

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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No. \_\_\_\_\_

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CORDELIA J. DONNELLY,  
Petitioner,

v.

CITY OF SAN MARINO,  
Respondent.

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After an Opinion by the Court of Appeal,  
Second Appellate District, Division 4  
(Case No. B294806)

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On Appeal from the Superior Court of Los Angeles County  
(Case No. BS170770, Honorable James C. Chalfant, Judge)

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**PETITION FOR REVIEW**

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## **Introduction**

Pursuant to California Rule of Court 8.500(a)(1), Plaintiff and Petitioner Cordelia Donnelly (Donnelly) petitions this Court to review the unpublished decision of the Court of Appeal, Second Appellate District, Division Four, filed April 9, 2020, entitled *Cordelia J. Donnelly v. City of San Marino*, a copy of which is attached hereto as Exhibit A (Decision Below).<sup>1</sup>

## **Question Presented**

Is a local ordinance prohibiting homeowners from adding accessory dwellings to their property that don't meet local criteria preempted under *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 56 Cal. 4th 729 (2013), by a state law requiring local agencies to provide ministerial approval to accessory dwellings that meet state criteria?

## **Reasons for Granting Review**

The Court should grant this petition so it can resolve the important legal issue of whether its 2013 decision in *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, supplies the legal standard and method of analysis for lower

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<sup>1</sup> 2020 WL 1808498 (Cal. Ct. App. Apr. 9, 2020). Citations to the decision are to the Westlaw cite.

courts to determine whether local accessory dwelling unit ordinances are preempted by Cal. Gov't Code § 65852.2(a)(6). This legal issue in turn is important to the state's legislative policy objective of increasing rental housing supply.

Section 65852.2<sup>2</sup> is the key part of a statewide comprehensive framework to encourage and facilitate by-right development of accessory dwellings for existing single-family homes, in pursuit of overarching state objectives to reduce rental housing costs and increase the availability of rental housing. Under Section 65852.2, local agencies are to either provide ministerial approval for permits to build accessory dwelling units on lots with existing single-family homes that meet the criteria of Section 65852.2(a)(1)(D), or adopt a local ordinance under Section 65852.2(a)(1)(A) that accomplishes the same result.

As particularly relevant to this case, Section 65852.2(a)(1)(D)(v) establishes a statewide maximum allowed floor space for detached accessory dwellings of 1,200 square feet and imposes no minimum lot size. Subsection (a)(6)<sup>3</sup> allows local

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<sup>2</sup> Subsequent references to Section 65852.2 are to the California Government Code as in effect in 2017.

<sup>3</sup> Subsequent references to Subsections are to subdivisions of Section 65852.2(a) as in effect in 2017.

agencies to require that the permit applicant be an owner occupier but imposes no long-term requirement that the homeowner remain an occupant. Subsection (a)(4) expressly preempts all inconsistent local ordinances. Gov't Code § 65852.2(a)(4) (“In the event that a local agency has an existing accessory dwelling unit ordinance that fails to meet the requirements of this subdivision, that ordinance shall be null and void . . . and that agency shall thereafter apply the standards established in this subdivision[.]”). Further, Subsection (a)(6) prohibits local agencies from using any “additional standards, other than those provided in this subdivision” to deny an accessory dwelling permit. Gov't Code § 65852.2(a)(6).

This case challenges three inconsistent provisions in the Defendant City of San Marino's applicable ordinance: (1) a minimum lot size requirement of 12,000 square feet, (2) a maximum unit size of 1,000 square feet, and (3) a requirement that the applicant record a deed-restriction that permanently foregoes the right to rent out both the primary and accessory dwellings as a condition of permit approval. Donnelly contends that these limitations are preempted by Section 65852.2(a)(4).

