ANSWER

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT:

COMES NOW DAVID WILLIAMS AND DOES 1-4, REAL PARTIES IN INTEREST, by and through their attorney, Joseph D. Elford, and by way of this Return to the Order to Show Cause issued by this Court on November 2, 2007, admits, denies, and alleges as follows:

I.

Except as herein expressly admitted, Real Parties in Interest denies each and every allegation of the Petition. Real Party in Interest specifically denies that the Respondent Court's order should be set aside because it constitutes an error of law.

II.

Real Parties in Interest admits the allegations contained in paragraphs 1 through 5 of the Petition.

III.

Real Parties in Interest admits the allegation, contained in paragraph 6 of the Petition, that on October 6, 2006, Respondent Court sustained the demurrer with leave to amend, but allege that the demurrer was sustained in part and overruled in part.

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IV.

Real Parties in Interest admits the allegation, contained in paragraph 7 of the Petition, that on December 8, 2006, Respondent Court sustained the demurrer with leave to amend, but allege that the demurrer was sustained in part and overruled in part.

V.

Real Parties in Interest admit the allegations contained in paragraphs 8 through 16 of the Petition.

VI.

Real Parties in Interest admits the allegation, contained in paragraph 17 of the Petition, that Petitioners seek an order from this Court compelling Respondent Court to sustain the demurrer without leave to amend, but deny that such order is appropriate.

VII.

Real Parties in Interest admits the allegation, contained in paragraph 18 of the Petition that Petitioners seek an order from this Court staying further proceedings in this case, but deny that such order is appropriate.

VIII.

Real Parties in Interest deny the allegation, contained in paragraph 19 of the Petition, that Respondent Court's order should be set aside because it constitutes a clear error of law.

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IX.

Real Parties in Interest deny the allegation, contained in paragraph 20 of the Petition, that Petitioners have no plain, speedy, or adequate remedy at law.

X.

Real Parties in Interest admit the allegation, contained in paragraph 21 of the Petition, that this Court has subject matter jurisdiction, but allege that this Court should not entertain this Petition.

XI.

Real Parties in Interest affirmatively allege as follows:

1. Real Parties in Interest incorporate their Fourth Amended Complaint for Damages, Declaratory Relief, Preliminary Injunction, and Permanent Injunction [hereinafter "Complaint"] [Exhibit 1] by reference herein.

2. Defendant Deputy Jacob Hancock did not have probable cause to order plaintiff David Williams to destroy all but 12 of the 41 medical marijuana plants being cultivated on Williams' property on September 8, 2005.

3. Defendant Jacob Hancock did not conduct any additional investigation to determine whether Williams was engaged in illegal activity after Williams told him on September 8, 2005, that the marijuana cultivation was through a legal collective under California law and provided Deputy Hancock with copies of seven physician's recommendations.

4. Respondent Court's order overruling the Demurrer to the Fourth Amended Complaint was correct under California law.

XII.

Real Parties in Interest hereby incorporate the accompanying memorandum of points and authorities by reference herein.

XIII.

WHEREFORE, Real Party in Interest respectfully requests (1) the order to show cause be withdrawn as improvidently issued, and/or (2) the petition for a writ of mandate or other appropriate relief be denied, and (3) costs and attorney fees, and (4) such other relief as may be just and proper.

DATED: November 30, 2007 Respectfully submitted,

_____
JOSEPH D. ELFORD
Counsel for Real Parties in Interest

VERIFICATION

I, JOSEPH D. ELFORD, declare as follows:

I am an attorney duly licensed to practice law in the State of California and I am the attorney for Real Parties in Interest in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct based upon my investigation and interview with Real Parties in Interest. Real Parties in Interest are absent from Alameda County, which is where I maintain my office for Americans for Safe Access, so I verify the Return on their behalf.

Executed on this __ day of November, 2007, in Oakland, California.

_____
JOSEPH D. ELFORD
Attorney for Real Parties in Interest

ISSUES PRESENTED FOR REVIEW

1. Does article I, section 13 of the California Constitution protect qualified medical marijuana patients from the ordered destruction of their property by law enforcement when there is no probable cause to believe they have committed any crime?

2. Do qualified medical marijuana patients have any judicial recourse for the violations of their constitutional rights by law enforcement when prosecutors do not elect to file criminal charges?

