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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SANTA BARBARA

ANACAPA DIVISION

CITY OF SANTA BARBARA, a charter city and municipal corporation, Plaintiff, vs. HEATHER POET, proponent of initiative measure, and DOES 1 through 20, inclusive, Defendants,	Case No. 1243675 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO STRIKE (C.C.P. § 425.16) Date: June 5, 2007 Time: 9:30 a.m. Dept 3/Anderle Complaint filed: 02/27/07

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I. INTRODUCTION

Plaintiff City of Santa Barbara ("the City") has filed the instant action to challenge the constitutionality of an initiative passed by two-thirds of Santa Barbara voters. It has filed its complaint against Heather Poet ("Poet"), a Santa Barbara resident, as the proponent of the popular initiative.

While the City is free to challenge the duly enacted initiative—however baseless its claims—it cannot name Poet as the defendant solely because she exercised her right to sponsor a petition that the voters enacted. California law protects defendants like Poet, sued in their capacity as participants in the political process, from strategic lawsuits against public participation ("SLAPP"). (*See* Code Civ. Proc. § 425.16.) Pursuant to this anti-SLAPP statute, Poet respectfully moves this Court to dismiss the City's meritless complaint.

II. FACTUAL BACKGROUND

On May 31, 2006, Poet filed with the City an initiative petition that, if passed, would make adults' private possession of small amounts of marijuana the City's lowest law-enforcement priority. (Compl., at ¶ 3.) The petition concluded with the following language:

> The address of the people proposing the measure is 1103 Garden St., Santa Barbara, California 93101. The phone number is 805-698-5822. Thank you.

Respectfully submitted,

Heather Poet, proponent

1103 Garden St.

Santa Barbara, Ca, 93101

(Compl., Exh. A, p. 2; *see also* Compl. at ¶ 3.) Poet gathered a sufficient number of signatures to place the measure on the ballot for the November 2006 election, and the City and County Clerks approved the proposed initiative for that election. (Compl. at ¶¶ 4-7.)

On November 7, 2006, 66% of Santa Barbarans voted for the initiative, also known as the "Lowest Law Enforcement Priority Policy Ordinance" (hereinafter "LLEP Policy Ordinance," or "Policy Ordinance"). Duly enacted, the LLEP Policy Ordinance has been codified as Chapter 9.145 of the Santa Barbara Municipal Code.

One of the two purposes of the Policy Ordinance is "[t]o make investigations, citations, arrests, property seizures, and prosecutions for adult marijuana offenses, where the marijuana was intended for adult personal use, the city of Santa Barbara's lowest law enforcement priority." (Santa Barbara Mun. Code ch. 9.145.020, subd. (A).[1]) To that end, the main provision of the LLEP Policy Ordinance states that "Santa Barbara law enforcement officers shall make law enforcement activity relating to marijuana offenses, where the marijuana was intended for adult personal use, their lowest law enforcement priority." (Code ch. 9.145.050, subd. (A).)[2]

The Policy Ordinance provides a further means of ensuring compliance with this first purpose in at least three ways. First, the City cannot accept federal funding or participate with federal or state law-enforcement agencies to investigate adults for possessing small amounts of marijuana in private. (Code ch. 9.145.050, subds. (C)-(E).) Second, the initiative establishes a community oversight committee to "ensur[e] timely implementation" of the initiative, and directs the committee to take certain actions to fulfill its mission. (Code ch. 9.145.060.) Third, the

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[1] All subsequent citations to a Code Chapter refer to the Santa Barbara Municipal Code.

[2] By its own terms, the Policy Ordinance does "not apply to use of marijuana on public property or driving under the influence." (Code ch. 9.145.050, subd. (B).) Nor does it prohibit City police officers from enforcing marijuana laws on private property; it merely declares as a matter of policy that such enforcement be the City's lowest priority. Furthermore, it does not purport to extend these priorities to non-City (e.g., state or federal) officers.

Policy Ordinance confers a private right of action on any registered voter in Santa Barbara "to ensure the law is fully implemented." (Code ch. 9.145.080.)

In an effort to publicize Santa Barbara's opposition to enhance enforcement of federal and state criminal laws that proscribe adult possession of small amounts of marijuana in private, the second purpose of the initiative is "[t]o transmit notification of the enactment of this initiative to state and federal elected officials who represent the city of Santa Barbara." (Code ch. 9.145.020, subd. (B).) To carry out this purpose, the LLEP Policy Ordinance provides that the City Clerk shall notify certain federal and state officials of the existence of the initiative, and request that they "enact similar laws." (Code ch. 9.145.070.[3])