The Court of Appeal below did a cursory preemption analysis that turned mechanically on two points: the fact that Subsection (a)(1)(B)(i) requires local accessory dwelling unit ordinances to “[i]mpose standards on accessory dwelling units that include, but are not limited to,” a series of specific topics (including maximum unit size, but not lot size), and that Section 65852.2(c) allows local agencies to establish minimum and maximum unit sizes for accessory dwellings. In the Court of Appeal’s reading, the “including but not limited” qualifier on the list of topics that a local ordinance must cover means that cities can add any unenumerated type of restriction on accessory dwellings, despite Subsection (a)(4)’s explicit preemption of inconsistent local ordinances, and Subsection (a)(6)’s prohibition on local agencies using any “additional standards” to deny accessory dwelling permits. Similarly, in reading Subsection (a)(1)(D)(v)’s specific statewide standard maximum unit size of 1,200 square feet alongside Subsection (c)’s more general allowance for setting minimum and maximum sizes, the Court of Appeal hastily concluded that the more general provision controlled over the specific, allowing cities to set the maximum size of allowed accessory dwellings as small



as they wish without triggering Subsection (a)(4)'s express preemption.

But this Court has established a far more searching preemption analysis for lower courts to use when asking whether a state law preempts local zoning powers. In *City of Riverside*, this Court's inquiry was whether the state law established a complete framework that encouraged or required a certain type of land use. 56 Cal. 4th at 755. While *City of Riverside* holds that the 1996 Compassionate Use Act did not preempt local zoning powers to the point of requiring cities to allow cannabis distribution businesses at any particular location within their boundaries, the Court arrived at this conclusion because the Compassionate Use Act did not establish a comprehensive program to ensure that a particular land use was accomplished despite the zoning power of local governments.

If *City of Riverside's* rule and methodology were applied in this case, it is a much closer question whether Section 65852.2(a) preempts the restrictions on accessory dwellings in San Marino's ordinance. That is because Section 65852.2(a) does, in fact, set up a statewide framework requiring a specific by-right land use in

every city and county in California, with minimal if any local variation in conditions allowed.

The California Legislature has found that by-right accessory dwellings, as discussed below, are an essential tool for adding desperately needed supply if California is to overcome its ongoing and worsening housing shortage. The legislature has shown a willingness to facilitate and encourage their development through state legislation that provides for their by-right development under statewide criteria, and explicitly preempts local ordinances that fail to provide similar facilitation.

This Court should grant this petition in order to answer the increasingly important legal question of whether local governments remain free to evade Section 65852.2's imperative of by-right accessory dwelling development, or if incompatible local ordinances are truly "null and void" as intended by the legislature.

**Background – California's Housing Shortage  
and the Legislature's Statewide Program for  
By-Right Development of Accessory Dwellings  
by Owners of Existing Single-Family Homes**

California faces a severe and worsening housing shortage: the Golden State has one of the least affordable housing costs in the nation. Coastal California is even worse. The poor have

suffered under these conditions for decades, and the crisis has progressed to impact middle class households as well. Publicly subsidized and rent controlled rental housing cannot mitigate or even arrest these conditions. California needs a massive increase in its supply of rental housing of all types if we all hope to be able to afford to live and work here.

As numerous academic and government studies have recently reported, two of the most significant obstacles to increasing housing supply in California are the complexity of the local government development approval process, and relatedly the resistance of local governments to new housing development. *See* Legislative Analyst's Office, *California's High Housing Costs: Causes and Consequences* (Mar. 17, 2015);<sup>4</sup> The White House, *Housing Development Toolkit* (Sept. 2016).<sup>5</sup> The authors of these studies recommend generally that the development permitting process needs to be simplified, and that opportunities for by-right housing development be increased.

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<sup>4</sup> Available at <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf>.

<sup>5</sup> Available at [https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing\\_Development\\_Toolkit%20f.2.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf)

One of the other major impediments to increased housing supply in coastal California is scarcity of land available for new development. *See generally California's High Housing Costs* at 12-13.

Given these constraints, there is an important potential reservoir of new rental housing that can be unleashed in California: accessory dwellings (aka in-law units, granny flats, “second units” as the San Marino ordinance in question calls them, and the like). With a market potentially as large as the state’s entire fleet of existing single-family homes, construction costs that are often a fraction of the cost of building new units in apartment buildings, and freedom from the constraint of scarce undeveloped land supply, the only significant constraints that hold back production of a significant supply of accessory dwellings are the twin obstacles of permitting complexity and local resistance. *See generally* Laura Bliss, *Portland’s ‘Granny Flats’ Get an Affordable Boost*, CityLab, Mar. 12, 2018;<sup>6</sup> Cierra Bailey, *Are granny units the next big thing in housing?*, Palo Alto Online, June 28, 2019.<sup>7</sup>

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<sup>6</sup> Available at <https://www.citylab.com/equity/2018/03/portlands-granny-flats-get-an-affordable-boost/555083/>.