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Despite the California Legislature's attempt to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects," defendants/petitioners Butte County, Butte County Sheriff's Office and Deputy Jacob Hancock [collectively "Petitioners" or "the County"] contend that they have the absolute discretion to order the destruction of medical marijuana cultivated through such projects and the victims would have no recourse in the courts. If accepted, the County's position will open the door to the widespread harassment of qualified medical marijuana patients who form private patient collectives. Such patients who cultivate marijuana collectively, as intended by the voters and Legislature, will be left to the whim of law enforcement officers who may enter their property and destroy their medicine without probable cause to believe that they have committed any crime. This Court explained in *People v.*

Urziceanu (2005) 132 Cal.App.4th 747, that through the enactment of the Medical Marijuana Program Act in 2003, the Legislature envisioned the "formation and operation of medical marijuana cooperatives." Unless this Court denies the instant Petition, the Legislature's will in this regard will be thwarted.

LEGAL STANDARDS

On November 4, 1996, the California electorate enacted the Compassionate Use Act (Cal. Health & Safety Code § 11362.5) [hereinafter "the CUA"] "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." (Cal. Health & Safety Code § 11362.5, subd. (b)(1)(A).) Although the Act did not expressly provide for a distribution system for marijuana to the seriously ill, it sought "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (Cal. Health & Safety Code § 11362.5, subd. (b)(1)(C).) To meet the voters' challenge, on September 10, 2003, the California Legislature passed S.B. 420, also known as the "Medical Marijuana Program Act" or "the MMPA." (Cal. Health & Saf. Code § 11362.7 *et seq.*; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785.) This legislation provides that "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." (Cal. Health & Safety Code § 11362.775). In passing the MMPA, the Legislature declared at the outset its purpose to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats, 2003, C. 875 (S.B. 420), Section 1, subd. (b)(3); *Urziceanu, supra*, 132 Cal.App.4th at p. 789.)

STATEMENT OF FACTS

Notwithstanding these state laws, Petitioners have implemented an underground policy, which forbids private patient collectives, unless all members actively participate in the cultivation of marijuana by, for example, planting, watering, pruning or harvesting the marijuana. (See Exhibit 1, ¶19.) One of the first victims of this underground policy was the seven-person patient collective on plaintiff David Williams' [hereinafter "Williams"] property. On September 8, 2005, Deputy Jacob Hancock [hereinafter "Hancock"] came to Williams' home without a warrant and, despite being presented with copies of medical marijuana recommendations for Williams and six other qualified medical marijuana patients who were part of the collective and told by Williams that the collective was formed in compliance with state law, Hancock ordered Williams to destroy all but

twelve of the forty-one marijuana plants growing there, under the threat of arrest and prosecution. (Exhibit 1, ¶17.) Acting pursuant to the County's rigid policy of requiring all members of medical marijuana collectives to actively participate in the cultivation, Hancock did not even attempt to find any evidence of additional marijuana plants or any crimes. To prevent similar violations of state law from recurring, Williams and the other plaintiffs instituted the instant action.

Due to the changing nature of the Petitioners' description of their policy and to crystallize the legal issues presented, plaintiffs filed multiple complaints. After several rounds of briefing, on September 6, 2006, Respondent Court overruled Petitioners' Demurrer to the Fourth Amended Complaint. (Exhibit 9.) Based on generally applicable legal principles, Respondent Court concluded: "Seriously ill patients certainly should not be required to risk criminal penalties and the stress and expense of a criminal trial in order to assert their rights [under the California Constitution]." (Exhibit 9, at p. 7.)

ARGUMENT

I. PLAINTIFFS MAY STATE CAUSES OF ACTION FOR VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS

A. This Case Is Governed By Generally Applicable Legal Principles

As Respondent Court correctly observed, this case is governed by generally applicable constitutional principles, which also apply to medical marijuana patients. "While it is true that the medical marijuana provisions do not specifically authorize an action by a patient for unlawful seizure of his marijuana, the

constitution and laws of the state which otherwise protect the rights of citizens may nevertheless provide an avenue for relief." (Exhibit 9, at pp. 6.) This was recently affirmed by the Fourth Appellate District when it stated that, although the state's medical marijuana laws do not expressly provide for the return of lawfully possessed medical marijuana that has been seized by the police, basic constitutional considerations require its return. (*City of Garden Grove v. Superior Court (Kha)* (Cal.App. 4 Dist. Nov. 29, 2007) --- Cal.Rptr.3d ----, 2007 WL 4181909, at pp. *21-*22 [certified for publication];[1] see also *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 577 ["it is well established that an initiative may have 'collateral effects' without violating the single-subject rule."] [quotation omitted].)

