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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No. C 02 4872 EMC

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: 4 December 2002
Time: 2:30 p.m.
Dept: C [15th Floor]
Honorable Edward M. Chen

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INTRODUCTION

As also referenced in Plaintiffs' Complaint for Declaratory Relief and For Preliminary and Permanent Injunctive Relief, the Sovereign State of California and the People of the State of California, on November 6, 1996, duly enacted through its initiative process, the Compassionate Use Act of 1996, which allows a patient to possess and cultivate medical cannabis with a doctor's recommendation. Cal. Health & Safety Code § 11362.5 (Deering's 2002).

The stated purpose of the State law is:

> To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

Cal. Health & Safety Code § 11362.5(b)(1)(A).

The Compassionate Use Act further states that "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." Cal. Health & Safety Code § 11362.5(b)(2)(d).[1]

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[1] To date, nine States, in exercising their sovereign rights, have enacted laws providing for the lawful cultivation and use of marijuana for medical purposes -- Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington. See Alaska Stat. Ann. §§ 11.71.090, 17.37.010 to 17.37.080 (2000); Cal. Health & Safety Code § 11362.5; Colo. Const., Art. XVIII, § 14; Haw. Rev. Stat. §§ 329-121 to 329-128 (Supp. 2000); Me. Rev. Stat. Ann., Tit. 22, § 2383-B(5) (2000); Nev. Const., Art. 4, § 38; Ore. Rev. Stat. §§ 475.300 to 475.346 (1999); Wash. Rev. Code §§ 69.51A.005 to 69.51A.902 (1997 and Supp. 2000-2001).

In addition, at least twenty-five states have enacted legislative bills into law that recognize the therapeutic value of cannabis. [Alabama (§ 20-2-110); Connecticut (Pub. Act 81-440, § 21a-246,253); District of Columbia (Law 4-29 (1981), § 33-522); Georgia (No. 710 (1980), § 43-34-120); Iowa (§ 124.204/206) Illinois (§ 720 ILCS 550/11 and 77 IAC Ch X, Sec 2085); Louisiana (Act No. 725 (1978); Act No 874 (1991)); Massachusetts (Ch. 480 (1991)); Minnesota (Ch. 614 (1980)); Montana (Ch. 320 (1979)); New Hampshire (Ch. 4107 (1981)); New Jersey (Ch 72 (1981)); New Mexico (Ch 22 (1978)); New York (Ch 810(1980)); Ohio (Act.No. 230 (1980); Rhode Island (Ch. 375 (1980)); South Carolina (Act No. 323 (1980)); Tennessee (Ch. 114 (1981); § 68-52-101); Texas (Health & Safety § 481.111 and § 481.201-205); Vermont (18 VSA § 4471); Virginia (Ch. 435 (1979), § 18.2-250.1 and § 18.2-251.1); Washington (Ch. 136 (1979)); West Virginia (Ch. 56 (1979), § 16-5A-7); Wisconsin (Ch. 193 (1981); Act 339 (1987)).]

All of Plaintiffs' conduct set forth herein is lawful under the Compassionate Use Act.

As evidenced by recent events identified in Plaintiff's Complaint, the United States Attorney General, the Administrator of the Drug Enforcement Administration, and their agents and officers, have implemented and accelerated a campaign to thwart the will of the People of the State of California by seeking out -- with threats, destruction of property, and prosecution -- those citizens whose actions are expressly authorized by California's Compassionate Use Act. The Defendants are unconstitutionally exceeding their authority by embarking on a campaign of seizing or forfeiting privately-grown wholly intrastate medical cannabis from California patients and caregivers, arresting or prosecuting such patients and caregivers, mounting paramilitary raids against such patients and caregivers, harassing such patients and caregivers, and avoiding the legal consequences of their acts by failing to invoke the sanction of any judicial body to justify or substantiate their conduct or to allow Plaintiffs an opportunity otherwise to assert their constitutional and sovereign rights, except as Plaintiffs seek to do so in this action. The Defendants purport to have authority for their actions under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*

Plaintiffs contend that defendants have exceeded the limits of their authority and the limits of the United States Constitution in taking such action. Because of the serious consequences these threats and actions will have on the health and well being of California's seriously ill citizens and the affront to California's sovereignty and the sovereign rights of its citizens, as well as the affront to the Constitution of the United States, Plaintiffs seek immediate injunctive relief to preserve the status quo pending resolution of the important legal issues presented in this case.

I. THE NINTH CIRCUIT HAS SET FORTH THE STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF

The Ninth Circuit uses two different, but related, tests to determine whether a court should issue a preliminary injunction.

