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By *M. Cervantes*, Deputy
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MEDICAL MARIJUANA COLLECTIVES LITIG.

AMERICANS FOR SAFE ACCESS, et al.,

Plaintiffs,

vs.

CITY OF LOS ANGELES, a municipal
corporation, et al.,

Defendants.

Case No.: BC433942

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION**

I. Introduction

On January 26, 2010, the City of Los Angeles ("the City") enacted a law governing medical marijuana collectives, Ordinance No. 181069 ("the Ordinance"). Pursuant to the Ordinance, the City has taken a number of steps calculated to limit the number of medical marijuana collectives ("collectives").

1 Plaintiffs are collectives and, in one case, patient members of a collective.¹ Their lawsuits
2 against the City raise a number of constitutional and procedural challenges and ask for injunctive relief
3 that would block the city from enforcing the Ordinance. The court has heard several oral arguments in
4 these actions and now makes the following rulings.

5 In the background of this controversy are two state measures and an earlier, but now defunct,
6 interim control ordinance that the City adopted. In 1996, California voters approved Proposition 215,
7 The Compassionate Use Act (“CUA”), which legalized the use of marijuana for medical purposes and
8 allowed people to grow or possess marijuana based on the recommendation of a licensed physician.
9 Thereafter, the state legislature enacted The Medical Marijuana Protection Act (MMPA). In 2007, the
10 City of Los Angeles passed an interim control ordinance (“the ICO”) designed to prevent new medical
11 marijuana dispensaries from opening.
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14 A time line of pertinent events may be helpful:

- 15 • 1996—California passes Proposition 215, (the CUA) (Cal. Health and Safety Code § 11362.5).
16 Prop. 215 provided, for the first time, the right for seriously ill Californians to use marijuana for
17 medical purposes when recommended by a physician.
- 18 • 2003—California passes Senate Bill 420, (the MMPA) (Cal. Health and Safety Code §
19 11362.775). The MMPA permitted, for the first time, qualified patients and caregivers of
20 qualified patients to collectively cultivate marijuana for medical purposes with freedom from
21 prosecution.

22 ¹ According to the case homepage website, the following collectives have joined in the motion for a preliminary injunction:
23 Holistic Cannabis Collective; Trinity Holistic Caregivers, Inc.; Galaxy Caregivers Group, LLC.; Green Leaf
24 Collective/Marijuana Collective; 420 Collective; Valley Holistic Caregivers, Inc.; Natural Ways Always; Herbal Remedies
25 Caregivers, Inc.; Starbudz; 420 Caregivers, LLC; Exclusive Caregivers of California, Inc.; Buddha Bar Collective; The Shop
26 at Greenbush; Jeg Inc. Wilshire medical Marijuana Collective; Healers on Third, Inc., Healers on 3rd Medical Marijuana
27 Collective; Green Joy Inc., Medical Cannabis Dispensary; Compassionate Caregivers of San Pedro; Medical Wellness
28 Center, Inc., A Medical Marijuana Collective; The Hills Caregivers, A Medical Marijuana Collective; Sunset Junction
Organic Medicine Medical Marijuana Collective; West Valley Caregivers; American Sobriety Inc., Green Hills Collective;
Herbal Medicine Care, Inc.; Nature’s Wonder Caregivers Group, Inc.; 420 Highway Pharmacy, Inc.; Colorado Pain Relief,
Inc.; Infinity Medical Alliancem, Inc.; Natural Solutions Patient Care, Inc.; Greenthumb Medicinal Clinic, Inc.; The
Hollywood Collective; Harmony House Collective, Inc.; Natural Choice Healing Center, Inc.; House of Kush, Inc.; Kush
Korner IV; Herbology, Inc.; Cancare Collective, Inc.; Cannamerchant, Inc.; Downtown Natural Caregivers; God’s Gift; L.A.
Area Herbal Delivery, Inc.; Mid City Cannabis Club, Inc.; New Era Caregivers; Safe Life Caregivers; Kush Korner V, Inc.;
Exclusive Caregivers of California.

- 1 • 2006—City Council Member Dennis Zine makes a motion to the Los Angeles City Council basically bringing to the council’s attention the increased number of collectives in Los Angeles and their effect on crime and safety in the city.
- 2 • August 1, 2007—Los Angeles adopts Ordinance No. 181027 (the ICO). The ICO permitted all
- 3 collectives that existed prior to August 1, 2007, and that submitted a series of documents to the
- 4 City Clerk’s Office by November 13, 2007, to continue operation.
- 5 • September 15, 2007—The ICO loses effect by operation of law and expires².
- 6 • November 13, 2007—The deadline for submitting documents to the City Clerk’s Office pursuant
- 7 to the ICO passes. Plaintiffs admit that none of them submitted the required documents.
- 8 • August 2008—The Attorney General issues “Guidelines for the Security and Non-Diversion of
- 9 Marijuana Grown for Medical Use,” hereinafter “Guidelines.”
- 10 • 2008 to 2009—Plaintiffs begin operation of collectives in the City of Los Angeles³.
- 11 • January 26, 2010—The Ordinance is passed. Among other things, the Ordinance limits the
- 12 operation of collectives in the City of Los Angeles to only those that had registered by November
- 13 13, 2007, pursuant to the defunct ICO.
- 14 • May 3, 2010—The mayor signs the Ordinance into law after approving a finalized fee schedule.
- 15 • May 4, 2010—The City sends letters to many collectives telling them to shut down immediately
- 16 or risk facing criminal and civil prosecution.
- 17 • June 7, 2010—The Ordinance becomes effective. Only collectives that were registered pursuant
- 18 to the ICO may begin submitting applications for continued operation to the City Clerk’s
- 19 Office—all others must terminate operations.
- 20 • June 14, 2010—Last day for collectives which were registered pursuant to the ICO to submit
- 21 their applications for continued operation as required by the Ordinance.

II. Summary of Rulings:

22 Two portions of the Ordinance are pre-empted by state law. The Ordinance violates the equal

23 protection clauses of the state and federal constitutions. The Ordinance violates the due process clause

24 of the Constitution of the State of California. The Ordinance violates Plaintiffs’ informational privacy

25 rights under the Constitution of the State of California as to their general contact information.

26 ² Government Code § 65858(a) and (b) provides that interim ordinances lose effect within 45 days of adoption unless a legislative body extends the interim ordinance pursuant to the terms of Government Code § 65090. Plaintiffs argue that the ICO expired on September 15, 2007. Defendant does not contest this allegation or otherwise argue that the ICO was extended pursuant to Government Code § 65090.

27 ³ 420 Collective was issued a tax registration certificate on August 30, 2008 (Motion 3rd Ex. 3); 420 Caregivers was issued a tax registration certificate on May 6, 2009 (Motion, 2nd Ex. 3); Green Horizon was issued a tax registration certificate on March 20, 2009 (Motion, 4th Ex. 2); and Organic Healing Center was issued a tax registration certificate on July 7, 2009 (Motion, 5th Ex. 2).

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III. Discussion:

CCP § 526 specifies a number of instances in which a court may grant a preliminary injunction.

Two are relevant to this motion:

- 1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
- 2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.

The issuance of a preliminary injunction requires the court to weigh two factors: the likelihood the moving party will prevail on the merits and the relative interim harm to the parties from the issuance or non-issuance of the injunction. *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999. “The trial court’s determination must be guided by a ‘mix’ of the potential-merit and interim-harm factors; the greater the plaintiff’s showing on one, the less must be shown on the other to support an injunction.” *Butt v. State of California* (1992) 4 Cal.4th 668, 678.

A. PLAINTIFFS’ LIKELIHOOD OF SUCCESS ON THE MERITS:

The bulk of this order is devoted to the likelihood of Plaintiffs’ success on the merits of their constitutional claims. The relative interim harm to the parties is addressed below in Section II(B).

1. The CUA and the MMPA do not preempt the bulk of the Ordinance:

Article XI Section 7 of the California Constitution controls preemption: “a city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with the general laws.” Plaintiffs claim that the CUA and the MMPA (both state laws) preempt the Ordinance (a local law enacted by the City of Los Angeles.)

There are three main types of preemption. “A conflict exists if the local legislation ‘duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.’” (Citation.) *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232,

1 1242. The burden in establishing preemption of a local ordinance by state law is on the party claiming
2 preemption. *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.

3 In *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, the court discussed when
4 preemption occurs based on an area of the law being “fully occupied:”

5 [L]ocal legislation enters an area that is “fully occupied” by general law when the
6 Legislature has *expressly manifested its intent to “fully occupy” the area [citation]*, or
7 when it has *impliedly done so in light of one of the following indicia of intent*: “(1) the
8 subject matter has been so fully and completely covered by general law as to clearly
9 indicate that it has become exclusively a matter of state concern; (2) the subject matter
10 has been partially covered by general law couched in such terms as to indicate clearly
11 that a paramount state concern will not tolerate further or additional local action; or (3)
the subject matter has been partially covered by general law, and the subject is of such a
nature that the adverse effect of a local ordinance on the transient citizens of the state
outweighs the possible benefit to the” locality [citations].’ [Citation.]”

12 *Kruse, supra*, 177 Cal.App.4th at 1169 (emphasis added.) In other words, preemption by full occupation
13 of the field can be *express* or *implicit*. Here, neither has occurred.

14 The CUA does not provide for the collective cultivation and distribution of medical marijuana.
15 *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 758. Instead, the CUA encourages state and federal
16 governments to implement a plan to provide for the safe and affordable distribution of medical
17 marijuana to those patients who need it. Health and Safety Code § 11362.5(b)(1)(C). Meanwhile the
18 MMPA contemplates the formation and operation of medicinal marijuana collectives that would receive
19 reimbursement for marijuana and for services in connection with providing medical marijuana. (*See*
20 *Urziceanu, supra*, at 785, “[The MMPA] represents a dramatic change in the prohibitions on the use,
21 distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers
22 and fits the defense defendant attempted to present at trial. Its specific itemization of the marijuana sales
23 law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that
24 would receive reimbursement for marijuana and the services provided in conjunction with the provision
25 of that marijuana. Contrary to the People's argument, this law did abrogate the limits expressed in the
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1 cases . . . which took a restrictive view of the activities allowed by the Compassionate Use Act”
2 (emphasis added.); Guidelines, § I(C) “the MMP[A] also defines certain terms . . . and recognizes a
3 qualified right to collective cultivation of medical marijuana;” *See also*, Guidelines § 4(A)(2) and §
4 (4)(B-C).)

