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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CENTRAL DIVISION

DARRYL COTTON, an individual, Plaintiff and Petitioner, **v.** **STATE OF CALIFORNIA, a public entity, ROBERT BONTA, an individual acting under color of law; and DOES 1 through 200, inclusive,** Defendants and Respondents.	Case No. 37-2021-00053551-CU-WM-CTL **DEFENDANTS AND RESPONDENTS' NOTICE OF DEMURRER AND DEMURRER TO PETITION TO PREEMPTORY WRIT OF MANDATE AND COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: April 29, 2022 Time: 10:30 a.m. Dept: C-64 Judge: The Honorable John S. Meyer Trial Date: Action Filed: December 22, 2021

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NOTICE OF DEMURRER AND DEMURRER

PLEASE TAKE NOTICE THAT on April 29, 2022 at 10:30 a.m., or as soon thereafter as the matter may be heard, in Department C-64 of the above-entitled court, located at 1100 Union Street, San Diego, CA 92101, Defendants and Respondents State of California and Attorney General Rob Bonta, (collectively "Respondents") will present for hearing, their demurrer to the petition for preemptory writ of mandate and complaint ("Petition"), filed by Petitioner and Plaintiff, Darryl Cotton ("Petitioner").

Respondents' motion is based on this notice, the demurrer, the supporting memorandum of points and authorities, the Declaration of Deputy Attorney General Ethan Turner, the concurrently filed Request for Judicial Notice, all pleadings and papers on file, and such other matters as may be presented in connection with the hearing on the motion.

DEMURRER TO PETITION AND COMPLAINT

The demurrer is made on the following grounds:

1. Petitioner does not have standing because the pleadings do not contain allegations demonstrating that he has suffered or is about to suffer an injury, that any duty is owed to him by any Respondent, or that he otherwise has a sufficient beneficial interest in the outcome of the controversy. Therefore, Petitioner cannot satisfy the jurisdictional requirement of standing as to either cause of action (Code Civ. Proc., § 430.10, subd. (a));

2. The Petition fails to state facts sufficient to warrant issuance of a writ of mandate because Petitioner has failed to establish a beneficial interest or right at issue and has failed to identify any mandatory act that was required to be performed but was not undertaken (Code Civ. Proc., § 430.10, subd. (e));

3. The Petition fails to state facts sufficient to sustain a complaint for injunctive relief because Petitioner has failed to identify any legally cognizable duty or obligation of the Respondents and has failed to allege facts which could demonstrate that any harm would be avoided, or any benefit would be derived from the issuance of the requested relief (Code Civ. Proc., § 430.10, subd. (e)); and,

4. The allegations supporting both of the causes of action for writ of mandamus and complaint for injunctive relief are fatally uncertain, ambiguous, and unintelligible because it is unclear how any act or omission of the Respondents has had any effect upon the Petitioner. Additionally, it cannot be determined from the face of the complaint what, if any duty has been breached, whether there has been any concrete or particularized injury, or any feasible remedy. (Code Civ. Proc. § 430.10, subd. (f).)

WHEREFORE, the State of California and Attorney General Rob Bonta move the Court for an order sustaining the demurrer to the Petition, without leave to amend, for an order of dismissal, and for such other relief as the Court may deem proper.

Dated: February 28, 2022

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Petition for Preemptory Writ of Mandate and Complaint (Petition) filed by Darryl Cotton (Petitioner) against the State of California, Rob Bonta[1], and Does 1-200 (collectively, Respondents) is based upon the belief that, former Attorney General, Edmund G. Brown misconstrued the medical cannabis laws when he published the "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use," that California's adult use commercial cannabis regulatory scheme is preempted by federal law, and that one or more Respondents had a mandatory duty, that was not undertaken, to interfere with the placement of Proposition 64 on the ballot and/or to prevent its implementation.

Petitioner offers a series of legal conclusions and abstract questions of law related to these topics, but does not establish how they are connected to any injury or beneficial interest particular to him. Petitioner alleges that his constitutional rights have been violated and that he has suffered unspecified injuries to his "mental stability," "interpersonal relationships," and "financial wellbeing." However, the Petition does not contain any legitimate basis for the constitutional claims, nor does it explain how any alleged personal injuries and claim for damages are connected to the allegations in the Petition. Respondents' demurrer should be granted because the Petitioner has failed to plead facts sufficient to establish standing, he has failed to state a claim for issuance of a writ or injunctive relief, and the Petition is untimely and unintelligible. (Code Civ. Proc. §430, subds., (a), (e), and (f).) Because these fundamental defects are incurable, Respondents' demurrer should be sustained without leave to amend.

