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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

COUNTY O F SAN DIEGO, Plaintiff, v. SAN DIEGO NORML INC., a California corporation; STATE OF CALIFORNIA; SANDRA SHEWRY, Director of the California Department of Health Services in her official capacity; and DOES 1 through 50, inclusive, Defendants.	CASE NO. GIC 860665 **NOTICE OF DEMURRER AND DEMURRER OF DEFENDANT SAN DIEGO NORML, INC. TO PLAINTIFF'S COMPLAINT** Date: May 5, 2006 Time: 2:30 p.m. Dept.: 64 Judge: William R. Nevitt, Jr. Trial Date: Not yet set.

PLEASE TAKE NOTICE that a Demurrer by Defendant, SAN DIEGO NORML, INC. (hereinafter "Defendant" or "NORML") to the Complaint of Plaintiff COUNTY OF SAN DIEGO (hereinafter "Plaintiff" or "County") has been set for May 5, 2006 at 2:30 p.m., or as soon thereafter as the matter may be heard in Department 64 of the above-entitled Court, located at 330 W. Broadway, San Diego, California.

This demurring defendant demurs on the grounds established in California Code of Civil Procedure sections 430.10 (a), (d), (e), and (f).

This Demurrer is based upon this notice, the Memorandum of Points and Authorities filed herewith, the complete court files of this action, and on such additional evidence and arguments as may be presented at the hearing.

Respectfully submitted,
THE WATKINS FIRM, APC

Dated: March 17, 2006

MICHAEL L. REEDY
Attorney for Defendant **SAN DIEGO NORML, INC.**

MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW Defendant, SAN DIEGO NORML, INC. ("NORML"), and responds to Plaintiff's Complaint requesting declaratory relief herein, as follows:

"The things I shall tell you are commonplace and smack of the lawcourts, but they are true." Plato, *Apology* 32b, *circa* 393 B.C.E.

I.

INTRODUCTION

Plaintiff County of San Diego has filed a Complaint against the State of California and NORML for declaratory relief, alleging that international treaty obligations under the Single Convention on Narcotic Drugs (the "Single Convention"), and Congressional determinations made in support of the Controlled Substances Act ("CSA"), 21 U.S.C.S. § 801 et seq., preempt California's Health & Safety Code ("H&S") §§11362.7-11362.83. As established herein, all such support for Plaintiff's requests has already been soundly rejected by the United States Supreme Court. Additionally, both the CSA and the Single Convention acknowledge by their own terms that they must and do take a back seat to the provisions of and powers granted by the United States Constitution. For these reasons, Plaintiff's requests must be denied.

The motivation behind the filing of Plaintiff's Complaint is the same as that which has emboldened Plaintiff to flatly reject and ignore California law (the aforementioned H&S code) since its enactment: a belief that California voters were somehow morally off, and that a handful of county administrators with a minority view can and should ignore the voters' will expressed through the State's police powers. The motivation behind naming NORML as a defendant was to quiet the organization and keep it from further insisting that Plaintiff County must obey the law.[1]

NORML, unlike Defendant State, has no ability to effectuate the orders and judgments Plaintiff prays for. To even name NORML as a Defendant (necessarily subjecting it to the associated expenses and burdens), for having only insisted that Plaintiff follow the law, is a violation of the organization's (and its members') First Amendment rights. NORML is an unnecessary and improper Defendant. Plaintiff's Complaint against it, for these reasons too, should be dismissed.

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[1] NORML also became a convenient scapegoat for Plaintiff's fiscal irresponsibility in filing this suit.

II.

LEGAL STANDARD

When examining a Complaint, the presumption is that the pleader has stated his case as favorably as possible; facts that are necessary to a cause of action, but not alleged, must be taken as having no existence. *Ibarra v. California Coastal Commission,* 182 Cal. App. 3d 687, 692 (1986). Presumptions and inferences from the pleadings are always against the pleader and all doubts are resolved against him or her, as the pleader is presumed to have stated his or her case as favorably as possible. *C & H Foods Co. v. Hartford Ins. Co.,* 163 Cal. App. 3d 1063 (1984); See also *Melikan v. Truck Ins. Exch.,* 133 Cal. App. 2d 113, 115 (1955).

"When any ground for objection to a complaint, cross-complaint, or answer appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading." California Code of Civil Procedure Section 430.30(a). Further, a party may object by demurrer to the pleading on the grounds that the pleading does not state facts sufficient to constitute a cause of action. California Code of Civil Procedure Section 430.10(e), (f).

