**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT, DIVISION ONE**

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| COUNTY OF SAN DIEGO, et al.,<br><br>Plaintiff/Respondent,<br><br>v.<br><br>SAN DIEGO NORML, et al.,<br><br>and<br><br>WENDY CHRISTAKES, et al.,<br><br>Intervenors/Respondents, | 4th Civil No. D050333<br><br>Sup. Ct. No. GIC860665 |

Appeal from a Judgment of the Superior Court,
County of San Diego, State of California,

The Honorable William R. Nevitt, Jr., Judge

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# AMICUS BRIEF

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## I

## INTRODUCTION

Pursuant to direction by the San Diego City Council, the City of San Diego offers this amicus curiae brief. In conformity with state law and popular mandate, the City wants to allow the use of medical marijuana by those citizens who need it. Identification card programs like the one the County refuses to implement are important because they help law enforcement determine who is legally entitled to possess medical marijuana under state law, how best to use limited law enforcement resources, and to offer some measure of comfort and security to those afflicted by illnesses warranting use of medical marijuana. The identification card program does not conflict with federal law, so there is no excuse for the County's failure to implement this state-law mandated program.

## II

## THE CITY HAS A COMPELLING INTEREST IN ENSURING ITS CITIZENS HAVE THE BENEFIT OF THE MEDICAL MARIJUANA PROGRAM

According to the State of California's Office of County Health Services, as of November 16, 2007, 35 counties had implemented the identification card program provided for in the State's Medical Marijuana

Program (Health and Safety Code sections 11362.7 *et.seq.*), and 17, 771 identification cards have been issued.[1] But not in San Diego.

The citizens of San Diego clearly want the benefits of the medical marijuana laws. Even before the passage of Proposition 215, the Compassionate Use Act of 1996, the City Council (Council) in 1994 passed a resolution urging the federal government to allow for the medical use of marijuana.[2] In 1996, the voters of the City of San Diego passed Proposition 215, with 56.1 percent of voters, voting "yes", and 43.9 percent of voters voting "no".

When Proposition 215 passed, there were many unanswered questions about how it would be implemented. On behalf of its citizens, the Council made a policy decision to answer some of those questions, and in May of 2001, the Council created the Proposition 215 Implementation Task Force, also known as the Medical Marijuana Task Force.[3] The Task Force was comprised of citizens, law enforcement, and city staff. The purpose of the Task Force was to investigate the existing local advocacy network, monitor local law enforcement efforts, monitor medical research efforts, and monitor and support legislative efforts.

Their work culminated in the passage of San Diego Municipal Code Division 13 of Chapter 4, Article 2, entitled "San Diego Medical Cannabis

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[1] http://dhs.ca.gov/mmp/default.htm
[2] Resolution Number R-283428
[3] Resolution Number R-294886

Voluntary Verification Card Program", adopted in 2002, with amendments in September 2003.

The passage of the City's verification card program was intended to assist physicians, patients, and law enforcement. The program was not implemented because of a lack of funding. Additionally, Senate Bill 420 (SB 420), the Medical Marijuana Program, was signed in October 2003 and became law in 2004. The City asked the Attorney General for an opinion on the ability of the City to implement its own card program in light of SB 420. The Attorney General opined that it is the County's responsibility, although the City could operate a program not in conflict with state law until the County implemented the program. 88 Op.Cal. Att'y Gen. 113 (2005). The County has refused to implement the program. Thus the citizens of San Diego who have expressed their desire to have an identification card program, through the actions of the City Council, remain without a program.

It has been over six years since the City approved an identification card system for its citizens. The County's failure to implement the medical marijuana identification card program has frustrated the will of the voters in the City of San Diego.

The identification card program does not, as the County asserts, enable individuals to do something prohibited by federal law. It provides protection from arrest under state law, and does not purport to exempt

individuals from federal drug laws. The program is voluntary, and if one is entitled to raise a defense pursuant to Health and Safety Code section 11362.5(d), one can do so without the card.

## III

## IDENTIFICATION PROGRAMS HELP LAW ENFORCEMENT DETERMINE HOW BEST TO EXPEND THEIR LIMITED RESOURCES

It is reasonable to believe that the identification card program may conserve law enforcement resources. The intent of the program is, *inter alia*, "to avoid unnecessary arrest and prosecution" and to "provide needed guidance to law enforcement." Stats. 2003, ch 875 §1(b) (1). The more information an officer is able to ascertain during a street encounter, the more accurate the determination made. It is not a good use of resources to investigate and arrest someone who will ultimately not be prosecuted because they are entitled to use marijuana to relieve their suffering as recommended by their physician. The identification card program is designed to conserve law enforcement resources.

