

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARTIN J. JENKINS, JUDGE

| | | |
|-------------------------|---|-------------------|
| ANGEL MCCLARY RAICH, |) | |
| ET AL. , |) | |
| |) | |
| |) | |
| PLAINTIFFS, |) | |
| |) | |
| VS. |) | NO. C-02-4872 MJJ |
| |) | |
| JOHN ASHCROFT, ET AL. , |) | |
| |) | |
| |) | |
| DEFENDANTS. |) | |
| _____ |) | |

SAN FRANCISCO, CALIFORNIA
TUESDAY, DECEMBER 17, 2002

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS: LAW OFFICES OF ROBERT RAICH
 1970 BROADWAY, SUITE 1200
 OAKLAND, CALIFORNIA 94612
BY: ROBERT RAICH, ESQ.

 LAW OFFICES OF DAVID M. MICHAEL
 THE DEMARTINI HISTORICAL
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 294 PAGE STREET
 SAN FRANCISCO, CALIFORNIA 94102
BY: DAVID M. MICHAEL, ESQ.

(APPEARANCES CONTINUED ON NEXT PAGE.)

REPORTED BY: SAHAR MCVICKAR, RPR - OFFICIAL REPORTER
 UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

(COMPUTERIZED TRANSCRIPTION BY ECLIPSE)

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APPEARANCES, CONTINUED:

FOR PLAINTIFFS: RANDY E. BARNETT, ESQ.
 PROFESSOR OF LAW
 BOSTON UNIVERSITY SCHOOL OF LAW
 765 COMMONWEALTH AVENUE
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FOR DEFENDANTS: UNITED STATES DEPARTMENT OF JUSTICE
 CIVIL DIVISION
 FEDERAL PROGRAMS BRANCH
 20 MASSACHUSETTS AVENUE, N.W.
 WASHINGTON, D.C. 20530
BY: MARK T. QUINLIVAN, ESQ.
 SENIOR COUNSEL

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1 DECEMBER 12, 2002

9:30 A.M.

2 P R O C E E D I N G S

3 THE CLERK: CALLING CIVIL MATTER NUMBER 02-4872,

4 ANGEL MCCLARY RAICH, ET AL., VERSUS JOHN ASHCROFT, ET AL.

5 COUNSEL, PLEASE STEP FORWARD AND STATE YOUR

6 APPEARANCES.

7 MR. RAICH: GOOD MORNING, YOUR HONOR.

8 THE COURT: GOOD MORNING.

9 MR. RAICH: ROBERT RAICH FOR THE PLAINTIFF.

10 MR. BARNETT: RANDY BARNETT FOR THE PLAINTIFF.

11 MR. MICHAEL: JACOB MICHAEL FOR THE PLAINTIFFS, YOUR

12 HONOR.

13 MR. QUINLIVAN: GOOD MORNING, YOUR HONOR.

14 MARK QUINLIVAN FOR THE DEFENSE.

15 THE COURT: OKAY. THIS MATTER IS ON FOR THE
16 PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION. AND THE RECORD

17 SHOULD REFLECT THAT I HAVE READ AND CONSIDERED THE PAPERS

18 SEVERAL TIMES, AND I SUSPECT THAT I WILL AGAIN; IT RAISES SOME

19 VERY INTERESTING AND COMPELLING ISSUES. AND I HAVE LOOKED AT

20 THE DECLARATION AND READ MOST OF THE PERTINENT CASE LAW.

21 I THINK THAT THE WAY TO PROCEED WOULD BE JUST TO
22 GIVE YOU, SORT OF, AN OVERVIEW OF SOME OF THE CONCERNS THAT I
23 HAVE AND THEN ALLOW YOU TO SPEAK TO THOSE ISSUES.

24 I THINK, FOR THE MOST PART, IT'S WELL BRIEFED.

25 THERE ARE SOME INTERSECTIONS THAT RAISE CONFLICTS THAT

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1 ULTIMATELY I'M GOING TO HAVE TO RESOLVE, JUST IN THE WAY THE
2 BRIEFING COMES IN AND THE WAY THAT YOU VIEW, FOR INSTANCE, THE
3 NINTH CIRCUIT AUTHORITY THAT THE GOVERNMENT BELIEVES IS
4 BINDING, AND THE PLAINTIFF'S BROADER VIEW, IT SEEMS TO ME, THAT
5 THOSE CASES REALLY ARE NOT BINDING, AND THAT THE COURT IS NOT
6 AT ALL ESTOPPED BY EXISTING CASE LAW FROM DETERMINING WHETHER
7 OR NOT THE PARTICULAR FACTS IN THIS CASE, WHEN VIEWED IN THE
8 CONTEXT OF THE CONGRESS' COMMERCE CLAUSE POWERS, THAT THE
9 STATUTE, OR STATUTES AT ISSUE, DO NOT AFFORD THIS COURT THE
10 POSSIBILITY OF FINDING THAT THESE STATUTES ARE CONSTITUTIONAL,
11 JUST ON THE COMMERCE CLAUSE ITSELF.

12 SO LET ME GO THROUGH ON THOSE ISSUES. I HAVE A FEW
13 QUESTIONS ON THE NINTH AND TENTH AMENDMENT ISSUES, AND THEN
14 SOME OBSERVATIONS WITH RESPECT TO THE PROPRIETY OF WHETHER OR
15 NOT THERE IS A NECESSITY DEFENSE GIVEN THE SUPREME COURT'S
16 DECISION IN CANNABIS BUYER'S.

