No. B188723

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 7

CALIFORNIA VETERINARY MEDICAL ASSOCIATION,
Plaintiff and Respondent,

vs.

CITY OF WEST HOLLYWOOD,
Defendant and Appellant.

Appeal From the Judgment of the Superior Court of California,
County of Los Angeles, Case No. SC084799
The Honorable James A. Bascue, presiding

BRIEF OF AMICI CURIAE ANIMAL LEGAL DEFENSE FUND, THE ASSOCIATION OF VETERINARIANS FOR ANIMAL RIGHTS, AND THE PAW PROJECT IN SUPPORT OF APPELLANT

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I.
INTRODUCTION

Amici Curiae Animal Legal Defense Fund ("ALDF"), the Association of Veterinarians for Animal Rights ("AVAR"), and the Paw Project (collectively "amici") submit this brief to assist the Court in its determination of whether the ordinance at issue on this appeal (the "Ordinance") legally prohibits non-therapeutic onychectomies (commonly known as "declawing") of domestic animals within the City of West Hollywood ("the City").

By passing the Ordinance, the citizens of West Hollywood joined a growing community around the world that considers declawing for non-therapeutic purposes to be cruel. The Superior Court's decision improperly denies these citizens the authority to determine standards of behavior consistent with the values of their community, and thus compels them to endure within their community the commission of acts that they have determined are cruel. The Superior Court's decision also frustrates the efforts of amici and others seeking to change society's values and attitudes with respect to animal cruelty by engaging in educational, lobbying, and legislative efforts at the local level.

In holding that West Hollywood could not outlaw acts its citizens deem cruelty, the Superior Court issued what counsel believe to be the first reported judicial decision holding that Business and Professions Code section 460 preempts a municipal ordinance. The California Supreme Court has admonished, however, that a finding of preemption should not be taken lightly. (*See Cal. Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17 (hereafter *Cal. Fed.*) ["courts should avoid making unnecessary choices between competing claims of municipal and

state governments."].) The Superior Court failed to consider whether there was some means of resolving any supposed conflict between the City's Ordinance and the State statutes cited by Respondent California Veterinary Medical Association ("CVMA"), whose members have a pecuniary interest in performing the acts that the City has determined to be cruel.

In a nutshell, the CVMA takes the California Veterinary Medical Practice Act—which, among other things, protects the public and animals—and tries to transform it into a veterinarians' protection act. The CVMA tries to accomplish this through two successive errors of statutory construction.

First, the CVMA leads the Court to examine only one of several subsections of Business and Professions Code section 4826 ("section 4826"), which is itself only one section of the Veterinary Medical Practice Act. The CVMA thus disregards both the other relevant subsections of section 4826, and also the necessary context provided by immediately preceding section 4825. Only by this selective citation to the Veterinary Medical Practice Act can one reach the artificial and contrary-to-common-sense conclusion that the practice of veterinary medicine includes painful operations and procedures that are not intended or likely to treat an animal's disease, alleviate suffering, or correct a deformity. Under the logic of the CVMA's tortured interpretation of the Veterinary Medical Practice Act, intentionally maiming and dismembering healthy animals constitutes the practice of veterinary medicine so long as someone with a white coat saying "D.V.M." is doing the maiming and dismembering.

Second, the CVMA exports its flawed reading of section 4826 into Business and Professions Code section 460 ("section 460"). The result is that section 460, which is plainly intended to preclude municipalities from

imposing licensing requirements duplicative of those established by the State, is transformed into a statute that precludes municipalities from regulating a broad range of activities that traditionally fall within local police power.

Based on this flawed construction, the Superior Court sets up an illusory conflict between the Ordinance and section 460. However, since the City has not established any sort of licensing scheme for veterinarians—instead, it has outlawed certain acts of cruelty, regardless of the status of the actor—a proper reading of the statutes and the Ordinance reveals no conflict.

II.
QUALIFICATIONS OF AMICI

Each amici plays a vital role in the animal protection movement by supporting individuals, municipalities, and states in their respective attempts to strengthen protections for animals. The Ordinance is one step in that evolving process by which communities determine what standards of behavior are consistent with their values.

The Superior Court's decision sounds a death knell for such grass roots efforts to enact ordinances that protect animals by placing an added—and unnecessary—burden on organizations such as amici by prohibiting them from attempting to effect change at the local level.

A. The Animal Legal Defense Fund

ALDF is a national non-profit organization involved in every aspect of animal law. Its mission is to "protect the lives and advance the interests of animals through the legal system," and it has nearly thirty years of experience litigating cases and analyzing legal issues concerning animals. ALDF's groundbreaking efforts to use the U.S. legal system to end the

suffering of abused animals are supported by hundreds of dedicated attorneys and more than 100,000 members.

ALDF pursues its mission by, among other things, filing lawsuits to stop animal abuse, providing free legal assistance to prosecutors handling cruelty cases, and working to strengthen state anti-cruelty statutes. ALDF also publishes a 2,000-plus page compendium of animal protection laws in the United States. ALDF has been intimately involved with the development of legal scholarship and legal education in all areas of animal protection, and it supports legal journals and other legal publications in the area of animal law. In the civil justice system, ALDF has been instrumental in the analysis and evaluation of animal protection laws, and it has litigated some of the nation's biggest animal cruelty cases. Courts are regularly interested in obtaining the perspective gained from ALDF's almost three decades of experience in important questions of animal law.