One test considers whether the plaintiff has demonstrated that (1) there is a fair chance of success on the merits, (2) there is a significant threat of irreparable injury, (3) there is at least a

minimal tip in the balance of hardships in plaintiff's favor; and (4) public interest favors granting the injunction. *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983).

The other test employed by the Ninth Circuit permits plaintiffs to meet their burden by showing either: (1) a probability of success on the merits and the possibility of irreparable injury; *or* (2) serious questions going to the merits where the balance of hardships tips sharply in plaintiff's favor. *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 565 (9th Cir. 2000); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993); *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Idaho Sporting Congress*, 222 F.3d at 565 (quoting *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998)). These are not two separate tests but merely extremes of a single "continuum of equitable discretion whereby the greater the relative hardship to the moving party, the less probability of success must be shown." *Regents of Univ. of Calif. v. ABC, Inc.*, 747 F.2d 511, 515 (9th Cir. 1984). *See*, also, *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1401 (9th Cir. 1992).

Thus, "[i]f the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Alaska v. Native Village of Venitie*, 856 F.2d 1384, 1389 (9th Cir.1988) (quoting *Aguirre v. Chula Vista Sanitary Serv.*, 542 F.2d 779 (9th Cir.1976)). Also, when the public interest is involved, a district court must examine whether that public interest favors the plaintiff. *Fund for Animals, Inc.*, 962 F.2d at 1400.

Under any formulation, to obtain a preliminary injunction, a showing that there is a "reasonable probability" of success -- not an overwhelming likelihood -- is all that need be shown for preliminary injunctive relief. *Gilder*, 936 F.2d at 422; *Johnson v. California State Board of Accountancy*, 72 F.3d 1427, 1429 (9th Cir. 1995).

Likelihood of success is examined in the context of the relative injuries to the parties and the public. 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. *Dataphase Systems. Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

When a violation of constitutionally protected rights is shown, as here, no further showing of irreparable injury is necessary. *Topanga Press*, 989 F.2d at 1528-1529; *Associated Gen. Contractors of Calif. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991); *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

II. THE CAUSES OF ACTION IN THE COMPLAINT ALLEGE AN ADEQUATE BASIS FOR PRELIMINARY INJUNCTIVE RELIEF AS THE GOVERNMENT'S INTERPRETATION OF THE CSA EXCEEDS THE AUTHORITY DELEGATED BY CONGRESS AND VIOLATES PLAINTIFFS' RIGHTS UNDER THE U.S. CONSTITUTION

A. The Purpose of the Controlled Substances Act Is Only to Address Drug Abuse and Trafficking

The federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("CSA") represents an attempt by Congress to regulate the abuse of drugs trafficked in interstate commerce. *See* 21 U.S.C. § 801 (stating findings of impact on interstate commerce of drug abuse). Among other provisions, the CSA requires the Attorney General to maintain schedules of controlled substances based on their potential for abuse, 21 U.S.C. § 812.

As originally written (and as applied, until now), the CSA respected traditional State sovereignty. Indications of congressional intent are clear from the declarations in the CSA, itself, which refer explicitly to the need to control "illicit trafficking" and to address "traffic in controlled substances," 21 U.S.C.§ 801(3). Reference to legislative history confirms those explicit declarations.

The legislative history of the CSA includes a statement that the principal purpose of the law was "to deal in a comprehensive fashion with the growing menace of drug abuse in the United States[.]" [2] Congress recognized that registration to prescribe controlled substances

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[2] H.R. Rep. No. 91-1444, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567.

"would be as a matter of right where the individual or firm is engaged in activities involving these drugs *which are authorized or permitted under State law*." [3] Moreover, Congress was "concerned about the appropriateness of having federal officials determine the appropriate method of the practice of medicine[.]" [4]

The House Committee Report on the bill that became the CSA explains: "The bill provides for control...of problems related to drug abuse through registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions outside the legitimate distribution chain illegal."[5] In short, the CSA was intended to address drug abuse and trafficking, not practices engaged in by physicians and their patients in accordance with State law.[6]

B. Plaintiffs in this Case Are Involved in Purely Noncommercial Intrastate Activity Pursuant to Valid California Law

As set forth in Plaintiffs' Complaint, Plaintiff Angel McClary Raich ("Angel"), of Alameda County, California, is a seriously ill patient suffering from numerous severe debilitating medical conditions for which cannabis uniquely provides relief. Angel possesses cannabis for medical purposes pursuant to California's Compassionate Use Act. Angel's primary care physician, and all of her numerous specialist physicians, support Angel's use of medical cannabis. Because Angel cannot cultivate her own cannabis, she now relies on two caregivers, John Doe Number One and John Doe Number Two, who provide cannabis to her without charge.

