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Petitioner *In Propria Persona*

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

DARRYL COTTON, an individual, Petitioner, v. STATE OF CALIFORNIA, a public entity; ROBERT BONTA, an individual acting under color of law; and DOES 1 through 200, inclusive, Respondents/Defendants.	Case No. 37-2021-00053551-CU-WM-CTL **NOTICE Of ERRATA RE PETIONERS OPPOSITION TO RESPONDENT'S DEMURRER TO PETITION FOR PREEMPTORY WRIT OF MANDATE AND COMPLAINT** **Date:** **April 29, 2022** **Time:** **10:30 a.m.** **Dept:** **C-64** **Judge:** **The Honorable John S. Meyer** **Trial Date:** **Not Set** **Action Filed:** **December 22, 2021**

To all Parties and their Respective Attorneys of Record:

PLEASE TAKE NOTICE that as a result of an inadvertent error, Petitioner Darryl Cotton's Opposition to Respondents Demurrer to Petition for Preemptory Writ of Mandate and Complaint filed on April 18, 2022 corrected a cited hyperlink, the footnote numbering and certain grammatical errors contained within the original version. This version, with the assent of Respondent, replaces the previous version of Petitioner's Opposition.

DATED: April 20, 2022

Respectfully submitted,

By: _____
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INTRODUCTION

This filing is in opposition to Respondent's Demurrer to Petitioner's Petition for Peremptory Writ of Mandate ("PWOM"). Petitioner appears before this Court *pro per* and begs the latitude the Courts have held that such a Petitioner is to be accorded if the form – rather than the substance – of this Opposition is improper in any way. Petitioner herein seeks to clarify any misunderstandings or misconceptions arising from the language in the PWOM.

In this Opposition, Petitioner addresses only that portion of the Demurrer which is directed at the sections of his previous filing in this matter which go to his need for – and standing to seek – mandamus relief and whether such relief properly could and should be granted. Petitioner, in concentrating on proving this, humbly seeks the Court's indulgence in granting him leave to amend the portion of the original filing which he now realizes should have been more properly submitted as a separate Complaint.

OPPOSITION

Petitioner's standing is established because he has suffered and continues to suffer – the exigent, ongoing violation of his right to equal protection of the law under the 14th Amendment through the passage of California Proposition 64: The Control, Regulate and Tax Adult Use of Marijuana Act (2016) (AUMA) ("Prop. 64"), as succeeded by and enacted in California Senate Bill 94, Medical and Adult-Use Cannabis Regulation and Safety Act (2017), signed by the Governor and filed with the Secretary of State on June 27, 2017 ("SB 94"). The duties Respondents legally owed to Petitioner are set forth below. Short of mandamus relief directing Respondents to perform their duties, Petitioner has no other form of relief which can either remove this cloud of legal jeopardy placed over his head (*see* Prop. 64 at 7:26), or restore the time under which he has been held captive in that jeopardy.

As argued at PWOM 8:1-10:6, the language of Prop. 64, Section 11,[1] removed Petitioner's protection from federal criminal jeopardy, provided by federal law to compliant state medical marijuana program participants by what was originally called the Rohrabacher-Farr Amendment in 2014

[1] "The provisions of this Act shall be liberally construed to effectuate the purposes and intent of the Control, Regulate and Tax the Adult Use of Marijuana Act; provided, however, ***no provision or provisions of this Act shall be interpreted or construed in a manner to create a positive conflict with federal law, including the federal Controlled Substances Act, such that the provision or provisions of this Act and federal law cannot consistently stand together***." (Emphasis added.) (Prop. 64, Section 11, p.62; *see* PWOM at Ex. 1 at p.103.)

("Rohrabacher").[2] It has been renewed every year since then. Petitioner acknowledges that, having been absorbed and succeeded by SB 94, Prop. 64 is no longer the controlling law, and that SB 94 does not contain this self-cancelling language. However, using the nearly-identical language of 21 U.S.C. § 903,[3] SB 94 places California's medical cannabis law in "… ***positive conflict*** [4] ***between that provision of this subchapter and*** [those provisions of SB 94 relating to the possession, cultivating, processing, distribution, and licensing of non-medical cannabis] ***so that the two cannot consistently stand together"*** (Emphasis added.) (*See* 4 n.4.)

Compliant medical marijuana licensees in other states retain the Rohrabacher "umbrella" of protection from federal prosecution. Thus, the 14th Amendments rights to equal protection – Rohrabacher – of Petitioner and of all California medical marijuana program participants are violated by the existence in California's medical cannabis law – SB 94 – of a scheme which purportedly legalizes possession of and commerce in non-medical cannabis, such that those provisions of SB 94 and federal law cannot consistently stand together.