A pleading must allege facts and not mere conclusions. *Vilardo v. County of Sacramento,* 54 Cal. App. 2d 413, 418 (1942). The function of a demurrer is to test the legal sufficiency of the challenged pleading as a matter of law. *Baldwin v. Zoradi,* 123 Cal. App. 3d 275, 278 (1981); *City of Chula Vista v. County of San Diego,* 23 Cal. App. 4th 1713 (1994).

A demurrer is used to challenge defects appearing on the pleading's face or from judicially noticeable facts. *Delgado v. American Multi-Cinema, Inc.,* 72 Cal. App. 4th 1403 (1999); *Blank v. Kirwin,* 39 Cal. 3d 311 (1985); *See also,* California Code of Civil Procedure Section 430.30(a). When no amendment will cure the defect in the pleading, leave to amend is not proper. *La Jolla Village Homeowners Assn. v. Superior Court,* 212 Cal. App. 3d 1131, 1141 (1999).

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III.

ARGUMENT

A. AUTHORITATIVE SUPPORT CITED BY PLAINTIFF IS SELF-LIMITING AND HAS BEEN DISCREDITED BY THE UNITED STATES SUPREME COURT

i. The Federal Government Is Barred From Encroaching Upon Constitutional Edicts By Way Of Negotiations With Other Nations.

As The United States Supreme Court emphasized in *Sahagian, v. United States*: "[i]t is well settled that the Bill of Rights limits both the federal government's treaty-making powers as well as actions taken by federal officials pursuant to the federal government's treaties." 864 F.2d 509, 513 (1988). Thus, to the extent a citizen challenges federal actions and/or agreements with foreign nations, or those agreements or actions conflict with constitutional rights, they must be assessed in light of the United States Constitution. *Ibid.* That Plaintiff would come before this esteemed Court, attempt to abdicate the State of California's constitutionally granted power to regulate health and safety, and rely on thirty-eight year old reasoning embedded in agreements with other nations as support, is mind-boggling.

Additionally, "[t]he concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *In re Eric J.*, 25 Cal. 3d 522, 531 (1979). "The Due Process Clause of the Fifth Amendment applies to the federal government a version of equal protection largely similar to that which governs the states under the Fourteenth Amendment." *Rodriguez-Silva v. Immigration and Naturalization Service,* 242 F.3d 243, 247 (5th Cir. 2001). Given the rights established under the CUA, there is no legitimate prosecutorial basis for distinguishing between an individual possessing a prescribed amount of Xanax, and one possessing an appropriate amount of cannabis pursuant to a prescription. That these two individuals should be treated so incredibly differently, based solely on the medication prescribed, is a violation of a medical marijuana patient's constitutional rights, as established through the equal protection clause fifth and fourteenth amendments to the United States Constitution.

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Rights and powers constitutionally granted to both individuals of the State of California and the State itself are at risk of serious erosion in this matter. Given the constitutional implications raised by Plaintiff's pleading, all reliance on international treaty provisions as support for their requested declaratory and injunctive relief has already been discredited by the highest Court in this land. *Sahagian*, 864 F.2d 509 (1988). Indeed the Single Convention itself provides that the parties to the treaty must have "due regard to their constitutional, legal and administrative systems" (Single Convention, art. 35.), and its ambit is limited in territories "where the previous consent of such a territory is required by the Constitution of the Party or of the territory concerned, or required by custom" (Id at art. 42).

ii. The United State Supreme Court Has Established That There Should Be No Legislative Determinations of What are Properly Matters for Medical Judgment

Plaintiff's only other source of authority for capitulating in this yet-to-be-conceived battle[2], is that "Congress determined that marijuana has 'no currently accepted medical use in treatment in the United States.'" It's true that Congress made that "determination" in, or at least codified it in, 1970. Three years later, and again in 1976, the United States Supreme Court made perfectly clear that "a legislative determination of what is properly a matter for medical judgment" is entirely unacceptable. *Planned Parenthood v. Danforth,* 428 U.S. 52, 63-64 (1976) (citing the earlier holding). While Congress may well be able to muster medical support for the above notion with respect to many of the controlled substances identified in the CSA, thirty-six years of science and development as a society have since rendered that "determination" nonsensical as it relates to marijuana.

The State of California has most certainly not, therefore, as Plaintiff would have the Court believe, broken any federal or international treaty law by enacting voter approved legislation in Proposition 215. Indeed California's decision to allow doctors to determine if and when marijuana's chemical effect has medicinal value to a patient, actually embodies, respects, and follows the aforementioned Supreme Court edict: [i]t is the intent of the Legislature that the state commission objective scientific research by the premier research institute of the world, the University of California, regarding the efficacy and safety of administering marijuana as part of medical

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[2] It appears the federal government has taken no action against the county at this time.

treatment." Health & Safety Code ("H&S") § 11362.9(a)(1). More directly, the stated purpose of the CUA is to "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...."

