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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

UNLIMITED JURISDICTION

AMERICANS FOR SAFE ACCESS, MARY JANE WINTERS, TIFFANY SIMPSON, ANTHONY BOWLES, JAMES HAGGARD, SHANNON STANSBERRY, KATHLEEN HONZIK, and DOES 1-2, Plaintiffs, v. CALIFORNIA HIGHWAY PATROL, an entity of unknown form; ARNOLD SCHWARZENEGGER, Governor of California; BILL LOCKYER, Attorney General of California; MIKE L. BROWN, Commissioner of California Highway Patrol, Defendants.	Civil Action No. RG 05198364 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Date: August 24, 2005 Time: 2:00 p.m. Place: Department 31

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INTRODUCTION

The protections afforded by the California Constitution apply to everyone, including medical marijuana patients. In blatant disregard of the State's medical marijuana laws and its constitutional guarantees of the rights to due process and to be free from unreasonable seizures of property, the California Highway Patrol ("CHP") maintains a policy of seizing marijuana from qualified medical marijuana patients in all cases where it is found during a routine traffic stop. The CHP policy is absolute – the officers cannot elect not to confiscate medical marijuana even when presented with a valid doctor's recommendation or locally issued medical marijuana identification card and they have no reason to believe that the marijuana possession is illegal. The policy is also harsh – sick persons have their medicine taken from them simply for having committed, at most, a minor traffic offense. Rigid and cruel in its application, the CHP policy violates both the search and seizure provision and the due process clause of article I, section 13 of the California Constitution.

Indeed, just weeks ago, the Attorney General (who is serving as counsel for the defendants) issued an opinion stating that a city may prohibit the seizure of medical marijuana by its police officers, since this would be consistent with local law, but it may not make medical marijuana identification cards a mandatory prerequisite for prohibiting detention and seizure "because such provision[] would directly contradict state law." (Atty. Gen. Cal. Ops., 05 C.D.O.S. 5575, 5576 (June 23, 2005) [citing Cal. Health & Safety Code §§ 11362.77 & 11362.71, subd. (f)] [hereinafter "June 23, 2005, Attorney General Opinion"] [attached to Index of Federal and Other Cases]). The CHP policy of seizing marijuana from qualified patients even when they present a valid identification card is even more at odds with state law, since no amount of proof can avoid a mandatory seizure. The California Constitution requires individualized suspicion of wrongdoing before the police may take one's property. The State's medical marijuana laws ensure qualified patients and their primary caregivers the rights to obtain and possess marijuana for medical use and provide a safe harbor where they possess less than eight ounces. The CHP policy of seizing marijuana from qualified patients in

all cases runs afoul of both of the constitution and these statutes and, if not enjoined, will continue to harm medical marijuana patients and frustrate the will of the voters. An injunction is needed to prevent the unconstitutional taking of medicine from seriously ill persons.

STATEMENT OF FACTS

On November 4, 1996, the California electorate passed Proposition 215, known as "the Compassionate Use Act," to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" without criminal penalty. (See Cal. Health & Safety Code § 11362.5, subd. (b)(1).) Seven years later, due to "reports from across the state [that] have revealed problems and uncertainties in the [Compassionate Use Act] that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended and, therefore, prevented qualified patients and designated primary caregivers from obtaining the protections afforded by the act," the Legislature, on September 10, 2003, enacted Senate Bill 420, Stats. 2003 c.875 ("SB 420"), to clarify its protections. (See SB 420 § 1(a)(2).) One such clarification concerns the quantity of marijuana a qualified patient may possess, with the Legislature setting a threshold of at least eight ounces of dried marijuana per qualified patient. (See Cal. Health & Safety Code § 11362.77, subd. (a); June 23, 2005, Attorney General Opinion, *supra*, 05 C.D.O.S. at 5576; Historical and Statutory Notes to Cal. Health & Safety Code § 11362.7 [Letter from John Vasconcellos & Mark Leno to The Hon. John Burton, dated Sept. 10, 2003] ["the guidelines in SB 420 establish permissible amounts that are intended to be the threshold, and not a ceiling"].))