<sup>7</sup> Available at <https://www.paloaltoonline.com/news/2019/06/28/are-granny-units-the-next-big-thing-in-housing>.

Given the very real challenges inherent in both of these obstacles, up against the very real crisis in housing affordability, it is not a surprise that the state legislature has established a statewide framework for owners of existing single-family homes to obtain by-right permits from their local governments to build accessory dwellings. See Queenie Wong, *California eases restrictions on ‘granny units’*, San Jose Mercury News, Sept. 27, 2016.<sup>8</sup> In 2016, the California legislature made the following findings:

- “California faces a severe housing crisis.”
- “The state is falling far short of meeting current and future housing demand with serious consequences for the state’s economy, our ability to build green infill consistent with state greenhouse gas reduction goals, and the well-being of our citizens, particularly lower and middle-income earners.”
- “Allowing accessory dwelling units in single-family or multifamily residential zones provides additional rental housing stock in California.”
- “Accessory dwelling units offer lower cost housing to meet the needs of existing and future residents within existing neighborhoods, while respecting architectural character.”
- “Accessory dwelling units are, therefore, an essential component of California’s housing supply.”

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<sup>8</sup> Available at <https://www.mercurynews.com/2016/09/27/california-eases-restrictions-on-granny-units/>.

Senate Bill 1069 (2016) (SB 1069), § 4; *see* Gov't Code § 65852.150(a)(4)-(8) (2017).

SB 1069 also amended Government Code section 65852.2 to establish two important statewide results: first, SB 1069 established statewide criteria under which permit applications by owners of existing single-family homes to add accessory dwellings would receive ministerial approval, Subsection (a)(4), and second, SB 1069 mandated that local governments either adopt their own ordinances to achieve this result, or implement the statewide criteria without adopting a local ordinance, *see* generally Subsection (a)(1)-(6).

The statewide criteria established in SB 1069 for ministerial approval of accessory dwellings are in Subsection (a)(1)(B)(i)-(xi). These include, as relevant, a maximum floor space of 1,200 square feet for detached accessory dwelling units, Subsection (a)(1)(B)(v), but no restrictions on minimum lot size or requirements for permanent owner occupancy of either the primary or accessory dwelling. Subsection (a)(6) does allow local agencies to require that, at the time of application, the applicant own and occupy the existing single-family home on the lot.

As relevant to the preemption analysis required by *City of Riverside*, Gov't Code § 65852.2, as amended by Senate Bill 1069, provided for the following:

“(a)(1) A local agency may, by ordinance, provide for the creation of accessory dwelling units in single-family and multifamily residential zones. The ordinance shall do all of the following:

“(a)(1)(B)(i) Impose standards on accessory dwelling units that include, but are not limited to, parking, height, setback, lot coverage, landscape, architectural review, maximum size of a unit, and standards that prevent adverse impacts on any real property that is listed in the California Register of Historic Places.”

“(a)(1)(D) Require the accessory dwelling units to comply with all of the following:

“(a)(1)(D)(ii) The lot is zoned for single-family or multifamily use and contains an existing, single-family dwelling.”

“(a)(1)(D)(v) The total area of floorspace for a detached accessory dwelling unit shall not exceed 1,200 square feet.”

“(a)(1)(D)(vii) No setback shall be required for an existing garage that is converted to a accessory dwelling unit, and a setback of no more than five feet from the side and rear lot lines shall be required for an accessory dwelling unit that is constructed above a garage.”