5 In neither the CUA nor the MMPA did the legislature express its intent to occupy the field of
6 medical marijuana legislation. If anything, the statutes display a contrary intent. The CUA expressly
7 says it does not supersede laws that protect individual and public safety. The MMPA supplemented the
8 CUA because the CUA did not discuss how qualified individuals could obtain and legally use medical
9 marijuana. *See e.g.*, Health and Safety Code § 11362.775; *Urziceanu, supra*, at 785.⁴ The MMPA also
10 lacks any express indication that it fully governs the area of medical marijuana. Medical marijuana
11 collectives are conspicuously absent from the language in the history of the MMPA. Moreover, the
12 MMPA contains the following language, at section 11362.93: “Nothing in article shall prevent a city or
13 other local governing body from adopting and enforcing laws consistent with this article.” *Kruse, supra*,
14 177 Cal.App.4th at 1175

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17 In *Kruse*, the Court of Appeal held that a moratorium on medical marijuana dispensaries was not
18 impliedly or expressly preempted by the CUA or the MMPA. The court noted that the CUA’s
19 provisions do not address zoning or business licensing decisions, nor does its plain language prohibit a
20 city from enforcing zoning and business licensing requirements. Moreover, the CUA does not authorize
21 the establishment and operation of a medical marijuana collective and does not prohibit local
22 governments from regulating them.
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⁴ Health and Safety Code § 11362.775 provides: “Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357 [possession of marijuana], 11358 [cultivation of marijuana], 11359 [possession for sale], 11360 [transportation], 11366 [maintaining a place for the sale, giving away or use of marijuana], 11366.5 [making available premises for the manufacture, storage or distribution of controlled substances], or 11570 [abatement of nuisance created by premises used for manufacture, storage or distribution of controlled substance].”

1 In both the CUA and the MMPA, the legislature never expressed its intent to occupy the field of
2 medical marijuana legislation. Indeed, the CUA was supplemented by the MMPA because the CUA
3 failed to discuss how qualified individuals could come into possession of and legally use medical
4 marijuana.

5 Turning to implied preemption, the legislature has not sufficiently indicated its intent to fully
6 occupy the field with either law. The CUA merely carved out immunities to criminal prosecution. As
7 noted above, the CUA did not even contemplate how one could legally grow or possess medical
8 marijuana. The MMPA, while more comprehensive, also falls short. Plaintiffs seem to recognize this in
9 their reply when they state, “the MMPA show[s] a legislative intent to decriminalize the use of
10 properties for medical marijuana activities.” (Reply, 4:3-4.) This limited scope—focusing on the
11 criminal consequences possibly associated with a particular use of a property—does not deal with issues
12 like (1) who must be involved in the cultivation, (2) whether cultivation must occur at the collective, and
13 (3) whether money in exchange for medical marijuana is acceptable. Because the MMPA fails to
14 address these concerns, the court cannot clearly infer that the legislature intended to reserve medical
15 marijuana as a matter solely of state concern. The Guidelines specifically contemplated by the MMPA
16 also indicate that the MMPA was not intended to occupy the field.⁵ Again, as referenced above, the
17 MMPA specifically permits local laws to regulate the area. *Kruse, supra*, 177 Cal.App.4th at 1175.

18 Plaintiffs argue that many of the restrictions set out in the Ordinance (e.g., audits, pre-inspection,
19 maintenance of records, and warrantless searches) contradict the MMPA because they attempt to define
20 what a lawful “collective” is. The problem with this argument is that the Plaintiffs assume that the
21 MMPA adequately defines what a “collective” is. The argument fails because the MMPA does not
22 define a valid “collective.” Some material on what constitutes a lawful collective comes from the
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28 ⁵ Health and Safety Code §11362.81(d) states “[T]he Attorney General shall develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the [CUA].”

1 Guidelines and the cases, but not nearly enough to support a preemption argument. If anything, local
2 entities are encouraged to make attempts to regulate, and presumably define, medical marijuana
3 cooperatives.

4 In two areas, however, Plaintiffs have a high likelihood of success on the merits of their
5 preemption claim. We turn to them now.

7 1. The criminal penalties set out in the Ordinance are preempted:

8 The criminal sanctions portion, at section 45.19.6.9, provides, in pertinent part, that “Each and
9 every violation (of the ordinance) shall constitute a separate violation and shall be subject to all remedies
10 and enforcement measures authorized by Section 11.00 of this Code.” Section 11.00’s remedies include
11 fines and imprisonment.⁶

13 “Local legislation ‘is “contradictory” to general law when it is inimical thereto.’ (Citation.) A
14 local ordinance is preempted by a state statute only to the extent that the two conflict.” *Action*
15 *Apartment Assn., supra*, 41 Cal.4th 1232, 1242-43. “Local Laws contradict state laws if they ‘prohibit
16 what the statute commands or command what it prohibits.” *Sherman-Williams v. City of Los Angeles*
17 (1993) 4 Cal.4th 893, 902.

19 The criminal sanctions portion of the Ordinance contradicts the MMPA. Support for this
20 conclusion comes from *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734:

21 The trial court apparently did not consider whether the MMPA's provisions that are
22 distinct from the CUA, including sections 11362.765 and 11362.775, preempt the city's
23 ordinance. The court in *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383,
24 1390, held that the “general availability of injunctive relief under [s]ection 11570 against
25 buildings and drug houses used to sell controlled substances is not affected by” the CUA.
26 The Legislature subsequently enacted the MMPA. Sections 11362.765 and 11362.775 of
27 the MMPA immunize operators of medical marijuana dispensaries-provided they are

28 ⁶Section 11.02.080 provides the penalty for violation of the code: “Violation of Division 1 of Title 11 is punishable by a fine
of not more than \$500.00, or by imprisonment in the County Jail for not more than six months, or by both such fine and
imprisonment. Each day during any portion of which any violation of any provision of this Division 1 is committed,
continued or permitted makes such violation of a separate offense. (Ord. 7583 Part 1 § 110, 1959.)”

1 qualified patients, possess valid medical marijuana identification cards, or are primary
2 caregivers-from prosecution under state nuisance abatement law (§ 11570) “solely on the
3 basis” that they use any “building or place ... for the purpose of unlawfully selling,
4 serving, storing, keeping, manufacturing, or giving away any controlled substance....”
5 Sections 11362.765 and 11362.775 also provide qualifying persons immunity from
6 nonfederal criminal sanctions imposed “solely on the basis” of “open[ing] or
7 maintain[ing] any place for the purpose of unlawfully selling, giving away, or using any
8 controlled substance ...” (§ 11366) or for “rent[ing], leas[ing], or mak[ing] available for
9 use ... [a] building, room, space, or enclosure for the purpose of unlawfully
10 manufacturing, storing, or distributing any controlled substance ...” (§ 11366 .5).

11 Whether the MMPA bars local governments from using nuisance abatement law and
12 penal legislation to prohibit the use of property for medical marijuana purposes remains
13 to be determined. Unlike in *Ross*, where the Supreme Court observed that “[t]he
14 operative provisions of the [CUA] do not speak to employment law” (42 Cal.4th at p.
15 928), the MMPA explicitly touches on land use law by proscribing in sections 11362.765
16 and 11362.775 the application of sections 11570, 11366, and 11366.5 to uses of property
17 involving medical marijuana. Here, viewing the allegations of the complaint most
18 favorably to the plaintiffs, as is required on demurrer, it appears incongruous at first
19 glance to conclude a city may criminalize as a misdemeanor a particular use of property
20 the state expressly has exempted from “criminal liability” in sections 11362.765 and
21 11362.775. Put another way, it seems odd the Legislature would disagree with federal
22 policymakers about including medical marijuana in penal and drug house abatement
23 legislation (compare 21 U.S.C. §§ 812 & 856 with §§ 11362.765 & 11362.775), but
24 intend that local legislators could side with their federal-instead of state-counterparts in
25 prohibiting and criminalizing property uses “solely on the basis” of medical marijuana
26 activities. (§§ 11362.765 & 11362.775.) After all, local entities are creatures of the state,
27 not the federal government.

28 *Qualified Patients Assn.*, *supra*, 187 Cal.App.4th at 753-54.

As *Qualified Patients Assn.* suggests, there is a statutory and logical contradiction between the
Ordinance and the MMPA. The MMPA prohibits criminal sanctions for collective cultivation if one
uses land for that sole purpose, while the Ordinance criminally sanctions that same conduct. There is no
readily apparent way to reconcile these two contradictory laws. The criminal sanctions language from
the MMPA controls.

The City argues that *People v. Mentch* (2008) 45 Cal.4th 275, controls. *Mentch* only provides
guidance on *who* is immune from criminal prosecution under the MMPA and the CUA *and in what*

1 scenarios someone is immune, not what uses of property are permitted under the MMPA and the CUA.

2 This is clear from the language of the opinion:

3 Here, this means *Mentch*, to the extent he assisted in administering, or advised or
4 counseled in the administration or cultivation of, medical marijuana, could not be charged
5 with cultivation or possession for sale “on that sole basis.” (§ 11362.765, subd. (a).) It
6 does not mean *Mentch* could not be charged with cultivation or possession for sale on
7 any basis; to the extent he went beyond the immunized range of conduct, i.e.,
8 administration, advice, and counseling, he would, once again, subject himself to the full
9 force of the criminal law. As it is undisputed *Mentch* did much more than administer,
10 advise, and counsel, the [MMPA] provides him no defense, and the trial court did not err
11 in failing to instruct on it.

12 *Mentch, supra*, 45 Cal.4th at 292. *Mentch* explains what the “solely on the basis” language from
13 *Qualified Patients Assn.* and the MMPA means. For instance, someone selling medical marijuana for a
14 profit would not be immunized under the MMPA, nor would someone providing medical marijuana to
15 another if that person does not qualify as a “primary caregiver” as defined in *Mentch*; however, this is
16 the limit of the opinion. The cases before this court reach beyond the facts and the holding of *Mentch*.
17 Plaintiffs are allegedly collectively cultivating medical marijuana as permitted by the MMPA. The
18 Ordinance stands to criminalize that otherwise immunized conduct, because Plaintiffs are not one of the
19 seventy collectives permitted to continue operating. *Mentch* does not control under these facts. The
20 criminal sanctions language from the Ordinance must be stricken because it commands what the state
21 law prohibits: criminal prosecution for collective cultivation of medical marijuana.

22 2. The Sunset Provision is preempted:

23 Section 45.19.6.10 of the Ordinance provides that its provisions shall sunset two years after the
24 effective date “and all collectives shall cease operation immediately, unless the City Council adopts an
25 ordinance to extend these provisions.”

26 This section of the Ordinance will prevent collectives even though the MMPA permits their
27 existence (put another way, it will “prohibit what the statute commands.” *Sherman-Williams, supra*, 4
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1 Cal.4th at 902.) While the Ordinance prohibits all but seventy collectives to continue operating, it still
2 permits collectives to operate. On this point, there is no clear contradiction. But a blanket ban on all
3 collectives in the City of Los Angeles, as the sunset provision purports to do, goes too far and
4 contradicts the MMPA. The court recognizes the possibility that the City will adopt an alternative
5 ordinance to permit collectives to operate within its borders, a fact that arguably makes this point too
6 uncertain and perhaps not ripe for a ruling. Nevertheless, the court believes it is preferable to decide this
7 issue now, while the City has the luxury of time to rework the Ordinance, as opposed to waiting two
8 years and creating another round of litigation.
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11 **2. The Ordinance deprives certain Plaintiffs of equal protection of the laws:**
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13 The Ordinance caps the maximum number of collectives at seventy, to be distributed about the
14 City. § 45.19.6.2 (B). To become one of those seventy, the Ordinance requires collectives to file a
15 “registration form.” (Ordinance § 45.19.6.2 (A).) The only collectives eligible to file this form are those
16 that, among other things, registered pursuant to the ICO on or before November 13, 2007. (*Id.* at §
17 45.19.6.2(B)(2).) In other words, the medical marijuana collectives that did not register under the ICO
18 may not register now.
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20 The relief requested by many of the Plaintiffs (who allegedly have operated lawfully and without
21 complaints from neighbors) is not to continue operating, but to be given the chance to continue
22 operating by submitting an application and registering in accordance with the Ordinance. The question
23 becomes whether the classification of collectives into those that registered under the ICO and those that
24 did not denies Plaintiffs the equal protection of the laws.
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26 Both the federal and state constitutions guarantee equal protection of the laws to all persons.
27 *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199. “The first prerequisite to a meritorious claim is a
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1 showing that the state has adopted a classification that affects two or more similarly situated groups in
2 an unequal manner.” *Id.* at 1199. “The equal protection clause requires more of a state law than
3 nondiscriminatory application within the class it establishes. (Citation.) It also imposes a requirement
4 of some rationality in the nature of the class singled out.” *Id.* “When a showing is made that two
5 similarly situated groups are treated disparately, the court must then determine whether the government
6 has a sufficient reason for distinguishing between them.” *G.G. Doe v. California Dept. of Justice* (2009)
7 173 Cal.App.4th 1095, 1111. “In resolving equal protection issues, the United States Supreme Court has
8 used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon
9 fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to
10 achieve a compelling state interest. Classifications based on gender are subject to an intermediate level
11 of review. But most legislation is tested only to determine if the challenged classification bears a rational
12 relationship to a legitimate state purpose.” *Hofsheier, supra*, at 1200.

