No. 03-15481

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL McCLARY RAICH, DIANE MONSON,
JOHN DOE NUMBER ONE, and JOHN DOE NUMBER TWO,
Plaintiffs-Appellants,

v.

JOHN ASHCROFT, as United States Attorney General, and
ASA HUTCHINSON, as Administrator of the Drug Enforcement Administration,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Case No. C 02-4872 MJJ.

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Codes and Statutes

Other Authorities

STATEMENT OF JURISDICTION

Angel McClary Raich ("Angel"), Diane Monson ("Monson"), John Doe Number One, and John Doe Number Two (collectively "Appellants") filed a civil complaint against John Ashcroft, as United States Attorney General, and Asa Hutchinson, as Administrator of the Drug Enforcement Administration, (collectively the "government") seeking preliminary and permanent injunctions and declaratory relief. Excerpts of Record ("ER") 001. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 2201.

This is an appeal of district court's March 5, 2003, order denying Appellants' motion for preliminary injunction. ER 250. Appellants filed a timely notice of appeal on March 12, 2003. ER 268. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

Whether the federal government, acting under the purported authority of the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, may: raid, arrest, or prosecute Appellants, seize their medicine, forfeit their property, or seek civil or administrative sanctions against them for their possession or cultivation of medical cannabis for the seriously ill Appellant patients' personal medical use, when:

1. State law designed to protect the public health and safety of California citizens specifically authorizes Appellants' activities; and

2. Appellants' activities are wholly intrastate, wholly noncommercial, and have absolutely no effect (substantial or otherwise) on interstate commerce; and

3. Appellants' activities are for the purpose of preserving the fundamental rights to prolong life, to ameliorate pain, to bodily integrity, and to the sanctity of the physician-patient relationship; and

4. The doctrine of Medical Necessity protects Appellants' activities.

STATEMENT OF THE CASE

In the face of well-justified fears, the Appellants require protection against the federal government and seek a preliminary injunction during the pendency of this action in order to avert overwhelming pain, maintain health, and preserve life itself. The State of California and the People of California explicitly recognize Appellants' rights. Under purported precedents of this Circuit, the district court declined to grant the relief Appellants so critically require. In so doing, the district court abdicated its duty to safeguard fundamental rights protected by the Constitution, and its duty to interpret federal law in a manner consistent with the limitations on federal authority set forth in the Constitution.

The constitutional issues raised in this case extend well beyond the narrow issue of medical cannabis. At stake in these proceedings is whether the federal government may exercise power in derogation of the Constitution and in defiance of centuries of common law, unrestrained by any recognition of the constitutionally protected sovereignty and autonomy of State governments or the fundamental rights of American citizens. To uphold the district court's actions in this case would weaken each of these foundations of our Republic.

STATEMENT OF FACTS

The facts in this case are undisputed. Angel and Monson are California citizens who use cannabis as a medical treatment for a variety of serious medical conditions. Angel suffers from a daunting litany of more than ten serious medical conditions, many of them life-threatening, including wasting syndrome with severe weight loss borderline cachexia, a seizure disorder, an inoperable brain tumor, nausea, and several severe chronic pain disorders. *See* Declaration of Angel McClary Raich ("Angel Decl.") ¶ 1, ER 062. Angel's primary care physician, and all of her numerous specialist physicians, support Angel's use of medical cannabis. *See* Angel Decl. ¶ 19, ER 069; Declaration of Frank Henry Lucido, M.D. ("Lucido Decl.") ¶¶ 4-5, ER 088-089. If denied cannabis by the government, Angel could

quickly suffer dangerous health repercussions, including a torturous death. Angel Decl. ¶ 9, ER 064; Lucido Decl. ¶ 4, ER 088-089.

Monson lives with serious chronic back pain, coupled with constant muscle spasms that often prove debilitating. *See* Declaration of Diane Monson ("Monson Decl.") ¶¶ 2-3, ER 092-093. These symptoms are caused by a degenerative disease of the spine. Declaration of Dr. John Rose ("Rose Decl.") ¶ 3, ER 097.

While Monson cultivates the cannabis she uses, Angel is unable to grow her own. Instead, her caregivers, John Doe Number One and John Doe Number Two, cultivate Angel's medicine on her behalf, which they provide to her free of charge, without any remuneration whatsoever. They provide Angel with medical-grade cannabis free of mold, fungus, pesticide residue, and other contaminates in the particular strains and potencies that Angel has found to be most effective in treating her specific medical conditions. In order to protect Angel's supply of medical cannabis, the John Does sued in an anonymous capacity. *See* Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction ("Motion") at 5-6, ER 035-036; *see also* Angel Decl. ¶ 48-49, ER 080-081.

Traditional medicine has utterly failed Angel and Monson (collectively "Appellant patients"). None of the treatments, prescription medications, or other interventions attempted by them and their physicians has proven effective. *See*

Rose Decl. ¶¶ 5, 6, ER 097; Lucido Decl. ¶ 7, ER 089, 090. The only thing that has provided any relief from symptoms and/or improvement in their condition is medication with cannabis. Rose Decl. ¶ 4, ER 097; Lucido Decl. ¶ 6, ER 089.

Angel's cannabis is cultivated using only water and nutrients originating from within California, and it is grown exclusively with equipment, supplies, and materials manufactured within the borders of the State. Motion at 6, ER 036. Monson grows her own cannabis for herself, and it is similarly local in nature. *See* Motion at 5, ER 035.

Both Appellants fear that federal agents may raid their homes and deprive them of the cannabis they need on a daily basis. Monson has actually experienced this. *See* Angel Decl. ¶¶ 56, 57, ER 083; Monson Decl. ¶ 10, ER 095. Deputies from the Butte County Sheriff's Department and agents from the DEA came to her home on August 15, 2002. *Id.* While the sheriff's deputies concluded that Monson's use of cannabis was legal under California's Compassionate Use Act, after a three-hour standoff in Monson's front yard, including an unsuccessful intervention by Butte County District Attorney Mike Ramsey with John Vincent, the United States Attorney for the Eastern District of California, the DEA agents seized and destroyed Monson's six (6) cannabis plants. *Id.* To avoid a similar occurrence in the future, and to ensure that the Appellant patients will be able to

continue to use cannabis as medication, Appellants filed this action on October 9, 2002, seeking declaratory relief and preliminary and permanent injunctions.

SUMMARY OF ARGUMENT

The district court committed reversible error by failing to grant a preliminary injunction in this case, despite Appellants' demonstrable need for protection against the government. The court's error hinged upon its unwillingness to interpret this Circuit's precedent in light of more recent Supreme Court authority, as further confirmed by this Court's own precedent handed down since the district court's ruling.

The government's actions requiring an injunction are purportedly taken pursuant to the CSA, a statute passed under Congress's Commerce Clause power. Appellants' activities at issue in this case are wholly intrastate, wholly non-economic, and utterly without any effect (substantial or otherwise) on interstate commerce. As such, Congress may not constitutionally authorize the government to prohibit Appellants' activities.

The State of California expressly authorizes Appellants' activities, to promote the health and safety of the State's citizens. Under principles of federalism, which lie at the very foundation of our system of government, federal

authority may not constitutionally interfere with the State's sovereign rights to protect its citizens' health and safety.

Appellants possess fundamental rights to their own lives, to ameliorate their pain, to their bodily integrity, and to the sanctity of their physician-patient relationships. Absent a compelling justification, the government may not constitutionally exercise its power in a manner that violates those fundamental rights.

Finally, the common law doctrine of medical necessity protects Appellants' personal activities against governmental interference under the CSA.

For all of these reasons, the district court committed reversible error by failing to grant the preliminary injunction.

ARGUMENT

I. STANDARDS OF REVIEW

Generally, this Court reviews a district court's grant or denial of a preliminary injunction for abuse of discretion, *United States v. Peninsula Communications*, 287 F.3d 832, 839 (9th Cir. 2002), and reviews a district court's conclusions of law *de novo*. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996).

Where, as here, the district court's rulings rest solely on a premise of law and

the facts are either established or undisputed, this Court's review is *de novo*. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 964-5 (9th Cir. 2002).

This Court reviews questions involving the constitutionality of a statute *de novo*. *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

II. THE COMMERCE CLAUSE DOES NOT PERMIT CONGRESS TO PROHIBIT PURELY INTRASTATE NON-COMMERCIAL ACTIVITY HAVING NO SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

It is Congress's Commerce Clause authority that permits the federal regulation of non-medical marijuana. 21 U.S.C. § 801; *United States v. Kim*, 94 F.3d 1247, 1250 (9th Cir. 1996). The Supreme Court addressed the power of Congress to regulate activities under the Commerce Clause in *United States v. Lopez*, 514 U.S. 549 (1995), holding that Congress's regulatory power did not extend to the non-economic intrastate act of possessing a firearm within 1,000 feet of a school. Following a thorough historical and legal analysis of the Commerce Clause, the Supreme Court rejected the "rational basis" test and determined that questions regarding federal regulation of activities under the Commerce Clause, including intrastate activity, require "an analysis of whether the regulated activity '*substantially affects*' interstate commerce." *Id.* at 559 (emphasis added).