17 I WILL BE CANDID WITH YOU ABOUT MY VIEW ON THAT;
18 EVEN THOUGH THEY DON'T SPECIFICALLY DECIDE THAT ISSUE, I THINK
19 JUSTICE THOMAS' OPINION GIVES US SOME -- A PRETTY GOOD IDEA THE
20 WAY THE COURT SEES THAT ISSUE. BUT I THINK THAT IS THE TAIL
21 WAGGING THE DOG HERE. I THINK THERE ARE BIGGER ISSUES HERE
22 THAT YOU'VE BRIEFED WELL.

23 SO THE WAY THAT I SEE THIS IS, I'VE LOOKED AT
24 BRAMBLE AND KIM AND VISMAN AND TISOR; I LOOKED AT THOSE CASES,
25 AND IT STRIKES ME THAT THE ISSUE OF THE COMMERCE CLAUSE AND ITS

1 RELATIONSHIP TO THESE PARTICULAR FACTS, POSSESSION AND
2 CULTIVATION, IN THE CONTEXT OF WHAT 215 SANCTIONS HAS NOT
3 REALLY BEEN DECIDED.

4 WITH THE CAVEAT, IT STRIKES ME THAT THE CLOSEST CASE
5 THAT I SEE IN THE NINTH CIRCUIT IS THE VISMAN CASE. AND THERE
6 IS A CULTIVATION COMPONENT ON THE FACE OF THE FACTS HERE. AND
7 YOU DON'T REALLY DEAL WITH THAT IN TERMS OF THE AUTHORITY THAT
8 HE CITES, PARTICULARLY IN LIGHT OF VISMAN.

9 VISMAN, IT SEEMS TO ME, EVEN THOUGH IT IS PRIOR IN
10 TIME TO LOPEZ AND MORRISON, WE COULD TALK ABOUT THE ALARCON
11 DECISION IN VISMAN. AND I THINK ALARCON IS THE AUTHOR OF KENT
12 AND OTHER DECISIONS, TOO. AND IT'S PRETTY CLEAR THAT VISMAN,
13 AT LEAST, SPEAKS TO SOME OF THE ISSUES RAISED HERE ON THE
14 CULTIVATION SIDE, NOT NECESSARILY THE POSSESSION SIDE OF THESE
15 ISSUES. AND I WANT TO SEE IF WE CAN TEASE AT THAT AND TALK
16 ABOUT THAT A LITTLE BIT IN TERMS OF THE COMMERCE CLAUSE
17 ANALYSIS.

18 SO A COUPLE OF QUESTIONS: IS THERE SOME DISTINCTION
19 TO BE MADE IN THE NINTH CIRCUIT AUTHORITY, AND I'M REALLY
20 SPEAKING TO VISMAN HERE, AS TO WHETHER OR NOT THE 841 OR 844
21 PASS MUSTER UNDER THE COMMERCE CLAUSE IN THE SCENARIO WHERE YOU
22 HAVE ONE OF THE PLAINTIFFS WHAT IS ACTUALLY CULTIVATING AND
23 USING, POSSESSING, MARIJUANA, AND THE OTHER PLAINTIFF, WHO
24 SEEMS TO BE -- THE FACTS SEEM TO BE A LITTLE MORE ANALOGOUS TO
25 CANNABIS BUYERS. SHE IS OBTAINING MARIJUANA FROM THE DOE

1 PLAINTIFFS. AND THERE IS CERTAINLY AN ARGUMENT TO BE MADE THAT
2 WHILE IT MAY BE WITHIN THE USE OF THE STATUTE, THE STATE
3 STATUTE, THERE IS DISTRIBUTION THERE.

4 SO I'M INTERESTED IF THERE IS A BASIS TO DISTINGUISH
5 HERE, IN TERMS OF THE POSSESSION, HOW IT OCCURS AND HOW THAT
6 CONDUCT READS ON THE STATUTES AT ISSUE, AND THEN HOW THAT LINES
7 UP WITH THE CASES THAT WE HAVE, SOME DISCUSSION ABOUT THAT.

8 NOW, TISOR IT'S PRETTY CLEAR TO ME, IS PRIMARILY A
9 DISTRIBUTION CASE. THAT IS THE CASE THAT WAS AUTHORED BY JUDGE
10 ALARCON. BRAMBLE, INVOLVES A POSSESSION COUNT. IT ALSO
11 INVOLVES OTHER ACCOUTREMENTS OF THE DRUG TRADE; I THINK THERE
12 WERE SCALES AND THINGS OF THAT NATURE. AND IN A VERY, VERY
13 SPARTAN FASHION, JUDGE FOGEL SAYS THERE THAT SECTION 844(A) IS
14 CONSTITUTIONAL, AND SHE RELIES ON KIM AND TISOR.

15 SO IT'S INTERESTING TO ME, AND I'M INTERESTED IN
16 YOUR VIEW, SINCE THE STATUTE AT ISSUE THAT WAS CHARGED, 844, IS
17 IN THE MIX. AND THE BRAMBLE DECISION FINDS IT PASSES
18 CONSTITUTION MUSTER. NOW, CLEARLY THIS IS BEFORE MORRISON, BUT
19 IT IS POST-LOPEZ.

20 ALL RIGHT, VISMAN IS AN EARLIER DECISION, AGAIN,
21 AUTHORED BY JUDGE ALARCON, THE SAME AUTHOR OF THE TISOR
22 DECISION. AND IT IS AS CLOSE A FACTUAL ANALOG TO THIS CASE, IT
23 SEEMS TO ME. WE'RE TALKING ABOUT A PATCH OF MARIJUANA THAT WAS
24 ROOTED IN CALIFORNIA SOIL. AND THE COURT SEEMS TO TAKE ON THAT
25 ISSUE AS A PURELY INTRA-STATE ANALYSIS.