By virtue of his authorship of California Assembly Bill 266 (2015) – incorporated into the *Medical Marijuana Regulation and Safety Act (2015)* and subsequently into its renamed and slightly amended version the *Medical Cannabis Regulation and Safety Act ("MCRSA")* – and any participation in drafting the California Blue Ribbon Commission Pathways Report, Policy Options for Regulation of Marijuana in California (2015), and co-authorship of SB 94, Respondent, as the state's chief law-enforcement official and lawyer, is someone who had – and knew they had – duties[5] including keeping

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[2] "None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the [states]…or with respect to the District of Columbia, the Commonwealth of the North Marianna Islands, United States Virgin Islands, Guam or Puerto Rico to prevent any of them from implementing their own laws that authorize the use, distribution, possession or cultivation of medical marijuana." (H.R. 2471 Consolidated Appropriations Act, 2022, 117th Congress (2021-2022), Section 531; *See also* PWOM @ 15:13-16:3.)

[3] "No provision of this subchapter shall be construed as indicating an intent on the part of the congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, ***unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."*** (Emphasis added.) (21 USC Section 903; *see also* PWOM @ 23:23-26.)

[4] " A difference between the laws of two or more jurisdictions with some connection to a case, such that the outcome depends on which jurisdiction's law will be used to resolve each issue in dispute, the conflicting legal rules may come from U.S. federal law, the laws U.S. States or the laws of other countries." (*See* Legal Information Institute, Wex, Conflict of Laws, https://www.law.cornell.edu/wex/conflict_of_laws) "...[W]hen they both claim the right to decide a cause…[it] is called 'positive conflict…" (*See* West's Encyclopedia of American Law, 2nd Ed.)

[5] "**(a)** A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client. **(b)** For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer." (Cal. Rules of Prof. Conduct, Rule 1.3; *see also* PWOM 6:24-7:5.)

abreast of both the history of the interaction between federal and California cannabis regulation going back at least as far as the Compassionate Use Act of 1996 and the *status quo, de jure*, as well as the specific potential legal implications of the linguistic nuances thereof, re positive conflict. As such, Respondent – even though he co-authored SB 94 – has a duty of candor to warn the Governor and all appropriate state agencies of the need to resolve the positive conflict SB 94 continued by the merging of MCRSA (*see* 5, n.17-18) and Prop. 64 into a single set of regulations which purports to legalize the possession, cultivation, processing, distribution and sales of non-medical cannabis. As none of these are protected by Rohrabacher, this is directly contradictory to federal law on the same subject, such that it cannot *consistently stand together* with it. Thanks to Rohrabacher this is not true of medical cannabis.

Respondent has a self-acknowledged duty to fulfill the Mission Statement of the Office of the California Attorney General to "Safeguard California's Human, Natural and Financial Resources for This and Future Generations" (*see* https://oag.ca.gov/office) and, as its senior law enforcement official includes, "enforcing civil rights laws" (*see* Cal. Cons. art. V, Executive, § 13). This includes Respondent's duty to protect Petitioner and other compliant California medical cannabis program participants' 14th Amendment rights to the protection from federal criminal prosecution mandated by Rohrabacher. There is no evidence of Respondent having done so. Given his involvement in the creation of SB 94, this gives the appearance of the type of *de facto* – though, in California, not *de jure* – conflict of interest referred to as a "conflict of roles."

On July 19, 2021, when Petitioner, acting as Director of Communications for the Wildstar gubernatorial campaign, advised Respondent, (in his role as the State's Top Lawyer as described on the California Attorney General's website), of this positive conflict via U.S. Mail, Return Receipt Requested, the receipt came back in a timely fashion. As of nine months later there has been no response.

Petitioner asserts the sole available path to the restoration of Petitioner's equal protection of federal law—*Rohrabacher,* is to compel Respondent through a Writ of Mandamus, to fulfill their duty to seek relief from egregious federal criminal jeopardy, *de jure,* for Petitioner and every other participant in California's medical cannabis program, and thereby remedy the violation, by restoring the 14th Amendment rights to equal protection of Rohrabacher to Petitioner and all California medical cannabis program participants through the severance of the provisions of SB 94 which create positive conflict on

the subject of non-medical cannabis. As co-authors of SB 94, Respondents should employ independent counsel and recuse themselves from the matter to avoid further any appearance of conflict of interest.