BACKGROUND

Possession and use of cannabis by medicinal patients was first decriminalized in 1996 through Proposition 215, also known as the Compassionate Use Act (CUA). The CUA provided "qualified patients and their primary caregivers a defense to the state crimes of marijuana possession and cultivation when that possession or cultivation is for medical purposes." (*Conejo*

[1] The Petition identifies the Attorney General as "Robert Bonta" whereas Defendant Bonta's correct name is "Rob Bonta."

Wellness Center, Inc. v City of Agoura Hills (2013) 214 Cal.App.4th 1534, 1554; Health & Saf. Code, § 11362.5.)

In 2004, Senate Bill 420, the Medical Marijuana Program Act (MMPA), was signed into law. (Sen. Bill No. 420 (2003-2004 Reg. Sess.).) The stated purpose of the bill was to "promote uniform and consistent application of the act among the counties within the state." (*Id*. at § 1.) The MMPA developed, inter-alia, a state-directed program for the issuance of identification cards to qualifying medicinal cannabis patients, and required the Attorney General to develop and adopt appropriate guidelines to ensure the security and non-diversion of cannabis grown for medicinal use by patients qualified under the Compassionate Use Act of 1996. (Health & Saf. Code, § 11362.71, et seq.)

In 2015, the Legislature passed the Medical Marijuana Regulation and Safety Act, implementing a statewide regulatory program for commercial medicinal marijuana activities. (Assem. Bill No. 243 (2015-2016 Reg. Sess.) § 1; Assem. Bill No. 266 (2015-2016 Reg. Sess.) § 1; Sen. Bill No. 643 (2015-2016 Reg. Sess.) § 1.) The program was quickly renamed the Medical *Cannabis* Regulation and Safety Act (MCRSA) (Sen. Bill No. 837 (2015-2016 Reg. Sess.) MCRSA specifically provided that "[N]o person shall engage in commercial cannabis activity without possessing both a state license and a local permit license or other authorization." (Former Bus. & Prof. Code, § 19320, added by Stats, 2015, ch. 689, and repealed by Stats. 2017, ch. 27, § 2.)

In 2016, the people of California, through the initiative process, voted to legalize and regulate the adult-use of cannabis through the passage of Proposition 64. (Respondents' RJN, Ex A [2016 Complete Statement of Vote, p. 74-76].) These sweeping changes to California law were intended to "establish a comprehensive system to legalize, control and regulate the cultivation, processing, manufacture, distribution, testing, and sale of non-medical marijuana." (Respondents' RJN, Ex. B [Ballot Pamp., Primary Elec. (Nov. 8, 2016) text of Prop. 64, p. 179].)

MCRSA and Proposition 64 were two separate regulatory schemes that were consolidated into the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) (Sen. Bill

No. 94 (2017-2018 Reg. Sess.) § 4.) MAUCRSA explicitly recognized that both medicinal and adult-use cannabis was illegal under federal law: "Although California has chosen to legalize the cultivation, distribution, and use of cannabis, it remains an illegal Schedule I controlled substance under federal law." (Sen. Bill No. 94 (2017-2018 Reg. Sess.) § 1, subd. (d); RJN, Exhibit C, p. 15.)

STANDARD ON DEMURRER

Respondents may demur to the Petition for Writ of Mandate to test its legal sufficiency. (*SJJC Aviation Services, LLC v. City of San Jose* (2017) 12 Cal.App.5th 1043, 1051). "A demurrer tests the legal sufficiency of factual allegations in a complaint." (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 225.) "To properly state a cause of action, and as pertinent here, the operative complaint must sufficiently allege (1) every element of [that] cause of action and (2) the plaintiff's standing to sue." (*Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125; internal citations omitted.) Mere recitals, references to or allegations of material facts which are left to surmise are subject to a special demurrer for uncertainty. (*Bernstein v. Piller* (1950) 98 Cal. App. 2d 441, 444.) Demurrer is also an appropriate response to a petition for writ of mandate that fails to state a sufficient claim for mandamus relief. (Code Civ. Proc., § 1089; *Larson v. Redondo Beach* (1972) 27 Cal.App.3d 332, 338 [affirming demurrer to writ of mandate petition that failed to show clear duty existed].) When it is clear under substantive law that no liability exists, a court should sustain a demurrer without leave to amend; a petitioner must show that amendment would be fruitful. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459-460.)

