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REFORM PROJECT

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January 23, 2006

Dear Honorable Members of the Board of Supervisors,

We are writing again on behalf of the American Civil Liberties Union (ACLU) and medical marijuana patients around the state to follow up on our January 19, 2006 letter to you. We have reviewed the Complaint you filed in federal district court on January 20, 2006. It is clear that the lawsuit has no merit. Unambiguous binding Ninth Circuit precedent clearly holds that as a political subdivision of the State, San Diego County has no standing to sue the State in federal court alleging claims premised upon the Supremacy Clause of the U.S. Constitution. Even if the County did have such standing, for the reasons stated in our January 19, 2006 letter, your Supremacy Clause claims have no merit because the federal Controlled Substances Act (CSA) does not pre-empt California's medical marijuana laws. Finally, we have reviewed your allegations concerning the Single Convention treaty and those claims are similarly without merit. For all of these reasons, we hereby demand that you immediately dismiss the lawsuit. If you do not take action to do so at your public meeting scheduled for tomorrow, January 24, 2006, we will take appropriate legal action, including formal intervention in the lawsuit.

San Diego County Lacks Standing To Sue The State of California In Federal Court Alleging Claims Premised Upon The Supremacy Clause

For more than twenty-five years, the law in this Circuit has been that political subdivisions of a state lack standing to challenge statutes of the state itself on constitutional grounds. *South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir.1980). The Ninth

Circuit has explicitly refused to create an exception to this rule for Supremacy Clause claims. *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d 1360, 1363-1364 (9th Cir. 1998). San Diego County admits that it is a political subdivision of the state. See Complaint filed by San Diego County January 20, 2006 in Federal District Court for the Southern District of California in Case No.06-CV0130, ("Complaint") at paragraph no. 1: "The County is a political subdivision of the State of California and is organized and existing under the laws of the State of California." Thus, San Diego County is without standing to proceed in this litigation and the case will be dismissed for lack of jurisdiction. There is absolutely no legal basis for proceeding with this lawsuit.

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California Medical Marijuana Laws Are Not Preempted By The Federal Controlled Substances Act Nor By International Treaty Obligations.

As discussed in our January 19, 2006 letter, though federal preemption was not the determinative issue before the U.S. Supreme Court last week when it decided *Gonzales v. Oregon*, __ U.S. __, 2006 WL 89200 (U.S.), 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 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 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 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.

U.S. obligations under the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol ("Single Convention") do not suggest otherwise, for several reasons. First, as the Complaint itself acknowledges, the Single Convention provides only that certain prohibitions are required of a signatory country, "if in its opinion prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare." Complaint at ¶ 7. The CSA represents the federal government's implementation of its obligations under the Single Convention. See Complaint at ¶ 11. As noted in our January 19, 2006 letter, the CSA contains a specific non-pre-emption clause. Congress reasonably determined that the CSA, including the non-pre-emption clause, reflected the federal government's "opinion" about what "prevailing conditions in its country" rendered "the most appropriate means of protecting the public health and welfare." Complaint at ¶ 7.

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More fundamentally, the allegations in the Complaint pertaining to the Single Convention betray a basic misunderstanding of federalism and the law of pre-emption. Nothing in the Single Convention requires the federal government to require individual states to enact state laws prohibiting each and every prohibition contained in the Single Convention, and the federal government has not done so. There is nothing inconsistent about the federal government imposing the restrictions it imposes under the CSA (such as requiring that a single government agency closely regulate and control federal cultivation of marijuana), while at the same time recognizing that, consistent with restrictions imposed by the Tenth Amendment, it may not conscript states into either enforcing federal laws or enacting specific state legislation. See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144 (1992); *Conant v. Walters*, 309 F.3d 629, 645-648 (9th Cir. 2002) (Kozinski, J. concurring), *cert. denied*, 540 U.S. 946 (2003). Pre-emption is not triggered by a state law that merely does not make illegal under state law conduct which is illegal under federal law (whether statutory or treaty). Absent a positive conflict (as defined recently by Justice Scalia in *Gonzales v. Oregon*, noted above) between federal law and California's medical marijuana laws, there can be no valid pre-emption claim. There is no such positive conflict here, with either the CSA nor the Single Convention.

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 § 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*, 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. 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 California Health and Safety Code § 11362.5. See *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 § 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.

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

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. ___, 125 S.Ct. 2195 (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 law still remains that, "[t]he 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. at 935; *see also New York v. United States*, 505 U.S. 144.

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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. Indeed, other states (including New Mexico) are currently considering enacting medical marijuana legislation similar to Proposition 215.

Conclusion

As we noted in our January 19, 2006 letter to you, 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, nor has any federal government official, made any claim that such state laws are pre-empted by the CSA or the Single Convention.

There is clearly no viable legal argument to be made in support of a pre-emption claim. Indeed, binding Ninth Circuit precedent of more than twenty-five years duration expressly holds that San Diego County is without legal standing to even assert such a claim. We are therefore 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 immediately dismiss the proposed lawsuit. We also demand that the Board of Supervisors immediately begin implementing the medical 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. We hereby demand that you immediately dismiss the lawsuit. If you do not take action to do so at your public meeting scheduled for tomorrow, January 24, 2006, we will take all appropriate legal action, including formal intervention in the case.

Yours Sincerely,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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