According to *Lopez*, a court must be able to make -- on a case by case basis -- a factual determination whether or not the regulated activity substantially affects

interstate commerce. *Id.* at 561. As explained by the Court, "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so"; rather, "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court". *Id.* at 557, n.2. *Accord, Solid Waste Agency v. United States Army Corp. of Engineers*, 531 U.S. 159, 173 (2001) (Determining whether Congress exceeded grant of authority under Commerce Clause requires a court "to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce.").

The Court expanded on its analysis of "substantial effect on interstate commerce" in *United States v. Morrison,* 529 U.S. 598 (2000). In *Morrison,* the Court invalidated the provisions of the Violence Against Women Act that provided victims of gender-based violence with a civil remedy against their abusers in federal court. The Court held that the Act was not supported by the Commerce Power because gender based violence was not "economic in nature." *Id.* at 613. The "non-economic, criminal nature of the conduct at issue" was dispositive despite extensive Congressional findings that gender-based violence has a significant economic effect. *Id.*

To the Court, conclusory findings by Congress regarding significant economic effect were, themselves, insufficient to satisfy constitutional requirements.[1] Furthermore, congressional economic findings are irrelevant if they rely on "attenuated analysis," a form of analysis "we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Id.* at 613.[2]

> We rejected these "costs of crime" and "national productivity" arguments because they would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." [citation] We noted that, under this but-for reasoning: "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under these theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."

Id. at 612-613.

It was the Supreme Court's authority in *Lopez* and *Morrison* that led Judge

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[1] Here, the CSA contains no finding, whatsoever, by Congress that the wholly intrastate possession, cultivation, or use of medical cannabis in accordance with State law substantially affects interstate commerce.

[2] The Court first rejected an "attenuated analysis" in *Lopez*, 514 U.S. at 563-567.

Kozinski to conclude,

> **Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce.** *Cf. Oakland Cannabis Buyers' Coop.*, 532 U.S. at 495 n.7 (reserving "whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause"). Federal efforts to regulate it considerably blur the distinction between what is national and what is local.

Conant v. Walters, 309 F.3d 629, 647 (9th Cir. 2002) (emphasis added).

A. The District Court Erred in Failing to Distinguish Ninth Circuit Precedent In Light of Subsequent Supreme Court Authority.

The district court in this case, while acknowledging the significance of both *Lopez* and *Morrison* and expressing great sympathy for Appellants' factual and legal positions, considered itself nevertheless bound by the earlier decisions of this appellate Court in *United States v. Rodriquez-Camacho*, 468 F.2d 1220 (9th Cir. 1972), *United States v. Visman*, 919 F.2d 1390 (9th Cir. 1990), *United States v. Kim*, 94 F.3d 1247 (9th Cir. 1996), and *United States v. Tisor*, 96 F.3d 370 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997), all of which generally upheld the CSA against challenges that it exceeded Congress's Commerce Clause authority. According to the district court:

> Contrary to plaintiffs' wishes, the Court is constrained from such a determination by the weight of precedent. As discussed above, the Ninth Circuit has repeatedly upheld the constitutionality of the CSA as applied to marijuana *See Tisor*, 96 F.3d at 374; *Rodriquez-Camacho*, 468 F.2d at 1221. The Court of Appeals has confirmed the validity

and adequacy of Congress' findings in support of the CSA, including its application to wholly intrastate cultivation of marijuana. *Visman*, 919 F.2d at 1392.

Slip op. at 8, ER 257.

> In the final analysis, this Court cannot undertake the resolution of this important issue as it is constrained from doing so by existing Circuit precedent -- precedent which has found that the CSA passes constitutional muster.

Slip op. at 10, ER 259.

The district court, however, failed to recognize that, whereas the earlier cases concerned drug trafficking, Appellants' conduct represents a *separate and distinct class of activity*: the completely intrastate noneconomic personal cultivation and possession of cannabis for medical purposes as recommended by patients' physicians pursuant to valid California State law (the Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5). This *class of activity* is separate and distinct from the class of activity involving trafficking in illegal drugs, as identified in *Rodriquez-Camacho*, *Visman*, *Kim*, and *Tisor*. Most importantly, the *class of activity* implicated in this case is beyond the reach of Congress under the Commerce Clause because, even in the aggregate, it has no substantial effect on interstate commerce.

Moreover, pursuant to this Court's recent analysis in *United States v. McCoy*, No. 01-50495, 2003 U.S. App. LEXIS 5378 (9th Cir. March 20, 2003), it is abundantly clear that Appellants activities are so utterly lacking in commercial or

economic character that they cannot be subject to regulation under the Commerce Clause.

B. The Recent Decision by this Circuit in *United States v. McCoy* Reaffirms that Home-Grown Medical Cannabis Not Intended for Distribution or Exchange Is Not Economic Activity and Cannot Be Prohibited as a Valid Exercise of the Commerce Clause Power.

Shortly after the district court's order denying Appellants' motion for preliminary injunction, this Court issued its opinion in *McCoy*, further analyzing the Supreme Court's holdings in *Lopez* and *Morrison*.[3] The reasoning of *McCoy* affirms that the activities for which Appellants seek protection -- the personal cultivation and personal possession of cannabis for medical purposes by California citizens as recommended by the patients' physicians pursuant to valid California State law -- are beyond the power of Congress "to regulate Commerce . . . among the several States," U.S. Const., art. I, § 8.

In *McCoy,* this Court examined the impact of *Lopez* and *Morrison* upon the validity of the federal prohibition against possession of child pornography, 18 U.S.C. § 2252(a)(4)(B), enacted pursuant to Congress's Commerce Power. In

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[3] The district court opinion in this case was filed on March 5, 2003, 15 days prior to this Circuit's decision in *McCoy* on March 20, 2003. Consequently, the district court did not have the advantage of this Circuit's later reasoning.

reaching its conclusion, *McCoy* carefully analyzed the four critical *Morrison* factors in deciding that the federal child pornography statute was not a constitutional exercise by Congress of its Commerce Clause power:

> 1) whether the statute in question regulates commerce "or any sort of economic enterprise"; 2) whether the statute contains any "express jurisdictional element which might limit its reach to a discrete set" of cases; 3) whether the statute or its legislative history contains "express congressional findings" that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated." 529 U.S. 598, 610-612 (2000).

McCoy, slip op. at 4032-33.

1. The "Economic Enterprise" and "Attenuated Link" Factors of *Morrison*

In its consideration of the four *Morrison* factors, this Court in *McCoy* found two of them -- the first and the fourth -- to be pivotal because an activity that is "utterly lacking in commercial or economic character would likely have too attenuated a relationship to interstate commerce and would, accordingly, not be subject to regulation under the Commerce Clause." *Id.* at 4033-4034.

> In reviewing its Commerce Clause jurisprudence, the Supreme Court stated that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613; see also *Ballinger*, 312 F.3d at 1270 ("No such aggregation of local effects is constitutionally permissible in reviewing congressional regulation of intrastate, non-economic activity.").

Id. at 4039.

For this reason, the Court in *McCoy*, held that the federal prohibition against child pornography, produced even using material transported in interstate commerce, was unconstitutional *as applied* to simple possession that is entirely non-economic or non-commercial.

> We interpret the statute as applied to McCoy's conduct as it falls within a *class of activity* that § 2252(a)(4)(B) purports to reach: intrastate possession of a non-commercial and non-economic character.
>
> * * *
>
> In sum, a thorough review of the *Morrison* factors persuades us that, *as applied* to McCoy and others similarly situated, § 2252(a)(4)(B) cannot be upheld as a valid exercise of the Commerce Clause power.

McCoy, supra at 4057-58.

> Here, we conclude that simple intrastate possession of home-grown child pornography not intended for distribution or exchange is "not, in any sense of the phrase, economic activity."

Id. at 4039.

Appellants are identical to the *McCoy* defendant in this regard.[4] As with the activity at issue in *McCoy*, Appellants' activities, viewed individually or as a class, are utterly lacking in commercial or economic character, and thus have too

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[4] Though, unlike the defendant in *McCoy*, the Appellants have good, State-sanctioned, constitutionally-protected reasons for their non-economic conduct.

attenuated a relationship to interstate commerce to justify their prohibition under the Commerce Clause.[5] The simple intrastate possession of home-grown medical cannabis not intended for distribution or exchange is not, in any sense of the phrase, economic activity. The CSA's prohibition against the cultivation or possession of cannabis is thus unconstitutional *as applied* to non-economic and non-commercial intrastate personal cultivation or possession of cannabis for medical purposes pursuant to valid California State law. Therefore, with regard to the first and fourth *Morrison* factors, Appellants' conduct is not subject to prohibition under the Commerce Clause.

2. The "Jurisdictional Element" Factor of *Morrison*

According to *McCoy*, the remaining *Morrison* factors -- the express jurisdictional element in the statute, and the statute's findings and legislative history

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[5] It is also worth emphasizing that, in granting a preliminary injunction, the district court, in *Conant v. McCaffrey*, 172 F.R.D. 681, 694 n.5 (N.D. Cal. 1997), took evidence on a similar issue and determined that activity under the Compassionate Use Act neither conflicts with the objectives and purposes of the CSA nor materially affects interstate commerce:

> [T]he government's fears in this case are exaggerated and without evidentiary support. It is unreasonable to believe that use of medical marijuana by this discrete population for this limited purpose will create a significant drug problem.

