ROBERT A. RAICH, P.C.
A PROFESSIONAL LAW CORPORATION

1970 BROADWAY, SUITE 1200
OAKLAND, CALIFORNIA 94612

(510) 338-0700
FAX (510) 338-0600

03 OCT -2 PM 4:12
FILED
DOCKETED
DATE INITIAL

October 2, 2003

BY HAND DELIVERY

Ms. Cathy Catterson
Clerk, Ninth Circuit Court of Appeals
95 Seventh Street
San Francisco, California 94103

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

Dear Ms. Catterson:

Pursuant to Federal Rule of Appellate Procedure 28(j), Appellants respond to the government's letter dated September 22, 2003, concerning *United States v. Adams*, 2003 WL 22087570 (9th Cir. Sept. 10, 2003), and *United States v. Holston*, 2003 WL 22053060 (2d Cir. Sept. 4, 2003).

In *Adams,* this Court rejected a *facial* Commerce Clause challenge to a federal child pornography statute with respect to possession of *commercial* child pornography, thereby distinguishing *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003). Unlike *Adams*, the instant case includes an "as applied" Commerce Clause challenge of the same kind upheld in *McCoy*: Appellants' homegrown medical cannabis "has not been . . . transported interstate and is not intended for interstate distribution, or for any economic or commercial use . . . ." *See McCoy* at 1115, 1133. Accordingly, application of the statute to Appellants' conduct "cannot be justified under the Commerce Clause." *Id.* at 1133.

Holston likewise rejected a facial challenge to a child pornography statute. The challenge concerned the jurisdictional prong of that statute, which extends congressional Commerce Clause power over depictions "produced using materials that have been . . . transported in interstate or foreign commerce . . . ." *Holston* at

*2. The Controlled Substances Act contains no such jurisdictional hook to delineate the interstate reach of congressional power. Even if such a hook existed, the conduct at issue here would not have satisfied it, as the cannabis is grown using only water, nutrients, growing equipment, supplies, and materials originating or manufactured within the borders of the State of California. Complaint at ¶¶ 8-9, ER 0003-04; Declaration of Angel McClary Raich at ¶¶ 49-50, ER 0080-81.

The Second Circuit, in dicta, opined, "Producing child pornography, like manufacturing controlled substances . . . concerns 'obviously economic activity.'" *Holston* at *4. In this case, however, Appellants' connection to economic activity is far from "obvious," indeed, it is nonexistent. Similarly, this Circuit recognized in *McCoy* that production of child pornography is not "obvious" economic activity.

Finally, *Holston* rejected an as-applied challenge because "[t]he nexus to interstate commerce . . . is determined by the class of activities regulated by the statute . . . ." *Holston* at *6. This formulation erroneously allows Congress to reach any class of intrastate commerce it deigns to reach thereby eliminating the enumerated powers scheme of the constitution. In contrast, the Ninth Circuit in *McCoy* did not leave the definition of the class to Congress but itself defined the *relevant* class as it must do when applying the *Wickard* aggregation principle. Moreover, in the instant case, the relevant class of activities is not simply "all intrastate marijuana production" (a class analogous to that rejected in *Holston*), but "the personal cultivation and personal possession of homegrown cannabis for medical purposes." It is this *class* of activities, rather than the specific conduct of Appellants, that has not been and cannot be shown to have a substantial effect on interstate commerce.

Very truly yours,

Robert A. Raich

cc: See Service List

SERVICE LIST

Angel McClary Raich, et al. v. John Ashcroft, et al.,
Ninth Circuit Case No. 03-15481

John Ashcroft and Karen Tandy

Mark T. Quinlivan
U.S. Department of Justice
20 Massachusetts Avenue, N.W., Room 7128
Washington, D.C. 20530
(by fax and first-class mail)

Angel McClary Raich, Diane Monson, John Doe Number One, and John Doe Number Two

David M. Michael
The DeMartini Historical Landmark Building
294 Page Street
San Francisco, California 94102
(by fax and first-class mail)

Prof. Randy E. Barnett
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(by fax and first-class mail)

Amicus Curiae State of California

Hon. Bill Lockyer
Taylor S. Carey
Office of the Attorney General
1300 I Street, Suite 1720
Sacramento, California 95814

Amicus Curiae County of Alameda

Richard E. Winnie
Alameda County Counsel
1221 Oak Street, Suite 450
Oakland, California 94612

Amicus Curiae County of Butte

Hon. Michael L. Ramsey
District Attorney
25 County Center Drive
Oroville, California 95965

Amicus Curiae City of Oakland

Hon. John A. Russo
Barbara J. Parker
City Attorney's Office
One Frank Ogawa Plaza, 6th Floor
Oakland, California 94612

Amici Curiae California Medical Association and California Nurses Association

Alice P. Mead
California Medical Association
221 Main Street, Fifth Floor
P.O. Box 7690
San Francisco, California 94120

Julie M. Carpenter
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 20005

Amici Curiae Marijuana Policy Project, Rick Doblin, Ph.D., and Ethan Russo, M.D.

Frederick L. Goss
Law Offices of Frederick L. Goss
1 Kaiser Plaza, Suite 1750
Oakland, California 94612

Rick Doblin, Ph.D.
3 Francis Street
Belmont, Massachusetts 02478

Rob Kampia
Executive Director
Marijuana Policy Project
P.O. Box 77492
Washington, D.C. 20013

Ethan Russo, M.D.
Missoula Medical Plaza, Suite 303
900 North Orange Street
Missoula, Montana 59823