1 WHAT IS INTERESTING TO ME THERE IS THAT
2 JUDGE ALARCON CLEARLY INDICATES -- PARROTS THE FINDINGS MADE BY
3 CONGRESS WITH RESPECT TO INTERSTATE ACTIVITIES IN CONTROLLED
4 SUBSTANCES AND THEN IN THE CASE OF THE COURT, THAT IS, THE
5 NINTH CIRCUIT, WILL NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF
6 CONGRESS, UNLESS THE RELATION OF SUBJECT MATTER TO CONGRESS IS
7 CLEARLY NONEXISTENT.

8 NOW, I READ THAT LANGUAGE AS CURIOUSLY SIMILAR TO
9 WHAT THE SUPREME COURT SAYS IN MORRISON. IT'S ALMOST PRESAGING
10 THE SUPREME COURT ULTIMATELY DID IN MORRISON IN ITS DISCUSSION
11 OF ATTENUATION AND THE BROAD-BASED KIND OF FINDINGS THAT WERE
12 NOT SUFFICIENT IN MORRISON TO BRING THE ACTIVITY THAT CONGRESS
13 SOUGHT TO REGULATE WITHIN THE POWERS OF ARTICLE 1, SECTION 9.

14 SO SOME DISCUSSION OF THE DISTINCTION BETWEEN --
15 EXCUSE ME, CULTIVATION AND POSSESSION IN TERMS OF HOW WE VIEW
16 THIS NINTH CIRCUIT LAW, AND SOME DISCUSSION OF THE NINTH
17 CIRCUIT'S DECISION IN VISMAN, REALIZING THAT IT IS PRE-MORRISON
18 BUT IT SEEMS TO ME HAS SOMETHING TO SAY ON THESE ISSUES.

19 THE PLAINTIFF HAS NOT HAD A CHANCE TO RESPOND TO THE
20 SUBMISSION OF JUDGE FOGEL'S DECISION IN THE WOMEN'S ALLIANCE
21 CASE, YOU MAY WANT TO ADDRESS THAT. I REALIZE THAT IT SETS UP
22 A BIT DIFFERENT, BUT IT ALSO ADDRESSES THE -- THE UNDERLYING
23 PREDICATE FOR THAT WAS CULTIVATION AND RETURN OF PROPERTY UNDER
24 41(E), IF I RECALL THAT DECISION CORRECTLY.

25 IT ALSO STRIKES ME AS A DECISION THAT DOESN'T

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1 ENCOMPASS THE POSSESSION COMPONENT HERE, IT FOCUSES ON THE
2 CULTIVATION COMPONENT, WHICH IS RAISED IN THESE FACTS, IT SEEMS
3 TO ME. AND SO IN THAT WAY HE RELIES ON VISMAN. SO I WOULD BE
4 INTERESTED IN YOUR VIEWS WITH RESPECT TO THAT. THAT'S ALL ON
5 THE ISSUE OF WHETHER OR NOT THERE IS BINDING NINTH CIRCUIT
6 AUTHORITY THAT THIS COURT HAS TO FOLLOW, WHICH IS PART OF THE
7 GOVERNMENT'S ANALYSIS.

8 THEN I WANT TO TURN A LITTLE BIT FROM THAT, BECAUSE
9 I DO HAVE MORRISON SITTING OUT THERE. AND IT STRIKES ME THAT
10 WHEN THE COURT LOOKS AT THE SUPREME COURT'S DISCUSSION OF THE
11 APPROPRIATE METHODOLOGY FOR A COMMERCE CLAUSE ANALYSIS, IT
12 CERTAINLY DID FIND DISFAVOR WITH RESPECT TO THE SPECIFICITY OF
13 THE FACTUAL FINDINGS MADE BY CONGRESS THAT ALLOW THE EXERCISE
14 OF COMMERCE POWERS IN A WAY THAT CONTINUES TO ABIDE BY THIS
15 DELICATE BALANCE BETWEEN STATE AND FEDERAL SOVEREIGNS.

16 AND I'M INTERESTED IN A BIT MORE DISCUSSION ABOUT
17 WHETHER WE'RE REALLY TALKING ABOUT, FROM THE GOVERNMENT'S VIEW,
18 A BROAD REGULATORY ACT THAT HAS WITHIN IT A CLASS OF
19 ACTIVITIES, INCLUDING THE ACTIVITIES THAT RELATE TO POSSESSION,
20 AND IF THOSE FINDINGS REALLY RELATE TO A CLASS OF ACTIVITY, OR
21 IF WE'RE REALLY TALKING ABOUT HERE A DIFFERENT, A SUBCLASS OF
22 ACTIVITIES, FOR WHICH THE FINDINGS, ARGUABLY, ARE NOT SPECIFIC
23 AS TO THE NEXUS BETWEEN THIS PURELY INTRASTATE ACTIVITY. THAT
24 IS SOUGHT TO BE REGULATED UNDER THE STATUTE.

25 NOW, I WILL JUST TELL YOU MY VIEW OF THESE CASES;

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1 I'M NOT CLEAR THAT'S WHY YOU'RE HERE, AS TO WHETHER OR NOT
2 WE'RE REALLY TALKING ABOUT THE SAME CLASS OF ACTIVITIES. AND I
3 THINK JUDGE SCHROEDER'S DECISION ON THE 844 COMPONENT, THAT
4 DECISION SEEMS TO STAND FOR THE PROPOSITION THAT WE ARE; IT'S
5 ARGUABLE. BUT IT IS EQUALLY AS ARGUABLE THAT IT IS NOT. AND
6 IF IT IS NOT, THEN THE COURT WOULD BE LOOKING AT THE UNDERLYING
7 FINDINGS TO DETERMINE WHETHER OR NOT THEY ARE SUFFICIENT, IF
8 THEY PASS MUSTER ON MORRISON.

