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**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

**PETITIONERS' OPPOSITION TO
RESPONDENTS' GENERAL DEMURRER
TO PETITION FOR WRIT OF
MANDATE/PROHIBITION, ETC.**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO**
2 **DEFENDANT’S DEMURRER TO THE COMPLAINT**

3 **I. INTRODUCTION**

4 The question that is before this court is whether Tehama County Ordinance No. 1936 and
5 its provisions codified therein, which limit the location and number of cannabis plants a qualified
6 patient¹, his/her primary caregiver, or an association thereof may maintain are preempted by state
7 law, and therefore unconstitutional on their face, and void. If the ordinance is preempted, then
8 Defendants’ demurrer to the complaint must be denied.

9 **II. STATEMENT OF FACTS**

10 On, April 6, 2010 the TEHAMA COUNTY BOARD OF SUPERVISORS enacted
11 Tehama County Ordinance No. 1936, which is a comprehensive nuisance ordinance, entitled
12 MARIJUANA CULTIVATION, that was codified at Title 9, Chapter 9.06 of the Tehama County
13 Code (TCC). A true and correct copy of Tehama County Ordinance No. 1936² is attached
14 hereto as **Exhibit 1**. Within The MARIJUANA CULTIVATION ordinance, the TEHAMA
15 COUNTY BOARD OF SUPERVISORS made the following findings:

16 Sec. 9.06.020 (K) - The limited right of qualified patients and their primary
17 caregivers under State law to cultivate marijuana plants for medical purposes does
18 not confer the right to create or maintain a public nuisance. By adopting the
19 regulations contained in this Chapter, the County will achieve a significant
20 reduction in the aforementioned harms caused or threatened by the unregulated
21 cultivation of marijuana in the unincorporated area of Tehama County.

22 Within The MARIJUANA CULTIVATION ORDINANCE the TEHAMA COUNTY
23 BOARD OF SUPERVISORS made the following declarations:

24 9.06.040 Nuisance Declared.

25 A. The cultivation of more than the following number of marijuana plants,
26 either indoors or outdoors, on any premises is hereby declared to be unlawful and

23 ¹ "Qualified patient" means a person who is entitled to the protections of Section 11362.5.
24 (H&S § 11362.7 (f)).

25 ² Petitioner requests judicial notice of Exhibits 1 – xxx pursuant to Evidence Code §§ 452 and
26 453.

1 a public nuisance that may be abated in accordance with this Chapter:

2 1. If the premises is twenty (20) acres in size or less, no more than 12
3 mature marijuana plants or 24 immature marijuana plants shall be cultivated on
4 the premises. If both mature and immature marijuana plants are cultivated on the
5 premises, there shall be no more than 12 mature marijuana plants and no more
6 than 24 total marijuana plants.

7 2. If the premises is greater than twenty (20) acres in size but less
8 than one hundred and sixty (160) acres in size, no more than 30 mature marijuana
9 plants or 60 immature marijuana plants shall be cultivated on the premises. If both
10 mature and immature marijuana plants are cultivated on the premises, there shall
11 be no more than 30 mature marijuana plants and no more than 60 total marijuana
12 plants.

13 3. If the premises is one hundred and sixty (160) acres or greater in
14 size, no more than 99 marijuana plants, whether mature or immature, shall be
15 cultivated on the premises.

16 The foregoing limitation shall be imposed regardless of the number of qualified
17 patients or primary caregivers residing at the premises or participating directly or
18 indirectly in the cultivation. Further, this limitation shall be imposed
19 notwithstanding any assertion that the person(s) cultivating marijuana are the
20 primary caregiver(s) for qualified patients or that such person(s) are collectively
21 or cooperatively cultivating marijuana.

22 B. The cultivation of marijuana, in any amount or quantity, either indoors or
23 outdoors, upon any premises located within one thousand (1,000) feet of any
24 school, school bus stop, school evacuation site, church, park, child care center, or
25 youth-oriented facility is hereby **declared to be unlawful** and a public nuisance
26 that may be abated in accordance with this Chapter.

1. Except as provided in Subdivision (B)(2), such distance shall be
measured in a straight line from the boundary line of the premises upon which
marijuana is cultivated to the boundary line of the premises upon which the
school, school bus stop, school evacuation site, church, park, child care center, or
youth-oriented facility is located.

2. If the premises is twenty (20) acres or greater in size, then such
distance shall be measured in a straight line from the building in which the
marijuana is cultivated, or, if the marijuana is cultivated in an outdoor area, from
the fence required by Subdivision (c)(3), to the boundary line of the premises
upon which the school, school bus stop, school evacuation site, church, park,
child care center, or youth-oriented facility is located.

C. The cultivation of marijuana, in any amount or quantity, either indoors or

1 outdoors, upon any premises is hereby **declared to be unlawful** and a public
2 nuisance that may be abated in accordance with this Chapter, unless all of the
following conditions are satisfied:

3 1. The person(s) owning, leasing, occupying, or having charge or
4 possession of any premises have registered the premises with the Tehama County
Health Services Agency, and provided all of the following current information
5 and documentation to the Agency:

6 a. The name of each person, owning, leasing, occupying, or
having charge or possession of the premises;

7 b. The name of each qualified patient or primary caregiver
8 who participates in the cultivation, either directly or by providing reimbursement
9 for marijuana or the services provided in conjunction with the provision of that
marijuana;

10 c. A copy of the current valid medical recommendation or
11 State-issued medical marijuana card for each qualified patient identified as
12 required above, and for each qualified patient for whom any person identified as
required above is the primary caregiver;

13 d. The number of marijuana plants cultivated on the premises;
14 and

15 e. Such other information and documentation as the Agency
determines is necessary to ensure compliance with State law and this Chapter.

16 This information and documentation shall be received in confidence, and
17 shall be used or disclosed only for purposes of administration or enforcement of
this Chapter or State law, or as otherwise required by law.

18 The Board of Supervisors may, by Resolution, establish a fee for such
19 registration in accordance with all applicable legal requirements.

20 2. If the person(s) cultivating marijuana on any legal parcel is/are not
21 the legal owner(s) of the parcel, such person(s) shall submit a notarized letter
22 from the legal owner(s) consenting to the cultivation of marijuana on the parcel.
This letter shall be examined by Agency, and shall then be returned to the
submitter. The Agency shall prescribe forms for such letters.

23 3. All marijuana grown outside of any building must be fully
24 enclosed by an opaque fence at least six (6) feet in height. The fence must be
25 adequately secure to prevent unauthorized entry. Bushes or hedgerows shall not
constitute an adequate fence under this Subdivision.

1 4. Each building or outdoor area in which the marijuana is cultivated
2 shall be set back from the boundaries of the premises as follows:

3 a. If the premises is twenty (20) acres in size or less, each
4 cultivation building or area shall be set back at least 100 feet from all boundaries
5 of the premises.

6 b. If the premises is greater than twenty (20) acres in size but
7 less than one hundred and sixty (160) acres in size, each cultivation building or
8 area shall be set back at least 300 feet from all boundaries of the premises.