The County's failure to implement an identification card program, or to at least set minimal guidelines to implement Proposition 215, sets up uncertainty. As noted by the Grand Jury, "Uniform enforcement guidelines are necessary to balance the rights and needs of legitimate patients and caregivers with the interest of law enforcement protect San Diegans from illegal use, cultivation, possession and sale of marijuana." Report of the

San Diego County Grand Jury 2004-2005, filed June 8, 2005, page 13. A patient or caregiver who can rely on the Municipal Code and the San Diego Police Department guidelines in the City has no standards to rely upon once that person steps into the County. The reason cited by the Grand Jury for the County's failure? "The San Diego County Board of Supervisors has been blinded by its prejudices against medical marijuana use and has failed to implement the will of California voters". *Id.* at 11.

The City of San Diego Police Department has also participated in the implementation of Proposition 215. As early as July of 1997, the Police Department issued guidelines to its officers to comport with Proposition 215.[4] The Police Department participated in Task Force discussions. The Police Department currently operates in conformance with the Municipal Code, despite the lack of a verification or identification card program.[5]

## IV

## IDENTIFICATION PROGRAMS OFFER COMFORT AND SECURITY TO THOSE WHO NEED AND ARE ENTITLED TO USE MEDICAL MARIJUANA

It is reasonable to believe that the identification card program provides comfort and some peace of mind to those who are entitled to the cards. Their privacy is protected, yet they are also assured that law

[4] San Diego Police Department Training Bulletin 97-3
[5] San Diego Police Department Procedure 3.28

enforcement will, at a minimum, do further research before taking action against them.

## V

## STATE LAW CAN BE ENFORCED WITHOUT CONFLICTING WITH FEDERAL LAW

Law enforcement officers can follow the medical marijuana laws without violating any obligation they have under federal law. In *City of Garden Grove v. Superior Court of Orange County (Kha)*, G036250, Fourth District Court of Appeal, filed Nov. 28, 2007, Garden Grove sought to overturn a trial court order ordering the return of marijuana seized from Mr. Kha. Mr. Kha was stopped for a traffic violation by Garden Grove police officers. They seized less than a third of an ounce of marijuana from Mr. Kha pursuant to a consent search. He was cited for Vehicle Code sections 23222(b) and 21453(a), possessing less than an ounce while driving and running a red light. The prosecution ultimately dismissed the drug charge after verifying Mr. Kha's "Physicians Statement" authorizing his use of cannabis as medicine for an undisclosed serious medical condition. Mr. Kha petitioned for and was granted the return of his property, the marijuana. *Slip Opn.* p. 3-4.

In determining whether the City had standing to challenge that court order, the Court examined whether the return of property could be viewed as a violation of federal law. Relying on the case of *Conant v. Walters* 309

F.3d 629 (9th Cir) (2002) [federal government may not punish doctors for recommending medical marijuana to their patients], the Court said

> Likewise here, holding the City or individual officers responsible for any violations of federal law that might ensue from the return of Kha's marijuana would appear to be beyond the scope of either conspiracy or aiding and abetting. No one would accuse the City of willfully encouraging the violation of federal law, were it merely to comply with the trial court's order. The requisite intent to transgress the law is so clearly absent here that the argument is no more than a straw man.

*Slip Opn.* p.10

When the Court turned to examining whether Mr. Kha was entitled to the return of his marijuana, the Court found that the State has no authority to invoke the sanction of destruction pursuant to Health and Safety Code section 11473.5, because the marijuana was lawfully possessed under state law. The court reasoned that if the State cannot prosecute violations of federal law against those possessing marijuana, it cannot impose the sanction of destruction. "...[T]he City cannot do indirectly what it could not do directly". *Slip Opn.* p. 24

The Court then addressed whether federal drug laws preempt state law to the extent state law authorizes the return of medical marijuana to qualified users. The Court looked at congressional intent and found that the goals of federal drug laws are to combat recreational drug use and curb

drug trafficking, not to regulate the practice of medicine, a traditional state power. The Court found state law consistent with the federal goals, reiterating that nothing in state law limits enforcement of federal drug laws. *Slip Opn*. p. 29-32.

As the United States Supreme Court has observed, as a general matter the federal government may not compel states to enact or administer federal programs. *Printz v. United States* 521 U.S. 898, 932 (1997); *New York v. United States* 505 U. S. 144, 188 (1992). Although police officers have discretion to arrest for violations of federal law, making arrests not in conformance with the state's medical marijuana laws does not make sense. State courts cannot enforce the federal statutes. Moreover, the State of California has an express policy to protect qualified patients and caregivers from criminal prosecution. Health and Safety Code §11362.5 (b) (1) (B). The "conflict" between state and federal law, for local law enforcement, is not in determining what laws to apply. If a potential suspect has a valid identification card, and possesses marijuana within the amounts prescribed, officers fulfill their state law duties by not arresting the individual. *Slip Opn*. p. 40.

## VI

## CONCLUSION

For the foregoing reasons, and for the reasons set forth by the State Attorney General, the City respectfully requests the trial court's ruling be affirmed.

Dated: December 17, 2007

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