With federal prosecution as the proverbial Sword of Damocles dangling and ready to drop due to the irreconcilable positive conflict between state and federal law, Petitioner has fastened fearful attention on that threat – as would many other potential participants in [state] medical marijuana markets were they likewise aware of it. Petitioner anticipates that Respondent will argue that prosecutorial discretion and resource allocation can properly ensure that legitimate participants in California's medical marijuana market will not be subject to federal criminal prosecution.

The language of Prop. 64 and SB 94 renders that moot by entirely removing the protection of Rohrabacher. The point is not that medical cannabis program participants acting in good faith – *e.g.,* Petitioner – *will be* prosecuted for even minute infractions of state law; rather, it is the current *status quo de jure* whereby they now *can be* prosecuted *even when fully compliant*. The government's vague assurances in this case likely will be cold comfort to anyone facing the legally valid fear that continuance of a state of positive conflict could lead to their federal indictment and imprisonment.

Petitioner rephrases herein his earlier allegations – *i.e.,* that Respondent has and/or had ministerial, fiduciary, constitutional and/or professional duties; they were fully aware of these duties; they have clearly shown that they were and/or are unwilling to fulfill those duties unless and until compelled to do so by the judiciary.

The relevant duties – both specific and implicit – of the Attorney General of the State of California are outlined and discussed herein. Respondent is the state's senior law-enforcement officer and top attorney. As such, Respondent is legally bound to obey each of the following:

a. U.S. Const. amend. the XIV;

b. Cal. Const.;

c. Cal. BAR Rules of Professional Conduct; and

d. Cal. Bus. & Prof. Code.

Respondent also is also ethically bound by statements made on his behalf by his representatives such as those found at on the Office of the Attorney General Website. (*See* https://oag.ca.gov/office.)

It is well within Respondent's legally mandated duties to warn California citizens, its Governor, legislature and relevant state agencies of the potential financial and egregious legal jeopardies involved in California's regulations entering positive conflict with federal law on merging non-medical cannabis into the same regulatory system as medical cannabis. (*See* 3-4, nn.5-6; PWOM 4:11-14; Cal. Const. art. V, § 13.) This remains true even though Respondent was an original sponsor of the regulations which create that positive conflict.

Federal District Courts for the Districts of California, Washington, Maine and the 9th and 1st Circuit Courts of Appeal have created a bright line of cases, beginning with (*United States v. Marin Alliance for Medical Marijuana,* 139 F. Supp. 3d 1039 (N.D. Cal. 2015).[6] holding that *Rohrabacher* shields from federal prosecution those who are in substantive compliance with their states' medical marijuana regulations and, emphatically, does NOT apply to "adult use" (hereafter "non-medical").

The US DOJ appealed Judge Breyer's decision to the 9th Circuit Court of Appeals, where it was consolidated with nine similar cases and heard *en banc* as *United States v. McIntosh,* 883 F.3d 1163, (9th Cir. 2016) ("*McIntosh*"). (*See* PWOM at 25:8-19.) The panel affirmed that *Rohrabacher* prohibits DOJ from spending funds from appropriations acts for the prosecution of individuals who engaged in conduct permitted by state medical marijuana laws and who fully complied with such laws. The panel wrote that individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in activity which is **NOT** protected by *Rohrabacher*. The inescapably obvious consequence here being that no state can enact a law legalizing possession of, nor commerce in, non-medical cannabis such that it can ***consistently stand together*** with the federal Controlled Substances Act;[7] and that to combine their medical and non-medical cannabis

[6] "This Court's only task is to interpret and apply Congress's policy choices, as articulated in its legislation. And in this instance, Congress dictated in [*Rohrabacher*] that it intended to prohibit the Department of Justice from expending any funds in connection with the enforcement of any law that interferes with California's ability to "implement [its] own State law[ ] that authorize[s] the use, distribution, possession, or cultivation of medical marijuana." 2014 Appropriations Act § 538 [*Rohrabacher*]. The CSA remains in place, and this Court intends to enforce it to the full extent that Congress has allowed in *Rohrabacher*, that is, with regard to any medical marijuana not in full compliance with "State law [] that authorize[s] the use, distribution, possession, or cultivation of medical marijuana." (*United States v. Marin Alliance for Medical Marijuana*, 139 F.Supp.3d 1039, 1044 (N.D. Cal. 2015).)

[7] "Given this context and the restriction of the relevant laws to those that authorize conduct, we conclude that [*Rohrabacher*] prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana. DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws. Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate [*Rohrabacher*]. Congress could easily have drafted [*Rohrabacher*] to prohibit interference with laws that address medical marijuana or those that regulate medical marijuana, but it did not. Instead, it chose to

regulatory schemes is to put both schemes outside of the *Rohrabacher* "umbrella" by creating a positive conflict of the specific type 21 USC § 903 proscribes.

