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SAN DIEGO COUNTY, CA

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SAN DIEGO COUNTY, CA

1 **BILL LOCKYER**
 Attorney General of the State of California
 2 **LOUIS R. MAURO**
 Senior Assistant Deputy Attorney General
 3 **CHRISTOPHER KRUEGER**
 Supervising Deputy Attorney General
 4 **JONATHAN K. RENNER**
 Deputy Attorney General
 5 State Bar No. 187138
 1300 I Street
 6 P.O. Box 944255
 Sacramento, California 94244-2550
 7 Telephone: (916) 445-8193
 Facsimile: (916) 324-8835
 8

9 **Attorneys for State of California, and Sandra Shewry,**
 Director of the California Department of Health Services

11 **SUPERIOR COURT OF CALIFORNIA**
 12 **COUNTY OF SAN DIEGO**

14 **COUNTY OF SAN DIEGO,**

15 **Plaintiffs,**

16 **vs.**

18 **SAN DIEGO NORML, a California**
 Corporation; **STATE OF CALIFORNIA;**
 19 **SANDRA SHEWRY, Director of the**
 California Department of Health Services in
 20 her official capacity; and **DOES 1 through 50,**
 inclusive

21 **Defendants.**

Case No. GIC 860665

**NOTICE OF HEARING ON
 DEMURRER BY THE STATE OF
 CALIFORNIA AND SANDRA
 SHEWRY, DIRECTOR OF THE
 CALIFORNIA DEPARTMENT OF
 HEALTH SERVICES, TO
 COMPLAINT FOR DECLARATORY
 RELIEF BY COUNTY OF SAN
 DIEGO**

DATE: May 5, 2006
TIME: 2:30 PM
DEPT: 64

JUDGE: Honorable R. Nevitt, Jr.

Action Filed: February 1, 2006

BY FAX

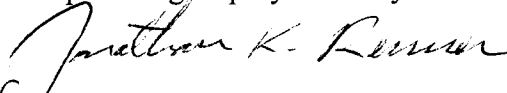
1 TO PLAINTIFF AND ITS COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that defendants' demurrer to the Complaint for
3 Declaratory Relief filed by County of San Diego has been set for hearing on May 5, 2006, at 2:30
4 p.m., or as soon thereafter as the matter may be heard in Department 64 of the above-entitled
5 court, located at Hall of Justice, Fourth Floor, 330 W. Broadway, San Diego, California.

6 DATED: March 20, 2006

7 Respectfully submitted,

8
9 BILL LOCKYER
Attorney General of the State of California
10 LOUIS R. MAURO
Senior Assistant Attorney General
11 CHRISTOPHER KRUEGER
Supervising Deputy Attorney General

12 
13 JONATHAN K. RENNER
14 Deputy Attorney General

15 **Attorneys for State of California, and Sandra**
16 **Shewry the Director of the California**
17 **Department of Health Services**

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9 Attorneys for State of California, and Sandra Shewry,
Director of the California Department of Health Services

11 SUPERIOR COURT OF CALIFORNIA

12 COUNTY OF SAN DIEGO

14 COUNTY OF SAN DIEGO,

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21 Defendants.

Case No. GIC 860665

DEMURRER BY THE STATE OF
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**DEMURRER TO SAN DIEGO'S ENTIRE
COMPLAINT FOR DECLARATORY RELIEF**

Defendants State of California, and Sandra Shewry, Director of the California Department of Health Services, hereby demur to the entire Complaint for Declaratory Relief filed by plaintiff, County of San Diego, on the ground that the pleading does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subs. (a) & (e).)

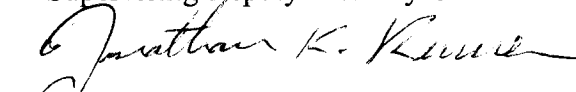
It is black letter law that courts should not entertain a lawsuit that does not present a justiciable controversy. (See 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 73, p. 132.) And an essential statutory prerequisite to a viable action for declaratory relief is an "actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.) Here, because San Diego cannot present an actual ripe controversy regarding the constitutionality of California's medical marijuana laws, this lawsuit fails to state a cause of action on which relief may granted and must be dismissed.

Defendants' demurrer is based on the Complaint for Declaratory Relief, this Demurrer, the attached Points and Authorities and the Request for Judicial Notice submitted concurrently herewith.

DATED: March 20, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
LOUIS R. MAURO
Senior Assistant Attorney General
CHRISTOPHER KRUEGER
Supervising Deputy Attorney General


JONATHAN K. RENNER
Deputy Attorney General

**Attorneys for State of California, and Sandra
Shewry the Director of the California
Department of Health Services**

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Deputy Attorney General
State Bar No. 187138
1300 I Street
P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 445-8193
Facsimile: (916) 324-8835

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SAN DIEGO COUNTY, CA

Attorneys for State of California, and Sandra Shewry,
Director of the California Department of Health Services

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO,

Plaintiffs,

vs.

SAN DIEGO NORML, a California
Corporation; STATE OF CALIFORNIA;
SANDRA SHEWRY, Director of the
California Department of Health Services in
her official capacity; and DOES 1 through 50,
inclusive

Defendants.

Case No. GIC 860665

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER BY THE STATE OF
CALIFORNIA AND SANDRA
SHEWRY, DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF
HEALTH SERVICES, TO
COMPLAINT FOR DECLARATORY
RELIEF BY COUNTY OF SAN
DIEGO**

DATE: May 5, 2006
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JUDGE: Honorable R. Nevitt, Jr.

