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April 29, 2003

**VIA OVERNIGHT MAIL**

Ms. Cathy Catterson  
Office of the Clerk  
U.S. Court of Appeals  
95 Seventh Street  
San Francisco, California 94103

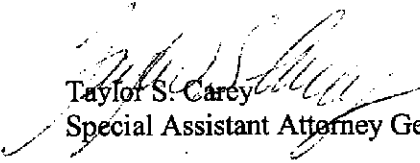
Re: Angel McClary Raich, et al. v. John Ashcroft, et al., No. 03-15481

Dear Ms. Catterson:

The State of California, the County of Alameda, and the City of Oakland, as *amici curiae* in the above referenced appeal, respectfully request that this Court include the enclosed brief as part of the Court's consideration of the above referenced appeal.

This brief was previously filed with the Court in *United States v. Oakland Cannabis Buyers' Cooperative, et al.*, No. 02-16534, and was also made part of the record in this case in the district court below (Docket No. 22-Plaintiffs' Request for Judicial Notice, filed November 26, 2002).

Very truly yours,

  
Taylor S. Carey  
Special Assistant Attorney General

FOR BILL LOCKYER  
Attorney General

Enclosure

cc: Mark T. Quinlivan  
Robert A. Raich  
David M. Michael  
Randy E. Barnett

**DECLARATION OF SERVICE**

Case Name: *Angel McClary Raich, et al. v. John Ashcroft, et al., No. 03-15481*

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

On April 29, 2003, I served the attached:  
**Letter to Cathy Catterson, Office of the Clerk, U.S. Court of Appeals dated April 29, 2003 enclosing a copy of the brief in *United States v. Oakland Cannabis Buyers' Cooperative, et al., No. 02-16534* as part of the Court's consideration of the above referenced appeal**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

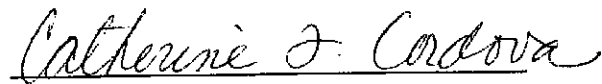
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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on April 29, 2003, at Sacramento, California.

  
DECLARANT

COPY

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee/Appellant,  
v.  
OAKLAND CANNABIS BUYERS'  
COOPERATIVE and JEFFREY JONES,  
Defendants-Appellant/Appellee

---

On Appeal from the United States District Court  
for the Northern District of California  
Case No. C 98-00088 CRB  
On Remand from the United States Supreme Court

---

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA,  
COUNTY OF ALAMEDA AND CITY OF OAKLAND  
IN SUPPORT OF DEFENDANTS' MOTION AFTER REMAND  
TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION

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UNITED STATES COURT OF APPEALS  
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UNITED STATES OF AMERICA,  
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19 IN THE UNITED STATES COURT OF APPEALS  
20 FOR THE NINTH CIRCUIT

21 UNITED STATES OF AMERICA,

22 Plaintiffs,

23 v.

24 OAKLAND CANNABIS BUYERS'  
25 COOPERATIVE AND JEFFREY  
JONES,

26 Defendants.

27  
28 AND RELATED ACTIONS.

NO. 02-16534

**BRIEF OF AMICUS CURIAE  
STATE OF CALIFORNIA, COUNTY  
OF ALAMEDA AND CITY OF  
OAKLAND IN SUPPORT OF  
DEFENDANTS' MOTION AFTER  
REMAND TO DISSOLVE OR  
MODIFY PRELIMINARY  
INJUNCTION**

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**STATEMENT OF AMICI CURIAE**

Amici Curiae State of California, the County of Alameda, and the City of Oakland have a constitutionally protected interest in the health and welfare of their residents and citizens. Each amici has a unique and protected interest in the health and safety of its citizens and each, either through statute, by ordinance, or by lawful declaration of a local public emergency, has sought to further that interest in a manner now threatened by this litigation. As the State's chief law enforcement officer, the Attorney General has a duty to see that the laws of the State are uniformly and adequately enforced. Cal. Const., article V, § 13. The City of Oakland and the County of Alameda have similar responsibilities and, because the Cannabis Buyers' Cooperative is located within their respective jurisdictions, and because the City of Oakland has designated the Oakland Cannabis Buyers' Cooperative as its agent for the distribution of medical cannabis under its Medical Cannabis Distribution program, both are vitally interested in this action. In November 1996, the voters of California adopted Proposition 215, the Compassionate Use Act of 1996, which makes the use of cannabis lawful for specified, limited purposes. No state law represents more forcefully the sovereign will of its citizens than that passed by direct ballot initiative. This proceeding calls into question the legitimacy of Proposition 215, and, thereby, the ability of this or any other State to address creatively the unique health needs of its citizens. This Court should honor the courage and determination of the people of California as these qualities find expression in the exercise of a sovereign State's fundamental right guaranteed by the Ninth and the Tenth Amendments of the United States Constitution and, by denying the injunction sought by the federal government, should return the Controlled Substances Act (CSA) to the established channels of federal authority.