15 Here, the City’s statutory scheme treats two similarly situated groups differently. The rational
16 basis test applies, because the ordinance does not create a suspect classification and does not touch upon
17 a fundamental interest. Under the rational basis test, ““a statutory classification that neither proceeds
18 along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal
19 protection challenge *if there is any reasonably conceivable state of facts that could provide a rational*
20 *basis for the classification.* (Citations.) Where there are ‘plausible reasons’ for [the classification] ‘our
21 inquiry is at an end.’”” *Hofsheier, supra*, at 1200-01, Citing *Kasler v. Lockyer* (2000) 23 Cal.4th 472,
22 481-482. “The party raising an equal protection challenge has the burden of establishing
23 unconstitutionality.” *G.G. Doe, supra*, 173 Cal.App.4th at 1111. The classification “must be reasonable,
24 not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the
25 object of the legislation, so that all persons similarly circumstanced shall be treated alike.” *F.S. Royster*
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1 *Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920). Put simply, the City cannot
2 legislate different treatment on the basis of criteria that is wholly unrelated to the purpose of the
3 ordinance. *Reed v Reed*, 404 U.S. 71, 75 (1971).

4 At first blush, the City's legislation of different treatment is based on criteria related to the
5 Ordinance's purpose, which is public safety. Collectives that registered under the ICO and have
6 remained in operation since November 2007 have a "track record." The rationale is that because the
7 pre-ICO collectives followed the City's laws and filed their documents by November 13, 2007, they are
8 more likely to abide by the City's laws moving forward. Compliance with the City's laws will further
9 the public safety and welfare goals of the Ordinance. The classification appears "reasonable, not
10 arbitrary," and rests upon "some ground of difference having a fair and substantial relation to the object
11 of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano*
12 *Co., supra*, at 415.

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15 Plaintiffs cannot successfully argue that the Ordinance unfairly favors existing, or older,
16 collectives over newer ones. In *Martinet v. Department of Fish and Game* (1988) 203 Cal.App.3d 791,
17 the court summarized similar distinctions under the equal protection analysis:

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19 An economic regulation creating classifications with some reasonable basis does not
20 result in denial of equal protection simply because the classifications are mathematically
21 imprecise or because their application results in some inequality. *Ferrante v. Fish &*
22 *Game Commission* (1946) 29 Cal.2d 365, 372. A law which favors existing businesses
23 over new ones will be upheld if there is any reasonable and substantial justification for
24 the distinction. *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, 382. The person
25 challenging such a classification has the burden of proving it is arbitrary and without
26 reasonable foundation. *Ferrante, supra*, 29 Cal.2d at p. 372. "[If] any state of facts
27 reasonably can be conceived that would sustain it, the existence of that state of facts at
28 the time the law was enacted must be assumed." (*Ibid.*)

29 *Martinet, supra*, 203 Cal.App.3d at 794. One of the clearest examples of such a distinction, which was
30 upheld by the United States Supreme Court, appears in *City of New Orleans v. Dukes* 427 U.S. 297
31 (1976). The City of New Orleans sharply limited the number of street and pushcart vendors in their

1 French Quarter "as a means 'to preserve the appearance and custom valued by the Quarter's residents
2 and attractive to tourists.'" *Dukes, supra*, at 304. The Supreme Court found that:

3 The legitimacy of that objective is obvious. The City Council plainly could further that
4 objective by making the reasoned judgment that street peddlers and hawkers tend to
5 interfere with the charm and beauty of a historic area and disturb tourists and disrupt
6 their enjoyment of that charm and beauty, and that such vendors in the Vieux Carre, the
7 heart of the city's tourist industry, might thus have a deleterious effect on the economy
8 of the city. They therefore determined that to ensure the economic vitality of that area,
9 such businesses should be substantially curtailed in the Vieux Carre, if not totally
10 banned.

11 *Dukes, supra*, at 304-05. In 1972, the City of New Orleans banned most of the peddlers and hawkers,
12 but adopted a "grandfather provision" that allowed peddlers who had registered before January 1972 to
13 stay in existence:

14 It is suggested that the "grandfather provision," allowing the continued operation of
15 some vendors was a totally arbitrary and irrational method of achieving the city's
16 purpose. But rather than proceeding by the immediate and absolute abolition of all
17 pushcart food vendors, the city could rationally choose initially to eliminate vendors of
18 more recent vintage. This gradual approach to the problem is not constitutionally
19 impermissible. The governing constitutional principle was stated in *Katzenbach v.*
20 *Morgan* 384 U.S. 641, 657(1966): "[W]e are guided by the familiar principles that a
21 'statute is not invalid under the Constitution because it might have gone farther than it
22 did,' (Citation,) that a legislature need not 'strike at all evils at the same time,' (Citation,) and that 'reform may take one step at a time, addressing itself to the phase of the
23 problem which seems most acute to the legislative mind,'" (Citation.) . . .

24 The city could reasonably decide that newer businesses were less likely to have built up
25 substantial reliance interests in continued operation in the Vieux Carre and that the two
26 vendors who qualified under the "grandfather clause" -- both of whom had operated in
27 the area for over 20 years rather than only eight -- had themselves become part of the
28 distinctive character and charm that distinguishes the Vieux Carre. We cannot say that
these judgments so lack rationality that they constitute a constitutionally impermissible
denial of equal protection.

Dukes, supra, at 305.

Legislatures may implement their program step by step, (Citation,) in such economic
areas, adopting regulations that only partially ameliorate a perceived evil and deferring
complete elimination of the evil to future regulations. (Citation.) In short, the judiciary
may not sit as a superlegislature to judge the wisdom or desirability of legislative policy
determinations made in areas that neither affect fundamental rights nor proceed along

1 suspect lines, (Citation;) in the local economic sphere, it is only the invidious
2 discrimination, the wholly arbitrary act, which cannot stand consistently with the
Fourteenth Amendment. (Citation.)

3 *Dukes, supra*, at 303-04.

4 If the facts here matched *Dukes*, there would be no equal protection violation. What complicates
5 the instant case is that on September 15, 2007, almost sixty days before the November 13 deadline, the
6 ICO expired by operation of law. The natural result of the ICO's expiration would be to remove any
7 reason and incentive for collectives to file documents with the City Clerk's Office as required by the
8 ICO so as to demonstrate a "willingness" to follow the City's laws. A collective that existed and was
9 entirely law-abiding before November 13, 2007, may have decided not to register because, quite simply,
10 there was no longer any need to. Now thanks to that choice, which was quite logical at the time, the
11 collective would find itself unable to continue in business. The court does not see how this result serves
12 the purpose of the Ordinance. The Ordinance's use of the November 13, 2007 deadline loses any
13 relation to the Ordinance's stated purpose of enhancing public safety, because the ICO was invalid
14 before the deadline came. There was no longer any reason to comply. A collective that procrastinated
15 and delayed filing only to learn that the law had been invalidated does not make it less likely to comply
16 with the City's laws moving forward. The collective's "track record" is no worse than those collectives
17 that filed early. The United States Supreme Court discussed the type of connection between a law's
18 purpose and the classification necessary to satisfy the equal protection clause:
19
20
21

22 [E]ven in the ordinary equal protection case calling for the most deferential of standards,
23 we insist on knowing the relation between the classification adopted and the object to be
24 attained. The search for the link between classification and objective gives substance to
25 the Equal Protection Clause; it provides guidance and discipline for the legislature,
26 which is entitled to know what sorts of laws it can pass; and it marks the limits of our
27 own authority. In the ordinary case, a law will be sustained if it can be said to advance a
legitimate government interest, even if the law seems unwise or works to the
disadvantage of a particular group, or if the rationale for it seems tenuous.

28 *Romer v Evans* 517 U.S. 620, 632 (1996).

1 The record indicates that an increase in the number of collectives has been linked to increased
2 crime, which is inimical to the health, safety and welfare of residents of Los Angeles. As articulated in
3 the preamble,⁷ a goal of the ordinance was to limit the number of collectives in order to protect the
4 citizenry. This is laudable and necessary. Crime, including violent crime, has followed the opening of
5 certain medical marijuana collectives in this community. Nevertheless, the focus of judicial inquiry
6 should be on the correspondence between the classification and the legislative goals (*People v. Valdez*
7 (2009) 174 Cal.App.4th 1528, 1531), not on the classification's overall effect on those goals. The
8 classification should serve the ordinance's purpose thanks to more than happenstance. The connection
9 between classification and legislative goals as seen in *Dukes, supra*, constitutes a good example of a
10 proper link. Other cases include the following:

- 13 • In *Martinet, supra*, 203 Cal.App.3d at 795, the court upheld a law limiting shark and swordfish
14 permits to fishermen with a certain amount of experience, in order to protect against overfishing.
15 The court focused on the reliance of the more experienced fisherman on the continued
16 availability of fishing for their livelihood.
- 17 • In *Bradley v. Public Utilities Com.* 289 U.S. 92, 97 (1933), the United States Supreme Court
18 upheld a state order, which denied a common carrier a certificate to use state highway, as a valid
19 exercise of the police power in order to promote safety by reducing highway congestion. The
20 court stated that a "classification based on priority of authorized operation has a natural and
21 obvious relation to the purpose of the regulation." *Id.* at 97.

22 However, in *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, a law denied permits to fish
23 reduction plants that were not housed in separate buildings. *Id.* at 381-82. The purpose of the law was
24 to make it easier for inspectors to determine whether the facilities in a building consisted of one or
25 multiple fish reduction plants. *Id.* at 383. The law contained an exception for plants that had been
26 issued permits in the prior year. *Id.* at 382. Our Supreme Court found the classification of whether
27 plants were/were not allowed was not rationally based because the year in which the plant had last

28 ⁷ E.g., "WHEREAS, there have been recent reports from the Los Angeles Police Department and the media of an increase in
and escalation of violent crime at the location of medical marijuana dispensaries in the City of Los Angeles, and the
California Police Chiefs Association has compiled an extensive report detailing the negative secondary effects associated
with medical marijuana dispensaries;..."