Santa Barbara is not alone in enacting its LLEP Policy Ordinance. Since 2000, at least eleven cities and counties, including seven in California, have enacted legislation treating certain marijuana offenses as a low or the lowest law-enforcement priority. (*See* Santa Monica Mun. Code § 3.72; Santa Cruz Mun. Code § 9.84; Mendocino Initiative Measure G [Nov. 7, 2000], *to be codified at* Mendocino County Code § 9.36; Oakland Initiative Measure Z [Nov. 2, 2004] [uncodified]; San Francisco Mun. Code ch. 12X; West Hollywood Resolution No. 06-3430 [June 19, 2006]; *see also, e.g.*, Seattle Mun. Code ch. 12A.20.060 [Seattle, WA]; Missoula County Initiative No. MSLA2006-02 [Nov. 14, 2006] [Missoula, MT]; Eureka Springs Initiative [Nov. 14, 2006], *available at* http://www.cityofeurekasprings.org/ORDS/intpet.html [last visited May 3, 2007], *amending* Eureka Springs Mun. Code § 7.04.01 [adding § 7.04.03] [Eureka Springs, AR]; Traverse City Mun. Code § 614.02 [Traverse City, MI].)

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[3] The initiative also contains a severability clause, which provides that, in the event any section is held invalid, all remaining sections "shall not be affected." (Code ch. 9.145.090.)

III. PROCEDURAL BACKGROUND

On February 27, 2007, the City of Santa Barbara filed a complaint ("Complaint") for declaratory relief against Poet, who is the only named defendant. The complaint alleges that certain, mostly unspecified provisions of the LLEP Policy Ordinance violate certain, mostly unspecified portions of the United States and California constitutions. (Compl., at ¶¶ 10-15.)

Poet is referenced three times in the Complaint. First, the caption reads: "HEATHER POET, proponent of initiative measrure" [*sic*]. (*Ibid.*, at p.1.) Second, in initially describing Poet, the City alleges that she "filed an initiative petition." (*Ibid.* at ¶ 3 [referring to the LLEP Policy Ordinance].) Third, when further describing Poet, the City alleges that she "is the 'proponent' (within the meaning of the California Elections Code) of the Initiative Measure which is the subject of this proceeding," and that she "was the only signer of the notice of intention to circulate the petition filed with the City of Santa Barbara on or about May 31, 2006, in accordance with section 9202 of the state Elections Code." (*Ibid.* at ¶ 4.) Besides alleging that Poet believes that the LLEP Policy Ordinance is constitutional, the complaint includes no other references to Poet.

On April 16, 2007, Poet filed a general denial. She now moves to strike the complaint pursuant to California Code of Civil Procedure § 425.16.

IV. STANDARD FOR ANTI-SLAPP MOTION

California's anti-SLAPP statute was enacted to prevent plaintiffs from suing an individual due to her participation in the political process. (Code Civ. Proc. § 425.16.) The statute creates a mechanism—a "special motion to strike"—to dismiss a complaint where the claims "aris[e] from any act of [the defendant] in furtherance of the person's right of petition or free speech . . ., unless the court determines that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc. § 425.16, subd. (b)(1).)

Courts engage in a two-step inquiry to resolve anti-SLAPP motions:

> First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the . . . acts of which the plaintiff complains were taken in furtherance of the [defendant]'s right of petition or free speech . . . .
>
> [Second, when] the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.

(*Equilon Enter. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [internal quotation marks omitted]; *see also City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 71.) In short, if Poet satisfies her burden to show that she has been named as a defendant based on her political activity, the burden then shifts to the City to demonstrate that it has a probability of prevailing on its claim. (*Shekhter v. Fin. Indem. Co.* (2001) 89 Cal.App.4th 141, 151; *see also Stewart*, *supra*, 126 Cal.App.4th at p. 71 ["The moving party bears the burden on the first issue; the responding party on the second."].)

V. ARGUMENT

Poet clearly satisfies the two-part test for the Court to grant her motion and to strike the Complaint. First, it is indisputable that Poet was sued because of her participation in the democratic process. The City selected Poet as the defendant in this lawsuit for one reason: Because she was the proponent of and public advocate for an initiative that the City believes is unlawful. Aside from her status as the initiative sponsor, Poet is materially indistinguishable from the rest of the City's residents and voters.

Second, the City cannot demonstrate that it is likely to prevail on its causes of action. Its noncommittal claims that the LLEP Policy Ordinance "may or may not" violate federal law, state

law, and the City Charter do not hold up to scrutiny. The City's novel claims are unsupportable, especially in light of the heavy burden that it must satisfy to warrant the striking down of an ordinance as facially unlawful.

A. DEFENDANT HEATHER POET, SUED AS THE PROPONENT OF AN INITIATIVE MEASURE, HAS BEEN HAULED INTO COURT DUE TO HER PARTICIPATION IN THE POLITICAL PROCESS.