Trial: Not Set
Action Filed: February 1, 2006

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3 Actions, § 73

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1 INTRODUCTION

2 The instant complaint is nothing more than a request for a series of advisory
3 opinions based merely on San Diego’s dissatisfaction with the voters’ decision to approve
4 Proposition 215. San Diego County asks this court to undertake a sweeping review regarding the
5 constitutionality of 22 California statutes related to medical marijuana. (Complaint 6:20-23.)
6 But San Diego fails to establish an actual controversy between it and the named defendants
7 regarding any of the challenged statutes. Because there is no ripe controversy this lawsuit fails to
8 state a cause of action and must be dismissed.

9 In determining whether a case is ripe, and judicial review is appropriate, courts
10 look at two criteria: (1) whether the dispute is sufficiently concrete so that declaratory relief is
11 appropriate; and (2) whether the parties will suffer an imminent and significant hardship if
12 judicial consideration is withheld. (*City of Santa Monica v. Stewart* (2005) 126 Cal. App. 4th 43,
13 64.) Here, San Diego does not have an actual concrete dispute with any of the defendants
14 regarding any of the 22 statutes it seeks to challenge. And San Diego’s political leadership
15 cannot create a ripe controversy by threatening to disobey the law. (*Lockyer v. City and County*
16 *of San Francisco* (2004) 33 Cal. 4th 1055, 1082 [local governments are without authority to
17 disobey state statutes because local officials believe the statute may be unconstitutional].)
18 Likewise, because medical marijuana has been legal in California for almost a decade, and San
19 Diego has not suffered any adverse consequences, the county cannot make a straight-faced
20 argument that it will suffer “imminent and significant hardship” without the immediate issuance
21 of declaratory relief. (*City of Santa Monica v. Stewart, supra*, 126 Cal. App. 4th 43 at p. 64.)
22 Ultimately, the only potential risk for San Diego is that it will have to comply with the law.

23 San Diego cannot present an actual controversy regarding the constitutionality of
24 California’s medical marijuana laws; this lawsuit fails to state a cause of action on which relief
25 may granted and must be dismissed.

26 ///
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1 **A DEMURRER IS APPROPRIATE WHERE, AS HERE, AN ACTION FOR**
2 **DECLARATORY RELIEF FAILS TO STATE A CAUSE OF ACTION**

3 An action for declaratory relief may properly be dismissed on demurrer when the
4 complaint fails to state a cause of action. (*Jackson v. Teachers Insurance Co.* (1973) 30
5 Cal.App.3d 341, 344-345 [trial court did not err when it sustained defendant’s demurrer without
6 declaring rights and liabilities as requested by plaintiff].) Furthermore, a court may sustain a
7 demurrer on the ground that a complaint for declaratory relief fails to allege an actual or present
8 controversy, or that it is *not justiciable*. (*Delaura v. Beckett* (Feb. 7, 2006, A109948) __
9 Cal.App.4th __ [certified for publication March 9, 2006].) And a court may sustain a demurrer
10 without leave to amend if it determines that a judicial declaration is not “necessary or proper at
11 the time under all the circumstances.” (*Ibid.* [quoting Code Civ. Proc., § 1061].)

12 **FACTS & BACKGROUND RELEVANT TO THIS ACTION**

13 **A. CALIFORNIA’S MEDICAL MARIJUANA LAWS**

14 On November 5, 1996, California voters approved Proposition 215, which
15 exempts patients and their caregivers from state laws prohibiting the possession and cultivation
16 of marijuana when the possession or cultivation is for personal medical purposes, and the
17 possession or cultivation is based on the recommendation of a physician. (Health & Saf. Code,
18 § 11362.5.)^{1/} This law is titled the “Compassionate Use Act of 1996.” (*Ibid.*) Nothing in the
19 Compassionate Use Act mandates specific action by San Diego. (§ 11362.5.)

20 On October 12, 2003, the Governor signed into law Senate Bill 420 which added
21 Article 2.5, titled “Medical Marijuana Program,” to Chapter 6 of Division 10 of the Health and
22 Safety Code. (§ 11362.7, et seq.) The Medical Marijuana Program creates a voluntary system
23 through which individuals qualified to use or possess marijuana under the Compassionate Use
24 Act may obtain a state identification card which clarifies that they should not be subject to state
25 criminal laws relating to marijuana. (§§ 11362.765, 11362.775.) The Medical Marijuana
26 Program imposes primarily clerical duties on counties relating to the issuance of the state
27

28 1. All statutory cites are to the California Health and Safety Code unless otherwise
indicated.

1 identification cards. (§§ 11362.71, 11362.72.) For example, each county must provide
2 applications for the state card, review and process applications, maintain records, and issue the
3 cards to qualified applicants. (§ 11362.71.)

4 **B. SAN DIEGO'S ABANDONED FEDERAL LAWSUIT**

5 On January 20, 2006, the County of San Diego filed a Complaint for Declaratory
6 and Injunctive Relief in the United States District Court for the Southern District of California.
7 (Request for Judicial Notice at Exh. "A.") San Diego named the State of California and the
8 Director of the Department of Health Services as the sole defendants. (*Ibid.*) San Diego's
9 federal lawsuit sought a declaration that California's Compassionate Use Act and Medical
10 Marijuana Program were preempted under the supremacy clause of the United States
11 Constitution. (*Id.* at 5:18-6:9.) And San Diego sought a declaration that the county had no
12 obligation to comply with the Medical Marijuana Program. (*Ibid.*) As a putative basis for this
13 federal lawsuit, San Diego asserted that: "The County brings this lawsuit because it believes
14 California's medical marijuana laws are preempted under the Supremacy Clause of the United
15 States Constitution (Article VI) because they conflict with a federal statute (the Controlled
16 Substances Act) and an international treaty (the Single Convention on Narcotic Drugs)." (*Id.* at
17 1:27-2:2.) Further, San Diego "should not be required to implement California's preempted and
18 therefore void medical marijuana laws." (*Id.* at 2:2-3.)

