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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF MENDOCINO

\* \* \* \* \*

JAMES HILL, TRELANIE HILL, )  
ANDREA NAGY, AND )  
MARTA NAGY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MENDOCINO COUNTY BOARD OF, )  
SUPERVISORS, AND THOMAS )  
ALLMAN, )  
 )  
Defendants. )

Case No. SCUK-CVG-09-54670  
  
PLAINTIFFS' OPPOSITION  
TO DEMURRER TO  
FIRST AMENDED COMPLAINT;  
POINTS AND AUTHORITIES  
  
DATE: DECEMBER 10, 2010  
TIME: 9:30 A.M.  
DEPT.: E

## TABLE OF CONTENTS

I.	INTRODUCTION	...1
II.	STATEMENT OF FACTS	...4
A.	THE COMPASSIONATE USE ACT PLACES NO BURDENS UPON A QUALIFIED PATIENT, AND PROVIDES NO LIMITATIONS BEYOND THAT WHICH IS REASONABLY RELATED THE PATIENTS CURRENT MEDICAL NEEDS.	...7
B.	THE MEDICAL MARIJUANA PROGRAM ACT ENHANCED THE ACCESS OF PATIENTS AND CAREGIVERS TO MEDICAL MARIJUANA THROUGH COLLECTIVE, COOPERATIVE CULTIVATION PROJECTS	...8
C.	THE MEDICAL MARIJUANA PROGRAM ACT PROVIDES NO ADDITIONAL BURDENS UPON AN INDIVIDUAL QUALIFIED PATIENT, AND PROVIDES NO LIMITATIONS ON THE NUMBER QUALIFIED PATIENTS OR PRIMARY CAREGIVER MAY ASSOCIATE FOR THE PURPOSES OF COLLECTIVELY CULTIVATING MARIJUANA FOR MEDICAL PURPOSES	...10
D.	THE <i>MMPA</i> CONTAINS EXPLICIT LAND USE REGULATIONS WHICH PROHIBIT THE OUTDOOR <u>USE</u> OF MARIJUANA ON PARCELS OF LAND WITHIN 1,000 FEET OF THE GROUNDS OF A SCHOOL, RECREATION CENTER, OR YOUTH CENTER.	...11
E.	THE <i>MMPA</i> INCLUDED PROVISIONS WHICH ALLOW LOCAL MUNICIPALITIES TO REGULATE THE USE AND CULTIVATION OF MEDICAL MARIJUANA WITHIN CERTAIN FACILITIES AND INSTITUTIONS.	...12
F.	THE <i>MMPA</i> EXPLICITLY TOUCHES ON LAND USE LAW BY PROSCRIBING IN SECTIONS 11362.765 AND 11362.775 THE APPLICATION OF SECTIONS 11570, 11366, AND 11366.5 TO USES OF PROPERTY INVOLVING MEDICAL MARIJUANA.	...12
G.	THE LEGISLATURE HAS OCCUPIED ALL MATTERS CONNECTED TO THE LAND USE REGULATION OF MEDICAL MARIJUANA WITHIN THE <i>MMPA</i>	...13
H.	WITHIN THE <i>MMPA</i> THE LEGISLATURE HAS OCCUPIED ALL OTHER ASPECTS CONNECTED TO THE REGULATION OF MEDICAL MARIJUANA, INCLUDING THOSE WHICH ARE CRIMINAL AND CIVIL IN NATURE	...13

III. <u>ARGUMENT</u>	...14
A. WHERE THE LEGISLATURE HAS MANIFESTED AN INTENTION, EXPRESSLY OR BY IMPLICATION, TO WHOLLY TO OCCUPY THE FIELD MUNICIPAL POWER TO REGULATE IN THAT AREA IS LOST, AND ANY ATTEMPT TO REGULATE THE FIELD IS VOID – WITH RESPECT TO THE <i>MMPA</i> MUNICIPALITIES MAY ONLY ENACT REGULATORY ORDINANCES CONSISTENT WITH THE PROVISIONS OF THE MEDICAL MARIJUANA PROGRAM ACT.	...14
B. LOCAL ORDINANCES THAT CONFLICT WITH STATE LAW ARE UNCONSTITUTIONAL AND VOID BY THE DOCTRINE OF PREEMPTION.	...17
C. THE MEDICAL MARIJUANA PROGRAM ACT PERMITS THE CULTIVATION OF MARIJUANA FOR MEDICAL PURPOSES AND EXEMPTED ALL FACILITIES FROM THE LAWS DECLARING THE USE OF PROPERTY FOR THESE PURPOSES A NUISANCE.	... 17
D. UNDER <i>H&amp;S</i> § 11362.83, LOCAL MUNICIPALITIES ARE ONLY PERMITTED TO ENACT ORDINANCES THAT ARE CONSISTANT WITH THE <i>MMPA</i> .	...19
E. THERE IS A CLEAR INDICATION OF PREEMPTIVE INTENT FROM THE VOTERS AND THE LEGISLATURE, THAT ALL REGULATIONS REGARDING MEDICAL MARIJUANA POSSESSION, CULTIVATION AND SALES ARE PREEMPTED BY STATE STATUTE, UNLESS THE REGULATIONS ARE CONSISTENT WITH THE MEDICAL MARIJUANA PROGRAM ACT AND/OR THE COMPASSIONATE USE ACT.	...22
F. <i>A &amp; B CATTLE CO. V. ESCONDIDO</i> IS ALSO DISPOSITIVE TO THIS CASE DEMONSTRATING THAT A LOCAL ORDINANCE IF PREEMPTED BY A LESS RESTRICTIVE STATE LAW	...28
G. THE APPELLATE DECISION IN <i>KRUSE</i> FAILS TO RESURRECT THE CONTESTED ORDINANCE	...30
1. CITY OF CLAREMONT V. KRUSE IS DISTIGUISHABLE FROM THE SITUATION AT HAND.	...31
2. <i>CITY OF CLAREMONT V. KRUSE</i> CONFLICTS WITH VARIOUS HOLDINGS OF THE CALIFORNIA SUPREME COURT WHICH THIS COURT IS BOUND TO FOLLOW.	...32

3.	<i>CITY OF CLAREMONT V. KRUSE</i> CONFLICTS WITH VARIOUS HOLDINGS OF THE COURT OF APPEAL THUS THIS COURT SHOULD FOLLOW THE MORE REASONED AND ACCURATE DECISIONS.	...34
H.	LOCAL LEGISLATION THAT CONFLICTS WITH STATE LAW UNCONSTITUTIONAL AND VOID	...36
I.	REFERENDUM STATUTES MAY BE AMENDED ONLY BY THE VOTERS – ANY AMENDMENTS WITHOUT SUCH VOTER APPROVAL ARE PREEMPTED BY STATE LAW	...37
J.	IF OTHERWISE VALID LOCAL LEGISLATION CONFLICTS WITH STATE LAW, IT IS PREEMPTED BY SUCH LAW AND IS VOID.	...40
K.	ORDINANCE 4235 IS INIMICAL TO, AND CANNOT BE RECONCILED WITH, THE <i>MMPA</i> OR THE <i>CUA</i> . THEREFORE THE ORDINANCE 4235 CONTRADICTS THE <i>MMPA</i> AND THE <i>CUA</i> .	...40
L.	THE CONTESTED ORDINANCE CONFLICTS WITH THE STATES DRUG HOUSE ABATEMENT LAWS, THUS IT IS PREEMPTED BY STATE LAW ON THESE GROUNDS ALSO.	...41
IV.	THE RECETENTLY ENACTED ASSEMBLY BILL 2650, ADDING <i>HEALTH AND SAFETY CODE</i> SECTION 11362.768, DOES NOT SAVE THE CONTESTED ORDINANCE.	...42
V.	CONCLUSION	...49

## TABLE OF AUTHORITIES

### CASES

<i>A &amp; B Cattle Co. v. Escondido</i> (1987) 192 Cal.App.3d 1032	...28
<i>Action Apartment Assn., Inc. v. City of Santa Monica</i> (2007) 41 Cal.4th 1232 I	...36
<i>Alfaro v. Terhune</i> (2002) 98 Cal.App.4th 492	...1
<i>American Financial Services Assn. v. City of Oakland</i> (2005) 34 Cal.4th 1239	...35-36
<i>Auto Equity Sales v. Superior Court</i> (1962) 57 Cal.2d 450	...34
<i>Cal. E.S. Comm., v. Payne</i> (1947) 31 Cal.2d 210	...45-46
<i>Candid Enter., Inc. v. Grossmont Union High School Dist.</i> (1985) 39 Cal. 3d 878	...17, 36, 37
<i>Citizens to Save California (CSC) v. California Fair Political Practices Commission (CFPPC)</i> (2006) 145 Cal.App.4 <sup>th</sup> 736	...20
<i>City of Claremont v. Kruse</i> (2009) 177 Cal. App. 4th 1153	...30, 31, 35
<i>City of Lodi v. Randtron</i> (2004) 118 Cal.App.4th 337	...37
<i>City of Torrance v. Transitional Living Centers</i> (1982) 30 Cal.3d 516	...32
<i>Cohen v. Board of Supervisors</i> (1985) 40 Cal. 3d 277	...17, 24-25, 32
<i>Commission on P.O.S.T v. Superior Court</i> (2007) 42 Cal.4th 278	...22
<i>Droeger v. Friedman</i> (1991) 54 Cal.3d 26	...45

<i>Franchise Tax Bd. v. Cory</i> (1978) 80 Cal. App. 3d 772	...37-38
<i>Galvan v. Superior Court</i> (1969) 70 Cal.2d 851	...17
<i>Ginns v. Savage</i> (1964) 61 Cal.2d 520	...31
<i>Harris v. Capital</i> (1991) 52 Cal.3d 1142	...45
<i>Herzberg v. County of Plumas</i> (2005) 133 Cal.App.4th 1, 11	...45
<i>Knight v. Superior Court</i> (2005) 128 Cal.App.4th 14	...37
<i>L.A. Co. Democratic Central Committee v. County of Los Angeles</i> (1976) 61 Cal.App.3d 335	...46
<i>Morehart v. County of Santa Barbara</i> (1994) 7 Cal.4th 725	...37
<i>N. Cal. Psychiatric Society v. City of Berkeley</i> (1986) 178 Cal.App.3d 90	...27, 34-35
<i>O'Connell v. Stockton</i> (2007) 41 Cal.4 <sup>th</sup> 1061	...14, 15, 22, 24, 26, 40
<i>In re Mathews</i> (1923) 191 Cal. 35	...20
<i>Odd Fellows' Cemetery Assn. v. City &amp; County of San Francisco</i> (1903) 140 Cal. 226	...20
<i>People v. Cooper</i> (2002) 27 Cal. 4th 38	...37
<i>People v. Kelly</i> (2010) 47 Cal.4th 1008	...33
<i>People v. Perez</i> (2010) 182 Cal.App.4th 231	...34

<i>People v. Superior Court (Douglass)</i> (1979) 24 Cal.3d 428	...47-48
<i>People v. Triggs</i> (1973) 8 Cal.3d 884	...32
<i>People v. Trippet</i> (1997) 56 Cal. App. 4th 1532	...6-8, 30
<i>People v. Urziceanu</i> (2004) 132 Cal. App. 4th 747	...9, 18, 33, 35
<i>People el rel Deukmejian v. County of Mendocino</i> (1984) 36 Cal.3d 476	...29
<i>People ex rel. Lungren v. Superior Court</i> (1996) 14 Cal.4 <sup>th</sup> 294	...22
<i>Pieri v. City and County of San Francisco</i> (2006) 137 Cal.App.4th 886	...1
<i>Proposition 103 Enforcement Project v. Quackenbush</i> (1998) 64 Cal.App.4th 1473	...38
<i>Qualified Patients Assn. v. City of Anaheim</i> (2010) 187 Cal. App. 4th 734	...9, 12-13, 20, 31
<i>Rotolo v. San Jose Sports and Entertainment</i> (2007) 151 Cal.App.4th 307	...34
<i>Seminole Tribe of Florida v. Florida</i> (1996) 517 U.S. 44	...31
<i>State Board of Equalization v. Board of Supervisors</i> (1980) 105 Cal.App.3d 813	...47
<i>Stockton Sav. &amp; Loan Bank v. Massanet</i> (1941) 18 Cal.2d 200	...47
<i>Stop Youth Addiction, Inc. v. Lucky Stores, Inc.,</i> (1998) 17 Cal. 4th 553	...44-45
<i>Sullivan v. City of Los Angeles</i> (1953) 116 Cal.App.2d 807	...20

<i>Tobe v. City of Santa Ana</i> (1995) 9 Cal 4th 1069	...1
---	------

**STATUTES AND CONSTITUTIONAL PROVISIONS**

<i>California Constitution</i> Article II §10	...20, 37
<i>Art. XI, § 7</i>	...17, 20
Government Code § 65858	...31
§ 83111	...20
§ 83112	...20
Health and Safety Code § 11362.5	...7
§ 11362.7(f)	...10
§ 11362.768	...42, 43, 48
§ 11362.77	...16
§ 11362.775	...9, 18, 29
§ 11362.785	...12
§ 11362.79	...11, 29
§ 11362.83	...12, 14
§ 11570	...33, 41-42
§ 11571.1	...33

**OTHER AUTHORITIES**

<i>80 Opinions California Attorney General 113,</i>	...26
<i>Stats 2003 ch 875 § 1; 2003 Cal SB 420 § 1</i>	...3, 8, 9, 16, 18, 19, 29, 41
<i>2010 Cal Stats. ch. 603</i>	...44

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The ultimate question that is before this court is whether Mendocino County Ordinance No. 4235 and its provisions codified therein, which limit the location and number of cannabis plants a qualified patient<sup>1</sup>, his/her primary caregiver, or an association thereof may maintain is preempted by state law, and therefore unconstitutional on its face, and void.

As argued by the defendants, a facial challenge to a statute or ordinance presents a pure question of law that is properly resolved on demurrer. (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 509-510.) In raising their demurrer, the Defendants contend that Plaintiffs will be unable to meet their burden to demonstrate that the Ordinance inevitably poses a present "total and fatal conflict with state law." (*Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 894; *Tobe v. City of Santa Ana* (1995) 9 Cal 4th 1069, 1084.), for reasons that: the CUA and MMPA provide only "limited *criminal* immunities under a narrow set of circumstances" citing *City of Claremont v. Kruse* (2009) 177 Cal.App.4<sup>th</sup> 1153, 1175), and for reasons that the CUA and MMPA do not grant an unlimited right to cultivate *any amount* of marijuana in *any location* free from reasonable time, place, and manner restrictions.