ARGUMENT

I. PETITIONER HAS NO STANDING

Petitioner cannot demonstrate that he has any beneficial interest that would be served, or any injury that would be redressed, by the Court's review of the questions raised in the Petition. While Petitioner has offered his legal opinion that MAUCRSA is "in direct positive conflict with both the [Controlled Substances Act] and [United Nations Single Convention on Narcotic

Drugs]" (Petition at p. 19:5-6), he has not alleged anywhere in his pleading that the purported unconstitutional character of MAUCRSA, has threatened any of his legal rights or directly caused any injury.

> "When a party asserts a statute is unconstitutional, standing is not established merely because the party has been impacted by the statutory scheme to which the assertedly unconstitutional statute belongs. Instead, the courts have stated that '[a]t a minimum, standing means a party must 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' . . . [I]t is well-settled law that the courts will not give their consideration to questions as to the constitutionality of a statute unless such consideration is necessary to the determination of a real and vital controversy between the litigants in the particular case before it." (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 814; internal citations omitted.)

Clearly, neither the alleged impact of the regulatory scheme on Petitioner's experience as a consumer of medicinal cannabis or on his aspirations to cultivate cannabis as his vocation, are sufficient to confer standing on the Petitioner.

A. There is No Injury and No Beneficial Interest Implicated

In his effort to establish standing and jurisdiction, Petitioner alleges: 1) Respondents' actions have violated Petitioner's Constitutional protections ". . .under *Article I* of *California's Constitution,* and the *First, Fourth, Fifth, Sixth, Eighth* and *Fourteenth Amendments* to the *Constitution of the United States of America*" (Petition at p. 3:20-23); and, 2) that the actions of the Respondents have caused personal injury to his "financial well-being, physical health, interpersonal relationships[,] and mental stability." (Petition at p. 6:24-26.) However, Petitioner makes no colorable claim regarding violations of his constitutional rights and the petition is silent as to how Petitioner's personal injuries and monetary damages resulted from the alleged preemptive conflict between MAUCRSA and the federal Controlled Substances Act (21 USC § 801 et seq.) (CSA).

1. Alleged Violation of Petitioner's Constitutional Rights

Petitioner's conclusion that any rights protected under the First, Sixth, and Eighth Amendments to the Federal Constitution are implicated by the existence of MAUCRSA is not supported by any allegations in the Petition. Regarding his rights under the Fifth Amendment, Petitioner states that he "**must** waive his *Fifth Amendment* protections against involuntary self-

incrimination to obtain the STATE license." (Petition at p. 8:14-15, emphasis in the original.) Additionally, Petitioner argues that cannabis collectives are "rightfully exempt from sales tax" and requiring payment of taxes on cannabis transactions also violates the "federal 5th amendment protections of the PLAINTIFF and every member of that collective." (Petition at p. 9:27-28.) Even if this case did involve members of a collective challenging cannabis taxes imposed by the voters, which it does not, the Fifth Amendment is inapplicable. No authority supports Petitioner's contention that voluntarily submitting an application or paying taxes on activity that is federally illegal, amounts to a violation his Fifth Amendment rights.

Petitioner erroneously relies on *Feinberg v. Commissioner of Internal Revenue,* (2019) 916 F.3d 1330 (*"Feinberg"*), to support his claims. In *Feinberg*, the petitioners refused to provide evidence that the Internal Revenue Service's (IRS) rejection of their business expense deductions was erroneous. (*Id.* at p. 1334.) They argued that because the evidence supporting their claims could otherwise be incriminating, they should not have the burden of showing the IRS made a mistake. (*Id.* at p. 1135.) The Court disagreed and distinguished the requirement that a party meet a burden of proof from situations in which individuals were compelled to provide incriminating evidence against themselves under threat of criminal sanction. (*Ibid.*) The Court found that the petitioners could decline to provide potentially incriminating information, but that doing so would render them unable to meet their burden of proof to establish that the IRS had acted erroneously. Pursuant to the rationale in *Feinberg,* Petitioner's argument is fatally flawed because MAUCRSA provides no *criminal* penalty for refusal to disclose activity that violates the CSA when applying for a commercial cannabis license or filing income taxes.