B. The Association of Veterinarians for Animal Rights

AVAR is a nonprofit animal protection organization based in Davis, California. It is supported by approximately 3,000 veterinary members and approximately 10,500 contributors. AVAR was founded in 1981 by veterinarians who were concerned that the animals they were trained to care for, treat, and heal in veterinary school were routinely being subjected to cruel treatment, sometimes for the most trivial of reasons. They recognized that the veterinary profession, under the banner of "adequate or standard veterinary care," often supported practices that were completely contrary to the well-being of animals. They also recognized that most existing veterinarians' organizations, including the CVMA, promoted the business interests of veterinarians or other human interests, and they wanted to form

an organization that would instead allow concerned veterinarians to advocate for and promote the interests of animals.

AVAR advocates that, just as physicians protect the interests and needs of their patients, so too should veterinarians protect the interests and needs of animals. AVAR seeks to educate the public and the veterinary profession about a variety of issues concerning animals and to secure higher ideals of humanity toward all animals. AVAR publishes and distributes a variety of educational materials and regularly participates in legislative efforts to pass laws that protect animals. AVAR's veterinary members also regularly assist with cruelty cases and testify at legislative hearings on behalf of animals.

C. The Paw Project

The Paw Project is a nonprofit corporation based in Santa Monica, California that was incorporated in 2004, and has roughly 2,500 members and supporters. It exists to promote animal welfare and increase public awareness about the crippling effects of declawing, to repair the paws of animals that have been declawed, and to advocate for an end to the practice of declawing animals merely for human convenience. The Paw Project has a special interest in this case, as it initiated efforts that led to enactment of the Ordinance.

III. LEGAL ARGUMENT

A. Legal Standards

1. Standard of Review

The Superior Court's decision is subject to *de novo* review. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 283 [grant of summary judgment reviewed *de novo*]; *Bd. of Equalization v.*

Superior Court (2006) 138 Cal.App.4th 951, 956) [interpretation of a statute reviewed *de novo*]; *Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1371) [preemption reviewed *de novo*].)

2. Standards of Preemption

In exercising its police power under the California Constitution, a city has broad discretion in determining what is reasonable and endeavoring to protect the public health, safety, morals, and general welfare of the community. (Cal. Const., art. XI, § 7; *Carlin v. City of Palm Springs* (1971) 14 Cal.App.3d 706, 711.) "The police power [expands] to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.'" (*Miller v. Bd. of Public Works* (1925) 195 Cal. 477, 485 quoting *Noble State Bank v. Haskell* (1911) 219 U.S. 104.)

The ultimate question in any preemption analysis is whether the municipal ordinance *conflicts* with state law. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 902 (hereafter *Sherwin-Williams*); *Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 385 (hereafter *Korean*).)

Because a finding of preemption effectively undermines the democratic process as exercised at the local level, it is not to be made lightly. As the California Supreme Court has explained, courts should "carefully insur[e] that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other." (*Cal. Fed.*, 54 Cal.3d at pp. 16-17; *see also S.D. Myers v. City and County of San Francisco* (9th Cir. 2003) 336 F.3d 1174, 1177; *Horton v. City of*

Oakland (2000) 82 Cal.App.4th 580, 585.) A municipal ordinance that has "some indirect impact" on the state's law (*Korean, supra*, 23 Cal.App.4th at p. 388), or that "incidentally affects" an area of statewide regulation, is not preempted. (*People v. Mueller* (1970) 8 Cal.App.3d 949, 954). Rather, there must be some "genuine" and "actual" conflict between the municipal ordinance and the state legislation. (*Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, 1813 (hereafter *Barajas*).)

B. Section 460 Does Not Preempt the West Hollywood Ordinance

Section 460 precludes municipal license requirements for all state-licensed professionals, including veterinarians, among over 200 others. (*See* www.dca.ca.gov/aboutdca/moreabout.htm [last visited 12/26/06].) By contrast, section 4826 regulates unlicensed professionals through its broad definition of the unauthorized practice of veterinary medicine. The CVMA improperly conflates these two unrelated statutes by arguing that:

(1) declawing is surgery;

(2) surgery is part of the practice of veterinary medicine;

(*QED*) a municipality cannot prohibit declawing.

(*See, e.g.*, Respondent's Brief ("RB") at pp. 1, 13, 61, 66.) The result is that the CVMA has dramatically and improperly enlarged the scope of section 460 far beyond the limited reach intended by the legislature.

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1. CVMA Has Failed to Establish That Non-Therapeutic Declawing Is a Portion of Veterinary Medicine

a. It Is Error to Read One Isolated Subsection of Section 4826 into Section 460

In arguing that section 460 preempts the Ordinance, the CVMA asserts that to interpret the scope of section 460, one must import a definition set forth in section 4826(d). This is error as a matter of law.

Section 460 provides in pertinent part:

> No city or county shall prohibit a person, authorized by one of the agencies in the Department of Consumer Affairs ["DCA"] by a license, certificate or other such means to engage in a particular business, from engaging in that business, occupation, or profession or any portion thereof.

(Bus. & Prof. Code § 460.)

