant challenges to California's legalization project at large.

Inland Empire Patients Health and Wellness Center (Inland Empire) had operated a medical marijuana dispensary in Riverside, California, since 2009.[6] Located in a commercial district and composed of the many colorful stalls of various sellers of cannabis products, Inland Empire said it operated "for the sole purpose of forming an association of qualified individuals who collectively cultivate medical marijuana and redistribute [it] to each other."[7] The same year it began operations, Inland Empire was put on notice by Riverside's Community Development Department that its medical marijuana operations were locally banned.[8] As Inland Empire continued to operate, the city moved for a preliminary injunction.[9] The state trial court granted the injunction against Inland Empire and a host of other named and unnamed defendants, reasoning that Riverside's zoning regulations were particularly appropriate in light of the federal-state conflict over medical marijuana.[10]

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[1] Christopher S. Wren, *Votes on Marijuana Are Stirring Debate*, N.Y. TIMES, Nov. 17, 1996, at A16.

[2] CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

[3] *Id.* §§ 11362.7–.83 (West 2007 & Supp. 2013).

[4] 300 P.3d 494 (Cal. 2013).

[5] 21 U.S.C. §§ 801–904 (2012).

[6] *Inland Empire*, 300 P.3d at 497.

[7] *Id.* at 498 n.4 (alteration in original).

[8] *Id.* at 498.

[9] *Id.*

[10] *See id.* at 498–99.

California's Fourth District Court of Appeal affirmed.[11] Writing for the panel, Justice Codrington[12] held that California state law did not preempt a municipal zoning ordinance's complete ban on medical marijuana dispensaries, and thus the granting of a preliminary injunction was proper on the ground that Inland Empire constituted a public nuisance per se.[13] She identified a presumption in favor of upholding municipal zoning ordinances, placing upon the defendants the burden of proving that the local law was preempted.[14] Noting that neither the CUA nor the MMP expressly refers to local zoning laws,[15] that the CUA expressly declines to preempt laws prohibiting conduct that endangers others,[16] and that the MMP sanctions only "lawful" medical marijuana dispensaries,[17] Justice Codrington comfortably concluded that the local zoning ban was valid.[18]

The Supreme Court of California affirmed.[19] Writing for a unanimous court, Justice Baxter held that Riverside's total ban on medical marijuana dispensaries was not preempted by California's medical marijuana laws.[20] He opened his analysis with a summary of the federal CSA's classification of marijuana as a Schedule I substance and its provision that marijuana has "no currently accepted medical use,"[21] and characterized California state law as "similar[]" to federal law except for certain "limited exceptions."[22] Noting that the federal law is still fully enforceable, he declined to weigh in on whether this apparent federal-state conflict could justify Riverside's total ban.[23]

Justice Baxter then proceeded to frame the discussion of state preemption of local law. He explained that the exercise of local police power is expressly recognized in the California Constitution and thus presumptively valid — especially where significant local interests may vary — unless in conflict with state law.[24] And such a conflict will only be found where local law duplicates, contradicts, or acts in an area fully occupied by state law.[25] Emphasizing the narrow scope of the

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[11] City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 133 Cal. Rptr. 3d 363, 367 (Ct. App. 2011).

[12] Justice Codrington was joined by Presiding Justice Hollenhorst and Justice Miller.

[13] *Inland Empire*, 133 Cal. Rptr. 3d at 367, 378–79.

[14] *See id.* at 371.

[15] *See id.* at 372.

[16] *Id.* at 374.

[17] *Id.* at 376.

[18] *See id.* at 378.

[19] *Inland Empire*, 300 P.3d at 513.

[20] *Id.* at 496.

[21] *Id.* at 497 (quoting 21 U.S.C. § 812(b)(1)(B) (2012)) (internal quotation mark omitted).

[22] *Id.*

[23] *See id.* at 497, 499.

[24] *Id.* at 499–500; *see also id.* at 508.