Under article I, section 13 of the California Constitution, individuals are guaranteed the right to be secure in their houses, papers and effects, free from unreasonable searches and seizures. This, in turn, requires that all seizures be based on probable cause. (*United States v. Place* (1983) 462 U.S. 696, 701, 103 S.Ct. 2637, 2641; see *United States v. Horton* (1990) 496 U.S. 128, 144, 110 S.Ct. 2301, 2311.) With very narrow exceptions involving a "special need," a search or seizure is unreasonable in the absence of individualized suspicion of wrongdoing based upon the totality of the circumstances. (See *City of Indianapolis v. Edmond*

[1] In *City of Garden Grove, supra*, the court clarified that *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, does not stand for the proposition that law enforcement is not required to return legally possessed marijuana, as Petitioners contend. (*Ibid.;* Petition at p. 12.)

(2000) 531 U.S. 32, 36 & 37-38, 121 S.Ct. 447, 451-52 [quotation and citations omitted]; *In re Randy G.* (2001) 26 Cal.4th 556, 565.) In the ordinary case, "a seizure of personal property [is] per se unreasonable . . . unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." (*Place, supra*, 462 U.S. at p. 701, 103 S.Ct. at p. 2641; *Horton,* 496 U.S. at p. 144, 110 S.Ct. at p. 2311.) Even if there is probable cause, a warrantless seizure of personal property is unreasonable unless there are exigent circumstances. (*Horton*, *supra*, 496 U.S. at p. 137 fn.7, 110 S.Ct. at p. 2308 fn.7; *Place*, *supra*, 462 U.S. at p.701, 103 S.Ct. at p. 2641 [collecting cases]; see also *Horton*, *supra*, 496 U.S. at p. 137 fn.7, 110 S.Ct. at p. 2308 fn.7 [same for contraband].)

In *People v. Mower* (2002) 28 Cal.4th 457, the Supreme Court of California affirmed that the constitutional requirements of individualized suspicion and probable cause apply with full force and effect in medical marijuana cases – "To be sure, law enforcement officers must have probable cause before they lawfully may arrest a person for any crime. [Citations.] Probable cause depends on all of the surrounding facts [citation], including those that reveal a person's status as a qualified patient or primary caregiver under [the Compassionate Use Act]." (*Id.* at pp. 468-469). As is shown below, this case involves a straightforward application of the probable cause requirement and other constitutional principles.

While wholly ignoring the Supreme Court's observations in *Mower* about probable cause, Petitioners point to this Court's decision in *People v. Fisher*

(2002) 96 Cal.App.4th 1147, in an attempt to defeat plaintiffs' claims. *Fisher*, however, does not do so. In *Fisher, supra*, which predates *Mower*, law enforcement officers applied for a search warrant after one observed three medical marijuana plants growing in defendant's backyard during a flyover of his property. (*Id.* at p. 1149.) After the officers obtained a warrant and attempted to execute it, they learned from the defendant that he claimed to be a medical marijuana patient and he furnished them what purported to be a physician's recommendation. (*Ibid.*) Still believing that a crime was possible, the officers continued to search and found additional marijuana, as well as a cane sword and ammunition. (*Ibid.*) A jury later convicted the defendant of unlawful possession of the cane sword and ammunition, but acquitted him of the marijuana charges. (*Id.* at p. 1150.)

On appeal, the defendant contended that the trial court erroneously denied his motion to suppress all of the evidence against, due to his status as a medical marijuana patient. This Court rejected this contention on the facts of the case, relying primarily on the officers' having obtained a warrant when they were unaware of the defendant's status as a medical marijuana patient. The Court explained that, although the officers later became unsure that a crime had been committed when presented with defendant's physician's recommendation (*ibid.*), they did not then have "the option to make a redetermination of probable cause," since the search warrant stated that they are "'Commanded to Search' (original capitalization) the premises." (*Id.* at pp. 1150 & 1151.) Because the officers were acting pursuant to a warrant, they were no longer the ones authorized to make the

probable cause determination. (*Id.* at p. 1151 [noting that defendant "misperceives who determines the existence of probable cause; it is not the officers"].)