Petitioner attempts to connect the Fourth and Fourteenth Amendments to his positive conflict arguments is similarly flawed. (Petition at p. 22:27-28; 23:5-6.) While the argument is unclear, Petitioner seems to allege that any confusion about what is illegal and legal with respect to commercial cannabis activities is the result of wrongful conduct perpetrated by the Respondents. (Petition at pp. 3:6-7 and 14:11-12.) However, the 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. In fact, the Petition only references instances in which it was acknowledged that the passage of Proposition 64 would *not* obstruct or impede the ability of federal authorities to enforce the CSA within the state of California.[2] Additionally, the legislation which created MAUCRSA expressly references the federal illegality and Schedule I status of cannabis under the CSA. (See Sen. Bill No. 94 (2017-2018 Reg. Sess.) § 1, subd. (d); RJN Exhibit C, p. 15.) Furthermore, MAUCRSA also requires that cannabis product warning labels contain a bold print statement that reads as follows: "GOVERNMENT WARNING: THIS PRODUCT CONTAINS CANNABIS, A SCHEDULE I CONTROLLED SUBSTANCE." (Bus. & Prof. Code, § 26120, subd (c)(1).) Therefore, Petitioner's claims that Respondents have attempted to deceive anyone regarding federal illegality, is contradicted by matters subject to judicial notice, and by the plain text of applicable statutes. (See RJN Ex. C at p. 15, 57 – MAUCRSA expressly refers to schedule I status.) Allegations in the Petition which are inconsistent with, or contradicted by, judicially noticed facts must be rejected. (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1040.)

Regardless of whether any actual person has been confused about conflicts between federal and state law (something not alleged anywhere in the Petition), the mere fact that federal law provides for criminal penalties for an activity that is regulated under state law, does not create a violation of any right protected under the Fourth or Fourteenth Amendments. Conflicts between what is permissible under state law and federal law are common, but a preemptive, positive conflict only exists when federal law and state law are irreconcilable. Overcoming the presumption against preemption is an exceptionally difficult feat,[3] and whether the Congressional intent even supports the Federal Government's interference with the implementation of state laws

[2] The Petitioner quotes the Blue Ribbon Commission on Marijuana Policy's report, which states "the federal government can enforce its own laws prohibiting marijuana use even within the states that have legalized it under their own law." (Petition at p. 19:21-22, citing *Pathways Report: Policy Options for Regulating Marijuana in California*.)

[3] "The mere fact that there is tension between federal and state law is not enough to establish conflict preemption." (*MetroPCS Cal., LLC v. Picker* (2020) 970 F.3d 1106, 1118 (internal quotation marks and alteration omitted).) "In the absence of irreconcilability" between state and federal law, "there is no conflict preemption." (*United States v. California*, (2019) 921 F.3d 865, 882.) 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.)

on this particular topic is an open question.[4] However, the Petitioner's contentions on the topic should not be addressed in the absence of a justiciable controversy.

For the foregoing reasons, the Petition does not contain allegations sufficient for the Court to find that there has been an invasion of the Petitioner's Constitutional rights and therefore Petitioner lacks standing.

2. Alleged Personal Injuries and Financial Harm

Petitioner's claims regarding personal and financial injuries are so vague and attenuated that equitable relief should be precluded. Petitioner alleges that "he has suffered financial, physical and emotional harm through former Attorney General Brown's "failure to obey the Legislature in § 11362.765(a)." (Petition at p. 30:10-11.) However, Petitioner fails to explain what constituted the alleged failure or how this purported failure resulted in his alleged personal injuries and financial damages. Petitioner also requests that he be "made whole." To the extent that this would involve curing the ills that federal preemption has caused to his "physical health, interpersonal relationships[,] and mental stability" (Petition at p. 6:25) or rescinding the "Guidelines for the Security and Non-Diversion of Marijuana for Medical Use" that were published 13 years ago, the requested relief is uncertain and unintelligible within the meaning of Code of Civil Procedure section 430.10, subdivision (f), because the pleadings do not contain any explanation of how the Petitioner's legal conclusion regarding positive conflict or his criticisms of the Attorney General's guidelines are connected to any harm. "It is settled law that, ...in pleading, the essential facts upon which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise. Those recitals, references to, or allegations of material facts which are left to surmise are subject to special demurrer for uncertainty." (*Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d.531, 537.)