[25] *Id.* at 499.

state law at issue,[26] Justice Baxter acknowledged the expansive purpose of the CUA — "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes"[27] — but concluded that "the operative steps the electorate took toward these goals were modest."[28] He noted that the same was true of the MMP[29] and returned multiple times to the refrain that these laws did nothing more than exempt particular people, engaged in particular conduct, from particular state sanctions.[30] Turning to the potential preemptive effect of the CUA and the MMP in the zoning context, Justice Baxter applauded the reasoning of two California Court of Appeal decisions that had found no conflict.[31]

Justice Baxter devoted the rest of his analysis to explaining why no preemption existed in the instant case. He first dispensed with the notion of express preemption, determining that nothing in the statutes guarantees the availability of locations where medical marijuana dispensaries may exist, or "requires" local governments to accommodate such uses.[32] He then considered the matter of implied preemption. Explaining that duplication was clearly not at issue and that contradiction had not occurred because one could comply with both local and state law by simply refraining from involvement with medical marijuana, Justice Baxter was left to determine whether the legislature intended to occupy the field of medical marijuana regulation.[33] He emphasized that the state had created no comprehensive regulatory scheme[34] and that different localities would have differing abilities to accommodate medical marijuana dispensaries or to handle the poten-

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[26] *See id.* at 501–03 (citing Ross v. RagingWire Telecomms., Inc., 174 P.3d 200 (Cal. 2008) (holding that the CUA did not protect an employee from being discharged for medical marijuana use); People v. Mentch, 195 P.3d 1061 (Cal. 2008) (holding that the CUA's exemption for "primary caregivers," *id.* at 1063, could not protect a defendant who only occasionally cared for patients)).

[27] *Id.* at 500 (alteration in original) (quoting CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2007)) (internal quotation marks omitted).

[28] *Id.*

[29] *Id.*

[30] *See id.* at 503; *see also id.* at 506, 509.

[31] *See id.* at 503–06 (addressing City of Claremont v. Kruse, 100 Cal. Rptr. 3d 1 (Ct. App. 2009) (dealing with a two-year moratorium on new medical marijuana dispensaries where defendant had not exhausted his administrative options); Cnty. of L.A. v. Hill, 121 Cal. Rptr. 3d 722 (Ct. App. 2011) (dealing with a potentially surmountable restriction on medical marijuana dispensaries within one thousand feet of certain public facilities, such as playgrounds and public libraries)).

[32] *Id.* at 506; *see also id.* at 506–07. Justice Baxter also rejected the city's claim that the state statutes expressly *authorize* total bans, noting that local police power preexists the statutes and does not need to be delegated by the state. *See id.* at 507 n.8.

[33] *Id.* at 507.

[34] *Id.* at 508. This determination allowed Justice Baxter to distinguish *Blue Circle Cement, Inc. v. Board of County Commissioners*, 27 F.3d 1499 (10th Cir. 1994), which the court had previously interpreted to stand for the proposition that when a statute seeks to promote something and yet permits more stringent local regulation, it nevertheless does not permit total local bans. *See Inland Empire*, 300 P.3d at 511.

tial increase in crime that could follow.[35] He further explained that, in accordance with *Nordyke v. King*,[36] the exemption of some act from state criminal prohibition does not "*mandate*" that local authorities authorize such act, but merely "permit[s]" them to do so if they so choose.[37] In closing, Justice Baxter noted that the court's analysis made it unnecessary to address the question of federal preemption[38] and highlighted the "delicate balance" and "sensitivity in federal-state relations" that characterize the present situation.[39]

Justice Liu concurred, writing separately "to clarify the proper test for state preemption of local law."[40] He explained that the second of the three forms of preemption — contradiction — should be assessed more broadly, applying not only to activities that state law requires or demands, but also to activities that state law authorizes or permits.[41] He thus commended the federal statement of preemption where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[42] Nevertheless, Justice Liu concluded that the court's opinion was correct because there was no clear intent by the legislature to authorize or even promote the operation of medical marijuana dispensaries.[43]

By adopting a narrow reading not only of the state's medical marijuana laws, but also of the test for state preemption of local law, the California Supreme Court avoided an interpretation of the CUA and the MMP that may have been problematic if subjected to federal scrutiny. Given the complicated nature of the federal preemption inquiry and the lack of guidance from the U.S. Supreme Court, *Inland Empire* may have actually protected marijuana access for residents of California and other similarly situated states, at least for the time being, at the expense of local access for the residents of Riverside.

Although the court seemed to imply that its holding was dictated by precedent[44] and that lower courts have all come to the same conclu-

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[35] *See Inland Empire*, 300 P.3d at 508.