The first grounds for Defendants' contentions is that:

The Ordinance does not attempt to qualify or limit the criminal defense provided by the CUA and MMPA, does not itself impose "criminal sanctions" of any kind, does not involve *any* of the identified state statutes, and - perhaps most importantly - does not attempt to punish qualified persons "*solely on the basis*" of their medical marijuana activities. Indeed, *no property* is declared to be a nuisance under the Ordinance "solely" on the basis of marijuana cultivation (whether collective, cooperative, or otherwise). Rather, the nuisance designation (and consequent remedies) depends upon a complex of other factors, such as location, number of marijuana plants, security measures, and the like. Any suggestion that such "time, place, and manner" regulations are prohibited would read the word "solely" right out of the MMPA. (Defendants' demurrer P&A pg. 13)

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<sup>1</sup> "Qualified patient" means a person who is entitled to the protections of Section 11362.5.

1 The Defendants further contend that:

2 The Ordinance provisions limiting the *locations* in which marijuana may be grown  
3 and the amount of marijuana that may be grown *in one place* do not prevent any  
4 qualified patient or primary caregiver from cultivating any amount of marijuana,  
5 either individually, collectively, or cooperatively. Rather, it governs *where* and  
6 *how* they do so in order to balance their needs against those of the surrounding  
7 community. This is entirely consistent with the right of qualified patients to  
8 possess whatever amount of marijuana they may need, or to form collective or  
9 cooperative operations of any overall size. (E.g., a 50 member collective that  
10 spread out its growing operations over several different premises, in permissible  
11 locations, would be perfectly consistent with the Ordinance.)” (Defendants’  
12 demurrer P&A pp. 13-14)

13 The defendants’ contention that under the Ordinance “*no property* is declared to be a  
14 nuisance under the Ordinance "solely" on the basis of marijuana cultivation . . . . Rather, **the**  
15 **nuisance designation** (and consequent remedies) **depends upon a complex of other factors,**  
16 **such as location, number of marijuana plants, security measures, and the like,**” amounts to  
17 nothing more than an attempt to fill a small void, (that being an area outside their interpretation  
18 and application of the term ‘solely’) within a comprehensive statutory scheme occupied by state  
19 law under the *MMPA*. Furthermore the defendants’ contention fails to recognize that  
20 ordinance’s additional “complex of other factors, such as location, number of marijuana plants,  
21 security measures, and the like,’ are indeed additional requirements, burdens, and restrictions  
22 that are placed upon the rights and privileges provided by the *CUA* and the *MMPA*, which are  
23 ultimately amendments to the *CUA* and the *MMPA*.

24 The defendants’ belief that the ordinance is entirely consistent with the right of qualified  
25 patients to possess whatever amount of marijuana they may need, or to form collective or  
26 cooperative operations of any overall size, because the “collective [may] spread out its growing  
operations over several different premises, in permissible locations, would be perfectly  
consistent with the Ordinance,” fails to recognize that the additional regulations that force a  
collective to spread out its growing operations are nothing other than additional burdens upon  
the *CUA* and the *MMPA*. Furthermore, the defendants’ aforementioned theory contradicts the  
legislative stated purpose of the *MMPA*, which is to:

1 “(2) Promote uniform and consistent application of the act among the counties  
within the state.

2 (3) Enhance the access of patients and caregivers to medical marijuana through  
3 collective, cooperative cultivation projects.”

*Stats 2003 ch 875; 2003 Cal SB 420 § 1*

4 It will be argued herein that the defendants do not have authority to regulate any area of  
5 law that is fully occupied by state law, and as such they are prohibited from enacting or  
6 enforcing any local ordinance that regulates the cultivation and distribution of medical  
7 marijuana.

8 The defendants also contend that the Ordinance does not conflict with the state's "drug  
9 house" abatement law, because “the Legislature has recently reaffirmed the nonexclusive nature  
10 of the drug house abatement law with the enactment of §11571.1, subdivision (a), allowing  
11 local municipalities to adopt ad enforce laws “consistent” with the states drug house abatement  
12 laws. However, the were misdirected because the state's "drug house" abatements laws only  
13 applies to facilities connected to the unlawful cultivation, possession and sales, etc. of  
14 controlled substances. See *Health & Saf Code* § 11570. Therefore, the defendants’ argument  
fails on these grounds also.

15 Finally the Defendants contend that:

16 The *CUA* and *MMPA* indeed contain relatively few restrictions on the criminal  
17 defenses provided therein. However, this hardly suggests intent that there be no  
18 such regulation regarding the cultivation of marijuana. Quite the contrary, it rather  
19 clearly indicates that the *CUA* and *MMPA* were never intended to serve as a  
comprehensive statewide regulatory scheme for marijuana cultivation.

(Defendants’ demurrer P&A pg. 14)

20 This position unquestionably contradicts the California Legislature’s stated purpose of  
21 the MMPA, which again is to:

22 “(2) Promote uniform and consistent application of the act among the counties  
23 **within the state.**

24 (3) Enhance the access of patients and caregivers to medical marijuana through  
25 collective, cooperative cultivation projects.”

*Stats 2003 ch 875; 2003 Cal SB 420 § 1*

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## II. STATEMENT OF FACTS

On the 6<sup>th</sup> day of April, 2010, the Board of Supervisors of Mendocino County Ordinance No. 4235, amending Chapter 9.31, sections 9.31.010 through 9.31.340, to the Mendocino County Code<sup>2</sup> (*MCC*), which limits the number of cannabis plants a qualified patient or his/her primary caregiver, or an association thereof, may cultivate to no more than one hundred (100) contiguous square feet per legal parcel indoors (*MCC* § 9.31.040) and/or no more 25 plants cannabis plants per parcel of land, regardless of whether the person(s) growing the marijuana is/are a "qualified patient", "primary caregiver", or "collective" (*MCC* §§ 9.31.050) regardless of the size<sup>3</sup> and location of the parcel of land, and “regardless of the number of qualified patients residing at such location” (§ 9.31.050) However, Mendocino County Ordinance No. 4235, did provide an exception to the 25-plant limit under certain conditions, but under no circumstances shall the permitted amount of cannabis plants exceed ninety-nine (99) plants per legal parcel, as long as the parcel of land upon which the marijuana is being cultivated is at least five (5) acres in size. (*MCC* §§ 9.31.110)

In order to qualify for exception to the 25-plant limit under *MCC* §§ 9.31.110 a qualified patient must provide in part:

(3) Written evidence that each person applying for the permit and any other person who will be engaged in the management of the collective is at least eighteen (18) years of age

(4) That the applicant or any individual engaged in the management

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<sup>2</sup> Plaintiff request judicial notice pursuant to Evidence Code §§ 452 and 453 of all of the attached Exhibits – Attached at Exhibit 1 is a true and correct copy of Ordinance 4235.

<sup>3</sup> Plaintiff request judicial notice pursuant to Evidence Code §§ 452 and 453, of the fact that the size of a legal parcel of land varies from a several hundred square foot +/- lot, to a parcel consisting of several U.S. land surveying “sections,” which are nominally one mile square each, containing 640 acres.

1 of, or employed by, the collective has not been convicted of a violent  
2 felony as defined in Penal Code Section 667.5 (c) within the State of  
3 California, or a crime that would have constituted a violent felony as  
4 defined in Penal Code Section 667.5 (c) if committed in the State of  
California and is not currently on parole or felony probation. A conviction  
within the meaning of this Section means a plea or verdict of guilty or a conviction  
following a plea of nolo contendere;

5 (5) A statement acknowledging that the permit applied for will be  
6 issued in conformance with the laws of the State of California and that  
7 such issuance does not confer upon the applicant, managers, employees  
8 and members of the collective immunity from prosecution under federal  
9 law;

10 (6) The applicant's waiver and release of the County from any and all  
11 legal liability related to or arising from the application for a permit or the  
12 enforcement of the conditions of the permit;

13 (9) Proof that the owner of the property, if other than the applicant,  
14 has been notified as set forth in Section 9.31.080;

15 (16) The applicant shall provide proof of either, a physician  
16 recommendation that the amount to be cultivated is consistent with the  
17 applicant's medical needs, the needs of the patients for whom the  
18 applicant is a caregiver, or a written agreement or agreements, that the  
19 applicant is authorized by one or more medical marijuana dispensing  
20 collectives to produce medical marijuana for the use of the members of  
21 said collective or collectives;

22 (19) Submission of payment of a permit fee sufficient to cover the cost  
23 to all County departments of investigating and processing the application  
24 in an amount that shall be set by the Board of Supervisors in accordance  
25 with all applicable laws and regulations;

26 (22) Authorization for the Sheriff, Fire District, and/or other appropriate  
County employees or agents or their designees, including building and  
fire inspectors, to enter the property only during normal business hours  
for the purpose of examining the location to confirm compliance with this  
Section.

MCC §§ 9.31.110

None of the aforementioned requirements are required under either the *CUA* or the *MMPA*, thus  
Plaintiffs assert that they are amendments to both the *CUA* and the *MMPA*.

1           Regardless of whether a proposed cultivator is a qualified patient, under no  
2 circumstances is the cultivation of marijuana to be permitted, whether grown collectively or  
3 individually, in any amount or quantity, in the following areas:

4           (1) Within one thousand (1,000) feet of a youth-oriented facility, a school, a park,  
5 or any "church" or residential treatment facility as defined herein.

6           (2) Outdoors within one hundred (100) feet of any occupied legal residential  
7 structure located on a separate legal parcel.

8           (3) Outdoors in a mobile home park as defined in Health and Safety Code Section  
9 18214.1 within one hundred (100) feet of an occupied mobile home that is under  
separate ownership.

10           (4) In any location where the marijuana plants are visible from the public right of  
way or publicly traveled private roads.

11           (*MCC* § 9.31.090.)

12           Again, none of the aforementioned requirements are required under either the *CUA* or the  
13 *MMPA* thus they are amendments to both the *CUA* and the *MMPA*. As stated by the  
14 defendants,

15           “Taken together, the provisions of Ordinance No. 4235 establish limited civil  
16 regulations for the use of land to cultivate marijuana. These regulations do not  
17 allow every property owner to grow unlimited amounts of marijuana in their  
backyard, but do permit reasonable amounts of marijuana to be cultivated in  
appropriate locations, including the ability to grow larger amounts, subject to  
moderate conditions”

18           (Defendants’ demurrer P&A pg. 4)

19           Of course, the reasonable amounts of marijuana is to be determined upon an individual  
20 bases, wherein that amount must be ‘reasonably related to the patient’s current medical needs,  
21 (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550-1551), not upon the dictates of the  
22 Mendocino County Board of Supervisors.

23           Finally *MCC* § 9.31.030 limits “medical marijuana collective[s]” to those “qualified  
24 patients, persons with valid identification cards, and the designated primary caregivers of  
25 qualified patients who associate by written agreement, or form a cooperative in accordance with  
26 Section 12300 of the Corporations Code within the unincorporated area of the County in order

1 to collectively or cooperatively cultivate, store, and/or dispense marijuana for medical purposes,  
2 as provided in Health and Safety Code Section 11362.775.” (*MCC § 9.31.030 Emphasis added*)  
3 Here, the “written agreement” is absent from Health and Safety Code Section 11362.775, thus  
4 once again MCC § 9.31 has amended the *MMPA*.

5 **A. THE COMPASSIONATE USE ACT PLACES NO BURDENS UPON A**  
6 **QUALIFIED PATIENT, AND PROVIDES NO LIMITATIONS BEYOND THAT**  
7 **WHICH IS REASONABLY RELATED THE PATIENTS CURRENT MEDICAL**  
8 **NEEDS.**

9 Under the *Compassionate Use Act* (H&S § 11362.5) (*CUA*), there are no explicit  
10 limitations on the number of cannabis plants a qualified patient or his or her primary caregiver  
11 may cultivate, so long as the amount marijuana ultimately harvested is reasonably related to  
12 meet the medical needs of the patient<sup>4</sup>. (See *Health and Safety Code § 11362.5* and *People v.*  
13 *Trippet*, (1997) 56 Cal. App. 4th 1532, 1549)

14 In November 1996, the California Voters enacted the Compassionate Use Act (also  
15 known as Proposition 215), which was codified at *Health and Safety Code § 11362.5*.  
16 The ballot materials of Proposition 215 make clear that the only “limitation” on the quantity of  
17 marijuana a qualified person under the *CUA* may possess, is the amount that is reasonably  
18 related the patient’s needs. An argument against the *CUA* was that it “allows unlimited  
19 quantities of marijuana to be grown anywhere ... in backyards or near schoolyards without any  
20 regulation or restrictions. This is not responsible medicine. It is marijuana legalization.” (Ballot  
21 Pamp., Gen. Elec. (Nov. 5, 1996), argument against Prop. 215, p. 61.) (see **Exhibit 2**) San  
22 Francisco District Attorney Terence Hallinan responded, “Proposition 215 does not allow  
23 ‘unlimited quantities of marijuana to be grown anywhere.’ It only allows marijuana to be grown

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24 <sup>4</sup> The *CUA* does not require that a physician’s recommendation or approval state any specific  
25 amounts of cannabis or dosage schedules in order to be valid. The *Trippet* Court examined the  
26 issue regarding amounts through an analysis of the ballot arguments (*People v. Trippet*, (1997)  
56 Cal. App. 4th 1532, 1545-1549), concluding “[T]he rule should be that the quantity  
possessed by the patient or the primary caregiver, and the form and manner in which it is  
possessed, should be reasonably related to the patient’s current medical needs,” (*Id.* at 1549)  
while leaving the issue “a factual question to be determined by the trier of fact.” *Id.*

1 for a patient's personal use. Police officers can still arrest anyone who grows too much, or tries  
2 to sell it.” (*Id.*, rebuttal to argument against Prop. 215, p. 61.) According to these ballot  
3 statements, the *CUA* does not place a numeric cap on how much marijuana is sufficient for a  
4 patient's personal medical use.

5 Approximately one year after the enactment of the *CUA* the Appellate Court in *People v.*  
6 *Trippet*, (1997) 56 Cal. App. 4th 1532 (*Trippet*), held that the quantity of marijuana permitted  
7 under the *CUA* is an amount that is “reasonably related to the patient's current medical needs.”  
8 (*Id.* at 1549–1551.)