Among all the voters and residents of Santa Barbara, Poet is named as the defendant in this action because of her quintessential political act of sponsoring an initiative. This lawsuit, if allowed, would have the effect of chilling political activity, as the sponsor of an initiative would be forced to bear the risk of being named as a defendant by any governmental body that wanted to test its belief that the initiative might be unlawful. As such, this suit falls precisely within the scope of California's anti-SLAPP statute.

The United States Supreme Court has repeatedly recognized that, when a political jurisdiction chooses to allow ballot initiatives, the conduct of initiative elections become a "basic instrument of democratic government." (*City of Eastlake v. Forest City Enters., Inc.* (1976) 426 U.S. 668, 679.) The act of voting upon an initiative is described as a "classic demonstration" (*ibid.*) of "devotion to democracy" (*James v. Valtierra* (1971) 402 U.S. 137, 141), which "give[s] citizens a voice on questions of public policy" (*ibid.*).

California has enacted its anti-SLAPP statute in order to protect the right of individuals to engage in the democratic process. (Code Civ. Pro. § 425.16.) The statute ensures that people will continue to participate in the initiative process, among other democratic fora, by providing a mechanism for expeditious resolution of any lawsuit filed against them as a result of their political activity. (Code Civ. Pro. § 425.16 subd. (b)(1).)

The anti-SLAPP statute applies to claims "arising from any act of [a defendant] in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." (Code Civ. Proc. § 425.16, subd. (b)(1).) The statute defines "any act . . . in furtherance of the person's right of petition or free speech" to include "any. . . conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16, subd. (e).) This section, which "shall be construed broadly" (Code Civ. Proc. § 425.16, subd. (a)), is aimed at encouraging "open and free participation in the democratic process" (*Navarro v. IHOP Props., Inc.* (2005) 134 Cal.App.4th 834, 839).

For purposes of an anti-SLAPP motion, a "person's right of petition or free speech" includes sponsoring an initiative. In *Stewart*, a Pasadena resident sued the City of Pasadena for failing to authenticate and certify an initiative petition that prohibited city officials from receiving certain campaign contributions and other items of value. (126 Cal.App.4th at 54.) The initiative's sponsor and a non-profit organization (collectively, The Foundation for Taxpayer and Consumer Rights, or "FTCR") then intervened on the plaintiff's behalf, and the City filed a cross-complaint against the sponsor, seeking a declaratory judgment that Pasadena had no duty to implement the initiative due to its alleged unconstitutionality. (*Ibid.* at pp. 54-55.) In response to this cross-complaint, the initiative's sponsor filed an anti-SLAPP motion, contending that its action "arose from acts taken in furtherance of its constitutionally protected rights of petition or free speech, specifically its sponsorship of the Initiative in Pasadena . . . ." (*Ibid.* at p. 55.)[4]

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[4] The *Stewart* intervenors' alternative ground for satisfying the political-speech prong of the anti-SLAPP motion was that they were sued for intervening in the action. (126 Cal.App.4th, *supra*, at p. 55.)

The Court of Appeals granted the initiative sponsor's anti-SLAPP motion, finding that the sponsor "was sued because . . . it sponsored the Initiative and supported its constitutionality." (*Ibid.* at p. 75.) Responding to Pasadena's argument that it had filed the cross-complaint, not because of the sponsor's actions, but because the initiative was approved by the voters, the Court stated:

> [E]ven if we agreed that the act which led to the filing of the cross-complaint against FTCR was the voters' approval of the FTCR-sponsored Initiative, that approval would represent, among other things, a paradigmatic exercise of FTCR's and the voters' engagement in "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

(*Ibid.* at p. 73.) The court held that sponsorship and general support of an initiative "fall squarely within the plain language of the anti-SLAPP motion." (*Ibid.*, at pp. 74-75 [quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90].)[5]

As in *Stewart*, Poet was sued because she "filed an initiative petition" [Complaint, at ¶ 3], "is the 'proponent' (within the meaning of the California Elections Code) of the Initiative Measure which is the subject of this proceeding," [Complaint, at ¶ 4], and "was the only signer of the notice of intention to circulate the petition filed with the City of Santa Barbara" [Complaint, at ¶ 4]. To drive home this point, the caption refers to Poet as the "proponent of initiative measrure" [*sic*]. (*See also supra* p. 5 [noting the City's characterization of Poet's

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[5] The *Stewart* court held that it was irrelevant that Pasadena had not *intended* to chill speech by filing the cross-complaint. (*Ibid.*, at p. 72 [noting the California Supreme Court's rejection of the proposition that "we judicially engraft the statute with requirements that defendants moving thereunder also prove the suit was intended to chill their speech or actually had that effect"] [citing, *inter alia*, *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733-34].) Rather, the anti-SLAPP statute can be invoked anytime a claim arises from a defendant's political action, regardless of the plaintiff's intent in filing its complaint.

relevant actions].) Poet's actions are classic examples of political speech that, pursuant to California's anti-SLAPP statute, should not subject an individual to a lawsuit.

