No. 03-15481

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGELA McCLARY RAICH; DIANE MONSON, JOHN DOE NUMBER ONE, and JOHN DOE NUMBER TWO,

Plaintiffs-Appellants,

v.

JOHN ASHCROFT, Attorney General of the United States, and WILIAM B. SIMPKINS, Acting Administrator of the Drug Enforcement Administration,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

# PETITION FOR REHEARING AND REHEARING EN BANC

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## INTRODUCTION AND SUMMARY

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, the government respectfully seeks rehearing of the panel's decision in this case and suggests that the case warrants rehearing en banc.

A divided panel held that Congress lacks authority under the Commerce Clause to make the Controlled Substances Act ("CSA") applicable to the cultivation and possession of marijuana for personal "medicinal" use, or to the distribution of marijuana without charge for such use. The panel thus concluded that the United States should be enjoined from enforcing the CSA to the extent that it prohibits plaintiffs from possessing, obtaining, manufacturing, or supplying marijuana for such purposes.

The panel decision cannot be reconciled with prior decisions of this Court, of the Supreme Court, and of other courts of appeals, and presents a question of exceptional importance.

In the CSA, Congress has comprehensively regulated the manufacture, distribution and possession of controlled substances. As the Supreme Court and this Court have made clear, when Congress regulates in this fashion, a statute's validity as an exercise of the commerce power is determined by reference to the full class of activities regulated by the statute, not by the nexus to commerce in an individual case. See, e.g., Perez v. United States, 402 U.S. 146, 154 (1971); Wickard v. Filburn, 317 U.S. 111, 128 (1942); United States v. Visman, 919 F.2d 1390,

1393 (9th Cir. 1990), cert. denied, 502 U.S. 969 (1991). This Court has repeatedly applied that principle to the local cultivation and possession of marijuana. See, e.g., Visman. The Court has likewise recognized that Congress may regulate the possession of a contraband good as a means of decreasing supply. See United States v. Adams, 343 F.3d 1024, 1033 (9th Cir. 2003).

Because Congress has validly regulated the possession of marijuana as part of a comprehensive regulatory scheme, individual users of marijuana may not invoke the particulars of their case to obtain an exemption from the statute. Once Congress has rationally defined a class of activity properly subject to its commerce power, individual instances of that class may not be excised as trivial.

The panel did not purport to question these principles. It believed, however, that it could reach the same result by re-defining the class of activities subject to statutory regulation. Thus, instead of looking to the general categories defined by the CSA - the manufacture, distribution, and possession of marijuana and other controlled substances - the panel declared that the class should be re-drawn to comprise only the noncommercial cultivation, distribution, and use of marijuana for medical purposes.

The attempt to excise particular instances from a class properly subject to regulation is not made more legitimate when a court disregards the class defined by Congress. Indeed, the

Second Circuit rejected precisely this mode of analysis in declining to create a sub-class consisting of "the cultivation of marijuana without intent to distribute in commerce." Proyect v. United States, 101 F.3d 11, 14 (2d Cir. 1996) (emphasis omitted). Similarly, the Fourth Circuit in United States v. Leshuk, 65 F.3d 1105 (4th. Cir. 1995), held that the CSA constitutionally applies to the possession and cultivation of marijuana for personal use because the constitutional question is whether "a general regulatory statute bears a substantial relation to commerce," and not the character of the individual instances arising under the statute. Id. at 1112 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

The panel's ruling is particularly anomalous because it re-defines the class of regulated activities in a manner that wholly disregards an explicit congressional judgment and the unambiguous teaching of the Supreme Court. A crucial premise of the panel's reasoning is that regulation of marijuana for "medicinal" purposes should be distinguished from the regulation of marijuana generally. But Congress placed marijuana on schedule I of the CSA because it found that marijuana has no currently accepted medical use and a high potential for abuse, and, as the Supreme admonished in United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494 n.7 (2001): "Lest there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the

prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act." The panel's reasoning suggests that the Supreme Court's decision might never have issued.

En banc review is warranted to correct the significant error in this case and to clarify this Court's application of the Commerce Clause to cases in which Congress has regulated possession of a product or commodity as part of a comprehensive regulatory scheme. The appropriateness of en banc review is underscored by the recent decision in United States v. Stewart, 348 F.3d 1142 (9th Cir. 2003), holding that provisions of the Gun Control Act could not be applied to a defendant who manufactured a machine gun for his personal possession.[1] The analysis in the present case and in Stewart represents a significant departure from governing jurisprudence and merits review by the full Court.