9 **B. THE MEDICAL MARIJUANA PROGRAM ACT ENHANCED THE ACCESS OF**  
10 **PATIENTS AND CAREGIVERS TO MEDICAL MARIJUANA THROUGH**  
11 **COLLECTIVE, COOPERATIVE CULTIVATION PROJECTS**

12 On October 12, 2003 the California Governor approved the California Legislation  
13 enacted through Senate Bill 420 the *Medical Marijuana Program Act (MMPA)*. In the un-  
14 codified portions of the *MMPA* the legislature found and declared in relevant part that:

15 (1) On November 6, 1996, the people of the State of California enacted the  
16 Compassionate Use Act of 1996 (hereafter the [CUA] act), codified in Section  
17 11362.5 of the Health and Safety Code, in order to allow seriously ill residents of  
18 the state, who have the oral or written approval or recommendation of a  
19 physician, to use marijuana for medical purposes without fear of criminal liability  
20 under Sections 11357 and 11358 of the Health and Safety Code.

21 (2) However, reports from across the state have revealed problems and  
22 uncertainties in the act that have impeded the ability of law enforcement officers  
23 to enforce its provisions as the voters intended and, therefore, have prevented  
24 qualified patients and designated primary caregivers from obtaining the  
25 protections afforded by the act.

26 (4) In addition, act called upon the state and the federal government to develop a  
plan for the safe and affordable distribution of marijuana to all patients in medical  
need thereof.

*Stats 2003 ch 875 § 1; 2003 Cal SB 420 § 1*

1 The Legislature also declared that their **intent** in enacting the MMPA was to do all of the  
2 following:

3 (b)

4 (2) Promote uniform and consistent application of the act among the counties  
5 within the state.

6 (3) Enhance the access of patients and caregivers to medical marijuana through  
7 collective, cooperative cultivation projects.

8 (c) It is also the intent of the Legislature to address additional issues that were  
9 not included within the act, and that must be resolved in order to promote the  
10 fair and orderly implementation of the act.

11 *Stats 2003 ch 875 § 1; 2003 Cal SB 420 § 1*

12 The *Medical Marijuana Program Act* contains section 11362.775, which states,

13 “Qualified patients, persons with valid identification cards, and the designated  
14 primary caregivers of qualified patients and persons with identification cards, who  
15 associate within the State of California in order collectively or cooperatively to  
16 cultivate marijuana for medical purposes, shall not solely on the basis of that fact  
17 be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360,  
18 11366, 11366.5, or 11570<sup>5</sup>.”

19 (*H&S § 11362.775*)

20 “Thus, the Legislature also exempted those qualifying patients and primary caregivers  
21 who collectively or cooperatively cultivate marijuana for medical purposes from criminal  
22 sanctions for possession for sale, transportation or furnishing marijuana, maintaining a location  
23 for unlawfully selling, giving away, or using controlled substances, managing a location for the  
24 storage, distribution of any controlled substance for sale, and **the laws declaring the use of  
25 property for these purposes a nuisance.**” *People v. Urziceanu* (2004) 132 Cal. App. 4th 747,  
26 785 *Emphasis added*

Therefore, the enactment of *H&S § 11362.775* within the *MMPA* demonstrates that the  
legislature expressly exempted associations of medical marijuana patients from “the laws

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<sup>5</sup> “§ 11570 **qualifies as ‘civil in nature,’ but also ‘quasi-criminal in effect’** and ‘character’ ”  
*Qualified Patients Assn. v. City of Anaheim*, (2010) 187 Cal. App. 4th 734, 755, citing *Cal.  
Procedure* (5th ed. 2008) Actions, § 70, p. 144

1 declaring the use of property for this purposes a nuisance,” in **all locations**, regardless of  
2 whether the association is collectively cultivating marijuana within the following areas  
3 prohibited by the ordinance:

4 (1) Within one thousand (1,000) feet of a youth-oriented facility, a school, a park,  
5 or any "church" or residential treatment facility as defined herein.

6 (2) Outdoors within one hundred (100) feet of any occupied legal residential  
7 structure located on a separate legal parcel.

8 (3) Outdoors in a mobile home park as defined in Health and Safety Code Section  
9 18214.1 within one hundred (100) feet of an occupied mobile home that is under  
10 separate ownership.

11 (4) In any location where the marijuana plants are visible from the public right of  
12 way or publicly traveled private roads.

13 **C. THE MEDICAL MARIJUANA PROGRAM ACT PROVIDES NO ADDITIONAL**  
14 **BURDENS UPON AN INDIVIDUAL QUALIFIED PATIENT, AND PROVIDES NO**  
15 **LIMITATIONS ON THE NUMBER QUALIFIED PATIENTS OR PRIMARY**  
16 **CAREGIVER MAY ASSOCIATE FOR THE PURPOSES OF COLLECTIVELY**  
17 **CULTIVATING MARIJUANA FOR MEDICAL PURPOSES**

18 Under the *Medical Marijuana Program Act*, a "Qualified patient" is a person who is  
19 entitled to the protections of Section 11362.5, but who does not have an identification card  
20 issued pursuant to the *MMPA*. (*H&S* 11362.7(f)) There are no limitations within the *MMPA* on  
21 the number qualified patients or primary caregivers who may associate for the purposes of  
22 collectively cultivating and distributing marijuana for medical purposes. (See *H&S* §  
23 11362.775). Since each individual qualified patient is entitled to a number of plants determined  
24 by either of the three guidelines set under *H&S* § 11362.77, and since the *MMPA* has not placed  
25 a limit on the number of patients who may associate to collectively cultivate medical marijuana  
26 at any single cultivation site, the *MMPA* has not placed a maximum limit upon the number of  
plants an association of qualified patients or their caregivers may cultivate at their cultivation  
site, so long as the number of plants is within the guidelines set within *H&S* § 11362.77, or  
within an amount that is reasonably related to the medical needs of the patients belonging to the

1 association. (See *H&S* §§ 11362.77 and .775) For example an association of five qualified  
2 individuals may cultivate thirty (30) plants under the six (6) mature plant guideline set under  
3 *H&S* 11362.77(a), while an association of one hundred (100) qualified individuals may cultivate  
4 six hundred (600) mature plants under the same guideline. Of course the association of patients  
5 noted in the examples may maintain additional plants if the county adopted guidelines under  
6 *H&S* § 11362.77(c), which permits the local establishment of guidelines for additional plants, or  
7 if their collective medical needs require additional plants to reasonably meet their needs. (*H&S*  
8 § 11362.77(b))

9 **D. THE MMPA CONTAINS EXPLICIT LAND USE REGULATIONS WHICH**  
10 **PROHIBIT THE OUTDOOR USE OF MARIJUANA ON PARCELS OF LAND WITHIN**  
11 **1,000 FEET OF THE GROUNDS OF A SCHOOL, RECREATION CENTER, OR**  
12 **YOUTH CENTER.**

13 The *MMPA* includes *H&S* § 11362.79 which provides,

14 Nothing in this article shall authorize a qualified patient or person with an  
15 identification card to engage in the smoking of medical marijuana under any of  
16 the following circumstances:

17 (a) In any place where smoking is prohibited by law.

18 (b) In or within 1,000 feet of the grounds of a school, recreation center, or youth  
19 center, **unless the medical use occurs within a residence.**

20 The provisions of *H&S* § 11362.79 are particularly relevant because they are land use  
21 statutes which prohibit outdoor smoking of marijuana on privately held land that is within 1,000  
22 feet of the grounds of a school, recreation center, or youth center. Thus, the only activity that  
23 the Legislature intended to restrict by location, or through land use regulation, was the smoking  
24 of marijuana in the specified locations that **are not within a residence**. Therefore, by  
25 implication, the Legislature considered and decided to permit the cultivation of marijuana for  
26 medical use regardless of the location where said activities occur. This implication is consistent  
with express provision of *H&S* § 11362.775, discussed previously.

1                   **E.       THE MMPA INCLUDED PROVISIONS WHICH ALLOW LOCAL**  
2                   **MUNICIPALITIES TO REGULATE THE USE AND CULTIVATION OF MEDICAL**  
3                   **MARIJUANA WITHIN CERTAIN FACILITIES AND INSTITUTIONS.**

4                   The California Legislature explicitly allowed local governments to enact regulations  
5                   regulating any medical use of marijuana on the property or premises of any jail, correctional  
6                   facility, or other type of penal institution in which prisoners reside or persons under arrest are  
7                   detained. *H&S* § 11362.785   Since Health and Safety Code § 11362.83 provides:

8                   “Nothing in this article shall prevent a city or other local governing body from  
9                   adopting and enforcing laws **consistent with this article**,” (*H&S* § 11362.83);

10                  the enactment of any such regulations are explicitly permitted, for reasons that the adoption and  
11                  enforcement of regulations concerning marijuana use within the permitted facilities would be  
12                  **consistent** with the *MMPA*.

13                   **F.       THE MMPA EXPLICITLY TOUCHES ON LAND USE LAW BY**  
14                   **PROSCRIBING IN SECTIONS 11362.765 AND 11362.775 THE APPLICATION OF**  
15                   **SECTIONS 11570, 11366, AND 11366.5 TO USES OF PROPERTY INVOLVING**  
16                   **MEDICAL MARIJUANA.**

17                   **Whether the MMPA bars local governments from using nuisance abatement**  
18                   **law ... legislation to prohibit the use of property for medical marijuana purposes**  
19                   **remains to be determined.** <sup>4</sup> Unlike in *Ross*, where the Supreme Court observed  
20                   that “[t]he operative provisions of the [CUA] do not speak to employment law”  
21                   (*Ross*, supra, 42 Cal.4th at p. 928), the *MMPA* explicitly touches on land use law  
22                   by proscribing in sections 11362.765 and 11362.775 the application of sections  
23                   11570, 11366, and 11366.5 to uses of property involving medical marijuana.

24                   **Here, ...it appears incongruous at first glance to conclude a city may**  
25                   **criminalize as a misdemeanor a particular use of property the state expressly**  
26                   **has exempted from “criminal liability” in sections 11362.765 and 11362.775.**

Put another way, it seems odd the Legislature would disagree with federal  
policymakers about including medical marijuana in penal and drug house  
abatement legislation (compare 21 U.S.C. §§ 812 & 856 with §§ 11362.765 &  
11362.775), but intend that local legislators could side with their federal—instead  
of state—counterparts in prohibiting and criminalizing property uses “solely on  
the basis” of medical marijuana activities. (§§ 11362.765 & 11362.775.) After all,  
local entities are creatures of the state, not the federal government.”

*Qualified Patients Association v. City of Anaheim (QPA)* (2010) 187 Cal. App. 4th 734,  
754.

1 Footnote 4 of *QPA* states:

2 <sup>4</sup> *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, on which the city  
3 relies, did not involve an ordinance like Anaheim's, which potentially contradicts  
4 sections 11362.765 and 11362.775 by making the use of property a crime “solely  
5 on the basis” of otherwise lawful medical marijuana activity. The city also relies  
6 on *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, which did not involve or  
7 discuss section 11362.765 or 11362.775, nor section 11366, 11366.5, or 11570.  
8 Additionally, unlike the scenario here, both *Kruse* and *Naulls* involved plaintiffs  
9 that ignored or circumvented established procedures for obtaining a business  
10 license, instead of seeking a declaratory judgment. And both cases involved  
11 temporary moratoriums rather than the permanent dispensary ban alleged here.  
12 Again, cases are not determinative for issues not considered.

13 *Qualified Patients Association v. City of Anaheim supra* at 754 fn. 4

14 Since this immediate case involves a permanent ordinance, it is congruent with *QPA*.  
15 Thus *QPA* is determinative, while *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153 is  
16 not. Therefore as in *QPA*, the issue of whether **the MMPA bars local governments from**  
17 **using nuisance abatement law** ... legislation to prohibit the use of property for medical  
18 marijuana purposes remains to be determined. *QPA supra* at 754

19 **G. THE LEGISLATURE HAS OCCUPIED ALL MATTERS CONNECTED TO**  
20 **THE LAND USE REGULATION OF MEDICAL MARIJUANA WITHIN THE MMPA.**

21 Thus far it has been shown that the *MMPA* included: 1) private land use regulations,  
22 limiting the outdoor use of medical marijuana on private lands; 2) authorized land use  
23 regulations within government facilities; and, 3) touched upon on land use law by proscribing in  
24 sections 11362.765 and 11362.775 the application of sections 11570, 11366, and 11366.5 to  
25 uses of property involving medical marijuana, prohibiting nuisance abatement “solely on the  
26 basis of otherwise lawful medical marijuana activity.” Therefore, the Legislature has occupied  
all land use matters connected to the regulation of medical marijuana.

The only leeway that was provided to local legislation was the authorization to pass  
local land use ordinances that are consistent with the *MMPA*, these are only those regulations  
that do not infringe upon or contradict the rights and privileges provided by the *MMPA*.



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### III. ARGUMENT

**A. WHERE THE LEGISLATURE HAS MANIFESTED AN INTENTION, EXPRESSLY OR BY IMPLICATION, TO WHOLLY TO OCCUPY THE FIELD ... MUNICIPAL POWER TO REGULATE IN THAT AREA IS LOST, AND ANY ATTEMPT TO REGULATE THE FIELD IS VOID – WITH RESPECT TO THE MMPA MUNICIPALITIES MAY ONLY ENACT REGULATORY ORDINANCES CONSISTENT WITH THE PROVISIONS OF THE MEDICAL MARIJUANA PROGRAM ACT.**

A local ordinance enters a field fully occupied by state law in either of two situations—when the Legislature “expressly manifest[s]” its intent to occupy the legal area or when the Legislature “impliedly” occupies the field. (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898; see also 8 *Witkin*, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p. 551 [“[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost.”].)

*O’Connell v. Stockton* (2007) 41 Cal.4<sup>th</sup> 1061, 1068

As clearly shown, the *MMPA* was a comprehensive statutory scheme that expressly occupied every aspect medical marijuana including its possession, consumption sales and manufacturing (cultivation and processing), administrative registry issues, civil issues regarding employment and professional licenses, land use, regulation within penal and governmental facilities, and its nuisance abatement. Further, the State Legislature, **expressly and fully occupied the field of medical marijuana**, as stated within § 11362.83, providing that “a city or other local governing body [may] adopt and enforc[e only those] laws consistent with [the *MMPA* that concern medical marijuana.]” (*H&S* § 11362.83)

If there is any doubt whether there was an express occupation of law by the state, regarding medical marijuana, there is also an implied occupation provided by the *MMPA*.