//////  
//////

1 **ARGUMENT**

2 **A. INTRODUCTION**

3 The CSA impermissibly interferes with the rights reserved to the  
4 States and their political subdivisions by the Ninth Amendment to enact and  
5 implement, laws protecting the health, safety and welfare of their citizens. By  
6 prohibiting seriously ill persons from using cannabis in States that have approved  
7 such use, the CSA also violates traditional notions of State sovereignty protected  
8 by the Tenth Amendment. California has a right to decide matters of public health  
9 and safety so long as in doing so it does not traverse a recognized power expressly  
10 granted to Congress. "[I]n our peculiar dual form of government, nothing is more  
11 fundamental than the full power of the state to order its own affairs and govern its  
12 own people, except so far as the Federal Constitution, expressly or by fair  
13 implication, has withdrawn that power. The power of the people of the states to  
14 make and alter their laws at pleasure is the greatest security for liberty and justice.  
15 . . ." *Twining v. State of New Jersey*, 211 U.S. 78, 106 (1908), *citing* *Hurtado v.*  
16 *California*, 110 U.S. 516, 527 (1884), *overruled on other grounds* in *Malloy v.*  
17 *Hogan*, 378 U.S. 1 (1964).

18 The CSA, classifying marijuana as a "Schedule I" drug was passed in  
19 1970. Much has changed since then. The ravages of AIDS have risen from vague,  
20 disturbing rumors to horrifying reality. By 1996, the AIDS epidemic had killed  
21 millions of people throughout the world and had become the 8<sup>th</sup> leading cause of  
22 death in the United States. *CDC Media Relations: HHS News*, Oct 7, 1998.

23 Since then we have also seen the accumulation of solid scientific  
24 evidence that marijuana can relieve the suffering of those afflicted by certain types  
25 of illness, including glaucoma, multiple sclerosis, spasticity, severe pain, and  
26 nausea induced by the drugs used in chemotherapy and in the treatment of AIDS.

27 *See, generally, Marijuana and Medicine: Assessing the Science Base*, National

28 // // // //

1 Academy Press 1999. More specifically, evidence indicates that for some,  
2 marijuana is the only drug capable of reducing their anguish.

3           Against this backdrop the citizens of California overwhelmingly  
4 adopted the Compassionate Use Act intending to relieve the suffering of those  
5 beyond the reach of other medications. Since 1996, eight states and the District of  
6 Columbia have joined California in authorizing the use of cannabis for seriously  
7 ill people. The Act does not legalize the general use of marijuana. It prohibits the  
8 use of marijuana for non-medicinal purposes, prescribing that “[n]othing in this  
9 section shall be construed to supersede legislation prohibiting persons from  
10 engaging in conduct that endangers others, nor to condone the diversion of  
11 marijuana for nonmedical purposes.” Cal. Health & Safety Code § 11362.5(b)(2)<sup>1</sup>.

12           Amici Curiae have no desire to legalize interstate commerce in  
13 controlled substances. However, they have a very strong desire to advance their  
14 conviction that under the limited circumstances authorized by California voters,  
15 the recommendation, distribution and use of marijuana are not criminal acts.

16 /////  
17 /////  
18 /////  
19 /////  
20 /////  
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22       1. In fact, California’s efforts to prevent the unauthorized use of marijuana  
23 continue unabated. The California Department of Justice, Bureau of Narcotics  
24 Enforcement (BNE) operates The Campaign Against Marijuana Planting (CAMP),  
25 an aggressive marijuana interdiction and eradication effort. CAMP  
26 was established in 1983 under the direction of the Attorney General and BNE.  
27 This multi-agency law enforcement task force, managed by BNE, provides  
28 personnel to remove marijuana growing operations and promote public  
information and education on marijuana. Member agencies, comprised of local,  
state and federal law enforcement representatives, carry out the enforcement  
operations of this program. (See generally, California Department of Justice  
website at <http://caag.state.ca.us>.)