9 I'VE HEARD VERY LITTLE FROM THE GOVERNMENT ON THAT
10 ISSUE, SO I WOULD LIKE TO HEAR SOME DISCUSSION WITH RESPECT TO
11 WHETHER WE'RE TALKING ABOUT THE SAME CLASS OF ACTIVITIES, AND
12 IF THERE IS A DISTINCTION TO BE MADE, WHICH IS ACKNOWLEDGED IN
13 JUDGE BREYER'S OPINION, IN 5 FED. SUP, THE INITIAL OPINION THAT
14 WENT UP.

15 HE SEEMS TO INDICATE, WITHOUT DECIDING, THAT WHAT
16 CONGRESS WAS REALLY LOOKING AT WAS TRAFFICKING IN PROMULGATING
17 THOSE FINDINGS. BUT HE DIDN'T HAVE TO DECIDE THAT QUESTION
18 THAT YOU PUT BEFORE ME TODAY, BECAUSE THERE WAS A VERY STRONG
19 DISTRIBUTION COMPONENT UNDER 841(A). AND IT'S ARGUABLE THAT I
20 DON'T HAVE THAT. AND SO I'M INTERESTED IN YOUR VIEW, JUST SO I
21 KNOW WHAT YOUR POSITION IS ON THAT QUESTION.

22 OKAY. THAT'S WHERE I THINK THE RUBBER WILL MEET THE
23 ROAD ON THE CONGRESS CLAUSE ANALYSIS, TO BE QUITE HONEST WITH
24 YOU. NOW, CONANT; LET ME JUST SORT OF GIVE YOU SOME SENSE OF
25 HOW I VIEW CONANT, BECAUSE YOU'VE CITED TO CONANT. AND YOU

1 HAVEN'T REALLY ADDRESSED AND I THINK I UNDERSTAND WHY.

2 TO THE EXTENT THAT CONANT IS A DECISION THAT READS
3 ON THE ANALYSIS HERE, IT CERTAINLY READS ON THE ANALYSIS IN A
4 WAY THAT SORT OF UNDERGIRDS THIS BALANCE BETWEEN THE REACH OF
5 COMMERCE POWER AND MAKING SURE THAT THERE IS NO OVERREACH THAT
6 WOULD UPSET THE BALANCE BETWEEN THE STATE SOVEREIGN AND THE
7 FEDERAL GOVERNMENT. FEDERALISM, THE SHORTHAND WAY.

8 THE PROBLEM OR CONCERN I HAVE ABOUT CONANT IS THIS:
9 AND THE COMMANDEERING DOCTRINE AS DISCUSSED THEREIN, THE
10 CONCERN THAT I HAVE IS THAT JUDGE KOZINSKI'S CONCURRENCE,
11 ALTHOUGH HE ARTICULATES OTHER INTERESTS THAT SUPPORT THE
12 EXERCISE OF EQUITY JURISDICTION IN JUDGE ALSUP'S CASE, IT IS
13 VERY CLEAR ON THAT RECORD THAT THERE WAS NO ISSUE OF ANY
14 CONDUCT THAT WOULD VIOLATE A FEDERAL STATUTE.

15 JUDGE SMITH, HAVING THE CASE BEFORE JUDGE ALSUP,
16 EXCEPTED OUT AIDING AND ABETTING, THE VIOLATION OF THE FEDERAL
17 STATUTE. WHAT WAS AT ISSUE THERE WAS THE COMMUNICATION ISSUE
18 AND A RECOMMENDATION WITH RESPECT -- PROVIDED BY POSITIONS.
19 AND IN THAT CONTEXT THE INJUNCTION ISSUED, AND IT WAS AFFIRMED.
20 JUDGE KOZINSKI GOES A LITTLE FURTHER IN HIS CONCURRENCE TO TALK
21 ABOUT OTHER INTERESTS THAT ARE IMPACTED THAT SUPPORT THE
22 EXERCISE OF EQUITY JURISDICTION THERE.

23 TWO THINGS COME UP FOR ME IN THE DISCUSSION OF THAT
24 DECISION BY JUDGE KOZINSKI ONE IS, IT'S CERTAINLY NOT THE LAW
25 OF THAT CASE. BUT TWO, IT STRIKES ME THAT THIS RECORD RAISES A

1 QUESTION THAT WAS NOT RAISED IN CONANT, WHICH IS THAT THE
2 GOVERNMENT, AND YOU ALLEGE AS THE BASIS FOR PRELIMINARY
3 INJUNCTIVE RELIEF, WOULD SEEK TO EXERCISE ITS AUTHORITY TO
4 BRING PROSECUTIONS UNDER FEDERAL STATUTES FOR THE VERY KIND OF
5 CONDUCT THAT CONANT SEEMS TO EXCEPT OUT IN ITS RESOLUTION OF
6 THE ISSUES BEFORE IT.

7 THERE WAS NO QUESTION, AND I THINK THE OPINION EVEN
8 SAYS, THAT ALL PARTIES AGREE THAT THERE IS NO ISSUE OF
9 VIOLATION OF FEDERAL STATUTE HERE. YOU CERTAINLY WOULD HAVE
10 THAT HERE. SO THAT IS A FACTOR, THAT JUDGE KOZINSKI IN HIS
11 CONCURRENCE, DOESN'T HAVE TO ACCOUNT FOR IT. AND SO I'M
12 INTERESTED IN WHETHER THAT MAKES A DIFFERENCE HERE.