[36] 44 P.3d 133 (Cal. 2002) (addressing the exemption of gun shows from the state prohibition on guns in public buildings).

[37] *Inland Empire*, 300 P.3d at 510 (quoting *Nordyke*, 44 P.3d at 138).

[38] *See id.* at 512 n.14.

[39] *Id.* at 513.

[40] *Id.* (Liu, J., concurring).

[41] *Id.*

[42] *Id.* at 514 (quoting Sprietsma v. Mercury Marine, 537 U.S. 51, 64 (2002)) (internal quotation mark omitted).

[43] *Id.*

[44] *See id.* at 496 (majority opinion) ("We have consistently maintained that the CUA and the MMP are but incremental steps toward freer access to medical marijuana, and the scope of these statutes is limited and circumscribed."); *id.* at 501 ("Our decisions have stressed the narrow reach of these statutes.").

sion,[45] the *Inland Empire* decision introduced a narrow interpretation of the state medical marijuana laws — and of the state preemption test — that goes beyond previous decisions. The previous high court opinions endorsing a narrow reading of the medical marijuana statutes did not address local authority and were more directly compelled by legislative text.[46] In this case, rather than confining the determination of legislative intent to the text,[47] the court chose to derive such intent at least in part from its understanding of the Proposition 215 campaign.[48] Notably, while the proponents of Proposition 215 may have campaigned narrowly, the initiative's opponents focused their message on the law being too expansive; the citizens of California passed Proposition 215, expansive language included,[49] while hearing both sides.[50] Furthermore, the lower court decisions applauded by *Inland Empire* fell short of addressing a total local ban,[51] and some of the lower

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[45] *See id.* at 503 ("Court of Appeal decisions have consistently held that these statutes . . . do not preempt local land use regulation . . . , even when such regulation amounts to a total ban . . . .").

[46] The first case cited by the court as precedent for a narrow reading of the medical marijuana statutes was *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008), which addressed whether public policy or the California Fair Employment and Housing Act (FEHA), CAL. GOV'T CODE § 12900 (West 2011), requires employers to accommodate medical marijuana usage. The *Ross* court held unanimously that public policy could not require accommodation, because of the inconsistency with federal law, *see Ross*, 174 P.3d at 210 (Kennard, J., concurring and dissenting), but split over the application of FEHA, with the majority deciding that it did not protect medical marijuana patients, *see id.* at 208 (majority opinion). The second case was *People v. Mentch*, 195 P.3d 1061 (Cal. 2008), which addressed the proper scope of the categorical exemption for "primary caregivers." *Id.* at 1063. Because the public policy determination under *Ross* was dictated by the federal CSA, and because *Mentch* involved statutory interpretation of a matter expressly addressed by the medical marijuana statutes, *see id.* at 1066–70, the reasoning in these cases can be characterized as more textual than that in *Inland Empire*.

[47] The court's preemption test turns on legislative intent, as "California courts will presume, absent a clear indication of preemptive intent from the Legislature, that [traditional local] regulation is *not* preempted by state statute." *Inland Empire*, 300 P.3d at 499 (quoting Big Creek Lumber Co. v. Cnty. of Santa Cruz, 136 P.3d 821, 827 (Cal. 2006)) (internal quotation mark omitted).

[48] *See id.* at 502 ("[T]he initiative's proponents had 'consistently described the proposed measure to the voters as motivated' only 'by the desire to create a narrow exception to the criminal law' . . . ." (quoting *Ross*, 174 P.3d at 206)); *id.* at 506 ("[T]he initiative statute's *actual* objectives, as presented to the voters, were 'modest' . . . ." (emphasis added) (quoting *Ross*, 174 P.3d at 206)).

[49] Among other goals, the CUA declared that its purpose was "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of . . . *any* . . . illness for which marijuana provides relief." CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2007) (emphasis added).

[50] *See* Michael Vitiello, *Why the Initiative Process Is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215*, 43 MCGEORGE L. REV. 63, 66–67 (2012).