The most recent germane federal case looking at the interplay of *Rohrabacher* and state cannabis regulations was *United States v. Bilodeau, No. 19-2292* (1st Cir. Jan.26, 2022). The Defendants' cases were remanded because they had very clearly committed substantive violations of Maine's medical cannabis regulations. However, the Court was explicit that: (a) *Rohrabacher* applies only to those who are not in substantive violation of their states' *MEDICAL* cannabis regulations; and (b) this compliance does not have to be absolute as distinguished clearly from the "*strict compliance*" called for in *McIntosh*. Minor *technical non-compliance* is not grounds to proceed with federal prosecution of otherwise compliant state licensees.

> The line the government would have us draw is between strict compliance and less-than-strict compliance. That is, it would have us rule that persons involved in growing or distributing medical marijuana are safe from federal prosecution only if they comply fully with every stricture imposed by [State] law. The government contends that the Ninth Circuit adopted this kind of strict-compliance test to differentiate between prosecutions that prevent a state's medical marijuana laws from having practical effect and those that do not. *See id*. 1178; *see* also *United States v. Evans*, 929 F.3d 1073, 1076 (9th Cir. 2019) (stating flatly that the court in McIntosh "stressed that defendants would not be able to enjoin their prosecutions unless they 'strictly complied' with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana (quoting *McIntosh*, 833 F.3d at 1179) [emphasis in original]. For two reasons, we find such a test inapplicable here.
>
> First, if Congress had intended the rider to serve as a bar to spending federal funds on a prosecution only when the defendant was in strict compliance with state law, it would have been very easy for Congress to so state. By eschewing such an obvious, bright-line rule in favor of one that bars the use of federal funds to "prevent [a state] from implementing [its] own [medical marijuana] laws," [citation omitted] Congress likely had in mind a more nuanced scope of prohibition -- one that would consider the practical effect of a federal prosecution on the state's ability to implement its laws.
>
> Second, the potential for **technical noncompliance** [emphasis added] is real enough that no person through any reasonable effort could always assure strict compliance…. With federal prosecution hanging as a sword of Damocles, ready to drop on account of any noncompliance with [State] law, many potential participants in [state] medical marijuana markets would fasten fearful attention on that threat. The predictable result would be fewer market entrants and higher costs flowing from the expansive efforts required to avoid even

proscribe preventing states from implementing laws that authorize the use, distribution, possession, and cultivation of ***MEDICAL*** marijuana." (*McIntosh*, *supra* (emphasis added); *see also* PWOM at 25:8-19.)

> tiny, unintentional violations. [State's], in turn, would feel pressure to water down [their] regulatory requirements to avoid increasing the risk of noncompliance by legitimate market participants. Likely anticipating these concerns, the district court below appeared to acknowledge that "some sort of technical noncompliance" with [State] regulations might be tolerated even under the strict compliance standard.
>
> The government attempts to downplay these concerns by arguing that prosecutorial discretion and resource allocation can properly ensure that legitimate participants in Maine's medical marijuana market will not be subject to federal criminal prosecution. But the point is not caregivers acting in good faith [*e.g.,* Petitioner] will be prosecuted for even tiny infractions of state law but that they can be prosecuted. The government's vague assurances in this case will likely be cold comfort to anyone facing fears that imperfect compliance … could lead to indictment and imprisonment. A strict compliance approach would skew a potential participant's incentives against entering that market.
>
> Strict compliance as construed by the government does have the benefit of identifying a bright line body of statutes, rules, and decisions that determine whether conduct violates state medical marijuana law and thus becomes subject to federal prosecution. *see McIntosh*, 883 F.3d at 1178 (looking to "those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana"). But those rules were not drafted to mark the line between lawful activity and cause for imprisonment. Rather, as with most every regulated market, Maine declined to mandate severe punishments (such as, for example, the loss of a license) on participants in the market for each and every infraction, no matter how small or unwitting [citation omitted] (providing that '[g]rounds for revocation of a registry identification card include... repeat forfeiture of excess marijuana") [emphasis in original]. To turn each and every infraction into a basis for federal criminal prosecution would upend that decision in a manner likely to deter the degree of participation in Maine's market that the state seeks to achieve.
>
> Although we reject the government's proposed strict compliance approach, we also decline to adopt the defendants' interpretations of the rider. Offering several slightly different formulations, the moving defendants and amicus argue that the rider must be read to preclude the DOJ, under most circumstances, from prosecuting persons who possess state licenses to partake in medical marijuana activity. These proposed formulations stretch the rider's language beyond its ordinary meaning. Congress surely did not intend for the rider to provide a safe harbor to all caregivers with facially valid documents without regard for blatantly illegitimate activity in which those caregivers may be engaged and which the state has itself identified as falling outside its medical marijuana regime.
>
> Instead, we adopt an approach that falls between the parties' positions. In charting this middle course, we need not fully define its precise boundaries.