Plaintiff Diane Monson ("Monson") of Butte County, California, is a seriously ill patient who uses medical cannabis on her doctor's recommendation to treat severe chronic back pain and spasms. Monson cultivates and possesses cannabis for medical purposes pursuant to California's

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[3] 1970 U.S.C.C.A.N. at 4590 (emphasis added).

[4] 1970 U.S.C.C.A.N. at 4581.

[5] H.R. Rep. No. 91-1444, p. 3, quoted in *United States v. Moore*, 423 U.S. 122, 135 (1975)

[6] *See United States v. Rosenberg*, 515 F.2d 190, 193 (9th Cir.), *cert. denied*, 423 U.S. 1031 (1975), *citing* 1970 U.S.C.C.A.N. at 4590 (explaining that Congress was concerned with the diversion of drugs out of legitimate channels of distribution for illegal uses).

Compassionate Use Act. On August 15, 2002, following a three-hour standoff in Monson's front yard, federal agents raided her home and seized her six (6) medical cannabis plants, in defiance of an urgent telephone plea by Butte County District Attorney Mike Ramsey to U.S. Attorney John K. Vincent imploring him to spare Monson's medicine.

Plaintiffs John Doe Number One and John Doe Number Two, of Alameda County, California, cultivate cannabis on Angel's behalf, which they supply to Angel free of charge, without any cost or remuneration whatsoever. John Doe Number One and John Doe Number Two cultivate and possess cannabis solely within the State of California for medical purposes. In order to protect Angel's supply of medical cannabis, John Doe Number One and John Doe Number Two sue in an anonymous capacity. In the cultivation of Angel's medical cannabis, John Doe Number One and John Doe Number Two use only water and nutrients originating from within the borders of the State of California. Further, John Doe Number One and John Doe Number Two use exclusively growing equipment, supplies, and materials manufactured within the borders of the State of California. John Doe Number One and John Doe Number Two cultivate for Angel 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.

C. Congress Lacks the Authority to Prohibit – or Allow the DEA to Prohibit – Practices That Are Wholly Intrastate, Authorized under State Law, and Unrelated to Drug Trafficking

1. The Commerce Clause Does Not Apply to Plaintiffs' Purely Noncommercial Intrastate Activity Having No Economic Impact on Interstate Commerce

The activities for which Plaintiffs seek protection in this case are purely intrastate actions pursuant to valid California State law -- the personal cultivation and personal use of cannabis for medical purposes by California citizens as recommended by the patients' physicians.[7] This

[7] As determined recently by the investigation of our own government's scientific institutions, there is no credibility to the claim that cannabis has no medical or therapeutic benefits. "In contrast with the many disagreements bearing on social issues, the study team found substantial consensus among experts in the relevant disciplines on the scientific evidence about potential medical uses of marijuana." . . . "The accumulated data indicate a potential therapeutic value for cannabinoid drugs, particularly for

wholly intrastate activity is beyond the power of Congress "to regulate Commerce . . . among the several States," U.S. Const., Art. I, sec. 8. *See The Federalist* 42, at 267-69 (J. Madison) (Rossiter ed.) (referring to the power "to regulate between State and State"). If Article I had included the power to regulate wholly intrastate commerce, it would simply have read "Congress shall have power to regulate commerce." The only reason for the tripartite breakdown[8] specified was to exclude the power to regulate wholly intrastate commerce. As Chief Justice Marshall explained in *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 195 (1824): "The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself." In sum, protecting wholly intrastate commerce from the reach of Congress is a constitutional imperative in our federal system.

Although the power to regulate commerce among the States included a limited power of prohibition (*Champion v. Ames*, 188 U.S. 321 (1903)), this extension of Congressional power "does not assume to interfere with traffic or commerce . . . carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States." *Id.* at 357. Had Congress the power under the Commerce Clause to regulate wholly intrastate commerce, it would have been unnecessary to adopt the Eighteenth Amendment to prohibit the intrastate "manufacture, sale, or transportation of intoxicating liquors." U.S. Const., Amend. XVIII (repealed).

It is Congress's Commerce Clause authority that permits the federal regulation of recreational marijuana. 21 U.S.C. § 801; *United States v. Kim*, 94 F.3d 1247 (9th Cir. 1996).

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symptoms such as pain relief, control of nausea and vomiting, and appetite stimulation." Institute of Medicine, "*Marijuana and Medicine: Assessing the Science Base*," Executive Summary, March 17, 1999, at ES.4.

[8]Article I, Section 8 permits Congress to regulate "Commerce with foreign Nations, and among the several States, and with the Indian tribes."

a. *Lopez*

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). 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, requires "an analysis of whether the regulated activity *substantially affects* interstate commerce." *Id.* at 560 and 566 (emphasis added).