As explained in greater detail in section III.B.2. below, section 460 is part of a licensing scheme for all professionals who are regulated by the DCA. It is not limited to veterinarians.

In contrast, section 4826 is a broad definitional section that sets forth a laundry list of activities that could be construed as the practice of—or the *appearance* of the practice of—veterinary medicine for purposes of Chapter 11 of the Business and Professions Code. Those activities include: (1) representing or inducing the belief that one is a veterinarian; (2) diagnosis, prescription, or administration of "a drug, medicine, appliance, application, or treatment of whatever nature for the prevention, cure or relief of a wound, fracture, bodily injury, or disease of animals"; (3) surgical or dental operations; and (4) procedures for diagnosis of pregnancy, sterility or infertility on limited species.

Section 4826 must be read in the context of its preceding section, (*see City of Santa Clarita v. NTS Technical Systems* (2006) 137

Cal.App.4th 264, 272), which prohibits the unlicensed practice of veterinary medicine. (Bus. & Prof. Code § 4825.) Thus, read together as they are intended to be, sections 4825 and 4826 cast a wide net to protect the public (and animals) by prohibiting untrained and unlicensed persons from performing a variety of acts that might *appear to the public* to be the practice of veterinary medicine.

The CVMA has pointed to nothing to suggest a legislative intent that section 4826 (or section 4826(d) in particular) provides a definition that delineates the scope of section 460. Indeed, it is illogical to so contend. Specifically, since section 4826 is written disjunctively, the actions in any individual subsection satisfy the preamble. Therefore, under the CVMA's reasoning, any one of the subsections of section 4826 could serve as the sole definition of veterinary medicine for purposes of section 460. Yet if one reads subsection (f)[1] into section 460, one reaches the illogical result that section 460 protects an unlicensed imposter who simply appears to practice veterinary medicine from any municipal obstruction of her supposed "practice."[2] CVMA would thus have the courts find that section

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[1] A person is practicing veterinary medicine (for purposes of section 4825) when he or she: "Uses any words, letters or titles in such connection or under such circumstances as to induce the belief that the person using them is engaged in the practice of veterinary medicine, veterinary surgery, or veterinary dentistry. This use shall be prima facie evidence of the intention to represent himself or herself as engaged in the practice of veterinary medicine, veterinary surgery, or veterinary dentistry." (Bus. & Prof. Code §4826 (f).)

[2] If that were the case, then one could "practice veterinary medicine" simply by wearing a white coat and a name tag with "D.V.M." appended. (*See* Bus. & Prof. Code §4826 (f).) While the public should be protected from someone who misrepresents herself as a veterinarian,

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460 preempts any municipal regulation of consumer fraud, false advertising, or other business misrepresentation. Certainly that is not the result intended by the legislature.

Even if it were appropriate to read section 460 into section 4826, the CVMA selectively extracts subsection (d), without ever explaining why that subsection should be definitional for purposes of section 460 instead of, for example, subsection (b). Indeed, subsection (b), which states that one practices veterinary medicine when one "[d]iagnoses or prescribes a drug, medicine, appliance, application, or treatment of whatever nature for the prevention, cure or relief of a wound, fracture, bodily injury, or disease of animals," better describes the practice of veterinary medicine as it is commonly understood.

Accordingly, it is error to read a statute intended to protect the public from unlicensed individuals who attempt (or appear) to practice veterinary medicine without a license as defining the totality of veterinary medicine for purposes of section 460. The Superior Court's construction contravenes the significant policy reasons that militate against transforming a statute intended to protect animals and the public into a tool to be used by a small group of veterinarians to defy a democratically-enacted municipal law that prohibits actions the municipality deems to be cruel.

b. The Superior Court's Construction of "Veterinary Medicine" Runs Contrary to a Plain Meaning of That Term

Not only is it improper to read section 4826(d) into section 460, but

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that does not mean that by virtue of such misrepresentation, the imposter is *in fact practicing* veterinary medicine.

the overly-broad construction of "veterinary medicine" that results is also contrary to common sense and the plain meaning of that term.

Courts must interpret the words used in a statute by giving effect to the plain, ordinary meaning of those words. (*See, e.g., City of Sanger v. Superior Court* (1992) 8 Cal.App.4th 444, 448 [consulting dictionary to define the term "plaintiff"].) Further, statutes should be construed by looking to their purpose. (*Diamond Multimedia Systems v. Superior Court* (1999) 19 Cal.4th 1036, 1047.)

Countless dictionaries—both medical and general—confirm that practicing "veterinary medicine" entails diagnosing and treating diseases and injuries in animals. (*See, e.g.*, American Heritage Dict. (1982) p. 1346 ["veterinary medicine" is "the medical science of the diagnosis and treatment of animal diseases"]; www.dictionary.com ["the branch of medicine dealing with the study, prevention, and treatment of diseases in animals, esp[ecially] domesticated animals"]; Random House Webster's Unabridged Dict. (2nd ed. 2001) p. 2117 [same]; Webster's Third New International Dict. (1986) vol. II, p. 2549 ["veterinary" means "of, relating to, or constituting a branch of science and art dealing with the prevention, cure, or alleviation of disease and injury in animals and esp[ecially] domestic animals"]; Stedman's Medical Dict. (26th ed. 1995) p. 1935 ["veterinary" is "relating to the diseases of animals"]; Taber's Cyclopedic Medical Dict. (20th ed. 2005) p. 2319 ["Veterinary" means "pert[aining] to animals, their diseases, and their treatment"].)

