A month ago, it was only going to be SB 420, the 2004 state Senate bill that ordered counties to provide ID cards to medical-marijuana patients.

What a difference a few weeks makes. On Tuesday, Dec. 6, the San Diego County Board of Supervisors voted to step up their attack on the Senate bill with a concurrent legal challenge that seeks to overturn Proposition 215, also known as the Compassionate Use Act, a 1996, voter-approved initiative that says chronically ill people with a doctor’s recommendation can use marijuana for medicinal purposes. Prop. 215 won by a 12-point margin statewide and even garnered majority support in traditionally conservative San Diego County.

County Counsel John Sansone said his office expects to file the lawsuit in federal court sometime after the first of the year. The lawsuit, Sansone said, will argue that the Controlled Substances Act, the law passed by congress in 1970 that classified marijuana as a Schedule I drug—in the same category as PCP, LSD and the so-called “date-rape” drug, GHB—supercedes any state law that legalizes marijuana for medical use. Schedule I drugs are considered to have no medical value.

“The question is whether or not [Prop. 215] is written in such a way that it conflicts with federal law,” Sansone said. “Our argument is going to be that we believe they conflict to the point of crossing the line.”

Sansone said he advised the supervisors on the pros and cons of filing such a lawsuit but wouldn’t comment further, citing attorney-client privilege. He said that from the beginning, when the supervisors were only going to challenge SB 420, he’d told them it would be an “uphill battle.”

“But we’ve had difficult uphill battles before and won them, and some we’ve lost,” Sansone said, adding that his own staff would handle the case. “Taxpayers aren’t going to pay any more or any less for the attorney staff time.”

A spokesperson for the state attorney general’s office, which would be defending the law, declined to comment on the case until she saw the actual complaint. Attorney General Bill Lockyer, however, has supported Prop. 215 in the past, arguing that the Controlled Substances Act is an antiquated law, passed before “the ravages of AIDS.”
“States are in, by far, the best position to determine whether and under what circumstances the use of cannabis by seriously ill patients should be permitted,” Lockyer wrote in a 2003 legal brief.

Prop. 215 has always been on shaky ground. Poorly defined from its inception and passed on Dan Lungren’s watch—the former state attorney general who vehemently opposed the ballot measure—medical-marijuana supporters and patients have looked to state and local officials to give the law some structure: How much marijuana can an individual possess? How is law enforcement to handle a person possessing or growing marijuana for medical use? And, more importantly, how are people with a doctor’s recommendations supposed to get marijuana when its sale and purchase remains illegal under state law? Cannabis dispensaries are regularly subjected to raids, evident in the Monday afternoon raids of 13 San Diego County dispensaries by a swarm of federal Drug Enforcement Administration agents with the aid of local law enforcement (please see accompanying story, “It’s ‘warfare’”).

Lungren made sure the new law was as narrowly defined as possible, but he never directly sought to overturn it. Dale Gieringer, who heads California NORML (National Organization to Reform Marijuana Laws), said Lungren consulted with federal officials and ultimately decided not to challenge the law. “Lungren declared that 215 was constitutional, since states have a right to decide which laws to enforce,” Gieringer said. He added that a subsequent challenge targeting doctors who recommended marijuana to patients (Conant v. Walters) was struck down in federal court in 2002. In 2003, Angel Raich and Diane Monson sued the federal government to block DEA agents from seizing marijuana from qualified patients. In June, the U.S. Supreme Court upheld the federal government’s right to do so, but, said Randy Barnett, a Boston University law professor who was on Raich and Monson’s legal team, the ruling in no way affected California’s medical-marijuana laws.

The county supervisors’ pending lawsuit will be the first that seeks to kill the Compassionate Use Act wholesale, said Hilary McQuie, spokesperson for American for Safe Access, a national organization that seeks to protect patients’ rights to use marijuana for medicinal purposes.

Despite the Bush administration’s opposition to state medical-marijuana laws (10 states currently have such laws), Glenn Smith, a professor at San Diego’s California Western School of Law, said a challenge to a state law must come from within the state. “The federal government can’t bring a lawsuit to stop an unconstitutional state law. It has to be somebody who is affected by that law and injured by it.”

Smith said the challenge can’t be based in theory—the supervisors will have to prove someone is, in fact, negatively affected by the law. They could argue, Smith said, that “they’re being required to spend money by this state law in a way that is a waste to taxpayers’ money.”
County Supervisor Bill Horn, easily the most vocal critic of medical marijuana, has said that any support for Prop. 215 or SB 420 would send the wrong message, especially to kids. He went so far as to compare the supervisors’ stand against medical-marijuana laws to Rosa Parks’ stand against segregation laws. In June, however, the county grand jury slammed the supervisors for failing to implement SB 420, saying the board had been “blinded by its prejudices against medical marijuana.”

“These people are not in the times; they’re living in the Reefer Madness days,” said Mark Bluemel, a San Diego attorney who’s worked on medical-marijuana cases, including that of Steve McWilliams. McWilliams, perhaps San Diego’s most outspoken proponent of medical marijuana, committed suicide in July after a federal judge, under terms of McWilliams’ bail, denied him the ability to use marijuana. McWilliams was severely injured in a 1992 motorcycle accident that left him with chronic migraines and neck pain. He was arrested by DEA agents in 2002 and charged with growing 25 marijuana plants in his backyard, some of which belonged to his partner, Barbara MacKenzie, who suffers from degenerative spinal disorder.

Marijuana Policy Project spokesperson Bruce Merkin said that even though the Raich ruling said state medical-marijuana laws don’t offer protection from federal prosecution, “That’s a very different thing from saying states are obligated to enforce federal medical-marijuana laws.

“So far as we can tell, the county is whistling in the dark,” Merkin said of the challenge to Prop. 215. “But I think the bigger question is why the county supervisors think that they should defy the will of their own voters?”

“We have cases that date back to the fugitive slave law,” he said, “back to the pre-Civil War days in which there were disputes over whether states… had to carry out federal statutes, and it’s always been very clear that they don’t. State and local laws can go in opposite directions.”

Barnett, the Boston law professor, called the supervisors’ argument “frivolous.” “No federal court would sustain it,” he said, “and I would ask for sanctions against anyone who raised it.”

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