Notwithstanding these statutory provisions entitling medical marijuana patients to possess and transport at least eight ounces of dried marijuana, the CHP maintains a compulsory policy of seizing all marijuana found during routine traffic stops. Section 6(c)(4)(e) of Chapter 1 of the CHP's General Law Enforcement Policy Manual provides that "[e]ven if a [medical marijuana] claim is alleged, all marijuana shall be confiscated and booked as evidence according to HPM 70.1. Those claiming a need for the marijuana should be advised to file a motion with the appropriate court seeking an

'Order of Return.'" (See Request for Judicial Notice, Exhibit 1 [hereinafter "the CHP Policy"]). The CHP Policy, thus, not only permits, but requires the seizure of marijuana from qualified patients without any consideration whatsoever to the legality of their conduct.

The results of this policy are harsh. For instance, on Christmas Day, 2004, plaintiff Tiffany Simpson was pulled over by the CHP for having expired registration stickers while driving home from a medical marijuana dispensary. (Declaration of Tiffany Simpson in Support of Plaintiffs' Motion for a Preliminary Injunction ["Simpson Decl."], filed herewith, at ¶3). While detained, the officer demanded that Ms. Simpson exit her vehicle and surrender the approximately eleven grams of dried marijuana she had just purchased. (Simpson Decl. ¶4). In issuing a citation to Ms. Simpson for marijuana possession and confiscating her marijuana, the officer refused even to look at the physician's recommendation she handed him, stating that the CHP does not "recognize" the Compassionate Use Act. (Simpson Decl. ¶¶5 & 6). Ms. Simpson returned home without the medicine she needs to ease her lower back and joint pain, her Christmas ruined. (Simpson Decl. ¶7). The charges against Ms. Simpson were dropped at her first court appearance when she presented the documentation she had attempted to present to the CHP Officer, which indicates her status as a qualified medical marijuana patient, to the local prosecutor. (See Simpson Decl. ¶8). Her story is disturbingly common. (See Declaration of Anthony Bowles in Support of Plaintiffs' Motion for a Preliminary Injunction, filed herewith; Declaration of Mary Jane Winters in Support of Plaintiffs' Motion for a Preliminary Injunction, filed herewith; Declaration of James Haggard in Support of Plaintiffs' Motion for a Preliminary Injunction, filed herewith; Declaration of Kathleen Honzik in Support of Plaintiffs' Motion for a Preliminary Injunction, filed herewith; Declaration of Tiffany Simpson in Support of Plaintiffs' Motion for a Preliminary Injunction, filed herewith; Declaration of Shannon Stansberry in Support of Plaintiffs' Motion for a Preliminary Injunction, filed herewith [collectively "Declarations Submitted in Support of Plaintiffs' Motion for a Preliminary Injunction]).

LEGAL STANDARDS

Trial courts traditionally consider and weigh two factors in determining whether to issue a preliminary injunction: (1) how likely it is that the moving party will prevail on the merits, and (2) the relative harm the parties will suffer in the interim due to the issuance or nonissuance of the injunction. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1449). "[T]he greater the ... 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). Injunctive relief is particularly appropriate where constitutional rights are at issue, or a failure to grant an injunction will result in a multiplicity of suits. (See Cal. Civil Code § 52.1; Cal. Code of Civil Procedure § 526, subd. (a)(6); *Brock v. Superior Court* (1939) 12 Cal.2d 605, 610; *Novar Corp. v. Bureau of Collection & Investigative Serv.* (1984) 160 Cal.App.3d 1, 5).

