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Attorneys for Petitioners:

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TEHAMA**

**JASON BROWNE, DAWN BROWNE,
WILLIAM BROWNE, MICHAEL BLACK,
GRANT NOTT, LINDSEY CROOKS,
BRIAN LOUCKS, and THOMAS SCOTT,**

Petitioners,

vs.

**THE COUNTY OF TEHAMA, THE
TEHAMA COUNTY BOARD OF
SUPERVISORS, and THE TEHAMA
COUNTY DEPARTMENT OF
PLANNING, BUILDING AND CODE
ENFORCEMENT**

Respondents.

Case No. CI 63676

**OPPOSITION TO RESPONDENTS'
SUPPLEMENTAL BRIEF
RE: ASSEMBLY BILL NO. 2650
IN SUPPORT OF RESPONDENT'S
DEMURRER**

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3 In summary, PETITIONERS' submit that *section 11362.768, subdivisions (b), (f) and (g)*
4 have no effect on Petitioners' arguments that the various provisions of the Tehama County ordinance,
5 complained of in the Petition for Writ of Mandate/Prohibition, violate the requirements and
6 limitations of *Health and Safety Code section 11362.83*; i.e., that all ordinances must be "consistent"
7 with the *MMPA*.

8 The newly enacted *section 11362.768* does not refer to, mention nor repeal any portion of the
9 Medical Marijuana Program (*MMPA*) nor does it refer to, mention or repeal *Health and Safety Code*
10 *section 11362.83*; thus, the force and effect of said statute (i.e., section 11362.83) still controls the
11 limitations of a municipalities ability to legislate in this area.

12 Petitioner has maintained that ordinances establishing rules regarding the operation and
13 location are permissible so long as they comply with *Health and Safety Code section 11362.83's*
14 singular and express requirement that **all** local ordinances have be "consistent" with the act.

15 Petitioner maintains that none of the portions of the Tehama ordinance complained about
16 pass the test mandated by section 11362.83; i.e., that all local ordinances must be "consistent" with
17 the *MMPA*. Because the Legislature is prohibited from making subsequent expressions of the intent
18 behind previously enacted legislation, *Health and Safety Code section 11362.768, subdivisions (b), (f)*
19 *and (g)*, **are simply expressions by the Legislature that the statute now being enacted is not**
20 **intended to be a determination that a local ordinance is preempted.** While the Legislature could
21 have easily referred to the *MMPA* when it enacted *section 11362.768*, it did not. Instead, the
22 Legislature expressly stated that the enactment of *section 11362.768* on its own was not intended to
23 preempt local ordinances and did so without reference to what preemption effect the *MMPA* could
24 have. Instead of referring to the *MMPA* or to *section 11362.83* the Legislature instead limited its
25 comments about preemption to the very statute being enacted and no other statute. Thus, the language
26 from section 11362.768 and its various subdivisions ((b), (f) and (g)) limits any claim of preemption
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4 under that newly enacted statute but not under the MMPA or section 11362.83. These limits are
5 confined:

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

10 This conclusion is evident in the following language from section 11362.768 (f) and (g):

11 "Nothing in **this section** shall prohibit ...ordinances or policies that further restrict the location or
12 establishment..." (subdivision (f)) and "Nothing in **this section** shall preempt local ordinances,
13 ...adopted prior to January 1, 2011, that regulate the location or establishment..." Clearly the
14 Legislature was not saying that ordinances are not preempted by other provisions of the MMPA and
15 in fact its failure to mention *section 11362.83* at all requires this court to reach to that statute to
16 determine if the provisions of the Tehama County ordinance which Petitioners challenge are
17 preempted or not "consistent" with the MMPA as required by *section 11362.83*.

18 Not only is this interpretation supported by the plain language of the statute (that the
19 Legislature did not address preemption issues with respect to the MMPA when they enacted *section*
20 *11362.768*) but the Legislative Digest to the bill also stated that preemption statements in the statute
21 were with respect to any claims over what effect the newly enacted statute had on preemption and no
22 others: "The bill also would provide that local ordinances, adopted prior to January 1, 2011, that
23 regulate the location or establishment of these medical marijuana establishments would not be
24 preempted by **its provisions**; and that nothing in **the bill** shall prohibit a city, county, or city and
25 county from adopting ordinances that further restrict the location or establishment of these medical
26 marijuana establishments." 2010 Cal ALS 603; 2010 Cal AB 2650; 2010 Cal Stats. ch. 603. Again
27 these medical marijuana establishments involve only those that have “a storefront or mobile retail
28 outlet which ordinarily requires a local business license,” as stated under § 11362.768(e).