In this case, the Constitutional claims either fail for lack of any factual allegations supporting them or because they are without legitimate legal basis. The personal injury and

[4] "If the Government is now content to allow States to act "as laboratories" " 'and try novel social and economic experiments,' then it might no longer have authority to intrude on "[t]he States' core police powers . . . to define criminal law and to protect the health, safety, and welfare of their citizens.". A prohibition on intrastate use or cultivation of marijuana may no longer be necessary or proper to support the Federal Government's piecemeal approach." (*Standing Akimbo, LLC v. United States* (2021) 141 S.Ct. 2236, 2238; internal citations omitted.)

monetary damages claims are left entirely to the speculation of the reader. Therefore, Petitioner has not plead facts sufficient to establish standing and will be unable to satisfy the required elements for a viable petition for writ of mandate or complaint for injunctive relief.

II. THE PETITION FAILS TO ESTABLISH THE ELEMENTS OF MANDAMUS RELIEF

A. There is No Beneficial Interest

In order to sustain a petition for writ of mandamus, Petitioner needed to make allegations sufficient to satisfy three basic elements. Specifically, that ". . .there is no other plain, speedy, and adequate remedy; the respondent has a clear, present, and ministerial duty to act in a particular way; and the petitioner has a clear, present[,] and beneficial right to performance of that duty." (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 606.) However, even if the Court were to accept Petitioner's assertion that there is no plain, speedy, and adequate remedy, Petitioner fails to make any allegation which, if true, would establish the other two required elements for issuance of a writ of mandate. Therefore, Petitioner has failed to plead facts adequate to establish a cause of action under Code of Civil Procedure section 1085, and the first cause of action should be subject to demurrer on this basis.

Petitioner has failed to establish standing because he has not established a direct and beneficial interest over and above the general public interest. (*Mission Hosp. Regional Med. Center v. Shewry* (2009) 168 Cal.App.4th 460, 479.) In order to establish standing, "petitioner also must show his legal rights are injuriously affected by the action being challenged." (*Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 87.) The standard used for determining whether a petitioner seeking a writ of mandate is beneficially interested in the subject matter for purposes of establishing standing is equivalent to the federal "injury in fact" test, which requires a party to prove by a preponderance of the evidence that it has suffered an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 829.)

Petitioner fails to allege the particular nature of his injuries, and fails to draw a causal connection between any act or omission by Respondents and his alleged injuries. "Allegations of

damages without allegations of fact to support them are but conclusions of law, which are not admitted by demurrer." (*Zumbrun v. University of California* (1972) 25 Cal.App.3d 1, 12). As discussed above, there is no factual pleading which supports the existence of any legally cognizable injury that could be redressed by the issuance of the requested writ. Further, to the extent Petitioner seeks to be "made whole" for damages to his "financial well-being," that would contradict his allegation that he has no "plain, speedy or adequate remedy in the ordinary Course of law" (Petition at p. 34:3-4.) If there is no injury in fact and there *is* an adequate remedy at law, then Petitioner has failed to establish two of the three elements required to justify mandamus relief. Therefore, Petitioner fails to satisfy *any* requisite element necessary to justify mandamus relief.

