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REFORM PROJECT

Governor Arnold Schwarzenegger
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Sandra Shewy, Director
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TREASURER

July 12, 2005

Dear Governor Schwarzenegger and Director Shewy:

We are writing on behalf of the American Civil Liberties Union (ACLU) and the Drug Policy Alliance to demand that you immediately reinstate implementation of the California Department of Health Services (CDHS) Medical Marijuana Program and the issuance of identification cards to qualified patients and their primary caregivers.

Last Friday afternoon, July 8, 2005, CDHS posted on its website a press release and a letter to all County Health Directors stating that you were suspending the implementation of the Medical Marijuana Program and the issuance of medical marijuana identification cards to qualified patients and their primary caregivers. According to that press release, CDHS has requested from the Attorney General a formal legal opinion regarding whether, "in light of" the June 6, 2005 U.S. Supreme Court decision in Gonzales v. Raich, continued operation of California's Medical Marijuana program would aid and abet individuals in committing a federal crime.

Your decision to suspend the medical marijuana program and issuance of identification cards on the basis of Raich is completely unfounded and a clear violation of California law for several reasons:

1) The CDHS does not have the authority to "suspend" duly-enacted state law on the basis of a perceived conflict with federal law;

2) state employees implementing and enforcing state medical marijuana laws, including the identification card program, are not in violation of federal aiding and abetting laws;

3) Attorney General Lockyer has already issued several official statements affirming the continued validity of California state medical marijuana laws after the Supreme Court's decision in Raich, and ordering that California state and local peace officers may not refuse to abide by those state laws on the basis that they conflict with federal law, and;

4) CDHS concerns about providing patients with a "false sense of security" and maintaining confidentiality of state records provide no legal basis for your unilateral suspension of duly-enacted state medical marijuana laws, since it is for the legislature, not CDHS, to determine if changes to state law are warranted to better inform patients of risks under federal law or protect patient information contained in state or county-maintained records.

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Unless you have resumed implementation of the Medical Marijuana Program and issuance of identification cards in compliance with California Health and Safety Code sections 11362.7 et. seq. and issued a public statement to this effect by 5:00 p.m. July 19, 2005, we will take appropriate legal action.

CDHS Does Not Have The Authority To "Suspend" State Medical Marijuana Laws.

CDHS does not have the authority to unilaterally declare California's medical marijuana statutes unenforceable, or to refuse to enforce those statutes, on the basis of agency concerns about federal law. Article III, section 3.5(c) of the California Constitution provides that, "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power ... to declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." See also Lockyer v. City and County of San Francisco (2004) 33 Ca.4th 1055.

The determination of whether or not there are conflicts between federal and state law can be made only by an appropriate appellate court. CDHS has mandatory ministerial duties under Health and Safety Code section 11362.7 et. seq., and has exceeded its authority by suspending implementation and enforcement of a duly-enacted state law absent a decision from an appellate court. While you may certainly request a

clarifying opinion from the Attorney General, you are without authority to suspend or refuse to enforce the law pending issuance of such an opinion.

State Employees Implementing And Enforcing State Medical Marijuana Laws, Including The Identification Card Program, Are Not Aiding And Abetting Violation Of Federal Marijuana Laws.

Under federal criminal law governing accomplice liability, state employees implementing the 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 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.

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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 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 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.

Attorney General Lockyer Has Already Unambiguously Confirmed That The U.S. Supreme Court's Decision In Raich Did Not Invalidate Or Render Unenforceable California Medical Marijuana Laws.

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) and a formal opinion (June 23, 2005) concerning the state's medical marijuana laws, 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. Even after Raich it is clear that states retain the power to enact and enforce 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. Moreover, 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. The Raich decision does nothing to grant the federal government power to require states to enforce federal drug laws or to enact state laws prohibiting medical marijuana.

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 state laws are still valid and in full force and effect. No government official from any of the ten other states with medical marijuana laws has indicated any concern or belief that state employees could be guilty of violating federal marijuana laws simply by virtue of participating in the implementation and enforcement of those states' medical marijuana provisions. Nor has any federal government official voiced such a concern or belief.

CDHS Concerns About Providing Patients With A "False Sense Of Security" And Maintaining Confidentiality Of State Records Provide No Legal Basis For The Unilateral Suspension of State Medical Marijuana Laws.

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The CDHS July 8, 2005 press release listed as "additional factors" underlying the decision to suspend the medical marijuana program claims that "the possession of a state medical marijuana card could give patients a false sense of security and lead them to believe that they are protected from federal prosecution," and, "information gathered from card holders could potentially be seized by federal officials to identify medical marijuana users for prosecution." As to patients' false sense of security, Oregon's Attorney General, in responding to a similar concern from the Department of Human Services, stated, "It is our belief that the vast majority of patients and caregivers already knew, before Raich was decided, that [state law] did not protect against possible federal prosecution." (June 17, 2005 Letter from Oregon Attorney General Hardy Meyers to Department of Human Services, available on the Oregon Attorney General's website, at http://www.doj.state.or.us/releases/pdf/GENM9991.pdf). The same is just as true of patients in California, where Proposition 215 was enacted in 1996, years before the Ninth Circuit's decision in Raich granted new, but short-lived, protection from federal law enforcement.

As to the potential federal seizure of state records, given that the identification card registry program is completely voluntary, California patients can decide for themselves whether the additional protection from state law enforcement arrest and seizure is worth the risk that the federal government will obtain their identifying information by seizing state records and then use that information to arrest them or seize their medication. California patients may reasonably determine that they have more to fear from state and local law enforcement officials unconvinced of their legal status in the absence of a valid state-approved identification card than from the federal government, which has not, to date, seized registry information or targeted individual patients in any state, no doubt

for a variety of practical and strategic reasons. Most importantly, it is for the legislature, not CDHS, to determine if changes to state law are warranted to better protect patients' information. CDHS's perception of this potential danger provides no legal basis for CDHS to unilaterally suspend valid state law.

Conclusion

There is still much uncertainty among the public regarding the impact of the Raich decision. Emotions are running high and sick and dying patients and their physicians are understandably concerned about their legal status. Under these circumstances, California government officials have the responsibility to ameliorate, not exacerbate, the public's fear and confusion. Instead, CDHS's improper actions have unnecessarily frightened and confused California's medical marijuana patients.

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California Health and Safety Code section 11362.7 et. seq. requires CDHS to, "establish and maintain a voluntary program for the issuance of identification cards to qualified patients who satisfy the requirements of this article and voluntarily apply to the identification card program." We demand that you comply with this mandatory duty and immediately lift the suspension of the Medical Marijuana Program and the issuance of identification cards.

Thank you for your prompt attention. Do not hesitate to contact us if you would like to discuss this matter.

Yours Sincerely,

Allen Hopper
Senior Staff Attorney
National ACLU Drug Law Reform Project

Daniel Abrahamson
Director of Legal Affairs
Drug Policy Alliance

cc: Attorney General Bill Lockyer