1 received a permit would not make it easier for inspectors to determine the number of plants in any given
2 building. *Id.* at 384.

3
4 In the case at bar, the only difference between those collectives that registered by November 13,
5 2007, and the others is the (idle, as it turned out) act of submitting various paperwork to the City Clerk's
6 Office. The justification for using that date as a bright line was compromised, if not confounded, by the
7 fact that it was unnecessary to register. The requirement had ceased almost two months earlier, and no
8 one could have anticipated that compliance with a dead statute would be necessary in order to continue
9 as a collective three years later. Like the classification in *Del Mar Canning Co.*, there is no rational
10 relationship between the classification and the purpose of the Ordinance. Therefore, the court finds the
11 use of the November 13, 2007 deadline arbitrary and capricious such that it violates the equal protection
12 clauses of the constitutions of the United States and the State of California. Had the Ordinance done
13 nothing more than give a calendar date before which collectives were "grandfathered," the Ordinance
14 probably would have been in line with cases like *Dukes, supra*. Amending the Ordinance accordingly
15 would most likely be the easiest way to avoid another equal protection challenge. At a subsequent
16 hearing, should there be a question about when a collective opened, those that filed documents in
17 connection with the expired ICO would still be able to use that fact as evidence, for the file-stamped
18 papers would be relevant as to when a collective was operating. Conversely, if by November 13, 2007,
19 the management of a collective was unaware that the ICO had expired yet failed to register with the City
20 Clerk's Office, that fact would be probative evidence with respect to a collective's willingness to follow
21 the laws. However, for the reasons stated, compliance with the expired ordinance cannot become the
22 *sine qua non* of the right to continue operating.

23 **3. The Ordinance violates the procedural due process rights of certain Plaintiffs:**

24 Plaintiffs argue that by preventing them from operating their collectives, the City has deprived
25 them of their vested property right without the opportunity of a neutral hearing. Plaintiffs argue that
26 section 45.19.6.7 deprives them of their vested property right without due process of law.
27
28

1 It is undisputed that Plaintiffs were denied any hearing prior to being forced to shut down their
2 businesses. The letter from the City dated May 4, 2010, simply stated that Plaintiffs were in violation of
3 the Ordinance by “not register[ing] with the City Clerk prior to November 13, 2007.” (Motion, 2nd Ex.
4 9.) The letter goes on to state that Plaintiffs “must therefore immediately cease [their] operations.” *Id.*
5 Therefore, if due process rights are triggered, then a violation has occurred because the City provided no
6 opportunity for the collectives to be heard at a meaningful time and in a meaningful matter.
7

8 *Ryan v. California Interscholastic Federation*, (2001) 94 Cal.App.4th 1048, controls the due
9 process issue here. The *Ryan* court held that in order to enjoy procedural due process protection, the
10 plaintiff must have a statutorily conferred benefit. *Ryan, supra*, 94 Cal.App.4th at 1071.⁸ This is an
11 important distinction from what is required under the U.S. Constitution in order to state a claim for due
12 process protection. *Ryan* (cited at length below) summarized how due process protection is triggered by
13 statutorily conferred benefits:
14

15 Our state due process constitutional analysis differs from that conducted pursuant to the
16 federal due process clause in that the claimant need not establish a property or liberty
17 interest as a prerequisite to invoking due process protection. *People v. Ramirez* (1979) 25
18 Cal.3d 260, 263-264; *Smith v. Board of Medical Quality Assurance* (1988) 202
19 Cal.App.3d 316, 327, focused rather on an individual's due process liberty interest to be
20 free from arbitrary adjudicative procedures (*People v. Ramirez, supra*, 25 Cal.3d at 263,
21 268), procedural due process under the California Constitution is “much more inclusive”
22 and protects a broader range of interests than under the federal Constitution (*San Jose*
23 *Police Officers Assn. v. City of San Jose* (1988) 199 Cal.App.3d 1471, 1478 superseded
24 by statute as stated in *Knapp v. City of Gardena* (1990) 221 Cal.App.3d 344, 347-348;
25 (Citation.) According to our Supreme Court, it “has expanded upon the federal analytical
26 base by focusing on the administrative process itself.” (*Saleeby v. State Bar* (1985) 39
27 Cal.3d 547, 564.) In *People v. Ramirez, supra*, 25 Cal.3d at pages 263-264, our Supreme
28 Court held that application of the due process clauses of the California Constitution

⁸ The facts of *Ryan* are admittedly different from the case at bar. An Australian student sought to transfer to a US high school (“RBV”), and later to attend and play football for the University of Colorado. *Ryan, supra*, at 1053-54. The plaintiff tried to play football for RBV in preparation for later attending the University of Colorado. He applied for eligibility as required to the California Interscholastic Federation (“CIF.”). *Id.* His application was denied and he appealed his denial to the CIF. His appeal was denied. Plaintiff then petitioned the courts for administrative mandamus. Trial court awarded Ryan his requested relief, but the Court of Appeal reversed, holding among other things, that plaintiff had failed to identify the requisite statutorily conferred benefit or interest of which he had been deprived. (*Id* at 1072.) Therefore, he had no due process protections afforded by the California Constitution in a review hearing.

1 “must be determined in the context of the individual's due process liberty interest in
2 freedom from arbitrary adjudicative procedures. *Thus, when a person is deprived of a*
3 *statutorily conferred benefit, due process analysis must start not with a judicial attempt*
4 *to decide whether the statute has created an 'entitlement' that can be defined as 'liberty'*
5 *or 'property,' but with an assessment of what procedural protections are constitutionally*
6 *required in light of the governmental and private interests at stake.” (Accord, In re*
7 *Jackson (1987) 43 Cal.3d 501, 510; Hernandez v. Department of Motor Vehicles (1981)*
8 *30 Cal.3d 70, 81, n. 12.) The Ramirez court instructed the state courts to “evaluate the*
9 *extent to which procedural protections can be tailored to promote more accurate and*
10 *reliable administrative decisions in light of the governmental and private interests at*
11 *stake' rather than relying 'on whether or not the state limits administrative control over a*
12 *statutory benefit or deprivation by the occurrence of specified conditions....’” (Saleeby v.*
13 *State Bar, supra, 39 Cal.3d at 564-565, quoting People v. Ramirez, supra, 25 Cal.3d at*
14 *267.) The Ramirez court further held that “the due process safeguards required for*
15 *protection of an individual's statutory interests must be analyzed in the context of the*
16 *principle that freedom from arbitrary adjudicative procedures is a substantive element of*
17 *one's liberty. [Citation.] This approach presumes that when an individual is subjected to*
18 *deprivatory governmental action, he always has a due process liberty interest both in fair*
19 *and unprejudicial decision-making and in being treated with respect and dignity.” (Id. at*
20 *268.)*

13 Although under the state due process analysis an aggrieved party need not establish a
14 protected property interest, the claimant must nevertheless identify a statutorily conferred
15 benefit or interest of which he or she has been deprived to trigger procedural due process
16 under the California Constitution and the Ramirez analysis of what procedure is due.
17 (*People v. Ramirez, supra, 25 Cal.3d at 264, 266, 268; Schultz v. Regents of University of*
18 *California, supra, 160 Cal.App.3d at 786; see also In re Jackson, supra, 43 Cal.3d at 510,*
19 *n. 8; Nichols v. County of Santa Clara (1990) 223 Cal.App.3d 1236, 1246; San Jose*
20 *Police Officers Assn. v. City of San Jose, supra, 199 Cal.App.3d at 1479.) The*
21 *“requirement of a statutorily conferred benefit limits the universe of potential due*
22 *process claims: presumably not every citizen adversely affected by governmental action*
23 *can assert due process rights; identification of a statutory benefit subject to deprivation*
24 *is a prerequisite.” (Schultz v. Regents of University of California, supra, 160 Cal.App.3d*
25 *at 786.)*

22 *Ryan, supra, 94 Cal.App.4th at 1069-71 (emphasis added.)*

23 The City argues that Plaintiffs have no statutorily conferred benefit to operate a collective. The
24 court considers the CUA and the MMPA together and finds that the State of California authorized
25 certain people to operate collectives. The CUA provided, for the first time, the right for seriously ill
26 Californians to use marijuana for medical purposes when recommended by a physician. The MMPA
27 permitted, for the first time, qualified patients and caregivers of qualified patients to collectively
28

1 cultivate marijuana for medical purposes with freedom from prosecution.⁹ Regardless of whether the
2 City of Los Angeles conferred a right to operate a specific type of business within its borders,¹⁰ the State
3 of California permits collective cultivation by statute. In the absence of machinery for a neutral hearing,
4 the Ordinance removes rights conferred by state law as found in the Health and Safety Code. To do that,
5 *Ryan* requires some procedural due process. Here there was none.¹¹ Therefore, the Ordinance denies
6 without due process of the law the statutorily conferred right to operate a collective. To this extent, the
7 Ordinance is unconstitutional.¹²

9 In reaching this conclusion, the court hastens to add that the City has the “power to govern – the
10 inherent reserved power... to subject individual rights (including rights conferred by the CUA and the
11 MMPA) to reasonable regulation for the general welfare.” (*See e.g., Witkin, Summary of California*
12 *Law*, 10th edition, Constitutional Law §§ 976, 977, 978 and cases cited therein.) The record in the
13 actions before this court displays a serious threat to the public welfare caused by the burgeoning
14 number of medical marijuana collectives in our community. The City has a duty to address the problem
15 of drug dealers and recreational users who are attempting to hijack California’s medical marijuana
16
17

18
19 ⁹ The express intent of the Legislature in adopting the MPMA was to: “(1) Clarify the scope of the application of the [CUA]
20 and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid
21 unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers. (2)
22 Promote uniform and consistent application of the [CUA] among the counties within the state. (3) Enhance the access of
23 patients and caregivers to medical marijuana through *collective, cooperative cultivation projects*.” (emphasis added). Health
& Safety Code § 11362.775 provides: “Qualified patients, persons with valid identification cards, and the designated primary
caregivers of qualified patients and persons with identification cards, *who associate within the State of California in order*
collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject
to state criminal sanctions . . .”

24 ¹⁰ Permits can sometimes trigger due process protection. The parties argued at length about whether Plaintiffs were required
25 to obtain a permit in order to operate a collective within the city. Plaintiffs obtained no permits and no permits existed for
operating collectives within the city. While permits are one way of triggering due process protection, statutorily conferred
rights also trigger due process protection under *Ryan*.

26 ¹¹ The Legislature cannot cut off all remedy. Unless it leaves a reasonably efficient remedy, the right itself (here, to operate a
27 medical marijuana collective) is affected, and the statute will be held invalid as an impairment of a substantive right. *Lane*
v. Wilson (2939) 307 U.S. 268; *Coleman v. Superior Court* (1933) 135 C.A. 74, 76

28 ¹² Plaintiff also puts forth an interesting argument by citing to *County of Butte v. Superior Court*, (2009) 175 Cal.App.4th 729,
731-32. *See Reply to Defendant’s Supp. Memo*, 4:20-5:16. This argument is less convincing because the court dealt with an
individual patient’s due process rights relative to a criminal investigation. That case only went as far as to hold that patients
have a statutory benefit which is protected under the Constitution—not collectives, who are the Plaintiffs in this action.