According to the Court, the Commerce Clause should be analyzed in the following fashion: Congress, in the first instance, makes the findings that are prerequisite to its power to regulate, but if those findings are challenged in a particular case as factually erroneous or otherwise insufficient, the *court* must make -- on a case by case basis -- a factual determination whether or not the regulated activity "substantially affects interstate commerce." *Id.* As explained by the Court, "[s]imply 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*, 531 U.S. 159, 173 (2001) (Determining whether Congress exceeded grant of authority under Commercel Clause requires a court "to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce.").

Defendants cannot justify their actions under the CSA as a regulation of the channels of interstate commerce where the activity at issue consists in its entirety of purely intrastate activities, lawfully sanctioned by the sovereign State of California. Plaintiffs' activities bear no resemblance whatsoever to rail yards, airports, or interstate highways or other activities found to be instrumentalities of interstate commerce. Even if recreational marijuana can be subject to regulation under the CSA, that, alone, is an insufficient basis to contend that Plaintiffs' wholly intrastate, completely noncommercial activities regarding medical cannabis somehow

substantially affect interstate commerce.

b. *Morrison*

The Court expanded on its analysis of "substantial effect" on interstate commerce in *United States v. Morrison*, 529 U.S. 598 (2000). In that case, 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 612. The "noneconomic, 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 of Congress regarding significant economic effect are, themselves, insufficient to satisfy constitutional requirements.[9] 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. [10]

> 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

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[9] 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.

[10] "Attenuated analysis" was the same government argument the Court first rejected in *Lopez*, that the possession of guns may lead to violent crime, and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. In addition, according to attenuated analysis, the presence of guns at schools poses a threat to the educational process, which in turn threatens to produce a less efficient and productive workforce, which will negatively affect national productivity and thus interstate commerce. 529 U.S. at 612-613.

an individual that Congress is without power to regulate."

Id. at 612-613.

If one reads the CSA as authorizing Defendants' actions and threatened actions against Plaintiffs, then Congress would be authorizing the federal government to reach into the private and personal decisions of sick and dying patients, their relationship with their physicians, and their compliance with a valid State law enacted by the citizens of the sovereign State of California. Congress in adopting the CSA did not intend to extend the Act's reach so far. The Act's findings deal with the impact of the interstate market in controlled substances and the effects of drug abuse, not the use of medical cannabis authorized by State law.

c. The 9th Circuit Decision in *Kim* and the Application of the CSA to State-Sanctioned Medical Cannabis

The Ninth Circuit in *Kim*, 94 F.3d at 1247, found in *Lopez* a two-prong test to resolve when the federal government exceeds it authority under the Commerce Clause. First, the court looks to the "terms" of the regulated activity to determine whether it has "[any]thing to do with commerce," and second, the court turns 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." *Id.* at 1249.

It warrants emphasis that, up until now, all Commerce Clause cases decided under the CSA concerned *illegal* drug activity, be it "illegal drug distribution," *Kim*, 94 F.3d 1247, or the "*local criminal* cultivation of marijuana," *United States v. Visman*, 919 F.2d 1390 (9th Cir. 1990) (emphasis added). Moreover, in every reported case the activity was illegal under BOTH federal and state laws. This is the first case in which the subject activity -- i.e., the possession and cultivation of medical cannabis -- is lawful under State law. Accordingly, prior decisions involving the illegal distribution and cultivation of marijuana are distinguishable.

When *Kim's* two-prong test is applied to the cultivation of medical cannabis, now authorized by the State of California, it becomes clear that this activity does NOT fall within the reach of the Commerce Clause. The noncommercial possession and cultivation of cannabis for personal medicinal purposes simply does not "substantially affect interstate commerce" and any

attempt by the federal government to regulate (or prohibit) this wholly intrastate activity threatens the federalism concerns of both *Lopez* and *Kim*.

Under the first prong of *Kim*, the subject activities in this case, authorized under the 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 by people who make their living to the detriment of the health and welfare of the people of the United States, the activity at issue in this case is the noncommercial cultivation and use of medical cannabis as *medication* for seriously ill patients. The noncommercial wholly intrastate medical cannabis activities involved in this litigation simply have no material effect on interstate commerce, whatsoever. Nor has there been any Congressional finding on the affect of these activities on interstate commerce.

Under the second prong of *Kim*, to determine whether a federal regulatory activity threatens "federalism," the 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. *Lopez*, 514 U.S. at 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 established 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) ("State 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).