A ruling in favor of the City on this point would severely undermine the purpose and effect of the anti-SLAPP statute. Initiative proponents must be assured they will not risk the time and expense of drawn-out litigation solely because they support the passage of a law that is later challenged in court. Fortunately for initiative proponents, like Poet, California's anti-SLAPP statute provides protection from protracted litigation.

B. THE CITY CANNOT MEET ITS BURDEN FOR DEMONSTRATING THAT IT WILL PREVAIL ON ITS CLAIMS.

The City cannot satisfy its burden of proving that it will prevail on its causes of action. Its claims, contained in paragraphs 10 through 15 of the Complaint, allege that (1) "some or all" of the provisions of the LLEP Policy Ordinance are improper subjects for an initiative because they are administrative, rather than legislative, in nature; (2) the initiative "may" be preempted by state or federal laws; and (3) the measure "may conflict" with three subsections of the City Charter. As discussed below, the City cannot prevail on any of these claims, especially in light of the heavy burden it must overcome.

1. The City Must Overcome a Heavy Burden Before It Can Prevail on Its Claims.

The City must overcome a multi-layered burden before it can prevail on its claims. Due to the nature of its causes of action, the City must clear not only the high hurdle faced by all plaintiffs in anti-SLAPP motions, but also the extra burdens that are attendant to facial challenges to an ordinance's constitutionality, claims that an ordinance violates a Charter provision, and claims that an ordinance is preempted by state or federal law.

As an initial matter, and as discussed above, the City bears the general burden of demonstrating that it is likely to prevail on its claims. (*Stewart, supra*, 126 Cal.App.4th at p. 71; *Shekhter, supra*, 89 Cal.App.4th at p. 151.) Moreover, the City's claims that the Policy Ordinance is unconstitutional are subject to the doctrine of constitutional validity, whereby courts presume that challenged legislation is constitutional. (*See People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509; *see also Porter v. City of Riverside* (1968) [applying the presumption of constitutionality to local ordinances].) Additionally, when assessing facial claims of constitutional invalidity, courts are required, if possible, to interpret the challenged statute in a manner that upholds its validity. (*See Romero, supra*, 13 Cal.4th at p. 509 [noting that this is true "even if a serious doubt of constitutionality is raised"].)

This presumption of constitutionality is particularly true with respect to the City's preemption claims, where "[t]he party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.) Indeed, in cases where "local government regulates in an area over which it traditionally has exercised control," such as the prioritization of the enforcement of criminal offenses, "California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." (*Ibid.* [citing *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 93] [emphasis in original].)

The City faces a similarly high hurdle for its claims that the LLEP Policy Ordinance violates the City Charter. It is a fundamental precept of statutory construction that legislation "should be construed, if possible, to avoid conflict with city charters." (*United Pub. Employees v. City & County of San Francisco* (1987) 190 Cal.App.3d 419, 423.) In other words, arguably ambiguous provisions of a charter and challenged ordinance should be read, if possible, to support the validity of the ordinance.

Accordingly, the City faces an exceedingly difficult proposition in opposing this motion. The City must convince this Court that it is not only likely to prevail on its claims, but that its arguments as to the facial invalidity of the LLEP Policy Ordinance are so clearly correct that there is no way for this Court to read the Policy Ordinance to avoid conflict with federal law, state law, and the City's Charter.

2. The LLEP Policy Ordinance is a Legislative Act Because It Declares a Public Purpose and Provides Means for Its Accomplishment.

The LLEP Policy Ordinance is plainly a legislative act: It declares public purposes and provides the ways and means for the accomplishment of those purposes. Nothing more is required for the Policy Ordinance to be considered legislative, and thus the proper subject of an initiative.

Initiatives are valid only if they are legislative, as opposed to administrative, acts. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776; *Worthington v. City Council of City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1140.) A legislative act (1) "constitute[es] a declaration of public purpose," and (2) "mak[es] provision for ways and means of its accomplishment. (*Pettye v. City & County of San Francisco* (2004) 118 Cal.App.4th 233, 241 [citing *McKevitt v. City of Sacramento* (1921) 55 Cal.App. 117, 124].) By contrast, an administrative act (1) is "necessary . . . to carry out legislative policies and purposes *already declared* by the legislative body," or (2) is "devolved upon [the executive branch] by the organic law of its existence." (*Pettye*, *supra*, 118 Cal.App.4th at p. 241 [emphasis added]; *Hughes v. City of Lincoln* (1965) 232 Cal.App.2d 741, 744-45.) As the Court of Appeal recently explained: "The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the

legislative body itself, or some power superior to it." (*Worthington*, *supra*, 130 Cal.App.4th at pp. 1140-41.)