ARGUMENT

I. THE CHP POLICY, ON ITS FACE AND AS APPLIED, VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEIZURES

A. The California Constitution Requires Individualized Suspicion of Wrongdoing, Exigent Circumstances, and Reasonableness for the Warrantless Seizures of Property

Section 13 of Article I of the California Constitution guarantees the right of individuals to be secure in their houses, papers and effects, free from unreasonable searches and seizures. Its protections apply equally to vehicles as to homes and are coextensive with the federal Fourth Amendment. (See *People v. Sanchez* (1985) 174 Cal.App.3d 343; *People v. Hester* (2004) 119 Cal.App.4th 376, 403]). With very narrow exceptions involving "special needs," a search or seizure is unreasonable in the absence of individualized suspicion of wrongdoing, based upon the totality of the circumstances. (See *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 36 & 37-38, 121 S.Ct. 447, 451-52 [quotation and citations omitted]; *In re Randy G.* (2001) 26 Cal.App.4th 556, 565). In the ordinary case, "a seizure of personal property [is] per se unreasonable . . . unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing

the items to be seized." (*United States v. Place* (1983) 462 U.S. 696, 701, 103 S.Ct. 2637, 2641; see *United States v. Horton* (1990) 496 U.S. 128, 144, 110 S.Ct. 2301, 2311). Even if there is probable cause, a warrantless seizure of personal property is unreasonable unless there are exigent circumstances. (*Horton*, *supra*, 496 U.S. at p. 137 fn.7, 110 S.Ct. at p. 2308 fn.7; *Place*, *supra*, 462 U.S. at p.701, 103 S.Ct. at p. 2641 [collecting cases]; see also *Horton*, *supra*, 496 U.S. at p. 137 fn.7, 110 S.Ct. at p. 2308 fn.7 [same for contraband]). In assessing the reasonableness of a seizure, the court must balance the government interests served by the seizure against the possessory interests of the individual. (See *Blair v. Pitchess* (1971) 5 Cal.3d 258, 272).

B. The CHP Policy Is Unconstitutional on Its Face for Requiring Seizures of Property Without Individualized Suspicion of Wrongdoing

By seizing the medicine of qualified medical marijuana patients without regard to the circumstances attesting to the legality of their conduct, the CHP Policy violates both the constitutional rights against unreasonable searches and seizures and to due process. In *People v. Mower* (2002) 28 Cal.4th 457, the Supreme Court of California affirmed that the constitutional requirement of individualized suspicion applies with full force and effect to medical marijuana cases – "Probable cause depends on all of the surrounding facts [citation], including those that reveal a person's status as a qualified patient or primary caregiver under [the Compassionate Use Act]." (*Id.* at p. 469). By turning a blind eye to these surrounding facts, the CHP Policy violates the constitutional requirement of individualized suspicion. (Cf. *People v. Butler* (1988) 202 Cal.App.3d 602, 606-07 [because some tinted glass windows are legal, no reasonable suspicion arises from mere observation of driving with tinted windows; "Without additional articulable facts suggesting that the tinted glass is illegal, the detention rests upon the type of speculation which may not properly support an investigative stop."]; see also *People v. Hester*, *supra*, 119 Cal.App.4th at p. 392 [mere membership in gang, without additional facts supporting an inference of criminal activity, does not constitute probable cause).

C. The CHP Policy Is Unconstitutional on Its Face for Requiring Seizures of Property Without a Warrant or Exigent Circumstances

The CHP Policy is also unconstitutional because it compels the seizure of personal property without a warrant or exigent circumstances. Unlike the run-of-the-mill highway drug bust, the CHP does not need to act quickly to prevent the detainee from absconding or destroying the evidence. Because medical marijuana is legal under California law, qualified patients stopped for minor traffic offenses do not hide or shy away from their medical marijuana possession, but, rather, they affirmatively claim possession of the marijuana and present documentation establishing their ownership and entitlement to possess it. (See Declarations Submitted in Support of Plaintiffs' Motion for a Preliminary Injunction). These patients not only expect to have their medicine returned to them, but they certainly would not destroy it themselves. In *People v. Mower*, *supra*, the Supreme Court of California analogized the possession of marijuana with a valid physician's recommendation to the possess of prescription medication -- "As a result of the enactment of [the Compassionate Use Act], the possession and cultivation of marijuana is no more criminal—so long as its conditions are satisfied—than the possession and acquisition of any prescription drug with a physician's prescription." (*Mower*, *supra*, 28 Cal.4th at p. 482). Just as there are no exigent circumstances to justify the warrantless seizure of prescription medication from the persons who need it, there are none to justify the seizure of medicine from medical marijuana patients.