Each of these definitions incorporates the idea of treating, diagnosing, or curing a disease or injury. None is broad enough to include non-therapeutic procedures that are performed on animals who have no deformity, injury, or disease. Accordingly, the Superior Court's

construction of "veterinary medicine" is contrary to the plain meaning of that term, and is error as a matter of law.

Moreover, non-therapeutic declawing is not a "surgical operation" on an animal under any plain language understanding of that term. According to Webster's, "surgery" is "the treatment of disease, injury, or deformity by manual or instrumental operations, as the removal of diseased parts or tissue by cutting." (Webster's New Universal Unabridged Dict. (2d Deluxe ed. 1979) p. 1835; *see also* Oxford English Dict. (2d ed. 1989) vol. XVII, p. 293 ["The art or practice of treating injuries, deformities, and other disorders"]; Black's Law Dict. (6th ed. 1990) p. 1442 [surgery is "for healing diseases, deformities, disorders, or injuries"]; Dorland's Illustrated Medical Dict. (30th ed. 2003) p. 1797 ["the branch of medicine that treats diseases, deformities and injuries"]; Taber's Cyclopedic Medical Dict. (20th ed. 2005) at p. 2113 ["correction of deformities and defects, repair of injuries, and diagnosis and cure of certain diseases"].) Further, a "surgeon" is defined as "one who practices the art of *healing* through manual operation." (Oxford English Dict. (2nd ed. 1989) vol. XVII, p. 293 [emphasis added].)[3]

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[3] The CVMA may assert that this definition of "surgery" excludes the concept of cosmetic surgery for humans. However, at least in the human patient's mind, the cosmetic surgery is addressing what he or she perceives to be a defect that diminishes his or her life. In that sense, the cosmetic surgery is therapeutic. With animals, it is difficult to argue that a painful operation that results in the amputation of healthy digits similarly enhances rather than diminishes the animal's expected future life. (*See* Dorland's Illustrated Medical Dict. (30th ed. 2003) p. 1797 ["plastic surgery" is "surgery concerned with the restoration, reconstruction, correction, or improvement in the shape and appearance

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Given the plain meaning of the term "surgery," "surgical operation" (as it is used in section 4826(d)) cannot simply mean the act of cutting into organic tissue for any purpose. Indeed, there are countless examples of excising flesh using "surgical tools" that are unlawful. (*See, e.g.*, Penal Code § 273.4 [prohibiting female genital mutilation]; Estanislao Oziewicz, *Four Charged in Probe of Illicit Body Parts Ring*, GLOBE & MAIL (Feb. 24, 2006) p. A2 [describing illegal body parts ring in New Jersey, one of whose members was an oral surgeon who had lost his license]; Staff writer, *3 Doctors Charged with Organ Theft*, MOSCOW TIMES (Apr. 30, 2004) p. 3 [doctors in Moscow conspired to remove a kidney from coma patient].)

A animal's normal, healthy phalanx—like a normal human finger—is not a deformity or a sickness requiring treatment. Emphasizing this point, the Ordinance distinguishes between *therapeutic* and *non-therapeutic* declawing—and prohibits only the latter. (*See* West Hollywood Municipal Code, tit. 9, art. 4, ch. 9.49.020.) A procedure unrelated to any "illness, infection, disease, injury, or abnormal condition in the claw" thus cannot be a "surgical operation" as defined by the Veterinary Medical Practice Act.

Finally, the CVMA's assertion that declawing must be a "portion" of the practice of veterinary medicine is belied by the laws of many other countries. The European Convention for the Protection of Pet Animals, which twenty-one countries have signed, specifically prohibits "surgical operations for the purpose of modifying the appearance of a pet animal or any other non-curative purposes...and, in particular:... (d) declawing and

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of body structures that are defective, damaged, or misshapen by injury, disease, or growth and development"].)

defanging." (European Convention for the Protection of Pet Animals, Art. 10 § 1(d) (hereafter "Convention").)[4] This section of the Convention also requires that only veterinarians perform certain procedures, such as surgeries that are likely to cause the animal severe pain, indicating that the countries that have signed this convention recognize the field of veterinary medicine. (*Id.* at § 3.)

Accordingly, the CVMA's bald assertion that anything involving a knife and an animal is a "portion" of the practice of veterinary medicine and therefore cannot be regulated by the City is not supported by any common sense meaning of the terms "veterinary medicine" or "surgery."[5]

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[4] The signatories to the Convention are: Austria, Azerbaijan, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Lithuania, Luxembourg, Netherlands, Norway, Portugal, Romania, Sweden, Switzerland, and Turkey. (*See* www.animallaw.info/treaties/itceceets125.htm [last visited December 27, 2006].)

[5] The CVMA relies on three declarations to support its overly broad definition, but none should have been considered by the Superior Court. Whether declawing is surgery for purposes of section 4826(d) or section 460 is an issue of law, and such questions are to be resolved by the court. (*See Carter v. City of Los Angeles* (1945) 67 Cal.App.2d 524, 528; *see also Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 86 fn. 7 *citing Commonwealth v. Porn* (1907) 196 Mass. 326, 328 [excluding expert testimony that would define the practice of medicine]; *Richman v. San Francisco* (1919) 180 Cal. 454, 463 [improper for the court to admit testimony interpreting the railroad rules at issue in the case].)