Moreover, the States have primary authority in defining and enforcing laws that protect

the health, safety, and medical treatment of their citizens. *Washington v. Glucksberg*, 521 U.S. 702 (1977) (the State has an "'unqualified interest in the preservation of human life'"); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 281 (1990) ("choice between life and death is a deeply personal decision [and] the State may legitimately seek to safeguard the personal element of this choice"); *Roe v. Wade*, 410 U.S. 113, 156 (1973) ("responsibility for the health of the community" lies with the States); *Whalen*, 429 U.S. at 602-603 (State has inherent "interests in protecting health and potential life"); *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").

Simply put, regulation of drugs and medicine is a traditional concern of the State, and here the State of California has declared that the use and cultivation of cannabis for medicinal 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 is to decide 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.[11]

It bears emphasizing that when Congress enacted the CSA, it was sensitive to issue of federalism, and for that reason, specifically determined that the CSA would *not* displace powers traditionally entrusted to the States:

> Application of State Law: No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903.

In accordance with 21 U.S.C. § 903 and the Court's decision in *Lopez*, should the Defendants contend that the Compassionate Use Act triggers a conflict with the CSA or is

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[11] Since the passage of the Compassionate Use Act in 1996, at least one California state court has held that federal law does not preempt State medical cannabis law. *People v. Westwood*, Superior Court of Mendocino County, Case #98-01282 (Nov. 18, 1998 Order) ("This Court finds the federal government did not intend to preempt the issue of whether marijuana may be possessed for medicinal purposes.").

otherwise inconsistent with federal regulations under the Commerce Clause, the *burden is on the government* to come forward and prove that 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).

It is worth emphasizing that, in granting a preliminary injunction, the District Court for the Northern District of California, in *Conant v. McCaffrey*, 172 F.R.D. 681 (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.

172 F.R.D., at 694, n. 5.

In subsequently affirming the District Court's permanent injunction, the Ninth Circuit, in *Conant v. Walters*, 2002 U.S. App. LEXIS 22492 (9th Cir. Oct.29, 2002),[12] has just now further expanded on the core issues of that case. Concurring in this unanimous decision, Judge Alex Kozinski examined the constitutional boundaries that forbid the federal government from interfering with the States' local governance of medical cannabis.

> In the circumstances of this case, however, I believe the federal government's policy runs afoul of the "commandeering"doctrine announced by the Supreme Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).
>
> *New York* and *Printz* stand for the proposition that "the Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935.

Conant, 2002 U.S. App. LEXIS 22492 at *45

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[12] In the appeal, defendant John P. Walters was substituted for his predecessor, Barry R. McCaffrey, as Director of the White House Office of National Drug Control Policy

> The commandeering problem becomes even more acute where Congress legislates at the periphery of its powers. The Constitution authorizes Congress to regulate activities that affect interstate commerce. But that authority is not boundless. As the Supreme Court recently reminded us, Congress must exercise its power so as to preserve "the Constitution's distinction between national and local authority." *United States v. Morrison*, 529 U.S. 598, 615 (2000). That distinction, in turn, was designed "so that the people's rights would be secured by the division of power." *Id.* at 616 n.7; see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."). The Supreme Court's recent Commerce Clause jurisprudence is cut from the same cloth as the commandeering principle; both protect the duality of our unique system of government. The Commerce Clause limits the scope of national power, while the commandeering doctrine limits how Congress may use the power it has. These checks work in tandem to ensure that the federal government legislates in areas of truly national concern, while the states retain independent power to regulate areas better suited to local governance.
>
> **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.

Id. at *46-*47 (emphasis added).

Thus, it is evident that Plaintiffs' activities regarding medical cannabis simply do not "substantially affect interstate commerce." They do "not have any direct or obvious effect on interstate commerce," and any attempt by the Defendants to use the CSA to prohibit the use of medical cannabis threatens federalism, as it intrudes into activity that has long been a traditional concern of the States.[13]

Another important principle in assessing the validity of an extension of the Commerce Power is that courts should "inquire whether the exercise of national power seeks to intrude upon an area of state concern." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). Defendants' conduct, unless enjoined, in this case would "foreclose[] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and

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[13] In addition to being "necessary," Congress's power over interstate commerce must also be "proper" insofar as it does not intrude upon either the reserved powers of the States or the fundamental liberties of the People. In *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court noted that one aspect of the "propriety" of a law is whether it intrudes into the sovereignty of a State.

expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Id.* at 583 (Kennedy, J. concurring). The offense against federalism is grievous, for by seeking to squash California's exercise of its own judgment in this area, Defendants, unless enjoined, will violate "the theory and utility of our federalism," under which "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.* at 581 (Kennedy, J., concurring).