B. There is No Duty to Compel.

Petitioner has also failed to establish the existence of any duty which can be compelled. Petitioner alleges that "Prop 64 was the product of a highly sophisticated conspiracy to enact law that on the surface appeared to be compliant with federal law . . . when in fact it is language within Prop 64 that demonstrates the initiative should not have been approved for placement on the November 2016 ballot." (Petition at p. 20:26-28). Implicit in this allegation is the assumption that the Attorney General or an officer or agent of the State of California can unilaterally interfere with the people's power to qualify initiatives for the ballot. No named or unnamed Respondent is vested with such power. Petitioner's claims against the State and the Attorney General demonstrate a misunderstanding of the initiative process. Contrary to Petitioner's claim, the Attorney General has no "fiduciary duty" to "protect the citizens of the State" from the initiative process. (See Petition at p. 4:22-24.) The nature and purpose of the initiative process are well established. (Cal. Const., art. II, § 8.) In California, "[a]ll political power is inherent in the people." (Cal. Const., art. II, § 1.) The initiative is "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8, subd. (a).) Once voters have approved an initiative measure, the results must be certified, regardless of whether there is a belief that the initiative may be unconstitutional. (*Kevelin v. Jordan* (1964) 62

Cal.2d 82, 83.) Proposition 64 qualified for the ballot, and the majority of Californians voted to pass Proposition 64. (Respondent's RJN, Ex A: Statement of Vote, Nov. 8, 2016 Election.) Respondents have not breached any duty implicated in these events and, therefore there is no duty which Respondents could be compelled to perform.

1. The Attorney General Has No Duty to Interfere with the Initiative Process

Petitioner claims "that he will prove at trial that BROWN, and each Attorney General of the STATE thereafter, has been derelict in the performance of their fiduciary duties." (Petition at p. 12:7-8.) However, Petitioner fails to describe the term "fiduciary duties" with any particularity and fails to provide any legal authority to support his claims. The Attorney General is the chief law enforcement officer of the State and is vested with the authority to ". . . see that the laws of the State are uniformly and adequately enforced. . ." and when "any law of the State is not being adequately enforced . . . to prosecute any violations of law . . ." (Cal. Const., art V, § 13.) With respect to the initiative process, the Attorney General is responsible for preparing the title and summary of the initiative, initiating a public review process, and transmitting copies of the text of the measure and the circulating title and summary to the Senate and the Assembly. (Elec. Code §§ 9001, 9002, & 9007.) The Attorney General does not comment on the constitutionality of an initiative and possesses no authority to veto or invalidate an initiative measure that has been approved by the voters. (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1126.)

Petitioner asks in his Petition, "Does a STATE's Attorney General, as that STATE's principal legal office, have a fiduciary duty to protect the citizens of that State from frivolous ballot measure?" (Petition at p. 4:22-24.) The answer to this question is definitively, no.

2. Alleged Ministerial Duties and Abuses of Discretion Are Baseless

In an effort to persuade the Court that some duty exists or that the execution of some duty is subject to the Court's review, Petitioner alleges unspecified actions as "abuses of discretion." However, the Court need only "accept well pleaded facts, but not adjectival descriptions or legal conclusions to determine whether a cause of action exists." (*Ellis v. County of Calaveras* (2016) 245 Cal.App.4th 64, 70; see also *Bell Atl. Cort v. Twombly* (2007) 550 US 544, 555 ["Courts are

not bound to accept as true legal conclusions couched as a factual allegation."].) None of the following allegations have any basis in law or fact.

First, Petitioner alleges that "Respondents had a ministerial duty to adhere to, follow and enforce the applicable law as had been set forth within Prop 215 and SB 420." (Petition at p. 33:10-11.) To the extent that there are provisions of the Compassionate Use Act and the Medical Marijuana Program Act that impose ministerial duties on one or more Respondents, no such ministerial duty is identified anywhere in the Petition.

Second, Petitioner claims that the issuance of provisional licenses without adherence to California Environmental Quality Act ("CEQA") requirements, violates Respondents' ministerial duty. (Petition at p. 33:12-17.) Petitioner's allegation demonstrates a misapprehension of applicable law. Business and Professions Code section 26050.2, subdivision (d)(2), authorizes the Department of Cannabis Control to issue provisional licenses so long as compliance with CEQA is underway. And, Petitioner makes no allegation that a provisional license has ever been issued in violation of CEQA.

