



January 19, 2006

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Sent this date for overnight delivery via Federal Express

Sent this date via facsimile to: (619) 557-4025 and (619) 531-5506

Dear Honorable Members of the Board of Supervisors,

According to recent reports in the media, San Diego County is refusing to implement the state-mandated medical marijuana patient identification card program ("I.D. card program") and plans to file a lawsuit in federal court challenging California's medical marijuana laws.

We are writing on behalf of the American Civil Liberties Union (ACLU) and medical marijuana patients around the state to urge you to reconsider these ill-advised decisions, and to demand that you immediately begin implementation of the I.D. card program in compliance with state law.

Especially in light of the U.S. Supreme Court's decision two days ago in *Gonzales v. Oregon*, --- S.Ct. ---, 2006 WL 89200 (U.S.), it is clear that federal law does not pre-empt California's medical marijuana laws. It is equally clear that state and local government officials carrying out their duties under the I.D. card program are not violating federal controlled substance laws. The contemplated lawsuit has no legitimate legal basis and unnecessarily threatens the well-being of seriously ill and dying medical marijuana patients throughout California.

If San Diego County does file the proposed lawsuit, the ACLU will take immediate legal action to intervene in the litigation to defend California's valid medical marijuana laws and to protect the rights and interests of California's seriously ill and dying medical marijuana patients, and of California voters who overwhelmingly approved Proposition 215.

California Medical Marijuana Laws Are Not Preempted By Federal Law.

Though federal preemption was not the determinative issue before the U.S. Supreme Court in the recent *Gonzales v. Oregon* case, the Court's decision includes a discussion of pre-emption that is dispositive to any argument that California's medical marijuana laws are pre-empted by federal law. At issue in *Gonzales v. Oregon* was an Attorney General's Directive indicating that physicians who assist suicide of terminally ill patients pursuant to an Oregon state law would be violating the federal Controlled Substances Act ("CSA").

In reaching its conclusion that the Attorney General's Directive incorrectly interpreted the CSA, the Court's majority opinion noted that the CSA "explicitly contemplates a role for the states in regulating controlled substances, as evidenced by its pre-emption provision." 2006 WL 89200 at p.6. The pre-emption provision referred to by the Court, found at 21 U.S.C. § 903, specifically states that the CSA is not to be construed as pre-empting state law. The only exception is if there is a "positive conflict" between state law and the CSA, "so that the two cannot consistently stand together." 21 U.S.C. § 903.

The meaning of the phrase "positive conflict" in this context was explained by Justice Scalia. Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, dissented from the majority's decision. But in that dissenting opinion, Justice Scalia noted that the non-pre-emption clause was "embarrassingly inapplicable" to the assisted suicide issue before the Court, because the Attorney General's Directive,

does not purport to pre-empt state law in any way, not even by conflict pre-emption – unless the Court is under the misimpression that some States require assisted suicide. The Directive merely interprets the CSA to prohibit, like countless other federal criminal provisions, conduct that happens not to be forbidden under state law (or at least the law of the State of Oregon.

2006 WL 89200 at p. 29, emphasis added. As Justice Scalia's comments make clear, in order for there to be a "positive conflict," such that federal and state law "cannot consistently stand together," the state law at issue would need to require some action that specifically violated federal law. The mere existence of federal law that prohibits "conduct that happens not to be forbidden under state law" does not rise to the level of "positive conflict" triggering pre-emption. As Justice Scalia points out, there are "countless other federal criminal provisions" that criminalize conduct that is legal under state law, and these do not

trigger federal pre-emption. Indeed, this is a fundamental tenet of federalism.

That is precisely the situation in California. Federal law prohibits uses of marijuana that are not prohibited under California law. That does not mean that California's medical marijuana laws are pre-empted by the CSA, because there is no "positive conflict." The federal laws and California's laws can and do "consistently stand together." The federal government can, within certain restrictions, enforce its own federal marijuana laws, even in states like California where state law permits medical marijuana use. But federal marijuana laws do not pre-empt California's medical marijuana laws.