United States v. Bilodeau, U.S. App. LEXIS 2383, *14-19 (1st Cir. 2022).

In this instance, Petitioner begs the Court to differentiate between the minor technical non-compliances referred to by the panel in *Bilodeau* and the impossibility of creating a state regulatory

scheme which licenses the possession, cultivation, processing, distribution and sale of non-medical cannabis – *e.g.*, recreational – in light of 21 USC § 903.[8] (*See* PWOM at 5:5-9:26.)

The legal definition of a *Conflict of Laws* is:

> A difference between the laws of two or more jurisdictions with some connection to a case, such that the outcome depends on which jurisdiction's law will be used to resolve each issue in dispute. The conflicting legal rules may come from U.S. federal law, the laws of U.S. States [] the laws of other countries....

(https://www.law.Cornell.edu/wex/conflict_of_laws.)

"[W]hen they both claim the right to decide a cause… [it] is called a 'positive conflict…." (West's Encyclopedia of American Law, 2nd Ed.)

Respondent's position is that there is no positive conflict is insufficient to demonstrate that there is no such positive conflict – especially when there is a bright line of federal and state court rulings to the contrary.[9] Petitioner is not envious of Respondent's duty to argue that the issue before this court is not a definitive example of state law and federal law being in positive conflict such that they cannot stand consistently together, as their meanings are directly opposed to each other.

Petitioner understands that his burden to demonstrate the existence of positive conflict, while heavy, is not insurmountable as Respondent would attempt to convince this court. In his Demurrer, Respondent states that, "The burden for showing a positive conflict is very high, the Petitioner 'must show that "no set of circumstances exists under which [it] would be valid.'" (*United States v. Salerno,* (1987) 481 U.S. 739, 745.) What counsel neglects to distinguish is that the burden of proof described by the *Salerno* court was that of a *facial challenge* to the constitutionality of the Bail Reform Act of 1984 (18 U.S.C. § 3141 *et seq.*). (*Id.*)

Contrary to Respondent's reliance on Salerno, Petitioner chooses to rely upon the court's more recent ruling in *Walsh,* as follows:

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[8] "The United States Supreme Court has construed § 903 as 'explicitly contemplating a role for the states in regulating controlled substances,'" (*Gonzales v. Oregon*, 546 U.S. 243, 251 (2006); *see also* PWOM at 26:21-25.) Under this construction States may pass laws related to controlled substances (including marijuana) as long as they do not create a positive conflict' such that state law and federal law '…cannot stand consistently together." (*Id.*)

[9] "It has long been established that 'a state statute is void to the extent that it actually conflicts with a valid federal statute." (*Clark v. Coye*, 60 F.3d 600, 603 (9th Cir. 1995) (citing *Edgar v. Mite Corp*., 457 U.S. 624, 631 (1982.) "Limiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach." (*Gonzales v. Raich*, 545 U.S. 1, 29 (2005.) *"[S]tate legalization of marijuana cannot overcome federal law."* (*Feinberg v. Comm'r*, 916 F.3d 1330, 1338 n. 3 (10th Cir. 2019) (emphasis added).)

> By the terms of the Act, marijuana is "contraband for any purpose," and, if there is ***any*** conflict between federal and state law with regard to marijuana legislation, federal law ***shall*** prevail pursuant to the Supremacy Clause.

(*United States v. Walsh*, 654 F. Appx 689, 695 (6th Cir. 2016) (quoting *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) [emphasis added].

There is no extant set of circumstances in which, absent statutory protection by federal law, the language of state law which is in direct contradiction of the language of federal law on the same subject does not create an irreconcilable positive conflict – particularly in this instance when the federal law is predicated upon and specifically provides that marijuana is "contraband for any purpose."

Through Prop. 64, as enacted in SB 94 and precedent cannabis regulations from 1996 to date, the State of California asserts and exerts jurisdiction over the regulation of cannabis. The language of SB 94 which purports to legalize and license commerce in non-medical cannabis is ***directly contrary*** to federal law and enjoys no Congressional protection; thus, it is impossible for it to consistently stand together with federal cannabis regulation.