D. The CHP Policy Is Unconstitutional on Its Face and as Applied Because It Requires the Unreasonable Seizure of Medicine

In any event, these seizures are unreasonable. The California Legislature has clarified that a qualified patient may possess at least eight ounces of dried marijuana and that one need not obtain a voluntary identification card to qualify for this protection. (Cal. Health & Safety Code §§ 11362.77 & 11362.71, subd. (f)]). More recently, the Attorney General recognized that it would be inconsistent with these laws to permit the police to detain qualified patients and seize their medicine, if they do not have a voluntary identification card. (June 23, 2005, Attorney General Opinion, *supra*,

05 C.D.O.S. at 5576). This position cannot be reconciled with a policy of seizing marijuana in all cases, even when the officer is shown both an identification card and a physician's recommendation.

Similarly, the CHP Policy cannot be reconciled with the Attorney General's recent "Bulletin to All California Law Enforcement Agencies." (Request for Judicial Notice, Exhibit 2 [hereinafter "Atty. Gen. Bulletin"]). Responding to the United States Supreme Court's decision in *Gonzalez v. Raich* (June 6, 2005), __ S.Ct. __, 2005 C.D.O.S. 4725, the Attorney General issued an official bulletin to California law enforcement stating that "they should avoid effecting arrests (and seizures of marijuana) on the sole basis of a federal law violation of the Controlled Substances Act in situations where it appears that the person encountered was legitimately using a medically-authorized, reasonable amount of marijuana within the meaning of California's Compassionate Use Act." (*Id.* at 2). The Attorney General's reasoning mirrors that advanced by plaintiffs here:

> [I]f there is reason for the officer to suspect an invalid authorization, possession of an amount inconsistent with personal medical use, diversion of the marijuana for non-medical reasons, or other activity not rendered lawful under the Compassionate Use Act, then an arrest and seizure of evidence is clearly authorized under state law. (*People v. Mower* (2002) 28 Cal.4th 457, 468-469.) On the other hand, in situations where a state or local officer can only conclude that the person encountered was legitimately using a medically-authorized, reasonable amount of marijuana within the meaning of the Compassionate Use Act, the only possible charge would be for violating the federal Controlled Substances Act.
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> . . . . California has an express policy decriminalizing the medically approved use of marijuana. . . . [which] must necessarily govern the exercise of discretionary arrest powers by California peace officers and counsels against effecting arrests and seizures under federal law when the use, possession, or cultivation of the marijuana appears legal within the meaning of California's Compassionate Use Act.

(*Ibid.*) The same conclusion governs this case.

A balancing of the interests at stake further reveals the unreasonableness of the CHP Policy. Consider first, the intrusion on the medical marijuana patients. The California electorate has explicitly recognized that marijuana is medicine. As such, it is a great imposition for law enforcement to seize it from qualified patients. (See *infra* at 11). As the CHP is well aware, the seizures of medicine are effectively permanent -- either because it is too expensive for a patient to

hire an attorney to litigate a motion for return of property or the court denies the motion for reasons having nothing to do with probable cause. (See *infra* at 12). The intrusion on the individual from these seizures could not be any more substantial.

On the other side of the balance, one is hard pressed to identify any legitimate government interest served by the CHP Policy. These cases involve only very small quantities of marijuana for personal medical use, which the California electorate has declared as worthy of protection. The CHP Policy undermines, rather than advances, this public policy.

Nor can the CHP justify its policy by positing that it is needed to prevent persons from presenting fraudulent documentation or reducing the number of people who drive under the influence of marijuana. Neither of these perceived dangers has any support in the record. (Cf. *Blair v. Pitchess* (1971) 5 Cal.3d 258, 278 [noting that government's contention that debtors threatened with confiscation of their property would abscond with their property is not supported by declarations on file]). Not one of the six individual named plaintiffs was accused of possessing invalid documentation or driving while under the influence. If, in any particular case, there is probable cause to believe that either of these crimes is being committed, the police may seize marijuana where the facts support this. Absent such particularized suspicion of wrongdoing, however, the bald and unsupported assertion that these dangers are prevalent cannot substitute for probable cause.[1]