The U.S. Supreme Court's June, 2005 Decision In *Gonzales v. Raich* Did Not Render California's Medical Marijuana Laws Invalid Or Pre-Empted.

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Since San Diego County did not file a lawsuit challenging the validity of California's medical marijuana laws in 1996, when Proposition 215 was enacted, nor in 2003, when S.B. 420 was enacted (establishing the state-wide patient identification card program), the decision to take legal action now may be premised at least in part upon the June, 2005 decision of the U.S. Supreme Court in *Gonzales v. Raich*, 545 U.S. --- (2005). If so, such reliance is entirely misplaced and misinterprets the *Raich* holding.

In the time since the Supreme Court's *Raich* decision, California Attorney General Bill Lockyer has issued an official statement (June 6, 2005), two bulletins to law enforcement (June 9 and June 22, 2005), a formal opinion (June 23, 2005), and a letter providing legal advice to the California Department of Health (July 15, 2005) concerning the state's medical marijuana laws, all unambiguously affirming their continued validity. As Attorney General Lockyer has confirmed, nothing in the *Raich* decision changed anything about the validity and enforceability of California's medical marijuana provisions.

The Supreme Court did not even suggest in *Raich* that the CSA pre-empted California's medical marijuana laws, nor call into question the continued validity of state medical marijuana laws. The Court merely affirmed that under the Commerce Clause, federal law enforcement officers may enforce federal marijuana laws even in states where medical marijuana use is legal under state law. Even after *Raich* it is clear that states retain the power to enact and enforce their own individual state protections shielding medical marijuana patients from arrest and prosecution under state marijuana laws, and California government officials must continue to enforce and comply with California medical marijuana laws.

The *Raich* decision did nothing to grant the federal government power to require states to enforce federal drug laws, or to enact state laws prohibiting medical marijuana, or force states to repeal existing state laws permitting medical marijuana use. “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Printz v. United States*, 521 U.S. 898, 935 (1997); *see also New York v. United States*, 505 U.S. 144 (1992).

Like Attorney General Lockyer, every other state attorney general who has reviewed the validity of state medical marijuana laws in the wake of the *Raich* decision has concluded that such state laws are still valid and in full force and effect.

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State Employees Implementing And Enforcing State Medical Marijuana Laws, Including The I.D. Card Program, Are Not Aiding And Abetting Violation Of Federal Marijuana Laws, Or Otherwise Violating Federal Law.

Just as there is clearly no federal pre-emption problem with California’s medical marijuana laws generally, likewise there is no pre-emption problem with the specific California provisions concerning issuance of patient identification cards by county officials. For the same reasons (discussed in more detail below) that state or county officials could not conceivably be found in violation of the federal CSA simply by virtue of issuing state identification cards to qualified patients, there is no “positive conflict” between the CSA and California’s I.D. card program provisions.

There is no federal law which prohibits the issuance of medical marijuana cards by state employees, and any such law, even if enacted, would be ruled an unconstitutional infringement of state authority. Under federal criminal law governing accomplice liability, state employees implementing California’s Medical Marijuana Program and issuing identification cards are clearly not aiding and abetting the commission of a federal crime.

In order to show that someone has aided and abetted the commission of a crime, the government must prove four elements: (1) that the accused had the specific intent to facilitate the commission of a crime by another; (2) that the accused had the requisite intent of the underlying substantive offense; (3) that the accused assisted or participated in the commission of the underlying substantive offense, and; (4) that someone committed the underlying substantive offense. *United States v. Gaskins*, 849 F.2d 454, 459 (9th Cir.1988).

Under California law, medical marijuana identification cards serve the limited purpose of officially memorializing the fact that a physician has recommended medical use of marijuana for a qualified patient under

California Health and Safety Code section 11362.5. The cards merely identify for law enforcement personnel and other government officials those persons who possess a valid physician's recommendation entitling them to protection from arrest and prosecution by state law enforcement officials for violation of state controlled substance laws.