The *O’Connell* Court further articulated that,

When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has impliedly done so. This occurs in three situations: when “ (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

1 terms as to indicate clearly that a paramount state concern will not tolerate further  
2 or additional local action; or (3) the subject matter has been partially covered by  
3 general law, and the subject is of such a nature that the adverse effect of a local  
4 ordinance on the transient citizens of the state outweighs the possible benefit to  
5 the ' locality.'" (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898.)

6 O'Connell supra at 1068

7 Here, there is no doubt that every aspect of medical marijuana regulation was considered  
8 by the legislature when they enacted the *MMPA*. The legislature examined every aspect of  
9 medical marijuana, including when, where and how a qualified medical marijuana patient may  
10 obtain, manufacture (cultivate) and use marijuana. Furthermore, the legislature expressed that  
11 the regulation of medical marijuana is of statewide concern stating that they intend to  
12 "[p]romote uniform and consistent application of the act among the counties within the state."  
13 *MMPA - Stats 2003 ch 875 § 1(b)* Therefore, the subject matter of medical marijuana has been  
14 so fully and completely covered by general law as to clearly indicate that it has become  
15 exclusively a matter of state concern.

16 The medical marijuana regulations contained within the *MMPA* were also couched in  
17 such terms as to indicate clearly that a paramount state concern will not tolerate further or  
18 additional local action. For example, in § 11362.77 the state allowed:

19 (c) Counties and cities may retain or enact medical marijuana guidelines allowing  
20 qualified patients or primary caregivers to exceed the state limits set forth in  
21 subdivision (a). (§ 11362.77(c))

22 This section acknowledged the presence of a statewide limit, demonstrates that the provisions of  
23 the *MMPA*, are of a paramount state concern. This section also granted Counties and cities  
24 permission to "retain or enact medical marijuana guidelines" which otherwise would not have  
25 been tolerated without this explicit permission. Likewise, the State Legislature explicitly  
26 provided that no local actions would be tolerated if they interfere with the *MMPA*, providing  
that only laws that are consistent with the *MMPA* will be tolerated. (See *H&S 11362.83*)

1                   **B. LOCAL ORDINANCES THAT CONFLICT WITH STATE LAW ARE UNCONSTITUTIONAL AND VOID BY THE DOCTRINE OF PREEMPTION.**

2                   Article XI, section 7 of the state Constitution provides that a county or city may  
3                   make and enforce within its limits all local, police, sanitary, and other ordinances  
4                   and regulations not in conflict with general laws. Local legislation in conflict  
5                   with the general laws is void.

6                   Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully  
7                   occupied by general law, either expressly or by legislative implication. If the  
8                   subject matter or field of the legislation has been fully occupied by the state, there  
9                   is no room for supplementary or complementary local legislation, even if the  
10                  subject was otherwise one properly characterized as a 'municipal affair.'

11                  *Cohen v. Board of Supervisors* (1985) 40 Cal. 3d 277, 290-291 *Citations omitted*

12                  The first step in a preemption analysis is to determine whether the local regulation  
13                  explicitly conflicts with any provision of state law. (*Id.*; see also *Galvan v. Superior Court*  
14                  (1969) 70 Cal.2d 851, 855-859.) It will be shown that several provisions of the present  
15                  ordinance suffer from that defect.

16                  Municipality authority to enforce local ordinances is strictly limited; they may only  
17                  "make and enforce within its limits all local, police, sanitary, and other ordinances and  
18                  regulations **not in conflict with general laws.**" *Cal. Const., art. XI, § 7 emphasis added.*  
19                  "Under the police power granted by the Constitution, counties and cities have plenary authority  
20                  to govern, subject only to the limitation that they exercise their power within their territorial  
21                  limits and subordinate to state law. (*Cal. Const., art. XI, § 7.*)" *Candid Enter., Inc. v.*  
22                  *Grossmont Union High School Dist.* (1985) 39 Cal. 3d 878, 885.

23                  Since, § 11362.83 expressly allows local municipalities to enact ordinances that are  
24                  ‘consistent’ with the *MMPA*, which could include those that duplicate the provisions of the  
25                  *MMPA*, the following arguments will focus upon those ordinances that ‘contradict’ the *MMPA*.

26                   **C. THE MEDICAL MARIJUANA PROGRAM ACT PERMITS THE CULTIVATION OF MARIJUANA FOR MEDICAL PURPOSES AND EXEMPTED ALL FACILITIES FROM THE LAWS DECLARING THE USE OF PROPERTY FOR THESE PURPOSES A NUISANCE.**

                  In the un-codified portions of the *MMPA* the Legislature declared that the intent and  
purpose of the *MMPA* was to:

1           “(b)(2) **Promote uniform and consistent application of the act among the**  
2           **counties within the state.**”

3           **(3) Enhance the access of patients and caregivers to medical marijuana through**  
4           **collective, cooperative cultivation projects.”**

5           *Stats 2003 ch 875 § 1; 2003 Cal ALS 875.*

6           To the stated intent, the *MMPA* allows and regulates the “associat[ion of qualified  
7           patients, persons with valid identification cards, and the designated primary caregivers of  
8           qualified patients and persons with identification cards] within the State of California [who  
9           associate] in order collectively or cooperatively to cultivate marijuana for medical purposes.”  
10          *Health and Safety Code § 11362.775* The court of appeal in *People v. Urziceanu* (2004) 132  
11          Cal.App.4<sup>th</sup> 747, 785, articulated that in enacting the *Health and Safety Code §11362.775* of the  
12          *MMPA*, it was it was the intent of the Legislature to exempt qualified patients and primary  
13          caregivers and their facilities from “**the laws declaring the use of property for these purposes**  
14          **a nuisance.**” (*People v. Urziceanu* (2004) 132 Cal. App. 4th 747, 785 *Emphasis added.*)

15                 "This new law represents a dramatic change in the prohibitions on the use,  
16                 distribution, and cultivation of marijuana for persons who are qualified patients or  
17                 primary caregivers ... "  
18          *People v. Urziceanu* (2004) 132 Cal.App.4<sup>th</sup> 747, 785

19                 Therefore, *H&S § 11362.775* was to exempt the operation of medical marijuana  
20          collectives and cooperatives from “the laws declaring the use of property for this purposes a  
21          nuisance,” **in all locations**; nevertheless Defendants maintain that they have a right to regulate  
22          the locations where qualified patients may cultivate their medical marijuana, through local  
23          nuisance ordinances. Furthermore, the *MMPA* contained *Health and Safety Code § 11362.77*  
24          which set a minimum cultivation threshold that must be exceeded by the cultivator in order for  
25          there to be probable cause for arrest and/or prosecution. Section 11362.77 also included a  
26          provision that allowed local municipalities to enact guidelines (ordinances) which provide a  
27          higher cultivation threshold; nevertheless Defendants maintain that they have a right to regulate  
28          the amount of medical marijuana qualified patients may cultivate to levels lower than the

1 minimum threshold provided within the *MMPA* – that being a minimum threshold that applies  
2 equally to one patient or any number of patients as a collective unit, which is based upon a  
3 parcel of land rather than upon aggregate needs of qualified patients.

4 **D. UNDER *H&S* § 11362.83, LOCAL MUNICIPALITIES ARE ONLY**  
5 **PERMITTED TO ENACT ORDINANCES THAT ARE CONSISTANT WITH THE**  
6 ***MMPA*.**

7 The Legislature has explicitly provided, in *H&S* § 11362.83 of the *MMPA* that a local  
8 governing body will EXCLUSIVELY be allowed to adopt and enforce laws “**consistent with**”  
9 the *MMPA* and its comprehensive scheme, which includes dozens of statutes covering every  
10 aspect of medical marijuana. Thus there is a clear indication of preemptive intent by the  
11 California Legislature that any local ordinance that is not “consistent with” the *MMPA* will be  
12 preempted by state statute.

13 Under no stretch of logic is the word “consistent” synonymous with a ban on what the  
14 Legislature found was of paramount importance; to **"Enhance to medical marijuana through**  
15 **collective, cooperative cultivation projects."** Interpreting *Health and Safety Code* section  
16 11362.83 as permitting a total ban on conduct authorized by *Health and Safety Code* sections  
17 11362.765 and 11362.775 would completely obliterate the Legislature's two principle purposes;  
18 to 1) **"Promote uniform and consistent application of the act among the counties within the**  
19 **state" and 2) "Enhance the access of patients and caregivers to medical marijuana**  
20 **through collective, cooperative cultivation projects."** (See *MMPA* preamble - *Stats 2003 ch*  
21 *875* § 1; 2003 *Cal SB 420* § 1).

22 A cursory analysis of the provisions of Mendocino County Ordinance No. 4235  
23 demonstrates that the county ordinance deprives every medical marijuana patient their right to  
24 obtain medical marijuana through legitimate lawful means permitted under the *CUA* and the  
25 *MMPA*, and for those reasons provisions of Mendocino County Ordinance No. 4235 has  
26 amended, limited and/or burdened the provisions of the *CUA* and the *MMPA*, and thus, conflicts  
with the *CUA* and the *MMPA*.

1 One of the most egregious provisions of is Section 9.31.040, which provides:

2 “The cultivation of more than twenty-five (25) marijuana plants on one (1) legal  
3 parcel, either indoors or outdoors, within the unincorporated area of the County,  
4 **regardless** of whether the person(s) growing the marijuana is/are a "qualified  
5 patient", "primary caregiver", or "collective", is hereby prohibited except as set  
6 forth in Section 9.31.110” (§ 9.31.050 *Empahsis added*)

7 Here the Board of Supervisors simply criminalized the cultivation of more than 25  
8 plants – despite the well established law that a qualified patient or his/her primary caregiver  
9 may cultivate any amount of marijuana as long as "the quantity [is] reasonably related to the  
10 patient's current medical needs." *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550-1551 -  
11 and despite the fact that more than 4 qualified patients may associate under Health and Safety  
12 Code § 11362.775 in order to collectively cultivate marijuana for medical purposes, each with  
13 their minimum entitlement to 6 plants each, for a total of 30 or more plants (for a collective that  
14 is 5 patients in size and up). Furthermore, qualified patients who reside on a parcel of land that  
15 has four patients exercising their cultivation rights, will be deprived of his/her cultivations rights  
16 completely, including those who reside within a parcel of land with multiple residences, such as  
17 an apartment building.

18 The fact that Mendocino County Ordinance No. 4235 is couched as a nuisance  
19 abatement statute (*MCC* §§ 9.31.130 - .300) rather than a penal statute is of no legal  
20 significance. *California Constitution* Article II §10 on its face applies across the board with  
21 respect to all legislative enactments, however denominated. By the same token Article XI §7 of  
22 the *California Constitution* has general application to all ordinances promulgated by the local  
23 legislature and specifically applies to the local exercise of the police power. The regulation of  
24 nuisance as well as the enactment of penal statutes are exercises of the police power. *Odd*  
25 *Fellows' Cemetery Assn. v. City & County of San Francisco* (1903) 140 Cal. 226, 231-232; *In re*  
26 *Mathews* (1923) 191 Cal. 35, 38; *Sullivan v. City of Los Angeles* (1953) 116 Cal.App.2d 807,  
810. As a practical matter, it makes no difference whether the board of supervisors impairs the  
reasonable exercise of the rights emanating from the state medical marijuana enactments by  
means of the imposition of penal punishment or a broad civil abatement statute which

1 encompasses the normal exercise of state conferred rights – the consequences for the medical  
2 use of cannabis are precisely the same. In other words, as recently held by the Appellate Court  
3 in *QPA*, it appears incongruous at first glance to conclude a city may criminalize as a  
4 misdemeanor a particular use of property the state expressly has exempted from “criminal  
5 liability,” *Qualified Patients Assn. v. City of Anaheim*, (2010) 187 Cal. App. 4th 734, 754

6 In *Citizens to Save California (CSC) v. California Fair Political Practices Commission*  
7 (*CFPPC*) (2006) 145 Cal.App.4<sup>th</sup> 736, the court interpreted language nearly identical to the  
8 “consistent with” language that is the key to *Health and Safety Code* section 11362.83.  
9 Pursuant to *Government Code* section 83111, the California Fair Political Practices Commission  
10 (FPPC), which has been delegated authority to administer the Political Reform Act (PRA), may  
11 only enact regulations which are "consistent with<sup>6</sup>" the PRA. (*CSC v. CFPPC* (2006) 145  
12 Cal.App.4<sup>th</sup> 736, 746; *Gov't Code* section 83112.) The court in *CSC v. CFPPC, supra*, held that  
13 any regulation which "conflicts" with *either* the Government Code statute's language or the  
14 *purpose* of the legislation is "inconsistent" and thus said regulation is rendered void as a matter  
15 of law. (*Id.* at p. 751 and 754.)

16 Regulation 18530.9 is at odds with the language of the PRA. It is also  
17 inconsistent with the legislative intent underlying the PRA’s contribution limits.  
18 The effect of regulation 18530.9 is to inhibit a candidate’s involvement in the  
19 initiative process. Involvement will lead to restrictions on the ballot measure  
20 committee’s fundraising. This conflicts with the voter’s concern, as expressed in  
21 the ballot proposition, that candidates devote insufficient time to matters of  
22 public policy.

23 (*Ibid.*)

24 The court in *CSC, supra*, held that a FPPC regulation limiting certain campaign  
25 donations to candidate controlled ballot measures violated *Government Code* section 83112 and  
26 therefore was inconsistent with PRA which does not restrict contribution limits to candidates

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6 Cal. Govt. Code § 83112 states in relevant part: “The commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission. These rules and regulations shall be adopted in accordance with the Administrative Procedure Act ... and shall be consistent with this title and other applicable law.”

1 who have significant influence over a ballot measure and was also **not consistent with the**  
2 **stated purpose** behind the Government Code's statutory scheme. (*Ibid.*)

3 "A local ordinance **contradicts** state law when it is inimical to or cannot be reconciled  
4 with state law." (*O'Connell v. Stockton* (2007) 41 Cal.4<sup>th</sup> 1061, 1068 (emphasis added).)  
5 Defendants' total ban on Plaintiffs' otherwise lawful conduct "contradicts state law" because it  
6 is "inimical to and cannot be reconciled" with the Legislature's paramount purpose of promoting  
7 "uniform" application of the *MMPA* and "enhance the access" to qualified patients; since  
8 Respondent's actions "contradict state law" Respondent's actions necessarily are also not  
9 "consistent" with the *MMPA* as required by Health and Safety Code section 11362.83.