13 TWO; IT'S ALSO INTERESTING TO ME THAT IN THAT
14 DECISION JUDGE KOZINSKI, CLEARLY WELL THOUGHT OUT, JUDGE
15 KOZINSKI TAKES A BRIEF STAB AT THE ISSUE OF WHETHER OR NOT THE
16 STATUTE 841 WOULD PASS MUSTER UNDER THE COMMERCE CLAUSE. HE
17 INDICATES THAT HE THINKS WHERE YOU'RE TALKING ABOUT PURELY
18 INTERSTATE ACTIVITY, THERE'S SIGNIFICANT PROBLEMS UNDER THE
19 COMMERCE CLAUSE.

20 HE SITES LOPEZ FOR THAT PROPOSITION. AND, OF
21 COURSE, IN LOPEZ, THERE WERE NO FINDINGS THAT UNDERGIRD THAT
22 PARTICULAR STATUTORY ENACTMENT. SO IT CAUSES ME TO WONDER WHAT
23 IS THE SUPPORT FOR THE STATEMENT THAT IS MADE IN THE OPINION
24 THAT THERE MAY BE PROBLEMS UNDER THE COMMERCE CLAUSE.

25 HE ALSO CITES THE SUPREME COURT'S DECISION IN

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1 CANNABIS BUYERS. AND, OF COURSE, WHEN YOU READ JUSTICE THOMAS'
2 OPINION, THE SUPREME COURT WAS INVITED IN THAT DECISION TO
3 CONSTRUE THE STATUTE IN A WAY WITH RESPECT TO MEDICAL NECESSITY
4 THAT WOULD NOT RAISE CONSTITUTIONAL PROBLEMS, THE CONGRESS
5 CLAUSE, NINTH AMENDMENT, THE TENTH AMENDMENT. AND
6 JUSTICE THOMAS SAYS WE DON'T NEED TO APPLY THAT MAXIMUM. THIS
7 STATUTE IS CLEAR ON ITS FACE. SO IT DID NOT DECIDE THOSE
8 CONSTITUTIONAL ISSUES. IT WAS A CLEAR ANALYSIS OF THE LANGUAGE
9 OF THE STATUTE, IN TERMS OF WHETHER THAT PARTICULAR FEDERAL
10 STATUTE WOULD COUNTENANCE A NECESSITY DEFENSE.

11 SO BOTH THE DECISIONS THAT JUSTICE -- THAT
12 JUDGE KOZINSKI CITES DON'T RESOLVE THE CONSTITUTIONAL ISSUE
13 THAT HE RAISES IN THE OPINION. AND SO I HAVE SOME CONCERNS AS
14 TO WHETHER OR NOT, EVEN IF I RELY ON THAT FOR SUPPORT -- I
15 THINK ULTIMATELY ON THE CONGRESS CLAUSE ISSUE IT'S GOING TO
16 COME BACK TO THE INITIAL COMMENTS THAT I MADE ON THE
17 RESOLUTION, AND THAT CONANT DOESN'T REALLY ENLIGHTEN US ON
18 THAT.

19 THEN ON THE QUESTION OF THE NINTH AMENDMENT AND DUE
20 PROCESS, LIBERTY INTEREST ISSUE, I HAVE SIGNIFICANT CONCERNS
21 WHEN I READ WASHINGTON VERSUS GLUXBERG, AND SOME OF THOSE CASES
22 THAT THE SUPREME COURT'S JURISPRUDENCE IN THIS AREA MAKES IT
23 VERY CLEAR, MAKES TWO THINGS VERY CLEAR; THAT THE COURT IS TO
24 TREAD LIGHTLY AND CAUTIOUSLY WITH DEFINING LIBERTY INTERESTS AS
25 A MATTER OF SUBSTANTIVE DUE PROCESS. IN FACT, IT EVEN SAYS

1 THERE OUGHT TO BE CONCRETE EXAMPLES IN DEFINING THOSE
2 INTERESTS. AND THOSE ARE INTERESTS THAT HAVE BEEN ROOTED IN
3 THE HISTORICAL CONTEXT OF DEVELOPMENT OF THIS COUNTRY AND THOSE
4 RIGHTS.

5 WHEN I LOOK AT THE PLAINTIFF'S BRIEF AS TO WHAT THAT
6 LIBERTY INTEREST IS HERE, IT IS THE INTEREST OF BEING FREE FROM
7 PAIN AND PRESERVING LIVES WITH THE ASSISTANCE OF PHYSICIANS.
8 AND IT STRIKES ME THAT THE SUPREME COURT'S JURISPRUDENCE IN
9 THIS AREA -- I HAVE CONCERNS ABOUT NOT HAVING MUSHY
10 DEFINITIONAL LIMITS ON WHAT CONSTITUTES LIBERTY INTERESTS FOR
11 SUBSTANTIVE DUE PROCESS PURPOSES.

12 SO, JUST INITIALLY, EVEN BEFORE WE GET TO RUTHERFORD
13 AND CARNOHAN, I HAVE SOME CONCERNS ABOUT SHORING UP WHAT THE
14 LIBERTY INTEREST IS, AND THEN SPEAKING TO ME ABOUT WHAT CASES
15 SUPPORT THAT VIEW.

16 JUST ANOTHER POINT ABOUT CONANT; ONE OF THE THINGS I
17 WOULD BE INTERESTED IN HEARING FROM YOU ABOUT IS THAT CONANT IN
18 DISCUSSION OF THE COMMANDEERING DOCTRINE, DISTINGUISHES BETWEEN
19 FEDERAL SOVEREIGN, COMPELLING A STATE SOVEREIGN TO DECLARE A
20 LAW ILLEGAL OR MANDATORY CONDUCT OF THAT NATURE. AND IT SAYS
21 THAT THE REMEDY IN THAT KIND OF SITUATION IS FOR THE
22 GOVERNMENT, THAT IS THE FEDERAL GOVERNMENT, TO RATCHET UP THE
23 PROSECUTION FOR THE REGULATORY ENFORCEMENT SCHEME.