“(a)(4) An . . . ordinance governing the creation of an accessory dwelling unit by a local agency . . . shall provide an approval process that includes only ministerial provisions for the approval . . . and shall not include any discretionary processes, provisions, or

requirements . . . except as otherwise provided in this subdivision. In the event that a local agency has an existing accessory dwelling unit ordinance that fails to meet the requirements of this subdivision, that ordinance shall be null and void upon the effective date of the act adding this paragraph and that agency shall thereafter apply the standards established in this subdivision for the approval of accessory dwelling units, unless and until the agency adopts an ordinance that complies with this section.”

“(a)(5) No other local ordinance, policy, or regulation shall be the basis for the denial of a building permit or a use permit under this subdivision.”

“(a)(6) This subdivision establishes the maximum standards that local agencies shall use to evaluate a proposed accessory dwelling unit on a lot zoned for residential use that contains an existing single-family dwelling. No additional standards, other than those provided in this subdivision, shall be utilized or imposed, except that a local agency may require an applicant for a permit issued pursuant to this subdivision to be an owner-occupant or that the property be used for rentals of terms longer than 30 days.”

“(c) A local agency may establish minimum and maximum unit size requirements for both attached and detached accessory dwelling units.”

“(g) This section does not limit the authority of local agencies to adopt less restrictive requirements for the creation of an accessory dwelling unit.”

Gov’t Code § 65852.2 (2017). These provisions, taken together, establish a statewide framework for homeowners to add accessory dwellings to their existing single-family homes on a by-right basis so long as they meet statewide standards, and preempt local



ordinances that impose more restrictive conditions on accessory dwellings.

### **Facts and Procedural History**

On December 14, 2016, two weeks before SB 1069 went into effect, Defendant the City of San Marino adopted Interim Ordinance No. O-16-1317, “An Interim Ordinance of the City Council of the City of San Marino Prohibiting New Accessory Dwelling Units (Also Known As Second Units), Except Those That Satisfy Specified Standards, and Declaring the Urgency Thereof” (Interim Ordinance). The Interim Ordinance contained the following provisions that are inconsistent with Government Code section 65852.2(a) as it was in effect in 2017:

“An accessory dwelling unit may be located only on residentially zoned lots that contain at least twelve thousand (12,000) square feet in area and contain no more than one single-family residence.” (minimum lot size provision)

“A detached accessory dwelling unit shall not exceed thirty (30) percent of the existing livable area of the primary residence or one thousand (1,000) square feet, whichever is less.” (maximum unit size provision)

The Interim Ordinance also had a severability provision, and a permanent owner-occupancy requirement with the obligation to record a deed-restriction requiring the property owner to occupy

one of the two units, and permanently relinquishing the right to rent out both units. Decision at \*2 (\*3 as to the owner-occupancy requirement).<sup>9</sup>

On January 9, 2017, Donnelly applied for a ministerial permit to add an accessory dwelling unit above the detached garage of her existing single-family residence. Decision at \*2. San Marino denied it on August 23, 2017, because (1) the maximum allowed living area of 2,700 square feet (established by other provisions of the City Code) would be violated, (2) violation of the 12,000 square foot minimum lot size in the Interim Ordinance, (3) an accessory dwelling above the existing garage would have less than a 10-foot set back from other buildings on the lot.

Donnelly petitioned for a writ of mandamus ordering the city to issue the applied-for permit under the Interim Ordinance, and facially challenging the Permanent Ordinance, including the minimum lot size, maximum unit size, and the permanent owner occupancy requirement. Decision at \*3-4.

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<sup>9</sup> A permanent ordinance followed, adopted November 8, 2017, which contained the same offending provisions (Permanent Ordinance). The Permanent Ordinance was adopted after denial of Donnelly's application. Decision at \*3.

The trial court denied the writ as to all but the maximum unit size, severed that from the Interim and Permanent Ordinances, and affirmed the Permanent Ordinance with that provision severed. Decision at \*5.

On appeal from the trial court, Donnelly again argued that the entire Interim Ordinance was preempted by Government Code section 65852.2(a)(4), and that the minimum lot size, maximum unit size, and permanent owner-occupant requirement were each individually preempted. The Court of Appeal rejected these arguments, along the following line of reasoning.