The LLEP Policy Ordinance fits squarely within the definition of a legislative act. First, it contains a declaration of public purposes: (1) that private possession of small amounts of marijuana by adults be police officers' lowest law-enforcement priority (Code ch. 9.145.020(A)); and (2) that Santa Barbara's state and federal representatives be apprised of the initiative and urged to enact similar laws within their respective jurisdictions (Code ch. 9.145.020(B)). Second, it "make[s] provision for ways and means of [the] accomplishment" of these purposes (*Pettye*, *supra*, 118 Cal.App.4th at p. 241) by (1) mandating that City police officers treat the subject offense as their lowest priority (Code ch. 9.145.050(A)); (2) prohibiting City police officers from cooperating with, or accepting commission from, federal or state officers for the purpose of "investigating, citing, arresting, or seizing property from adults for" the subject offense (Code ch. 9.145.050(C), (D); (3) prohibiting the City from accepting "federal funding that would be used to investigate, cite, arrest, prosecute, or seize property from adults" for the subject offense (Code ch. 9.145.050(E)); (4) establishing a community oversight committee to monitor the City's compliance with the initiative (Code ch. 9.145.060); and (5) conferring on Santa Barbara voters a private right of action to "seek a writ of mandate to ensure the law is fully implemented" (Code ch. 9.145.080). (*See generally* Code ch. 9.145.080-.090.)

Moreover, the ordinance does not fit the definition of an administrative act. None of the Policy Ordinance's provisions is "necessary . . . to carry out legislative policies and purposes *already declared* by the legislative body," nor are they "devolved upon the Mayor's office by the organic law of its existence," i.e., the Santa Barbara City Charter.[6] (*Pettye*, *supra*, 118 Cal.App.4th at pp. 241.)

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[6] In rare cases, a legislative act can be rendered "administrative" despite its legislative nature when the following two conditions are met: (1) the California Legislature has designated

In *Kugler v. Yocum* (1968) 69 Cal.2d 371, 377, the Supreme Court held that the setting of wages for city firemen was a legislative act because it embodied a "fundamental issue" of policy. This would stand in contrast, the Court noted, to "the subsequent filling in of the facts in application and execution of the policy." (*Ibid.*, at p. 377.) Accordingly, the *Kugler* Court held that setting wages of the city's personnel was a legislative act within the voters' initiative power. (*Ibid.*, at p. 373 [noting that plaintiffs had filed a writ of mandate to compel the defendant city either to place the wage ordinance on the ballot or for the city council to approve the proposed initiative]; *see also Prof'l Eng'r in Cal. Gov't v. Kempton* (2007) 155 P.3d 226, --, 56 Cal.Rptr.3d 814, 835 [reaffirming *Kugler* and holding that a city's authority to enter into contracts with private companies is a legislative, not administrative, act].)

Here, and as discussed above, the setting of priorities for the enforcement of a criminal offense is a "fundamental issue" of policy—"it prescribes a new policy or plan" (*Worthington*, *supra*, 130 Cal.App.4th at pp. 1140-41), to at least the same extent as the legislative act of setting city employees' salaries. While City officials might have authority to "fill in the facts" as to how the Policy Ordinance will be executed in practice, the initiative contains the overarching legislative declaration of policy, as well as basic ways and means for the accomplishment of that policy. Accordingly, the Policy Ordinance is a legislative act that was the proper subject of an initiative.

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the municipality in question as its agent "to implement a comprehensive system of state regulations affecting a matter of statewide concern" (*see W. W. Dean & Assoc. v. City of South San Francisco* (1987) 190 Cal.App.3d 1368, 1375-76), *and* (2) state law provides only "narrow authority" for the City Council to implement the statutory scheme as the State's agent (*Hughes*, *supra*, 232 Cal.App.2d at p. 745). Neither of these prongs—let alone both prongs—has been met. There is no comprehensive system of state-wide regulations requiring that adult possession, in private, of small amounts of marijuana be treated with any particular level of priority.

3. Federal and State Law Do Not Preempt a City's Ability to Tell Its Law Enforcement Officers How to Prioritize Matters Within Its Own Jurisdiction.

The City cannot prevail on its vague claim that state and federal laws "may preempt" the LLEP Policy Ordinance. (Complaint at ¶ 11.) If the City's preemption claims were deemed meritorious, the scope and effect of such a ruling would be extraordinary: That cities are unable to instruct their own law enforcement officers how to prioritize law enforcement within city limits. This result would turn on its head traditional respect for local control over city law-enforcement officers.