9 c. If the premises is one hundred and sixty (160) acres or
10 greater in size, each cultivation building or area shall be set back at least 1,000
11 feet from all boundaries of the premises.

12 Such setback distance shall be measured in a straight line from the building in
13 which the marijuana is cultivated, or, if the marijuana is cultivated in an outdoor
14 area, from the fence required by Subdivision (c)(3), to the boundary line of the
15 premises.

16 D. No person owning, leasing, occupying, or having charge or possession of
17 any premises within the County shall cause, allow, suffer, or permit such premises
18 to be used for the outdoor or indoor cultivation of marijuana plants in violation of
19 this Chapter.

20 The provisions of 9.06.040 (C) declared that “[t]he cultivation of marijuana, in any
21 amount or quantity, either indoors or outdoors, upon any premises is hereby declared to be
22 unlawful and a public nuisance that may be abated in accordance with [Chapter 9.06] unless all
23 of the [conditions contained within the subsections of 9.06.040 (C) are satisfied,]. Since no
24 marijuana may be cultivated, under any circumstances, within 100 feet from all boundaries of a
25 premises that is twenty (20) acres in size or less, under § 9.06.040 (C)(4)(a), § 9.06.040 (C) is a
26 complete prohibition of all cultivation of marijuana for medical purposes on all parcels of land
that are less than 200 feet wide. Furthermore, it is a complete prohibition of indoor cultivation of
marijuana for medical purposes in all residences, which have housing structures located within
100 feet of its boundary.

 Since 9.06.040 (C)(1)(c) requires “A copy of the current valid medical recommendation
or State-issued medical marijuana card for each qualified patient,” the provisions of 9.06.040 (C)
amount to a complete prohibition of cultivation of marijuana for medical purposes against all

1 qualified patients who have received only an oral approval or recommendation for the medical
2 use of marijuana from their California physician under *Health and Safety Code* § 11362.5(d).

3 Since § 9.06.040 (A) has “declared to be unlawful and a public nuisance” the cultivation
4 of more than the following number of marijuana plants, either indoors or outdoors as follows:
5 (1.) on a premises that is twenty (20) acres in size or less, no more than 12 mature marijuana
6 plants or 24 immature marijuana plants; (2.) on a premises that premises is greater than twenty
7 (20) acres in size but less than one hundred and sixty (160) acres in size, no more than 30 mature
8 marijuana plants or 60 immature marijuana plants; (3.) on a premises that is one hundred and
9 sixty (160) acres or greater in size, no more than 99 marijuana plants; - the provisions of
10 9.06.040 (A) (1) are a complete ban of the collective cultivation of marijuana by 3 or more
11 qualified patients on parcels of land that are twenty (20) acres in size or less. The provisions of
12 9.06.040 (A) (2) are a complete ban of the collective cultivation of marijuana by 6 or more
13 qualified patients³ on parcels of land that are greater than twenty (20) acres in size but less than
14 one hundred and sixty (160) acres in size; And, (4.) the provisions of 9.06.040 (A)(3) are a
15 complete ban of the collective cultivation of marijuana by 17 or more qualified patients on
16 parcels of land that are one hundred and sixty (160) acres or greater in size.

17 On the basis of the TEHAMA COUNTY BOARD OF SUPERVISORS’ findings and
18 declarations, including, but not limited to the forgoing findings enumerated at Sec. 9.06.020 and
19 9.06.040, the ordinance regulates the cultivation of marijuana for medical purposes throughout
20 the County of Tehama, regulating the amount of marijuana a qualified patient, or primary
21 caregiver of a qualified patient, and/or an association of a qualified patients and/or primary
22 caregivers may cultivate pursuant to the *Compassionate Use Act* and/or the *Medical Marijuana*
23 *Program Act*, and regulating the location where a qualified patient, or a primary caregiver of a
24 qualified patient, and/or an association of qualified patients and/or primary caregivers may
25 cultivate pursuant to the *Compassionate Use Act* and/or the *Medical Marijuana Program Act*.

26 ³ Pursuant to Health and Safety Code § 11362.77 (a), each qualified patient is *per se* allowed to cultivate six mature or 12 immature marijuana plants per qualified patient.

1 1.) Section 9.06.050 - Notice to Abate Unlawful Marijuana Cultivation, provides:

2 Whenever the enforcing officer determines that a public nuisance as described in
3 Chapter exists on any premises within the unincorporated area of Tehama County,
4 he or she is authorized to notify the owner(s) and/or occupant(s) of the property,
through issuance of a "Notice to Abate Unlawful Marijuana Cultivation."

5 2.) 9.06.110 Enforcement, provides:

6 (a) Whenever the enforcing officer becomes aware that an owner or occupant
7 has failed to abate any unlawful marijuana cultivation within fourteen (14) days
8 the date of service of the Notice to Unlawful Marijuana Cultivation, unless timely
9 appealed, or of the date of the decision of the Board of Supervisors requiring such
10 abatement, the enforcing officer may take one or more of the following actions:

11 (1) Enter upon the property and abate the nuisance by County personnel, or by
12 private contractor under the direction of the enforcing officer. The enforcing
13 officer may apply to a court of competent jurisdiction for a warrant
14 authorizing entry upon the property for purposes of undertaking the work, if
15 necessary. If any part of the work is to be accomplished by private contract,
16 that contract shall be submitted to and approved by the Board of Supervisors
17 prior to commencement of work. Nothing herein shall be construed to require
18 that any private contract under this Code be awarded through competitive
19 bidding procedures where such procedures are not required by the general
20 laws of the State of California; and/or

21 (2) Request that the County Counsel commence a civil action to redress,
22 enjoin, and abate the public nuisance.

23 **A. THE COMPASSIONATE USE ACT PLACES NO BURDENS
24 UPON A QUALIFIED PATIENT, AND PROVIDES NO LIMITATIONS
25 BEYOND THAT WHICH IS REASONABLY RELATED THE
26 PATIENTS CURRENT MEDICAL NEEDS.**

Under the *Compassionate Use Act* (H&S § 11362.5) (*CUA*), there are no explicit
limitations on the number of cannabis plants a qualified patient or his or her primary caregiver
may cultivate, so long as the amount marijuana ultimately harvested is reasonably related to meet
the medical needs of the patient⁴. (See *Health and Safety Code* § 11362.5 and *People v. Trippet*,
(1997) 56 Cal. App. 4th 1532, 1549)

⁴ The *CUA* does not require that a physician's recommendation or approval state any specific
amounts of cannabis or dosage schedules in order to be valid. The *Trippet* Court examined

1 In November 1996, the California Voters enacted the Compassionate Use Act (also
2 known as Proposition 215), which was codified at *Health and Safety Code* § 11362.5.