[51] The first of these cases, *City of Claremont v. Kruse*, 100 Cal. Rptr. 3d 1 (Ct. App. 2009), dealt only with a moratorium on new medical marijuana dispensaries, albeit eventually extended over two years. The second, *County of Los Angeles v. Hill*, 121 Cal. Rptr. 3d 722 (Ct. App. 2011), dealt only with a restriction on medical marijuana dispensaries within one thousand feet of cer-

courts that did address a total local ban found it preempted by state law.[52] These latter courts applied a preemption test more closely resembling the "obstacle to the . . . full purposes" test advocated by Justice Liu in his concurrence.[53] While the *Inland Empire* majority opinion did expressly reject the notion that the state medical marijuana laws "authorize" any activities,[54] its statement of the actual preemption test indicates that local governments would not be constrained by the statutes even if those statutes did constitute an authorization.[55]

By narrowly reading the state medical marijuana laws and narrowly applying the state preemption test, the California Supreme Court avoided the potential for implied federal conflict preemption.[56] Although the CSA expressly limits preemption to cases of "positive conflict" only,[57] the text of that clause does not end the preemption inquiry. In *Wyeth v. Levine*,[58] the U.S. Supreme Court considered a similar saving clause that referred to "direct and positive conflict,"[59] and proceeded to engage in both impossibility and obstacle conflict analyses.[60] Furthermore, the Court in *International Paper Co. v. Ouellette*[61] determined that saving clauses should not be interpreted so as to undermine the "full purposes and objectives of Congress."[62] As

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tain public facilities, which could potentially be surmounted by obtaining a business license, conditional use permit, and/or zoning variance.

[52] *See* Cnty. of L.A. v. Alt. Medicinal Cannabis Collective, 143 Cal. Rptr. 3d 716 (Ct. App. 2012), *transferred with directions to vacate*, 304 P.3d 162 (Cal. 2013); City of Lake Forest v. Evergreen Holistic Collective, 138 Cal. Rptr. 3d 332 (Ct. App. 2012), *transferred with directions to vacate*, 303 P.3d 1185 (Cal. 2013).

[53] *Inland Empire*, 300 P.3d at 514 (Liu, J., concurring) (quoting Sprietsma v. Mercury Marine, 537 U.S. 51, 64 (2002)); *see Alt. Medicinal Cannabis*, 143 Cal. Rptr. 3d at 725 (resting analysis on the principle that nothing which is authorized by state law can be banned by local authorities); *Evergreen Holistic*, 138 Cal. Rptr. 3d at 343 (same).

[54] *Inland Empire*, 300 P.3d at 510 (internal quotation marks omitted).

[55] *See id.* at 500 ("The 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands. Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (citations omitted)).

[56] Federal conflict preemption will generally be implied in two cases, "where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[57] 21 U.S.C. § 903 (2012).

[58] 129 S. Ct. 1187 (2009).

[59] *Id.* at 1196 (quoting Pub. L. No. 87-781, § 202, 76 Stat. 793 (1962)) (internal quotation marks omitted). Justice Alito explained that this provision "simply recognize[d] the background principles of conflict pre-emption" and thereby failed to "displace [the Court's] conflict-pre-emption analysis." *Id.* at 1221 n.4 (Alito, J., dissenting).

[60] *See id.* at 1193–94 (majority opinion).

[61] 479 U.S. 481 (1987).

[62] *Id.* at 493–94 (quoting Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)) (internal quotation marks omitted).

such, the CSA may have preemptive effect not only in cases of impossibility conflict, but also in cases of obstacle conflict. In *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board*,[63] the Court held that a state law that authorized conduct forbidden by federal law indeed created an obstacle to the full purposes and objectives of Congress.[64] Finding that California's medical marijuana statutes do not "authorize" any particular conduct was, therefore, key to avoiding *Michigan Canners*–type scrutiny. And finding that the state statutes do not require any particular course of action on the part of local authorities ensured that it would be reasonably possible to comply with both state and local law.

As it stands, decisionmakers disagree over the extent to which the federal CSA preempts state marijuana decriminalization projects. Congressional intent on this subject is obscured by the fact that the CSA preemption clause hardly generated any legislative history at all.[65] As the U.S. Supreme Court has yet to speak clearly to the issue,[66] state courts and other political actors have come to diverse conclusions.[67] For example, in considering whether a state medical marijuana identification card program was preempted by the CSA, a California appellate court in *County of San Diego v. San Diego NORML*[68] determined that Congress had probably meant to exclude obstacle conflict analysis from the scope of CSA preemption, but that in any event the identification cards did not constitute an obstacle to federal law because they did not imply immunity from federal law.[69] By contrast, considering the same question, the Oregon Supreme Court in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*[70] determined that obstacle conflict analysis did apply and that identification cards purporting to authorize conduct which federal law pro-

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[63] 467 U.S. 461 (1984).