2. Section 460 Is a Licensing Statute and Does Not Prohibit the City from Regulating Non-Therapeutic Declawing

To sustain the Superior Court's broad interpretation of section 460, this Court must determine that section 460 was adopted to prevent cities and counties from enacting *any* regulations that *could somehow* impinge upon *any portion* of a licensed professional's business. Statutory construction, this Court's own precedent, and the fundamental principles underlying the balance between state and municipal laws preclude such a construction. Section 460 is merely a licensing statute intended to preempt local licensing (and analogous interference) of state-licensed professions. Accordingly, it would be legal error to construe section 460 so broadly that it preempts the Ordinance.

a. Principles of Statutory Construction Dictate That Section 460 Is Merely a Licensing Statute

Statutes must be construed with regard to the context of the entire statutory framework. (*See Santa Clarita,* 137 Cal.App.4th at p. 272; *see also* 56 Ops. Cal. Atty. Gen. 349 (1973) [the purpose of a code section may be inferred from its location].) Section 460 is one of three sections that appears in the "Licensee" section (Division 1, Chapter 7) of the Business and Professions Code. (Bus. & Prof. Code Chapter 7.) The only other two sections that appear in this Chapter are section 461, which addresses whether a city can request certain criminal information in a licensing application, and section 462, which addresses how a city can establish an inactive licensure program. (*Id.* at §§ 461-62.) None of these sections addresses issues beyond the subject of the chapter—namely, licensing.

Thus, both the chapter title and the surrounding provisions illustrate that section 460 merely precludes the City from generating its own licensing scheme for veterinarians (or any other state-licensed professionals/businesses), but does not limit the City's ability to prohibit animal cruelty within its borders. This conclusion is confirmed by the legislative history of section 460, in which the Department of Professional and Vocational Standards (the predecessor to the DCA), explained that "[t]he bill simply prohibits local government from denying licensed persons to do business for the state and from practicing their licensed occupation." (AA at 229.)

b. This Court Has Already Confirmed That Section 460 Is a Licensing Statute

This Court has already held that section 460 preempts only *licensing* by municipalities: "Section 460 ... declares a policy of preemption by the state *of the licensing of all businesses*, occupations and professions licensed by the State Department .... except local licensing for revenue purposes and to cover the costs of regulation." (*Maloy v. Municipal Court of Los Angeles Judicial Dist.* (1968) 266 Cal.App.2d 414, 418 [emphasis added].)

The only other reported case interpreting section 460 also held that 460 is merely a licensing statute. A city's ordinance was not preempted where it "did not suspend, revoke or otherwise affect Stacy's license or curtail the geographic area within which Stacy could seek to work." (*Stacy & Witbeck, Inc. v. City and County of San Francisco* (1995) 36 Cal.App.4th 1074, 1095.)[6]

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[6] Despite the broad dicta in *Stacy*, the statements relied upon by the CVMA are inapplicable here. Specifically, the ordinance at issue in

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Because the City is not trying to create or prevent a licensing scheme, section 460 does not preempt the Ordinance.

c. The Superior Court's Interpretation of Section 460 Vastly Broadens Its Scope

The Superior Court's opinion is the first reported judicial decision to hold that section 460 preempts a municipal ordinance. Specifically, the Superior Court found that the Ordinance prevents veterinarians from engaging in a *portion of* their profession by preventing them from declawing animals for non-therapeutic purposes, echoing the reasoning of the Department of Consumer Affairs ("DCA") Opinion relied upon by the CVMA:

> Similar to other "professional medical practice acts," the [Veterinary Medical Practice] Act does not delineate or specify a comprehensive listing of all medical practices or procedures that are specifically restricted or authorized. . . . Our reading of Business and Professions Code section 460 is that a city cannot prohibit a licensed veterinarian from practicing any aspect of veterinary medical work that falls within the perimeter of the state license. Under this interpretation, a city cannot prevent a licensed medical professional from practicing his or her profession with respect to third parties.

(AA at 369-70.)

Under this reasoning, veterinarians are neither specifically permitted, nor prohibited, by the state from engaging in the practice of non-therapeutic declawing as an exercise of their profession. However, the Superior Court's decision necessitates that "the practice of veterinary medicine" be so broadly defined that the municipality cannot prevent a veterinarian from

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Stacy did prevent state-licensed professionals from engaging in some "portion" of their professions—namely, doing business with the city. Moreover, even if it were on point, *Stacy* is not binding on this District.

performing any act that falls within the CVMA's exceptionally broad—and unsupportable—definition of "practicing veterinary medicine." As demonstrated below, the CVMA and DCA have failed to produce support (much less undisputed support) for their broad definition. More importantly, they have failed to demonstrate that the Legislature has stated or suggested that such a broad definition should be imported into section 460.