3 The ballot materials of Proposition 215 make clear that the only “limitation” on the
4 quantity of marijuana a qualified person under the *CUA* may possess, is the amount that is
5 reasonably related to the patient’s needs. An argument against the *CUA* was that it “allows
6 unlimited quantities of marijuana to be grown anywhere ... in backyards or near schoolyards
7 without any regulation or restrictions. This is not responsible medicine. It is marijuana
8 legalization.” (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), argument against Prop. 215, p. 61.) (see
9 **Exhibit 2**) San Francisco District Attorney Terence Hallinan responded, “Proposition 215 does
10 not allow ‘unlimited quantities of marijuana to be grown anywhere.’ It only allows marijuana to
11 be grown for a patient's personal use. Police officers can still arrest anyone who grows too much,
12 or tries to sell it.” (*Id.*, rebuttal to argument against Prop. 215, p. 61.) According to these ballot
13 statements, the *CUA* does not place a numeric cap on how much marijuana is sufficient for a
14 patient's personal medical use.

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

19 **B. THE MEDICAL MARIJUANA PROGRAM ACT ENHANCED THE ACCESS OF
20 PATIENTS AND CAREGIVERS TO MEDICAL MARIJUANA THROUGH
21 COLLECTIVE, COOPERATIVE CULTIVATION PROJECTS**

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

25 the issue regarding amounts through an analysis of the ballot arguments (*People v. Trippet*,
26 (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 (1) On November 6, 1996, the people of the State of California enacted the
2 Compassionate Use Act of 1996 (hereafter the [CUA] act), codified in Section
3 11362.5 of the Health and Safety Code, in order to allow seriously ill residents of the
4 state, who have the oral or written approval or recommendation of a physician, to use
5 marijuana for medical purposes without fear of criminal liability under Sections
6 11357 and 11358 of the Health and Safety Code.

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

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

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

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

17 (b)

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

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

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

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

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

“Qualified patients, persons with valid identification cards, and the designated
primary caregivers of qualified patients and persons with identification cards, who
associate within the State of California in order collectively or cooperatively to
cultivate marijuana for medical purposes, shall not solely on the basis of that fact be

1 subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366,
2 11366.5, or 11570⁵.”
(H&S § 11362.775)

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

9 Therefore, the enactment of H&S § 11362.775 within the *MMPA* demonstrates that the
10 legislature expressly exempted associations of medical marijuana patients from “the laws
11 declaring the use of property for this purposes a nuisance,” **in all locations**, regardless of
12 whether the association is collectively cultivating marijuana within one thousand (1000) feet of
13 any school, school bus stop, school evacuation site, church, park, child care center, or youth-
14 oriented facility.

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

20 Under the *Medical Marijuana Program Act* (H&S 11362.7 et seq) (*MMPA*), a "Qualified
21 patient" is a person who is entitled to the protections of Section 11362.5, but who does not have
22 an identification card issued pursuant to the *MMPA*. H&S 11362.7(f) There are no limitations
23 within the *MMPA* on the number qualified patients or primary caregivers who may associate for
24 the purposes of collectively cultivating and distributing marijuana for medical purposes. (See

25 ⁵ “§ 11570 qualifies as ‘civil in nature,’ but also ‘quasi-criminal in effect’ and ‘character’ ”
26 *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 *H&S* § 11362.775). Since each individual qualified patient is entitled to a number of plants
2 determined by either of the guidelines set under *H&S* § 11362.77, and since the *MMPA* has not
3 placed a limit on the number of patients who may associate to collectively cultivate medical
4 marijuana at any single cultivation site, the *MMPA* has not placed a maximum limit upon the
5 number of plants an association of qualified patients or their caregivers may cultivate at their
6 cultivation site, so long as the number of plants is within the guidelines set within *H&S* §
7 11362.77, or within an amount that is reasonably related to the medical needs of the patients
8 belonging to the association. (See *H&S* §§ 11362.77 and .775) For example an association of
9 five qualified individuals may cultivate thirty (30) plants under the six (6) mature plant guideline
10 set under *H&S* 11362.77(a), while an association of one hundred (100) qualified individuals may
11 cultivate six hundred (600) mature plants under the same guideline. Of course the association of
12 patients noted in the examples may maintain additional plants if the county adopted guidelines
13 under *H&S* § 11362.77(c) which permit the local establishment of guidelines for additional
14 plants, or if their collective medical needs require additional plants in order to reasonably meet
15 their needs. (*H&S* § 11362.77(b))

15 **D. THE *MMPA* CONTAINS EXPLICIT LAND USE REGULATIONS WHICH**
16 **PROHIBIT THE OUTDOOR USE OF MARIJUANA ON PARCELS OF LAND WITHIN**
17 **1,000 FEET OF THE GROUNDS OF A SCHOOL, RECREATION CENTER, OR**
18 **YOUTH CENTER.**

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

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

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

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

24 The provisions of *H&S* § 11362.79 are particularly relevant because they are land use
25 statutes which prohibit outdoor smoking of marijuana on privately held land that is within 1,000
26 feet of the grounds of a school, recreation center, or youth center. Thus, the only activity that

1 the Legislature intended to restrict by location, or through land use regulation, was the smoking
2 of marijuana in the specified locations that **are not within a residence**. Therefore, by
3 implication, the Legislature considered and decided to permit the cultivation of marijuana for
4 medical use regardless of the location where said activities occur. This implication is consistent
5 with express provision of *H&S* § 11362.775, discussed previously.

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

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

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

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

16 **F. THE MMPA 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.**

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. ⁴ 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

1 the basis” of medical marijuana activities. (§§ 11362.765 & 11362.775.) After all,
2 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.

3 Footnote 4 of *QPA*:

4 ⁴ *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, on which the city
5 relies, did not involve an ordinance like Anaheim's, which potentially contradicts
6 sections 11362.765 and 11362.775 by making the use of property a crime “solely
7 on the basis” of otherwise lawful medical marijuana activity. The city also relies
8 on *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, which did not involve or
9 discuss section 11362.765 or 11362.775, nor section 11366, 11366.5, or 11570.
10 Additionally, unlike the scenario here, both Kruse and Naulls involved plaintiffs
11 that ignored or circumvented established procedures for obtaining a business
12 license, instead of seeking a declaratory judgment. And both cases involved
13 temporary moratoriums rather than the permanent dispensary ban alleged here.
14 Again, cases are not determinative for issues not considered.
15 *Qualified Patients Association v. City of Anaheim supra* at 754 fn. 4

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

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

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

1 **H. WITHIN THE *MMPA* THE LEGISLATURE HAS OCCUPIED ALL OTHER**
2 **ASPECTS CONNECTED TO THE REGULATION OF MEDICAL MARIJUANA,**
3 **INCLUDING THOSE WHICH ARE CRIMINAL AND CIVIL IN NATURE.**