1                   **B. THE CONTROLLED SUBSTANCES**  
2                   **ACT IMPROPERLY INTERFERES**  
3                   **WITH STATES' SOVEREIGN RIGHTS**  
4                   **TO CARE FOR THE HEALTH,**  
5                   **SAFETY, AND WELFARE OF THEIR**  
6                   **CITIZENS**

7                   The States bear primary responsibility for the health, safety, and  
8                   welfare of their citizens. In our federal system they often serve as democracy's  
9                   laboratories. *Washington v. Glucksberg* 521 U.S. 702 (1997); *Cruzan v. Missouri*  
10                  *Dept. of Health*, 497 U.S. 261, 292 (1990); *New State Ice Co. v. Liebmann* 285  
11                  U.S. 262, 311 (1932), Brandeis, J., dissenting. "The essence of federalism is that  
12                  the state must be free to develop a variety of solutions to problems and not be  
13                  forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431  
14                  (1979).

15                  The Framers recognized from the very inception of the Republic that  
16                  a federal government might find it hard to resist the temptation to overbear the  
17                  interests of the States. They provided the means for diminishing that risk by  
18                  imposing limitations on the federal government's power. As the U.S. Supreme  
19                  Court has noted:

20                               [T]he Constitution of the United States . . . recognizes  
21                               and preserves the autonomy and independence of the  
22                               States — independence in their legislative and  
23                               independence in their judicial departments. Supervision  
24                               over either the legislative or the judicial action of the  
25                               States is in no case permissible except as to matters by  
26                               the Constitution specifically authorized or delegated to  
27                               the United States. Any interference with either, except  
28                               as thus permitted, is an invasion of the authority of the  
                             State and, to that extent, a denial of its independence.

29                  *Alden v. Maine*, 527 U.S. 706, 754 (1999), quoting *Erie R. Co. v. Tompkins*, 304  
30                  U.S. 64, (1938).

31                  In keeping with their time-honored role as democracy's laboratories,  
32                  the States are in by far the best position to determine whether and under what  
33                  circumstances the use of cannabis by seriously ill patients should be permitted. As

1 Justice Brandeis, observed, "[i]t is one of the happy incidents of the federal system  
2 that a single courageous State may, if its citizens choose, serve as a laboratory; and  
3 try novel social and economic experiments without risk to the rest of the country."

4 He cautioned, however:

5 This Court has the power to prevent an experiment. We  
6 may strike down the statute which embodies it on the  
7 ground that, in our opinion, the measure is arbitrary,  
8 capricious or unreasonable. We have power to do this,  
9 because the due process clause has been held by the  
10 Court applicable to matters of substantive law as well as  
11 to matters of procedure. But in the exercise of this high  
12 power, we must be ever on our guard, lest we erect our  
13 prejudices into legal principles. If we would guide by  
14 the light of reason, we must let our minds be bold.

11 *Boy Scouts of America v. Dale*, 530 U.S. 640, 664 (2000) Stevens, J., dissenting,  
12 quoting *New State Ice Co.*, 285 U.S. at 311, Brandeis, J., dissenting.

13 Under the circumstances of this case the CSA violates the spirit of this  
14 tradition and impermissibly interferes with California's sovereign right to address  
15 matters that concern the health, safety and welfare of its citizens.

16 **i. Lawfully Enacted Innovative State Social**  
17 **Policies Should Not be Enjoined Based on**  
18 **Obsolete Legislative Findings**

18 Advancements in science and technology frequently debunk popular  
19 myths. The CSA was enacted the year before the first commercial microprocessor  
20 was introduced. By 1996, the year California adopted the Compassionate Use Act,  
21 us of the Internet and the World Wide Web was skyrocketing. Today, literally  
22 billions of people routinely communicate across the globe at the speed of light.  
23 Yet, few could have foreseen 30 years ago what their future, today's present,  
24 would be like. Congress may be learned, but it is not omniscient. What is believed  
25 is not always true, and what is true is not always believed. We must study and we  
26 must adapt to what we learn.