Federal law asserts and exerts jurisdiction over regulating cannabis in the form of the federal Controlled Substances Act at 21 U.S.C. §§ 841, 844 and 846 which proscribes all uses of high (>0.3%) THC cannabis, except for research. It is also federal law through this nation's status as a signatory to the United Nations Single Convention on Narcotic Drugs ("SCND").[10] (*See* PWOM at Exs. 11, 12.)

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[10] "As a matter of domestic law within the United States, Congress may override a pre-existing treaty or Congressional-Executive agreement of the United States. To do so, however, would place the United States in breach of the obligation owed under international law to its treaty partner(s) to honor the treaty or agreement in good faith. Consequently, courts in the United States are disinclined to find that Congress has actually intended to override a treaty or other internationally binding obligation. Instead, they struggle to interpret the Congressional act and/or the international instrument in such a way as to reconcile the two.

Provisions in treaties and other international agreements are given effect as law in domestic courts of the United States only if they are 'self-executing' or if they have been implemented by an act (such as an act of Congress) having the effect of federal law.… There are varying formulations as to what tends to make a treaty provision self-executing or non-self-executing, but within constitutional constraints (such as the requirement that appropriations of money originate in the House of Representatives) the primary consideration is the intent--or lack thereof--that the provision become effective as judicially enforceable domestic law without implementing legislation. For the most part, the more specific the provision is and the more it reads like an act of Congress, the more likely it is to be treated as self-executing….

All treaties are the law of the land, but only a self-executing treaty would prevail in a domestic court over a prior, inconsistent act of Congress. A non-self-executing treaty could not supersede a prior inconsistent act of Congress in a U. S. court….

In addition, if state or local law is inconsistent with an international agreement of the United States, the courts will not allow the law to stand. The reason, if the international agreement is a self-executing treaty, is that such a treaty has the same effect in domestic courts as an act of Congress and therefore directly supersedes any inconsistent state or local law."

Frederic L. Kirgis, *International Agreements and U.S. Law*, American Society of International Law, Vol.2:5 (May 27, 1997) (https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law#:~:text=Congress%20may%20supersede%20a%20prior,of%20its%20international%20law%20obligations.)

Where there is positive conflict such that federal and state law cannot consistently stand together, it is federal law which is pre-eminent. This derives from the Supremacy Clause (U.S. Const. art. VI). Given current federal law, including international treaty obligations, it is clear that recreational cannabis cannot be legalized by the states in the same laws which create those states' medical cannabis regulations without placing those reliant on their states' medical cannabis regulatory structure in jeopardy of federal criminal prosecution under 21 U.S.C. §§ 841, 844 and 846. The relevant sections of each of these would have to be repealed first. This would, *de jure* require that the USA first withdraw from SCND. The federal Controlled Substances Act is the act of Congress whereby this nation implements the SCND. The language of CSA, particularly in the scheduling of controlled substances, closely parallels that of the SCND.

It is seldom that a *pro se* litigant gets to instruct a Deputy Attorney General on an extremely basic point of law, but this is immediately germane. Petitioner had thought a proper legal education would include instruction on the meaning of every Article of the Constitution. Fortune may favor the bold but not so when it flies against the statutory text and structure as well as historic tradition. At page 22, line 15 of Defendant's and Respondent's Memorandum of Points and Authorities in support of his Demurrer to the Peremptory Writ of Mandate and Complaint ("Demurrer"), Respondent's counsel writes that "[t]he predominant theme of the Petition is that California's cannabis laws are preempted by Federal law and, ***supposedly*** [emphasis added], by an international treaty." Petitioner asks the Court to recognize Respondent's forlorn attempt to brush off the foundational issue asserted in PWOM for what it was.

Petitioner draws Respondent's attention to the operative clauses of the Supremacy Clause:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

(U.S. Const. Art. VI, Paragraph 2.)

There is a bright line of cases, specifically including the *Raich* decision, in which it has been found that when Congress intends an outcome federal law **must** preempt state law.

> The [*Raich*] Court soundly rejected the notion that the marijuana growing and use at issue, were not "an essential part of a larger regulatory scheme" because they had been "isolated by the State of California, and [are] policed by the State of California," and thus remain "entirely separated from the market." "The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition," concluded the Court, and one that Congress could have rationally rejected when it enacted the CSA.
>
> In the end, the Court held, If California wished to legalize the growing, possession and use of marijuana, it would have to seek permission to seek permission to do so "in the halls of Congress."

Is the Department of Justice Adequately Protecting the Public From the Impact of State Recreational Marijuana Legalization? Hearing Before the Senate Caucus on International Narcotics Control, 114th Cong. (Apr. 5, 2016) (Testimony of Douglas J. Peterson, Attorney General, State of Nebraska (p.6, ¶2) *citing Raich*, 545 U.S. at 30, 33 [fns. omitted] 7.)