4 The *MMPA* was also a comprehensive statutory scheme that expressly occupied every
5 aspect medical marijuana possession, consumption sales and manufacturing (cultivation and
6 processing). The *MMPA* included a statewide registry and identification card program (*H&S* §
7 11362.71 - .76); the *MMPA* exempted those qualifying patients and primary caregivers who
8 collectively or cooperatively cultivate marijuana for medical purposes from criminal sanctions
9 for possession for sale, transportation or furnishing marijuana, maintaining a location for
10 unlawfully selling, giving away, or using controlled substances, managing a location for the
11 storage, distribution of any controlled substance for sale, and the laws declaring the use of
12 property for these purposes a nuisance (*H&S* §§ 11362.765 and .775); the *MMPA* provided arrest
13 and prosecution guidelines concerning medical marijuana patients and caregivers (*H&S*
14 11362.77 and .78); the *MMPA* addressed and regulated the allowable prohibitions of possession
15 and consumption of medical marijuana within places of employment, jails, correctional facilities,
16 and penal institutions (*H&S* 11362.785); the *MMPA* regulated the locations where marijuana
17 may be consumed privately and publicly (*H&S* 11362.79); the *MMPA* regulated the medical use
18 of marijuana while a criminal defendant is released on bail, on probation or parole (*H&S*
19 11362.795); the *MMPA* regulated the professional licensing boards prohibiting them from
20 imposing a civil penalty or taking other disciplinary action against a licensee based solely on the
21 licensee's acts related to medical marijuana (*H&S* 11362.8); and the *MMPA* explicitly regulated
22 the local governing bodies legislative acts, limiting said acts to those that are consistent with the
23 *MMPA*. (*H&S* 11362.83)

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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.4th 1061, 1068

Here, the State Legislature, **expressly and fully occupied the field** of medical marijuana, while providing that “a city or other local governing body [may] adopt and enforcing [only those] laws consistent with [the *MMPA* that concern medical marijuana.]” (H&S § 11362.83)

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.

In *Urziceanu* the Court summarized the provisions of the *MMPA* which exempt a qualified patient/caregiver from criminal and civil sanctions connected to marijuana regulation, holding:

[T]he Medical Marijuana Program Act contains section 11362.775, which states, "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." Thus, the Legislature also exempted those qualifying

1 patients and primary caregivers who collectively or cooperatively cultivate
2 marijuana for medical purposes from criminal sanctions for possession for sale,
3 transportation or furnishing marijuana, maintaining a location for unlawfully selling,
4 giving away, or using controlled substances, managing a location for the storage,
5 distribution of any controlled substance for sale, **and the laws declaring the use of
6 property for these purposes a nuisance.**

7 *People v. Urziceanu* (2005) 132 Cal. App. 4th 747, 785 *Emphasis added*

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

10 The *O'Connell* Court further provided that,

11 When the Legislature has not expressly stated its intent to occupy an area of law, we
12 look to whether it has impliedly done so. This occurs in three situations: when “ ‘(1)
13 the subject matter has been so fully and completely covered by general law as to
14 clearly indicate that it has become exclusively a matter of state concern; (2) the
15 subject matter has been partially covered by general law couched in such terms as to
16 indicate clearly that a paramount state concern will not tolerate further or additional
17 local action; or (3) the subject matter has been partially covered by general law, and
18 the subject is of such a nature that the adverse effect of a local ordinance on the
19 transient citizens of the state outweighs the possible benefit to the’ locality.”
20 (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898.)

21 *O'Connell supra* at 1068

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

The medical marijuana regulations contained within the *MMPA* were couched in such
terms as to indicate clearly that a paramount state concern will not tolerate further or additional

1 local action. In fact the State Legislature explicitly provided that no local actions would be
2 tolerated if they interfere with the *MMPA*, only laws that are consistent with the *MMPA* will be
3 tolerated. (See *H&S* 11362.83)

4 For the forgoing reasons, the State Legislature has expressly and impliedly occupied all
5 areas of law that regulate the possession, consumption, cultivation/manufacturing, sales and
6 transportation of medical marijuana through the enactment of the *Medical Marijuana Program*
7 *Act*. Therefore, the Legislature explicitly and impliedly preempted any local ordinances and
8 regulations that are not consistent with the provisions of the *Medical Marijuana Program Act*.
9 The States' preemption included a preemption of any local ordinances and regulations that
10 interfere with the location where an association of qualified patients may possess and cultivate
11 medical marijuana under *Health and Safety Code* § 11362.775, other than those locations
12 identified within *H&S* § 11362.785 (i.e. penal institutions etc.). The States' preemption also
13 included a preemption of any local ordinances and regulations that interfere with the number of
14 qualified patients who may associate for the purposes of collectively cultivating marijuana for
15 medical purposes, which is in effect a preemption of the number of plants an association may
16 collectively cultivate at any one location.

17 The only leeway provided for local legislation in enacting local ordinances regulating the
18 cultivation of medical marijuana was the authorization to pass ordinances that are "consistent"
19 with the *MMPA*. (See *Health and Safety Code* § 11362.83 (emphasis added).) For example,
20 "The Medical Marijuana Program Act further provides limitations on how much marijuana a
21 patient or qualified primary caregiver may possess or cultivate ... and further authorizes cities
22 and counties to establish guidelines that exceed these base amounts. *People v. Urziceanu* (2004)
23 132 Cal.App.4th 747, 784. Since the *MMPA* explicitly authorizes local municipalities to enact
24 guidelines that are greater than those provided in the *MMPA*, the enactment of such guidelines
25 would be 'consistent' with the *MMPA* and the enactment thereof would be explicitly permitted
26 under *H&S* § 11362.83.

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

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

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

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

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

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

24 **B. THE MEDICAL MARIJUANA PROGRAM ACT PERMITS THE**
25 **CULTIVATION OF MARIJUANA FOR MEDICAL PURPOSES AND**
26 **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 their **intent** in
enacting the MMP was to:

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

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

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

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

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

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

1 **D. UNDER *H&S* § 11362.83, LOCAL MUNICIPALITIES ARE ONLY**
2 **PERMITTED TO ENACT ORDINANCES THAT ARE CONSISTANT WITH THE**
3 **MMPA. THEREFORE ANY ORDINANCE THAT CONFLICTS WITH THE MMPA IS**
4 **PREEMPTED BY STATE LAW**

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

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

20 A cursory analysis of the provisions of Tehama County Ordinance No. 1936
21 demonstrates that the county ordinance deprives every medical marijuana patient their right to
22 obtain medical marijuana through legitimate lawful means permitted under the *CUA* and the
23 *MMPA*, and for those reasons provisions of Tehama County Ordinance No. 1936 has amended,
24 limited and/or burdened the provisions of the *CUA* and the *MMPA*, and thus, conflicts with the
25 *CUA* and the *MMPA*.