24 I JUST WONDER HOW THAT PLAYS ON THE RECORD, WHICH IS
25 -- THE BASIS OF THE ARGUMENT HERE IS THAT THESE FOLKS WOULD BE

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1 PROSECUTED. AND ISN'T THAT CONSISTENT WITH ENFORCING A
2 REGULATORY SCHEME IN THE WAY THAT EVEN CONANT DISCUSSES THAT?

3 OKAY, THEN I JUST HAVE A CONCERN; THERE'S A LOT OF
4 DISCUSSION IN THE PAPERS -- I SHOULDN'T SAY A LOT, BUT THERE'S
5 SOME DISCUSSION IN THE PAPERS WITH RESPECT TO THE COURT'S
6 EXERCISE OF EQUITY JURISDICTION. AND, OBVIOUSLY, THE PUBLIC
7 INTEREST FINDINGS ARE A COMPONENT OF THAT.

8 IT JUST STRIKES ME THAT THERE IS A MIGHTY CONFLICT
9 WITH RESPECT TO FINDINGS ON THE PUBLIC INTEREST COMPONENT WHEN
10 YOU LOOK AT THE INTERESTS OF THE STATE UNDER 215, AND THE
11 INTEREST THAT ARE ESPOUSED IN THE CONTROLLED SUBSTANCES ACT,
12 THEY SEEM TO CONFLICT. BUT NOBODY WANTS TO TALK ABOUT
13 PREEMPTION HERE, JUST SORT OF AN UNDERLYING THEME IN A LOT OF
14 THESE CASES. AND I DON'T THINK THAT WE HAVE TO RESOLVE THIS ON
15 PREEMPTION GROUNDS; TO BE QUITE HONEST, I DON'T.

16 I RAISE THIS BECAUSE I'M INTERESTED IN HOW YOU BOTH
17 SEE, NOTWITHSTANDING THE BRIEFING, THE COURT'S ANALYSIS AND
18 RESOLUTION OF THE PUBLIC INTEREST COMPONENT OF THE EQUITY
19 BALANCE IN THE CONTEXT OF PRELIMINARY INJUNCTION.

20 NOW, I REALIZE THAT THAT WAS A BIT, BUT I WANTED TO
21 GIVE YOU SOME SENSE OF MY THINKING ON IT. IF YOU DON'T ANSWER
22 THE QUESTIONS THAT I'VE ASKED, I'LL PUT YOU BACK ON THEM.

23 WHY DON'T WE START WITH THE PLAINTIFF IN THE MATTER.
24 AND IT DOESN'T MATTER TO ME IF ONE OR MORE OF YOU WANT TO ARGUE
25 CERTAIN POINTS, THAT'S FINE.

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1 MR. MICHAEL: THANK YOU, YOUR HONOR. DAVID MICHAEL.

2 I REALLY APPRECIATE YOUR COMMENTS.

3 THE COURT: PARDON ME?

4 MR. MICHAEL: I REALLY APPRECIATE YOUR COMMENTS --

5 THE COURT: FINE. OKAY.

6 MR. MICHAEL: -- AND YOUR GUIDEPOST. AND I

7 APPRECIATE THE COURT ALLOWING ALL OF US TO DISCUSS IT, BECAUSE

8 IT IS IMPORTANT, AND THERE ARE SUBSTANTIAL CONSTITUTIONAL

9 ISSUES THAT ARE A LITTLE BIT MURKY, SHALL WE SAY, IN THE

10 PRESENT ATMOSPHERE. AND I'M VERY MUCH APPRECIATIVE OF

11 PROFESSOR BARNETT COMING OUT HERE FROM BOSTON TO HELP WITH THIS

12 ARGUMENT.

13 I WOULD LIKE TO ADDRESS BRIEFLY AND THEN PROBABLY

14 PASS THE BATON TO MR. BARNETT AND MR. RAICH THE ISSUE THAT YOU

15 MENTIONED REGARDING VISMAN AND JUDGE FOGEL'S DECISION AND HOW

16 YOU LOOK AT THAT IN TERMS OF THE COMMERCE CLAUSE.

17 IT REMINDS ME, ANECDOTALLY, OF A LITTLE FLEERS

18 (PHONETIC) BUBBLE GUM COMIC THAT I READ ONCE. YOU REMEMBER THE

19 OLD --

20 THE COURT: YOU MEAN THE --

21 MR. MICHAEL: -- THE ONE CENT -- IT USED TO BE ONE

22 CENT WHEN I WAS A KID. YOU'D BUY THE BUBBLE GUM AND YOU'D OPEN

23 IT UP.

24 THE COURT: I THINK WE'RE THE SAME GENERATION.

25 MR. MICHAEL: I THINK SO. AS A MATTER OF FACT, I

1 USED TO BUY THIS UP IN BERNAL HEIGHTS IN SAN FRANCISCO WHEN I
2 WAS A KID. I DON'T KNOW WHY IT STUCK WITH ME, BECAUSE I WAS
3 SUCH A YOUNG KID THEN. BUT WHEN I WAS OLDER I REMEMBERED IT.

4 AND IT WAS ONE OF THE KIDS HAVING THE COMIC BOOKS
5 LOOKING FOR SOMETHING UNDER A STREETLIGHT, AND A BUDDY OF HIS
6 CAME UP TO HIM, AND HE SAID, "WHAT ARE YOU LOOKING FOR?" HE
7 SAYS, "WELL, I LOST A NICKEL AND I'M LOOKING FOR IT." HE SAID,
8 "WHERE DID YOU LOSE IT?" HE SAYS, "OVER THERE."