27 Much needs to be learned about the therapeutic uses of cannabis as a  
28 drug. At the time of its introduction, the CSA classified marijuana as a drug

1 having no accepted medical use. The times have changed. This classification is  
2 not a statement of science, but a hollow phrase bereft of factual support, a mantra  
3 indentured to the long discredited notion that denying reality prevents its  
4 consideration. It should have collapsed upon itself long before the citizens of  
5 California adopted Proposition 215. The development and use of Marinol, the  
6 trade name for a product containing synthetic tetrahydrocannabinol (THC), a  
7 psychoactive ingredient in marijuana, belies the contention that cannabis has no  
8 accepted medical use. "Dronabinol, the active ingredient in Marinol, is synthetic  
9 delta-9-tetrahydrocannabinol (delta-9-THC). Delta-9-tetrahydrocannabinol is also  
10 a naturally occurring component of *Cannabis sativa L.* (Marijuana)." *Physicians*  
11 *Desk Reference* 55th ed. 2001, page 2828. Although the outer parameters of that  
12 use may need further clarification, they include "... treatment of: 1. anorexia  
13 associated with weight loss in patients with AIDS; and 2. nausea and vomiting  
14 associated with cancer chemotherapy in patients who have failed to respond  
15 adequately to conventional antiemetic treatments." *PDR* 55th ed. 2001, page 2829.

16           Although the atmosphere surrounding the battle against drug abuse  
17 glows with the incandescent exhortations of its champions and detractors, the  
18 controversy surrounding Proposition 215 has nothing to do with the war on drugs.  
19 This case concerns nothing more than a State's right to enact regulations for the  
20 health and welfare of its citizens. The regulation California has chosen on this  
21 occasion is certainly controversial, perhaps even outrageous in some eyes.  
22 California's bold assertion that cannabis can relieve suffering recognizes that a  
23 drug—even one roiled in controversy—having limited medical applications, or  
24 having a limited range of effectiveness still may have a legitimate use. State-  
25 authorized, medically indicated use should not be proscribed on any but the firmest  
26 scientific basis—particularly where, as here, the federal government's action  
27 unnecessarily and unreasonably brings the sovereignty of the State of California  
28 into conflict with the Congress of the United States.

1                   ii.    **The Controlled Substances Act, as Applied,  
2                           Exceeds the Ninth and Tenth Amendment Limits  
3                           on the Power of Congress and the Federal Government**

4                   The Congress and the federal government have limited authority to  
5 interfere with Amici’s interest in regulating the health, safety and welfare of their  
6 citizens. The Ninth Amendment to the Constitution of the United States recites  
7 that “[t]he enumeration in the Constitution, of certain rights, *shall not be construed*  
8 *to deny or disparage others retained by the people.*” (Emphasis added). It  
9 “preserves against encroachment by the federal government individual rights well  
10 embedded in state law until such rights are modified or abolished by state  
11 authorities or a judicial determination of unconstitutionality or in some way  
12 interfere with the proper scope of federal authority.” *United States v. Stowe*, 100  
13 F.3d 494, 500 (7th Cir. 1996), *cert. denied*, 520 U.S. 1171. The language and  
14 history of the Ninth Amendment reveal that the Framers of the Constitution  
15 believed that there are additional fundamental rights, protected from government  
16 infringement, which exist alongside those fundamental rights specifically  
17 mentioned in the first eight amendments.” *Griswold v. Connecticut*, 381 U.S. 479,  
18 488 (1965), (Goldberg J., concurring.) This case requires deference to that history.

19                   The Supreme Court has recognized that controversial areas of social  
20 policy are best resolved through the democratic process. Whether to allow  
21 seriously ill patients the right to use cannabis upon the advice of a physician is one  
22 such controversy. Proposition 215 authorizes the administration, wholly within  
23 California’s borders, of an admittedly unconventional, but—in the professional  
24 judgment of their physicians— effective medication to a very limited class of  
25 persons. The wisdom of deferring to the States’ inventive genius for solving  
26 pressing issues of public health and welfare has no less force because the chosen  
27 solution challenges conventional norms.

28                   The States reserved to themselves alone the police power to address  
the health and welfare of their citizens. “The [Tenth] Amendment expressly



1 declares the constitutional policy that Congress may not exercise power in a  
2 fashion that impairs the States' integrity, or their ability to function effectively in a  
3 federal system. . . ." *Fry v. United States*, 421 U.S. 542, 547, Fn. 7 (1975).

4           In the American constitutional system . . . the power to  
5 establish the ordinary regulations of police has been left  
6 with the individual states, and cannot be assumed by the  
7 national government . . . . It is embraced . . . in that  
8 immense mass of legislation which can be most  
9 advantageously exercised by the states, and over which  
10 the national authorities cannot assume supervision or  
11 control." *Patterson v. Kentucky*, 97 U. S. 501, 503, 504  
12 (1878) (internal citations and quotation marks omitted).