In *Morrison*, the Supreme Court explicitly warned against any interpretation of the enumerated powers of Congress that would create for Congress what the Founders denied to it—a general police power superseding that of the States. *Morrison*, 529 U.S. at 623. In order to give effect to this principle of federalism, courts must insist on more than formalism or the invocation of magic words to justify an extension of the Commerce Power into local matters. "The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact, we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted." *Id.* It is difficult to think of any activity that by tradition, experience, and logic, more clearly falls on the "truly local" side of this line than the State's medical oversight of the cultivation and use of a medicinal plant to alleviate pain and suffering and the activities of the citizens of the State in dealing with their most intimate medical concerns.

2. Under the Tenth Amendment, the State Has the Sovereign Responsibility for the Health and Safety of Its Citizens

As the Supreme Court observed in *New York v. United States*, 505 U.S. 144, 157 (1977), "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." 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; and the Supreme Court has always acknowledged that Congress lacks such a power. *See Lopez*, 514 U.S. at 566.

The power of Congress over interstate commerce is plenary. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat) at 197. 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* 315-6 (1803).

These propositions are not inconsistent. As stated in *Printz v. United States*, 521 U.S. 898, 924 (1997), the power over interstate commerce, while plenary, cannot be exercised in a manner that improperly "violates the principle of state sovereignty" by intruding into the traditional sovereign powers of States. Moreover, Congress cannot properly claim an *incidental* power to reach wholly *intrastate* activity under the Necessary and Proper Clause when doing so would interfere with the exercise of State sovereign powers. *Id.* at 937.

On issues of public health, the United States Supreme Court has long recognized the authority of State and local governments to enact measures reasonably necessary to protect such public health. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court rejected a constitutional challenge to a Massachusetts law requiring compulsory vaccinations. *See Id.* at 48-49. The 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 (emphasis added).

Similarly, the Court has upheld State regulations of professions that "closely concern" public health. *See, e.g., Watson v. Maryland*, 218 U.S. 173, 176 (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.

See Id.. 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 State so long as such regulations are reasonable and necessary).

As most recently observed by the Ninth Circuit in *Conant:*

> 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"). 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).

2002 U.S. App. LEXIS 22492, at *24-*25

Thus, 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, primarily responsible for the health and safety of its citizens, a power central to the sovereignty of the States.

3. Plaintiffs' Fundamental Constitutional Rights Are Protected by The Fifth and Ninth Amendments

The protection of unenumerated liberties traditionally has been afforded against the federal government under the Due Process Clause of the Fifth Amendment. It 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 Ninth Amendment was intended to negate any inference that "those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." 1 Annals of Cong. 456 (1789). *Cf. Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 848 (1992) (citing the Ninth Amendment in support of the proposition that the "substantive sphere of liberty" protected by Due Process extends beyond

"the Bill of Rights [or] the specific practices of States at the time of the adoption of the Fourteenth Amendment").

The Ninth and Tenth Amendments 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. 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 these powers.

Infringements upon fundamental liberties call for heightened scrutiny of the means by which Congress exercises its enumerated powers. The Supreme Court recognized this in *United States v. Carolene Products*, 304 U.S. 144 (1938), which states that "[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *Id.* at 153, n.4. As the Supreme Court has long held, unenumerated liberties can be as fundamental as enumerated liberties. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (right of parents to educate their children in the German language); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to send their children to private Catholic school); *United States v. Troxel*, 530 U.S. 57 (2000) (right of parents to make decisions concerning care).

To receive constitutional protection, an unenumerated liberty 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,' such that 'neither liberty nor justice would exist if [it] were sacrificed,' [*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)]." *Washington v. Glucksberg*, 521 U.S. at 720-21. In Due Process cases, the Supreme Court has emphasized that a claimed right can have roots 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.

a. The Rights to Bodily Integrity, to Ameliorate Pain, and to Prolong Life Are Constitutionally Protected

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 this most fundamental right.

This right has deep roots in our Nation's history, legal tradition and the practice of permitting decisions about one's body to be made free from governmental intervention. The right is concomitant with the established rights to bodily integrity, to be free of pain and suffering, and to prolong life.

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.[14] 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 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. Four concurring opinions in *Glucksberg* strongly suggest that the Due Process Clause protects an individual's right to obtain medical treatment to alleviate

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[14] *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").

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 Stephens 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).

At the heart of this traditionally recognized liberty, Justice Stevens noted, was that of "[a]voiding intolerable pain and the indignity of living one's final days incapacitated and in agony." *Id.* at 745. 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).

A majority of the Supreme Court in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. at 852; *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.