19 Neither the defendants nor the court got an opportunity to challenge San Diego's
20 hollow federal claims; because, without explanation, San Diego voluntarily dismissed its federal
21 lawsuit without prejudice on February 1, 2006. (Request for Judicial Notice at Exh. "B.")

22 **C. SAN DIEGO'S INSTANT STATE COURT LAWSUIT**

23 On the same day it dismissed its federal lawsuit, San Diego filed the instant
24 lawsuit in state court. (See Complaint.) The new state action offers no explanation for San
25 Diego's decision to drop its federal lawsuit and start over in state court. But, like the dismissed
26 federal action before it, this lawsuit seeks a declaration that California's Compassionate Use Act
27 and Medical Marijuana Program are preempted by federal law under the supremacy clause of the

28 ///

1 United States Constitution. (Complaint at 6:23-7:15.) And, again, San Diego seeks a declaration
2 that it has no obligation to comply with the Medical Marijuana Program. (*Ibid.*)

3 One substantive change between the dismissed federal lawsuit and the instant
4 lawsuit, is that San Diego has dramatically watered down its allegation that the Compassionate
5 Use Act is unconstitutional. (Complaint at ¶¶ 25-26.) Specifically, the current lawsuit does not
6 challenge the portion of the Compassionate Use Act that actually exempts qualified patients and
7 caregivers from prosecution for possession and cultivation of marijuana under state law.^{2/} (*Ibid.*)
8 San Diego's new complaint offers no explanation as to why it no longer contests the legality of
9 the most powerful provision of California's medical marijuana laws – the language that actually
10 legalizes medical marijuana under state law.

11 The one structural difference between San Diego's new state lawsuit and its
12 dismissed federal lawsuit, is that San Diego devotes more of its complaint to trying to invent an
13 actual controversy. In particular, San Diego now claims that its concern over the
14 constitutionality of state law arises out of a letter that the San Diego Board of Supervisors
15 received on November 7, 2005, from San Diego NORML, a marijuana rights group not affiliated
16 with the State. (Complaint at 3:2-19.) The significance now placed on NORML's letter is
17 especially surprising given that the letter was not mentioned in the abandoned federal lawsuit.

18 ARGUMENT

19 A. THE CONSTITUTIONALITY OF CALIFORNIA'S MEDICAL 20 MARIJUANA LAWS IS NOT RIPE FOR JUDICIAL REVIEW.

21 It is black letter law that courts should not entertain a lawsuit that does not present
22 a justiciable controversy. (See 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 73, p. 132.)
23 "The concept of justiciability involves the intertwined criteria of ripeness and standing."
24 (*California Water & Telephone Co. v. The County of Los Angeles* (1967) 253 Cal.App.2d 16,
25 23.) In the present case, San Diego's concern that California's medical marijuana laws are

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28 2. Inexplicably, San Diego *does* challenge the constitutionality of identical provisions in
the Medical Marijuana Program. (Complaint at 6:22 [challenging Health & Saf. Code,
§ 11362.71, subd. (e)].)

1 unconstitutional is not ripe for judicial review. There is no concrete legal dispute between San
2 Diego and defendants that can be resolved without improper judicial speculation, and San Diego
3 will not suffer any harm if judicial consideration is withheld.

4 The ripeness requirement applies equally to actions for declaratory relief, and the
5 declaratory relief mechanism does not enlarge the jurisdiction of courts over the parties or the
6 subject matter. (*Hoyt v. Board of Civil Service Commissions of the City of Los Angeles* (1942)
7 21 Cal.2d 399, 403 [declaratory relief is not intended to enlarge the jurisdiction of courts over
8 parties and subject matter].) And directly relevant to instant claims made by San Diego, a “mere
9 dissatisfaction with the performance of either the legislative or executive branches, or
10 disagreement with their policies does not constitute a justiciable controversy” sufficient to
11 support a claim for declaratory relief. (*Zetterberg v. State Department of Public Health* (1974)
12 43 Cal.App. 3d 657, 662.) In fact, an essential statutory prerequisite to a viable action for
13 declaratory relief is an “actual controversy relating to the legal rights and duties of the respective
14 parties.” (Code Civ. Proc., § 1060.)

15 The California Supreme Court has explained that the ripeness requirement of a
16 justiciable controversy prevents the courts from becoming bogged down issuing advisory
17 opinions to individuals who merely seek guidance regarding the state of the law rather than the
18 resolution of a specific factual dispute:

19 The ripeness requirement, a branch of the doctrine of justiciability,
20 prevents courts from issuing purely advisory opinions. It is rooted
21 in the fundamental concept that the proper role of the judiciary
22 does not extend to the resolution of abstract differences of legal
23 opinion [t]he ripeness doctrine is primarily bottomed on the
24 recognition that judicial decision making is best conducted in the
25 context of an actual set of facts so that the issues will be framed
26 with sufficient definiteness to enable the court to make a decree
27 finally disposing of the controversy.

24 (*Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 170.)

25 In California, “a two-pronged test is used to determine the ripeness of a
26 controversy: (1) whether the dispute is sufficiently concrete so that declaratory relief is
27 appropriate; and (2) whether the parties will suffer hardship if judicial consideration is withheld.”
28 (*City of Santa Monica v. Stewart, supra*, 126 Cal. App. 4th 43, 64 [internal citation omitted].)

1 And in applying the test, “[u]nder the first prong, the courts will decline to adjudicate a dispute if
2 ‘the abstract posture of [the] proceeding makes it difficult to evaluate . . . the issues,’ if the court
3 is asked to speculate on the resolution of hypothetical situations, or if the case presents a
4 ‘contrived inquiry.’ Under the second prong, *the courts will not intervene merely to settle a*
5 *difference of opinion*; there must be an imminent and significant hardship inherent in further
6 delay.” (*Ibid.*, [emphasis added; internal citations omitted].)