The Court of Appeal interpreted “maximum standards” as used in Subsection (a)(6) to roughly mean that local agencies can restrict accessory dwellings by setting standards more restrictively than the limits in Subsection (a)(1)(D)(v), Decision at \*5-6, and the “including but not limited to” provision of Subsection (a)(1)(B)(i) to mean that other categories of “standards” can be imposed on accessory dwellings, with the effect of making it much more difficult to obtain permits that the statewide standards would allow. Decision at \*6. Otherwise, the court below reasoned, “including but not limited to” would be rendered meaningless. *Id.* Under this view, San Marino was allowed, under Subsection

(a)(1)(D), to add an entirely new category of limitation (minimum lot size) to restrict homeowners' opportunity to add accessory dwellings to the city's housing stock, without violating Subsection (a)(5)'s prohibition on denying accessory dwelling permits based on any "other local ordinance, policy, or regulation" or Subsection (a)(6)'s statement that Subsection (a) "establishes the maximum standards that local agencies shall use." Decision at \*7.

The court below also relied on the California Department of Housing and Community Development's December 2016 Accessory Dwelling Unit Memorandum, which asserts that lot size standards can be established "with certain limitations." Decision at \*7.<sup>10</sup> This reliance on an executive branch interpretation of the statute violated the Court of Appeal's duty, which it acknowledged in citing *Weatherford v. City of San Rafael*, 2 Cal. 5th 1241, 1247 (2017), to interpret the statute itself *de novo*. *But see Yamaha Corp. of America v. State Board of Equalization*, 19 Cal. 4th 1, 7 (1998).<sup>11</sup>

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<sup>10</sup> The legislature has since amended Section 65852.2 to prohibit the imposition of minimum lot sizes. Decision at \*7 n.7 (citing Stats. 2019, c. 653, § 1; c. 655, § 1; c. 659, § 1.5).

<sup>11</sup> It is doubtful that *Yamaha* applies to agency statements that are not adopted using the formal procedures of the state's Administrative Procedures Act, and to statutes which the agency

On the same basis, the Court of Appeal concluded that the minimum lot size requirement was not preempted. Decision at \*10-11. The crux of this conclusion is the fact that Section (a)(1)(D) is silent on lot size requirements, that Section (a)(1)(B)(ii) provides a non-exclusive list of topics that ADU ordinances must cover, and that the Department’s December 2016 Memo agrees. Decision at \*11.

The Court of Appeal then held that the permanent owner-occupant requirement in both the Interim and Permanent Ordinances is not preempted. Decision at \*11-12. But the Court’s analysis of this provision is limited to the status as owner-occupier at the time of application, which the version of Subsection (a)(6) in effect in 2017 allowed cities to require. *See* Gov’t Code § 65852.2(a)(6) (“No additional standards . . . shall be utilized or imposed, except that a local agency may require an *applicant* . . . to be an owner-occupant[.]”) (emphasis added). The Interim and Permanent Ordinances both add the additional permanent requirement that the owner occupy either the primary or accessory

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itself does not administer or enforce. *Cf. PaintCare v. Mortensen*, 233 Cal. App. 4th 1292, 1304 (2015) (*Yamaha* rejects deference where question is if a regulation is within the scope of legislative delegation).

residence on the property and record this limitation by deed restriction against their and all future owners' otherwise available right to vacate the property and rent both units. Decision at \*3 (describing terms of permanent owner-occupant requirement). And again, the Court of Appeal relied heavily on the Department's interpretation of the statute and its recommendation that local agencies impose deed restrictions that go beyond the allowance that *applicants* can be required to be owner occupants.<sup>12</sup>

The final provision which the Court of Appeals held was not preempted was the maximum unit size of 1,000 square feet. Decision at \*12-13. This holding rested on the fact that Subsection (a)(1)(B)(i) directs the local agency to adopt standards for unit size, and that Subsection (c) allows the agency to "establish minimum and maximum unit size requirements for both attached and detached" units, so long as the standard allows at least an efficiency unit to be built. And again, the Court of Appeal leans on the Department's Memo. Decision at \*12.<sup>13</sup>

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<sup>12</sup> A later version of Subsection (a)(6), now in effect, prohibits local agencies from imposing an owner-occupant requirement. Decision at \*11; Cal. Gov't Code § 65852.2(a)(6) (2020).