Irrespective of where one believes California's university system ranks in the world, and notwithstanding Plaintiff's pleading, California has clearly and legitimately identified this issue as a health matter, and one thus properly left to trained medical professionals rather than politicians. (Recent revelations of influence peddling and the like further highlight the wisdom and logic behind the Supreme Court's determination that doctors alone should make decisions relating to an individuals' health.) Congress's misinformed and/or misguided earlier efforts simply cannot work to divest the State of California, or any other state, of its inherent police powers. Congress acknowledged as much in § 903 of the CSA: [n]o provision of this title 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...."

B. REGULATION OF HEALTH AND SAFETY IS A CONSTITUTIONALLY GRANTED STATE POWER - THERE IS NO PREEMPTION

The presumption is always that state and local regulations of matters related to health and safety are not invalidated under the Supremacy Clause. *Hillsborough County, Florida v. Automated Med. Lab., Inc.*, 471 U.S. 707, 715 (1976). Where the field that Congress is said to have pre-empted has traditionally been occupied by the States, the assumption is that the historic police powers of the States are not superseded by federal actions. *Id* at 715.

Even where it is alleged (as Plaintiff appears to allege) that a particular field has been pre-empted by a federal agency, acting pursuant to congressional delegation, a showing of implicit pre-emption of the whole field, or of a conflict between a particular local provision and the federal scheme, must be made - one that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation. 471 U.S. at 715. Given the CSA's inherent limitations, Plaintiff will be unable to make such a showing.

The CSA, by its very terms, allows certain controlled substances to be available by a written prescription from a registered physician. 21 U.S.C.S. § 822(a)(2). Any argument that marijuana's current status as a controlled substance automatically makes the CUA provisions logistically untenable, therefore, is without merit. Were the federal government to simply reclassify marijuana as a schedule II drug, the CSA's inherent conflict with this State's power to regulate health and safety would be eliminated (or at least substantially reduced). It is those Schedule I provisions, to the extent controlled substances so classified have evidenced medicinal value, that should be struck down as unlawful. Indeed, on September 6, 1988, the Drug Enforcement Agency's chief administrative law judge, Francis L. Young, in Docket No. 86-22, after reviewing medical opinions and materials addressing medicinal benefits associated with marijuana, declared marijuana in its natural form as "one of the safest therapeutically active substances known to man." He added that the provisions of the CSA "require the transfer of marijuana from Schedule I to Schedule II.." *Ibid.*

Additionally, on the very same day Plaintiffs signed their original federal pleading, the United States Supreme Court established that the prescription requirement of the CSA did not authorize the U.S. Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct. *Gonzalez v. Oregon,* 2006 U.S. LEXIS 767, 56-57. In reaching that conclusion, the Supreme Court made a number of determinations highly relevant to the matter at bar. Among those was its holding that Congress only "regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, [the CSA] manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism, which allow the States great latitude under their police powers to legislate as to the protection of lives, limbs, health, comfort, and quiet of all persons." *Id* at 48. "The structure and operation of the [CSA] presume and rely upon a functioning medical profession regulated under the States' police powers."[3] *Id* at 48-49.

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[3] Even the Single Convention officially recognized "that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the

"Cautioning against the conclusion that the [CSA] effectively displaces the States' general regulation of medical practice is the CSA's [very own] pre-emption provision, which indicates that, absent a positive conflict, none of the [CSA's] provisions should be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State." *Id* at 49-50. The Court went on to detail the Oregon statute's procedures and protections (which are strikingly similar to those found in the CUA) before determining that the federal government had overstepped its authority. *Ibid.* Where, as here, time and science have revealed that control of any given subject-matter and/or substance is appropriately attributed to a field within the ambit of powers granted to the State pursuant to the United States Constitution, untenable legislative determinations made by Congress and relevant only in another alternatively, erroneously, or superlatively applied field, must give way.

C. NAMING NORML AS A DEFENDANT IN THIS MATTER IS IMPROPER AND A VIOLATION OF ITS FIRST AMENDMENT RIGHTS

Plaintiff county has improperly named NORML as a defendant. Though the following is an Eleventh Amendment analysis, the analysis' framework and court's reasoning (from *NAACP v. California*) are apropos: *even when naming state actors* actually connected with enforcement of challenged legislation, a general duty to enforce state laws does not make one a proper defendant. 511 F. Supp. 1244, 1261 (1981).[4] NORML, of course, has absolutely *no* ability to control any state entity actions. This is perhaps best evidenced by Plaintiff County's continued insistence, since the passage of prop. 215 and notwithstanding NORML's requests to do otherwise, on flouting the State's and people's authority and mandates.