7 With respect to the first prong, San Diego has completely failed to identify any
8 dispute that is sufficiently concrete to serve as a foundation for declaratory relief. On the
9 contrary, the sole factual allegation that San Diego offers to demonstrate an actual ripe
10 controversy is a letter the County Board of Supervisors received from NORML four months ago,
11 in November of 2005. The letter suggests that NORML might seek to compel San Diego to
12 comply with unspecified provisions of California’s medical marijuana laws, should San Diego
13 refuse to comply with some or all of those laws.^{3f} (Complaint at 3:2-20.) It is difficult to
14 imagine a more hypothetical and abstract fact pattern on which to base a claim for declaratory
15 relief. For example, San Diego’s complaint does not indicate which statutes – if any – the county
16 is actually planning to disobey – let alone whether the county *is* currently disobeying state law.
17 And NORML’s letter merely advises the Board of Supervisors that “continued rejection of
18 California State Law regarding the legal issuance of medical marijuana identification card [sic],
19 regrettably would force [NORML] to bring a class action to compel compliance.” (Complaint at
20 Exh. “A.”) The letter does not suggest that litigation is imminent, nor does the letter say what
21 specific legal theory will be raised if NORML does sue. (*Ibid.*) Instead, the letter takes the
22 inherently reasonable position that “continued rejection” of state law would trigger a lawsuit to
23 compel compliance with state law. (*Id.*) The vague and hypothetical nature of this conflict is
24 underscored by San Diego’s unfocused attempt to obtain judicial review of 22 statutes, many of
25

26 3. San Diego’s decision to sue NORML based on this letter appears to be in violation of
27 California’s anti-SLAPP statutes. Code of Civil Procedure section 425.16 outlines a procedure
28 whereby lawsuits filed in response to protected speech on “public issue” may be stricken. Here,
NORML’s letter to the Board of Supervisors reacting to the county’s threat of non-compliance
with state law would certainly qualify as protected speech on a public issue.

1 which do not mandate any direct action from the county. NORML’s letter plainly does not create
2 a concrete conflict sufficient to establish a justiciable controversy.

3 With respect to the second prong, as a matter of law, San Diego will not suffer
4 any “immediate and significant hardship” if judicial consideration is withheld. This conclusion
5 is self-evident from the fact that medical marijuana has been legal in California for almost a
6 decade. And the federal government’s position that marijuana has “no currently accepted
7 medical use” has been law since 1970. (21 U.S.C. § 812(b)(1)(B) [enacted October 27, 1970].)
8 During the past decade, California’s Compassionate Use Act has been before state and federal
9 courts of every level – including the California Supreme Court and the United States Supreme
10 Court. (See, e.g., *People v. Mower* (2002) 28 Cal.4th 457; *Gonzales v. Raich* (2005) 545 U.S. __
11 [125 S.Ct. 2195].) And at no time has any court, state or federal, declared California’s
12 Compassionate Use Act unconstitutional or preempted by federal law. Ultimately, the only
13 potential hardship San Diego has identified is that the county may have to wait to see whether the
14 Board of Supervisors follow through on their threat to disobey state law and, if so, whether
15 NORML files a lawsuit to compel compliance. (Complaint at 3:13-17.) San Diego’s concerns
16 that it may be forced to comply with long-standing state law is not an imminent and significant
17 hardship that flows from the existence of a ripe controversy.

18 **B. SAN DIEGO IS COMPLETELY WITHOUT AUTHORITY TO REFUSE**
19 **TO COMPLY WITH STATE LAW AND CANNOT USE THE THREAT**
20 **OF NON-COMPLIANCE TO CREATE AN ACTUAL CONTROVERSY.**

21 There can be no actual controversy regarding the fact that San Diego must comply
22 with California’s medical marijuana laws – irrespective of whether some local officials believe
23 medical marijuana laws conflict with their political philosophies, or their understanding of
24 constitutional law. As a consequence, San Diego cannot manufacture an actual controversy,
25 sufficient to justify declaratory relief, by threatening to disobey state statutes on constitutional
26 grounds.

27 Whether a local government has authority to ignore state statutes that it believes
28 may be unconstitutional has been recently addressed by the California Supreme Court. (*Lockyer*
v. City and County of San Francisco, supra, 33 Cal. 4th 1055.) The Supreme Court confirmed

1 that local officials are completely without authority to refuse to comply with state statutes based
2 on their own opinion of whether the statute is constitutional^{4/}:

3 To begin with, most local executive officials have no legal training
4 and thus lack the relevant expertise to make constitutional
5 determinations. Although every individual (lawyer or nonlawyer)
6 is, of course, free to form his or her own opinion of what the
7 Constitution means and how it should be interpreted and applied, *a
8 local executive official has no authority to impose his or her
9 personal view on others by refusing to comply with a ministerial
10 duty imposed by statute.*

8 (*Lockyer v. City and County of San Francisco, supra*, 33 Cal. 4th at p. 1107 [emphasis added].)

9 Likewise, the Supreme Court expressly rejected the argument that the federal supremacy clause
10 gives local officials the authority to disregard a state statute they believe may be preempted by
11 the federal law:

12 In light of the high court's repeated statements that federal
13 executive officials generally lack authority to determine the
14 constitutionality of statutes, *the city's claim that the federal
15 supremacy clause itself grants a state or local official the authority
16 to refuse to enforce a statute that the official believes is
17 unconstitutional is plainly untenable.*

16 (*Id.* at p.1111 [emphasis added].)