[64] *Id.* at 478.

[65] *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 13 (2013).

[66] The two U.S. Supreme Court cases so far that have dealt with the intersection of CSA marijuana regulation and state law are *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) (holding that the CSA allows no medical necessity defense to its prohibition on manufacturing and distributing marijuana, regardless of state law, based on express language that marijuana has "no currently accepted medical use," *id.* at 491 (quoting 21 U.S.C. § 812 (2012))), and *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that applying the CSA to purely intrastate growers and users of marijuana for medical purposes did not constitute a violation of the Commerce Clause, *id.* at 9).

[67] *See generally* TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS (2012), *available at* http://www.fas.org/sgp/crs/misc/R42398.pdf.

[68] 81 Cal. Rptr. 3d 461 (Ct. App. 2008).

[69] *Id.* at 479–82.

[70] 230 P.3d 518 (Or. 2010) (en banc).

hibits were preempted.[71] Similarly, another California appellate court found a city zoning ordinance preempted to the extent that it provided *permits* to medical marijuana dispensaries,[72] whereas a Michigan appellate court found that a state law which *required* cities to accommodate medical marijuana dispensaries was not preempted.[73] While at least two state governors have vetoed or threatened to veto medical marijuana legislation on the ground that it would not survive federal scrutiny,[74] at least two other states have seriously considered growing medical marijuana and distributing it to their citizens directly.[75] Amidst this uncertainty, Justice Baxter's opinion took the safest approach.

By interpreting state law so as to limit local medical marijuana access, the California Supreme Court may have shielded state legalization efforts from federal scrutiny for the time being.[76] Justice Baxter's conservative approach thus allows for the continued state-by-state organic development of marijuana policy, such that if the preemption question does someday reach the U.S. Supreme Court, public opinion may have dramatically shifted in the interim.[77] Should that day come, Congress's "rational basis" may not look so rational.[78] Congress may even change the CSA itself.

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[71] *Id.* at 527–29.

[72] *See* Pack v. Superior Court, 132 Cal. Rptr. 3d 633, 652 (Ct. App. 2011).

[73] *See* Ter Beek v. City of Wyoming, 823 N.W.2d 864, 866, 873 (Mich. Ct. App. 2012), *appeal granted*, 828 N.W.2d 381 (Mich. 2013).

[74] *See* Mikos, *supra* note 65, at 6 n.12 (former Governor Pete Wilson of California and Governor Martin O'Malley of Maryland).

[75] *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1432 (2009) (New Mexico and Maine).

[76] In fact, the Department of Justice may be particularly on alert for opportunities to challenge state laws since two states recently legalized *recreational* marijuana. *See* Michael Tarm, *Former DEA Heads: Nullify Colorado, Washington Marijuana Laws*, HUFFINGTON POST (Mar. 5, 2013, 3:53 PM), http://www.huffingtonpost.com/2013/03/05/dea-marijuanan_2810347.html.

[77] The Pew Research Center recently reported for the first time that a majority (52%) of Americans support the legalization of marijuana. PEW RESEARCH CTR., MAJORITY NOW SUPPORTS LEGALIZING MARIJUANA (2013), *available at* http://www.people-press.org/files/legacy-pdf/4-4-13%20Marijuana%20Release.pdf. Interestingly, public support for gay marriage when the U.S. Supreme Court decided its 2013 gay marriage cases was at a similar level (51%) as current marijuana legalization support. *See* PEW RESEARCH CTR., IN GAY MARRIAGE DEBATE, BOTH SUPPORTERS AND OPPONENTS SEE LEGAL RECOGNITION AS 'INEVITABLE' (2013), *available at* http://www.people-press.org/files/legacy-pdf/06-06-13%20LGBT%20General%20Public%20Release.pdf.

[78] Particularly, should states succeed in crafting legislation and regulation that prevents the diversion of medical marijuana into illegal recreational markets, it may no longer be obvious that failure to regulate intrastate medical marijuana "leave[s] a gaping hole in the CSA." Gonzales v. Raich, 545 U.S. 1, 22 (2005).