**BACKGROUND**

1. Plaintiffs Angel McClary Raich and Diane Monson use marijuana pursuant to physician recommendations.

Raich alleges that she has been diagnosed with more than ten serious medical conditions, and has endured four years of paralysis, which confined her to a wheelchair. ER 4, 15 19, 62-79. She alleges that marijuana is the only medication that alleviates these conditions, that she has used marijuana for

[1] The government has also sought en banc review in that case.

medicinal purposes for five years, and that her physicians recommend that she "medicate" with marijuana every two hours. ER 4-5, 62-3. She further alleges that she is unable to grow her own marijuana, and that she relies on two caregivers (plaintiffs John Doe Number One and John Doe Number Two) to cultivate and provide marijuana to her free of charge. ER 3, 80-81.

Monson alleges that she suffers from severe chronic back pain and constant, painful muscle spasms, and that she has been using marijuana as a medication for more than four years. ER 6, 92-95. She alleges that, on October 25, 2002, agents from the DEA and the Butte County Sheriff's Department came to her home during which time the DEA agents seized and destroyed six marijuana plants in her back yard, over the objection of the Butte County District Attorney. ER 3, 95. Monson alleges that, as a result of this action, she has been forced to "find a way to get my medicine from another source." ER 95.

2. Plaintiffs moved for a preliminary injunction to enjoin the government from enforcing the CSA against them to the extent that it prevents them from possessing, obtaining, manufacturing, or providing marijuana for allegedly medical use. Slip op. 17917. ER 21, 22-23. Plaintiffs urged that the CSA, as applied to their circumstances, exceeded Congress's authority under the Commerce Clause.

The district court denied the motion for preliminary injunction, concluding that "the weight of precedent precludes a

finding of likelihood of success on the merits * * *." Raich v. Ashcroft, 248 F. Supp. 2d 918, 920 (N.D. Cal. 2003).

3. A divided panel of this Court reversed and remanded, holding the CSA unconstitutional as applied. The panel majority recognized that this Court has repeatedly held that the application of the CSA in a particular case does not require a demonstrated nexus to interstate commerce. It concluded, however, that it could properly subdivide the class of activities subject to regulation and re-define a class consisting only of "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician," a class of activities that the panel reasoned was "different in kind from drug trafficking." Slip op. at 17921. The panel declared that "concern regarding users' health and safety is significantly different in the medicinal marijuana context, where the use is pursuant to a physician's recommendation." Ibid. In the panel's view, "the limited medicinal use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse." Ibid. The panel reasoned that "this limited use is clearly distinct from the broader illicit drug market - as well as any broader commercial market for medicinal marijuana - insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." Id. at 17921-22.

The panel then held that "[a]s applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise. The cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity." Id. at 17924.

In dissent, Judge Beam concluded that "[i]t is simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce" in Wickard v. Filburn, 317 U.S. 111 (1942). Slip op. at 17934-35. The dissent urged that the majority's "argument ignores the fungible, economic nature of the substance at issue - marijuana plants - for which there is a well-established and variable interstate market, albeit an illegal one under federal law." Id. at 39. Judge Beam reasoned that, "[i]f Congress cannot reach individual narcotics growers, possessors, and users, its overall statutory scheme will be totally undermined" because "[t]he goal of the CSA is to prevent the interstate marijuana trade, even medicinal marijuana." Id. at 42.

**REASONS WHY THE PETITION SHOULD BE GRANTED**

1. Congress has established a comprehensive scheme to regulate the market in controlled substances. Under the Controlled Substances Act, the manufacture, distribution,

dispensation, and possession of "schedule I" drugs including marijuana and heroin are generally prohibited. See 21 U.S.C. §§ 841(a)(1), 823, 844(a); see also United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 489-90 (2001).

In enacting the CSA, Congress expressly found that controlled substances manufactured within a state cannot be meaningfully distinguished from those distributed interstate; that controlled substances possessed within a state often have moved in interstate commerce; and that the local possession and distribution of controlled substances swell the interstate traffic in such substances. 21 U.S.C. §§ 801(3)-(6). Based on these findings, Congress further found that "Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." Id. § 801(6).