17 In the present case, San Diego has no authority to disregard California's medical
18 marijuana laws simply because certain local politicians feel that the medical marijuana laws may
19 be preempted. San Diego's effort to inflame a controversy by threatening to commit an illegal
20 act cannot be rewarded with an otherwise improper advisory opinion.

21 ///

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23 _____
24 4. The Supreme Court suggested that the better approach would be for local government
25 officials to comply with the law and to encourage the citizens actually injured by the law to bring
26 a legal challenge. (*Lockyer v. City and County of San Francisco, supra*, 33 Cal. 4th at p. 1199.)
27 Here, according to San Diego, the truly injured party is the federal government. Thus, it seems
28 fairly obvious that the United States Attorney General is capable of defending the federal
Controlled Substance Act from potentially conflicting state laws. And, yet, in almost 10 years the
federal government has not brought such an action – in California or any of the other states that
have similar laws.

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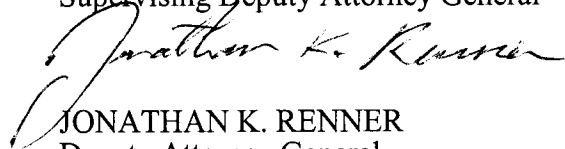
CONCLUSION

This case does not present a ripe controversy that is appropriate for judicial review, and San Diego's attempt to use NORML's letter to create an actual controversy fails to satisfy the legal test for ripeness. San Diego's attempt to get an advisory opinion regarding the constitutionality of 22 statutes should be rejected and this case should be dismissed.

DATED: March 20, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
LOUIS R. MAURO
Senior Assistant Attorney General
CHRISTOPHER KRUEGER
Supervising Deputy Attorney General


JONATHAN K. RENNER
Deputy Attorney General

**Attorneys for State of California, and Sandra
Shewry the Director of the California
Department of Health Services**

COPY

05 MAR 21 PM 3:57

CLEARINGHOUSE COURT
SAN DIEGO COUNTY, CA

1 **BILL LOCKYER**
 Attorney General of the State of California
 2 **LOUIS R. MAURO**
 Senior Assistant Deputy Attorney General
 3 **CHRISTOPHER KRUEGER**
 Supervising Deputy Attorney General
 4 **JONATHAN K. RENNER**
 Deputy Attorney General
 5 State Bar No. 187138
 1300 I Street
 6 P.O. Box 944255
 Sacramento, California 94244-2550
 7 Telephone: (916) 445-8193
 Facsimile: (916) 324-8835
 8

9 **Attorneys for State of California, and Sandra Shewry,**
 Director of the California Department of Health Services
 10

11 **SUPERIOR COURT OF CALIFORNIA**
 12 **COUNTY OF SAN DIEGO**
 13

14 **COUNTY OF SAN DIEGO,**

15 **Plaintiffs,**

16 **vs.**

17
 18 **SAN DIEGO NORML, a California**
 Corporation; **STATE OF CALIFORNIA;**
 19 **SANDRA SHEWRY, Director of the**
 California Department of Health Services in
 20 her official capacity; and **DOES 1 through 50,**
 inclusive
 21

22 **Defendants.**

Case No. GIC 860665

**REQUEST FOR JUDICIAL NOTICE
 IN SUPPORT OF DEMURRER BY
 THE STATE OF CALIFORNIA AND
 SANDRA SHEWRY, DIRECTOR OF
 THE CALIFORNIA DEPARTMENT
 OF HEALTH SERVICES, TO
 COMPLAINT FOR DECLARATORY
 RELIEF BY COUNTY OF SAN
 DIEGO**

DATE: May 5, 2006
 TIME: 2:30 PM
 DEPT: 64

JUDGE: Honorable R. Nevitt, Jr.

Action Filed: February 1, 2006

BY FAX

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Pursuant to Evidence Code sections 452 subdivision (d) and 453, Defendants State of California, and Sandra Shewry, the Director of the California Department of Health Services, respectfully request that this Court take judicial notice of the following documents:

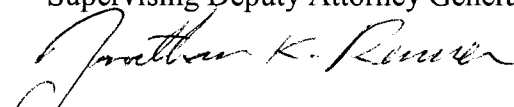
1. San Diego's federal lawsuit (Case No. 06CV0130) filed in the United States District Court for the Southern District of California on January 20, 2006, attached hereto as Exhibit "A."

2. San Diego's voluntary dismissal of its federal lawsuit filed on February 1, 2006, attached hereto as Exhibit "B."

DATED: March 20, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
LOUIS R. MAURO
Senior Assistant Attorney General
CHRISTOPHER KRUEGER
Supervising Deputy Attorney General


JONATHAN K. RENNER
Deputy Attorney General

Attorneys for State of California, and Sandra Shewry the Director of the California Department of Health Services

EXHIBIT A

1 JOHN J. SANSONE, County Counsel
County of San Diego

2 By C. ELLEN PILSECKER, Senior Deputy (State Bar No. 154241)

THOMAS D. BUNTON, Senior Deputy (State Bar No. 154241)

3 1600 Pacific Highway, Room 355
San Diego, California 92101

4 Telephone: (619) 531-4713

FILED

2006 JAN 29 AM 8:59

CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY _____ DEPUTY

5 Attorneys for Plaintiff County of San Diego
6

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10
11 COUNTY OF SAN DIEGO,

12 Plaintiff,

13 v.