26 The fact that Ordinance No. 1936 is couched as a nuisance abatement statute (*TCC* §
9.06.040) rather than a penal statute is of no legal significance. *California Constitution* Article II
§10 on its face applies across the board with respect to all legislative enactments, however
denominated. By the same token Article XI §7 of the *California Constitution* has general

1 application to all ordinances promulgated by the local legislature and specifically applies to the
2 local exercise of the police power. The regulation of nuisance as well as the enactment of penal
3 statutes are exercises of the police power. *Odd Fellows' Cemetery Assn. v. City & County of San*
4 *Francisco* (1903) 140 Cal. 226, 231-232; *In re Mathews* (1923) 191 Cal. 35, 38; *Sullivan v. City*
5 *of Los Angeles* (1953) 116 Cal.App.2d 807, 810. As a practical matter, it makes no difference
6 whether the board of supervisors impairs the reasonable exercise of the rights emanating from
7 the state medical marijuana enactments by means of the imposition of penal punishment or a
8 broad civil abatement statute which encompasses the normal exercise of state conferred rights –
9 the consequences for the medical use of cannabis are precisely the same. In other words, as
10 recently held by the Appellate Court in *QPA*, *it appears incongruous at first glance to conclude*
11 *a city may criminalize as a misdemeanor a particular use of property the state expressly has*
12 *exempted from “criminal liability,”* *Qualified Patients Assn. v. City of Anaheim*, (2010) 187 Cal.
App. 4th 734, 754

13 In *Citizens to Save California (CSC) v. California Fair Political Practices Commission*
14 *(CFPPC)* (2006) 145 Cal.App.4th 736, the court interpreted language nearly identical to the
15 “consistent with” language that is the key to *Health and Safety Code* section 11362.83. Pursuant
16 to *Government Code* section 83111, the California Fair Political Practices Commission (FPPC),
17 which has been delegated authority to administer the Political Reform Act (PRA), may only
18 enact regulations which are "consistent with"⁶ the PRA. (*CSC v. CFPPC* (2006) 145 Cal.App.4th
19 736, 746; *Gov't Code* section 83112.) The court in *CSC v. CFPPC*, *supra*, held that any
20 regulation which "conflicts" with *either* the Government Code statute's language or the *purpose*
21 of the legislation is "inconsistent" and thus said regulation is rendered void as a matter of law.
(*Id.* at p. 751 and 754.)

24 ⁶ Cal. Govt. Code § 83112 states in relevant part: “The commission may adopt, amend and rescind rules and
25 regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission.
26 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 Regulation 18530.9 is at odds with the language of the PRA. It is also
2 inconsistent with the legislative intent underlying the PRA's contribution limits.
3 The effect of regulation 18530.9 is to inhibit a candidate's involvement in the
4 initiative process. Involvement will lead to restrictions on the ballot measure
committee's fundraising. This conflicts with the voter's concern, as expressed in
the ballot proposition, that candidates devote insufficient time to matters of public
policy.

(Ibid.)

5 The court in *CSC, supra*, held that a FPPC regulation limiting certain campaign donations
6 to candidate controlled ballot measures violated *Government Code* section 83112 and therefore
7 was inconsistent with PRA which does not restrict contribution limits to candidates who have
8 significant influence over a ballot measure and was also **not consistent with the stated purpose**
9 behind the Government Code's statutory scheme. (Ibid.)

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

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

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

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

6 Here, Defendants' ordinance contradicts upon the rights and privileges provided by the
7 California voters in the *Compassionate Use Act* by completely banning, and rendering unlawful,
8 the cultivation of marijuana for medical purposes by all qualified patients who do not possess a
9 written physician's recommendation or approval for the medical use of marijuana under *TCC* §
10 9.06.040(C), which is not required under the *CUA*⁷.

11 Furthermore all of the numerical caps limiting the amount of marijuana contradict the
12 rights and privileges provided by *CUA* by completely banning, and rendering unlawful, the
13 cultivation of enough marijuana by all those qualified patients who require more than that
14 provided by the numerical caps provided within Ordinance 1936.

15 The Defendants' ordinance also contradicts the rights and privileges provided by the
16 voters in the *CUA* and the Legislature in the *MMPA* by completely banning and rendering
17 unlawful, the cultivation of marijuana by all 'qualified patients' at their residence who reside on
18 a parcel of land that is within one thousand (1,000) feet of any school, school bus stop, school
19 evacuation site, church, park, child care center, or youth-oriented facility under *TCC* §
20 9.06.040(B);

21 Finally, the Defendants' ordinance contradicts the rights and privileges provided by the
22 Legislature in the *MMPA* as follows:
23

24 ⁷ (d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of
25 marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for
26 the personal medical purposes of the patient upon the written or **oral recommendation or approval of a physician.**
H&S § 11362.5

1 1) By completely banning and rendering unlawful, the cultivation of marijuana by all
2 'qualified patients,' at their residence, who reside on a parcel of land that is less than 200
3 feet in width or length;

4 2) By completely banning and rendering unlawful, the cultivation of marijuana by all
5 'qualified patients,' at their residence, who reside on a parcel of land that is greater than
6 twenty (20) acres in size but less than one hundred and sixty (160) acres in size, and less
7 than 600 feet in length or width;

8 3) By completely banning and rendering unlawful, the cultivation of marijuana by all
9 'qualified patients,' at their residence, who reside on a parcel of land that is one hundred
10 and sixty (160) acres or greater in size, and less than 2000 feet in length or width;

11 4) By completely banning and rendering unlawful, the individual or collective
12 cultivation of marijuana by three (3) or more qualified patients on a parcel of land that is
13 twenty (20) acres in size or less, by reason of the 12 mature marijuana plant or 24
14 immature marijuana plant limit, regardless of whether the qualified patients reside on the
15 parcel in either individual residences or shared residences, and regardless of whether they
16 are individually or collectively cultivating their medical marijuana;

17 5) By completely banning and rendering unlawful, the individual or collective
18 cultivation of marijuana by six (6) or more qualified patients on a parcel of land that is
19 greater than twenty (20) acres in size but less than one hundred and sixty (160) acres in
20 size, by reason of the 30 mature marijuana plant or 60 immature marijuana plant limit,
21 regardless of whether the qualified patients reside on the parcel in either individual
22 residences or shared residences, and regardless of whether they are individually or
23 collectively cultivating their medical marijuana;

24 6) By completely banning and rendering unlawful, the individual or collective
25 cultivation of marijuana by seventeen (17) or more qualified patients on a parcel of land
26 that is one hundred and sixty (160) acres in size, by reason of the 99 marijuana plant
limit, regardless of whether the qualified patients reside on the parcel in either individual
residences or shared residences, and regardless of whether they are individually or
collectively cultivating their medical marijuana.

1 As explicitly stated at TCC § 9.06.040(A),

2 “the foregoing limitation[s] shall be imposed regardless of the number of
3 qualified patients or primary caregivers residing at the premises or participating
4 directly or indirectly in the cultivation. Further, this limitation shall be imposed
5 notwithstanding any assertion that the person(s) cultivating marijuana are the
6 primary caregiver(s) for qualified patients or that such person(s) are collectively
7 or cooperatively cultivating marijuana.”

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

14 For the forgoing reasons, Defendants have in essence re-written the *MMPA* to their liking
15 and eliminated the ability for anyone to exercise the rights afforded under that legislation. (See,
16 *People v. Urziceanu* (2004) 132 Cal.App.4th 747, 785.)