Relying in part on these findings, this Court has repeatedly rejected contentions that the CSA cannot validly be applied absent a demonstrated nexus to interstate commerce in a particular case. As the Court held in United States v. Visman, "Congress may constitutionally regulate intrastate criminal cultivation of marijuana plants found rooted in the soil" because "local criminal cultivation of marijuana is within a class of

activities that adversely affects interstate commerce." Visman, 919 F.2d at 1393.[2]

Nor can there by any doubt that Congress may "criminalize the intrastate possession of a contraband good" where "the congressional intent is to stamp out the entire market for that good." United States v. Adams, 343 F.3d 1024, 1033 (9th Cir. 2003). As this Court explained: "Laws criminalizing the possession of a good decrease the demand for that good. This decrease results in a decrease of supply as production becomes less profitable and therefore less attractive." Ibid.

2. The panel in this case did not and could not question Congress's power to ban marijuana possession generally. It believed, however, that it could properly subdivide the broad class of marijuana possession regulated by CSA into subclasses and define a particular subclass so as to minimize, though not eliminate, its apparent connection to interstate commerce.

The panel's mode of analysis is fundamentally flawed. It is well established that, where a class of activities is properly subject to federal regulation, individual instances within the

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[2] See also United States v. Bramble, 103 F.3d 1475, 1479 (9th Cir. 1996); United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), cert. denied, 519 U.S. 1140 (1997); United States v. Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996); United States v. Montes-Zarate, 552 F.2d 1330, 1331-32 (9th Cir. 1977), cert. denied, 435 U.S. 947 (1978); United States v. Rodriguez-Camacho, 468 F.2d 1220, 1221-22 (9th Cir. 1972), cert. denied, 410 U.S. 985 (1973).

class may not be examined for their connection to interstate commerce. See Lopez, 514 U.S. at 558 ("'[w]here a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence'") (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)); Perez v. United States, 402 U.S. 146, 154 (1971) ("[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class") (quoting Wirtz, 392 U.S. at 193). As this Court held en banc in United States v. Sacco, 491 F.2d 995 (9th Cir. 1974), "Congress can declare that an entire class of activities affects interstate commerce" and "[i]f the class of activities is within the reach of the federal power and the regulation imposed is reasonable, a court's investigation is concluded. There is no need for inquiry on a case-by-case basis or proof that a particular activity had an effect on commerce." Id. at 999.

Thus, in Wickard, the Supreme Court rejected the contention that the wheat grown by a single farmer for personal consumption could be divorced from the larger national market. Likewise, in Perez, it sufficed that Congress could regulate those who engaged in loan sharking and that the defendant was "a member of the class." 402 U.S. at 153. If the class of activities defined by Congress is within its commerce power, a court may not require

"proof that the particular intrastate activity against which a sanction was laid has an effect on commerce." Id. at 152.

These principles apply just as clearly to the cultivation of marijuana for personal consumption as to the cultivation of wheat for home use. As the Second Circuit stressed, in upholding a conviction for the cultivation of marijuana grown solely for personal consumption, "[t]he nexus to interstate commerce * * * is determined by the class of activities regulated by the statute as a whole, not by the simple act for which an individual defendant is convicted." Proyect v. United States, 101 F.3d 11, 13 (2d Cir. 1996).

Nor, as the Second Circuit explained in Proyect, may a court excise instances of the class by re-defining the class of regulated activities so as to attenuate the connection to interstate commerce. The Second Circuit thus rejected the defendant's attempt to define the relevant class of activities as "the cultivation of marijuana without intent to distribute in commerce," 101 F.3d at 14 - precisely the type of re-definition adopted by the panel majority here. The Second Circuit explained:

> Congress unquestionably has the power "to declare that an entire class of activities affects commerce. The only question for the courts is then whether the class is within the reach of the federal power. The contention that in Commerce Clause cases the courts have the power to excise, as trivial, individual instances falling within the rationally defined class has been put entirely to rest."

Id. at 13 (quoting Wirtz, 392 U.S. at 192-93). Likewise, the Fourth Circuit in United States v. Leshuk, 65 F.3d 1105 (4th. Cir. 1995), rejected the contention that the CSA was unconstitutional as applied to a defendant whose "possession and cultivation were for personal use and did not substantially affect interstate commerce," because "Lopez expressly reaffirmed the principle that where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." Id. at 1112.

The panel decision cannot be reconciled with these cases. Indeed, in some respects the ruling here recognizes an even broader exception than that rejected by the Second and Fourth Circuits. The panel's holding extends not only to persons possessing marijuana for their own use, but to the plaintiff "caregivers" who supply the marijuana. See Slip op. 17948 (Beam, J., dissenting) ("in Raich's situation the marijuana plants were clearly 'transferred' to her from her horticulturally inclined surrogates"). The panel offered no justification for an analysis that would excise from a general regulatory scheme those transactions that take place without payment. Indeed, its ruling would rewrite Wickard to exclude not only possession of a regulated commodity for personal use, but distribution of the commodity without payment.