-- aid "our analysis but are ordinarily not, in themselves, dispositive". *McCoy, supra* at 4034.

Various circuits have referred to the express jurisdictional factor as a "jurisdictional hook." As *McCoy* expressed it:

> The statute's "jurisdictional hook" had been viewed by some courts in decisions predating *Morrison* as sufficient to render the statute constitutional. The Supreme Court's decisions in *Lopez* and *Morrison* however, reject the view that a jurisdictional element, standing alone, serves to shield a statute from constitutional infirmities under the Commerce Clause. At most, the Court has noted that such an element "*may* establish that the enactment is in pursuance of Congress' regulation of interstate commerce," or that it may "lend support" to this conclusion. *Morrison*, 529 U.S. at 612, 613 (emphasis added).

McCoy, supra at 4043-44.

As with the contested statutes in *Lopez* and *Morrison*, the provisions of the CSA that Appellants address here do not in themselves contain any jurisdictional hook shielding them from constitutional infirmities under the Commerce Clause.

3. The "Congressional Findings" Factor of *Morrison*

With regard to the remaining *Morrison* factor -- congressional findings -- *McCoy* has made clear that congressional findings are neither necessary nor conclusive, but *can* "assist in determining whether that activity substantially affects interstate commerce. *Lopez*, 514 U.S. at 563." *McCoy*, slip op. at 4047. In *Morrison*, the Supreme Court found that, despite explicit congressional findings

regarding the alleged national effect of gender-motivated violence, such a congressional rationale was doubtful and the determination was, ultimately, a judicial not a legislative one. *Morrison*, 529 U.S. at 614-615.

This Court, in *McCoy,* also rejected general congressional findings associated with 18 U.S.C. § 2252(a)(4)(B). It held that, even if Congress declared *commercial* child pornography to be a national problem, such determinations "speak only to the general phenomenon of commercial child pornography; they do not speak to the relationship between *intrastate non-commercial* conduct like McCoy's and the interstate commercial child pornography market." *McCoy*, slip op. at 4047.

Although most of the findings in the CSA address only the interstate trafficking in controlled substances or local manufacturing that is later transported in interstate commerce (21 U.S.C. § 801(3), (4), and (6)), Section 801(5) more broadly addresses intrastate manufacturing and distribution:

> Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

21 U.S.C. § 801(5).[6]

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[6] Under constitutional scrutiny, this congressional finding borders on an attempt to satisfy Commerce Clause requirements through an "attenuated analysis,"

Yet the congressional finding in Section 801(5) is, for all practical purposes, useless if it completely fails to guarantee that the final product regulated substantially affects interstate commerce. *McCoy*, *supra* at 4043; *United States v. Rodia*, 194 F 3d 465, 473 (3rd Cir. 1999).[7] It is clear that the cannabis grown and possessed by Appellants for the limited purpose of medical use will never be traded between states nor, in any imaginable way, affect interstate commerce. The supposition that this *might* occur does not give Congress police power over this class of activity. Therefore, under the rationale of *Morrison* and *McCoy*, it fails, in this instance, to justify, under the Commerce Clause, any regulation of the personal cultivation and possession of cannabis for medical purposes by California citizens as recommended by the patients' physicians and pursuant to California State law.[8]

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condemned in both *Lopez* and *Morrison*. See *supra* p. 10.

[7] The *McCoy* opinion also references the legislative findings in the CSA. *McCoy*, slip op. at 4050, n.24; *see also* discussion at n.9, *infra*. As noted in text, *supra*, congressional findings are neither necessary nor conclusive for determining whether a statute is a constitutional exercise of Congress's Commerce Power. *McCoy* at 4047, *Lopez* at 563. Furthermore, the findings in the CSA address only the "general phenomenon" of commercial drug trafficking, not the wholly intrastate non-commercial non-economic activities of Appellants. Accordingly, under this *Morrison* factor, the CSA's findings are of no assistance in determining whether Appellants' activities substantially affect interstate commerce.

[8] In accordance with 21 U.S.C. § 903 and the Supreme Court's decision in *Lopez*, should the government contend that the Compassionate Use Act triggers a conflict with the CSA or is otherwise inconsistent with federal regulations under the Commerce Clause, the *burden is on the government* to come forward and prove that

The instant case is identical to *Morrison* and *McCoy* in regard to congressional findings. In the CSA, Congress made no finding concerning the *intrastate, non-commercial medical* uses of cannabis and had no basis for doing so. The legislative history of the CSA confirms that Congress had no information upon which to make any judgement about the medical use of cannabis when it enacted the CSA in 1970.

In fact, Congress intended to place cannabis *only tentatively* in Schedule I "until the completion of certain studies now underway." 1970 U.S. Code Cong. & Admin. News 4579. Congress instructed the Presidential Commission on Marihuana and Drug Abuse ("Shafer Commission") to conduct a comprehensive study of marijuana and its effects. Public Law 91-513, § 601(e) (October 27, 1970). "The recommendations of this Commission will be of aid in determining the appropriate disposition of this question in the future." *Id.*

The results of this eighteen-month study concluded that marijuana was demonized because it symbolized the "counterculture," not because it had any harmful physiological effects. Comm. on Marihuana and Drug Abuse, *Marijuana:*

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activity authorized under California law "substantially affects interstate commerce." *Lopez,* 514 U.S. at 566, 568 (burden on government "to show the requisite nexus with interstate commerce"), quoting *United States v. Bass*, 404 U.S. 336, 347 (1971).

A Signal of Misunderstanding; First Report of the National Commission on Marijuana and Drug Abuse, 145-146 (1972); *see also* National Research Council, *An Analysis of Marijuana Policy*, 9 (1982). The Shafer Commission went on to recommend a dramatic reduction in the legal penalties for "possession of marijuana for personal use" and for the "casual distribution of small amounts of marijuana for remuneration, or insignificant remuneration not involving profit." *Id.* at 152-154. Thus, in light of the Shafer Commission's report, one cannot claim that Congress investigated the medical potential of cannabis as a basis for the CSA.

For the above reasons, the third factor in *Morrison*, related to express legislative findings, mitigates against any determination that the CSA, as applied to Appellants, is a valid constitutional exercise by Congress of its Commerce Clause power.

4. The "Aggregation Principle" of *Wickard v. Filburn*

In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court rejected a Commerce Clause challenge to the application of the Agriculture Adjustment Act to the regulation of "home-grown" wheat. The Court applied an "aggregation principle" based on the Act's legitimate purpose to regulate the national volume, variability, and market price of wheat and concluded that "home-grown" wheat competed with wheat in commerce. 317 U.S. at 128.

In rejecting the extension of *Wickard* to "home-grown" child pornography, *McCoy* first noted that the Supreme Court, in *Lopez* and *Morrison*, carefully limited the reach of *Wickard* to only obvious economic activity. *See Lopez*, 514 U.S. at 558. *Morrison* affirmed that "in every case where we have sustained federal regulation under the aggregation principle in *Wickard* . . ., the regulated activity was of an apparent commercial character." *Morrison*, 529 U.S. at 611, n.4. *Morrison* further declared *Wickard* to be "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Id.* at 610. *McCoy* thus correctly found that *Wickard* did not apply to "home-grown" child pornography because there existed no justification for assuming it would ever enter the interstate market. *McCoy* at 4038.

Likewise, in this case, *Wickard* has no application. First, and most significantly, there is no "obvious economic activity" nor "apparent commercial character" to the activities of Appellants that would justify any Commerce Clause authority under *Lopez* and *Morrison*. Second, a core purpose of Congress in enacting the CSA was not to regulate "the national volume, variability, and market price" of medical cannabis but, quite the opposite, to eliminate the illicit drug market. Therefore, the rationale of *Wickard* -- its legitimate intent to regulate "home-grown" wheat that competed with wheat in commerce -- does not exist here.

Wickard, 317 U.S. at 128.

The undisputed facts in this case are that Appellants cultivate and possess their medical cannabis for personal medical use. As in *McCoy*, Appellants' medical cannabis is "purely non-economic and non-commercial, and had no connection with or effect on any national or international commercial . . . market, substantial or otherwise." *McCoy*, *supra* at 4039.

C. This Circuit's Prior Precedents Only Address Illegal Drug Activity and Drug Trafficking, Predate *Morrison*, and Are Clearly Distinguishable from Appellants' Activities.

Appellants' *class of activity* is separate and distinct from that class of activity involving trafficking in illegal drugs, such as the earlier pre-*Lopez* or pre-*Morrison* cases identified by the district court below -- *Visman*, *Tisor*, *Rodriquez-Camacho*, and *Kim*.

First, it is significant that two of the cases cited -- *Visman* and *Rodriquez-Camacho* -- were pre-*Lopez* and all four of them are pre-*Morrison*, making their interpretations of *Lopez* and the application of the CSA to Appellants here justifiably suspect. Furthermore, all these cases concerned only *illegal* commercial drug activity and drug trafficking, not the non-economic, non-commercial, non-distribution, personal cultivation or possession of medical cannabis pursuant to State law.