10 "To the extent this examination of the statutory language leaves uncertainty, it is  
11 appropriate to consider 'the consequences that will flow from a particular  
12 interpretation. Where more than one statutory construction is arguably possible, our  
13 'policy has long been to favor the construction that leads to the more reasonable  
14 result. This policy derives largely from the presumption that the Legislature intends  
15 reasonable results consistent with its apparent purpose. Thus, our task is to select  
16 the construction that comports most closely with the Legislature's apparent intent,  
17 **with a view to promoting rather than defeating the statutes' general purpose**,  
18 and to avoid a construction that would lead to unreasonable, impractical, or arbitrary  
19 results. (emphasis added) (internal citations omitted)  
20 (*Commission on P.O.S.T v. Superior Court* (2007) 42 Cal.4<sup>th</sup> 278, 290.)

21 Again, "A court should not adopt a statutory construction that will lead to results  
22 contrary to the Legislature's apparent purpose." (*People ex rel. Lungren v. Superior Court*  
23 (1996) 14 Cal.4<sup>th</sup> 294, 305.)

24 An interpretation of *Health and Safety Code* section 11362.83 must necessarily be  
25 guided by the twin goals of uniformity of law (which would not exist if municipalities and  
26 Defendants could legally restrict or ban cultivation altogether), and enhancing access to  
qualified patients (a Legislative purpose practically vanquished by Defendants' actions as  
access is either restricted or eliminated and certainly not enhanced.)

The Defendants' ordinance also contradicts the rights and privileges provided by the  
voters in the *CUA* and the Legislature in the *MMPA* by completely banning and rendering

1 unlawful under *MCC* § 9.31.090, the cultivation of marijuana by all ‘qualified patients’ at their  
2 residence who reside on a parcel of land that is within one of the following locations:

3 (1) Within one thousand (1,000) feet of a youth-oriented facility, a school, a park,  
4 or any "church" or residential treatment facility as defined herein.

5 (2) Outdoors within one hundred (100) feet of any occupied legal residential  
6 structure located on a separate legal parcel.

7 (3) Outdoors in a mobile home park as defined in Health and Safety Code Section  
8 18214.1 within one hundred (100) feet of an occupied mobile home that is under  
9 separate ownership.

10 (4) In any location where the marijuana plants are visible from the public right of  
11 way or publicly traveled private roads.  
12 (*MCC* § 9.31.090.)

13 Moreover, the Defendants’ ordinance contradicts the rights and privileges provided by  
14 the Legislature in the *MMPA*, by completely banning and rendering unlawful, the cultivation of  
15 marijuana by all ‘qualified patients,’ at their residence, who reside on a parcel of land that is  
16 less than 200 feet in width or length. (See § 9.31.090(2), requiring the grow to be at least 100  
17 feet from an adjacent parcel.)

18 Under the *MMPA*, individuals who may cooperatively or collectively cultivate or share  
19 physician recommended marijuana, without any such numerical limitations on the number of  
20 members who may associate in order to exercise their right to collectively/co-operative cultivate  
21 marijuana, as no such limitation exists within the *MMPA*. As stated by the California Attorney  
22 General: “collectives and cooperatives may cultivate and transport marijuana **in aggregate**  
23 **amounts tied to its membership numbers.**” *A.G. Guidelines* § IV (B)(7) (See **Exhibit 3**)

24 In situations where more than four (4) qualified patients reside on any single parcel of  
25 land, the fifth qualified patient, and all others thereafter, will not be permitted to cultivate his/or  
26 her medical cannabis under *MCC* §§ 9.31.050, and .070<sup>7</sup>, even if all the patients residing on the

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<sup>7</sup> Likewise if premises is greater than twenty (20) acres in size but less than one hundred and sixty (160) acres in size, no more than 30 mature marijuana plants or 60 immature marijuana plants shall be cultivated on the premises, and if the premises is one hundred and sixty (160)

1 same parcel of land maintain a medical cannabis garden within the 6 mature plant guideline set  
2 by H&S § 11362.77(a). Therefore, *MCC* §§ 9.3.050, and .070, denies those qualified patients  
3 their right to cultivate medical marijuana under the *CUA* and the *MMPA*. *MCC* § 9.31.110  
4 (*allowing additional plants with upon an approved permit*) does not save the constitutionality of  
5 the ordinance, because the numerical caps are then extended to limits to 16 patients with the  
6 same effect – no more than 16 patients may collectively cultivate their medical marijuana.

7 For the forgoing reasons, Defendants have in essence re-written the *MMPA* to their  
8 liking and eliminated the ability for anyone to exercise the rights afforded under that legislation.  
9 (See, *People v. Urziceanu* (2004) 132 Cal.App.4<sup>th</sup> 747, 785.) Therefore, *MCC* §§ 9.31.050,  
10 .070, .090 and 110 contradict the provisions of the *MMPA*.

11 **E. THERE IS A CLEAR INDICATION OF PREEMPTIVE INTENT**  
12 **FROM THE VOTERS AND THE LEGISLATURE, THAT ALL REGULATIONS**  
13 **REGARDING MEDICAL MARIJUANA POSSESSION, CULTIVATION AND SALES**  
14 **ARE PREEMPTED BY STATE STATUTE, UNLESS THE REGULATIONS ARE**  
15 **CONSISTENT WITH THE MEDICAL MARIJUANA PROGRAM ACT AND/OR THE**  
16 **COMPASSIONATE USE ACT.**

17 In a case on point, the California Supreme Court in *O'Connell* held that,

18 “[W]hen local government regulates in an area over which it traditionally has  
19 exercised control, such as the location of particular land uses, California courts will  
20 presume, absent a clear indication of preemptive intent from the Legislature, that  
21 such regulation is not preempted by state statute.”

22 *O'Connell v. City of Stockton* (2007) 41 Cal. 4th 1061, 1069 (*O'Connell*)

23 The State Supreme Court in *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277 held  
24 that any ordinance which **prohibits** (as opposed to regulate) conduct already authorized by state  
25 law is preempted;  
26

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27 acres or greater in size, no more than 99 marijuana plants, whether mature or immature, shall be  
28 cultivated on the premises.

1 "If the ordinance were in substance a criminal statute which attempted to prohibit  
2 conduct proscribed or permitted by state law either explicitly or implicitly, it would  
be preempted."

3 *Id* at 293.

4 Thus, "impose[ing] a sanction for engaging in" (*Id.* at 295) conduct authorized by state  
5 law is sufficient to render the local ordinance void. In the instant case, *MCC* §§ 9.31.050, .070,  
6 .090 and 110 prohibits the cultivating marijuana for medical purposes, which would have  
otherwise been authorized by state law under the *MMPA* and/or the *CUA*.

7 Again, California State Law allows qualified patients and their primary caregivers to  
8 associate in order to collectively/co-operatively cultivate marijuana for medical purposes (*H&S*  
9 § 11362.775) without any limitations upon the number of qualified patients who may associate  
10 for a cultivation project, and without any limitation upon the location of where the cultivation  
project may take place.

11 Since the County Ordinance is "prohibiting conduct...permitted by state law" (*Cohen*  
12 *supra*, 293) and since the conduct is expressly authorized by state law (*Health and Safety Code*  
13 §§ 11362.775, 765 and 11362.5) it is "conduct... permitted by state law...explicitly or implicitly,  
14 [and] it would be preempted." *Id* at 293. As *Cohen* points out while there may be authority to  
15 enact ordinances regulating conduct otherwise authorized by state law it is the prohibition on  
16 such conduct which renders Defendants' actions unlawful as preempted by state law. It appears  
17 that *Cohen's* allowance of regulation around conduct authorized by state law was recognized by  
18 the Legislature when they enacted *Health and Safety Code* §11362.83 which appears to permit  
19 some regulation so long as it is "consistent" with the *MMPA*; certainly banning what the  
20 Legislature has encouraged violates the holding in *Cohen*.

21 In a similar context the Attorney General has issued an opinion regarding preemption of  
22 the *MMPA* over local ordinances stating in the opinion as follows;

23 "We believe that a city may (1) continue to operate a local registry and  
24 identification program, (2) prohibit cardholders from being arrested by city police  
25 officers, (3) prohibit the seizure of medical marijuana by city police officers, and (4)  
26 allow possession of marijuana in amounts greater than specified in the 2003  
legislation. These elements of a local program would be **consistent** with state law.  
(See §§ 11362.71, subd. (e); 11362.77, subds. (a), (b), (c), (f); *Dublin v. City of*

1 *Alameda* (1993) 14 Cal.App.4th 264, 275-277.)

2 On the other hand, a city would be preempted from allowing possession of  
3 marijuana at levels *less than* what the state law permits and making identification  
4 cards a *mandatory* prerequisite for prohibiting detention and seizure, because such  
5 provisions would directly contradict state law. (See § 11362.77 [qualified patient or  
6 caregiver may have at least eight ounces of marijuana per patient; cities and  
7 counties may permit quantities that *exceed* state amounts]; § 11362.71, subd. (f)  
8 [identification card not required to claim Act's protections].) Similarly, **a city  
9 program that defined "attending physician" and "primary caregiver" more  
10 narrowly than state law would be preempted to the extent that it prohibited  
11 what state law expressly permitted.** (Cf. §§ 11362.7, subd. (a) [defining  
12 "attending physician"], 11362.7, subd. (e) [permitting "primary caregiver" to be  
13 under 18 years of age under specified circumstances].)"

14 *80 Opinions California Attorney General 113, 117-118, 2005 Cal. AG LEXIS 17  
15 (2005)*(See **Exhibit 4**)

16 In *O'Connell v. Stockton* (2007) 41 Cal.4<sup>th</sup> 1061, the California Supreme Court  
17 articulated California law on the subject of preemption as it relates to the Health and Safety  
18 Code;

19 Whenever the Legislature has seen fit to adopt a general scheme for the  
20 regulation of a particular subject, the entire control over whatever phases of the  
21 subject are covered by state legislation ceases as far as local legislation is  
22 concerned.

23 *O'Connell, supra*, 41 Cal.4<sup>th</sup> 1061, 1068.

24 In *O'Connell, supra*, 41 Cal.4<sup>th</sup> at 1069, the court held (consistent with their holding in  
25 *Cohen*) that a provision of the Stockton Municipal Code permitting forfeiture of vehicles used  
26 to solicit prostitution was preempted by the *Health and Safety Code's Uniformed Controlled  
Substance Act* ("UCSA") as the UCSA governed forfeiture of vehicles as a penalty for specific  
violations of the UCSA. Based on the same pervasiveness in legislation concerning the subject  
as contained in the *MMPA* (i.e., the Legislature's detailed statutory scheme covering multiple  
aspects of the subject), the court in *O'Connell* found preemption, holding:

"The comprehensive nature of the UCSA in defining drug crimes and specifying  
penalties (including forfeiture) is so thorough and detailed as to manifest the  
Legislature's intent to preclude local regulation."

*O'Connell, supra*, 41 Cal.4<sup>th</sup> at 1071

Again, the *MMPA* and its comprehensive scheme, includes dozens of statutes covering  
every aspect of medical marijuana, thus the statutory scheme within the Medical Marijuana

1 Program Act is also so thorough and detailed as to manifest the Legislature's intent to preclude  
2 local regulation. However, as demonstrated earlier, the Legislature has explicitly provided, in §  
3 11362.83 of the *MMPA* that a local governing body will EXCLUSIVELY be allowed to adopt  
4 and enforce laws “consistent with” the *MMPA*. Therefore, there is a clear indication by the  
5 Legislature that any local ordinance that is not “consistent with” the *MMPA* (i.e., bans what it  
6 permits) will be preempted by the *MMPA*.

7 The decision in *N. Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d  
8 90, 103-104 sums up the situation here; again consistent with the holding in *Cohen* the court  
9 struck down as preempted a local ordinance which banned the use of electroconvulsive therapy  
10 (ECT) for psychiatric patients despite the existence of a *Welfare and Institutions Code* which  
11 gave the patient the ability to chose the therapy-finding that the ordinance did not permit what  
12 state law permitted, the ordinance was struck down; the court's ruling compellingly applies to  
13 the situation at hand.

14 "The languages of these statutes, while limiting and carefully regulating the  
15 administration of ECT and other convulsive therapies in order to protect the rights  
16 of patients, appears to indicate an intent on the part of the Legislature that ECT  
17 remain as an available option for psychiatric treatment. Indeed, the Legislature has  
18 expressly recognized that ECT may be "a lifesaving treatment" in certain instances.  
19 **By enacting an outright, unconditional ban on the administration of ECT  
20 within its own borders, Berkeley has created an apparent conflict with the state  
21 legislative statutory scheme** and its guarantee to all mentally ill persons of a "right  
22 to treatment services which promote the potential of the person to function  
23 independently." (emphasis added)

24 *N. Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 103-104

25 Here too Defendants are acting unlawfully: "By enacting an outright, unconditional ban"  
26 on the cultivation of marijuana at all locations by qualified patients who have a physician's oral  
approval for the medical use of marijuana, and require more than 25 plants to meet his/her  
medical needs (See *MCC* § 9.31.110 (16) vs. *H&S* § 11362.5 and *People v. Trippet* supra); by  
enacting an outright, unconditional ban of the cultivation of medical marijuana upon all parcels  
of land that are less than 200 feet wide, which is permitted under the *CUA* and the *MMPA* (See  
*MCC* § 9.31.090 (subsecs. 2 and 3) vs. *H&S* §§ 11362.5 and 11362.7 et seq); by enacting an

1 outright, unconditional ban of the cultivation of medical marijuana upon all parcels of land that  
2 are within “one thousand (1,000) feet of a youth-oriented facility, a school, a park, or any  
3 "church" or residential treatment facility” (See *MCC* § 9.31.090(1) vs. *H&S* §§ 11362.5 and  
4 11362.7 et seq); and, by enacting an outright, unconditional ban of the collective and co-  
5 operative cultivation of medical marijuana by associations of qualified patients which require a  
6 number of marijuana plants that are greater than the caps provided within *MCC* § 9.31.050, .070  
7 and .110, which are less than the minimum guidelines provided within *H&S* § 11362.77.  
8 Defendants "ha[ve] created an apparent conflict with the state legislative statutory scheme and  
9 its guarantee to all [qualified medical cannabis patients]" (*N. Cal. Psychiatric Society at 103-*  
10 *104*) of uniform application of the law, of enhanced access, of the right to associate in order to  
11 obtain cannabis and the ability to form collectives or co-operatives as encouraged by the  
12 Legislature (See, Legislative Preamble *Stats 2003 ch 875* § 1) and provided for by *Health and*  
*Safety Code* §§ 11362.775 and 11362.765.