The majority's attempt to define a sub-class of activities underscores the error of its analysis. As Wickard made clear, and Lopez reaffirmed, activity occurring within a market is subject to the commerce power even when it is not itself commercial. As Wickard amply illustrates, production of a regulated product or commodity may be economic activity even when produced for personal use and even when it "may not be regarded as commerce * * *." Lopez, 514 U.S. at 556 (quoting Wickard, 317 U.S. at 125).

The present case illustrates the close market connections, recognized by Congress, between marijuana possession generally and the broader market. Marijuana is fungible, and, as the dissent observed, plaintiffs "are growing and/or using a fungible crop which could be sold in the marketplace[.]" Slip op. at 17941. Plaintiff Raich does not grow her own marijuana at all, but obtains it from the John Doe plaintiffs. The transactions between the plaintiffs allegedly do not involve cash consideration, but gratis distributions of a regulated commodity are subject to economic regulation just as clearly as possession.

It should be beyond serious question that a "cannabis cooperative" of hundreds or thousands of persons growing marijuana for collective distribution would constitute economic activity subject to federal regulation. The analysis should not alter because, in this case, the group is smaller or because an

individual is both producer and consumer (as in Wickard). Either as individuals or as a cooperative, the growers and users of marijuana have not ceased to be part of the overall market; they have simply chosen to effect their transactions on a noncommercial basis. And, of course, even individuals who attempt to isolate themselves from the broader market to the greatest extent possible must still obtain items such as seeds, which, like marijuana itself, are regularly sold in interstate commerce.

The point of such connections to the larger market is not, as the panel believed, whether they would serve to satisfy a statutory jurisdictional element if one existed. Id. at 17931 n.8. The point is simply that the market in marijuana, from the purchase of seeds to its cultivation, manufacture, distribution, and possession, takes place in the context of an interstate market that is comprehensively regulated by Congress, and that Congress's judgment about the need to reach all aspects of inter- and intrastate distribution and possession cannot properly be second-guessed.

3. Ultimately, the panel's departure from governing precedent is premised on a frank rejection of Congress's determination that marijuana has "no currently accepted medical use in treatment in the United States," a "high potential for abuse" and "a lack of accepted safety for use * * * under medical

supervision." 21 U.S.C. 812(b)(1)(A)-(C); id. § 812(c)(c). The panel believed that it could create a new sub-class of activity because "concern regarding users' health and safety is significantly different in the medicinal marijuana context, where the use is pursuant to a physician's recommendation," slip op. at 12, and because "the limited medicinal use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse." Ibid.

The panel's conclusion that federal law should recognize a distinct category of cultivation for medical purposes puts it squarely at odds with Congress and with the Supreme Court's decision in Oakland Cannabis. In holding that the CSA does not allow for a medical necessity exception, the Court explained that the CSA:

> reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, see 21 U.S.C. § 829, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has "no currently accepted medical use" at all.

532 U.S. at 491 (emphasis supplied).

The Supreme Court emphasized that, "[l]est there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act. Furthermore, the

very point of our holding is that there is no medical necessity exception to the prohibitions at issue, even when the patient is 'seriously ill' and lacks alternative avenues for relief." Id. at 494 n.7.

The extraordinary effect of the panel's decision is to constitutionalize under the Commerce Clause the very medical necessity defense that was unanimously rejected in Oakland Cannabis.

In sum, the panel's decision departs from fundamental principles of Commerce Clause jurisprudence and conflicts with the prior holdings of this Court and other courts of appeals. The distinctions drawn between the "medicinal" use of marijuana and marijuana manufactured and possessed for other purposes represent a rejection of congressional judgment and disregard the ruling in Oakland Cannabis. Rehearing by the full Court is therefore warranted.

## CONCLUSION

For the foregoing reasons, the case should be reheard.

Respectfully submitted,

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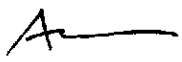
JANUARY 2004

**CERTIFICATE OF COMPLIANCE**

I certify the pursuant to Circuit Rule 35-4 and 40-1, the attached petition for rehearing and rehearing en banc is monospaced, has 10.5 or fewer characters per inch and contains 3,642 words, according to the count of Corel WordPerfect 9.



Alisa B. Klein

## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2004, I am causing the foregoing petition to be sent to this Court and to the following counsel by Federal Express:

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