In *Rodriquez-Camacho*, a 1972 case, the defendant was convicted of possessing of 99 pounds of marijuana with intent to distribute. In *Visman*, the defendant was convicted of possession with intent to distribute, distribution of, and manufacturing of marijuana. In *Kim*, the defendant was convicted of possession with intent to distribute 800 grams of crystal methamphetamine. In *Tisor*, the defendant was convicted of conspiracy to distribute methamphetamine, distribution of methamphetamine, and the use of a communication facility in drug trafficking.

Moreover, in every reported case the activity was illegal under BOTH federal and State laws, whereas, here, the subject activity -- i.e., the possession and cultivation of medical cannabis -- is lawful under State law, further distinguishing those prior decisions involving illegal distribution and commercial cultivation of marijuana.[9]

Indeed, even though the court in *Kim* found an intent to distribute on the facts before it, the court properly applied the *Lopez* two-prong test to resolve when the

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[9] *McCoy* acknowledged that this Circuit had in the past rejected Commerce Clause challenges to the CSA, citing *Tisor*, *Kim*, and *Visman*. Nonetheless, *McCoy* explicitly made clear that it was expressing no view as to the effect of *Morrison* on those cases. *McCoy*, *supra* at 4050, n.24. It is manifestly clear, as set forth herein, that Appellants' class of activity is separate from the trafficking aspect of the prior cases, and is so utterly lacking in commercial or economic character that, *as applied* to Appellants, the CSA cannot be upheld under *Morrison* as a valid exercise of the Commerce Clause power. The prior cases, *Tisor*, *Kim*, and *Visman*, are thus readily distinguishable.

federal government exceeds it authority under the Commerce Clause. First, *Kim* looked to the "terms" of the regulated activity to determine whether it has "[any]thing to do with commerce," and second, *Kim* turned to the issue of "federalism" to determine whether the regulatory interest of the federal government intrudes into a State activity that is both "not outlawed by the state" and is a "traditional concern of the states." *Kim*, 94 F.3d at 1247, 1249.

Under the first prong of *Kim*, the subject activities in this case, authorized under the California Compassionate Use Act, are confined to seriously ill Californians (a strictly "intrastate" class of people) and have "nothing to do with 'commerce' or any sort of economic enterprise." *Kim*, 94 F.3d at 1249 (quoting *Lopez*). Unlike Congress's intent to control the *illegal* flow of harmful drugs, the activity at issue in this case is the non-commercial cultivation and possession of medical cannabis as *medication* for seriously ill patients. This non-commercial wholly intrastate activity simply has no material effect on interstate commerce, whatsoever. Nor has there been any Congressional finding on the effect of this activity on interstate commerce.

Under the second prong of *Kim*, to determine whether a federal regulatory activity threatens "federalism," a court must determine whether the suspect activity is (a) authorized under State law, and (b) is a "traditional concern of the states."

Kim, 94 F.3d at 1249. First, as noted above, the State of California expressly authorizes medical cannabis under the Compassionate Use Act. Second, it has long been the rule that States possess primary authority over drug, medicine, and criminal laws. *See Lopez*, 514 U.S. at 561, n. 3 ("States possess primary authority for defining and enforcing the criminal law"); *Whalen v. Roe*, 429 U.S. 589, 603, n. 30 (1977) ("well settled that the State has broad police powers in regulating the administration of drugs by the health professions"); *Robinson v. California*, 370 U.S. 660, 664-665 (1962) ("no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription, and use of dangerous and habit-forming drugs"); *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) ("[S]tate has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there"); *Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41, 45 (1921) (same).

Simply put, regulation of drugs and medicine is a traditional concern of the State, and here the State of California declared that the possession and cultivation of cannabis for medical purposes is a lawful activity related to the health of its citizens. As Congress lacks a general police power, the Constitution contemplates that the activities in question here are to be regulated by a State exercising its police power. It is the State that decides which of these activities are to be prohibited and

also which are to be permitted. Accordingly, any attempt by the federal government to interfere with this State authorized activity is a direct threat to federalism and exceeds the government's authority under the Commerce Clause.

In sum, this Circuit's prior precedents only assess the constitutionality of the CSA as applied to *illegal* drug activity or drug trafficking. These cases predate *Morrison* and its requirement that congressional findings be judicially evaluated. The activities at issue in previous cases are strikingly different than Appellants' activities here -- the personal cultivation and possession of cannabis for medical purposes by California citizens as recommended by the patients' physicians pursuant to valid California State law. Finally, application of the *Lopez* test employed by this Court in *Kim* leads to the conclusion that the CSA cannot constitutionally be applied to the class of activities here without exceeding the powers of Congress under the Commerce Clause.

III. THE DISTRICT COURT FAILED TO RESPECT PRINCIPLES OF FEDERALISM, UNDER WHICH THE STATE OF CALIFORNIA HAS THE SOVEREIGN POWER TO PROTECT THE HEALTH AND SAFETY OF ITS CITIZENS.

While the Constitution delegates to Congress the power over interstate commerce and other national concerns, the States are primarily responsible for the health and safety of their citizens, a power known as the police power. Traditionally, no power is more central to the sovereignty of the States under our

system of dual sovereignty; and the Supreme Court has always acknowledged that Congress lacks such power. *See Lopez*, 514 U.S. at 566-68, and cases cited therein.

The district court erred by not considering the extent to which its ruling infringes upon the sovereign powers reserved to the State of California, as confirmed by the Tenth Amendment. The district court wrongly assumed that if it determined Congress legitimately exercised its power under the Commerce Clause, then "the Tenth Amendment is not implicated." Slip op. at 11, ER 260. In fact, principles of federalism embodied in the Tenth Amendment provide a separate and independent justification for granting the injunction Appellants seek.

Deference to State sovereignty is particularly important where, as here, congressional "regulation of purely intrastate activity reaches the outer limits of Congress' commerce power." *McCoy*, slip op. at 4032, *quoting United States v. Ballinger*, 312 F.3d 1264, 1270 (11th Cir. 2002). *See also*, *Conant*, 309 F.3d at 647 (Under the CSA, "Congress legislates at the periphery of its powers.") (Kozinski, J., concurring). Lack of such deference to State sovereignty blurs "the Constitution's distinction between national and local authority," *id.*, *quoting Morrison*, 529 U.S. at 615, a distinction "designed 'so that the people's rights would be secured by the division of power.'" *Id.*, *quoting Morrison* at 616 n.7.

Although the Supreme Court's recent Commerce Clause jurisprudence,

discussed *supra*, and Tenth Amendment principles of federalism "work in tandem to ensure that the federal government legislates in areas of national concern" while the States remain independent over local governance, *Conant* at 647, both concepts are separate constitutional doctrines and require independent analysis. The district court erred by not considering them separately and independently.

A. The State and Federal Sovereigns, Within Their own respective Jurisdictions, Share Political Sovereignty.

Principles of federalism must inform any analysis of claimed implied federal powers.[10] As the Supreme Court observed in *New York v. United States*, 505 U.S. 144, 157 (1992), "the Tenth Amendment confirms that the power of the Federal government is subject to limits that may, in a given instance, reserve power to the States." As noted by St. George Tucker, learned jurist and author of the earliest treatise on the Constitution: "The congress of the United States possesses no power to regulate, or interfere with the domestic concerns, or police of any state." Tucker, 1 Appendix to *Blackstone's Commentaries* 315-16 (1803). On the other hand, the power of Congress over interstate commerce is plenary. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 197 (1824). These propositions are not inconsistent. As stated in *Printz v. United States*, 521 U.S. 898, 924 (1997), the power over interstate

[10] Along with fundamental rights. See *infra* Section IV.

commerce, while plenary, cannot be exercised in a manner that improperly "violates the principle of state sovereignty" by intruding upon the traditional sovereign powers of States. Moreover, Congress cannot claim an *incidental or implied* power to reach wholly *intrastate* activity under the Necessary and Proper Clause (U.S. Const. art. I, § 8, cl. 18) when doing so would improperly interfere with the exercise of sovereign State police powers.

It is essential for the welfare of the people that the States be allowed to exercise their police powers effectively and without interference from the federal government. Precisely because Congress has no comparable police power, it may not use its incidental or implied powers as a pretext to countermand a decision by a sovereign State and its people that allows a particular intrastate activity to protect health and safety.

B. The Sovereign States Reserve to Themselves Power Over Matters of Public Health and Safety.

Congress cannot exercise its power over interstate commerce to interfere with a State's police power by prohibiting *wholly intrastate* conduct the State endorses in the interest of health and safety. This would be improper under the Necessary and Proper Clause. The district court failed to follow well-established Supreme Court precedent recognizing the authority of State governments to enact measures reasonably necessary to protect public health.

In *Jacobson v. Massachusetts*, 197 U.S. 11, 48-49 (1905), the Supreme Court rejected a constitutional challenge to a Massachusetts law requiring compulsory vaccinations. The Supreme Court confirmed that States may enact wholly intrastate measures to protect public health.

> The authority of the State to enact this statute is . . . commonly called the police power -- a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this Court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.

Id. at 24-25. Similarly, the Supreme Court has upheld State regulations of professions that "closely concern" public health. *See, e.g., Watson v. Maryland*, 218 U.S. 173 (1910). In *Watson*, the Supreme Court noted:

> It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine.

Id. at 176. *See also Williams v. Arkansas*, 217 U.S. 79 (1910) (regulation of businesses or professions, essential to the public health or safety, falls within the police power of the States so long as such regulations are reasonable and

necessary).