9 HE SAYS, "WELL, WHY ARE YOU LOOKING OVER HERE UNDER
10 THE STREETLIGHT?" HE SAYS, "BECAUSE THE LIGHT'S BETTER UNDER
11 HERE." AND I THOUGHT THAT WAS REALLY KIND OF APT, AND SOMEHOW
12 THAT WOULD HAVE SOME EFFECT ON HOW I VIEW LIFE.

13 HERE IS HOW I SEE THAT APPLIES HERE: I THINK IF YOU
14 LOOK AT VISMAN AND, ACTUALLY ALL OF THE CASES CITED BY THE
15 GOVERNMENT, AND, AS THE COURT KNOWS, WE MADE AN EFFORT TO
16 ADDRESS ALL OF THE THOSE CASES, EITHER IN THE FOOTNOTE IN OUR
17 REPLY, AND WE RESEARCHED THEM AND TRIED TO SHOW HOW THEY WERE
18 DISTINGUISHED. AND VISMAN WE SPECIFICALLY ADDRESSED, I THINK,
19 IN OUR ORIGINAL MOTION IN TALKING ABOUT VISMAN AND KIM ALSO.

20 THE ISSUE ISN'T SO MUCH WHETHER OR NOT WE'RE TALKING
21 ABOUT PLANTS ROOTED IN THE GROUND, PLANTS BEING CULTIVATED, I
22 THINK THAT'S A MISFOCUS. IT'S NOT A DISTINCTION BETWEEN
23 DISTRIBUTION, PEOPLE TRANSPORTING, PEOPLE HAVING LOOSE PACKED
24 DRUGS, YOU KNOW, THAT THEY'RE TRANSPORTING BACK AND FORTH
25 WHETHER IT'S INTERSTATE OR INTRASTATE COMMERCE, AS OPPOSED TO

1 PLANTS GROWING IN THE GROUND.

2 I THINK VISMAN REALLY WAS LOOKING AT THE CONCEPT OF
3 PLANTS GROWING IN THE GROUND. AND THE VISMAN DEFENDANT WAS
4 FOCUSING ON STRICTLY THAT ACTIVITY, SAYING THAT THAT PURELY
5 INTRASTATE ACTIVITY OF GROWING PLANTS IN THE GROUND DOES NOT
6 SUBSTANTIALLY AFFECT INTERSTATE COMMERCE.

7 THAT IS NOT THE ISSUE WE ARE ADDRESSING HERE, AND
8 THAT'S NOT OUR CONCERN. WE ARE NOT ARGUING THAT THE CONTROLLED
9 SUBSTANCES ACT DOES NOT APPLY TO CULTIVATION OF MARIJUANA. THE
10 CONTROLLED SUBSTANCES ACT MAY VERY WELL APPLY TO CULTIVATION OF
11 MARIJUANA, BECAUSE THERE IS AN ARGUMENT THAT CAN BE MADE AND
12 THAT CONGRESS SAW FIT AND VARIOUS CASES HAVE SUPPORTED, THAT
13 THE PURELY INTRASTATE ACTIVITY OF TRAFFICKING OR POSSESSING
14 WITH THE INTENT TO TRAFFIC OF MARIJUANA IS SOMETHING THAT DOES
15 SUBSTANTIALLY AFFECT INTERSTATE COMMERCE, WHETHER IT'S
16 ECONOMIC, OR WHETHER IT'S JUST UNDER THE LOPEZ SUBSTANTIALLY
17 AFFECT INTERSTATE COMMERCE ANALYSIS. WE'RE NOT DISPUTING THAT
18 CONTENTION. I THINK THAT'S VERY, VERY IMPORTANT.

19 SO WHEN JUDGE FOGEL, IN THE WAMM CASE, SAYS THAT
20 VISMAN IS CONTROLLING BECAUSE VISMAN TALKS ABOUT THE PURELY
21 INTRASTATE CULTIVATION OF MARIJUANA, HE'S LOOKING UNDER A
22 STREETLIGHT THAT WE'RE NOT UNDER; THAT'S NOT WHERE OUR ARGUMENT
23 IS.

24 OUR ARGUMENT, AND I THINK THIS IS ONE OF THE LYNCH
25 PINS OF WHAT WE ARE SAYING TO THIS COURT, IS THAT THE

1 ACTIVITIES OF OUR PLAINTIFFS ARE A DISTINCT CLASS OF ACTIVITY;
2 THE POSSESSION, THE MANUFACTURING, THE USE OF MEDICAL CANNABIS
3 TO RELIEVE THEIR PAIN AND SUFFERING DONE UNDER STATE LAW --

4 THE COURT: WELL, WHY DOES THE COMMERCE CLAUSE CARE
5 WHAT YOU DO WITH IT, OR FOR WHAT PURPOSE YOU DO WITH IT?

6 MR. MICHAEL: BECAUSE I THINK THAT --

7 THE COURT: I MEAN, HAVE YOU SEEN THAT ANALYSIS IN
8 ANY CASE --

9 MR. MICHAEL: I --

10 THE COURT: -- AS OPPOSED TO, AS OPPOSED TO --

11 MR. MICHAEL: BUT --

12 THE COURT: -- FINDINGS MADE BY CONGRESS THAT MAY
13 REFLECT THE PURPOSE FOR WHICH THE STATUTE IS ENACTED.

14 THE ISSUE THAT IT WAS POSSESSED FOR MEDICAL USE,
15 MEDICINAL USE, JUST FOR PURPOSES OF DETERMINING WHETHER OR NOT
16 THE REGULATED ACTIVITY IS ONE THAT IS -- DOESN'T SUBSTANTIALLY
17 AFFECT THE COMMERCE CLAUSE; I DON'T SEE WHY THAT IS SO
18 RELEVANT.