Finally, even though Petitioner has not identified any specific duty, he requests that the Court review any exercises of discretion that may have occurred in connection with the performance of some duty or another. (Petition at p. 33:17-23.) Petitioner's assertion is merely a conclusion and characterization that is not connected to any identified event, set of facts, or any other allegations that can be deemed true for the purposes of demurrer. "The court does not, however, assume the truth of contentions, deductions or conclusions of law." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) "A plaintiff is only required to set forth in his complaint the essential facts of his case with reasonable precision and with sufficient clarity and particularity that a defendant may be apprised of the nature, source, and extent of his cause of action." (*Foster v. Sexton* (2021) 61 Cal.App. 5th 998, 1019-1020.) However, Petitioner fails to meet that threshold because the 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. Therefore, Petitioner's first cause of

action should be subject to general demurrer because it fails to state a claim upon which relief can be granted and may be subject to special demurrer because it is uncertain and unintelligible in that it does not apprise Respondents of any beneficial interest in issue or any duty that can be compelled. (Code Civ. Proc., § 430.10, subds. (e) and (f).)

III. PETITIONER'S ALLEGATIONS ARE INSUFFICIENT TO SUSTAIN A COMPLAINT FOR INJUNCTIVE RELIEF

To obtain a permanent injunction "a plaintiff ordinarily must show that the defendant's wrongful conduct threatens to cause irreparable injury, meaning injury that cannot be adequately compensated in damages." (*Syngenta Crop Protection Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1167, citing *Intel Corp v. Hamidi* (2003) 30 Cal.4th 1342, 1352, Civ. Code, § 3422.). Petitioner fails to establish that there has been an irreparable injury or wrongful conduct.

A. Petitioner Has No Irreparable Injury

For the reasons articulated above, Petitioner failed to provide any colorable claim for violation of his constitutional rights, and has failed to make any allegation that connects Respondents' actions to his personal injuries. To the extent that Petitioner wishes to be "made whole" for injuries to his "financial well-being" (Petition at p. 3:14-15), that is not the proper subject of injunctive relief. This is because "mere monetary loss does not constitute irreparable harm" (*Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 890), and even "a substantial economic loss of [business] revenues" does not rise to the level of irreparable injury. (*IT Corp. v. County. of Imperial* (1983) 35 Cal.3d 63, 75.)

B. There Has Been No Wrongful Act That Can Be Redressed Through Injunctive Relief.

Just as Petitioner has failed to identify any duty relative to mandamus relief, he has also failed to establish the required element that any breach of duty or wrong has occurred which could be redressed by injunctive relief. As set forth above, there is no duty that was breached, the pleadings do not demonstrate that any cognizable injury has occurred, and Petitioner does not draw a connection between any act of Respondents and any purported injuries. Just as Petitioner failed to demonstrate that there is any duty of Respondents which ought to be compelled,

Petitioner has also failed to plead facts sufficient to establish that there has been any injury or any wrongful conduct. There is no duty, there is no breach, and in the absence of any identifiable wrongful conduct which must be redressed or prevented, a complaint for injunctive relief will not lie.

C. The Demurrer Should be Granted as to the Second Cause of Action.

Where it cannot be shown that there is (1) a wrongful act constituting a cause of action, and (2) a factual showing that the wrongful act constitutes an actual or threatened injury to property or personal rights which cannot be compensated by damages, a complaint for injunctive relief may be disposed of by demurrer. (See, *Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410; *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 748-749.) Petitioner has failed to plead facts or present any legal theory that could be the basis of a complaint for injunctive relief. The Petition is therefore subject to demurrer for failure to state a claim upon which relief can be granted. (Code Civ. Proc., § 430.10, subd. (e).)

IV. THE SUPREMACY CLAUSE DOES NOT CREATE A PRIVATE RIGHT OF ACTION

The predominant theme of the Petition is that California's cannabis laws are preempted by Federal law and, supposedly, by an international treaty. As discussed above, this question should not be entertained by the Court because there is no controversy to be resolved in answering this question. In the absence of standing, Article VI, paragraph 2 (Supremacy Clause) of the United States Constitution does not provide for any private right of action. (*Armstrong v. Exceptional Child Care Center* (2015) 575 U.S. 320, 326.) In the context of an actual controversy, Courts may enjoin actions of state officials where the execution of a state law would violate rights protected under Federal law. (*Ibid.*) In this case, Petitioner has failed, as a matter of law, to plead any facts that can show that the existence of MAUCRSA or any past action by current or past Attorneys General has violated or jeopardized any federally protected right. Therefore, it is not possible that any amendment to the complaint would cure its fatal defects, and demurrer should be granted without leave to amend.