Recently, in the context of medical cannabis, this Court reaffirmed:

> Our decision is consistent with principles of federalism that have left states as the primary regulators of professional conduct. *See Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) (recognizing states' broad police powers to regulate the administration of drugs by health professionals); *Linder v. United States*, 268 U.S. 5, 18 (1925) ("direct control of medical practice in the states is beyond the power of the federal government.")

Conant, 309 F.3d at 639.

Here the State of California and its People, through the initiative process, have determined that they best serve the health and safety of the State's citizens by allowing seriously ill patients access to cannabis for medical purposes. Under the circumstances of this case, the Court should respect the choice made both by a sovereign State and by the ultimate sovereigns, the People of that State. This Court recently recognized that:

> We must "show[ ] respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country." *[United States v.] Oakland Cannabis [Buyers' Coop.]*, 532 U.S. [483 (2001)] at 501 (Stevens, J., concurring) (internal quotation marks omitted).

Conant, at 639.

The principle of federalism at issue in these proceedings extends far beyond

medical cannabis. The power claimed by the government to interfere with State police power would extend to traditional State functions such as licensing of doctors, attorneys, and other professionals. Unlike the class of activities at issue in this case, all these activities are "economic." The only constitutional doctrine preventing federal usurpation of these traditionally State-regulated activities is that such federal laws would improperly violate the principles of federalism.

C. Congress Exceeded Its Authority by purporting to Impose Federal Prohibition over the Activities At Issue in this Case.

The district court misapplied Supreme Court precedent with respect to Congress's Commerce power, stating that if that power "is validly exercised, it does not infringe upon any sovereignty that has been retained by the States." Slip op. at 11, ER 260, *citing New York v. United States*, 505 U.S. 144, 156-57 (1992). In fact, the Supreme Court ruled that "*if a power is an attribute of state sovereignty reserved by the Tenth Amendment*, it is necessarily a power the Constitution has *not* conferred on Congress." *New York* at 156 (citations omitted) (emphasis added). In other words, in *New York*, the Supreme Court actually affirmed that the preexistence of State's sovereign police power influences the determination of whether Congress has an implied Commerce power. Appellants do not deny that where Congress has an expressly enumerated power, that power is supreme over a conflicting claim of State police power. This case, however, concerns whether

Congress has "validly exercised" an implied power under the Constitution, i.e., the implied power to reach certain intrastate, wholly noncommercial, activity.

When validly exercised, the Commerce and Necessary and Proper clauses do not interfere with the police power of States to protect public health and safety. A conflict only arises when Congress goes beyond its authority over "commerce . . . among the several states" to reach irrefutably intrastate activity in a manner that improperly interferes with the exercise of a vital police power of a State. U.S. Const. art. I, § 8, cl. 3.

The district court's analysis erred in other aspects, as well. The court stated, "Examples of where the Supreme Court has curtailed federal power under the Tenth Amendment are found when Congress has compelled some sort of state action. . . . This type of 'commandeering' is not at issue in this case." Slip op. at 11, ER 260. Although cases involving that type of commandeering do indeed represent "[e]xamples" of curtailed federal power under the Tenth Amendment, they are *not* the *only* such cases. For example, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), a Defendant in the instant case, John Ashcroft, as Governor of Missouri, supported the right of States to govern their own affairs. There was no commandeering in that case, which exempted State judges from the Age Discrimination in Employment Act of 1967, a federal statute with obvious applications to commerce. Despite the

absence of commandeering, the Supreme Court avoided federal interference with "a power reserved to the States under the Tenth Amendment . . . ." *Id.* at 463. In addition to Defendant Ashcroft's support of federalism, President Bush also advocates State self-determination, specifically regarding medical cannabis. *See Bush Backs States' Rights on Marijuana: He Opposes Medical Use But Favors Local Control*, Dallas Morning News, Oct. 20, 1999, at 6A (quoting then-Governor Bush as stating, "I believe each state can choose that decision as they so choose.").

Indeed, both *Lopez* and *Morrison* also involved non-commandeering Congressional interferences with the police powers of States to regulate intrastate actions. In *Lopez*, the Court bolstered its Commerce Clause analysis by focusing on how the government's theory, if accepted, would interfere with State sovereignty. "Under the theories that the government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education *where States historically have been sovereign*." 514 U.S. at 564 (emphasis added). Likewise, in *Morrison*, the Court reinforced its Commerce Clause analysis with the following: "Indeed, we can think of no better example of the *police power*, which the Founders denied the National Government and *reposed in the States*, than the suppression of violent crime and vindication of its victims." 529 U.S. at 618 (emphasis added).

Moreover, the "sort of state action" mentioned by the district court is not the only "type of 'commandeering'" prohibited by the Constitution. Slip op. at 11, ER 260. Judge Kozinski has found application of the very statute at issue here to be "commandeering," and thus an improper interference with the sovereign power of the State of California. "I believe the federal government's policy runs afoul of the 'commandeering' doctrine . . . ." *Conant*, 309 F.3d at 645.

> Applied to our situation, this means that, much as the federal government may prefer that California keep medical marijuana illegal, it cannot force the state to do so. Yet, . . . the federal policy makes it impossible for the state to exempt the use of medical marijuana . . . . In effect, the federal government is forcing the state to keep medical marijuana illegal.

Id. at 645-646, (footnote omitted). What the federal government may not impose on the State indirectly (through doctors, as in *Conant*), the federal government may not impose on the State directly (through patients, in this case). These concerns are particularly acute where, as here, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

According to eminent historian Bernard Bailyn, the Founders of our nation developed the novel concept of federalism to overcome the primal presumption of

the revolutionary ideology that any consolidated central government violated "the spirit of '76" by establishing a political center in a faraway place beyond the direct control of the citizens it would govern. *See* B. Bailyn, *To Begin the World Anew: The Genius and Ambiguities of the American Founders* (2003). Federalism thus "imposes a duty on federal courts" to "show[ ] respect for the sovereign States that comprise our Federal Union." *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 501 (2001) (Stevens, J., concurring); *accord*, *Conant*, 309 F.3d at 639 (Schroeder, C.J.).

Under the Tenth Amendment, the wholly intrastate activity of possessing and cultivating medical cannabis pursuant to State law is an exercise of the police power reserved to the State of California, which is primarily responsible for the health and safety of its citizens.[11] The inability of the State to exercise its sovereign police power as to this class of wholly intrastate activities having no substantial affect on interstate commerce, is a direct result of an overreaching claim of power by the federal government, and the erroneous failure of the district court to keep Congress within its constitutional bounds. Effective exercise of the police power is central to

[11] For many years the State of California banned medical cannabis under its police power, without federal interference. Only now, when the State has legitimized medical cannabis under its police power, does the federal government challenge the State's authority.

the sovereignty of the States, and it is a tenet central to the very foundations of our system of government.

IV. THE DISTRICT COURT FAILED TO PROTECT APPELLANTS' FUNDAMENTAL RIGHTS.

In analyzing the government's infringements upon Appellants' fundamental rights, the district court mentioned only the constitutional protections of individual rights provided by the Ninth Amendment, not the protections guaranteed by the Fifth Amendment. The district court further erred by tersely dismissing challenges to the infringements on some of Appellants' fundamental rights (i.e., the rights to bodily integrity, to ameliorate pain, and to prolong life) (slip op. at 12:11, ER 261) based upon a misinterpretation of inapplicable authority. Moreover, the court failed even to mention another fundamental right asserted by Appellants below and upon which the government is infringing: the right to consult with and act upon a physician's treatment recommendation.

A. The Protection of Unenumerated Rights is Justified Both Textually and Historically.

The Due Process Clause of the Fifth Amendment has traditionally protected unenumerated rights from infringement by the federal government. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. The protection of unenumerated rights is also both textually

and historically warranted under the Ninth Amendment's express injunction that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

The Tenth Amendment, discussed *supra*, and the Ninth Amendment perform distinct functions. The Tenth Amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. James Madison explained that, while the Tenth Amendment "exclude[s] every source of power not within the Constitution itself," the Ninth Amendment "guard[s] against a latitude of interpretation" of those enumerated powers. 2 Annals of Cong. 1951 (1791) (referring to the 11th and 12th articles proposed to the States for ratification). Thus, whereas the Tenth Amendment limits Congress to its delegated powers, the Ninth Amendment prohibits an unduly broad interpretation of those congressional powers.

The Supreme Court has long held that an unenumerated right can be as fundamental as those that were enumerated. No right is more fundamental than one of the rights infringed by the government's actions in this case: the right to preserve one's life. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990). Indeed, the Constitution protects many other liberty interests as fundamental rights in

situations that, although important, are less vital than the interests at stake here. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (right to keep extended family together); *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to bear child); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *United States v. Guest*, 383 U.S. 745 (1966) (right to travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to purchase contraceptives); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to choose education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to teach in foreign language); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (right to refuse medical treatment).

To receive constitutional protection, an unenumerated right must be "'deeply rooted in this Nation's history and tradition,' [*Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)] . . . and 'implicit in the concept of ordered liberty,' [*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)]." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). In Due Process cases, the Supreme Court has emphasized the need to examine a claimed right's basis in "our Nation's history, legal traditions, and practices." *Id.* at 710. An analysis of the history and tradition of a right "tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Id.* at 722.