1 legislation for their own benefit. Failure to do will not only endanger the citizens as a whole, but will
2 negatively impact the ability of legitimate patients to obtain the medical marijuana they need. But in
3 discharging its powers and duties under the police power, the City must not lose sight of the fact that the
4 People of the State of California have conferred on qualified patients the right to obtain marijuana for
5 medical purposes. No local subdivision should be allowed to curtail that right wholesale or regulate it
6 out of existence.
7

8 The judicial branch is not the legislature, and this court will not endeavor to usurp the function of
9 the Los Angeles City Council. Having said that, the court wishes to note several issues the City should
10 consider in its salutary attempt to regulate marijuana collectives. Most troubling are the complaints that
11 the police have raided collectives where, allegedly, no laws have been broken. From the outside looking
12 in, it can be hard, sometimes impossible, for an officer to determine whether a criminal offense has
13 occurred when a person enters a collective and, minutes later, leaves with marijuana. The City takes the
14 position that this scenario constitutes an illegal sale. This conclusion is based on undercover activity:
15 according to the record, an officer enters a collective, shows a physician's recommendation, signs
16 whatever documentation is required to join the collective, and then pays money for medical marijuana.
17 Plaintiffs contend that patients may obtain medical marijuana in this fashion so long as they have a valid
18 doctor's recommendation and join the collective. The law is unclear in this regard, with the result that
19 the police face an extraordinarily difficult enforcement challenge. Underlying the controversy is the fact
20 that what constitutes a medical marijuana collective remains a matter for debate.
21
22

23
24 As provided for under the MMPA,¹³ the Attorney General promulgated guidelines, which among
25 other things discuss how collectives should conduct their business. In attempting to determine what
26 constitutes a collective, one must consider the Guidelines, which were quoted with approval in *People v.*
27

28 ¹³ Health and Safety Code § 11362.81(d) requires the Attorney General to adopt "guidelines to ensure the security and
nondiversion of marijuana grown for medical use."

1 *Hochanadel* (2009) 176 Cal.App.4th 997.¹⁴ The Guidelines provide some instruction to law enforcement
2 as to whether activities comply with the CUA and MMPA. In this regard, the Guidelines specifically
3 address “Storefront Dispensaries.” (Guidelines, *supra*, at p. 11, boldface omitted.) The Attorney
4 General is of the opinion that while “dispensaries, as such, are not recognized under the law,” “a
5 properly organized and operated collective or cooperative that dispenses medical marijuana through a
6

7
8 ¹⁴ Besides those listed in the main text of this order, the AG’s Guidelines also include the following as outlined in
9 *Hochanadel, supra*, 176 Cal.App.4th at 1010-11:

10 “Further, the A.G. Guidelines provide a definition of “cooperatives” and “collectives.” A cooperative “must
11 file articles of incorporation with the state and conduct its business for the mutual benefit of its members.
12 [Citation.] No business may call itself a ‘cooperative’ (or ‘co-op’) unless it is properly organized and
13 registered as such a corporation under the Corporations or Food and Agriculture Code. [Citation.]
14 Cooperative corporations are ‘democratically controlled and are not organized to make a profit for
15 themselves, as such, or for their members, as such, but primarily for their members as patrons.’ [Citation.]”
16 (A.G. Guidelines, *supra*, at p. 8.) Further, “[c]ooperatives must follow strict rules on organization, articles,
17 elections, and distribution of earnings, and must report individual transactions from individual members
18 each year.” (*Ibid.*)

19 A collective is “‘a business, farm, etc., jointly owned and operated by the members of a group.’ [Citation.]”
20 (A.G. Guidelines, *supra*, at p. 8.) Thus, “a collective should be an organization that merely facilitates the
21 collaborative efforts of patient and caregiver members—including the allocation of costs and revenues.”
22 (*Ibid.*) Further, the A.G. Guidelines opine, “The collective should not purchase marijuana from, or sell to,
23 non-members; instead, it should only provide a means for facilitating or coordinating transactions between
24 members.” (*Ibid.*)

25 The A.G. Guidelines further provide guidelines for the lawful operation of cooperatives and collectives.
26 They must be nonprofit operations. (A.G. Guidelines, *supra*, at p. 9.) They may “acquire marijuana only
27 from their constituent members, because only marijuana grown by a qualified patient or his or her primary
28 caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative . . .
29 *Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its*
30 *members.* Instead, the cycle should be a closed-circuit of marijuana cultivation and consumption with no
31 purchases or sales to or from non-members. To help prevent diversion of medical marijuana to non-medical
32 markets, collectives and cooperatives should document each member's contribution of labor, resources, or
33 money to the enterprise. They should also track and record the source of their marijuana.” (*Id.* at p. 10,
34 italics added.)

35 Distribution and sales to nonmembers is prohibited: “State law allows primary caregivers to be reimbursed
36 for certain services (including marijuana cultivation), but nothing allows individuals or groups to sell or
37 distribute marijuana to non-members. Accordingly, a collective or cooperative may not distribute medical
38 marijuana to any person who is not a member in good standing of the organization. A dispensing collective
39 or cooperative may credit its members for marijuana they provide to the collective, which it may then
40 allocate to other members. [Citation.] Members also may reimburse the collective or cooperative for
41 marijuana that has been allocated to them. Any monetary reimbursement that members provide to the
42 collective or cooperative should only be an amount necessary to cover overhead costs and operating
43 expenses.” (A.G. Guidelines, *supra*, at p. 10.)

1 storefront may be lawful under California law, but ... dispensaries that do not substantially comply with
2 the guidelines [covering collectives and cooperatives] are likely operating outside the protections of [the
3 CUA] and the MMP[A], and ... the individuals operating such entities may be subject to arrest and
4 criminal prosecution under California law. *For example, dispensaries that merely require patients to*
5 *complete a form summarily designating the business owner as their primary caregiver—and then*
6 *offering marijuana in exchange for cash ‘donations’—are likely unlawful.”* (Guidelines, *supra*, at p. 11,
7 *italics added.*)” While the Attorney General’s views do not bind this court, they are entitled to
8 considerable weight. *Hochanadel, supra*, 176 Cal.App.4th at 1011. The court concludes that under
9 proper conditions, as set out in the cases and the Guidelines, a storefront dispensary can be a legitimate
10 medical marijuana collective. The Guidelines also suggest that under proper circumstances, an
11 exchange of money for medical marijuana is allowed. (E.g., “...cooperatives should document each
12 member’s contribution of labor, resources, or money to the enterprise.” *Id.*, at p. 10.)
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17 **4. The Ordinance violates members’ rights to privacy in their general contact information;**
18 **certain of Plaintiffs’ privacy arguments are moot; others are unpersuasive:**

19 Article I Section 1 of the California Constitution guarantees the people of the State of California,
20 among other things, the right of privacy. Defendant argues that Plaintiffs lack standing to assert privacy
21 claims. It is therefore important to consider the threshold question: who or what can claim the
22 protections of the right to privacy?

23 The general rule is that the right of privacy is limited to “people” and does not apply to
24 corporations. *Roberts v. Gulf Oil Corp.* (1983) 147 Cal.App.3d 770, 791. However, the inquiry changes
25 when a corporation is asserting the rights of its members:
26

27 Although corporations have a lesser right to privacy than human beings and are not
28 entitled to claim a right to privacy in terms of a fundamental right, some right to privacy
exists. Privacy rights accorded artificial entities are not stagnant, but depend on the

1 circumstances. *United States v. Hubbard*, *supra.*, 650 F.2d 293 speaks to this point:
2 “However, we think one cannot draw a bright line at the corporate structure. The public
3 attributes of corporations may indeed reduce *pro tanto* the reasonability of their
4 expectation of privacy, *but the nature and purposes of the corporate entity and the nature*
5 *of the interest sought to be protected will determine the question whether under given*
6 *facts the corporation per se has a protectable privacy interest. Moreover at least certain*
7 *types of organizations -corporate or non-corporate-should be able to assert in good faith*
8 *the privacy interests of their members. Finally, whether acting for itself or on behalf of its*
9 *members, surely the privacy interests of a 'church' [which was at issue in Hubbard] must*
10 *be assessed somewhat differently from the privacy interests of other sorts of*
11 *'corporations.'”* (Citation).

12 It is clear to us that the law is developing in the direction that the strength of the privacy
13 right being asserted by a nonhuman entity depends on the circumstances. Two critical
14 factors are the strength of the nexus between the artificial entity and human beings and
15 the context in which the controversy arises.

16 *Roberts, supra*, 147 Cal.App.3d at 796-97. Although it seems that collectives could assert privacy rights
17 of their members, based on these facts, *Roberts* makes it clear that the right to privacy claimed by the
18 corporate entities in this action would not rise to the level of a fundamental right.

19 The patient Plaintiffs’ claims are different. There is one patient plaintiff class action: *Kevin*
20 *Anderson, et al. v. City of Los Angeles*, (BC438671).¹⁵ On these claims, and on the freedom of
21 association claims (which can be asserted by either patient Plaintiffs themselves or by the collectives,
22 assuming they have associational standing), a heightened level of scrutiny applies.

23 The California Supreme Court articulated a three-prong test for determining whether violation of
24 the right to privacy has occurred:

25 A plaintiff alleging an invasion of privacy in violation of the state constitutional right to
26 privacy must establish each of the following: (1) a legally protected privacy interest; (2) a
27 reasonable expectation of privacy in the circumstances; and (3) conduct by defendant
28 constituting a serious invasion of privacy.

29 *Hill v. National Collegiate Athletic Association*, (1994) 7 Cal.4th 1, 39-40. A defendant prevails on this
30 claim by negating only one of the three elements. *Id* at 40.

31 _____
32 ¹⁵ There was a class action as part of the *Timothy Leary Case* (BS126927); however, Plaintiffs’ amended pleading dropped all
33 class allegations.

1 We are concerned here with two types of legally protected privacy interests: (1) informational
2 privacy—interest in precluding the dissemination or misuse of sensitive and confidential information;
3 and (2) autonomy privacy—interests in making intimate personal decisions or conducting personal
4 activities without observation, intrusion, or interference. *Hill, supra*, at 35.

5 Plaintiffs claim the Ordinance violates their informational privacy rights by (1) requiring
6 collectives to keep a log of all members' general contact information, and (2) by permitting the
7 disclosure of their medical history information. Section 45.19.6.4 allows the police to obtain
8 documents without a warrant, subpoena, or other court process.¹⁶ It appears that with the
9 exception of private medical records, members of the Los Angeles Police Department can, at
10 will, inspect a collective's records. Those records include the names and identifying information
11 of all of the members of a collective.
12
13

14 While the Ordinance requires certain procedural steps before the police can obtain "private
15 medical records,"¹⁷ the name, address, and telephone number of a member (patient) is not protected, nor
16 is there any control with respect to what the police may do with this information. During a hearing,
17
18

19 ¹⁶ Section 45.19.6.4 states in pertinent part: "A medical marijuana collective shall maintain records at a location accurately
20 and truthfully documenting, among other things: (1) the full name, address, and telephone number(s) of the owner, landlord
21 and/or lessee of the location; (2) the full name, address, and telephone number(s) of all members who are engaged in the
22 management of the collective and the exact nature of each member's participation in the management of the collective; (3)
23 *the full name, address, and telephone number(s) of all patient members to whom the collective provides medical marijuana, a*
24 *copy of a government-issued identification card for all patient members, and a copy of every attending physician's or*
25 *doctor's recommendation or patient identification card;* (4) the full name, address, and telephone number(s) of all primary
26 caregiver members to whom the collective provides medical marijuana and a copy of every written designation(s) by the
27 primary caregiver's qualified patient(s) or the primary caregiver's identification card; (5) written documentation of all
28 circumstances under which the collective provided medical marijuana to a non-member, including but not limited to the
recipient's name, address, and telephone number, amount of medical marijuana received, *and medical emergency*
justification; . . . (8) a log documenting each transfer of marijuana reflecting . . . *the full name of the member to whom it was*
transferred; . . . These records shall be maintained by the collective for a period of five years and shall be made available by
the collective to the Police Department upon request, *except that private medical records shall be made available by the*
collective to the Police Department only pursuant to a properly executed search warrant, subpoena, or court order."
(emphasis added)

¹⁷ ¹⁷ Ordinance section 45.19.6.1.B defines a "private medical record" as: "Documentation of the medical history of a
qualified patient or person with an identification card. 'Private medical record' shall not include the recommendation of an
attending physician or doctor for the medical use of marijuana, an identification card, or the designation of a primary
caregiver by a qualified patient or by a person with an identification card."