Generally speaking, federal and state statutes can have a preemptive effect on local legislation. (*See, e.g., County of Santa Cruz v. Waterhouse* (2005) 127 Cal.App.4th 1483.) However, the scope of a statute's preemptive reach depends entirely on the statute at issue. (*See ibid.* at p. 1490 [finding preemption where state statute expressly stated that it "supercedes any ordinance enacted by any city, county, or city and county, whether general law or chartered," and professed a goal of promoting uniformity]). This is because preemption is a matter of legislative intent (*see, e.g., Capital Research & Mgmt. Co. v. Brown* (2007) 147 Cal.App.4th 58, 65), and legislatures intend only certain statutes to have broad preemptive reach, usually by spelling out the intended preemptive effect (*see, e.g.,* 29 U.S.C. § 1144 [providing that the Employee Retirement Income Security Act (ERISA) preempts local or state laws "insofar as they may now or hereafter relate to any employee benefit plan," but does not preempt local or state laws "which regulate[] insurance"]).

Because the Complaint identifies only one specific state statute—and no specific federal statute—that "may preempt" the LLEP Policy Ordinance (*see* Compl., at ¶ 12 [referencing California Penal Code § 836]), this memorandum will demonstrate that the specified state statute does not preempt the Policy Ordinance. Moreover, since the City obliquely refers to the purported preemptive effect of State and Federal laws that "regulat[e] marijuana usage" (Compl.,

at ¶ 11), this memorandum will further show that such laws likewise do not preempt the Policy Ordinance.

a. California Penal Code Section 836, which allows a police officer to arrest an individual for possessing a small amount of marijuana in the officer's presence, does not preempt the LLEP Policy Ordinance, which does not rescind the officer's authority to make such arrests.

The City's claim that Penal Code Section 836 ("Section 836") preempts the LLEP Policy Ordinance is belied by the text of the Ordinance itself. While Section 836 authorizes (but does not command) a police officer to arrest an individual for possessing a small amount of marijuana in the officer's presence, the Policy Ordinance merely prioritizes the enforcement of this offense; the initiative does not strip the officer of the authority to effectuate an arrest for committing such an offense. Accordingly, Section 836 does not preempt the initiative.

In the absence of a statutory provision to the contrary, a state statute can preempt a local ordinance where the ordinance: (1) "duplicates," or is "coextensive with," state law; (2) is "contradictory to" or "inimical to" state law, such that the ordinance "prohibit[s] what the statute commands or command[s] what it prohibits;" or (3) enters into an area fully occupied by state law. (*Kumar v. Superior Court* (2007) – Cal.Rptr.3d –, 2007 WL 779511, at *4 (March 16, 2007); *Harrahill v. City of Monrovia* (2002) 104 Cal.App.4th 761, 767-68.) The City cannot meet its burden to demonstrate that Section 836 preempts the LLEP Policy Ordinance under any of these preemption tests.

Section 836 confers authority on a police officer to make arrests without a warrant in the following circumstances:

(1) The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence.

(2) The person arrested has committed a felony, although not in the officer's presence.

(3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

(Penal Code § 836, subd. (a).) Subsection (2) and (3) are inapposite to this case because, among other reasons, possession of a small amount of marijuana by an adult in private is a misdemeanor, not a felony. (Health & Safety Code § 11357.) Therefore, subsection (1), which authorizes a police officer to arrest an adult for possessing small amounts of marijuana on private property in the officer's presence, is the only portion of Section 836 for which any preemption argument could even be raised.

The Policy Ordinance, which prioritizes arrests for a particular misdemeanor offense, does not "duplicate" Section 836, which authorizes officers to make such arrests. Authority to arrest and prioritization of offense-enforcement are different—i.e., non-duplicative—concepts. Duplication occurs when, for instance, local legislation imposes criminal penalties identical to those imposed by state law. (*See In re Portnoy* (1942) 21 Cal.2d 237, 240.) Mere overlap between offenses or penalties, however, is insufficient. *See Harrahill*, 104 Cal.App.4th at 767 (concluding that there was no duplication where local legislation made it illegal for students to be in city streets during school hours, even though state legislation already provided penalties for truancy.) As Section 836 and the Policy Ordinance deal with different topics, the Policy Ordinance does not duplicate this state law.

Nor is the LLEP Policy Ordinance "contradictory to" or "inimical to" state law, such that the ordinance "prohibit[s] what [Section 836] commands or command[s] what it prohibits." (*Harrahill*, *supra*, 104 Cal.App.4th at pp. 767-68.) First, Section 836 does not command or prohibit officers to do anything; it merely permits arrests in certain circumstances. Second, neither does the Policy Ordinance command or prohibit officers in any fashion that contradicts Section 836; it merely prioritizes investigation and arrest for a particular offense. The present situation might be far different if the LLEP Policy Ordinance completely forbid officers from

arresting an adult for possessing a small amount of marijuana in non-public spaces, but that is decidedly not what the LLEP Policy Ordinance does.