In light of *Rohrabacher*, Petitioner asserts that such permission has, in point of fact, already been granted, but solely to state medical cannabis programs, NOT to state recreational cannabis.

It is because of the exigency of his legal jeopardy that Petitioner has brought this matter before the Court as soon as he could after he became aware of it, and as he has been forced to, seeking relief in an *ex parte* petition prior to his Complaint being heard.

DEMURRER ALLEGATIONS AND OPPOSITION REBUTTALS

Petitioner has: alleged the specific nature of his injuries; established standing through his direct and beneficial interest; and has defined and cited where to verify that Respondent and DOES did, and do, have duties[5-8] they have been derelict in performing. Demurrer Allegations are bolded and are cited to the page and line of the Demurrer at which they are found. Opposition Rebuttals are not bolded. Rebuttals not spelled out below are cited to as either footnotes or by page and line on which they appeared in PWOM and/or herein.

PETITIONER HAS NO STANDING

1. "Petitioner cannot demonstrate that he has any beneficial interest that would be served…." (Demurrer at 12:23-25) – Petitioner has established that the beneficial interest is his 14th Amendment right to equal protection of the law (Rohrabacher). The injury to Petitioner is the legal jeopardy and the stress resulting from being deprived of Rohrabacher's protections. (*See* PWOM 1:16-22, 3:20-24.)

2. "**<u>There is No Injury and No Beneficial Interest Implicated</u>." (Demurrer at 13:13-19)** – *See* PWOM at 13:27-14:2.

3. "**<u>Petitioner makes no colorable claim regarding violations of his constitutional right….</u>" (Demurrer at 13:19-23**) – *Id.*

4. **"<u>[T]he Petition contains no allegation that any employee, agent, or officer of the State of California or the Attorney General ever represented that compliance with state law would 'immunize' anyone from federal prosecution</u>." (Demurrer at 14:26 – 15:1) –** Petitioner was specific that this misrepresentation was through implication, and calls the Court's attention to the PWOM at fn.7, ln.8 and 3:5-11 where he has established same using the word "implied," and 27:9-13. *Id.*

5. **"<u>The Petition Fails To Establish The Elements of Mandamus Relief.</u>" (Demurrer at 17:4 – 18:10(b))** – Petitioner (a) as a medical cannabis patient previously protected under Rohrabacher, has established for himself ***a direct and beneficial interest***, over that of the interest of the general public (*id.* at 2:1-4, 30:26-31:3, 1:16-22, 6:10-10:4, and fns.3, 4, 10 & 11); (b) has proven by a preponderance of the evidence that he has suffered an invasion of a liberty interest which is both concrete and particularized, and actual or imminent (*id.*); (c) has been specific in alleging the particular nature of his injuries which entitle him to the relief requested (*id.*); and (d) set forth a causal relationship between his injuries and the acts and omissions by Respondents, at *id.* 6:17-7:17 and clarified it, as relates to Respondent Bonta (*id.* at 4:8-5:3).

6. **"<u>There is No Duty to Compel</u>" (Demurrer at 18:11)** – The PWOM presents some of the duty to be compelled as a series of rhetorical questions at 4:10-27, (the fact that they are rhetorical is made clear at 5:1); the duties of Respondent Attorneys Generals and how they relate to Petitioner's plea for mandamus relief are surveyed widely (*id.* 2:10-4:7)

7. **"<u>Alleged Ministerial Duties and Abuses of Discretion Are Baseless</u>" (Demurrer at 19:22)** – **"… [T]he Petition does not adequately inform either the Respondents or the Court of the existence of any particular duty, or explain how any act or omission of the Respondents is related to any harm suffered by Petitioner."** The specifics regarding the respective and collective duties, acts and/or omissions of Respondents is set forth hereinabove. Should this court determine that the Complaint lacks the facts sufficient to properly plead these claims against Respondents, Petitioner respectfully

submits that he has demonstrated herein his ability to do so, and respectfully requests leave of court to amend his Complaint accordingly.

8. "Petitioner Has No Irreparable Injury" (Demurrer at 21:12) – How does one make something "unhappen?" Petitioner has been *de jure* – and therefore also *de facto* – at risk of criminal prosecution and imprisonment since Prop. 64 went into effect.