Here, by sharp contrast, Deputy Hancock acted without a warrant, so he alone had to make the probable cause determination. (See *Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 844.) His doing so without seeking a warrant divested the judiciary of exercising its constitutional function of protecting against unauthorized searches by having a neutral and detached officer determine whether there is probable cause to conduct a seizure. (See, e.g., *Steagald v. United States* (1981) 451 U.S. 204, 212, 101 S.Ct. 1642, 1648.) Lacking a properly issued warrant, the officer must possess "facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused," as well as exigent circumstances, before effectuating a seizure of property. (*Mower, supra*, 28 Cal.4th at p. 473; *Horton*, *supra*, 496 U.S. at p. 137 fn.7, 110 S.Ct. at p. 2308 fn.7; *Place*, *supra*, 462 U.S. at p.701, 103 S.Ct. at p. 2641.) The consideration of probable cause, as the Court held in *Mower*, must include the officer's consideration of one's status as a qualified medical marijuana patient. (*Mower, supra*, 28 Cal.4th at pp. 468-469.)

B. Deputy Hancock's Seizure of Williams' Medical Marijuana Violated the California Constitution

Judged by these appropriate legal standards, Deputy Hancock's actions are unconstitutional and subject to review by this Court. Through the enactment of the Medical Marijuana Program Act in 2003 [hereinafter "MMPA"], the

Legislature declared at the outset its purpose to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (States, 2003, C. 875 (S.B. 420), Section 1, subd. (b)(3); *Urziceanu, supra*, 132 Cal.App.4th at p. 789.) To this end, the Legislature enacted Health and Safety Code section 11362.775, which exempts qualified patients and their designated primary caregivers "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes" from state criminal sanctions. (Cal. Health & Safety Code § 11362.775; *Urziceanu, supra,* 132 Cal.App.4th at pp. 784-785.)[2] The seven members of Williams' private patient collective cultivated less than the six plants per qualified patient permitted by law. (See Cal. Health & Safety Code § 11362.77, subd. (a); *People v. Wright* (2006) 40 Cal.4th 81, 97 [noting that amounts provided by Health & Safety Code Section 11362.77, subdivision (a) constitute a floor, rather than a ceiling].) Thus, once Williams explained to Deputy Hancock that the 41 plants were being cultivated as part of a patient collective, pursuant to the MMPA, and he presented the officer with facially valid physician's recommendation for the seven patients, Deputy Hancock no longer had probable cause to believe that the patients were engaged in any state law crime. (Cf. *People v. Butler* (1988) 202 Cal.App.3d 602, 606-07 [because some tinted glass windows are legal, no

[2] It is important to note as an initial matter that Williams is not contending that he is a primary caregiver for anyone; rather, he is part of a patient collective, which was expressly authorized by the California Legislature in 2003 to enable qualified patients to work together to cultivate marijuana to be shared with each other. (See Cal. Health & Safety Code § 11362.775; Stats, 2003, C. 875 (S.B. 420), Section 1, subd. (b)(3).)

reasonable suspicion arises from mere observation of driving with tinted windows; "Without additional articulable facts suggesting that the tinted glass is illegal, the detention rests upon the type of speculation which may not properly support an investigative stop."]; see also *People v. Hester*, *supra*, 119 Cal.App.4th at p. 392 [mere membership in gang, without additional facts supporting an inference of criminal activity, does not constitute probable cause].) Although Deputy Hancock could have continued his search in an effort to uncover other signs of illegality that might support an arrest or seizure (see *Mower, supra*; *Fisher, supra*), without such additional evidence, he was left with only the mere "possibility" that a crime was being committed. (See *Fisher, supra*, 96 Cal.App.4th at p. 1149.) Probable cause, however, requires more than this -- it requires "facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a *strong suspicion* of the guilt of the accused." (*Mower, supra*, 28 Cal.4th at p. 473 [Italics added.].) Deputy Hancock, therefore, violated the California Constitution when he ordered Williams to destroy all but 12 of the 41 marijuana plants on his property.[3] (See also *City of Garden Grove, supra*, 2007 WL 4181909, at pp. *21-*22