B. The Appellants' Fundamental Rights Require Protection.

The uncontroverted evidence in this case demonstrates that Appellant patients require cannabis to implement their doctors' treatment recommendations, to ameliorate pain, to permit the use and integrity of their bodies, and, in the case of Angel, to remain alive. The Complaint and declarations in the case provide a glimpse into the tremendous suffering that the Appellant patients must endure daily. Angel suffers from a long list of serious, debilitating, and life-threatening medical conditions. Complaint ("Comp.") ¶ 13, Angel Decl. ¶ 1; ER 004, 062. For example, Angel was confined to a wheelchair for years until discovering cannabis as the only treatment to help bring her paralysis into complete remission. Comp. ¶ 13, Angel Decl. ¶¶ 3, 22-24; ER 004, 062, 070, 071. Without access to cannabis, Angel would suffer serious medical consequences within a matter of hours, ultimately leading to horrible pain, suffering, and death. Comp. ¶¶ 18, 16, Angel Decl. ¶¶ 6, 20, 21, 36, 39; ER 005, 063, 069, 070, 075, 077. Angel has great difficulty maintaining a healthy weight, and without cannabis her weight can quickly drop precipitously, causing her to run the risk of starvation and death. Comp. ¶ 52, Angel Decl. ¶¶ 6, 33, 36, 37; ER 015, 063, 074-076. Every second that she is awake, Angel experiences pain from one or more of her many chronic pain conditions, which medical cannabis helps alleviate. Comp. ¶¶ 54-54H, Angel

Decl. ¶¶ 7, 15, 17, 18, 20, 21, 29, 30, 32, 36, 38, 39, 46; ER 015-017, 063, 066-070, 073-077, 079. The pain sometimes becomes so overpowering that Angel becomes completely debilitated. Comp. ¶ 54, Angel Decl. ¶¶ 16, 21, 45; ER 015, 067, 070, 079. Before discovering cannabis, her pain levels were so high for such a prolonged period of time that, her body and soul racked with agony, Angel attempted suicide -- as a desperate attempt at the only escape she could perceive from her torment. Comp. ¶ 54, Angel Decl. ¶ 28; ER 016, 072.

Similarly, Monson suffers from severe chronic back pain and spasms. Comp. ¶¶ 7, 21, Monson Decl. ¶¶ 2, 6; ER 003, 006, 092, 093. They are extremely painful, torturous, and unbearable without cannabis. Comp. ¶ 21, Monson Decl. ¶¶ 3, 7; ER 006, 093, 094.

Both Angel's and Monson's physicians recommend that they medicate with cannabis. Lucido Decl. ¶¶ 4, 6, 7, 8, Rose Decl. ¶¶ 4, 5; ER 088-091, 09.

C. The Constitution Protects the Rights to Bodily Integrity, to Ameliorate Pain, and to Prolong Life.

The rights to bodily integrity, to ameliorate pain, and to prolong life are so closely related that it is difficult to say if they are distinct rights or merely specific aspects of the famous trinity of "life, liberty, and the pursuit of happiness" in the Declaration of Independence. The substance of the Constitution's protection, however, should not turn on the particular linguistic formulation employed to

express these most fundamental rights.

These rights have deep roots in "our Nation's history, legal tradition and practices," *Glucksberg,* 521 U.S. at 710, of permitting decisions about one's body to be made free from governmental intervention.

> [T]he Supreme Court repeatedly has affirmed that "the right of every individual to the possession and control of his own person, free from all restraint or interference of others," is "so rooted in the traditions and conscience of our people," as to be ranked as one of the fundamental liberties protected by the "substantive" component of the Due Process Clause.

Newman v. Sathyavaglswaran, 287 F.3d 786, 789 (9th Cir. 2002) (internal citations omitted), *cert. denied*, 123 S.Ct. 558 (2002).

The right to be free of government intrusion with respect to one's body has roots in natural rights principles and the philosophy of individual autonomy.[12]

American legal precedent in the past century has consistently upheld legal protection for this individual right. In fact, the origin of this precedent in the Anglo-American legal tradition pre-dates decisions in this country by at least two hundred years. Blackstone recognized a right to personal security that "consists in a

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[12] *See* Locke, *Two Treatises of Government*, 328 (1698) (Cambridge Univ. Press 1960) ("[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself."); Mill, *On Liberty,* pp. 60-69 (1859) (Penguin Books 1985) (concluding that "[o]ver himself, over his own body and mind, the individual is sovereign").

person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." 1 Wm. Blackstone, *Commentaries* *128 (1765). Blackstone extended protection to the "preservation of a man's health from such practices as may prejudice or annoy it." *Id.* at *133.

The right to be free of pain likewise finds its source in both legal precedent and important historical traditions of this Nation. Five concurring opinions in *Glucksberg* indicate that the Due Process Clause protects an individual's right to obtain medical treatment to alleviate unnecessary pain. Justice O'Connor's opinion (with which Justice Ginsburg concurred, *Glucksberg,* 521 U.S. at 789) makes clear that suffering patients should have access to any palliative medication that would alleviate pain even where such medication might hasten death. "[A] patient who is suffering from a terminal illness and who is experiencing great pain has *no legal barriers* to obtaining medication, from qualified physicians." *Id.* at 736-37 (O'Conner, J., concurring) (emphasis added).

Similarly, Justice Breyer's concurrence suggests that a "right to die with dignity" includes a right to "the avoidance of unnecessary and severe physical suffering." *Id.* at 790 (Breyer, J., concurring).

Referring to the protected "substantive sphere of liberty," Justice Stevens wrote:

> Whatever the outer limits of the concept may be, it definitely includes protection for matters "central to personal dignity and autonomy." It includes, "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition."

Id., at 744 (Stevens, J., concurring) (citation omitted). Justice Stevens further noted, "Avoiding intolerable pain and . . . agony is certainly '[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'" (citation omitted). *Id.* at 745.

Finally, Justice Souter likewise recognized that this "liberty interest in bodily integrity" includes "a right to determine what shall be done with his own body in relation to his medical needs." *Id.* at 777 (Souter, J., concurring).

Similarly, majorities of the Supreme Court in *Planned Parenthood v. Casey,* 505 U.S. 833, 852 (1992); *Hudson v. McMillian,* 503 U.S. 1, 9-10 (1992); and *Ingraham v Wright,* 430 U.S. 651, 673-674 (1977), assumed the existence of a fundamental right of a seriously ill patient to be free from unnecessary pain and suffering.

The right to ameliorate pain has long been embedded in the professional and ethical practices of physicians and other caregivers. Allowing a patient to experience unnecessary pain and suffering of any form is considered substandard medical practice, regardless of the nature of the patient's condition or the goals of

medical intervention.[13] Since the inception of medical ethics in western culture,[14] physicians have had a moral and ethical duty to provide relief from pain and suffering.[15] Accordingly, the rights to bodily integrity, to ameliorate pain and suffering, and to prolong life are fundamental rights that are central to the Nation's history, legal traditions, and practices.

Of course, finding the existence of a fundamental right is only the first step in evaluating the constitutionality of a government restriction on its exercise. The Supreme Court has also examined whether there is a long tradition of restricting the exercise of the liberty in question. *See Bowers v. Hardwick*, 478 U.S. 186 (1986). Historically, cannabis enjoys an ancient and longstanding acceptance as a medicine in this country. In contrast with the activity at issue in *Bowers*, the common law

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[13] *See, e.g.*, Ben A. Rich, *A Prescription for the Pain: The Emerging Standard of Care for Pain Management*, 26 Wm. Mitchell L. Rev. 1, 4 (2000).

[14] *See, e.g.*, Amundsen, *Medicine, Society, and Faith in the Ancient and Medieval Worlds*, 33 (Johns Hopkins Univ. Press 1996); Cassell, *The Nature of Suffering and the Goals of Medicine*, 306 New England J. Med. 639 (1982) ("[T]he obligation of physicians to relieve human suffering stretches back into antiquity").

[15] *See, e.g.*, Post et al., *Pain: Ethics, Culture, and Informed Consent to Relief*, 24 J. Law, Med. & Ethics 348 (1996) ("[O]ne caregiver mandate remains as constant and compelling as it was for the earliest shaman - - the relief of pain. Even when cure is impossible, the physician's duty of care includes palliation."); Wanzer, et al., *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look*, 320 New England J. Med. 844 (1989) (concluding that "[t]o allow a patient to experience unbearable pain or suffering is unethical medical practice.")

contained no proscription against medical cannabis, and when the original 13 States ratified the Constitution, cannabis was in use as a medicine. The first federal regulation on its sale was the Marihuana Tax Act of 1937. Federal law did not prohibit the medical use of cannabis until 1970, with the passage of the CSA. Therefore, *while the liberty to use cannabis for medical purposes has a long tradition in America, the same cannot be said for the claim of federal power to prohibit it.*

D. The Right to Consult With and Act Upon a Doctor's Recommendation is a Protected Right Rooted in the Traditionally Sanctified Physician-Patient Relationship.

The right to consult with one's doctor about one's medical condition is also a fundamental right deeply rooted in our history, legal traditions, and practices. The right asserted by Appellants -- to prevent governmental interference with their ability to act on their doctors' treatment recommendations -- is based in significant part on imperatives established by the physician-patient relationship. Despite this, the district court, in its order denying the preliminary injunction, did not even mention this right.