14 STATE OF CALIFORNIA; SANDRA
15 SHEWRY, Director of the California
Department of Health Services in her official
16 capacity; and DOES 1 through 50, inclusive,

17 Defendants.

NO6 CV 0 130

WQH JMA

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

18
19 Plaintiff County of San Diego ("the County") alleges as follows:

20 **PRELIMINARY STATEMENT**

21 As required by treaty obligations, the United States has enacted legislation declaring that
22 there is no accepted medical use for marijuana and has generally outlawed its use, possession,
23 distribution and cultivation. Contrary to federal law and an international treaty, California has
24 enacted laws declaring that certain persons have a right to use marijuana for medical purposes
25 and has authorized those individuals to use, possess, distribute and cultivate marijuana without
26 criminal sanction.

27 The County brings this lawsuit because it believes California's medical marijuana laws
28 are preempted under the Supremacy Clause of the United States Constitution (Article VI)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1 because they conflict with a federal statute (the Controlled Substances Act) and an international
2 treaty (the Single Convention on Narcotic Drugs). Thus, the County believes that it should not
3 be required to implement California's preempted and therefore void medical marijuana laws.

4 **THE PARTIES**

5 1. The County is a political subdivision of the State of California and is organized
6 and existing under the laws of the State of California.

7 2. Defendant State of California ("State") is, and at all times herein mentioned was, a
8 state government.

9 3. Defendant Sandra Shewry ("Shewry") is Director of the California Department of
10 Health Services. As Director of the Department, she has responsibility for ensuring that the
11 requirements of California Health & Safety Code §§ 11362.7 through 11362.83 are satisfied.

12 4. The true names and capacities of defendants Does 1 through 50, inclusive, are
13 unknown to the County, and the County therefore sues said defendants by such fictitious names.
14 The County will amend the complaint to allege the true names and capacities of the defendants
15 sued herein as Does 1 through 50, inclusive, when ascertained.

16 **JURISDICTION**

17 5. This Court has jurisdiction under 28 U.S.C. § 1331 because the County alleges
18 that proposition 215 (Cal. Health & Safety Code § 11362.5) and its implementing legislation
19 (Cal. Health & Safety Code §§11362.7-11362.83) are preempted under the Supremacy Clause of
20 the United States Constitution (Article VI) because they conflict with a federal law (the
21 Controlled Substances Act) and an international treaty to which the United States is a party (the
22 Single Convention on Narcotic Drugs).

23 **CALIFORNIA'S MEDICAL MARIJUANA LAWS ARE PREEMPTED**

24 6. The United States, along with more than 150 other countries, is a party to the
25 Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol ("Single
26 Convention"). This treaty was entered into because "effective measures against abuse of
27 narcotic drugs require co-ordinated and universal action." (Single Convention, pmbl.)

28 7. Marijuana (cannabis) is specifically addressed in the Single Convention.

1 Marijuana is listed under Schedule IV of the treaty. For Schedule IV drugs such as marijuana, a
2 party to the treaty “shall, if in its opinion prevailing conditions in its country render it the most
3 appropriate means of protecting the public health and welfare, prohibit the production,
4 manufacture, export and import of, trade in, possession or use of any such drug *except for*
5 *amounts which may be necessary for medical and scientific research only*, including clinical
6 trials therewith to be conducted under or subject to the direct supervision and control of the
7 Party.” (art. 2, § 5.b.)

8 8. If a party to the Single Convention decides to permit the cultivation of marijuana,
9 it “shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in,
10 the leaves of the [marijuana] plant.” (art. 28, § 3.)

11 9. If a party to the Single Convention decides to permit the cultivation of marijuana,
12 “a single government agency” of the party must: (1) “designate the areas in which, and the plots
13 of land on which, cultivation of [marijuana] for the purpose of producing [marijuana] shall be
14 permitted”; (2) restrict cultivation of marijuana to only those cultivators licensed by the
15 government agency; (3) specify the amount of land on which cultivation of marijuana is
16 permitted; (4) provide that cultivators deliver their entire crop of marijuana to the government
17 agency; and (5) have the exclusive right of importing, exporting, wholesale trading and
18 maintaining stocks of marijuana.

19 10. The Single Convention is not self-executing. It requires parties to take legislative
20 or administrative action to carry out its provisions.

21 11. In 1970, Congress passed the Controlled Substances Act (21 U.S.C. §§ 801-904)
22 in order to comply with its obligations under the Single Convention. 21 U.S.C. § 801(7). In the
23 Controlled Substances Act, Congress determined that marijuana has “no currently accepted
24 medical use in treatment in the United States.” 21 U.S.C. § 812(b)(1)(B),
25 812(c)(sched. I)(c)(10). Therefore, Congress criminalized the manufacture, possession and
26 distribution of marijuana for any purpose. 21 U.S.C. §§ 841(a), 844(a).

27 12. In addition, as authorized by the Single Convention, the United States has decided
28 to allow cultivation of limited amounts of marijuana for research purposes. The United States

1 has designated the National Institute on Drug Abuse (“NIDA”) as the agency responsible for
2 administering the cultivation of marijuana according to the terms of the Single Convention.
3 NIDA has entered into a contract with the University of Mississippi whereby the Institute has
4 the option in any given year of growing 1.5 or 6.5 acres of marijuana, or no marijuana at all,
5 depending on the research demand. NIDA is the only legal source for marijuana in the United
6 States.

7 13. In 1996, California voters sought to override Congress’ determinations and the
8 provisions of the Single Convention. California voters passed Proposition 215, which added
9 Section 11362.5 to California’s Health & Safety Code. Proposition 215 declares that
10 “Californians have the right to obtain and use marijuana for medical purposes where that
11 medical use is deemed appropriate and has been recommended by a physician who has
12 determined that the person’s health would benefit from the use of marijuana” Cal. Health
13 & Safety Code § 11362.5(b)(1)(A).