Nor can the City speculate that the total removal of discretion to arrest is a likely result of its compliance with the Policy Ordinance. Because the City's present action is a facial challenge, the Policy Ordinance must survive attack if there is *any conceivable set of facts* under which the Policy Ordinance can be executed constitutionally. (*See Cogswell v. City of Seattle* (9th Cir. 2003) 347 F.3d 809, 813-14; *S.D. Meyers, Inc. v. City & County of San Francisco* (9th Cir. 2001) 253 F.3d 461, 467.) Here, the ordinance does not prevent a City police officer from exercising his authority to arrest an adult for private possession of marijuana, notwithstanding the fact that this offense is the City's lowest law-enforcement priority.

Finally, the Policy Ordinance does not tread upon a field "fully occupied" by Section 836. Section 836 does not implicate local police priorities at all, let alone dictate them in a way that could be construed to fully occupy the field of local law-enforcement priorities. (*Cf.* Penal Code § 13900, subd. (b) [recognizing that the "criminal justice needs and problems vary greatly among the different local jurisdictions of this state"].)

In sum, Section 836 does not preempt the LLEP Policy Ordinance. No state law sets priorities for local police; this is a classic matter of local concern upon which the voters of Santa Barbara are free to make declarations of policy.

b. State and Federal statutes regulating "marijuana usage" do not preempt a local ordinance that tells local police officers which offenses not to prioritize in their home jurisdictions.

Neither state nor federal statutes purport to prioritize local enforcement of "marijuana usage" laws, and therefore these federal and state statutes do not preempt the LLEP Policy Ordinance. (Complaint at ¶11.) The Policy Ordinance—which does not prohibit City law

enforcement officers from enforcing federal or state marijuana-use laws and does not prohibit federal or state law-enforcement officials from entering Santa Barbara to enforce laws—is unaffected by state or federal "regulation of marijuana usage."

First, federal and state laws do not make low-level marijuana-possession offenses the lowest law-enforcement priority, and therefore do not render the LLEP Policy Ordinance "duplicative." The prohibition of use of marijuana and the prioritization of enforcement of offenses are distinctly different topics, and are not duplicative of one another. (*Cf. In re Portnoy* (1942) 21 Cal.2d 237, 240; *Harrahill*, *supra*, 104 Cal.App.4th at p. 767.)[7]

Second, the LLEP Policy Ordinance does not command what the federal and state "marijuana usage" statutes prohibit, just as it does not prohibit what the federal and state statutes command. As stated above, the Policy Ordinance merely prioritizes City police-officer enforcement of a particular criminal offense, while the "marijuana usage" statutes prohibit the use of marijuana.

Third, the federal and state "marijuana usage" statutes do not "fully occupy" the field of local police prioritization of marijuana offenses. In fact, no federal or state statute even purports to demand local police-officer prioritization of marijuana offenses vis-à-vis other crimes.

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[7] If the federal "marijuana usage" statute to which the City refers is the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, the only applicable type of preemption would be "positive-conflict preemption." (*See* 21 U.S.C. § 903 [CSA's anti-preemption provision]; *see also S. Blasting Servs., Inc. v. Wilkes County* (4th Cir. 2002) 288 F.3d 584, 591 [reviewing an anti-preemption provision that is materially identical to 21 U.S.C. § 903 and limiting the preemption analysis to positive-conflict preemption].) Accordingly, insofar as the City's preemption argument rests on preemption of the Policy Ordinance by the CSA, the ordinance would be preempted only if it *requires* people to use marijuana. (*See Gonzales v. Oregon* (2006) -- U.S. --, 126 S. Ct. 904, 934 [dis. op. of Scalia] [noting the meaning of "positive-conflict" preemption].) Of course, the Policy Ordinance does not require anyone to use marijuana, and therefore is not preempted by the CSA.

The LLEP Policy Ordinance does not require federal or state law-enforcement officers to alter their enforcement priorities. It does not even command City police officers to refrain from enforcing "marijuana usage" statutes. Rather, it makes private, low-level marijuana offenses committed by adults the lowest law-enforcement priority for City police officers—a subject unaddressed by any state or federal "marijuana usage" statute.

4. The City's Charter Provisions Specified in the Complaint, Which Deal with the Day-To-Day Administration of the City's Departments and Other Intradepartmental Matters, Do Not Prohibit The People of Santa Barbara from Enacting General Policy Prioritizing the Enforcement of Certain Criminal Offenses.

While an initiative must yield if it conflicts with a provision of a City Charter (*see Alesi v. Bd. of Retirement* (2000) 84 Cal.App.4th 597, 601-02), the LLEP Policy Ordinance does not conflict with the Santa Barbara City Charter ("Charter") provisions identified by the City. These Charter provisions establish merely that certain individuals exercise supervisory authority over the day-to-day functioning of the City's departments; they do not prohibit voters or their representatives from legislatively enacting a policy that the enforcement of a particular criminal offense shall be the City's lowest law-enforcement priority.

a. Sections 604 and 607

The City candidly admits in its complaint that Sections 604 and 607 of the Charter place responsibility with the City Administrator "for the day-to-day administration and supervision of city affairs and personnel employment matters." (Compl., at ¶ 13.) These sections do not restrict the legislature's and the people's ability to enact law-enforcement policy regarding enforcement-prioritization for criminal offenses. Therefore, the Policy Ordinance's declaration that, as a

matter of policy, the enforcement of a particular criminal offense shall be prioritized creates no conflict between the Charter and the Policy Ordinance.