[3] The County's Policy is also unconstitutional because it compels the seizure of personal property without a warrant or exigent circumstances. Unlike the run-of-the-mill drug bust, Deputy Hancock did not need to act quickly to prevent the suspect from absconding or destroying the evidence. Williams made clear to Hancock that he wished to keep the marijuana plants and he certainly would not have destroyed them on his own if Hancock had left to get a warrant. Just as there are no exigent circumstances to justify the warrantless seizure of prescription medication from the persons who need it (cf. *Mower*, *supra*, 28 Cal.4th at p. 482 ["As a result of the enactment of [the Compassionate Use Act], the possession and cultivation of marijuana is no more criminal—so long as its conditions are satisfied—than the possession and acquisition of any prescription drug with a physician's prescription."], there are none to justify the seizure of medicine from medical marijuana patients.

[holding that it would violate due process for courts to withhold lawfully possessed medical marijuana].) Both article 1, section 13 of the California Constitution, as well the Bane Civil Rights Act (Cal. Civil Code § 52.1), provide civil causes of action for this. (See, e.g., *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843 [holding that plaintiffs properly stated cause of action under the Bane Civil Rights Act for unreasonable search and seizure accompanied by threats, intimidation or coercion.); cf. *id.* at pp. 850-851 (conc. opn. of Baxter, J.) [noting the broad scope of the "threat, intimidation or coercion" requirement of Bane Civil Rights Act]; see also *Degrassi v. Cook* (2002) 29 Cal.4th 333, 341 [noting that private damages cause of action for violation of constitutional right may be inferred from common law history and "such history exists regarding constitutional search and seizure provisions in some jurisdictions"] [citing *Katzberg v. Regents of Univ. of Cal.* (2002) 29 Cal.4th 300, 322-324].)

Nor does the Supreme Court's statement in *Mower, supra*, that the Compassionate Use Act does not provide a "complete" immunity from arrest alter Williams' argument that there still must be probable cause to effectuate an arrest or seizure. In general, an immunity from arrest provides complete protection from arrest for certain persons, such as foreign sovereigns and diplomats, and out-of-state witnesses who travel into the state to testify pursuant to a subpoena. (See 4 Witkin & Epstein, *Cal. Criminal Law* (3d ed. 2000) Pretrial Proceedings §10, pp. 208-209 [citations omitted].) Thus, in *Mower, supra,* the Court rejected defendant's argument that one's *status* as a qualified patient grants him a complete

immunity from arrest like that given to foreign dignitaries. Meanwhile, however, the Court reaffirmed that, to effectuate an arrest, an officer must have probable cause. The Court explained:

> We agree with the Court of Appeal that section 11362.5(d) does not grant any sort of "complete" immunity from prosecution that would require reversal of defendant's convictions. To be sure, law enforcement officers must have probable cause before they lawfully may arrest a person for any crime. [Citation.] Probable cause depends on all of the surrounding facts [citation], including those that reveal a person's status as a qualified patient or primary caregiver under section 11362.5(d). But contrary to defendant's position, the requirement that law enforcement officers have probable cause for an arrest does not mean that section 11362.5(d) must be interpreted to grant such persons immunity from arrest. It is well established that immunity from arrest is exceptional, and, when granted, ordinarily is granted expressly. [Citation.] Plainly, section 11362.5(d) does not expressly grant immunity from arrest.

(*Mower, supra,* 28 Cal.4th at pp. 468-469.)

Thus, while the Compassionate Use Act does not afford qualified patients a "complete" immunity from arrest simply by virtue of their status as patients, that fact, nevertheless, *must* be considered in the probable cause determination. The rigid policy enforced harshly by Deputy Hancock against Williams here prohibited him from making an individualized determination of probable cause. This violates article I, section 13 of the California Constitution. (Cf. *Butler, supra,* 202 Cal.App.3d at pp. 606-07.)