9           Despite the breadth of federal regulatory authority, there are no police  
10 powers by which the federal government can compel reluctant States to accept its  
11 conception of proper *local* order. Congress has no general power to enact police  
12 regulations operative within a State's territorial limits (*Slaughter-House Cases*, 83  
13 U.S. 36 (1872)), and it cannot take this power from the States or attempt any  
14 supervision over the regulations of the States established under this power. *Keller*  
15 *v. United States* 213 U.S. 138 (1909).

16           Throughout our history the several States have exercised  
17 their police powers to protect the health and safety of  
18 their citizens. Because these are primarily, and  
19 historically, . . . matter[s] of local concern, the States  
20 traditionally have had great latitude under their police  
21 powers to legislate as to the protection of the lives, limbs,  
22 health, comfort, and quiet of all persons. *Medtronic, Inc.*  
23 *v. Lohr*, 518 U.S. 470, 475 (1996) (citations and internal  
24 quotation marks omitted).

22           The decision whether to enact a particular law or statutory scheme for  
23 the health and welfare of their citizens falls entirely within the powers retained by  
24 the States. "[W]hen a state exerting its recognized authority, undertakes to  
25 suppress what it is free to regard as a public evil, it may adopt such measures  
26 having reasonable relation to that end *as it may deem necessary* in order to make  
27 its action effective." *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 201

28 // // // //

1 (1912) (emphasis added). This includes the power to define a public evil as the  
2 denial of medication capable of relieving suffering.

3           The importance of maintaining the States' preeminent role as  
4 caretakers of their citizens lies at the heart of this controversy. It is one thing for  
5 the federal government to dictate what items may be transacted in interstate  
6 commerce, for example. It is quite another for it to impose its particular notions of  
7 medical propriety upon a State whose people have clearly and unequivocally  
8 exercised their discretion in a different direction. For then, the federal government  
9 arrogates to itself an unsustainable power. The "essence of our federal system is  
10 that within the realm of authority left open to them under the Constitution, the  
11 States must be equally free to engage in any activity that their citizens choose for  
12 the common weal, *no matter how unorthodox or unnecessary anyone*  
13 *else—including the judiciary—deems state involvement to be."* *Garcia v. San*  
14 *Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545–46 (1985) (Emphasis  
15 added).

16                           **C. THE CONTROLLED SUBSTANCES**  
17                           **ACT EXCEEDS CONGRESS'**  
18                           **COMMERCE CLAUSE AUTHORITY**

19           The question presented here concerns not whether Congress may  
20 enact laws to control the interstate manufacture, transportation and sale of drugs,  
21 but rather the degree to which it may regulate purely local activity wholly confined  
22 *within* a State. It may not, for example, ban the possession of a weapon within a  
23 prescribed distance of a school (*United States v. Lopez*, 514 U.S. 549 (1995)),  
24 or impose civil remedies for gender-based violence (*United States v.*  
25 *Morrison*, 529 U.S. 598 (2000)), nor may it make mere possession of a firearm by  
26 an ex-felon a federal crime absent a nexus to interstate commerce (*United States v.*  
27 *Bass*, 404 U.S. 336 (1971)). These acts exceed Congress' delegated powers.

28 // // // //

// // // //

1                   **i. The Federal Government is One**  
2                   **of Limited, Delegated Powers.**

3                   Congress derives its authority to regulate interstate commerce from  
4 the Constitution, but though proceeding from that inspired instrument, these  
5 powers are not unlimited. Having so recently prevailed against the tyrannical  
6 forces of the Crown, the newly independent States were loath to submit once again  
7 to an imperious central authority. Indeed, the power granted to the federal  
8 government under the Constitution was deliberately restricted because of the  
9 jealous reluctance of the sovereign States to part with very much of it. As James  
10 Madison observed, “[t]he powers delegated by the proposed Constitution to the  
11 federal government are few and defined. Those which are to remain in the State  
12 governments are numerous and indefinite. The Federalist No. 45, *The Federalist:*  
13 *A Commentary on the Constitution of the United States*, p. 298 (Modern Library  
14 Edition, Random House Inc. 2000).