<sup>13</sup> The current version of Section 65852.2(c) allows local agencies to set a maximum unit size of at least 850 square feet or 1,000

After concluding that Donnelly’s challenge to the Permanent Ordinance was mooted by the fact that a later enacted version of Government Code section 65852.2(a) forbids both the minimum lot size and owner occupant provisions, rendering the Permanent Ordinance “null and void” under Subsection (a)(4) for failure to meet the standards in current Subsections (a)(1)(B)(i) and (a)(6), the Court ruled that her challenge to the denial of her permit under the Interim Order was not moot, and that if she had prevailed on her claims against the Interim Ordinance, she would have been entitled to her permit. Decision at \*14.

Donnelly now petitions this Court to review the decision of the Court of Appeal, in order to resolve whether the proper preemption analysis for California’s statewide accessory dwelling standards is that set forth by this Court in *City of Riverside*, rather than the Court of Appeal’s contrary approach.

### **Argument**

*City of Riverside* sets forth the following tests for preemption of local ordinances by state law:

[L]ocal legislation that conflicts with state law is void.  
A conflict exists if the local legislation duplicates,

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square feet for a unit with more than one bedroom. Decision at \*13 n.11 (citing Gov’t Code § 65852.2(c) (2020)).

contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.

Local legislation is “duplicative” of general law when it is coextensive therewith.

Similarly, local legislation is “contradictory” to general law when it is inimical thereto.

56 Cal. 4th at 743 (citations and quotation marks omitted).

[L]ocal legislation enters an area that is “fully occupied” by general law when the Legislature has expressly manifested its intent to “fully occupy” the area, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

*Id.* (citations and quotation marks omitted).

The Court of Appeal below employed a different preemption test, which looked at only one question: are the challenged provisions of the local ordinance expressly forbidden by the state statute? Finding the answer to that question to be no, the court below concluded that the statute did not preempt San Marino’s ordinance.



But this was the wrong question to ask. In proceeding this way, the Court of Appeal departed from the zoning preemption analysis that this Court employed in *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 56 Cal. 4th 729 (2013). In *City of Riverside*, this Court established a far more robust and probing analysis for lower courts to apply in considering whether local zoning ordinances are preempted by state law. A necessary part of that analysis was whether the state law in question merely deals with matters of state law (leaving local zoning implications of the state law to local government in the ordinary exercise of its police power), or whether the state statute “explicitly guarantees the availability of locations where such activities may occur, restricts the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning within their borders, or requires local zoning and licensing laws to accommodate” the activity in question. *City of Riverside*, 56 Cal. 4th at 753-54.

*City of Riverside* also emphasizes the role of legislative history in looking at questions of preemption, *id.* at 746-47, 753 (examining voter pamphlet arguments by initiative proponents). In contrast, the Court of Appeal below ignored crucial legislative

history, including important legislative findings that show indicia of preemption, *see* Gov't Code § 65852.150(a)(4)-(8) (2017), and instead relied heavily and inappropriately on an executive branch memorandum to interpret the state statute at issue in this case.

*City of Riverside* addressed whether California's 1996 Compassionate Use Act, Health and Safety Code § 11362.5, *et seq.*, as supplemented by the 2004 Medical Marijuana Program, Health and Safety Code § 11362.7, *et seq.*, preempted local zoning authority to the degree that a city could not maintain a local public nuisance action to abate a cannabis dispensary. In *City of Riverside*, this Court started with the observation that "California's voters and legislators have adopted limited exceptions to the sanctions on this state's criminal and nuisance laws in cases where marijuana is possessed, cultivated, distributed, and transported for medical purposes." 56 Cal. 4th at 739.

The "narrow methods" and "modest objectives" of the Compassionate Use Act, expressed in arguments by proponents to voters as legislative history, were important to the Court in assessing whether it preempted local zoning of cannabis distribution businesses. *Id.* at 746-47; *id.* at 753. The Court also

looked to the limited and explicit safe harbors from prosecution in the Medical Marijuana Program, and that it did not speak to the creation of employment rights or “compel[ ] the establishment of local regulations to accommodate medical marijuana dispensaries.” *Id.* at 750-51 (quoting *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1176 (2009)); *id.* at 753.