To the extent that the CHP had any serious concern with fraudulent or otherwise invalid medical marijuana documentation, there are far less intrusive alternatives available to them to

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[1] With respect to the government's fear of being presented with fraudulent documentation, it defies common sense to believe that this crime would be prevalent. Whereas possession of less than one ounce of marijuana is a misdemeanor punishable by no more than a $100 fine (see Cal. Health & Safety Code § 11358), presenting fraudulent medical marijuana documentation to a police officer is punishable by up to six months imprisonment and a $1,000 fine (see Cal. Health & Safety Code § 11362.81). Especially when considered in light of the ease of detecting an invalid doctor's recommendation, *see infra* at 9, this strong deterrent will make fraudulent proof of a physician's recommendation exceedingly rare, and certainly not so common as to warrant an unrebuttable presumption of guilt.

prosecute such offenses, short of seizing one's medicine. (Cf. *United States v. Place* (1983) 462 U.S. 696, 709, 103 S.Ct. 2637, 2646 [in assessing the reasonableness of a seizure, "we take into account whether the police diligently pursue their investigation"]; *People v. Bracamonte* (1975) 15 Cal.3d 394, 400 ["a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope"]). As stated above, qualified medical marijuana patients are forthcoming about their possession of the marijuana at issue, so the police can easily document this, even without seizing the marijuana. For instance, the officer can copy the information provided in the signed doctor's recommendation or voluntary identification card presented by the patient and, if he is not satisfied with its authenticity, he can call the doctor or issuer of the identification card to confirm the recommendation, as contact numbers are provided on these documents. If the officer still harbors any suspicion, he could request the detainee to sign for the marijuana, photograph it, and/or, at worst, seize a copy of the physician's recommendation. Any or all of these procedures would provide the officer or, later, the prosecutor or the court all of the information needed to make the probable cause determination. Instead, the CHP Policy requires the seizure of medicine in circumstances where neither a court nor a prosecutor would find probable cause.

Thus, the CHP Policy not only needlessly intrudes upon seriously ill patients, but it also drains the resources of local prosecutors and the courts. When the CHP cites a qualified medical marijuana patient for possession or transportation and seizes their medicine, the case is placed on the local court's criminal calendar and the local prosecutor must review the case before the charges are inevitably dismissed. As the Attorney General has recognized, "effecting an arrest and seizure on the basis of only a violation of federal law will leave the local prosecutor's office with no charges to file because the 'state courts do not enforce the federal criminal statutes'. . . ." (Cf. Atty. Gen. Bulletin at 2 [quoting *People v. Tilekooh* (2003) 113 Cal.App.4th 1433, 1445-46]). Weeks later, the case may appear on the criminal calendar yet again, if the patient seeks the return of his property through a noticed motion. These burdens on the local court system could have been avoided if the CHP

permitted its individual officers to exercise their discretion in the first instance, as the California Constitution commands.

That the CHP did not seemingly consider any of these alternatives in formulating its policy and, instead, rigidly requires the seizure of medical marijuana in every case not only evidences the unreasonableness of these seizures, but also casts serious doubts on the CHP's motives. The United States Supreme Court has held that "[w]hile 'subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," [*Whren v. United States* (1996) 517 U.S. 806, 813, 116 S.Ct. 1769], programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." (*City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 45-46, 121 S.Ct. 447, 465; see also *id.* at p.46 ["our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level"]). The CHP is well aware that its policy functions as a dragnet that snatches marijuana from innocent medical marijuana patients. Motivated by such animosity towards medical marijuana, the CHP Policy is unconstitutional. (Cf. *In re Randy G.* (2001) 26 Cal.4th 556, 567 ["detentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment"]).