15                   The Framers did not merely *consider* the notion of limiting the power  
16 of the federal government, they believed it imperative to do so. The purpose of the  
17 division of powers between the federal and State governments under the Tenth  
18 Amendment “is to protect the liberty of individual citizens from excessive  
19 concentration of power in a central government” (*Frank v. United States*, 78 F.3d  
20 815, 825 (2d Cir. 1996), *cert. granted, judgment vacated on other grounds* in  
21 *Frank v. United States*, 521 U.S. 1114 (1997)). “Just as the separation and  
22 independence of the coordinate branches of the Federal Government serve to  
23 prevent the accumulation of excessive power in any one branch, a healthy balance  
24 of power between the State and the Federal Government will reduce the risk of  
25 tyranny and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S. 452, 458  
26 (1991).

27                   “Every law enacted by Congress must be based on one or more of its  
28 powers enumerated in the Constitution. ‘The powers of the legislature are defined

1 and limited; and that those limits may not be mistaken or forgotten, the constitution  
2 is written.” *Morrison*, 529 U.S. at 607, citing *Marbury v. Madison*, 1 Cranch 137,  
3 176, 2 L.Ed. 69 (1803) (Marshall, C.J.). A connection must exist between those  
4 powers and the prohibited act or conduct Congress seeks to regulate. That  
5 connection is missing here.

6 **ii. The CSA Cannot be Justified as an Exercise**  
7 **of Congress’ Delegated Power Under the**  
8 **Commerce Clause**

9 The federal government may legitimately exercise its powers, even to  
10 the extent of imposing its rules upon the States, when employing a power expressly  
11 granted by the Constitution such as that granted under the Commerce Clause “[t]o  
12 regulate commerce with foreign nations, and among the several states, and with the  
13 Indian tribes.” *U.S. Const.*, art. I, § 8. This “is the power to regulate; that is, to  
14 prescribe the rule by which commerce is to be governed. This power, like all  
15 others vested in congress, is complete in itself, may be exercised to its utmost  
16 extent, and acknowledges no limitations, other than are prescribed in the  
17 constitution.” *Lopez* at 552, citing *Gibbons v. Ogden*, 9 Wheat. 1, 189, 196, 6  
18 L.Ed. 23 (1824). But the Constitution prescribes limits.

19 Generally, Congress may regulate three categories of activity under its  
20 commerce power: (1) It may regulate the use of the *channels* of interstate  
21 commerce, (2) It may regulate and protect the *instrumentalities* of interstate  
22 commerce and finally, (3) It may regulate those activities having a *substantial*  
23 *relation* to interstate commerce. *See, Lopez* at 552.

24 While conceding that guns are routinely bought and sold in interstate  
25 commerce, the Supreme Court found that the Gun-Free School Zones Act “has  
26 nothing to do with commerce or any sort of economic enterprise, however broadly  
27 one might define those terms.” *Lopez*, at 561. Even though the Act regulated the  
28 use of a product regularly traded in interstate commerce, the Court held: “The  
[Gun-Free School Zones] Act . . . neither regulates a commercial activity nor

1 contains a requirement that the possession be connected in any way to interstate  
2 commerce.” *Id.* at 551. Applying the same analysis to Proposition 215 requires  
3 the same result.

4 To be validly applied to this case, the Controlled Substances Act must  
5 necessarily be restricted to the regulation of activities employing the channels and  
6 instrumentalities of—and having a substantial relationship to—interstate  
7 commerce. These elements are missing from the activity permitted by California’s  
8 Compassionate Use Act. Although the cannabis recommended by a physician and  
9 distributed under Proposition 215 *may* have hypothetical sources outside of this  
10 State, there is no *lawful* intrastate or interstate trade in the drug, and California’s  
11 statute does not assume reliance on illicit sources. More to the point, were the  
12 federal, State, and local governments successful in their efforts to eradicate the  
13 illegal traffic in marijuana, the conduct authorized by Proposition 215 would be  
14 unaffected.

15 To implicate federal authority, a *substantial connection* between what  
16 is authorized by the Proposition and interstate commerce must be demonstrated.  
17 California’s law has no ambitions beyond its own borders. Read in its proper  
18 context, Proposition 215 does not conflict with or otherwise implicate federal law.  
19 This State cannot—nor may it authorize others to—place into interstate commerce  
20 products prohibited by the federal government, and it does not presume to do so.  
21 To be lawful in California, the conduct must be confined within the narrow class of  
22 intrastate activities specifically authorized by Proposition 215. Judged in that light  
23 and interpreted to give effect to its provisions, the *Compassionate Use Act* only  
24 authorizes what is already beyond the reach of federal law—the limited use of  
25 cannabis by its citizens for specified medicinal purposes. And it does so through a  
26 lawful exercise of this state’s police powers.