Further, adopting the CVMA's reasoning could necessitate finding that countless city ordinances and county rules conflict with section 460, and are therefore void. Municipalities routinely regulate many activities that (1) would constitute a portion of the practice of a state-licensed professional, and (2) have neither been expressly authorized, nor expressly prohibited by the state. For example, under the code of Los Angeles County:

> No animals shall be without attention more than 12 consecutive hours. Whenever an animal is left unattended at a commercial animal facility, the telephone number of the department of animal care and control, or the name, address and telephone number of the responsible person, shall be posted in a conspicuous place at the front of the property.

(LA County Code §10.40.010(E).)

This provision both prohibits veterinarians from leaving an animal without attention for more than 12 consecutive hours, and it requires a veterinarian to post certain information when the animal is left alone. A veterinarian could easily argue that this ordinance would restrict her from practicing a portion of her profession because she cannot afford to provide the manpower to meet these demands, and that if forced to do so, she would not be able to practice a portion of her profession.

The CVMA's construction would necessitate voiding many other ordinances, as well. For example, the City prohibits construction before 8:00 a.m. (West Hollywood Municipal Code, tit. 9, art. 2, ch. 9.08.050(f).) Any contractor could argue that he is prevented from doing a portion of his licensed profession because he cannot work between midnight and 8:00 a.m. Under CVMA's theory, such an argument would render this section, and many other municipal code sections, void under section 460. Surely the City has at least an equal interest in banning cruelty within the community as it does in regulating noise and traffic.

Thus, the logic of the Superior Court's decision suggests that California cities could lose their discretion to regulate countless significant activities that affect their citizens and their borders—activities that they have been charged with regulating for decades. While the State of California remains silent about the non-therapeutic declawing of domestic animals, the City of West Hollywood has spoken. Its voice should not be silenced by an improper conflating of a licensing statute and an unrelated code section that the state never intended to combine, much less be used to limit a City's ability to regulate animal cruelty.

C. The Veterinary Medical Practice Act Does Not Preempt the City's Ordinance

The Superior Court did not reach the CVMA's alternative contention: that the City's Ordinance is also preempted by the Veterinary Medical Practice Act. Because this Court may affirm the grant of summary judgment on this alternate ground (*see Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1244), amici offer the following discussion.

The CVMA's only serious argument here concerns preemption by implication.[7] But there can be no finding of preemption unless the CVMA persuades the Court that the Veterinary Medical Practice Act evidences a clear manifestation of legislative intent to fully occupy the entire field of declawing (or animal cruelty) to the exclusion of any local regulation. Instead of attempting to do so, the CVMA has obscured the relevant issues, exaggerated the scope of the Veterinary Medical Practice Act, ignored its plain terms, and misstated the law of implied preemption.

1. The CVMA Fundamentally Misconstrues the Veterinary Medical Practice Act

One example of the CVMA's misdirection is its assertion that the City misunderstands the scope of the Veterinary Medical Practice Act. (*See* RB at p. 53.) Specifically, the CVMA agrees wholeheartedly with the

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[7] Even the CVMA does not argue forcefully for preemption by duplication or by express preemption. Amici respectfully refer the Court to Appellant's briefs for a discussion of these alternative arguments.

As for the CVMA's argument that the Ordinance somehow contradicts the Veterinary Medical Practice Act, (RB at pp. 51-53), the CVMA's concession that "the Veterinary Medical Practice Act does not mandate or expressly permit non-therapeutic declawing" (RB at p. 52) means that preemption by contradiction is not possible. Preemption by contradiction occurs only where a local ordinance "prohibit[s] what the [state] statute commands or commands what it prohibits." (*Sherwin-Williams, supra,* 4 Cal.4th at p. 902.) The CVMA's sole authority for its "contradiction" argument is *Water Quality Assn. v. County of Santa Barbara* (1996) 44 Cal.App.4th 732, 741-42. The question there was: "May local entities enact ordinances which prohibit water softeners permitted by the state statute?" (*Id.* at p. 738.) In *Water Quality*, the ordinance explicitly prohibited what the statute expressly allowed, and there was no reconciling the two; by contrast, the Veterinary Medical Practice Act does not permit, prohibit, or even mention declawing.

City's hypothetical prosecution of a veterinarian, under a San Francisco ordinance, for failing to provide a dog in his or her care with food, water, and adequate shelter. (RB at p. 54.) The CVMA agrees because, in its view, an ordinance setting minimum standards for humane treatment of companion dogs "***does not regulate the practice of veterinary medicine!***" (RB at p. 54 [emphasis in original].) Indeed, the San Francisco ordinance regulates *all* persons, including practicing veterinarians. The problem with the CVMA's agreement on that point is that the Ordinance at issue here does the exact same thing. (*See* West Hollywood Municipal Code tit. 9, art. 4, ch. 9.49.020.)

The CVMA also argues that "one searches [Business and Professions Code section 4826] (or any other California statute or regulation) in vain for any statement that feeding or sheltering an animal is part of veterinary medicine." (RB at p. 54.) Perhaps the CVMA should take a second look at the regulations. (*See, e.g.*, Cal. Code Regs. tit. 16, § 2030(d) ["If animals are housed or retained for treatment, the following shall be provided: (1) Compartments for animals which are maintained in a comfortable and sanitary manner."].)