II. THE CHP POLICY VIOLATES DUE PROCESS

A. Due Process Requires a Hearing Before Property Is Taken by the Government, Especially Where That Property Is a "Life Essential"

The CHP Policy violates due process for similar reasons. The central due process precept is that an individual is guaranteed a right to a hearing before he is deprived of a significant property interest, except under "extraordinary circumstances." (*Randone v. Appellate Department of Superior Court of Sacramento County* (1971) 5 Cal.3d 536, 547, 550; see *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 342, 89 S.Ct. 1820, 1823 (Harlan, J., concurring); see also *Boddie v. Connecticut* (1971) 401 U.S. 371, 377, 91 S.Ct. 780, 785 [holding that due process requires

meaningful opportunity to be heard prior to being subjected by force of law to significant deprivation, "absent countervailing state interest of overriding significance"]). To satisfy due process, a procedure authorizing the deprivation of a property interest without prior notice and hearing must be carefully tailored to limit its effect to such "extraordinary" situations. (See *Randone*, *supra*, 5 Cal.3d at p. 547). Furthermore, where "necessities of life" are at stake, the process that is due increases concomitantly – a policy that is drafted so broadly as to permit even the temporary deprivation of one's "life necessities" prior to a hearing may, for this reason alone, violate due process. (See *Randone*, *supra*, 5 Cal.3d at pp. 547 & 558).

B. The CHP Policy Violates Due Process by Requiring the Taking of Medicine in an Overbroad Manner

Despite the fact that the seizures in medical marijuana cases involve only small amounts of property, these deprivations cannot be considered "de minimis," since medicine is essential to one's health and well-being. (Cf. *Sniadach*, *supra*, 395 U.S. at p. 342, 89 S.Ct. at p. 1823 [recognizing that temporary attachment or garnishment of property amounted to a "taking" of a significant property interest for due process purposes because it deprived individual of use of property]; *accord Randone*, *supra*, 5 Cal.3d at p. 548 fn.9 & pp. 551-52; see also *Washington v. Glucksberg* (1997) 521 U.S. 702, 776, 117 S.Ct. 2258, 2288 ["'[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body' in relation to his medical needs"] [Souter, J., concurring] [quoting *Schloendorff v. Society of New York Hospital* (1914) 211 N.Y. 125, 129, 105 N.E. 92, 93]). The Supreme Court of California has recognized as "necessities of life" such items as television sets, refrigerators, and sewing machines. (See *Randone*, *supra*, 5 Cal.3d at p. 560; see also *Sokol v. Public Utilities Comm'n* (1966) 65 Cal.2d 247, 254-56 [curtailment of telephone service constitutes significant property interest as to require due process]). It hardly bears stating that medicine is at least as much a "necessity of life" as an appliance.

Thus, in order to pass muster under the due process clause of the California Constitution, the CHP Policy must, at a minimum, be narrowly drawn to those "extraordinary situations" which serve a state interest of "overriding significance." (See *Randone*, *supra*, 5 Cal.3d at p. 552 [quotations omitted]). As was demonstrated in Part 1.D, *supra*, the CHP Policy falls far short of meeting this standard. The nature of the risk for these small quantities of marijuana does not require any immediate action to prevent serious harm to the public and, even if this were true in the aggregate, the CHP Policy is not narrowly drawn to apply "only when great necessity actually arose." (Cf. *id.* at p. 554). The CHP cannot point to a single instance in the record to justify its summary procedure of confiscating medicine, much less can it point to so many as to justify its blanket seizures. (Cf. *id.* at pp. 555-56). The policy violates due process. (Cf. *id.* at p. 557 fn.20).

The CHP Policy is also constitutionally defective because it deprives patients of a life necessity without a prior hearing. Underscoring this point is *Randone*, *supra*, wherein the Supreme Court of California struck down as violative of due process a statute generally permitting the attachment of any property of a debtor, including life necessities, without prior notice or hearing. The Court stressed that "extreme hardship arises not only from the attachment of liquid attachment of liquid assets, such as wages or bank account proceeds, but also from the summary seizure of such items of personal property as 'television sets, refrigerators, stoves, and sewing machines, and furniture of all kinds' (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 279), items that might loosely be described as 'necessities' in our modern society." (*Id*. at p. 560). The Court found unconstitutional the sanction of a prehearing attachment because it was so "brutal" in its application and, due to the severe pressure on the debtor to settle, effectively deprives them any hearing on the merits of the creditor's claim. (*Id.* at pp. 561-62 [quoting (*Goldberg v. Kelly* (1970) 397 U.S. 254, 261, 90 S.Ct.1011)]). The Court concluded that the statute authorizing the prehearing attachment was unconstitutional on its face, especially because it disproportionately impacted those who are most in need. (*Id.* at pp.563-64).