13 **F. *A & B CATTLE CO. V. ESCONDIDO IS ALSO DISPOSITIVE TO THIS CASE***  
14 ***DEMONSTRATING THAT A LOCAL ORDINANCE IS PREEMPTED BY A LESS***  
15 ***RESTRICTIVE STATE LAW***

16 *A & B Cattle Co. v. Escondido* (1987) 192 Cal.App.3d 1032, 1036, involved an  
17 ordinance enacted by the City of Escondido regulating the manufacture, possession and sale of  
18 drug paraphernalia by requiring a license to sell such items. The State subsequently enacted a  
19 comprehensive statutory scheme modifying a less extensive and less restrictive law pertaining  
20 to the manufacture, possession and sale of drug paraphernalia, the same items regulated by the  
21 City of Escondido through the local ordinance. (*Id.* at 1038.) The court in *A & B Cattle, supra*,  
22 held that while the Legislature did not expressly prohibit local regulation with regard to the  
23 manufacture and distribution of drug paraphernalia, state law, as a result of modifications made  
24 by the Legislature has nonetheless “preempted the regulatory field regarding drug paraphernalia  
25 to the exclusion of local legislation.” (*Id.* at 1038.) The court of appeal found the City’s  
26 argument that the local ordinance did not conflict with state law where the local ordinance only  
controls “record keeping and licensing” unpersuasive, holding that there is a conflict when both

1 laws “burden the sale of drug paraphernalia.” (*Id.* at 1043). In effect, a local ordinance may  
2 not be enacted to fill a void left within a comprehensive statutory scheme enacted by the State.

3 The court of appeal in *A & B Cattle Co.*, *supra*, held that “where an ordinance is in  
4 substance a criminal statute attempting to prohibit conduct proscribed or permitted by state law  
5 either explicitly or impliedly, it is preempted.” (*A & B Cattle Co. v. Escondido* (1987) 192  
6 Cal.App.3d 1032, *citing, Cohen, supra*, 40 Cal.3d at 293.) In the present case, the *MMPA* has  
7 the express intent of enhancing access to medical marijuana and promoting uniform application  
8 of medical marijuana laws (*See Stats 2003 ch 875 § 1: 2003 Cal SB 420 § 1*) One of the  
9 provisions of the *MMPA* expressly provides that Qualified patients, persons with valid  
10 identification cards, and the designated primary caregivers of qualified patients and persons  
11 with identification cards, may associate within the State of California in order collectively or  
12 cooperatively to cultivate marijuana for medical purposes, and shall not solely on the basis of  
13 that fact be subject to sanctions under Sections ... 11366, 11366.5, or 11570. (See *H&S*  
14 11362.775)

15 The zoning ordinances which exclude medical marijuana associations /collectives from  
16 collectively cultivating marijuana for medical purposes within the County of Mendocino,  
17 similar to the anti-paraphernalia statute in *A & B Cattle Co.*, prohibit, with the consequence of  
18 abatement and fines, conduct which the state permits (the individual and/or collective/co-  
19 operative cultivation of marijuana for medical purposes). The regulatory scheme established  
20 through the passage of the *MMPA* is comprehensive and even goes so far as to regulate where a  
21 person may smoke marijuana for medical purposes. (*See H&S Code § 11372.79.*) It is clear  
22 from the various provisions of the *MMPA* discussed *infra*, that the use of marijuana for medical  
23 purposes and access to such marijuana was of a “paramount state concern [that would] **not**  
24 **tolerate further or additional local action.**” (*People el rel Deukmejian v. County of*  
25 *Mendocino* (1984) 36 Cal.3d 476, at 485.) It is inconceivable that the Legislature, in enacting  
26

1 legislation regulating the locations a person may smoke medical marijuana, did not implicitly  
2 incorporate possession and cultivation of medical marijuana into the statutory scheme and  
3 therefore allow such conduct without restriction. The Mendocino County ordinance, which  
4 restricts what the state permits, the cultivation of marijuana for medical purposes, is preempted  
5 by the *MMPA*'s regulations as to where and when marijuana may be used, possessed and  
6 cultivated.

7 Furthermore, the Mendocino County ordinance which restricts the cultivation of  
8 marijuana for medical purposes, takes away from a qualified patient's right to cultivate  
9 marijuana for medical purposes which was provided by the *Compassionate Use Act*, wherein a  
10 qualified patient or his/her primary caregiver may cultivate any amount of marijuana as long as  
11 "the quantity [is] reasonably related to the patient's current medical needs." *People v. Trippet*  
12 (1997) 56 Cal.App.4th 1532, 1550-1551, regardless of the location where the marijuana is being  
13 cultivated.

14 Since Ordinance 4235 contradicts the *CUA* and the *MMPA*, it preempted by State law, and  
15 as such, it will be argued in detail that Ordinance 4235 is unconstitutional and void.

16 **G. THE APPELLATE DECISION IN *KRUSE* FAILS TO RESURRECT THE**  
17 **CONTESTED ORDINANCE**

18 Defendants seek to resurrect the County Ordinance through a reliance upon the decision  
19 in *City of Claremont v. Kruse* (2009) 177 Cal. App. 4th 1153 (*Kruse*), arguing "the recent  
20 decision in *City of Claremont v. Kruse, supra*, unequivocally holds that the *CUA* and *MMPA* do  
21 not preempt local land use," while asserting "*Claremont's* analysis is essentially dispositive" to  
22 this case. However, the decision in *Kruse* is distinguishable from the immediate case.  
23 Furthermore, the decision in *Kruse* is not harmonious with the stated purpose of the *MMPA* and  
24 the case law interpreting the provision of the *MMPA*.

1                                   **1. CITY OF CLAREMONT V. KRUSE IS DISTIGUISHABLE FROM THE**  
2                                   **SITUATION AT HAND.**

3                   The decision in *Kruse* applies to a different set of facts than those before this court; here  
4 the County of Mendocino has not enacted a temporary moratorium pursuant to *Government*  
5 *Code sect. 65858* to study the issue as in *Kruse*. (See *City of Claremont v. Kruse, supra*, 177  
6 Cal. App. 4th at 1160) The issue before the *Kruse* court was whether the *MMPA* "preempts the  
7 city's enactment of a [temporary] moratorium"..." *Id* at 1168. The court reviewed *Health and*  
8 *Safety Code* section 11362.83 and determined that an adoption of a "**temporary** moratorium"  
9 was not preempted. *Id* at 1175. Nothing in *Kruse* sanctions a **complete** ban with no moratorium  
10 to limit the period of the ban and no realistic end in sight; *Kruse* simply did not consider a  
11 **permanent** ban with no end in sight as Defendants have undertaken and if those specific  
12 actions by a municipality are "consistent" with the *MMPA* as required by *Health and Safety*  
13 *Code* section 11362.83.

14                   "[L]anguage used in any opinion is of course to be understood in light of the facts and  
15 the issue then before the court, and an opinion is not authority for a proposition not therein  
16 considered." *Ginns v. Savage (1964)* 61 Cal.2d 520, 524 fn.2.

17                   In other words, as stated by the United States Supreme Court:

18                   When an opinion issues for the Court, it is not only the result but also those  
19 portions of the opinion necessary to that result by which we are bound.  
20 *Seminole Tribe of Florida v. Florida (1996)* 517 U.S. 44, 66-67

21                   This issue was pointed out in *QPA*, holding that *Kruse* involved temporary moratoriums  
22 rather than a permanent ban, thus *Kruse* is not determinative for a permanent ordinance  
23 regulating medical marijuana. *Qualified Patients Association v. City of Anaheim supra* at 754  
24 fn. 4

25                   Since the *Kruse* decision involves a temporary ordinance, it may not serve as a binding  
26 precedent in support of the permanent ordinance, which is addressed in the instant case.

1                   **2. CITY OF CLAREMONT V. KRUSE CONFLICTS WITH VARIOUS**  
2                   **HOLDINGS OF THE CALIFORNIA SUPREME COURT WHICH THIS COURT**  
3                   **IS BOUND TO FOLLOW.**

4                   The *Kruse* decision is in conflict with the California Supreme Court's holding in *Cohen*  
5                   *v. Board of Supervisors* (1985) 40 Cal.3d 277 wherein the California Supreme Court held that  
6                   any ordinance which **prohibits** (as opposed to regulate) conduct already authorized by state law  
7                   is preempted;

8                   "If the ordinance were in substance a criminal statute which attempted to prohibit  
9                   conduct proscribed or permitted by state law either explicitly or implicitly, it  
10                  would be preempted." *Id at 293.*

11                  The holding in *Cohen* cannot be reconciled with *Kruse* which appears to provide an  
12                  exception to the holding in *Cohen* that what is permitted by state law can be prohibited if done  
13                  only temporarily; nothing in the *Cohen* decision supports that exception. Thus, this court is  
14                  instead bound by the holding in *Cohen*.

15                  The California Supreme Court has made it clear that "[O]ur statements of the law remain  
16                  binding on the trial and appellate courts of this state and must be applied whenever the facts of a  
17                  case are not fairly distinguishable from the facts in the case in which we have declared the  
18                  applicable principles of law." *People v. Triggs* (1973) 8 Cal.3d 884, 890-891; (overruled on  
19                  separate grounds in *People v. Lilienthal* (1978) 22 Cal.3d 891, 896 fn4.).

20                  The *Kruse* decision also conflicts with the holding in *City of Torrance v. Transitional*  
21                  *Living Centers* (1982) 30 Cal.3d 516 which requires a court to take the Legislative purpose into  
22                  account in determining if local legislative zoning actions are preempted, and found that a statute  
23                  similar to *Health and Safety Code section 11362.83* "did not permit the **exclusion**..." *Id at 521*  
24                  of otherwise state sanctioned and encouraged conduct.

25                  Finally, the *Kruse* decision conflicts with *O'Connell v. Stockton* (2007) 41 Cal.4<sup>th</sup> 1061,  
26                  wherein the California Supreme Court articulated California law on the subject of preemption as  
it relates to the Health and Safety Code and held that when the Legislature creates a pervasive  
and detailed statutory scheme (such as the *MMPA* which dealt with every conceivable subject  
including insurance claims, health departments, police, hospices, clinics, professional licensing

1 and immunity, registry system, municipal authority to enact guidelines, locations where the  
2 activity could not take place, requirements for the attorney general and the myriad of varying  
3 statutes on the subject), local action in that area of law is preempted.

4 Furthermore, the breadth of the County's enforcement of zoning requirements under  
5 *Kruse*, would also burden the same immunities/defense in a manner that would be  
6 unconstitutional. (See *People v. Kelly* (2010) 47 Cal.4th 1008, 1012; "... insofar as [*Health and*  
7 *Safety Code*] section 11362.77 **burdens a defense** under the *CUA* to a criminal charge of  
8 possessing or cultivating marijuana, it impermissibly amends the *CUA* and in that respect is  
9 invalid...".) While the *Kelly* court addressed the burdening of a **criminal** defense it is evident  
10 from the specific enumeration of drug house abatement statutes within *Health and Safety Code*  
11 §§ 11362.775 and .765 (i.e. declaring laws which made any place where controlled substance is  
12 cultivated and/or distributed a nuisance are not applicable to medical marijuana associations, or  
13 a qualified patient/caregiver relationship) that the Legislature was extending its protection to  
14 situations wherein any local law sought to label the activity as a "nuisance" by declaring  
15 medical cannabis associations illegal unless they complied with requirements which are  
16 supplemental to those provided for in the *MMPA*. "[T]he Legislature [ ] exempted those...who  
17 collectively or cooperatively cultivate marijuana for medical purposes from...**the laws**  
18 **declaring the use of property for these purposes a nuisance.**" *People v. Urziceanu* (2004)  
19 132 Cal. App. 4th 747, 785. The very statutes the Legislature declared within *Health and Safety*  
20 *Code* § 11362.775 were not applicable to those...who collectively or cooperatively cultivate  
21 marijuana for medical purposes, thus they can no be used to prevent the operation of medical  
22 cannabis associations, even if there are concerns of public nuisances as a result of cultivating  
23 controlled substances. Thus the enumerated and exempted nuisances statute within *Health and*  
24 *Safety Code* § 11362.775 also prohibits that the matter from being addressed through local  
25 legislation nuisance laws and a **civil** causes of action. Clearly the "defense" provided for in  
26 *Health and Safety Code* § 11362.775 can be employed in a local **civil** nuisance abatement  
actions. (See, *Health and Safety Code* § 11570 and § 11571.1)

1 More accurately stated, the Legislature meant what is said - you can't use local nuisance  
2 laws to declare medical cannabis associations, or the facilities where medical cannabis is being  
3 cultivated within the scope of the *MMPA*, illegal; thus, *Kelly* requires an analysis as to whether  
4 or not this zoning enforcement procedure "burdens" Appellants' right to associate for the  
5 cultivation of medical cannabis as permitted by the *MMPA*. Few other governmental actions  
6 could "burden" the rights provided for in the *MMPA* more than the enactment of a local ban  
7 under the premise that the exercise of said rights is a nuisance under local ordinances.

8 It is simply not possible to reconcile the holdings of these four California Supreme Court  
9 decisions with the holding in *Kruse*. When "our Supreme Court [has] reached the same  
10 conclusion...we are bound by its reasoning." *People v. Perez* (2010) 182 Cal.App.4th 231, 245.  
11 "And, under the principles of stare decisis, we must defer to California Supreme Court  
12 authority..." *Rotolo v. San Jose Sports and Entertainment* (2007) 151 Cal.App.4th 307, 316.  
13 "The decisions of this court [the California Supreme Court] are binding upon and must be  
14 followed by all the state courts of California." *Auto Equity Sales v. Superior Court* (1962) 57  
15 Cal.2d 450, 455.

16 **3. CITY OF CLAREMONT V. KRUSE CONFLICTS WITH VARIOUS**  
17 **HOLDINGS OF THE COURT OF APPEAL THUS THIS COURT SHOULD**  
18 **FOLLOW THE MORE REASONED AND ACCURATE DECISIONS.**

19 "Of course, the rule under discussion has no application where there is more than one  
20 appellate court decision, and such appellate decisions are in conflict. In such a situation, the  
21 court exercising inferior jurisdiction can and must make a choice between the conflicting  
22 decisions." *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 456.