C. Petitioners Have Not Shown That Their Actions Are Constitutional

At the barest minimum, the Petition should be denied so that Deputy Hancock can explain the basis for his probable cause determination, since

probable cause depends on the facts known to the officer at the time of the search or seizure. (*Hamilton, supra*, 217 Cal.App.4th at p. 844.) Petitioners have the burden to demonstrate the legality of their warrantless search (*People v. Torres* (1992) 6 Cal.App.4th 1324, 1334 [citations omitted], but they have candidly admitted that the basis for Deputy Hancock's order are "not in the record." (Petition at p. 7.) This may explain why the County does not even attempt to justify the legality of the seizure in its Petition.

Furthermore, although "'subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis" (*Whren v. United States* (1996) 517 U.S. 806, 813, 116 S.Ct. 1769), programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." (*City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 45-46, 121 S.Ct. 447, 465; see also *id.* at p.46 ["our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level"]). Here, there is a serious question about the motives of the County's policy towards medical marijuana collectives, especially where it has proffered no legitimate justification for it. Additional factual development is needed to determine whether the County has acted with untoward purposes. (Cf. *In re Randy G.* (2001) 26 Cal.4th 556, 567 ["detentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment"]).

II. THE COUNTY'S PROHIBITION OF MEDICAL MARIJUANA COLLECTIVES THAT DO NOT REQUIRE ALL MEMBERS TO ACTIVELY CULTIVATE CONFLICTS WITH, AND IS PREEMPTED BY CALIFORNIA LAW

Distilled to its essence, Petitioners' position is that its law enforcement officers can harass medical marijuana patients with impugnity, pursuant to a rigid policy that does not consider individualized facts bearing on probable case, without judicial recourse. This policy is inimical to the purposes of the MMPA, which prompted Respondent Court to find that it conflicts with the state's medical marijuana laws. (Exhibit 9, at pp.5-6.) As in *City of Garden Grove, supra*, this Court is confronted with the "facially anomalous request that we approve state confiscation of a substance which is legal in the circumstances under which it was possessed." (*City of Garden Grove, supra*, 2007 WL 4181909, at p. *1.)

The California Constitution provides that a municipal ordinance is preempted and, therefore, void if it conflicts with state law. (See *Americans Financial Services Association v. City of Oakland* (2005) 34 Cal.4th 1239, 1251; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 747; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 290.) Such conflict between state law and a local ordinance exists where, as here, "the ordinance duplicates or is coextensive therewith, *is contradictory or inimical thereto*, or enters an area either expressly or impliedly fully occupied by general law." (*American Financial Services Association v. City of Oakland*, *supra*, 34 Cal.4th at p. 1251 [emphasis added]; see *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-898.)

Stated differently, a local ordinance conflicts with, and is preempted by state law if it is repugnant to a matter of pressing statewide concern. (See *Johnson v. Bradley* (1992) 4 Cal.4th 389, 404.)

In enacting the MMPA, the Legislature declared at the outset its purpose to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (States, 2003, C. 875 (S.B. 420), Section 1, subd. (b)(3).) To this end, the Legislature enacted Health and Safety Code section 11362.775, which provides that "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." (Cal. Health & Safety Code § 11362.775). This Court recognized in *People v. Urziceanu* (2005) 132 Cal.App.4th 747, that "[t]his new law represents a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers and fits the defense defendant attempted to present at trial. Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana. (*Id.* at p. 785.) Williams and the other members of his patient collective acted in precisely

the manner prescribed by this law, albeit in an even less commercial manner -- they pooled their labor, land and other resources for an approximately equal share of the medicine produced. (See Complaint ¶¶ 16 & 18.) The Butte County policy, which contains restrictions on patient collectives without any basis in law, is inimical to the MMPA and, accordingly, it is preempted.[4] (Cf. 88 Ops. Cal. Atty. Gen. 113, pp. 4-5 ["a city would be preempted from allowing possession of marijuana at levels less than what the state law permits . . . because such provision[] would directly contradict state law. . . . Similarly, a city program that defined 'attending physician' and 'primary caregiver' more narrowly than state law would be preempted"]; *City of Fresno v. Pinedale County Water Dist.* (1986) 184 Cal.App.3d 840, 845; see also Cal. Health & Safety Code § 11362.83 ["Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws *consistent with* this article."] [Italics added].)