17 As noted above, the cultivation restrictions set by *TCC* § 9.06.040 also contradict the
18 *CUA*, which does not limit the number of cannabis plants that a qualified patient may cultivate.
19 All qualified patients who require more than the number of plants authorized under the ordinance
20 to meet their medical needs, have lost their right to sufficient medical marijuana under the *CUA*.
21 Furthermore, in situations where more than 3 qualified patients reside on any single parcel of
22 land that is twenty (20) acres in size or less, the third qualified patient, and all others thereafter,
23 will not be permitted to cultivate his/or her medical cannabis under *TCC* § 9.06.040⁸, even if all
24 the patients residing on the same parcel of land maintain a medical cannabis garden within the 6
25

26 ⁸ 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)
acres or greater in size, no more than 99 marijuana plants, whether mature or immature, shall be
cultivated on the premises.

1 mature plant guideline set by H&S § 11362.77(a). Therefore, *TCC* § 9.06.040, denies those
2 qualified patients their right to cultivate medical marijuana under the *CUA* and the *MMPA*.

3 Moreover, any qualified patient under the *CUA* will lose his right to cultivate his/her own
4 marijuana for medical purposes with his/her residence if their residence is location within an are
5 prohibited by *TCC* § 9.06.040. Therefore, *TCC* § 9.06.040 contradicts the provisions of the
6 *CUA*.

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

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

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

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

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

23 “If the ordinance were in substance a criminal statute which attempted to prohibit
24 conduct proscribed or permitted by state law either explicitly or implicitly, it would
25 be preempted.”

26 *Id* at 293.

Thus, “impose[ing] a sanction for engaging in” (*Id.* at 295) conduct authorized by state
law is sufficient to render the local ordinance void. In the instant case, *TCC* § 9.06.040 prohibits
the cultivating marijuana for medical purposes, which would have otherwise been authorized by
state law under the *MMPA* and/or the *CUA*.

1 Again, California State Law allows qualified patients and their primary caregivers to
2 associate in order to collectively/co-operatively cultivate marijuana for medical purposes (*H&S* §
3 11362.775) without any limitations upon the number of qualified patients who may associate for
4 a cultivation project, and without any limitation upon the location of where the cultivation
5 project may take place.

6 Since the County Ordinance is "prohibiting conduct...permitted by state law" (*Cohen*
7 *supra*, 293) and since the conduct is expressly authorized by state law (*Health and Safety Code*
8 §§ 11362.775, 765 and 11362.5) it is "conduct... permitted by state law...explicitly or implicitly,
9 [and] it would be preempted." *Id* at 293. As *Cohen* points out while there may be authority to
10 enact ordinances regulating conduct otherwise authorized by state law it is the prohibition on
11 such conduct which renders Defendants' actions unlawful as preempted by state law. It appears
12 that *Cohen's* allowance of regulation around conduct authorized by state law was recognized by
13 the Legislature when they enacted *Health and Safety Code* §11362.83 which appears to permit
14 some regulation so long as it is "consistent" with the *MMPA*; certainly banning what the
15 Legislature has encouraged violates the holding in *Cohen*.

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

18 "We believe that a city may (1) continue to operate a local registry and identification
19 program, (2) prohibit cardholders from being arrested by city police officers, (3)
20 prohibit the seizure of medical marijuana by city police officers, and (4) allow
21 possession of marijuana in amounts greater than specified in the 2003 legislation.
22 These elements of a local program would be **consistent** with state law. (See §§
23 11362.71, subd. (e); 11362.77, subds. (a), (b), (c), (f); *Dublin v. City of Alameda*
24 (1993) 14 Cal.App.4th 264, 275-277.)

25 On the other hand, a city would be preempted from allowing possession of marijuana
26 at levels *less than* what the state law permits and making identification cards a
mandatory prerequisite for prohibiting detention and seizure, because such
provisions would directly contradict state law. (See § 11362.77 [qualified patient or
caregiver may have at least eight ounces of marijuana per patient; cities and counties
may permit quantities that *exceed* state amounts]; § 11362.71, subd. (f)
[identification card not required to claim Act's protections].) Similarly, **a city
program that defined "attending physician" and "primary caregiver" more**

1 **narrowly than state law would be preempted to the extent that it prohibited**
2 **what state law expressly permitted.** (Cf. §§ 11362.7, *subd. (a)* [defining "attending
3 physician"], 11362.7, *subd. (e)* [permitting "primary caregiver" to be under 18 years
4 of age under specified circumstances].)"

5 80 Opinions California Attorney General 113, 117-118, 2005 Cal. AG LEXIS 17
6 (2005)(See **Exhibit 4**)

7 In *O'Connell v. Stockton* (2007) 41 Cal.4th 1061, the California Supreme Court
8 articulated California law on the subject of preemption as it relates to the Health and Safety
9 Code;

10 Whenever the Legislature has seen fit to adopt a general scheme for the regulation
11 of a particular subject, the entire control over whatever phases of the subject are
12 covered by state legislation ceases as far as local legislation is concerned.
13 *O'Connell, supra*, 41 Cal.4th 1061, 1068.

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

21 "The comprehensive nature of the UCSA in defining drug crimes and specifying
22 penalties (including forfeiture) is so thorough and detailed as to manifest the
23 Legislature's intent to preclude local regulation."
24 *O'Connell, supra*, 41 Cal.4th at 1071

25 Again, the *MMPA* and its comprehensive scheme, includes dozens of statutes covering
26 every aspect of medical marijuana, thus the statutory scheme within the Medical Marijuana
Program Act is also so thorough and detailed as to manifest the Legislature's intent to preclude
local regulation. However, as demonstrated earlier, the Legislature has explicitly provided, in §
11362.83 of the *MMPA* that a local governing body will EXCLUSIVELY be allowed to adopt
and enforce laws "**consistent with**" the *MMPA*. Therefore, there is a clear indication by the
Legislature that any local ordinance that is not "consistent with" the *MMPA* (i.e., bans what it
permits) will be preempted by the *MMPA*.

1 "A city has no power to legislate upon matters which are not of a local nature. When
2 there is a doubt as to whether an attempted regulation relates to a municipal or to a state matter,
3 or if it be the mixed concern of both, the doubt must be resolved in favor of the legislative
4 authority of the state." *Abbott v. City of Los Angeles* (1960) 53 Cal.2d 674, 681

5 The decision in *N. Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90,
6 103-104 sums up the situation here; again consistent with the holding in *Cohen* the court struck
7 down as preempted a local ordinance which banned the use of electroconvulsive therapy (ECT)
8 for psychiatric patients despite the existence of a *Welfare and Institutions Code* which gave the
9 patient the ability to chose the therapy-finding that the ordinance did not permit what state law
10 permitted, the ordinance was struck down; the court's ruling compellingly applies to the situation
at hand.