1 counsel for the City candidly admitted that the police may run a member's name through databases in
2 order to determine whether that person has a criminal record, and if so, the police may monitor that
3 person or place that person under surveillance. The court understands the reasons why law enforcement
4 may want this ability, but a person with a criminal record has the right to obtain medical marijuana
5 should a licensed physician so recommend, and she should not have her rights abridged for doing so. As
6 explained below, because the Ordinance permits police to obtain medical marijuana patients' general
7 contact information without any procedural safeguards, portions of Section 45.19.6.4 violate the
8 Plaintiffs' right to informational privacy under the *Hill* test.

9
10 1. Legally Protected Privacy Interest:

11 The court in *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669,
12 quoted two California Supreme Court decisions analyzing the need to protect patients' medical
13 information from government collection:
14

15
16 The Supreme Court, in *White v. Davis* [] (1975) 13 Cal.3d 757, articulated four purposes
17 of the 1972 amendment (of Article I § 1 of the California Constitution) in light of the
18 statement contained in the election brochure (drafted by the proponents) stating:

19 "First, the statement identifies the principal 'mischiefs' at which the amendment is
20 directed: (1) 'government snooping' and the secret gathering of personal information;
21 (2) the overbroad collection and retention of unnecessary personal information by
22 government and business interests; (3) the improper use of information properly
23 obtained for a specific purpose, for example, the use of it for another purpose or the
24 disclosure of it to some third party; and (4) the lack of a reasonable check on the
25 accuracy of existing records."

26 ...
27 And in *People v. Privitera* (1979) 23 Cal.3d 697, 709, the Supreme Court discerned:

28 ""(T)he moving force behind the new constitutional provision (to Article I § 1) was a
more focused privacy concern, relating to the accelerating encroachment on personal
freedom and security caused by increased surveillance and data collection activity in
contemporary society. The new provision's primary purpose is to afford individuals
some measure of protection against this most modern threat to personal privacy.""

In short the amendment was a voter response to a public awareness and concern that
"proliferation of government snooping and data collecting is threatening to destroy our

1 traditional freedoms. Government agencies seem to be competing to compile the most
2 extensive sets of dossiers of American citizens. Computerization of records makes it
3 possible to create "cradle-to-grave" profiles of every American.' " (*People v. Privitera*,
4 *supra*, at p. 709)

5 *Gherardini, supra*, 93 Cal.App.3d at 677-78 (emphasis added.) As the *Gherardini* court
6 recognized, the addition of the privacy right to Article I § 1 was principally motivated to prevent
7 personal data collection and government snooping. Our courts have also recognized the threat
8 to privacy interests stemming from, specifically, increased surveillance and data gathering. The
9 City has admitted that the police may run a member's name through databases in order to
10 determine whether that person has a criminal record and monitor him if he does so. This is the
11 exact type of governmental "mischief" the California Supreme Court identified as the impetus
12 for the 1972 amendment to Article I § 1. *White v. Davis, supra*, at 775. Given the facts of this
13 case, the members' general contact information constitutes a legally protected privacy interest.

14 2. Reasonable Expectation of Privacy:

15
16 Second, the court finds Defendants arguments against a reasonable expectation of privacy
17 unpersuasive. The *Hill* court reviewed what constitutes a reasonable expectation of privacy:

18 Customs, practices, and physical settings surrounding particular activities may create or
19 inhibit reasonable expectations of privacy. (Citations) . . . A "reasonable" expectation of
20 privacy is an objective entitlement founded on broadly based and widely accepted
21 community norms.

22 *Hill, supra*, 7 Cal.4th at 36-37.

23 The City analogizes to Health and Safety Code § 11100(a) (regulating pharmacies). However,
24 this section does not regulate as the City claims it does. § 11100(a) deals with the wholesale,
25 manufacture and retail sale of the most dangerous of chemicals—it does not specifically regulate
26
27
28

1 pharmacies. In fact, § 11100(a) specifically exempts pharmacists from § 11100.¹⁸ Moreover, §
2 11100(a) does not permit the Justice Department to access those records without a warrant. California
3 Code of Regulations § 1707 (Division 17, Title 16) requires pharmacies to “maintain medication profiles
4 on all patients who have prescriptions filled in that pharmacy” when they are prescribed dangerous
5 chemicals. These profiles include the patients’ full name, address, telephone number, date of birth,
6 gender, and the name, strength and dosage of the prescription. Patients who receive any of the
7 dangerous chemicals (from the pharmacy) are notified that their medical records will be kept for three
8 years and patients may apply for an offsite storage waiver. There is also no indication in § 1707 that the
9 police may obtain patients’ records without a search warrant, subpoena, or court order. The City also
10 argues that the Combat Methamphetamine Epidemic Act of 2005 (“CMEA”) is analogous to the
11 Ordinance. This analogy fails for the same reason. The CMEA does not provide for warrantless police
12 searches of records; rather, it specifically requires the Attorney General to provide express guidelines on
13 how to access those records.
14
15

16 Members of collectives have an objectively reasonable expectation of privacy because they
17 receive no indication or warning that the government will be able to obtain their medical records in the
18 first instance. The Ordinance contains no requirement that patients receive notice that their records can
19 be turned over to the police, nor are there any procedural safeguards limiting the governments’ access to
20 Plaintiffs’ personal contact information. *Hill* directs courts to consider “the customs, practices, and
21 physical settings surrounding particular activities.” *Hill, supra*, 7 Cal.4th at 36. A medical marijuana
22 patient who patronizes a collective does not impliedly consent to possible unlimited police surveillance.
23 Plaintiffs have a reasonable expectation of privacy in their general contact information.
24
25
26

27 ¹⁸ Subsection “(e)” states “This section shall not apply to any of the following: (1) Any pharmacist or other authorized person
28 who sells or furnishes a substance upon the prescription of a physician, dentist, podiatrist, or veterinarian.”

1 3. Serious Invasion of Privacy:

2 Third, it is what the Ordinance does not say about how this information will be used that
3 constitutes a serious invasion of privacy. We are left to speculate how police will utilize medical
4 marijuana patients' general contact information. The City Attorneys' honesty at the hearing regarding
5 the possible uses of this information, while laudable and appreciated, does not dispel the court's
6 concerns. The court is remains worried about the limits of the use of contact information that may be
7 entered into databases or used to set up surveillance of patients. The uncertainty surrounding the
8 possible uses of that information renders the invasion of privacy serious enough to trigger constitutional
9 protection. While *Hill* does not require the City to show a compelling interest (*Hill, supra*, at 34), it
10 does not do away with the consideration of whether less restrictive alternatives exist to achieve a law's
11 stated purpose. Here, the City does not claim that less restrictive alternatives are impossible or
12 improbable. The court believes that the City can pursue the Ordinance's stated purpose by less
13 restrictive means. While adding procedural protections to the Ordinance and/or some additional
14 transparency in the use of patients' general contact information may remedy the constitutional
15 shortcomings, as written, the Ordinance's provisions regarding disclosure of patients' general contact
16 information violate the right to privacy under Article I Section 1 of the Constitution of the State of
17 California.
18
19
20

21 The Ordinance also requires collectives to track how much marijuana they sell to people in
22 emergency situations and the medical reasons for needing that marijuana. This provision of the
23 Ordinance does not violate patient Plaintiffs' informational privacy rights.
24

25 When an ordinance "regulates business behavior, constitutional requirements are more relaxed
26 than they are for statutes that are penal in nature." *Amaral v. Cinats Corp. No. 2* (2008) 163
27 Cal.App.4th 1157, 1181. As noted above, section 45.19.6.4 requires collectives to keep records of the
28

1 “medical emergency justification” when non-members are forced to use another collective in a medical
2 emergency. The Ordinance includes a member’s “medical history” as a “Private Medical Record” in
3 section 45.19.6.1.B. This definition reasonably encompasses the emergency situation contemplated in
4 section 45.19.6.4 (referring to “medical emergency justification”) where collectives are forced to log
5 emergency non-member distributions of medical marijuana. The “Private Medical Records” definition
6 from section 45.19.6.4.B reasonably encompasses both members’ medical history and justification for
7 using medical marijuana. Both require additional procedural safeguards before the police may obtain
8 that information.
9

10 There is no other requirement in the Ordinance that collectives must record members’ reasons for
11 using medical marijuana. No other portion of the Ordinance requires collectives to track members’
12 medical history or their justification for using medical marijuana. Therefore, the only scenario when a
13 medical log containing patients’ medical conditions would even exist is when non-member patients
14 receive medical marijuana from a collective in an emergency situation. Because the Ordinance provides
15 added protection (requiring the police to first obtain a “properly executed search warrant, subpoena or
16 court order”) for the more sensitive “medical history” and “medical emergency justification”
17 information, the court finds that the Ordinance does not violate the third-prong of the *Hill*
18 test. *Hill*,
19 *supra*, 7 Cal.4th at 40. The City’s conduct in obtaining a search warrant, subpoena, or court order prior
20 to obtaining private medical information does not constitute a serious invasion of privacy. On balance,
21 the need for the police to track and prevent the illegal sales and diversion of medical marijuana greatly
22 outweighs the small percentage of members who would ever be required to disclose Private Medical
23 Records to a collective because of some emergency.
24
25

26 The court acknowledges that a patient with a physician’s recommendation could visit a large
27 number of collectives claiming a medical emergency and build a stockpile of marijuana to sell illegally.
28

1 By adding the requirement that emergency patients disclose their justification for not attending their
2 normal collective, thereby making it more difficult to obtain emergency medical marijuana, the City
3 Council hopes to limit this kind of activity. Finally, because the Ordinance provides procedural
4 protections before obtaining Private Medical Records, the risk of a serious invasion of privacy or abuse
5 is greatly reduced. As they relate to patients' Private Medical Records, the court finds that the
6 Ordinance's record-keeping and disclosure provisions do not violate Plaintiffs' privacy rights.
7