Outside of the legal context, the right to ameliorate pain is embedded in the professional and ethical standards 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.[15] Likewise, physicians have a moral and ethical duty to provide relief from pain and suffering.[16] This standard has, in fact, been in place since the inception of medical ethics in western culture.[17] The right to ameliorate severe pain and suffering and to prolong life is thus a fundamental liberty that is central to the Nation's history, legal traditions, and practices.[18]

For these reasons, in the absence of a compelling interest that would be furthered by such a proscription, the federal government cannot, consistent with the Due Process Clause, abridge the rights of seriously ill patients by preventing or deterring them from using medicine in a kind and quantity sufficient to relieve their pain or prolong their lives. In the face of an interest as powerful as the avoidance of physical suffering, the restoration of health, and the preservation of life,

> a state may not rest on threshold rationality or 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.

Glucksberg, 521 U.S. at 766

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[15]*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).

[16] *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.")

[17]*See, e.g.*, Amundsen, *Medicine, Society, and Faith in the Ancient and Medieval Worlds*, 33 (Johns Hopkins Univ. Press 1996) ("The treatise entitled *The Art* in the Hippocratic Corpus defines medicine as having three roles: doing away with the sufferings of the sick, lessening the violence of their diseases, and refusing to treat those who are overmastered by their diseases, realizing that in such cases medicine is powerless"); 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").

[18]*Cf. Vacco v. Quill*, 521 U.S. 793, 808 n.11 (1997) ("[J]ust as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen . . . unintended '. . . effect' of hastening . . . death").

If any right is implicit in the concept of "ordered liberty," *Poe v. Ullman*, 367 U.S. 497, 549 (1961) (Harlan J., dissenting), it is the right to seek medical assistance and to protect one's health and life by reasonable means that do not harm others.

b. 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 Plaintiffs -- to prevent governmental interference with their ability to act on doctors' treatment recommendations — is based in significant part on imperatives established by the physician-patient relationship. For this reason as well, Plaintiffs' rights must be accorded constitutional status.

The Supreme Court has acknowledged the sanctity of the physician-patient relationship in numerous substantive due process cases, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, doctors from Planned Parenthood violated a Connecticut law making it a crime to distribute contraceptives. *Id.* at 480. In finding that the criminalization of contraception violated a right guaranteed by the Due Process Clause, the Supreme Court relied on the fact that "[t]his 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 reproductive rights 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, with New York passing a physician-patient testimonial privilege in 1828. *See* 8 Wigmore on Evidence, § 2380 (rev. ed. 1961). Though physician-patient communication is "subject to reasonable licensing and regulation *by the State*" (*Casey*, 505 U.S. at 884) (emphasis added), when such regulation defeats the purpose of the physician-patient relationship by preventing the physician from fulfilling his or her duties, such regulation is impermissible. *See, e.g., Conant v. McCaffrey*, 172 F.R.D. 681, 694-95 (N.D. Cal. 1997) (holding that the federal government's statutory authority to regulate distribution and possession of drugs did not allow government to quash protected speech between physician and patient about cannabis).

Unless the Due Process Clause guarantees the unfettered communication and the freedom to act on physician advice concerning the treatment of serious illness, the related fundamental rights of bodily integrity, freedom from pain and suffering, and prolonging life will be rendered nugatory.

c. In Assessing Whether a Liberty 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 liberties and protect them in the same manner as those that are enumerated. *See, e.g., Casey*, 505 U.S. at 848 (1992) (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 liberty — 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.[19]

The People of a State have no more power to violate the United States Constitution than has their legislature. But where the People, or their representatives in state legislatures, act to protect a particular liberty, this provides invaluable guidance to judges who must distinguish fundamental rights from mere liberty interests. Such popular action indicates that a particular liberty 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 obtain and use marijuana for medical purposes . . . ." Cal. Health & Safety Code § 11362.5(b)(1)(A) (emphasis added).

III. DEFENDANTS' CONDUCT THREATENS PLAINTIFFS' RIGHTS UNDER THE MEDICAL NECESSITY DOCTRINE

In reaffirming its earlier holding in *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), this Circuit's decision in *United States v. Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109 (9th Cir. 1999) specifically and expressly applied the medical necessity doctrine to those suffering patients who need medical cannabis. The unanimous panel determined 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

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[19] 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).

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. 190 F 3d at 1115.

Although the Ninth Circuit's decision was subsequently reversed by the Supreme Court on other grounds in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), and remanded for further proceedings, the issue of the availability of a medial necessity defense for seriously ill patients was not addressed by the majority decision and was notably preserved by the Court's concurrence.

> 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.

532 U.S. at 501.

Plaintiffs are seriously ill patients and their caregivers for whom there is no alternative means of avoiding starvation or suffering without the benefits of medical cannabis. The medical necessity doctrine exists to protect these seriously ill patients, who possess and obtain medical cannabis for their own personal medical treatment when there is no alternative means of avoiding starvation or extraordinary suffering.