In addition, the CVMA asserts that "California courts have repeatedly held that local regulation of licensed trades and professions is impermissible because such regulation restricts the rights of licensees to conduct business in local municipalities." (RB at p. 11.) In fact, the CVMA's cited authority demonstrates exactly why the Ordinance is *not* preempted. First, and most important, all four of CVMA's cases involved a city ordinance imposing an additional, stricter *licensing* scheme on state-licensed professions. (*See Verner, Hilby & Dunn v. City of Monte Sereno* (1966) 245 Cal.App.2d 29, 33 [municipal license requirement for land

surveyors and civil engineers]; *Robillwayne Corp. v. City of Los Angeles* (1966) 241 Cal.App.2d 57, 61 [municipal license requirement for insurance adjustors]; *San Francisco v. Boss* (1948) 83 Cal.App.2d 445, 451 [municipal license requirement for contractors]; *Horwith v. City of Fresno* (1946) 74 Cal.App.2d 443, 447 [municipal license requirement for electrical contractors].) Consequently, those cases are inapposite because the City's Ordinance does not require veterinarians to obtain an additional license to practice in West Hollywood. Second, all four cases were decided before 1967—the year the legislature enacted Business & Professions Code section 460. As described above (*infra* at section III.B.), section 460 was the legislative response to city ordinances such as those at issue in the four cases cited by the CVMA, which imposed stricter licensing requirements on state-licensed professionals. (AA 227 [the "effect [of adopting this section] is to . . . prohibit adoption or enforcement of ordinances which require compliance therewith as a condition to engaging in a business"].) Again, that is not this case. Third, all four cases involved the *direct* local regulation of entire professions: compliance with the ordinances was a necessary condition to practicing those professions within city limits. The City's Ordinance, however, has at most an *incidental* (though potentially significant) effect on the activities of some veterinarians in that city; the Ordinance simply prevents *any* person from performing—or requesting—a specified act that the citizens of West Hollywood deem cruel and unnecessary.

2. The Veterinary Medical Practice Act Occupies a Different Field Than the Ordinance

To demonstrate preemption by implication (which amici believe does not lie here), the CVMA must show that by enacting the Veterinary

Medical Practice Act, the California legislature *clearly indicated* its intent to fully occupy the field of animal declawing (or even the broader field of animal cruelty), to the exclusion of all local regulation. (*American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1252 (hereafter *Am. Fin.*).)

A general presumption exists against implied preemption.[8] (*See Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149-50 (hereafter *Big Creek Lumber*); *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484.)

In performing the analysis, the legislature's intent "with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme." (*Am. Fin.*, *supra*, 34 Cal.4th at p. 1252 [internal quotation marks omitted].)

Because there can be no implied preemption if the Veterinary Medical Practice Act does not occupy the same field as the Ordinance, (*Barajas*, *supra*, 15 Cal.App.4th at p. 1813), the CVMA argues that the Veterinary Medical Practice Act occupies an exceedingly broad field that

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[8] The majority opinion in *Am. Fin.* does indicate that Court "disagree[d]" with the appellate court's presumption against implied preemption in that case. (*Am. Fin.*, *supra*, 34 Cal.4th at p. 1261.) A closer reading of the opinion, however, reveals that the Court was concerned with a slightly *different* kind of presumption. Specifically, in that case, the state legislature had at some point before passage of the law considered and rejected the inclusion of an express preemption provision. (*Id.* at p. 1260.) On that basis, the Court of Appeal applied what looked like a conclusive presumption that the legislature could not have intended to preempt by implication. (*Id.* at pp. 1260-63.) The Court disagreed with *that* presumption. (*Id.* at p. 1261.)

regulates all aspects of the practice of veterinary medicine. That is inconsistent with the fact that "the whole purpose and scope of the legislative scheme" of the Veterinary Medical Practice Act is to set up the Veterinary Medical Board and to regulate the licensing of veterinarians. (*Am. Fin., supra*, 34 Cal.4th at p. 1252 [internal quotation marks omitted].) In fact, the Veterinary Medical Practice Act is little more than a general framework for licensing veterinarians in California. It does not include the term "declawing;" it does not purport to define "animal cruelty;" and it does not catalogue the types of procedures that licensed veterinarians may perform on animals. (*See Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707-08.)[9]

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[9] The CVMA argues that the VMPA need not mention declawing or animal cruelty to preempt those areas because the VMPA is a comprehensive scheme to regulate all matters related to veterinary medicine. (RB at p. 37 fn. 14.) Perhaps unsurprisingly, the CVMA can muster only a strained, and incorrect, reading of one case that it claims supports its position: *N. Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90. But *N. Cal.* actually cuts the other way. There, a city had by local ordinance enacted a *complete prohibition* of electric shock therapy (ECT). (*See id.* at p. 97.) The Court found the ordinance to be preempted by the state's "detailed legislation extensively regulating the administration of ECT." (*Id.* at p. 99.) Thus, the ordinance was preempted *not* because the Human Medical Practice Act "comprehensively regulate[s] matters of human health and medicine." (RB at p. 37 fn.14.) Rather, there was preemption because the ordinance and the "detailed legislation" specifically addressing the very conduct at issue were in direct conflict: the ordinance "prohibit[ed] what the statute command[ed]." (*Sherwin-Williams, supra,* 4 Cal.4th at p. 902.) Here, of course, no amount of rhetoric can transform the VMPA into "detailed legislation extensively regulating" everything that veterinarians do, in particular non-therapeutic declawing or acts that some consider animal cruelty.