27 Although the CSA does purport to regulate commercial activity,  
28 which distinguishes it from the Gun-Free School Zone Act, to be correctly applied

1 under these circumstances, the Constitution requires the regulated conduct be  
2 connected to commerce *among* the states—which it is not. “Comprehensive as the  
3 word ‘among’ is, it may very properly be restricted to that commerce which  
4 concerns more States than one. The enumeration presupposes something not  
5 enumerated; and that something, if we regard the language, or the subject of the  
6 sentence, must be the exclusively internal commerce of a State.” *Gibbons v.*  
7 *Ogden*, 9 Wheat. 1, 189, 194-196; *United States v. Morrison*; *United States v.*  
8 *Lopez*.

9           The commerce power “does not comprehend the purely internal  
10 domestic commerce of a State which is carried on between man and man within a  
11 State or between different parts of the same State.” *Kidd v. Pearson* 128 U.S. 1, 17  
12 (1888). Nor does it comprehend the purely internal exercise of California’s police  
13 powers to ease the suffering of those identified by Proposition 215.

14           Although the CSA recites that “[i]ncidents of the traffic [in controlled  
15 substances] which are not an integral part of the interstate or foreign flow, such as  
16 manufacture, local distribution, and possession, nonetheless have a substantial and  
17 direct effect upon interstate commerce” (21 U.S.C. § 801(3)), that is not the case  
18 here. As has often been observed, simply calling a thing by a name does not make  
19 it so. *City of Madison, Joint School District No. 8 v. Wisconsin Employment*  
20 *Relations Commission*, 429 U.S. 167, 174 (1976). More precisely, even though  
21 “Congress may conclude that a particular activity substantially affects interstate  
22 commerce does not necessarily make it so.” *Lopez* at 557.

23           For example, the Supreme court rejected Congress’ attempt to  
24 abrogate state sovereign immunity under the Americans with Disabilities Act,  
25 despite what dissenting Justice Breyer described as “a vast legislative record  
26 documenting massive, society-wide discrimination against persons with  
27 disabilities.” *Alabama v. Garrett*, 531 U.S. 356, 377(2000). The majority  
28 characterized the evidence as “minimal.” *Id.* at 370. But even minimal evidence is

1 some evidence. Here there is no evidence at all so support Congress' finding and  
2 this court should have no qualms about rejecting it.

3           The federal government cannot acquire plenary powers over the states  
4 simply by directing its attention to matters touching upon interstate commerce.  
5 Were it otherwise, Congress could easily subordinate the states to its will merely  
6 by inserting a token reference to a subject within its legitimate constitutional  
7 powers into every piece of legislation, bootstrapping itself into the catbird seat  
8 with no further effort. But the Supreme Court has never held "that Congress may  
9 use a relatively trivial impact on commerce as an excuse for broad general  
10 regulation of state or private activities." *Lopez* at 558. "Were the Federal  
11 Government to take over the regulation of entire areas of traditional state concern,  
12 areas having nothing to do with the regulation of commercial activities, the  
13 boundaries between the spheres of federal and state authority would blur." *Lopez*  
14 at 577. In this case, as in *Lopez*, "neither the actors nor their conduct has a  
15 commercial character. . . ." *Lopez* at 580. While the CSA may have "an evident  
16 commercial nexus," (*Id.* at 580) its applicability to the conduct authorized under  
17 California law is theoretical to the point of invisibility and the Court has  
18 consistently required more than hypothetical connections to interstate commerce.  
19 "In a sense any conduct in this interdependent world of ours has an ultimate  
20 commercial origin or consequence, but we have not yet said the commerce power  
21 may reach so far." *Id.* at 580.

22           The language of Proposition 215 carefully distinguishes what it  
23 authorizes from what it prohibits. The activity authorized by the people of  
24 California presumes nothing upon federal law, nor supposes to make legal what the  
25 federal government has properly banished from interstate commerce. All traffic in  
26 marijuana not specifically authorized, which the CSA properly addresses, also  
27 violates California law. Unfortunately, in failing to make the same distinction, the  
28 CSA exceeds the power of Congress.