In *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), *cert. denied*, 540 U.S. 946 (2003), the United States Court of Appeals for the Ninth Circuit examined California's medical marijuana provisions and rejected the suggestion that California doctors who recommended marijuana for qualified patients were aiding and abetting violations of federal drug laws. In *Conant*, the district court had issued an injunction prohibiting the federal government from either revoking a physician's license to prescribe controlled substances or conducting an investigation of a physician that might lead to such revocation, where the basis for the government's action was solely the physician's professional recommendation of the use of medical marijuana under Health and Safety Code section 11362.5. *Conant*, 309 F.3d at 632.

The government argued that the district court's permanent injunction applied whether or not a physician anticipated that a patient would, in turn, use his or her recommendation to obtain marijuana in violation of federal law, and suggested that the injunction thus protected criminal conduct, because a recommendation under such circumstances would constitute aiding and abetting the patient's violation of federal law. The Court soundly rejected this misinterpretation of federal law governing criminal accomplice liability:

A doctor's anticipation of patient conduct ... does not translate into aiding and abetting, or conspiracy. A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana. Similarly, a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, agree to help the patient acquire marijuana, and intend to help the patient acquire marijuana. Holding doctors responsible for whatever conduct the doctor could anticipate a patient might engage in after leaving the doctor's office is simply beyond the scope of either conspiracy or aiding and abetting.

Conant, 309 F.3d at 635-636 (citations omitted; emphasis added).

If a physician's act of issuing a recommendation to a qualified patient under Health and Safety Code section 11362.5 is not aiding and abetting the violation of federal marijuana laws, then neither is a state or county employee's even more attenuated act of issuing such a patient a state identification card which merely verifies and memorializes the fact of the physician's recommendation.

Conclusion

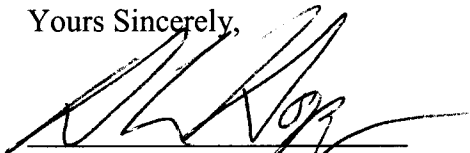
Since California's pioneering enactment of Proposition 215 nearly ten years ago, ten additional states have enacted similar medical marijuana law provisions. At no time over the past decade has any government official from any of the ten other states with medical marijuana laws concluded that state employees would be guilty of violating federal marijuana laws simply by virtue of participating in the implementation and enforcement of those states' medical marijuana provisions. In fact, at least two state Attorneys General, in Oregon and California, have conclusively found precisely the opposite, that state employees issuing identification cards could not be found in violation of federal law. Nor has any federal government official publicly voiced any such concern or belief. Despite its demonstrated antipathy to state medical marijuana laws, the federal government has not, in all this time, made any claim that such state laws are pre-empted by federal law.

Because there is clearly no viable legal argument to be made in support of a pre-emption claim, we are concerned that the Board of Supervisors may be acting out of political, rather than legal, motivations, such as the Board's political disagreement with the wisdom of state laws permitting medical marijuana use. Such motivation, especially coupled with the complete lack of legal support for the lawsuit, would, of course, render the lawsuit an improper use of taxpayer funds and, moreover, of the federal courts.

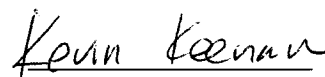
We therefore urge the Board of Supervisors to reconsider this ill-advised legal action and refrain from filing the proposed lawsuit. We also demand that the Board of Supervisors immediately begin implementing the marijuana patient identification card program as required by duly enacted state law.

Be assured that the ACLU stands fully prepared to take immediate legal action to protect the interests of California's seriously ill and dying medical marijuana patients and to defend the state's long-standing medical marijuana laws against this unwarranted, unreasonable and unfounded attack.

Yours Sincerely,



Allen Hopper, Senior Staff Attorney
National ACLU
Drug Law Reform Project



Kevin Keenan,
Executive Director
ACLU Foundation of
San Diego & Imperial
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