The same is true here. Even more so than furniture or television set, medicine is a life necessity. Not only will the qualified patient suffer the embarrassment and humiliation of being treated like a criminal when complying with California law, but he will endure severe pain or worse from the deprivation of his medicine. Worse still, the taking of the small quantities of marijuana involved in these cases will effectively deprive the victim of the seizure any hearing on the legality of his marijuana possession, due to the time and expense of filing a motion for the return of property with such little economic value. (Cf. *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 309 [collateral judicial remedy is insufficient because it "would place on the party whose property has been taken the additional financial burden of instituting an action for the property's return"]; *Bryte v. City of La Mesa* (1989) 207 Cal.App.3d 687, 691 ["[T]he imposition of a requirement of affirmative action by the property owner, including the preparation of formal pleadings, the payment of a filing fee, and subsequent participation in all the formal procedural devices of a superior court action, must be deemed unreasonable."].)[2] As a group, medical marijuana patients are poor and sick. As in *Randone*, they are "those especially in need of the protection afforded by [due] process [and] in the instant case, [] includes those whose very necessities of life [have been] taken from them without a prior opportunity to show the invalidity of the [CHP's] claim." (See *Randone*, *supra*, 5 Cal.3d at pp. 563-64; see also *Washington v. Glucksburg* (1997) 521 U.S. 702, 731, 117 S.Ct. 2258, 2273 ["the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes."]). Targeting the needy in this manner, the CHP Policy violates due process.

[2] The Legislature subsequently amended the statute at issue in *Bryte* to address the shortcomings noted by the court. (*People v. One Ruger.22-Caliber Pistol* (2000) 84 Cal.App.4th 310, 313).

III. INJUNCTIVE RELIEF IS NECEESSARY TO STOP THE UNCONSTITUTIONAL SEIZURE OF MEDICINE FROM SERIOUSLY ILL PERSONS

Because the CHP Policy results in unreasonable seizures of property and violates due process, it must be enjoined. It is beyond dispute that the seizure of marijuana from qualified medical marijuana patients by the CHP will continue unless and until the CHP Policy is enjoined by this Court. Meanwhile, sick persons, like the named individual plaintiffs, will continue to lose their medicine and suffer deleterious health effects from not having their medicine available. No remedy coming after the seizure can undo the suffering of these persons from their inability to use their medicine. This is irreparable harm.

Underscoring this point is *Blair v. Pitchess* (1971) 5 Cal.3d 258, wherein the Supreme Court of California affirmed a permanent injunction entered in favor of plaintiffs restraining the Sheriff of Los Angeles and his employees from seizing property before a hearing on the propriety of the taking. (*Id.* at p. 267). At issue in *Blair* was a claim and delivery statute authorizing the seizure of a tenant's personal property upon the filing of a complaint and affidavit by the plaintiff stating that: he is entitled to the property, that the defendant is wrongfully detaining it, and the property is unencumbered. (*Id.* at p. 265). Despite the fact that the statute provided for a post-deprivation hearing for the return of the property, the Court found it to violate the constitutional prohibition against unreasonable searches and seizures, as well as the due process clause. (*Id.* at pp. 276 & 280). The Court reasoned as follows:

> An injunction is particularly appropriate in this case for no other remedy would give effective relief to the majority of persons whose property was illegally seized. In most cases, the defendant would be unable to obtain any relief prior to the seizure of his property. But as we have seen the removal of his goods often occasions irreparable harm. No judicial remedy can restore the privacy shattered by an illegal search. Nor can the subsequent return of property compensate for or repair the suffering caused a family by temporary loss of appliances indispensable to its day to

> day living. A post-seizure remedy in such cases grants no effective relief; hence, the preventative remedy afforded by the instant injunction is particularly appropriate.