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

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

18 Here too Defendants are acting unlawfully: "By enacting an outright, unconditional ban"
19 on the cultivation of marijuana at all locations by qualified patients who have a physician's oral
20 approval for the medical use of marijuana (See *TCC* § 9.06.040 (C) vs. *H&S* § 11362.5); by
21 enacting an outright, unconditional ban of the cultivation of medical marijuana upon all parcels
22 of land that are less than 200 feet wide, which is permitted under the *CUA* and the *MMPA* (See
23 *TCC* § 9.06.040(C) vs. *H&S* §§ 11362.5 and 11362.7 et seq); by enacting an outright,
24 unconditional ban of the cultivation of medical marijuana upon all parcels of land that are within
25 1000 feet of a school, school bus stop, school evacuation site, church, park, child care center, or
26 youth-oriented facility (See *TCC* § 9.06.040(B) vs. *H&S* §§ 11362.5 and 11362.7 et seq); and, by
enacting an outright, unconditional ban of the collective and co-operative cultivation of medical

1 marijuana by associations of qualified patients which require a number of marijuana plants that
2 are greater than the caps provided within *TCC* § 9.06.040, which are less than the minimum
3 guidelines provided within H&S § 11362.77. Defendants "ha[ve] created an apparent conflict
4 with the state legislative statutory scheme and its guarantee to all [qualified medical cannabis
5 patients]" (*N. Cal. Psychiatric Society at 103-104*) of uniform application of the law, of
6 enhanced access, of the right to associate in order to obtain cannabis and the ability to form
7 collectives or co-operatives as encouraged by the Legislature (See, Legislative Preamble *Stats*
8 *2003 ch 875* § 1) and provided for by *Health and Safety Code* §§ 11362.775 and 11362.765.

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

12 *A & B Cattle Co. v. Escondido* (1987) 192 Cal.App.3d 1032, 1036, involved an ordinance
13 enacted by the City of Escondido regulating the manufacture, possession and sale of drug
14 paraphernalia by requiring a license to sell such items. The State subsequently enacted a
15 comprehensive statutory scheme modifying a less extensive and less restrictive law pertaining to
16 the manufacture, possession and sale of drug paraphernalia, the same items regulated by the City
17 of Escondido through the local ordinance. (*Id.* at 1038.) The court in *A & B Cattle, supra*, held
18 that while the Legislature did not expressly prohibit local regulation with regard to the
19 manufacture and distribution of drug paraphernalia, state law, as a result of modifications made
20 by the Legislature has nonetheless “preempted the regulatory field regarding drug paraphernalia
21 to the exclusion of local legislation.” (*Id.* at 1038.) The court of appeal found the City’s
22 argument that the local ordinance did not conflict with state law where the local ordinance only
23 controls “record keeping and licensing” unpersuasive, holding that there is a conflict when both
24 laws “burden the sale of drug paraphernalia.” (*Id.* at 1043). In effect, a local ordinance may not
25 be enacted to fill a void left within a comprehensive statutory scheme enacted by the State

26 The court of appeal in *A & B Cattle Co., supra*, held that “where an ordinance is in
substance a criminal statute attempting to prohibit conduct proscribed or permitted by state law

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

11 The zoning ordinances which exclude medical marijuana associations /collectives from
12 collectively cultivating marijuana for medical purposes within the County of Tehama, similar to
13 the anti-paraphernalia statute in *A & B Cattle Co.* prohibit, with the consequence of abatement
14 and fines, conduct which the state permits (the cultivation of marijuana for medical purposes).
15 The regulatory scheme established through the passage of the *MMPA* is comprehensive and even
16 goes so far as to regulate where a person may smoke marijuana for medical purposes. (*See H&S*
17 *Code § 11372.79.*) It is clear from the various provisions of the *MMPA* discussed *infra*, that the
18 use of marijuana for medical purposes and access to such marijuana was of a “paramount state
19 concern [that would] not tolerate further or additional local action.” (*People el rel Deukmejian v.*
20 *County of Mendocino* (1984) 36 Cal.3d 476, at 485.) It is inconceivable that the Legislature, in
21 enacting legislation regulating the locations a person may smoke medical marijuana, did not
22 implicitly incorporate possession and cultivation of medical marijuana into the statutory scheme
23 and therefore allow such conduct without restriction. The Tehama County ordinance, which
24 restricts what the state permits, the cultivation of marijuana for medical purposes, is preempted
25
26

1 by the *MMPA*'s regulations as to where and when marijuana may be used, possessed and
2 cultivated.

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

9 Since Ordinance 1936 contradicts the *CUA* and the *MMPA*, it preempted by State law, and
10 as such, it will be argued in detail that Ordinance 1936 is unconstitutional and void.

11 **G. THE APPELLATE DECISION IN *KRUSE* FAILS TO RESURRECT THE**
12 **CONTESTED ORDINANCE**

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

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

22 The decision in *Kruse* applies to a different set of facts than those before this court; here the
23 County of Tehama has not enacted a temporary moratorium pursuant to *Government Code sect.*
24 *65858* to study the issue as in *Kruse*. (See *City of Claremont v. Kruse, supra*, 177 Cal. App. 4th
25 *at 1160*) The issue before the *Kruse* court was whether the *MMPA* "preempts the city's
26 enactment of a [temporary] moratorium"..." *Id at 1168*. The court reviewed *Health and Safety*

1 Code section 11362.83 and determined that an adoption of a "**temporary** moratorium" was not
2 preempted. *Id at 1175*. Nothing in *Kruse* sanctions a **complete** ban with no moratorium to limit
3 the period of the ban and no realistic end in sight; *Kruse* simply did not consider a **permanent**
4 ban with no end in sight as Defendants have undertaken and if those specific actions by a
5 municipality are "consistent" with the *MMPA* as required by *Health and Safety Code* section
6 11362.83.

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

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

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

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

16 4

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

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

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

26

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." *Id at 293.*

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

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

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

16 Finally, the *Kruse* decision conflicts with *O'Connell v. Stockton* (2007) 41 Cal.4th 1061,
17 wherein the California Supreme Court articulated California law on the subject of preemption as
18 it relates to the Health and Safety Code and held that when the Legislature creates a pervasive
19 and detailed statutory scheme (such as the *MMPA* which dealt with every conceivable subject
20 including insurance claims, health departments, police, hospices, clinics, professional licensing
21 and immunity, registry system, municipal authority to enact guidelines, locations where the
22 activity could not take place, requirements for the attorney general and the myriad of varying
statutes on the subject), local action in that area of law is preempted.

23 Furthermore, the breadth of the County's enforcement of zoning requirements under
24 *Kruse*, would also burden the same immunities/defense in a manner that would be
25 unconstitutional. (See *People v. Kelly* (2010) 47 Cal.4th 1008, 1012; "... insofar as [*Health and*
26

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

22 More accurately stated, the Legislature meant what is said - you can't use local nuisance
23 laws to declare medical cannabis associations, or the facilities where medical cannabis is being
24 cultivated within the scope of the *MMPA*, illegal; thus, *Kelly* requires an analysis as to whether
25 or not this zoning enforcement procedure "burdens" Appellants' right to associate for the
26 cultivation of medical cannabis as permitted by the *MMPA*. Few other governmental actions

1 could "burden" the rights provided for in the *MMPA* more than the enactment of a local ban
2 under the premise that the exercise of said rights is a nuisance under local ordinances.