III. NOT ALLOWING CIVIL CAUSES OF ACTION FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS WILL DEFEAT THE LEGISLATIVE PURPOSE IN ENACTING THE MMPA

To allow the County to implement its rigid policy against medical marijuana collectives, without any individualized determination of probable cause, will defeat the Legislature's intent in enacting the MMPA, as law enforcement actions like the one at issue here could effectively end medical marijuana

[4] It bears emphasizing that the County did not even attempt to defend its policy in its Demurrer to the Fourth Amended Complaint. This is likely because state law does not require members of cooperatives to actively participate in the formation of products. Other contributions suffice. (See Exhibit 5, at pp. 5-7.)

collectives. The County contends that patients who are harassed in the same manner as Williams can assert their legal rights only through "fac[ing] arrest, and then challeng[ing] any resulting charges by filing a motion to set aside the indictment or information, or asserting an affirmative defense at trial" (Petition at p. 15), but this provides such patients no remedy at all. After the patient is arrested and his medical marijuana plants are seized, the prosecutor could then elect not to file any criminal charges. Having now endured jail time, the patient will be in no better position to vindicate his constitutional rights than he was before, since the County's position is that there is *never* a civil remedy for medical marijuana patients. Citing this Court's decision in *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, the court in *City of Garden Grove, supra*, stated: "[T]he City cannot do indirectly what it could not do directly. That is what it seeks to do in destroying [a qualified patient's] marijuana when it cannot punish him under the criminal law for possessing it." (*City of Garden Grove, supra*, 2007 WL 4181909, at p. *14.) That is precisely what the County is attempting here.[5]

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[5] The court in *City of Garden Grove, supra*, also rejected another variant of the argument proffered by Petitioners:

> Characterizing Kha as a "criminal defendant," amici claim the CUA only provides him with a "defense" to certain offenses and does not make his possession of medical marijuana "lawful." But Kha is clearly *not* a criminal defendant with respect to the subject marijuana. Since the prosecution dismissed the drug charge he was facing, he is nothing more than an aggrieved citizen who is seeking the return of his property. The terms "criminal" and "defendant" do not aptly apply to him.

(*Id.* at p. 23; see also Exhibit 9, at p. 7 ["Seriously ill patients certainly should not be required to risk criminal penalties and the stress and expense of a criminal trial in order to assert their rights."].)

Knowing that they are subject to such harassment and that their lawfully possessed marijuana plants can be taken from them at any time, medical marijuana patients throughout the state will be deterred from forming private patient collectives to cultivate their medicine. There is no reason why the civil courts should be closed off to medical marijuana patients. If the Petition is granted, however, they will be left to the whim of the police without judicial recourse for police harassment, and the Legislature's planed "formation *and operation* of medical marijuana cooperatives" in California (*Urziceanu, supra,* 132 Cal.App.4th at p. 785) [Italics added]) will be defeated. (Cf. *City of Garden Grove, supra*, 2007 WL 4181909, at p. *7 [California's medical marijuana "laws are intended to give qualified patients the right to obtain and use marijuana for medical purposes. But if the City prevails, the police could thwart that objective by withholding marijuana they have seized from qualified patients, even when the patient is no longer subject to state criminal prosecution.").

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

DATED: November 30, 2007 Respectfully submitted,

_____
JOSEPH D. ELFORD
Counsel for Real Parties in Interest

CERTIFICATE OF WORD COUNT

I, JOSEPH D. ELFORD, declare as follows:

I am the attorney for Real Parties in Interest in this matter. On November 30, 2007, I performed a word count of the above-enclosed brief, which revealed a total of 5,763 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this __ day of November in Oakland, California.

_____

JOSEPH D. ELFORD

DECLARATION OF SERVICE

I am a resident of the State of California and over the age of eighteen years. My business address is Americans for Safe Access, 1322 Webster St., Suite 402, Oakland, CA 94612. On November 30, 2007, I served the within document(s):

REAL PARTIES IN INTERST'S ANSWER TO PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF

Via first-class mail to:

Bradley Stephens
Deputy County Counsel
25 County Center Drive
Oroville, CA 95965
Tel: (530) 538-7621

Superior Court for the County of Butte
The Honorable Barbara Roberts
Department C-09
655 Oleander Avenue
Chico, CA 95926

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this __ day of September, 2007, in Oakland, California.

_____
JOSEPH D. ELFORD