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

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

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

18 *Id at 569*

19 This test is not met here and the court is "bound if possible, to maintain the integrity of both
20 statutes if the two may stand together" (*id at 569*); *section 11362.83* is the statute which dictates the
21 limitations of and when a local ordinance is preempted. *Section 11362.768, subdivisions (b), (f) and*
22 *(g)* are mere expression by the Legislature that the newly enacted statute should not be seen as
23 preempting other local ordinances. Thus, *section 11362.83* and *11362.768* are not "irreconcilable,
24 clearly repugnant, and so inconsistent that the two cannot have concurrent operation" (*id at 569*).
25 "[T]his statute [i.e., *section 11362.83*]..., ... has never been repealed or amended. Nor has the statute
26 been repealed by implication since it can be read consistently together with" *section 11362.768*.

27 *Herzberg v. County of Plumas (2005) 133 Cal.App.4th 1, 11.*

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4 Further, the Legislature could not have been intending to express what the purpose was of the
5 *MMPA*, legislation enacted 7 years prior, as an expression years after the original statute is enacted is
6 not a "binding declaration" of intent; "The Legislature has no authority to interpret a statute. That is a
7 judicial task." *Harris v. Capital (1991) 52 Cal.3d 1142, 1157 fn.6* (Legislature's expression of intent
8 15 years after statute enacted not binding on court). "A subsequent expression of the Legislature as to
9 the intent of a prior statute is not binding." *Droeger v. Friedman (1991) 54 Cal.3d 26, fn.14*. The
10 Legislature simply has no authority to divine the intent behind prior enacted legislation. *Cal. E.S.*
11 *Comm., v. Payne (1947) 31 Cal.2d 210, 214 ("Payne")*. It is for this reason that the Legislature in
12 enacting *section 11362.768* carefully avoided any statement about preemption as it relates to the
13 *MMPA* and the *MMPA's* limitation on local ordinances expressed in *section 11362.83*. As the court
14 in *Payne* pointed out, had such action been undertaken by the Legislature (again pointing out the
15 Legislature expressly did not when it limited its comments to what "this section" did and did not do
16 with respect to preemption) when they enacted 11362.768, it would not bind this court's duty to
17 interpret section 11362.83. *Payne* points out that any attempt to state what the prior intent was cannot
18 change the plain meaning of that prior statute and the court is still bound to give the statute whatever
19 meaning it had at the time it was previously enacted. As stated by *Payne*:

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21 "The construction of statutes is a function of the judiciary, but where a statute is
22 ambiguous various aids may be employed in determining the legislative intent, and a
23 subsequent expression of the Legislature as to the intent of the prior statute, although
24 not binding on the court, may properly be used in determining the effect of a prior
25 act.(citations); 2 Sutherland, Statutory Construction [3d ed. 1943], pp. 316, 526.) In
26 the instant case, however, section 45.2 was not ambiguous as to the matter of intent to
27 evade the act...The amendment to section 45.2 in 1943 added the further condition
28 that an intent to evade the act be shown before the running of 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

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4 "clarification" provision in this case cannot be given an obviously absurd effect, and
5 the court cannot accept the Legislative statement that an unmistakable change in the
6 statute is nothing more than a clarification and restatement of its original terms."

7 *Id at 214*

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

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

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

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

18 If one were to conclude that *section 11362.768* is a green light to municipalities to enact
19 whatever legislation they please, it "would render superfluous those provisions previously noted [i.e.
20 section 11362.83] which expressly state that such [local legislation must be consistent with the
21 *MMPA*]. We have generally been exceedingly reluctant to attach an interpretation to a particular
22 statute which renders other existing provisions unnecessary." *People v. Superior Court (Douglass)*
23 *(1979) 24 Cal.3d 428, 434*

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

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

13 In the instance case, Ordinance 1963 applies only to the cultivation of marijuana for medical
14 purposes, by all qualified patients and their designated caregivers, without any limitation to those
15 “medical marijuana cooperative, collective, dispensary, operator, establishment, or provider
16 authorized by law to possess, cultivate, or distribute medical marijuana that has a storefront or mobile
17 retail outlet.” Since, Ordinance 1963, is not limited to those operations that have “a storefront or
18 mobile retail outlet,” AB 2650 - Section 11362.768 has no effect upon the immediate case at hand, on
19 its face. Furthermore, since AB 2650 cannot be deployed to interpret either the statutory construction
20 of the CUA or the MMPA, it again ha no effect upon the case at hand.
21

22 **CONCLUSION**

23 AB 2650 - Section 11362.768 has no effect upon the immediate case.
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Respectfully submitted.

Date: November 23, 2010

E. D. Lerman
Attorney for Petitioners