The Court concluded its inquiry into express preemption thus:

No provision of the MMP explicitly guarantees the availability of locations where such activities may occur, restricts the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning within their borders, or requires local zoning and licensing laws to accommodate the cooperative or collective cultivation and distribution of marijuana. Hence, there is no ground to conclude that Riverside’s ordinance is expressly preempted by the MMP.

*Id.* at 753-54 (footnotes omitted).

Tellingly, Section 65852.2 does almost exactly what this Court held the Compassionate Use Act does not do: “restricts the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning within their borders,” and “requires local zoning and [permitting] laws to accommodate [accessory dwelling units].” SB 1069 comes quite close to “explicitly

guarantee[ing] the availability of locations where [accessory dwelling units] may occur.” The preemption approach adopted by the Court of Appeal below, over this Court’s approach in *City of Riverside*, was very likely outcome determinative. This Court should grant review to direct the lower courts in their future preemption decisions related to Section 65852.2.

This Court found no duplication between state and local law in *City of Riverside* because the state law dealt with one set of issues (criminalization and nuisance under state law) and the city ordinance dealt with a different set (zoning and locally defined nuisance). *Id.* at 754. Nor were the two schemas “inimical” to each other because it was not impossible to comply with both. *Id.* at 754-55. The state marijuana laws did not require the business enterprises that the city ordinance prevented.

The Compassionate Use Act involved “no attempt by the Legislature to fully occupy the field of medical marijuana regulation as a matter of statewide concern, or to partially occupy this field under circumstances indicating that further local regulation will not be tolerated.” *Id.* at 755. There was “no comprehensive scheme or system for authorizing, controlling, or

regulating the processing and distribution of marijuana for medical purposes, such that no room remains for local action.” *Id.*

But in *Donnelly* there is such a statute with just such a scheme. The Court of Appeal relied on a single phrase within Subsection (a)(1)(B)(i), that local agencies could “[i]mpose standards on accessory dwelling units *that include, but are not limited to*, parking, height, setback, lot coverage, landscape, architectural review, maximum size of a unit, and standards that prevent adverse impacts on any real property that is listed in the California Register of Historic Places.” Gov’t Code § 65852.2(a)(1)(B)(i). But the meaning of a statute “may not be determined from a single word or sentence;” and related provisions “must be harmonized to the extent possible.” *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988). The Court of Appeal ignored other provisions of Section 65852.2 that show clear legislative purpose to fully occupy the field of accessory dwelling unit regulation, including the statement that the statute establishes the “maximum standards” for review of accessory dwelling unit permits, and that “[n]o other local ordinance, policy, or regulation shall be the basis for the denial of [an accessory dwelling unit] building permit.” Gov’t Code § 65852.2(a)(5). This

Court should grant review to resolve the important question of whether the statute as written does preempt local zoning control.

And in *City of Riverside* there was no indication that the state law was designed to impose a uniform way of doing things that would override the wide variety of local interests in Riverside. 56 Cal. 4th at 756. But that is clearly what the California legislature did in 2016 with SB 1069. The legislature definitively stated that SB 1069 “establishes the maximum standards that local agencies shall use to evaluate a proposed accessory dwelling unit on a lot zoned for residential use that contains an existing single-family dwelling . . . .” Gov’t Code § 65852.2(a)(6). Nor are local agencies left free to restrict surreptitiously through other means, because SB 1069 also provides that “[n]o other local ordinance, policy, or regulation shall be the basis for the denial of a building permit or a use permit under this subdivision.” *Id.* § 65852.2(a)(5). Finally, the legislature established that any “existing accessory dwelling unit ordinance that fails to meet the requirements of this subdivision . . . shall be null and void . . . .” *Id.* § 65852.2(a)(4). Local agencies with incompatible ordinances are required to approve accessory dwelling units under the standards of SB 1069—standards that Donnelly’s permit application met—

“unless and until the agency adopts an ordinance *that complies with this section.*” *Id.* (emphasis added). Finally, SB 1069 only allows a local agency to “amend its zoning ordinance or general plan to incorporate the policies, procedures, or other provisions applicable to the creation of accessory dwelling unit *if these provisions are consistent with the limitations of this subdivision.*” *Id.* § 65852.2(a)(7) (emphasis added). To the extent that local agencies are left free to regulate post-SB 1069, the legislature has preempted any local regulation *unless* that regulation is *less restrictive* than the established state standards.