8 Plaintiffs claim the Ordinance violates their autonomy privacy rights by infringing on their right
9 to choose medical marijuana as a medication. The problem with this argument is that it does not deal
10 with the ability of individuals to join other collectives and still easily maintain their right to use medical
11 marijuana for their illnesses. Plaintiffs cite cases like *American Academy of Pediatrics v. Lundgren*
12 (1997) 16 Cal.4th 307, in support of their autonomy privacy argument. The analogy fails. In *Lundgren*,
13 the California Supreme Court was called to decide whether an assembly bill violated minors' rights to
14 choose medical treatment. The assembly bill required a pregnant minor to secure parental consent or
15 judicial authorization before she could obtain an abortion. *Id.* at 313. Without parental consent or
16 judicial authorization, the pregnant minor was prevented from choosing certain medical treatment. The
17 instant case is different. The Ordinance does not prohibit collectives, nor does it prevent patients from
18 obtaining their choice of medicine or selecting their medical treatment. Plaintiffs have failed to show
19 any significant interference with their right to choose medical marijuana as a form of medical
20 treatment.¹⁹ California case law provides that *de minimis* infringements do not violate the right to
21
22
23
24

25 ¹⁹ The only evidence provided by Plaintiffs regarding any impact on individuals' ability to obtain medical marijuana exists,
26 by implication only, in the declarations of Chris Conrad and Brian Silveira submitted with the Motion for Preliminary
27 Injunction in the *Kevin Anderson, et al. v. City of Los Angeles*, (BC438671) filed June 4, 2010. The declarations combine to
28 demonstrate how much space is needed to provide medical marijuana cultivation and the limited number of spaces in three
distinct neighborhoods in Los Angeles: Wilshire, Westlake and Hollywood. (Decl. of Siveira, ¶ 3.) Plaintiffs' declarants
hypothesize that, of the 38 total "Areas Allowed" for collectives in the three neighborhoods, 36 areas would not allow
collectives "after taking into account all of the restrictions stated in Ordinance No. 181069." *Id.* at ¶ 6. This is apparently due
to the space required to cultivate medical marijuana along with the numerous distance restrictions imposed by the Ordinance

1 privacy. (See *Hill, supra*, requiring a “serious invasion of privacy,” 7 Cal.4th at 31; and *Lundgren,*
2 *supra*, “[*Hill’s*] threshold elements [] permit courts to weed out claims that involve so insignificant or *de*
3 *minimis* an intrusion on a constitutionally protected privacy interest[s] . . . ” 16 Cal.4th at 331.) Plaintiffs
4 provide evidence showing, at most, a *de minimis* infringement on their right to choose medical
5 marijuana as a treatment. It follows that their autonomy privacy claims fail.
6

7 The freedom to associate falls under the right of privacy. *Hill, supra*, 7 Cal.4th at 42-43.

8 Plaintiffs include corporate entities and also a class of patient Plaintiffs. The freedom to associate is so
9 important that it is recognized as a fundamental right that triggers a compelling interest test requiring the
10 court to review infringements with strict scrutiny. *Id.* at 34. In order to infringe on a fundamental right,
11 a government must show a compelling interest and demonstrate that it has used the least restrictive
12 means in achieving that interest. *Id.* While *Hill* departed from the strict scrutiny analysis for claims of
13 straight privacy violations, the same strict scrutiny analysis still applies to freedom of association claims.
14

15 This is evident from the opinion:

16 As we have observed in part 2(a)(2), ante, there is no clear or uniform “compelling
17 interest” standard emanating from the federal penumbral “privacy” decisions. Based on
18 its language and the authority it cites, our decision in *White* signifies only that some
19 aspects of the state constitutional right to privacy—those implicating obvious government
20 action impacting freedom of expression and association—are accompanied by a
21 “compelling state interest” standard.

22 *Hill, supra*, 7 Cal.4th at 34 (emphasis added.)²⁰

23 (Plaintiffs claim that 15,000 square feet is needed to provide medical marijuana for 570 patients). The implication of
24 Plaintiffs’ evidence is that by limiting three neighborhoods to only two possible locations for collectives to operate, patients
25 will be denied their ability to obtain medical marijuana. However, these numbers are unreliable as they presume that
26 cultivation must take place on site. (Compare Decl. of Conrad, ¶¶ 34-36 with Decl. of Silveira, ¶ 7.) There is no requirement
in the Ordinance or in the Health and Safety Code that marijuana must be cultivated at the collective. Therefore, limiting the
number of possible locations for collectives would not limit patients’ access to medical marijuana in the same way. Other
than these declarations, there is no evidence that patients will be significantly limited in their ability to obtain medical
marijuana after the Ordinance takes effect.

27 ²⁰ There was some question regarding the appropriate test for determining whether a violation of the freedom of association
28 had occurred. During the hearing, the court asked defense counsel why this quoted language did not control. Defense
counsel provided no reason and the court is unaware of any contrary controlling authority. *Hill* says that a compelling
interest test applies to freedom of association claims by relying on the concurrence from *Griswold v. Connecticut*, (1965) 381
U.S. 479. As the court in *Hill* notes, the compelling interest test was never expressly adopted by the majority in *Griswold*;

1 Although it predates *Hill*, the court in *City of Los Altos v. Barnes*, (1992) 3 Cal.App.4th 1193,
2 provides guidance on what the freedom of association entails:

3
4 We begin with the right of privacy and free association. (5) “The right to privacy is the
5 right to be left alone. It is a fundamental and compelling interest. It protects our homes,
6 our families, our thoughts, our emotions, our expressions, our personalities, our freedom
7 of communion and our freedom to associate with the people we choose. ...” (Citation).
8 The United States Supreme Court “has recognized the vital relationship between freedom
to associate and privacy in one’s associations. ... Inviolability of privacy in group
association may in many circumstances be indispensable to preservation of freedom of
association” (Citation).

9 *Barnes, supra*, 3, Cal.App.4th at 1199-1200. As *Hill* and *Barnes* demonstrate, the freedom to associate
10 triggers the compelling interest test and is broad enough to apply to various group settings where
11 individuals come together to associate with one another. Collectives arguably fall into that category.
12 However in evaluating whether a violation has occurred, California law carves out an exception of sorts
13 for zoning ordinances.
14

15 An important distinction arises when zoning ordinances are at issue, especially when the
16 ordinance focuses on the use of property instead of the people who use the property. As the court
17 explained in *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, “In general, zoning ordinances
18 are much less suspect when they focus on the use than when they command inquiry into who are the
19 users.” *Id.* at 133 (emphasis in original). *Adamson* is a good starting point. The City of Santa Barbara
20 passed an ordinance prohibiting certain numbers and types of people from residing together in an
21 apparent effort to “maintain family-style living.” *Id.* at 131. The ordinance defined a family as two or
22 more people related by blood, marriage or adoption, or a group not to exceed five persons. If inhabitants
23 of a home did not qualify under the ordinance’s criteria, they could not live together. The California
24 Supreme Court struck down the ordinance as violating the freedom to associate after applying the strict
25
26
27

28 however, *Hill* still appears to adopt the compelling interest test as indicated from the plain language of the opinion cited
above.

1 scrutiny test. *Id.* at 133-34. While the Santa Barbara ordinance had a *use* component (for family-style
2 living) it also inquired into *who* was living at the home. This “who” inquiry triggered strict scrutiny, and
3 the court struck down the law, stating:

4 * The fatal flaw in attempting to maintain a stable residential neighborhood through the use
5 of criteria based upon biological or legal relationships is that such classifications operate
6 to prohibit a plethora of uses which pose no threat to the accomplishment of the end
7 sought to be achieved. ... As long as a group bears the “generic character of a family unit
8 as relatively permanent household,” it should be equally as entitled to occupy a single
9 family dwelling as its biologically related neighbors.” (Citation).

10 *Adamson, supra*, 27 Cal.3d at 134. The *Adamson* court noted the flaw in focusing on the biological and
11 legal relationships of inhabitants. The court noted that because the ordinance focused on the inhabitants
12 as opposed to the use of the home, it violated the freedom of association. Put another way, the
13 ordinance was overly broad in limiting who could associate with whom after considering the law’s
14 purpose.

15 The City argues, as it must, for cases like *Ewing v. City of Carmel-By-The-Sea* (1991) 234
16 Cal.App.3d 1579, and *Barnes, supra*, to control.²¹ In those cases, courts found the strict scrutiny test did
17 not apply because the ordinances focused on *use* of property, not who used it. *Ewing, supra*, 234
18 Cal.App.3d at 1598; *Barnes, supra*, 3 Cal.App.4th at 1201.

19 In *Ewing*, plaintiffs challenged the constitutionality of a zoning ordinance prohibiting transient
20 commercial use of residential property for less than 30 consecutive days. *Ewing, supra*, at 1585. The
21 court refused to apply strict scrutiny and found the ordinance constitutional, stating:

22 [The ordinance] differs sharply from the ordinances, policies, and covenants declared
23 unconstitutional in the cases cited by plaintiffs. The rule challenged in each of those cases
24 prohibited cohabitation by certain people or groups of people. In effect, each rule
25 governed with whom residents could reside, based upon the number of people or upon
26 their familial relationship. *The ordinance here does no such thing. Plaintiffs are free to
27 live with whom they wish. They may entertain whom they wish. They may rent to whom
28 they wish—the only condition being that the occupancy, possession, or tenancy last at least
29 30 consecutive calendar days.* As the Supreme Court emphasized in *City of Santa
30 Barbara v. Adamson, supra*, 27 Cal.3d at page 133, “In general, zoning ordinances are
31 much less suspect when they focus on the use than when they command inquiry into who

32 ²¹ The City makes no argument that the Ordinance is the least restrictive means to achieve the stated purpose of the
33 Ordinance (“ensuring the health, safety and welfare of the residents of the City of Los Angeles.” Ordinance § 45.19.6.)

1 are the users.” The ordinance here does just that. *It prohibits the transient commercial use*
2 *of residential property for remuneration* in the R-1 District-regardless of who the parties
3 are. Because [the ordinance] focuses on use, rather than users, it does not violate
4 fundamental rights and does not warrant stricter scrutiny than is normally accorded
5 zoning laws.

6 *Ewing, supra*, at 1597-98 (emphasis added.)

7 The ordinance in *Barnes* drew the same distinction and commanded the same result:

8 The facts in [*Adamson*] differ sharply from the circumstances here. In [*Adamson*], the
9 government sought to intrude into private areas of individual lives. In [*Adamson*], the
10 ordinance governed with whom residents could reside. . . . The Los Altos ordinance, by
11 contrast, does not intrude into *Barnes's* private affairs. *It does not regulate with whom she*
12 *resides, inquire into whom she employs or force her to divulge information about whom*
13 *her associates are.* All the ordinance does is regulate the use of her home. In particular,
14 the ordinance places limits upon the use of her residence for commercial purposes. As we
15 emphasized in (*Ewing*) “In general, zoning ordinances are much less suspect when they
16 focus on the use than when they command inquiry into who are the users.” (Citation).
17 *Because the ordinance does not seek to regulate any aspect of Barnes's private life, and*
18 *does not dictate with whom she resides, works, or associates, it does not violate her*
19 *constitutionally protected rights of privacy or association.*

20 3 Cal.App.4th at 1201 (emphasis added).