V. THE STATUTE OF LIMITATIONS BARS ALL OF PETITIONER'S CLAIMS

A general demurrer is proper where the dates alleged in the complaint show that the action is barred by the statute of limitations. (*Roman v. County. of Los Angeles* (2000) 85 Cal.App.4th 316, 324.) The Petition alleges that the issuance of guidelines by the Attorney General in 2008, the passage of Proposition 64 in November 2016, and the subsequent passage of Senate Bill 94, in June 2017, are at the basis for his claims. (Petition at p. 10:7-12:19, 30:9-12.) Petitioner filed the complaint on December 28, 2021, more than thirteen years after the guidelines were issued, five years after the passage of Proposition 64, and more than four years following the passage of Senate Bill 94. Because there is no specific statute of limitations governing an attack on guidelines issued by an Attorney General or a lawfully passed initiative, the general statute of limitations of four years is applicable. (Code Civ. Proc., § 343.) Therefore, the statute of limitations has run on Petitioner's claims. To the extent that Petitioner claims he suffered damages or a compensable injury as a result of the State or the Attorney General, he was required to file a Government Torts Claim within six months of the accrual of the injury. (Gov. Code, § 910.) Having failed to do so, Petitioner's claims are statutorily barred as a matter of law under Government Code sections 910, subdivision (e), 911.2, 950.2, and 950.4, due to the failure to comply with mandatory Government Tort Claims Act filing requirements.

VI. THE DOCTRINE OF LACHES BARS THIS ACTION

Notwithstanding the statute of limitations, a demurrer is also properly sustained to a complaint that is not timely pursued based on the doctrine of laches. "It is a well-settled rule of law that the defense of laches can be raised by a general demurrer." (*Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 725, citing *Kleinclaus v. Dutard* (1905) 147 Cal. 245, 250.) The doctrine of laches rests on the maxim that "the law helps the vigilant, before those who sleep on their rights." (Civ. Code, § 3527.) It is applicable where "unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay" are established. (*Conti v. Bd. of Civil Serv. Commissioners* (1969) 1 Cal.3d 351, 359 (Conti).)

Here, Petitioner's action is barred by laches because: (1) he unreasonably delayed in asserting his claim; (2) he acquiesced in the behavior that he now complains about; and, (3) the State is prejudiced by Petitioner's unreasonable delay. (*Conti*, supra, 1 Cal.3d at p. 359.) Petitioner has unreasonably delayed the commencement of this action to the prejudice of Respondents in that the events allegedly giving rise to this action occurred over thirteen years ago, and were known to Petitioner at that time. The Attorney General caused to be issued Guidelines on Medical Cannabis in 2008. Since 2016, the State has been responsible for ensuring that Proposition 64, a statewide ballot initiative approved by the majority of Californians, is implemented. To this end, the State has established the Department of Cannabis Control to oversee, establish regulations, and engage in enforcement activity related to commercial cannabis activity in the state, set-up a system to collect taxes, ensured the protection of California's environmental resources, and ensured criminal justice reforms and public safety efforts. Moreover, Petitioner has not alleged any excuse or reason for his delay. (*Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal.App.4th 1357, 1362 [statute of limitations period borrowed as measure of outer limit of reasonable delay in determining laches].) Thus, the doctrine of laches also applies and this case should be dismissed.

CONCLUSION

For the reasons set forth, the Department respectfully requests that the Court grant its motion for demurrer without leave to amend.

Dated: February 28, 2022

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: **Cotton v. State of CA, et. al.**
Case No.: **37-2021-00053551-CU-WM-CTL**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for the transmission of electronic mail.

On February 28, 2022, I served the attached **DEFENDANTS AND RESPONDENTS' NOTICE OF DEMURRER AND DEMURRER TO PETITION TO PEREMPTORY WRIT OF MANDATE AND COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**
by transmitting a true copy via electronic mail, addressed as follows:

Darryl Cotton
6176 Federal Blvd.
San Diego, CA 92114
E-mail Address: 151DarrylCotton@gmail.com

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on February 28, 2022, at Rocklin, California.

N. Clark
Declarant


Signature

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