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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