The court below instead fashioned a preemption rule that requires the state to explicitly and exhaustively forbid anything and everything that it does not want local agencies to remain able to do. By failing to anticipate, for example, the minimum lot size that San Marino adopted, the legislature apparently failed in its otherwise obvious effort to preempt local agencies’ ability to frustrate by-right development of accessory dwellings that meet state standards.

*City of Riverside* also features an important separate concurrence by Justice Liu, which states that state law may preempt not only where it requires what local law forbids, but

where it permits or authorizes it. 56 Cal. 4th at 763 (citing majority opinion at 758 (citing *Cohen v. Board of Supervisors*, 40 Cal. 3d 277, 293 (1985), and at 760 (citing *Great Western Shows v. County of Los Angeles*, 27 Cal. 4th 853, 867-68 (2002))). Further, Justice Liu argued that a state law can preempt where it authorizes or promotes (not just requires) what a local ordinance prohibits. *Id.* at 763. Justice Liu develops this idea by analogizing to federal preemption law and opining that the same principle “no doubt applies to California law. Local law that prohibits an activity that state law intends to promote is preempted, even though it is possible for a private party to comply with both state and local law by refraining from that activity.” *Id.* at 764 (citing *Great Western Shows*, 27 Cal. 4th at 867-68; and *Cohen*, 40 Cal. 3d at 293).

By stark contrast the Decision Below, which fails to cite *City of Riverside*, never looks at whether SB 1069 established a statewide framework to encourage and facilitate the by-right development of accessory dwellings on lots with existing single-family homes, with very limited remaining local restriction. It would not have had far to look—SB 1069 includes legislative findings that accessory dwelling units are “valuable” and “an essential component of California’s housing supply.” Gov’t Code



§ 65852.150(a)(1) and (8). Next, it explicitly states that the intent of the legislature is that any local regulation within the field “has the effect of providing for the creation of accessory dwelling units” and preventing any such regulation that is “so arbitrary, excessive, or burdensome so as to unreasonably restrict the ability of homeowners to create accessory dwelling units . . . .” *Id.* § 65852.150(b). Justice Liu’s concurrence in *City of Riverside* calls the Court of Appeal’s approach into serious question.

The Court below also departed from the methodology of *City of Riverside* by relying on executive branch interpretations of Government Code section 65852.2(a), rather than on legislative history. This departure casts further doubt on which preemption analysis courts should be using as further disputes develop between homeowners who want to develop accessory dwellings, the local governments where they live, and the state legislature.

This Court should grant the petition to resolve the question of whether *City of Riverside* controls the preemption analysis in accessory dwelling cases, and thereby provide clear guidance to the legislature, local governments, and homeowners who wish to develop accessory dwellings. The urgency of this clarification derives from California’s ever-worsening housing shortage.

**Conclusion**

For the foregoing reasons, this Court should grant this petition.

DATED: May 19, 2020.

Respectfully submitted,

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JEREMY TALCOTT  
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## **Certificate of Compliance**

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing Petition for Review is proportionately spaced, has a typeface of 13 points or more, and contains 5,788 words.

DATED: May 19, 2020.

s/ Anthony L. François  
ANTHONY L. FRANÇOIS

## **Declaration of Service**

I, Anthony L. François, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On May 19, 2020, a true copy of the Petition for Review was electronically filed with the Court through Truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efilings system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

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I declare under penalty of perjury that the foregoing is true  
and correct and that this declaration was executed this 19th day  
of May, 2020, at Sacramento, California.

s/ Anthony L. François  
ANTHONY L. FRANÇOIS