1           One searches in vain for a nexus between the conduct authorized by  
2 California and the conduct prohibited by Congress. Permitting application of the  
3 CSA to this situation invites the federal government to “take over the regulation of  
4 entire areas of traditional state concern, areas having nothing to do with the  
5 regulation of commercial activities.” *Lopez* at 611.

6           “[T]he interstate commerce power must be considered in the light of  
7 our dual system of government and may not be extended so as to embrace effects  
8 upon interstate commerce so indirect and remote that to embrace them, in view of  
9 our complex society, would effectually obliterate the distinction between what is  
10 national and what is local and create a completely centralized government.” *Jones*  
11 *& Laughlin Steel*, 301 U.S. 1, 37 (1937). In Proposition 215 California has done  
12 nothing more than determine, consistent with its sovereign police power, that  
13 within its narrowly prescribed parameters cannabis lawfully may be recommended  
14 by a physician and used by a patient.

#### 15           **CONCLUSION**

16           California’s unequivocal determination to authorize the medical use of  
17 cannabis deserves the respect due lawful acts of a sovereign State. Its decision to  
18 enact Proposition 215 “must be considered in light of our dual system of  
19 government.” The Commerce Clause does not permit Congress to insert itself into  
20 activities having no more than “indirect and remote” effects on interstate  
21 commerce, nor does it authorize intrusions upon State acts having no effects  
22 whatsoever on interstate commerce. The federal government’s attempts to impose  
23 its will on California in defiance of the expressed desires of its citizens usurps the  
24 sovereign rights of the States under the Ninth Amendment, it intrudes upon the  
25 powers reserved to the States under the Tenth Amendment, and exceeds the power  
26 delegated to Congress by the Commerce Clause of the United States Constitution.

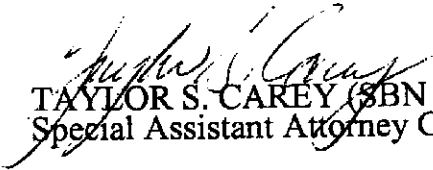
27           “All great truths begin as blasphemies.” *Hoffman v. Cargill*, 142  
28 F.Supp.2d 1117, 1118 (2001), *quoting* George Bernard Shaw. The question here is



1 whether deference shall be paid to California's heretical decision to test the  
2 medical efficacy of marijuana for the purpose of relieving suffering caused by  
3 illness or disease. Amici curiae State of California, City of Oakland, and County  
4 of Alameda respectfully submit that Californians have a constitutionally protected  
5 right to indulge this blasphemy— so long as its utterance is wholly contained  
6 within State boundaries. Although none can say what great medical truths, if any,  
7 California's intrepid initiative may ultimately liberate, this experiment by one of  
8 the nation's great laboratories of democracy should not be enjoined.

9 November 15, 2002.

10 Respectfully Submitted,  
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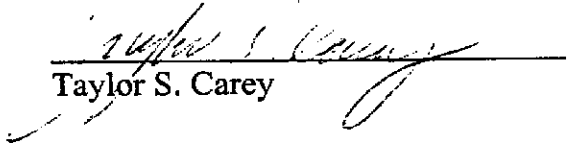
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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 (a) 7 (c) and Ninth Circuit Rule 32, I certify that the Brief of Amicus Curiae State of California, County of Alameda and City of Oakland in the case of *United States of America v. Oakland Cannabis Buyers' Cooperative and Jeffrey Jones* is prepared in proportionately space Times New Roman typeface in fourteen point.

The brief, excluding this Certificate of Compliance, the Cover Page, the Table of Contents, The Table of Authorities, and the Proof of Service, contains 5,114 words based on a count by the word processing system at the Attorney General's Office.

Dated: November 15, 2002

  
Taylor S. Carey

**DECLARATION OF SERVICE**

Case Name: ***UNITED STATES OF AMERICA, Plaintiff-Appellee/Appellant, v. OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES, Defendants-Appellant/Appellee.***

No.: 02-16534

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

On November 18, 2002, I served the attached

**BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA, COUNTY OF ALAMEDA AND CITY OF OAKLAND IN SUPPORT OF DEFENDANTS MOTION AFTER REMAND TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION.**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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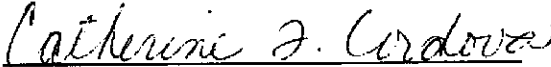
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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on November 18, 2002, at Sacramento, California.

  
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