14 14. Contrary to the federal Controlled Substances Act, Proposition 215 declares that
15 “patients and their primary caregivers who obtain and use marijuana for medical purposes upon
16 the recommendation of a physician are not subject to criminal prosecution or sanction.” *Id.* at
17 subd. (b)(1)(B). Also contrary to the Controlled Substances Act, Proposition 215 declares that
18 “no physician in this state shall be punished, or denied any right or privilege, for having
19 recommended marijuana to a patient for medical purposes.” *Id.* at subd. (c).

20 15. In 2003, the California Legislature enacted a statutory scheme implementing
21 Proposition 215 (Cal. Health & Safety Code §§ 11362.7-11362.83). This statutory scheme
22 requires the County to issue identification cards to “a person authorized to engage in the medical
23 use of marijuana and the person’s designated caregiver” Cal. Health & Safety Code §§
24 11362.7(g), 11362.71(b)(5).

25 16. Despite the provisions of the federal Controlled Substances Act, California’s
26 statutory scheme declares that “[n]o person or designated primary caregiver in possession of a
27 valid identification card shall be subject to arrest for possession, transportation, delivery, or
28 cultivation of medical marijuana in an amount established pursuant to this article” Cal.

1 Health & Safety Code § 11362.71(e).

2 17. The California Legislature also authorized patients and caregivers to cultivate “no
3 more than six mature or 12 immature marijuana plants per qualified patient” even though under
4 the Single Convention only the NIDA may license individuals to cultivate marijuana. Cal.

5 Health & Safety Code § 11362.77(a).

6 18. Proposition 215 and its implementing legislation, California Health & Safety Code
7 §§ 11362.7 through 11362.83, are preempted under the Supremacy Clause (Article VI, cl. 2) of
8 the United States Constitution. The Supremacy Clause provides that the “Constitution, and the
9 Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or
10 which shall be made, under the Authority of the United States, shall be the supreme Law of the
11 Land” California’s medical marijuana laws --which declare that marijuana is an acceptable
12 treatment for medical conditions, authorize its use, cultivation and possession for this purpose,
13 and purport to immunize patients and caregivers from criminal prosecution – conflict with the
14 federal Controlled Substances Act and the Single Convention on Narcotic Drugs and are
15 therefore preempted.

16 **FIRST CAUSE OF ACTION**

17 **(Declaratory Relief)**

18 19. The County refers to and incorporates herein by reference Paragraphs 1
19 through 18.

20 20. The County seeks a declaration whether it is obligated to comply with the
21 requirements of California Health & Safety Code §§ 11362.7 through 11362.83.

22 21. The County also seeks a declaration whether Proposition 215 (Cal. Health &
23 Safety Code § 11362.5) and its implementing legislation (Cal. Health & Safety Code §§
24 11362.7-11362.83) are preempted under the Supremacy Clause of the United States
25 Constitution.

26 22. An actual controversy has arisen in that the County contends that California
27 Health & Safety Code §§ 11362.5 and 11362.7 through 11362.83 are preempted under the
28 Supremacy Clause of the United States Constitution, and Defendants contend that those

1 provisions are not preempted under the Supremacy Clause.

2 23. Based upon the foregoing, a clear, actual and present controversy has arisen
3 between the County and the State and its officers, which controversy cannot be resolved without
4 a judicial determination.

5 24. Accordingly, County seeks a judicial determination whether (1) it is obligated to
6 comply with the requirements of California Health & Safety Code §§ 11362.7 through 11362.83
7 and (2) Proposition 215 (Cal. Health & Safety Code § 11362.5) and its implementing legislation
8 (Cal. Health & Safety Code §§ 11362.7-11362.83) are preempted under the Supremacy Clause
9 of the United States Constitution.

10 **SECOND CAUSE OF ACTION**

11 **(Injunctive Relief)**

12 25. The County refers to and incorporates herein by reference Paragraphs 1 through 24
13 above as though fully incorporated herein.

14 26. The State and Defendant Shewry must be enjoined from enforcing Proposition 215
15 (Cal. Health & Safety Code § 11362.5) and its implementing legislation (Cal. Health & Safety
16 Code §§ 11362.7-11362.83) because these provisions are preempted under the Supremacy
17 Clause of the United States Constitution because they conflict with the federal Controlled
18 Substances Act and the Single Convention.

19 27. The County has no plain, speedy and adequate remedy at law.

20 WHEREFORE, plaintiff, the County of San Diego, prays for judgment, against
21 defendants, and each of them, as follows:

22 1. Declaring that Proposition 215 (Cal. Health & Safety Code § 11362.5) and its
23 implementing legislation (Cal. Health & Safety Code §§ 11362.7-11362.83) are preempted
24 under the Supremacy Clause of the United States Constitution;

25 2. Declaring that the County has no obligation to comply with the requirements of
26 California Health & Safety Code §§ 11362.7 through 11362.83;

27 3. Enjoining defendants State and Shewry from enforcing California Health & Safety
28 Code §§ 11362.5 and 11362.7 through 11362.83;

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- 4. For costs of suit incurred herein; and
- 5. For such other and further relief as the Court deems just and proper.

DATED: January 17, 2006 JOHN J. SANSONE, County Counsel

By *Thomas D. Bunton*
THOMAS D. BUNTON, Senior Deputy
Attorneys for Plaintiff County of San Diego

EXHIBIT B

1 JOHN J. SANSONE, County Counsel
County of San Diego
2 By C. ELLEN PILSECKER, Senior Deputy (State Bar No. 154241)
THOMAS D. BUNTON, Senior Deputy (State Bar No. 193560)
3 1600 Pacific Highway, Room 355
San Diego, California 92101
4 Telephone: (619) 531-4713

FILED

2006 FEB -1 PM 2:09

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
[Signature]

5 Attorneys for Plaintiff County of San Diego
6

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10
11 COUNTY OF SAN DIEGO,
12 Plaintiff,
13 v.
14 STATE OF CALIFORNIA; SANDRA
15 SHEWRY, Director of the California
16 Department of Health Services in her official
17 capacity; and DOES 1 through 50, inclusive,
Defendants.