In contrast, "[m]ost broadly defined, in conformity with its purpose," the subject matter of the Ordinance is the prevention of animal cruelty. (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 904; *see* West Hollywood Municipal Code tit. 9, art. 4, ch. 9.49.010 [non-therapeutic declawing involves "unnecessary pain, anguish and permanent disability caused the animal"].) "Most narrowly defined, in accordance with its terms," the subject matter of the Ordinance is the non-therapeutic declawing of animals. (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 904; *see* West Hollywood Municipal Code tit. 9, art. 4, ch. 9.49.020 [no declawing of animals except for therapeutic purpose].)

It thus defies common sense to argue that the Veterinary Medical Practice Act is sufficiently logically related to either non-therapeutic declawing or animal cruelty that a court can detect a "patterned approach" to those subjects. (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 904; *see also Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 600.)

Finally, even if the Veterinary Medical Practice Act were stretched beyond its language and scope and defined to include *all* regulation of the practice of veterinary medicine, there *still* would be no implied preemption here because *the Ordinance does not regulate the practice of veterinarians*. Rather, it prohibits *all* persons from performing or requesting a specific non-therapeutic procedure that the citizens of West Hollywood deem cruel and unnecessary. (*See* West Hollywood Municipal Code tit. 9, art. 4, ch. 9.49.020.) While the burden of the Ordinance may fall disproportionately on some licensed veterinarians practicing in West Hollywood who would otherwise elect to perform non-therapeutic declawing, that is patently distinct from an ordinance mandating that all veterinarians comply with additional, local requirements (*e.g.*, licenses, examinations, moral fitness

qualifications), as a *precondition* to practicing within that city. (*See* Bus. & Prof. Code § 460.)

3. There Is No Clear Indication That the Legislature Intended to Fully Occupy the Field

Even if the Court were to conclude that the Veterinary Medical Practice Act enters the area occupied by the Ordinance, that does not end the implied preemption inquiry. Rather, the Court must next gauge the three indicia of the legislature's intent to "fully occupy" that area.[10] Here, again, the implied preemption argument fails because nothing in the Veterinary Medical Practice Act demonstrates any intent to regulate either declawing or animal cruelty.

First, because the Veterinary Medical Practice Act does not even mention declawing or animal cruelty, it does not so "fully and completely" cover declawing or animal cruelty so as to clearly indicate that those subjects have "become exclusively a matter of state concern." (*See Sherwin-Williams, supra*, 4 Cal.4th at p. 898.) In contrast, when the legislature *did* intend to preempt a certain field (cleanliness) by enacting the Veterinary Medical Practice Act, it expressly said so. (*See* Bus. & Prof. Code § 4809.6.) The CVMA asserts that section 4809.6 is irrelevant

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[10] (1) Has the subject matter has been so fully and completely covered as to clearly indicate that it has become exclusively a matter of state concern?; (2) has the subject matter been partially covered and couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action?; or (3) has the subject matter been partially covered 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? (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898.)

because it is merely an *enforcement* provision. (RB at p. 41.) Under these circumstances, though, the distinction between enforcement provisions and regulatory provisions is truly one without a difference. What matters is that the legislature did expressly intend to preempt a narrow field of local action with the VMPA. That "begs the question of why, if preemption was legislatively *intended* [as to declawing or animal cruelty], the Legislature did not simply say so, as the Legislature has done many times in many circumstances." (*Cal. Rifle & Pistol Assn., Inc. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1317.)

The second *Sherwin-Williams* inquiry—whether "partial cover[age]" "clearly indicate[s] that a paramount state concern will not tolerate local government action"—must also be answered in the negative. (*See Sherwin-Williams*, *supra*, 4 Cal.4th at p. 905.) Again, the Veterinary Medical Practice Act does not even partially cover the fields of declawing or animal cruelty, let alone in preclusive terms. Not only is there no "clear" indication that "no further or additional local action is permissible" in the areas of non-therapeutic declawing or animal cruelty, but there is not even a hint of an indication. (*See Cal. Rifle*, *supra*, 66 Cal.App.4th at p. 1319.)

Finally, the subject matter of the Ordinance will have no practical effect on "transient citizens." (*See Sherwin-Williams*, *supra*, 4 Cal.4th at pp. 905-06.) The CVMA's imagery of transient veterinarians (RB at p. 50) borders on being risible. The effect of the Ordinance on transient veterinarians is, if not pure fantasy, certainly *de minimus*. As for the uncertainty wrought on the animal guardians of West Hollywood (RB at p. 50), the CVMA forgets that it was the citizens of West Hollywood—including, and especially, those animal guardians—who enacted the prohibition on non-therapeutic declawing in the first place.

IV.
CONCLUSION

For the foregoing reasons, amici respectfully request that the Court overturn the trial court's grant of summary judgment to the CVMA and enter summary judgment in favor of the City.

Dated: December 27, 2006

Respectfully submitted,

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George A. Nicoud III

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BRIEF OF AMICUS CURIAE ON BEHALF OF THE ANIMAL LEGAL DEFENSE FUND, ASSOCIATION OF VETERINARIANS FOR ANIMAL RIGHTS, AND THE PAW PROJECT IN SUPPORT OF APPELLANT

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