In *Winter v. Gnaizda*, the California Court of Appeal reminded, upon dismissing a similarly improper defendant, that without a justiciable controversy between the parties, the court would be required to render an advisory opinion, which is explicitly forbidden by law in an action brought for

availability of narcotic drugs for such purposes." (Single Convention, pmbl.)

[4] See also: *Long v. Van De Kamp*, 961 F. 2d 151, 152 (9th Cir. 1992); *Planned Parenthood of Idaho, Inc. V. Wasden*, 376 F. 3d 908, 919 (9th Cir. 2004).

declaratory relief. 90 Cal. App. 3d 750 (1979). "Even if assumed arguendo that [the dismissed defendant] should be deemed somehow an interested party because the controversy at bench involved the interpretation of state regulations which are of great general interest, the declaratory relief action against appellant still must be held inappropriate." *Id*, at 756. It is hard to ignore the applicability of the *Winter* court's reasoning and holdings, and Defendant NORML should likewise be dismissed.

The United States Supreme Court: "[t]he First Amendment protects the right of all organizations, not just a subset of them, to engage in political speech." *McConnell v. Federal Election Commission*, 540 US 93 (2003). Defendant NORML's requests that Plaintiff County follow the law should certainly be among the most highly protected forms of political speech, and suggesting some sort of culpability on NORML's part (by naming it as a defendant in this lawsuit) is entirely unacceptable. Again, the United States Supreme Court: "[t]he rights of political association are fragile enough, without adding the additional threat of destruction by lawsuit. We have not been slow to recognize that the protection of the First Amendment bars subtle as well as obvious devices by which political association might be stifled." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931-932 (1982).

IV.

CONCLUSION

Based on the forgoing, establishing the supremacy of the United States Constitution over any law established by international treaty, and establishing that the CSA and Congress's ability to legislate must give way to the State of California's police powers over the health and safety of its citizens, Defendant's demurrer should be granted. Additionally, as established above, NORML is an entirely inappropriate defendant who should be dismissed pursuant to cited law, and whose lack of any real connection or expected efficacy with regards to the judgments prayed for, robs the court of requisite jurisdictional elements in this particular case.

Plaintiff has failed to establish any real controversy, that is, in that "[a] mere demand for [declaratory] relief does not by itself establish a case or controversy necessary to confer subject matter jurisdiction," *Jenkins v. United States*, 386 F.3d 415, 417 (2d Cir. 2004), and they can point to

plaintiff "allege, and ultimately prove, that he has suffered an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). (While the law cited here is from the federal arena, the reasoning and common sense approach should be equally applicable to the case at bar.) For these reasons, as well as others expressed herein, it is respectfully requested that the Court, pursuant to California Code of Civil Procedure sections 430.10 (a), (d), (e), and/or (f), grant defendant NORML's demurrer as to all aspects of Plaintiffs Complaint, without leave to amend.

Respectfully Submitted,

Dated March 17, 2006

Michael L. Reedy, Esq.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO, Plaintiff, v. SAN DIEGO NORML INC., a California corporation; STATE OF CALIFORNIA; SANDRA SHEWRY, Director of the California Department of Health Services in her official capacity; and DOES 1 through 50, inclusive, Defendants.	CASE NO. GIC 860665 **PROOF OF SERVICE** Date: May 5, 2006 Time: 2:30 p.m. Dept.: 64 Judge: William R. Nevitt, Jr. Trial Date: Not yet set.

I am a citizen of the United States, over the age of eighteen years, and not a party to or interested in the above-entitled cause. I am an employee of THE WATKINS FIRM, a professional corporation, and my business address is 4520 Executive Drive, Suite 105, San Diego, California 92121. I am readily familiar with the business practice for collection and processing of correspondence. On this date, I caused service of the following documents:

1. **NOTICE OF DEMURRER AND DEMURRER OF DEFENDANT SAN DIEGO NORML, INC. TO PLAINTIFF'S COMPLAINT; and**
2. **PROOF OF SERVICE**

/ / /

/ / /

XX By U.S. Mail. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at 4520 Executive Drive, Suite 105, San Diego, California in the ordinary course of business. I am aware on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ By Overnight Delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ By Messenger Service. I served the documents by placing them in a n envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service for service.

XX By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

☐ By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ By Certified Mail or Registered Mail. By mailing to an address within California (*by first-class mail, postage prepaid, requiring a return receipt)* copies to the persons served below.

☐ By Personal service. I personally delivered the documents to the persons listed below. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the ours of eight in the morning and six in the evening.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. EXECUTED on March 20th, 2006 at San Diego, California.

DAVID E. MICHAEL