The Supreme Court has acknowledged the sanctity of the physician-patient relationship in numerous due process cases, e.g., *Griswold v. Connecticut,* 381 U.S. 479 (1965). In finding that the criminalization of contraception violated a right

guaranteed by the Due Process Clause, the Supreme Court in *Griswold* relied on the fact that this law "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." *Id.* at 482.

The Supreme Court has also stressed the importance of the physician-patient relationship in other cases. For example, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court emphasized that myriad and fundamental privacy and personal liberty interests, such as medical, physical, social, and spiritual choice, were impugned by the criminalization of abortion. *Id.* at 153. The *Roe* decision also stressed that such a violation of privacy interests, although personal to the woman, detrimentally affected the physician-patient relationship. *Id.* at 153, 156.

Likewise, in his concurrence in *Glucksberg,* Justice Souter relied upon the view that medical assistance falls within the scope of a cognizable liberty interest: "Without physician assistance in abortion, the woman's right would have too often amounted to nothing more than a right to self-mutilation." 521 U.S. at 778.

State legislation granting a statutory physician-patient privilege further demonstrates the importance of the physician-patient relationship. Many of the statutory privileges are a very old aspect of our Nation's history and legal traditions. *See* 8 Wigmore on Evidence, § 2380 (rev. ed. 1961).

The Ninth Circuit's *Conant* decision affirms the sanctity of the physician-

patient relationship in the context of the Compassionate Use Act, explicitly recognizing the importance of communication between physician and patient unimpeded by government interference: "The doctor-patient privilege reflects 'the imperative need for confidence and trust' inherent in the doctor-patient relationship." *Conant*, 309 F.3d 636 (Schroeder, C.J.) (*quoting Trammel v. United States*, 445 U.S. 40 (1980)). In his concurring opinion, Judge Kozinski emphasized the critical role of physicians in the context of medical cannabis under California law: "Those immediately and directly affected by the federal government's policy [of intimidating doctors] are the patients . . . and the State of California . . . ." *Conant* at 640 (Kozinski, J., concurring).

Patients' fundamental right to open communication with their physicians, as so recently affirmed by this Court, would mean nothing without a corresponding freedom to act upon the physicians' medical advice. While any police power regulation of medical treatments must be subject to meaningful scrutiny, here the State has specifically authorized the treatment recommended by the physician. *See Oregon v. Ashcroft*, 192 F.Supp.2d 1077, 1092 (D. Or. 2002) ("The CSA was never intended . . . to establish a national medical practice or act as a national medical board.").

Assuming it is acting within its enumerated powers, the federal government

must have a compelling reason to restrict this fundamental right. In the absence of such a power and such justification, the government simply cannot constitutionally substitute its judgment for that of a treating physician acting under authority of State law.

E. In Assessing Whether a Right is Fundamental, Courts Should Defer to the Judgment of the People.

The Supreme Court has strongly affirmed the judiciary's power to identify "fundamental" unenumerated rights and protect them in the same manner as enumerated rights. *See, e.g., Casey,* 505 U.S. at 848 (opinion of the Court relying in part on the Ninth Amendment). Others have expressed doubts about entrusting judges with the task of identifying whether a particular liberty interest is or is not fundamental. *See, e.g., Troxel,* 530 U.S. at 91 (Scalia, J., dissenting) ("[T]he Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judge's list against laws duly enacted by the people").

In his dissent in *Troxel*, Justice Scalia observed that it is "entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has no *power* to interfere with parents' authority over the rearing of their children".

530 U.S. at 92. For the same reason, it is entirely compatible with the commitment to representative democracy for the People of a State, acting through the initiative process, to declare that a particular right -- especially one that could not otherwise claim a long tradition of *judicial* protection -- is fundamental and for this Court to acknowledge and defer to their judgment.[16] Indeed, the voice of the People themselves is arguably more valuable than that of federal judges to an analysis of the recognition of fundamental rights in American legal traditions and practices. *Id.* at 91.

Of course, the People of a State have no more power to violate the United States Constitution than has their legislature. *See Romer v. Evans*, 517 U.S. 620 (1996). But where the People, or their representatives in State legislatures, act to protect a particular right, this provides invaluable guidance to judges who must distinguish fundamental rights from mere liberty interests. Such popular action indicates that a particular right is fundamental just as surely as a judicial inquiry into its historical roots. Moreover, the People of California and the State of California expressly determined that "seriously ill Californians have *the right* to

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[16] Indeed, four members of the Supreme Court concluded that the people of a State, amending their State constitution by popular vote, could impose additional qualifications on their Representatives to Congress. *See United States Term Limits v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting).

obtain and use marijuana for medical purposes . . . ." Cal. Health & Safety Code § 11362.5(b)(1)(A) (emphasis added).

In sum, it is not merely the Appellants who assert the existence of this right but also the People acting patiently through legal channels. Their ringing affirmation strongly bolsters the textual and historical analysis presented above. Judges should long hesitate before setting aside the expression of the People that the specific liberty in question here merits protection from governmental infringement.

F. The District Court Misinterpreted Nonapplicable Authorities.

In dismissing Appellants' fundamental rights claims, the district court apparently relied on two laetrile cases, *Carnohan v. United States,* 616 F.2d 1120 (9th Cir. 1980), and *Rutherford v. United States,* 616 F.2d 455 (10th Cir. 1980). Both cases are plainly distinguishable on their facts, and neither case addresses the fundamental rights at stake in this matter.

Initially, a critical distinguishing factor the district court ignored is the fact that citizens in the United States remain free to possess and manufacture laetrile for their own personal use -- they simply cannot obtain it in commerce. The Appellants here merely require recognition of those same rights to their own medical cannabis.

In *Carnohan* the Ninth Circuit's two-page *per curium* opinion stated:

> *We need not decide* whether defendant Carnohan has *a constitutional right to treat himself with home remedies of his own confection*. Constitutional rights of privacy and personal liberty do not give individuals the *right to obtain laetrile* free of the lawful exercise of *government police power*. . . . His claim that the requirements of *state and federal law* deny him due process are premature since he has not availed himself of the procedures which those laws afford. The FDA and the California State Department of Health Services have primary jurisdiction to determine whether persons may *traffic* in new drugs. If Carnohan wishes to obtain laetrile, he must *exhaust his administrative remedies* before seeking judicial relief.

616 F.2d at 1122 (emphasis added).

This Court's limited holding was that Carnohan's claim was "premature" because he had not exhausted administrative remedies. The Court, therefore, did not even consider Carnohan's Due Process challenge -- the very challenge Appellants are making here. Moreover, this Court clearly confined its holding to "the right to obtain laetrile" in commerce. Unlike *Carnohan*, the Appellants here do not seek reclassification of any drug, and do not seek to obtain any substance in commerce or through pharmacies. The Appellants simply seek to be left alone, free from federal interference with their only effective medical treatment.

Importantly, this Court in *Carnohan* expressly declined to consider whether Carnohan had "a constitutional right to treat himself with home remedies *of his own confection*." *Id.* (emphasis added). In this case, the Appellant patients now specifically require the Court's protection to treat themselves with "remedies of

[their] own confection:" natural medicinal herbs that Monson grows for herself and Angel's plants grown by two caregivers.[17] For all these reasons, *Carnohan* is inapplicable to this case.

Rutherford, the other laetrile case referred to by the district court, is a two-page opinion by the Tenth Circuit that is equally cursory in its treatment of fundamental rights. Its entire discussion consists of a single unsupported sentence, quoted by the district court: "It is apparent in the context with which we are here concerned that *the decision by a patient whether to have a treatment or not is a protected right*, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health." 616 F.2d at 457 (emphasis added). Again, the Tenth Circuit clearly confined its analysis to an asserted right to obtain laetrile.

There is no indication that Rutherford attempted to establish that laetrile was his *only* effective treatment. This is a crucial distinction. Here, uncontroverted evidence establishes that cannabis is the only effective treatment for the Appellant

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[17] Angel additionally processes cannabis oil for cooking, bakes cannabis foods, and makes therapeutic cannabis massage oil and skin balm. Angel Decl. ¶ 51, ER 081. These certainly qualify as home remedies of her own confection.

patients.[18] The district court itself recognized that "marijuana is the only medication that has proven effective to ameliorate their symptoms . . . ." Slip op. at 15, ER 264. Therefore, if "the CSA deprives plaintiffs of the right to use [cannabis] lawfully [as] a *type of treatment*," it is, in fact, denying these Appellants "the right to treatment itself." Slip op. at 12:13-14, ER 261. In other words, to permit the government to interfere with the Appellant patients' use of cannabis is to deny them the very right explicitly recognized by *Rutherford* as "protected": the right to decide whether to have medical treatment. Because cannabis is the *only* effective treatment for the Appellant patients, to deny them the right to use cannabis is to deny them any medical treatment at all.

