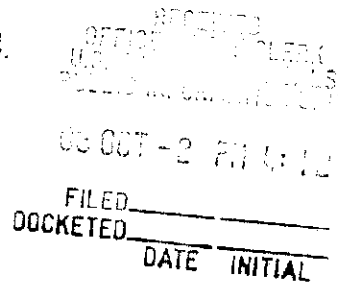


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October 2, 2003

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

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*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

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Ninth Circuit Case No. 03-15481

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