No. 06-cv-0130 WQH JMA

NOTICE OF VOLUNTARY DISMISSAL

18
19 NOTICE IS HEREBY GIVEN that pursuant Fed.R.Civ.P. 41(a), plaintiff voluntarily
20 dismisses the above-captioned action without prejudice.

21 DATED: February 1, 2006 JOHN J. SANSONE, County Counsel

22
23 By *Thomas D. Bunton*
24 THOMAS D. BUNTON, Senior Deputy
Attorneys for Plaintiff County of San Diego

25
26
27
28 **ENTERED ON FEB 02 2006**

8

06cv0130

PROOF OF SERVICE BY MAIL

I, LEE WOLFE, declare:

I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the mailing occurs; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

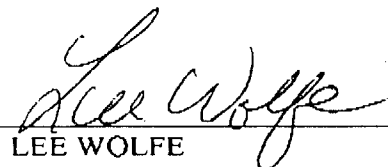
I caused to be served the following document(s): **NOTICE OF VOLUNTARY DISMISSAL** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

GARY SCHONS, Sr. Asst. Atty. Gen. CA DEPT OF JUSTICE 110 WEST A ST, STE 1100 SAN DIEGO, CA 92101 <i>Attorneys for Defendants</i>	ALLEN HOPPER ALYSE BERTENTHAL ACLU DRUG LAW REFORM PROJECT 1101 PACIFIC AV STE 333 SANTA CRUZ CA 95060 <i>Attorneys for Intervenors</i>
JOSEPH D. ELFORD AMERICANS FOR SAFE ACCESS 1322 WEBSTER ST, STE 208 OAKLAND, CA 94612 <i>Attorneys for Intervenors</i>	JORDAN C. BUDD ACLU OF SAN DIEGO & IMPERIAL COUNTIES P.O. BOX 87131 SAN DIEGO, CA 92138 <i>Attorneys for Intervenors</i>
DANIEL N. ABRAHAMSON DRUG POLICY ALLIANCE 819 BANCROFT WAY BERKELEY, CA 94710 <i>Attorneys for Intervenors</i>	

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 1, 2006, at San Diego, California.


LEE WOLFE

COPY

1 **BILL LOCKYER**
 Attorney General of the State of California
 2 **LOUIS R. MAURO**
 Senior Assistant Deputy Attorney General
 3 **CHRISTOPHER KRUEGER**
 Supervising Deputy Attorney General
 4 **JONATHAN K. RENNER**
 Deputy Attorney General
 5 State Bar No. 187138
 1300 I Street
 6 P.O. Box 944255
 Sacramento, California 94244-2550
 7 Telephone: (916) 445-8193
 Facsimile: (916) 324-8835
 8

06 MAR 21 PM 3:57
 CLERK-SUPERIOR COURT
 SAN DIEGO COUNTY, CA

9 **Attorneys for State of California, and Sandra Shewry,**
 Director of the California Department of Health Services
 10

11 **SUPERIOR COURT OF CALIFORNIA**
 12 **COUNTY OF SAN DIEGO**

13
 14 **COUNTY OF SAN DIEGO,**
 15 **Plaintiffs,**
 16
 17 **vs.**
 18 **SAN DIEGO NORML, a California**
 Corporation; **STATE OF CALIFORNIA;**
 19 **SANDRA SHEWRY, Director of the**
 California Department of Health Services in
 20 her official capacity; and **DOES 1 through 50,**
 inclusive
 21
 22 **Defendants.**

Case No. GIC 860665
DECLARATION OF SERVICE
[Demurrer to Complaint for
Declaratory Relief]
 DATE: May 5, 2006
 TIME: 2:30 PM
 DEPT: 64
 JUDGE: Honorable R. Nevitt, Jr.
 Action Filed: February 1, 2006

BY FAX

-See Attached-

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **County of San Diego v. State of California, et al**

No.: **GIC860665**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 21, 2006, I served the attached :

NOTICE OF HEARING ON DEMURRER BY THE STATE OF CALIFORNIA AND SANDRA SHEWRY, DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES , TO COMPLAINT FOR DECLARATORY RELIEF BY COUNTY OF SAN DIEGO;

DEMURRER BY THE STATE OF CALIFORNIA AND SANDRA SHEWRY, DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES , TO COMPLAINT FOR DECLARATORY RELIEF BY COUNTY OF SAN DIEGO;

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER BY THE STATE OF CALIFORNIA AND SANDRA SHEWRY, DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES , TO COMPLAINT FOR DECLARATORY RELIEF BY COUNTY OF SAN DIEGO; and

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEMURRER BY THE STATE OF CALIFORNIA AND SANDRA SHEWRY, DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES, TO COMPLAINT FOR DECLARATORY RELIEF BY COUNTY OF SAN DIEGO

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

John J. Sansone, County Counsel
C. Eileen Pilsecker, Sr. Dep. County Counsel
Thomas D. Bunton, Sr. Dep. County Counsel
San Diego County Counsel's Office
1600 Pacific Highway, Room 355
San Diego, CA 92101-2469
(Attorneys for Plaintiff, San Diego County)

Mark S. Bagula, Esq.
Michael L. Reedy, Esq.
The Watkins Firm, APC
4520 Executive Drive, Suite 105
San Diego, CA 92121
(Attys for Def., San Diego NORML, INC.)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 21, 2006, at Sacramento, California.

Kathleen Lewis

Declarant


Signature