9. "Statute of Limitations Bars All of Petitioner's Claims" (Demurrer at 23:1) – Petitioner agrees with Respondent that the general statute of limitations is four years. (Cal. Code of Civ. Proc. § 343.) However, the discovery of certain facts and elements giving rise to fraud or mistake were not known to him until on or about July 15, 2021, thus providing the operative exception to that general statute of limitation. Petitioner relies on Cal. Code Civ. Proc. § 338(d): "An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

10. "The Doctrine of Laches Bars This Action" (Demurrer at 23:18) – As argued above, Petitioner asserts that the Doctrine of Laches does not apply to the PWOM based upon the time which has elapsed since Petitioner discovered the violation of his 14th Amendment protection through the removal of the equal protection of federal law provided by Rohrabacher.

11. "The Attorney General Has No Duty to Interfere With the Initiative Process" (Demurrer at 19:5) – Petitioner agrees that Attorneys General do not have a specified duty *de jure* to prevent a *prima facie* void initiative from being placed on the ballot and Respondent Bonta was not the AG at the time that Prop. 64 was placed on the ballot. Neither was he the AG when SB 94 was enacted. This does not mean that we won't be revisiting this issue in regard to other defendants in the complaint who are currently listed as DOES. Notwithstanding, however, they *are* duty bound as attorneys to ensure the inclusion of – and not knowingly omitting – vital information from the initiative summary when the language of an initiative appears to – and/or *did* – create a positive conflict with federal law on the same subject. Given such a conflict, federal and state law cannot stand together consistently, thereby increasing the probability – and, in this case, the actuality – of that conflict resulting in years of delay in implementation and millions of dollars in litigation costs directly resulting from Respondents' failure to

perform their duty to ensure that California voters were able to make a fully informed decision when they voted on the initiative.

CONCLUSION

Petitioner respectfully submits that he has pled facts adequate to establish his causes of action under Cal. Code of Civ. Proc. § 1085; namely that Petitioner has no other plain, speedy and adequate remedy. Respondents have a clear, present and ministerial duty to act in a particular manner, and Petitioner has a clear, present and beneficial right to Respondents' performance of their duties. Petitioner respectfully requests that this court overrule Respondent's Demurrer in its entirety.

Should the Court find that Respondent's pleading is deficient in any manner, Petitioner respectfully submits that he is able to amend his Complaint to plead his claims with the requisite specificity to adequately plead his causes of action of action against Respondents, and respectfully requests that he be granted leave of court to do so.

DATED: April 20, 2022

Respectfully submitted,

By: _____
DARRYL COTTON
Petitioner *In Propria Persona*

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO:
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FIRM NAME:
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CITY: San Diego STATE: CA ZIP CODE: 92114
TELEPHONE NO.: (619) 954-4447 FAX NO.:
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ATTORNEY FOR (name): Petitioner In Propria Persona

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
STREET ADDRESS: 330 West Broadway
MAILING ADDRESS: 330 West Broadway
CITY AND ZIP CODE: San Diego, CA 92101
BRANCH NAME: Central Division - Civil

PLAINTIFF/PETITIONER: DARRYL COTTON, an individual

DEFENDANT/RESPONDENT: STATE OF CALIFORNIA, a public entity, et al.

CASE NUMBER: 37-2021-53551-CU-WM-CTL

JUDICIAL OFFICER: The Honorable John S. Meyer

DEPARTMENT: C-64

PROOF OF ELECTRONIC SERVICE

1. I am at least 18 years old.
   a. My residence or business address is *(specify):*
   6176 Federal Boulevard
   San Diego, CA 92114

   b. My electronic service address is *(specify):*
   151DarrylCotton@gmail.com

2. I electronically served the following documents *(exact titles):*
   Notice of Errata re Petitioner's Opposition to Respondent's Demurrer to Petition for Peremptory Writ of Mandate and Complaint

   ☐ The documents served are listed in an attachment. *(Form POS-050(D)/EFS-050(D) may be used for this purpose.)*

3. I electronically served the documents listed in 2 as follows:
   a. Name of person served: Joshua Eisenberg, Supervising Deputy Attorney General

   On behalf of *(name or names of parties represented, if person served is an attorney):*
   Respondent Rob Bonta, an individual acting under the color of law

   b. Electronic service address of person served *:*
   Ethan.Turner@doj.ca.gov

   c. On *(date):* April 20, 2022

   ☐ The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment. *(Form POS-050(P)/EFS-050(P) may be used for this purpose.)*

Date: April 20, 2022

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

DARRYL COTTON
(TYPE OR PRINT NAME OF DECLARANT)

▶ _____
(SIGNATURE OF DECLARANT)

Form Approved for Optional Use
Judicial Council of California
POS-050/EFS-050 [Rev. February 1, 2017]

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