(*Id.* at pp. 283-84). These words are equally applicable here. More so than appliances, medicine is indispensable to one's day to day living, especially where it enables one to eat or if it grants relief from unbearable pain. Recovery of this medicine weeks after the seizure cannot compensate for this suffering. As in *Blair*, an injunction is needed to put an end to the constitutional violations mandated by the CHP Policy.

CONCLUSION

For the foregoing reasons, this Court should grant plaintiffs' requested preliminary injunction.

DATED: July 13, 2005

Respectfully submitted,

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AMERICANS FOR SAFE ACCESS, MARY JANE WINTERS, TIFFANY SIMPSON, ANTHONY BOWLES, JAMES HAGGARD, SHANNON STANSBERRY, KATHLEEN HONZIK, and DOES 1-2, Plaintiffs, v. CALIFORNIA HIGHWAY PATROL, an entity of unknown form; ARNOLD SCHWARZENEGGER, Governor of California; BILL LOCKYER, Attorney General of California; MIKE L. BROWN, Commissioner of California Highway Patrol, Defendants.	Civil Action No. RG05198364 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION** Date: August 24, 2005 Time: 2:00 p.m. Place: Department 31

TO: ATTORNEY GENERAL BILL LOCKYER, ASSISTANT ATTORNEY GENERAL JONATHAN RENNER, AND ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on August 24, 2005, or as soon thereafter as this matter may be heard in Department 31, plaintiffs will seek a preliminary injunction:

a. enjoining defendants from seizing marijuana from any person who presents facially valid documentation indicating his status as a qualified patient or primary caregiver and who possesses less than eight ounces of dried marijuana and no more than six mature plants or twelve immature plants, unless such seizure is supported by circumstances, aside from the mere possession or transportation of marijuana, establishing probable cause to believe that the marijuana is possessed or transported in violation of California law;

b. enjoining defendants from assisting any other law enforcement officials or third parties from seizing marijuana from any person who presents facially valid documentation indicating his status as a qualified patient or primary caregiver and who possesses less than eight ounces of dried marijuana and no more than six mature plants or twelve immature plants, unless such seizure is supported by circumstances, aside from the mere possession or transportation of marijuana, establishing probable cause to believe that the marijuana is possessed or transported in violation of California law;

c. ordering defendants to inform, instruct, and train all law enforcement officials in the State of California that seizing marijuana from persons who present a facially valid documentation indicating the person's status as a qualified patient or primary caregiver, absent circumstances establishing probable cause to believe that the documentation is not valid or the marijuana is possessed or transported in violation of California law; and

d. instructing defendants to promptly return any medical marijuana in their possession, or that in the future comes into their possession, seized from persons who have presented facially valid documentation indicating their status as a qualified patient or primary caregiver, absent circumstances establishing probable cause to believe that the documentation is not valid or the marijuana is possessed or transported in violation of California law.

This motion is based upon the instant Notice of Motion; Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction; the Declaration of Anthony Bowles in Support of Plaintiffs' Motion for a Preliminary Injunction; the Declaration of Mary Jane Winters in Support of Plaintiffs' Motion for a Preliminary Injunction; the Declaration of James Haggard in Support of Plaintiffs' Motion for a Preliminary Injunction; the Declaration of Kathleen Honzik in Support of Plaintiffs' Motion for a Preliminary Injunction; the Declaration of Tiffany Simpson in Support of Plaintiffs' Motion for a Preliminary Injunction; the Declaration of Shannon Stansberry in Support of Plaintiffs' Motion for a Preliminary Injunction; California Constitution Article I, Section 13; California Civil Code section 52.1; California Code of Civil Procedure section 526; California Health and Safety Code sections 11362.5, 11362.71 and 11362.77; this Court's inherent and supervisory powers, the briefing and declarations presented in support of the motion for preliminary injunction, and all oral argument and records in this case.

DATED: July 13, 2005

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JOSEPH D. ELFORD
Attorney for Plaintiffs