The Defendant's conduct, challenged here, deprives or threatens to deprive Plaintiffs of their medical cannabis used to treat or alleviate serious medical conditions and places Plaintiffs in justifiable fear of actual harm.

IV. UNDER THE FACTS OF THIS CASE, A PRELIMINARY INJUNCTION IS APPROPRIATE

Plaintiffs have demonstrated that they meet each and every standard justifying the issuance of a preliminary injunction. *American Motorcyclist Ass'n*, 714 F.2d at 965, *Idaho Sporting Congress*, 222 F.3d at 565; *Topanga Press*, 989 F.2d at 1528; *Gilder*, 936 F.2d at 422.

First, based on the numerous arguments presented here, there exists a significant probability of success on the merits by Plaintiffs. Plaintiffs' conduct is beyond the power of Congress to prohibit under the Commerce Clause. Plaintiffs' conduct is expressly authorized by the sovereign State of California pursuant to powers retained by the State and the People.

Plaintiffs are exercising their personal rights and liberties protected under the Fifth and Ninth Amendments. Plaintiffs' conduct, additionally, is the only alternative available to then to avert imminent harm, including starvation or extraordinary suffering.[20]

Second, from any perspective, the balance of hardships tilts sharply in Plaintiffs' favor. A preliminary injunction merely preserving the status quo during the pendency of this matter presents absolutely *no hardship* to Defendants, who would remain perfectly free, at their unfettered discretion, to engage in all other operations, including the deployment of resources toward vigorous prosecution of illicit drug traffickers. In contrast, without the protection of a preliminary injunction, Plaintiff patients are subject to enduring extreme suffering and pain without their medication, ultimately including starvation and death. It is difficult to imagine a more *grievous hardship*.

Third, Plaintiffs have made a strong showing that there is a significant threat of irreparable injury unless the Defendants are enjoined. Unless enjoined by this Court, at Defendants' hands or by their actions, Plaintiffs Angel and Monson will endure severe pain, spasms, and suffering and Plaintiff Angel will also experience, *inter alia*, nightmares, flashbacks, overwhelming anxiety, panic, seizures, nausea, life-threatening weight loss, malnutrition, cachexia, and starvation, and possibly a growing brain tumor and a return to paralysis -- all constituting irreparably injuries. Furthermore, Defendants' conduct demonstrates a violation of constitutionally protected rights, requiring no further showing of irreparable injury. *Associated Gen. Contractors of Calif.*, 950 F.2d at 1410; *Elrod*, 427 U.S. at 373; *Topanga Press*, 989 F.2d at 1528-1529.

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[20] As noted earlier, Plaintiffs' likelihood of success is to be examined in the context of the relative injuries to the parties and the public. 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. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). Here, the risk to Defendants is low or even non-existent and the constitutional questions raised and the harm to Plaintiffs are substantial. For purposes of the granting of a preliminary injunction, Plaintiffs, thus, need only make a low showing of success on the merits.

Fourth, the public interest strongly favors granting the injunction. There is an undeniable public interest in the availability of a doctor-recommended treatment to ameliorate the medical conditions of the seriously ill Plaintiffs in this action. The People and the State of California have, by statute, expressly identified the dominant public interests involved in maintaining and promoting good public health of citizens. Moreover, as noted above, authority to enact public health legislation is a power reserved to the States. See, *e.g, Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This is the exact same position taken in litigation by Defendant Ashcroft, himself, as then-Governor of the State of Missouri, and confirmed by the U.S. Supreme Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). "The Constitution created a Federal Government of limited powers. . . . U.S. Const., Amdt. 10. . . . This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society . . . . " *Id.* at 457-8. "Perhaps the principal benefit of the federalist system is a check on abuses of government power. 'The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties."'" *Id.* at 458.

Due to the gravity of the consequences here, it is even more important in this case for the Court to enter a preliminary injunction against Defendants in order to "ensure the protection of" Plaintiffs' "fundamental liberties."

CONCLUSION

This Court should preliminarily enjoin Defendants' unconstitutional intrusions into the utilization by Plaintiffs of California's Compassionate Use Act for the relief of pain and suffering pending resolution of the important legal and constitutional issues presented in this case. Every day that Defendants remain unenjoined, Plaintiffs face the very real likelihood of reprisal by

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Defendants with serious and disastrous consequences for Plaintiff patients' already precarious health. Accordingly, this Court should grant Plaintiffs' motion for a preliminary injunction.

Dated: 29 October 2002

Respectfully submitted,

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