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

11 **3. CITY OF CLAREMONT V. KRUSE CONFLICTS WITH VARIOUS**
12 **HOLDINGS OF THE COURT OF APPEAL THUS THIS COURT**
13 **SHOULD FOLLOW THE MORE REASONED AND ACCURATE**
14 **DECISIONS.**

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

18 The decision in *Kruse* further conflicts with the holdings in *People v. Urziceanu* (2004)
19 132 Cal. App. 4th 747, 785 ("Thus, the Legislature [] exempted those qualifying patients and
20 primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes
21 from ...**the laws declaring the use of property for these purposes a nuisance.**"); *N. Cal.*
22 *Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 103-104 ("By enacting an
23 outright, unconditional ban on the administration of ECT within its own borders, Berkeley has
24 created an apparent conflict with the state legislative statutory scheme...").

24 First, and most critical of the decision is that its rationale is unquestionably wrong. *Kruse*
25 makes the completely incorrect allegation that "Medical marijuana dispensaries are not
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1 mentioned in the text or history of the MMP". *Id at 1175*. Perhaps the "text and history" were
2 not written with the vernacular the *City of Claremont* panel was searching for in that the term
3 "medical marijuana dispensary" is not mentioned anywhere in the legislation-but it is simply
4 wrong to conclude that with the "dramatic change in the prohibitions on the use, distribution, and
5 cultivation of marijuana" (See, *Urziceanu supra, 785*) the Legislature created by enacting
6 *Health and Safety Code § 11362.775*, including its exemption from sales laws, its encouragement
7 of the conduct and its express purpose to "enhance access", that it did not intend, contemplate
8 and debate the proliferation of "associations" (the Legislature's chosen vernacular) as storefronts.
9 The statute permitting for the creation of "associations" was also the Legislature's response to the
10 voter's demand when they enacted *Proposition 215* that the Legislature create methods for the
11 safe and affordable distribution. (See, *Urziceanu supra, 785*) The *Kruse* decision also failed to
12 note that Health and Safety Code § 11570 is civil⁹ in nature, and failed to note, for this reason,
13 the immunities and defenses provided by § 11362.775 were not limited to criminal matters only.
14 "[T]he Legislature [] exempted those...who collectively or cooperatively cultivate marijuana for
15 medical purposes from...**the laws declaring the use of property for these purposes a
nuisance.**" *People v. Urziceanu* (2004) 132 Cal. App. 4th 747, 785.

16 H. LOCAL LEGISLATION THAT CONFLICTS WITH STATE LAW 17 UNCONSTITUTIONAL AND VOID

18 Under the California Constitution, each city and county is authorized to "make and
19 enforce within its limits all local, police, sanitary, and other ordinances and regulations not in
20 conflict with general laws." (Cal. Const., art. XI, § 7.) In *Candid Enterprises, Inc. v. Grossmont
21 Union High School Dist.* (1985) 39 Cal.3d 878, 885, the Supreme Court examined the scope of
22 this constitutional grant of authority:

23 "Under the police power granted by the Constitution, counties and cities have plenary
24 authority to govern, subject only to the limitation that they exercise their power
25 within their territorial limits and subordinate to state law. (Cal. Const., art. XI, §§ 7.)

26 ⁹ See footnote 5

1 Apart from this limitation, the police power [of a county or city] under this provision
2 is as broad as the police power exercisable by the Legislature itself.' [Citation.]"
3 Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal.3d 878, 885

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

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

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

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

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

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

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 original

1 statute, the act is amendatory, even though in its wording it does not purport to amend the
2 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.¹⁰” (§ 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 According to the Board of Supervisors of the County of Tehama’s Findings and Purpose,
25 the express intent in enacting Ordinance 1936,

26 “the intent and purpose of this Chapter is to establish reasonable **regulations**
upon the manner in which marijuana may be cultivated, including
restrictions on the amount of marijuana that may be individually,
collectively, or cooperatively cultivated in any location or premises.

TCC § 9.06.020 (F)

¹⁰ 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 In order to effectuate the stated purpose of Ordinance 1936, the defendants enacted *TCC*
2 § 9.06.040, limiting the location where a qualified patient may cultivate his/her marijuana for
3 medical purposes, and, and limiting the quantity of marijuana that a qualified patient may
4 cultivate. As such these limitations are unlawful amendments to the *CUA*, in violation of *Cal.*
5 *Constitution*, Article 2, Sec. 10 (c). Furthermore, under *TCC* § 9.06.040(C), each and every
6 medical marijuana patient who intends to cultivate his/her marijuana is required to provide “all
7 of the following current information and documentation to the Agency:

8 a. The name of each person, owning, leasing, occupying, or having
9 charge or possession of the premises;

10 b. The name of each qualified patient or primary caregiver who
11 participates in the cultivation, either directly or by providing reimbursement for
12 marijuana or the services provided in conjunction with the provision of that
13 marijuana;

14 c. A copy of the current valid medical recommendation or State-issued
15 medical marijuana card for each qualified patient identified as required above, and
16 for each qualified patient for whom any person identified as required above is the
17 primary caregiver;

18 d. The number of marijuana plants cultivated on the premises; and

19 e. Such other information and documentation as the Agency determines
20 is necessary to ensure compliance with State law and this Chapter.”

21 All of the forgoing documentary requirements are contrary to the stated intent of the *CUA* which
22 provides that the *CUA* “requires absolutely no written documentation of any kind to grow or
23 smoke marijuana.” (**Exhibit 2 - Rebuttal to Argument in Favor of Proposition 215**) As such the
24 documentary requirements of *TCC* § 9.06.40(C), also unlawfully amend the *CUA*, in violation of
25 *Cal. Constitution*, Article 2, Sec. 10 (c).

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

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

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

10 O’Connell supra at 1067 *Emphasis added*

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**K. ORDINANCE 1936 IS INIMICAL TO, AND CANNOT BE
RECONCILED WITH, THE MMP OR THE CUA. THEREFORE THE
ORDINANCE 1936 CONTRADICTS THE MMPA AND THE CUA.**

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

O’Connell supra at 1068

Here, it has been shown in detail that Ordinance 1936 is inimical to or cannot be reconciled the *MMPA* or the *CUA*. Moreover, it has been shown that Ordinance 1936 cannot be reconciled with the stated purpose of the *MMPA* which is to “[p]romote uniform and **consistent application of the act among the counties within the state, and to enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.”** (*Stats 2003 ch 875 § 1(a) Emphasis added*) This stated purpose cannot be overcome by any local land use regulations that would break-up and subdivide collective/co-operative cultivation projects or limit the formation of any said projects. Therefore, as provided in O’Connell, Ordinance 1936 contradicts both the *MMPA* and the *CUA*. Since Ordinance 1936 contradicts both the *MMPA* and the *CUA* it is unconstitutional and void as a matter of law.

IV. CONCLUSION

For the forgoing reasons, this court should deny Defendants’ Demurrer to the First Amended Complaint.

1 Respectfully submitted.

2 Date: November 22, 2010

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6 E. D. Lerman
7 Attorney for Petitioners
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