23 The decision in *Kruse* further conflicts with the holdings in *People v. Urziceanu* (2004)  
24 132 Cal. App. 4th 747, 785 ("Thus, the Legislature [ ] exempted those qualifying patients and  
25 primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes  
26 from ...**the laws declaring the use of property for these purposes a nuisance.**"); *N. Cal.*

1 *Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 103-104 ("By enacting an  
2 outright, unconditional ban on the administration of ECT within its own borders, Berkeley has  
3 created an apparent conflict with the state legislative statutory scheme...").

4 First, and most critical of the decision is that its rationale is unquestionably wrong.  
5 *Kruse* makes the completely incorrect allegation that "Medical marijuana dispensaries are not  
6 mentioned in the text or history of the MMP". *Id at 1175*. Perhaps the "text and history" were  
7 not written with the vernacular the *City of Claremont* panel was searching for in that the term  
8 "medical marijuana dispensary" is not mentioned anywhere in the legislation-but it is simply  
9 wrong to conclude that with the "dramatic change in the prohibitions on the use, distribution,  
10 and cultivation of marijuana" (See, *Urziceanu supra*, 785) the Legislature created by enacting  
11 *Health and Safety Code § 11362.775*, including its exemption from sales laws, its  
12 encouragement of the conduct and its express purpose to "enhance access", that it did not  
13 intend, contemplate and debate the proliferation of "associations" (the Legislature's chosen  
14 vernacular) as storefronts. The statute permitting for the creation of "associations" was also the  
15 Legislature's response to the voter's demand when they enacted *Proposition 215* that the  
16 Legislature create methods for the safe and affordable distribution. (See, *Urziceanu supra*,785)  
17 The *Kruse* decision also failed to note that Health and Safety Code § 11570 is civil<sup>8</sup> in nature,  
18 and failed to note, for this reason, the immunities and defenses provided by § 11362.775 were  
19 not limited to criminal matters only. "[T]he Legislature [ ] exempted those...who collectively or  
20 cooperatively cultivate marijuana for medical purposes from...**the laws declaring the use of  
21 property for these purposes a nuisance.**" *People v. Urziceanu* (2004) 132 Cal. App. 4th 747,  
22 785.

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23  
24  
25 <sup>8</sup> See footnote 5  
26



1 outweighs the possible [\*\*\*26] benefit to the” locality [citations].’ [Citation.]” *American*  
2 *Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1252

3 The contested local zoning ordinance regulating the cultivation of marijuana by  
4 associations of medical marijuana patients and their caregivers, often described as medical  
5 marijuana collectives or cooperatives, has entered into a field of law that is a subject of  
6 statewide concern; accordingly, if the operation of the county’s zoning ordinances conflict with  
7 state law, the local zoning ordinance regulating medical marijuana collectives is preempted and  
8 void. (See *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1251;  
9 *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 747; *Cohen v. Board of Supervisors*  
10 (1985) 40 Cal.3d 277, 290; *Candid Enterprises v. Inc. v. Grossmont Union High School Dist.*,  
11 *supra*, 39 Cal.3d at p. 885; *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 351.)

12 **I. REFERENDUM STATUTES MAY BE AMENDED ONLY BY THE**  
13 **VOTERS – ANY AMENDMENTS WITHOUT SUCH VOTER APPROVAL**  
14 **ARE PREEMPED BY STATE LAW.**

15 The Constitution of the State of California provides, in relevant part, as follows:

16 The Legislature may amend or repeal referendum statutes. It may amend or repeal an  
17 initiative statute only by another statute that becomes effective only when approved by  
18 the electors unless the initiative statute permits amendment or repeal without their  
19 approval.

20 *Cal. Constitution*, Article 2, Sec. 10 (c).

21 An ‘amendment’ is any change of the scope or effect of an existing statute, whether by  
22 addition, omission, or substitution of provisions, which does not wholly terminate its  
23 existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an  
24 act independent and original in form. A statute which adds to or takes away from an  
25 existing statute is considered an amendment.

26 *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22; see also *People v. Cooper*, (2002) 27  
Cal. 4th 38, 44.)

Whether an act amends existing law is determined by an examination and comparison of  
its provisions with existing law. If its aim is to clarify or correct uncertainties which arose from  
the enforcement of the existing law, or to reach situations which were not covered by the

1 original statute, the act is amendatory, even though in its wording it does not purport to amend  
2 the language of the prior act. (*Franchise Tax Bd. v. Cory* (1978) 80 Cal. App. 3d 772, 777.)

3 When deciding whether a legislative act amends an initiative,

4 it is the duty of the courts to jealously guard the people's initiative and referendum  
5 power. It has long been our judicial policy to apply a liberal construction to this  
6 power wherever it is challenged in order that the right to [ ] initiative or referendum]  
7 be not improperly annulled. Any doubts should be resolved in favor of the initiative  
8 and referendum power, and amendments which may conflict with the subject matter  
9 of initiative measures must be accomplished by popular vote, as opposed to  
10 legislatively enacted ordinances, where the original initiative does not provide  
11 otherwise.

12 *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1485–  
13 1486

14 The *CUA* does not quantify the marijuana a patient may cultivate or possess. Rather, the  
15 only “limit” on how much marijuana a person falling under the *CUA* may cultivate and/or  
16 possess is that it must be for the patient's “personal medical purposes.”<sup>9</sup> (§ 11362.5, subd. (d).)

17 The *CUA* also does not “limit” the number of qualified patients that may reside or cultivate  
18 marijuana on any single “legal parcel.” of land, nor does it limit the location where a qualified  
19 patient may cultivate his/her medical marijuana. According to the ballot arguments, the *CUA*  
20 “allows marijuana to be grown anywhere ... in backyards or near schoolyards  
21 without any regulation or restrictions.” (**Exhibit 2**- Argument Against Proposition 215)

22 Finally the *CUA* “requires absolutely no written documentation of any kind to grow or smoke  
23 marijuana.” (**Exhibit 2** - Rebuttal to Argument in Favor of Proposition 215)

24 Ordinance 4235, limits the location where a qualified patient may cultivate his/her  
25 marijuana for medical purposes, limits the quantity of marijuana that a qualified patient may  
26 cultivate, and requires a written Physician’s recommendation for the medical use of marijuana,  
when a patient requires more than 25 plants. As such these limitations are unlawful  
amendments to the *CUA*, in violation of *Cal. Constitution*, Article 2, Sec. 10 (c).

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<sup>9</sup> The “rule should be that the quantity possessed by the patient or the primary caregiver, and the form and manner in which it is possessed, should be reasonably related to the patient's current medical needs.” *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549

1 Furthermore, under *MCC* § 9.31.110, each and every medical marijuana patient who  
2 intends to cultivate his/her marijuana is required to provide in part all of the following  
3 information and documentation to the Agency:

4 (4) That the applicant or any individual engaged in the management  
5 of, or employed by, the collective has not been convicted of a violent  
6 felony as defined in Penal Code Section 667.5 (c) within the State of  
7 California, or a crime that would have constituted a violent felony as  
8 defined in Penal Code Section 667.5 (c) if committed in the State of  
California and is not currently on parole or felony probation. A conviction  
within the meaning of this Section means a plea or verdict of guilty or a  
conviction following a plea of *nolo contendere*;

9 (5) A statement acknowledging that the permit applied for will be  
10 issued in conformance with the laws of the State of California and that  
11 such issuance does not confer upon the applicant, managers, employees  
and members of the collective immunity from prosecution under federal  
law;

12 (6) The applicant's waiver and release of the County from any and all  
13 legal liability related to or arising from the application for a permit or the  
enforcement of the conditions of the permit;

14 (9) Proof that the owner of the property, if other than the applicant,  
15 has been notified as set forth in Section 9.31.080;

16 (10) A statement that the requested use will not violate the limitation  
locations set forth in Section 9.31.090;

17 (16) The applicant shall provide proof of either, a physician  
18 recommendation that the amount to be cultivated is consistent with the  
19 applicant's medical needs, the needs of the patients for whom the  
20 applicant is a caregiver, or a written agreement or agreements, that the  
21 applicant is authorized by one or more medical marijuana dispensing  
collectives to produce medical marijuana for the use of the members of  
said collective or collectives;

22 (19) Submission of payment of a permit fee sufficient to cover the cost  
23 to all County departments of investigating and processing the application  
24 in an amount that shall be set by the Board of Supervisors in accordance  
with all applicable laws and regulations;

25 (22) Authorization for the Sheriff, Fire District, and/or other appropriate  
26 County employees or agents or their designees, including building and  
fire inspectors, to enter the property only during normal business hours

1 for the purpose of examining the location to confirm compliance with this  
2 Section.

3 All of the forgoing documentary requirements are contrary to the stated intent of the *CUA*  
4 which provides that the *CUA* “requires absolutely no written documentation of any kind to grow  
5 or smoke marijuana.” (**Exhibit 2 - Rebuttal to Argument in Favor of Proposition 215**)  
6 Furthermore, *MCC* § 9.31.110 subsections 5, 6, 9, 19, and 22, require a monetary payment and  
7 relinquishment of basic rights in order to obtain permission from the local government for  
8 something already allowed by the state. For example, under subsection (6) a patient will be  
9 required to forfeit his right to seek a remedy for governmental misconduct under the Federal  
10 Civil rights Act 42 U.S.C. 1983, and the Government Claims Act; and under subsection (22) a  
11 qualified patient must forfeit his/her right to be free from unreasonable searches and seizures.

12 As such the documentary requirements of *MCC* § 9.31.110(B), also unlawfully amend  
13 the *CUA*, in violation of *Cal. Constitution*, Article 2, Sec. 10 (c).

14 **J. IF OTHERWISE VALID LOCAL LEGISLATION CONFLICTS  
15 WITH STATE LAW, IT IS PREEMPTED BY SUCH LAW AND IS VOID.**

16 With respect to legislative acts and referendum statutes, the *O'Connell* Court held that,

17 “Under article XI, section 7 of the California Constitution, [a] county or city may  
18 make and enforce within its limits all local, police, sanitary, and other ordinances  
19 and regulations not in conflict with general state laws. If otherwise valid local  
20 legislation conflicts with state law, it is preempted by such law and is void. **A  
21 conflict exists if the local legislation ‘duplicates, contradicts, or enters an area  
22 fully occupied by general law,** either expressly or by legislative implication.’  
23 (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 (Sherwin-  
24 Williams); see also *American Financial Services Assn. v. City of Oakland* (2005) 34  
25 Cal.4th 1239, 1251 (American Financial).)”

26 *O'Connell* supra at 1067 *Emphasis added*

27 **K. ORDINANCE 4235 IS INIMICAL TO, AND CANNOT BE  
28 RECONCILED WITH, THE MMPA OR THE CUA. THEREFORE THE  
29 ORDINANCE 4235 CONTRADICTS THE MMPA AND THE CUA.**

30 A local ordinance contradicts state law when it is inimical to or cannot be reconciled  
31 with state law. (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898, citing *Ex parte Daniels*  
32 (1920) 183 Cal. 636, 641–648 [192 P. 442] [as finding “ ‘contradiction’ ” in a local  
33 ordinance that set the maximum speed limit for vehicles below that set by state  
34 law].)” *O'Connell* supra at 1068

1 Here, it has been shown in detail that Ordinance 4235 is inimical to or cannot be  
2 reconciled the *MMPA* or the *CUA*. Moreover, it has been shown that Ordinance 4235 cannot be  
3 reconciled with the stated purpose of the *MMPA* which is to “[p]romote uniform and **consistent**  
4 **application of the act among the counties within the state, and to enhance the access of**  
5 **patients and caregivers to medical marijuana through collective, cooperative cultivation**  
6 **projects.”** (*Stats 2003 ch 875 § 1(a) Emphasis added*) This stated purpose cannot be overcome  
7 by any local land use regulations that would break-up and subdivide collective/co-operative  
8 cultivation projects or limit the formation of any said projects – for reasons that they prohibit  
9 that which is permitted under state law – and they run contrary to the stated purpose of  
10 enhancing access. Therefore, as provided in *O’Connell*, Ordinance 4235 contradicts both the  
11 *MMPA* and the *CUA*. Since Ordinance 4235 contradicts both the *MMPA* and the *CUA* it is  
12 unconstitutional and void as a matter of law.

13  
14 **L. THE CONTESTED ORDINANCE CONFLICTS WITH THE STATES**  
15 **DRUG HOUSE ABATEMENT LAWS, THUS IT IS PREEMPTED BY STATE LAW ON**  
16 **THESE GROUNDS ALSO.**

17 The defendants contend that the Ordinance 4235 does not conflict with the state's "drug  
18 house" abatement law, because “the Legislature has recently reaffirmed the nonexclusive nature  
19 of the drug house abatement law with the enactment of §11571.1, subdivision (a):

20 "Nothing in this article shall prevent a local governing body from adopting  
21 and enforcing laws, consistent with this article, relating to drug abatement.  
22 Where local laws duplicate or supplement this article, this article shall be  
23 construed as providing alternative remedies and not preempting the field."  
24 (*Stats. 2009, ch. 244, § 7. [H&S § 11571.1]*)

25 (Defendants’ demurrer P&A pg. 15)

26 However, the article pertaining to the state's "drug house" abatements laws only applies  
to:

“Every building or place used for the purpose of **unlawfully** selling, serving,  
storing, keeping, manufacturing, or giving away any controlled substance,  
precursor, or analog specified in this division, and every building or place wherein  
or upon which those acts take place, is a nuisance which shall be enjoined, abated,

1 and prevented, and for which damages may be recovered, whether it is a public or  
2 private nuisance.”

3 *Health & Saf Code § 11570 Emphasis added*

4 A local ordinance declaring the **lawful** “selling, serving, storing, keeping,  
5 manufacturing, or giving away any controlled substance, precursor” as a nuisance cannot  
6 possibly be “consistent” with the state statutes pertaining to the **unlawful** “selling, serving,  
7 storing, keeping, manufacturing, or giving away any controlled substance, precursor”, for the  
8 simple reason one applies to a lawful activity versus one applying to an unlawful activity. Thus,  
9 the defendants have failed to distinguish the difference between lawful and unlawful marijuana  
10 possession, cultivation and sales, when they argued that § 11571.1 allows local municipalities to  
11 adopt and enforce laws that are ‘consistent’ with the states drug house abatement laws – while  
12 applying § 11571.1 to the lawful cultivation of marijuana. Therefore, the defendants’ argument  
13 fails on these grounds also.