Section 604(g), for example, provides that the City Administrator shall "[s]upervise the enforcement of the . . . ordinances . . . of the City." This subsection charges the City Administrator, not with creating ordinances or prescribing policy, but rather with ensuring that ordinances are implemented. More specifically, Section 604(g) requires the City Administrator to oversee police officers' enforcement of the LLEP Policy Ordinance by supervising its day-to-day execution. While opponents of the Policy Ordinance apparently would like to turn this Charter provision on its head—allowing the City Administrator both to legislate and to supervise implementation of that legislation—such a construction would be at odds with the Charter and with basic principles of democratic governance.[8]

Section 607, the Charter's anti-graft provision, is also unavailing for the City. This section of the Charter prohibits the City Council and individual councilmembers from "deal[ing] with the administrative service under the jurisdiction of the City Administrator [except] through the City Administrator" or giving orders to "subordinate[s] of the City Administrator . . . [e]xcept when for the purpose of inquiry." Whatever the scope of Section 607, it is plainly inapplicable

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[8] Similarly, Section 604(h) vests in the City Administrator the responsibility to "exercise control of . . . all departments of the City" and to "prescribe . . . rules and regulations . . . for the general conduct of the administrative offices and departments." This Section does not vest in the City Administrator the ability—let alone the exclusive ability—to set policy with the force of law regarding law-enforcement priorities. Even if the City Administrator could issue regulations regarding law-enforcement priorities, any such regulations would need to fit within the legislative policy framework enacted by the voters and their representatives. It is beyond peradventure that rules and regulations must be promulgated consonant with applicable law, including ordinances such as the LLEP Policy Ordinance. (*See Kugler*, *supra*, 69 Cal.2d at p. 376 ["The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect."].)

to the LLEP Policy Ordinance, which does not require the City Council or its members to take any particular action.

Accordingly, Sections 604 and 607 of the Charter do not conflict with the LLEP Policy Ordinance. In fact, they make clear that it is the City Administrator's responsibility to supervise the execution of the policies and plans declared in the Policy Ordinance itself: They require, *inter alia*, that the City Administrator ensure ordinances are put into practice effectively, and that City Council members do not seek special favors or treatment from City workers. This in no way conflicts with a duly enacted ordinance's policy of treating adult possession of small amounts of marijuana, in private, as the City's lowest law-enforcement priority.

b. Section 702

Section 702 of the Charter similarly does not conflict with the LLEP Policy Ordinance. This section deals with *intradepartmental* organization and conduct—such as personnel and other management decisions—not with declarations of policy related to law-enforcement priorities. Accordingly, Section 702 does not foreclose the ability of the people to enact the Policy Ordinance.

Section 702 does not conflict with the LLEP Policy Ordinance because, first and foremost, prioritization of the enforcement of criminal offenses is not a power conferred by this Section of the Charter. As with Sections 604 and 607, Section 702 does not mandate any prioritization scheme, and thus does not conflict with the Policy Ordinance.

Furthermore, Section 702 grants authority unrelated to the type of policy decision embodied in the LLEP Policy Ordinance. Section 702 allows the enactment of ordinances "for the organization, conduct, and operation" of the various departments of the City, as well as to, for instance, assign "functions" and "duties" to one department or another. As the City notes in its Complaint, the type of "organization, conduct, and operation" referenced in Section 702 is the

type that is implemented in Chapter 2.33 of the Municipal Code. (Compl., at ¶ 14.) This provision of the Municipal Code creates a police department and establishes the position of Police Chief to "supervise and control" the department's personnel, materials, and equipment, as well as to take responsibility for the performance of the functions of the Department. Code ch. 2.33. In short, Section 702, like Chapter 2.33, deals with departmental creation and intradepartmental management, not with legislative-policy decisions regarding law enforcement.

Accordingly, Section 702 does not conflict with the LLEP Policy Ordinance. Section 702 provides legislative authority to create departments and make intradepartmental management decisions; it does not conflict with an initiative that declares a policy that prioritizes the enforcement of a particular criminal offense.

VI. CONCLUSION

Because Poet was sued for her participation in the political process and because the City cannot satisfy its burden of demonstrating that it is likely to prevail on its claims, Poet respectfully requests that the Court grant this Motion and strike the Complaint with prejudice.

Dated: May 4, 2007

Respectfully submitted,

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