Finally, a crucial factor distinguishing this case from *Carnohan* and *Rutherford* is that California expressly authorizes the medical use of cannabis. It is not merely an individual or small group who have asserted the value of cannabis to alleviate their suffering or prolong their lives. Here, the People of the State of California have made this judgment in exercising their reserved police power. This is in stark contrast to the individual cancer patients who sought to traffic in Laetrile in *Carnohan* and *Rutherford*, which neither the State nor the federal government

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[18] Angel Decl. ¶¶ 2, 4, 6, 7, 8, 21, 23, 24, 32, 33, 36, 37, 39, 53, 55, 64; ER 062, 063, 070, 071, 074-077, 081-083, 085, 086. Lucido Decl. ¶¶ 6, 7; ER 089, 090. Monson Decl. ¶¶ 3, 9; ER 093-095. Rose Decl. ¶¶ 4, 5; ER 097.

approved for sale, a fact upon which this Court specifically focused in *Carnohan*. 616 F.2d at 1122. Indeed, when the Court in *Carnohan* referred to "the lawful exercise of government police power," *id.*, it was obviously referring to the *State's* police power, because the federal government has no such comparable power, as discussed *supra* at Section III.

G. The District Court Did Not Articulate Any Legitimate, Much Less Compelling, Justification for the Government's Infringement upon Appellants' Fundamental Rights.

Infringements upon fundamental rights call for heightened judicial scrutiny of the means by which Congress exercises its enumerated powers, thereby narrowing the "presumption of constitutionality" of legislation. *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938). The government must justify an infringement on fundamental rights by demonstrating that the legislation is narrowly tailored to further a compelling governmental interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). In the face of fundamental rights as powerful as those at issue in this case, involving the preservation of human life and the delivery of essential medical care, the government "may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted." *Washington v. Glucksberg*, 521 U.S. at

766. In this case, neither the district court nor the government so much as even articulated any compelling governmental interest to justify an infringement on Appellants' fundamental rights. Indeed, they have provided no justification at all.

The district court failed to engage in the analysis required by the Constitution. Instead, the court simply reiterated that Congress placed marijuana in Schedule I. Slip op. at 13:3, ER 262. However, "courts are obligated to 'assure that, in formulating its judgments, Congress has drawn reasonable inferences, based on substantial evidence.'" *California Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999) (quotations and citations omitted); *see also Casey*, 505 U.S. at 887-98. Moreover, Appellants do not seek to reschedule marijuana. Regardless of how Congress classifies marijuana, in the absence of a compelling justification, the government may not prohibit the medical use of cannabis by these seriously ill patients where that medical use is authorized by the State and where that prohibition infringes upon the constitutional rights of these patients.

The district court's failure to obtain any evidence of a compelling governmental interest (or even to articulate one) should have precluded the court from denying the injunction. Even should this Court find no fundamental right, the application of the CSA to prohibit the medical use of cannabis would also fail

intermediate scrutiny, an "undue burden" standard, or the "rational basis" test for the failure to articulate any discernable governmental interest.

V. THE GOVERNMENT'S CONDUCT THREATENS APPELLANTS' RIGHTS UNDER THE MEDICAL NECESSITY DOCTRINE.

In reaffirming recognition of the necessity doctrine from *United States v. Aguilar*, 883 F.2d 662, 692 (9th Cir. 1989), this Court's decision in *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999), specifically and expressly applied the necessity doctrine to suffering patients who need medical cannabis. This Court acknowledged that

> there is a class of people with serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms; who will suffer serious harm if they are denied cannabis; and for whom there is no legal alternative to cannabis for the effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects.

Id. at 1115. Although that decision was subsequently reversed with respect to cannabis *distribution* in *United States v. Oakland Cannabis Buyers' Coop.* ("*OCBC*"), 532 U.S. 483 (2001), the availability of the medical necessity doctrine with respect to *possession by seriously ill patients* was not before the Supreme Court[19] and was notably preserved by the Court's concurrence:

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[19] As Justice Stevens pointed out in his *OCBC* concurrence, to the extent the five-vote majority opinion may have purported to limit the application of the

> Because necessity was raised in this case as a defense to distribution, the Court need not venture an opinion on whether the defense is available to anyone other than distributors. Most notably, whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not presented here.

Id. at 501 (Stevens, J., concurring in judgment). Accordingly, this Court's precedent remains the law of this Circuit with respect to individual patients, and the district court erred by denying Appellant patients the protection of the necessity doctrine.

The district court recognized that, regarding Angel, the record in this case illustrates that cannabis "is the only method of treatment that deals with the burden of the scope of maladies that she suffers from." ER 210. Indeed, Angel literally is "a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering."[20] *OCBC*, at 501.

The cannabis that John Does Number One and Two provide for Angel is her

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medical necessity doctrine beyond the facts of that case, the "opinion on this point is pure dictum," 532 U.S. at 502 (Stevens, J., concurring), and in that regard it is not binding precedent.

[20] Angel is seriously ill; will suffer imminent harm without access to cannabis; needs cannabis to alleviate her medical conditions or their symptoms; and has no reasonable legal alternative to cannabis, having tried all other legal alternatives, which were ineffective or resulted in intolerable side effects. Lucido Decl. ¶¶ 2, 3, 4, 6, 7; ER 088-090. Her medical risks include, *inter alia*, "starvation" and "severe chronic pain" becoming "unmanageable". Lucido Decl. ¶ 4; ER 088, 089.

own medicine, which they cultivate on her behalf; therefore, no distribution is involved. Even if the Court were to determine this arrangement constitutes "distribution," that would not prevent Angel from availing herself of the necessity doctrine with respect to her own mere possession of her medicine.

The government's conduct, challenged here, threatens to deprive Angel of the only effective medicine to treat or alleviate her serious medical conditions and places her in justifiable fear of actual serious harm.

VI. PUBLIC INTEREST FACTORS REQUIRE ENTRY OF THE PRELIMINARY INJUNCTION.

The district court correctly determined that the issues in this case have "a clear impact on the public interest of all Californians," slip op. at 15, ER 264, and that the government's interests "wane in comparison with the public interests enumerated by plaintiffs and by the harm they would suffer if denied medical marijuana." *Id.* at 16, ER 265.

> The enactment of the Compassionate Use Act of 1996 manifests the express will of California voters to permit individuals with a medical need for marijuana treatment to have access to the drug, subject to a doctor's supervision. Federal enforcement of the Controlled Substances Act, plaintiffs assert, serves to thwart this will. This conflict between state and federal law is far from a purely theoretical quandary, as Monson's incident with the sheriff's deputies and the DEA amply demonstrates. Plaintiffs' list of medical conditions, and their statements that marijuana is the only medication that has proven effective to ameliorate their symptoms, provide strong evidence that plaintiffs will suffer severe harm and hardship if denied use of it.

Id. at 15, ER 264.

Yet, "despite the gravity of plaintiffs' need for medical cannabis, and despite the concrete interest of California to provide it for individuals like them," the district court felt constrained from granting the relief Appellants requested because, in the district court's view, prior decisions of this Court restrained Appellants from establishing the "irreducible minimum" of a likelihood of success on the merits under the law of this Circuit. *Id.* at 16, ER 265.[21] As Appellants have demonstrated herein, these prior decisions only addressed *illegal* drug activity and drug trafficking, predate *Morrison* and *McCoy*, and are clearly distinguishable from the non-economic activities of Appellants here -- the personal cultivation and possession of cannabis for medical purposes by California citizens as recommended by the patients' physicians pursuant to valid California State law. Therefore, granting the preliminary injunction in this matter is both appropriate and necessary because, according to the district court, sitting as a chancellor of equity, "the

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[21] In fact, for the purposes of the granting of a preliminary injunction, Appellants needed only to make a low showing of success on the merits. *Dataphase Systems. Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (The lower the risk of injury to the defendant if the injunction is granted, the lower showing the party must make of likely success on the merits. Moreover, when the moving party has raised a "substantial question" and the equities are otherwise strongly in his or her favor, the showing of success on the merits can be less.) In this case, the district court correctly found that the risk to the government was low, and the constitutional questions raised and the harm to Appellants substantial.

equitable factors tip in plaintiff's favor". *Id.*

VII. CONCLUSION

For all the foregoing reasons, Appellants request that the district court's order be reversed.

Dated: April 23, 2003

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equitable factors tip in plaintiff's favor". *Id.*

VII. CONCLUSION

For all the foregoing reasons, Appellants request that the district court's order be reversed.

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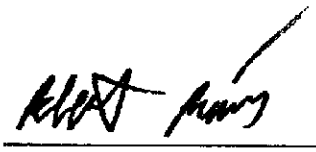

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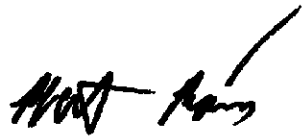
CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Appellants' Opening Brief is proportionately spaced and has a typeface of 14 points. The brief, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, the Statement of Related Cases, and the Certificate of Service, contains 13,978 words as counted by WordPerfect.



Robert A. Raich

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(c), this case may be deemed to raise "related issues" to two other cases pending in this Court: *United States v. Oakland Cannabis Buyers' Cooperative, et al.*, Nos. 02-16335, 02-16534, 02-16715, and *Wo/men's Alliance for Medical Marijuana v. United States*, No. 03-15062. Appellants note, however, that -- unlike the Oakland Cannabis Buyers' Cooperative and Wo/men's Alliance for Medical Marijuana -- the Appellants herein are not organizations that exist for the primary purpose of distributing cannabis.