21 The parties disputed the nature of the Ordinance at length during the hearings. The court has
22 reviewed the supplemental briefing requested on this issue and finds the Ordinance to be part zoning and
23 part public safety. While the Ordinance contains language relating to public safety²² as well as language
24 relating to the use of property for zoning purposes,²³ placing substance over form, the court relies on the
25 Ordinance’s focus on use of properties as collectives in finding that it qualifies as a zoning ordinance for
26 purposes of evaluating Plaintiffs’ freedom of association claims. In one sense, the Ordinance resembles
27 the law in *Adamson*, because it limits its application to collectives of four or more persons. The
28 *Adamson* ordinance also limited the number of persons who could use a property. However, this is not
an *inquiry* in the same way it was in *Adamson*. In *Adamson* the number of people inhabiting a home

²² Some of the sections dealing with public safety include: Preamble, 45.19.6, 45.19.6.2(D), 45.19.6.3(B), and 45.19.6.5.

²³ Some of the sections dealing with zoning include: 45.19.6.1 (definition of “Location,”) 45.19.6.2(B)(1)(including Table 1), 45.19.6.2.(B)(2), 45.19.6.2(D), 45.19.6.3(A), and 45.19.6.3(B).

1 only became relevant when those individuals were not “related.” An inquiry into *who* was inhabiting a
2 home was always necessary under the *Adamson* ordinance: the first question under the *Adamson*
3 ordinance would be, “is everyone related?” If the answer was yes, then the number of people living in a
4 home became irrelevant. On the other hand, if the answer was no, then the number of inhabitants could
5 not exceed five. The Los Angeles Ordinance does not inquire into characteristics of the members of
6 collectives. While it does extend the state law requirements that members be qualified patients and/or
7 caregivers, it makes no other inquiry.

9 Another type of “inquiry” could be the Ordinance’s record keeping requirements (name, address
10 phone number, etc.). However, those are not at issue because the Ordinance does not prevent
11 association of members based on those records—it just requires that collectives maintain the records.
12 No part of the Ordinance looks at who makes up each collective. As the Supreme Court emphasized in
13 *Adamson*, “In general, zoning ordinances are much less suspect when they focus on the use than when
14 they command inquiry into who are the users.” *Adamson, supra*, 27 Cal.3d at page 133. The Ordinance
15 here does just that.²⁴

19
20 ²⁴ The parties also argued that if the Ordinance was a “zoning ordinance,” then it was required to be referred to the City
21 Planning Commission per City Charter § 558. Plaintiffs argue that because the Ordinance was not referred to the City
22 Planning Commission, it is invalid. However, Plaintiffs have failed to show prejudice resulting from any failure to refer to
23 Ordinance to the City Planning Commission. There is an applicable safe harbor provision in Gov. Code § 65010, which
24 provides, “there shall be no presumption that error is prejudicial or that injury was done if the error is shown.” In *Mack v.*
25 *Ironside* (1973) 35 Cal.App.3d 127, 130, the court described the need to show prejudice before a court can overturn
26 legislative acts: “That there should be applied such a liberal construction appears from the mandate of Government Code
27 section 65801 (the precursor to § 65010), which is that *no action by any legislative or administrative body shall be set aside*
28 *by any court as to any matter pertaining to appeals or any matters of procedure whatever, unless after consideration of the*
entire case, including the evidence, a different result would have been probable if the error had not occurred” (emphasis
added.) In this case, Plaintiffs have not shown that any failure to refer to the Ordinance to the City Planning Commission
resulted in prejudice. The City Council is the final decision maker on all legislation and the City Planning Commission
provides only recommendations to the City Council. City Charter §§ 240, 249. Moreover, the Ordinance went through
sixteen hearings prior to being adopted, seven of which were before the Planning and Land Use Management Committee of
the City Council. Plaintiffs have not shown a lack of notice of these sixteen hearings. Plaintiffs have also not shown that
they were prevented from raising concerns about the process for enacting the Ordinance during those hearings. This leads the
court believe that even if the Ordinance had been referred to the City Planning Commission pursuant to City Charter § 558, a
different result would not have occurred. Any failure to refer the Ordinance to the City Planning Commission did not result
in prejudice; therefore, the court declines to invalidate the City Council’s legislative enactment.

1 Plaintiffs argue that by closing down their collective, the City is preventing them from freely
2 associating with other members of that collective. Perhaps this is true. However, because the Ordinance
3 focuses on use, a lesser level of scrutiny controls as was applied in *Ewing* and *Barnes*. Applying the
4 rational basis test, the City has articulated a strong justification for closing down collectives—the
5 Ordinance will “ensur[e] the health, safety and welfare of the residents of the City of Los Angeles.”
6 (Ordinance, § 45.19.6.) As noted above, the record reflects an increase in crime corresponding with an
7 increase in collectives. The purpose of the Ordinance is sufficiently related to its restrictive provisions.
8 The Ordinance does not violate Plaintiffs’ freedom of association.
9

10 The court treats as moot arguments that the Plaintiffs raised about the portion of the Ordinance
11 pertaining to ownership requirements. Ordinance § 45.19.6.2(B) required the same
12 ownership/management of each collective from September 13, 2007, through the present as a condition
13 to filing a notice of intent to register. The court understands that this language was recently amended to
14 liberalize the ownership requirements. Any arguments pertaining to Plaintiffs freedom of association
15 claims as they relate to the same ownership/management clause of the Ordinance are now MOOT.
16
17
18

19 **5. Summary of Plaintiffs’ Likelihood of Success on the Merits:**

20 Plaintiffs have shown a high likelihood of success on the merits of: (1) some of their preemption
21 claims, (2) their equal protection claims, (3) their due process claims, and (4) some of their privacy
22 claims. While Plaintiffs show a lower likelihood of success on the merits for other aspects of their
23 preemption claims and privacy claims, an injunction can still issue as to several portions of the
24 Ordinance.
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1 **B. THE BALANCE OF RELATIVE INTERIM HARM DOES NOT OVERPOWER**
2 **PLAINTIFFS' HIGH LIKELIHOOD OF SUCCESS ON THE MERITS:**

3 “The trial court’s determination must be guided by a ‘mix’ of the potential-merit and interim-
4 harm factors; *the greater the plaintiff’s showing on one, the less must be shown on the other to support*
5 *an injunction.*” *Butt v. State of Cal., supra*, 4 Cal.4th at 678 (emphasis added.) Because Plaintiffs have
6 shown a high likelihood of success on the merits, the City must demonstrate significantly higher relative
7 interim harm to prevent an injunction from issuing. The City has not met its burden in that regard.

8 If an injunction is not issued, Plaintiffs will have to cease operations and close their doors. They
9 may face criminal and/or civil penalties, certain of which the court believes are preempted. The record
10 shows that Plaintiffs could lose costs spent constructing and improving their businesses and will never
11 recoup their startup expenses because the businesses are, by definition, non-profit. Plaintiffs may be
12 forced to breach their leases and incur civil liability. They will have to lay off employees, including
13 owners who work at the collectives and receive compensation for their employment.

14 Defendant claims that Plaintiffs have no claim for irreparable harm because their operations were
15 illegal in the first instance. This argument puts the cart before the horse. This case is all about whether
16 the Ordinance makes their operation illegal. While in some instances, purely monetary harm may not
17 satisfy the irreparable harm prong (*Sampson v. Murray*, 415 U.S. 61, 90 (1974)), Plaintiffs’ claimed
18 injuries encompass more than purely monetary harm.

19 Defendant claims substantial immediate and irreparable harm if the law is found unconstitutional
20 and invalid. The public health and safety reasons recited in Captain McCarthy’s declaration support
21 Defendants’ claim. The City claims that without the ability to enforce the Ordinance, more collectives
22 will be formed in Los Angeles, driving up crime and endangering the citizenry.

23 Plaintiffs claim that the City faces no harm if an injunction were to issue because all that
24 Plaintiffs request is the opportunity to submit an application and register pursuant to the Ordinance.
25
26
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1 This misses the point. Plaintiffs' injunction challenges the constitutional validity of the Ordinance and
2 does so, in part, successfully. Portions of the Ordinance found unconstitutional become ineffective.
3 Because the Ordinance is the only law preventing new collectives from opening up and the only law
4 preventing recently shut down collectives from reopening, there is a good chance that a large number of
5 collectives could open once the injunction takes effect. This would endanger the City's interest in
6 protecting its residents. The City has a real claim for immediate irreparable harm.
7

8 The court recognizes that the City will have a second chance to regulate and limit the collectives
9 within its borders by passing a new or amended version of the Ordinance to remedy the issues identified
10 in this order.²⁵ Plaintiffs, on the other hand, may incur harm which cannot be so easily remedied. While
11 the balance of interim harm does not tip heavily in either direction, Plaintiffs' high likelihood of success
12 on the merits warrants enjoining enforcement of portions of the Ordinance as follows:
13

14 The court GRANTS a preliminary injunction barring the City from enforcing the
15 following portions of the Ordinance:

- 16 • Section 45.19.6.9: the first sentence of that section which provides "Each and
17 every violation (of the ordinance) shall constitute a separate violation and shall be
18 subject to all remedies and enforcement measures authorized by Section 11.00 of
19 this Code."
- 20 • Section 45.19.6.10: the first paragraph, i.e., the sunset clause, which, the court
21 assumes, should have been designated as Sec. 1.
- 22 • Section 45.19.6.2(A): to the extent it deprives Plaintiffs of vested property rights
23 without a neutral hearing.
- 24 • Section 45.19.6.2(B)(2): the following language "was registered pursuant to the
25 Interim Control Ordinance No. 179,027 with the City Clerk's office on or before
26 November 13, 2007."
- 27 • Section 45.19.6.4: the following language "(3) the full name, address, and
telephone number(s) of all patient members to whom the collective provides
medical marijuana."

28 ²⁵ The Court notes that the City has already amended the Ordinance since the filing of the instant motion. Those amendments became effective on December 1, 2010. (See Ex. A to "Response by City of Los Angeles to Court's November 29, 2010 Request for Copies of All Amendments to the City's Medical Marijuana Ordinance" filed November 30, 2010.)

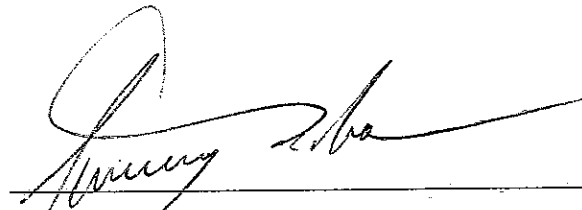
1 Plaintiffs' motions are otherwise DENIED.²⁶

2 The court orders counsel to brief the question of the need for a bond and if so, its amount. A
3 hearing on that question is scheduled for January 7, 2011, at 10:00 A.M., and briefs are due by
4 December 30, 2010.

5 Although this order is most likely appealable, a party may wish to petition for writ relief. For
6 this reason, and pursuant to CCP § 166.1, the court states its belief that there is a controlling question of
7 law as to which there are substantial grounds for difference of opinion, appellate resolution of which
8 may materially advance the conclusion of the litigation.
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10 **IT IS SO ORDERED.**

11 DATED: December 10, 2010

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14 Anthony J. Mohr

15 Judge of the Los Angeles Superior Court
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27 ²⁶ Section 4 of section 45.19.6.10 of the Ordinance is a severability clause. It provides that, "...if any provision of this
28 ordinance is found to be unconstitutional or otherwise invalid, ...that invalidity shall not affect the remaining provisions of
this ordinance which can be implemented without the invalid provision, and, to this end, the provisions of this ordinance are
declared to be severable."