14 **IV. THE RECENTLY ENACTED ASSEMBLY BILL 2650, ADDING HEALTH  
15 AND SAFETY CODE SECTION 11362.768, DOES NOT SAVE THE CONTESTED  
16 ORDINANCE.**

17 The newly enacted section 11362.768<sup>10</sup> does not refer to, mention nor repeal any portion  
18 of the Medical Marijuana Program (*MMPA*) nor does it refer to, mention or repeal *Health and  
19 Safety Code* section 11362.83; thus, the force and effect of said statute (i.e., section 11362.83)  
20 still controls the limitations of a municipalities ability to legislate within the field of medical  
21 marijuana.

22 Plaintiffs have maintained that ordinances establishing rules regarding the operation and  
23 location are permissible so long as they comply with *Health and Safety Code section 11362.83's*  
24 singular and express requirement that **all** local ordinances have be "consistent" with the *MMPA*.

25 Plaintiffs maintain that none of the portions of the Mendocino ordinance complained  
26 about pass the test mandated by section 11362.83; i.e., that all local ordinances must be

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<sup>10</sup> Assembly Bill No. 2650, chaptered – enacting *Health and Safety Code § 11362.768* is  
attached hereto at **Exhibit 5**.

1 "consistent" with the *MMPA*. Because the Legislature is prohibited from making subsequent  
2 expressions of the intent behind previously enacted legislation, *Health and Safety Code* section  
3 11362.768, subdivisions (b), (f) and (g), **are simply expressions by the Legislature that the**  
4 **statute now being enacted is not intended to be a determination that a local ordinance is**  
5 **preempted.** While the Legislature could have easily referred to the *MMPA* when it enacted  
6 *section 11362.768*, it did not. Instead, the Legislature expressly stated that the enactment of  
7 *section 11362.768* on its own was not intended to preempt local ordinances and did so without  
8 reference to what preemption effect the *MMPA* could have. Instead of referring to the *MMPA*  
9 or to *section 11362.83* the Legislature instead limited its comments about preemption to the  
10 very statute being enacted and no other statute. Thus, the language from section 11362.768 and  
11 its various subdivisions ((b), (f) and (g)) limits any claim of preemption under that newly  
12 enacted statute but not under the *MMPA* or section 11362.83. These limits are confined:

13 “**only** to a medical marijuana cooperative, collective, dispensary, operator,  
14 establishment, or provider that is authorized by law to possess, cultivate, or  
15 distribute medical marijuana and **that has a storefront or mobile retail**  
**outlet** which ordinarily requires a local business license.” § 11362.768(e)  
*Emphasis added*

16 This conclusion is evident in the following language from section 11362.768 (f) and (g):  
17 "Nothing in **this section** shall prohibit ...ordinances or policies that further restrict the location  
18 or establishment..." (subdivision (f)) and "Nothing in **this section** shall preempt local  
19 ordinances, ...adopted prior to January 1, 2011, that regulate the location or establishment..."  
20 Clearly the Legislature was not saying that ordinances are not preempted by other provisions of  
21 the *MMPA* and in fact its failure to mention *section 11362.83* at all requires this court to reach  
22 to that statute to determine if the provisions of the Tehama County ordinance which Petitioners  
23 challenge are preempted or not "consistent" with the *MMPA* as required by *section 11362.83*.

24 Not only is this interpretation supported by the plain language of the statute (that the  
25 Legislature did not address preemption issues with respect to the *MMPA* when they enacted  
26

1 *section 11362.768*) but the Legislative Digest to the bill also stated that preemption statements  
2 in the statute were with respect to any claims over what effect the newly enacted statute had on  
3 preemption and no others: "The bill also would provide that local ordinances, adopted prior to  
4 January 1, 2011, that regulate the location or establishment of these medical marijuana  
5 establishments would not be preempted by its provisions; and that nothing in the bill shall  
6 prohibit a city, county, or city and county from adopting ordinances that further restrict the  
7 location or establishment of these medical marijuana establishments." 2010 *Cal Stats.* ch. 603;  
8 2010 Cal ALS 603; 2010 Cal AB 2650;. Again these medical marijuana establishments involve  
9 only those that have "a storefront or mobile retail outlet which ordinarily requires a local  
10 business license," as stated under § 11362.768(e).

11 It would be absurd to conclude that the Legislature was permitting a "free for all" with  
12 respect to the enactment of any type of ordinance a municipality would wish without any  
13 limitation and to do so without even bothering to refer to the *MMPA* or *section 11362.83*;  
14 clearly all the legislature was expressing was that if there are ordinances currently existing  
15 THIS statute (i.e., *section 11362.768*) is not intended to preempt them. However, the limitation  
16 of local legislation in this area continues to be controlled by *Health and Safety Code section*  
17 *11362.83* and the *MMPA*.

18 This interpretation is also most consistent with the rules of statutory construction; here,  
19 there is no support for any conclusion that *section 11362.768* repealed or changed, in any way,  
20 the *MMPA* or *Health and Safety Code section 11362.83*; as stated in *Stop Youth Addiction, Inc.*  
21 *v. Lucky Stores, Inc.*, (1998)17 *Cal. 4th* 553, 569:

22 "The governing principles in determining whether a statute repeals another  
23 by implication are well established. (citations) The law shuns repeals by  
24 implication. (*Ibid.*) In fact, the presumption against implied repeal is so  
25 strong that, To overcome the presumption the two acts must be  
26 irreconcilable, clearly repugnant, and so inconsistent that the two cannot  
have concurrent operation. The courts are bound, if possible, to maintain the  
integrity of both statutes if the two may stand together." *Id at 569*

1                   This test is not met here and the court is "bound if possible, to maintain the  
2 integrity of both statutes if the two may stand together" (*id at 569*); *section 11362.83* is the  
3 statute which dictates the limitations of and when a local ordinance is preempted. *Section*  
4 *11362.768, subdivisions (b), (f) and (g)* are mere expression by the Legislature that the newly  
5 enacted statute should not be seen as preempting other local ordinances. Thus, *section 11362.83*  
6 and *11362.768* are not "irreconcilable, clearly repugnant, and so inconsistent that the two cannot  
7 have concurrent operation" (*id at 569*). "[T]his statute [i.e., section 11362.83]..., ... has never  
8 been repealed or amended. Nor has the statute been repealed by implication since it can be read  
9 consistently together with" section 11362.768. *Herzberg v. County of Plumas* (2005) 133  
10 Cal.App.4th 1, 11.

11                   Further, the Legislature could not have been intending to express what the purpose was  
12 of the *MMPA*, legislation enacted 7 years prior, as an expression years after the original statute  
13 is enacted is not a "binding declaration" of intent; "The Legislature has no authority to interpret  
14 a statute. That is a judicial task." *Harris v. Capital* (1991) 52 Cal.3d 1142, 1157 fn.6  
15 (Legislature's expression of intent 15 years after statute enacted not binding on court). "A  
16 subsequent expression of the Legislature as to the intent of a prior statute is not binding."  
17 *Droeger v. Friedman* (1991) 54 Cal.3d 26, fn.14. The Legislature simply has no authority to  
18 divine the intent behind prior enacted legislation. *Cal. E.S. Comm., v. Payne* (1947) 31 Cal.2d  
19 210, 214 ("*Payne*"). It is for this reason that the Legislature in enacting *section 11362.768*  
20 carefully avoided any statement about preemption as it relates to the *MMPA* and the *MMPA's*  
21 limitation on local ordinances expressed in *section 11362.83*. As the court in *Payne* pointed  
22 out, had such action been undertaken by the Legislature (again pointing out the Legislature  
23 expressly did not when it limited its comments to what "this section" did and did not do with  
24 respect to preemption) when they enacted 11362.768, it would not bind this court's duty to  
25 interpret section 11362.83. *Payne* points out that any attempt to state what the prior intent was  
26

1 cannot change the plain meaning of that prior statute and the court is still bound to give the  
2 statute whatever meaning it had at the time it was previously enacted. As stated by *Payne*:

3 "The construction of statutes is a function of the judiciary, but where a statute is  
4 ambiguous various aids may be employed in determining the legislative intent,  
5 and a subsequent expression of the Legislature as to the intent of the prior statute,  
6 although not binding on the court, may properly be used in determining the effect  
7 of a prior act.(citations); 2 Sutherland, *Statutory Construction* [3d ed. 1943], pp.  
8 316, 526.) In the instant case, however, section 45.2 was not ambiguous as to the  
9 matter of intent to evade the act....The amendment to section 45.2 in 1943 added  
10 the further condition that an intent to evade the act be shown before the running of  
11 the statute of limitations should be suspended, and the declaration of the  
Legislature that the amendment in 1943 was merely a clarification of the original  
statute, may not be invoked to change the clear meaning of section 45.2 as first  
enacted...Similarly, the language of the "clarification" provision in this case  
cannot be given an obviously absurd effect, and the court cannot accept the  
Legislative statement that an unmistakable change in the statute is nothing more  
than a clarification and restatement of its original terms."

*Id at 214*

12 Again, Plaintiffs point out that the prohibitions on subsequent expressions of intent by  
13 the Legislature which are in the *Payne* case were not violated because the Legislature expressly  
14 limited its comments to what *section 11362.768's* effect would be on a preemption claim and  
15 did not comment or recreate their intent on preemption as it relates to the *MMPA's* prohibition  
16 on enacting local ordinances which are not "consistent" with the *MMPA. Health and Safety*  
17 *Code section 11362.83.*

18 The limited times the courts have used a subsequent legislative expression of intent is  
19 when it was contemporaneous with the enactment of the prior statute and the new statute  
20 expressly stated a declaration of the legislature's intent with respect to the prior statute. That is  
21 not the case here wherein the *MMPA* nor any of its various statutes are mentioned at all in  
22 *section 11362.768* and the language on preemption in its subdivisions is limited to what effect  
23 "this section" has. See, *L.A. Co. Democratic Central Committee v. County of Los Angeles*  
24 (1976) 61 Cal.App.3d 335, 342("...the Legislature has expressly found and declared that the  
25 amendments effected by this act are declaratory of the legislative intent in enacting' the 1973  
26

1 act. Although we are not bound by the Legislature's statement regarding the 1973 legislation,  
2 that statement properly may be considered in construing the provision in question.")

3 "A further exception to this general rule of construction arises when the  
4 Legislature merely clarifies existing law(citations) Thus, if it can be shown [Proposition]8 was  
5 enacted to clarify the provisions of [proposition]13, [proposition] 8 must be given the same  
6 effect as if embodied in the original [proposition]13 at the time of its passage (citations)...This  
7 measure would revise the definition...and would make... *various clarifying* changes in such  
8 definition....It is clear the legislative intent was to make "various clarifying changes...Thus,  
9 since 8 was clearly intended to *clarify* 13, the rules of construction pertaining to clarifying  
10 amendments require that Proposition 8 be given effect as of the effective date of Proposition 13,  
11 July 1, 1978." *State Board of Equalization v. Board of Supervisors* (1980) 105 Cal.App.3d 813,  
12 824-825. Here, there is no indication of an intent to make "clarifying changes" as the  
13 Legislature did not mention the *MMPA* and its limitations on local ordinances when the enacted  
14 section 11362.768.

15 Thus, section 11362.768 is not an "expression by the legislature concerning the  
16 existence of an ambiguity and the declaration of the intent of the [*MMPA or section 11362.83*]"  
17 and even if it was, which the express language of section 11362.768 indicates quite the contrary,  
18 "The subsequent legislation interpreting the statute construed, does not change the meaning; it  
19 merely supplies an indication of the legislative intent which may be considered together with  
20 other factors in arriving at the true intent existing at the time the legislation was enacted."  
21 *Stockton Sav. & Loan Bank v. Massanet* (1941) 18 Cal.2d 200, 204.

22 If one were to conclude that *section 11362.768* is a green light to municipalities to enact  
23 whatever legislation they please, it "would render superfluous those provisions previously noted  
24 [i.e. section 11362.83] which expressly state that such [local legislation must be consistent with  
25 the *MMPA*]. We have generally been exceedingly reluctant to attach an interpretation to a  
26

1 particular statute which renders other existing provisions unnecessary." *People v. Superior*  
2 *Court (Douglass)* (1979) 24 Cal.3d 428, 434

3 With respect to provisions of *Health and Safety Code* § 11362.768, § 11362.768  
4 provides a that as a matter of statewide concern “no medical marijuana cooperative, collective,  
5 dispensary, operator, establishment, or provider authorized by law to possess, cultivate, or  
6 distribute medical marijuana that has a storefront or mobile retail outlet which ordinarily  
7 requires a local business license shall be located within a 600-foot radius of any public or  
8 private school” (See preamble of Assembly Bill No. 2650)

9 Section 11362.768, also provides that “Nothing in this section shall prohibit a city,  
10 county, or city and county from adopting ordinances or policies that further restrict the location  
11 or establishment of a medical marijuana cooperative, collective, dispensary, operator,  
12 establishment, or provider.” § 1362.768 (f). One obvious example of an authorized “further  
13 restrict[ion]” could be an increase in the minimum “600-foot radius” to a 1000-foot radius from  
14 schools, wherein a collective/co-operative” that has a storefront or mobile retail outlet may  
15 establish its operations.

16 In the instance case, Ordinance 4235 applies only to the cultivation of marijuana for  
17 medical purposes, by all qualified patients and their designated caregivers, without any  
18 limitation to those “medical marijuana cooperative, collective, dispensary, operator,  
19 establishment, or provider **authorized by law to possess, cultivate, or distribute medical**  
20 **marijuana that has a storefront or mobile retail outlet.**” Since, Ordinance 4235, is not  
21 limited to those operations that have “a storefront or mobile retail outlet,” AB 2650 - Section  
22 11362.768 has no effect upon the immediate case at hand, on its face. Furthermore, since AB  
23 2650 cannot be deployed to interpret either the statutory construction of the *CUA* or the *MMPA*,  
24 it again ha no effect upon the case at hand.

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**V. CONCLUSION**

For the forgoing reasons, this court should deny Defendants' Demurrer to the First Amended Complaint, must be denied.

Respectfully submitted.

Date: November 29, 2010

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Attorney for Plaintiffs  
JAMES HILL ET AL