19 MR. MICHAEL: I WOULD LIKE MR. BARNETT TO ADDRESS
20 THAT ALSO, BUT INITIALLY I WILL SAY THAT THIS IS, FROM THAT
21 PERSPECTIVE, A CASE OF FIRST IMPRESSION. YOU ARE DEALING WITH
22 A CASE OF FIRST IMPRESSION IF YOU CONSIDER THAT WE ARE TALKING
23 ABOUT A DISTINCT CLASS OF PEOPLE SEPARATE FROM ALL THE CLASSES
24 OF PEOPLE THAT THE CASES HAVE DEALT WITH, IN TERMS OF THE
25 COMMERCE CLAUSE AND IT'S ABILITY TO REGULATE PURELY INTRASTATE

1 ACTIVITIES.

2 THE COURT: RIGHT, THAT'S WHAT I'M SAYING; IT'S THE
3 ACTIVITY THEY ENGAGE IN THAT ARE THE SUBJECT OF THE REGULATION.

4 MR. BARNETT: I BELIEVE, YOUR HONOR --

5 AND RANDY BARNETT FOR THE RECORD --

6 I BELIEVE, YOUR HONOR, THAT THE PURPOSE IS ALL OVER
7 THE LOPEZ AND MORRISON DECISIONS, WHEN THEY DISTINGUISH BETWEEN
8 ECONOMIC AND NONECONOMIC ACTIVITIES. TO MAKE THAT DISTINCTION
9 IS A PURPOSE OF DISTINCTION.

10 THE VERY SAME ACTIVITY COULD BE ECONOMIC OR
11 NONECONOMIC, DEPENDING ON THE PURPOSE FOR WHICH IT'S ENGAGED
12 IN. SEXUAL ACTIVITY, FOR EXAMPLE, TYPICALLY NONECONOMIC. IF
13 IT IS ECONOMIC IT'S A WHOLE DIFFERENT THING. BUT THE VERY SAME
14 ACT COULD BE ONE OR THE OTHER, DEPENDING ON THE PURPOSE FOR
15 WHICH IT'S ENGAGED.

16 THAT IS ONE OF THE MAJOR REASONS WHY THE ACTIVITIES
17 OF OUR CLIENTS ARE OUTSIDE THE PROPER SCOPE OF CONGRESS, UNDER
18 THE COMMERCE POWER, BECAUSE OF THE PURPOSES FOR WHICH IT WAS
19 ENTERED INTO. AND IT IS WHAT DISTINGUISHES OUR CASE FROM THE
20 OTHER NINTH CIRCUIT CASES, IN WHICH THE PURPOSE FOR WHICH THOSE
21 VERY SAME ACTIVITIES, IN SOME CASES, WERE ENGAGED IN WAS
22 ECONOMIC.

23 THE COURT: RIGHT.

24 SO THE -- YOUR POSITION IS, THE COURT OUGHT TO LOOK
25 AT, AND CERTAINLY, IT'S PART OF THE FACTUAL RECORD, THE PURPOSE

1 FOR WHICH THE CULTIVATION WAS UNDERTAKEN IN THIS CASE. AND YOU
2 BELIEVE THAT LOOKING AT LOPEZ AND THE OTHER DECISIONS, THAT
3 THAT RAISES A PRINCIPLE FACTUAL DISTINCTION THAT TAKES IT
4 OUTSIDE --

5 MR. BARNETT: YES.

6 THE COURT: -- OF THE FINDINGS THAT HAVE BEEN MADE
7 THAT SUPPORT THE REGULATED -- THE STATUTE THAT SEEKS TO
8 REGULATE THIS CONDUCT?

9 MR. BARNETT: ABSOLUTELY.

10 FIRST OF ALL, JUST THE MERE FACT THAT THE ACTIVITIES
11 MIGHT BE ECONOMIC DOESN'T NECESSARILY GIVE CONGRESS POWER OVER
12 IT IF THEY'RE WHOLLY INTRASTATE ECONOMIC ACTIVITIES. IF
13 THEY'RE WHOLLY -- UNDER LOPEZ AND MORRISON, AND EVEN UNDER
14 WICKARD VERSUS FILBURN, IF THERE ARE WHOLLY INTERSTATE ECONOMIC
15 ACTIVITIES, THEN THERE HAS TO BE A SUBSTANTIAL EFFECT ON
16 INTERSTATE COMMERCE, AND THERE HAVE TO BE ADEQUATE FINDINGS
17 ABOUT THE PARTICULAR CLASS, WHETHER THOSE WHOLLY INTRASTATE
18 ECONOMIC ACTIVITIES HAVE THAT EFFECT.

19 BUT UNDER LOPEZ AND MORRISON, ALTHOUGH
20 JUSTICE REHNQUIST DIDN'T COMMIT HIMSELF TO THIS, HE STRONGLY
21 SUGGESTED THAT IN OUR HISTORY WE HAVEN'T EXTENDED THE REACH OF
22 THE COMMERCE CLAUSE TO WHOLLY -- TO COMPLETELY NONECONOMIC
23 ACTIVITIES, LIKE THE POSSESSION OF A GUN, LIKE THE COMMISSION
24 OF THE CRIME OF RAPE. BECAUSE OF THAT, THOSE ACTIVITIES WERE
25 SIMPLY OUT THE SCOPE OF THE COMMERCE CLAUSE, WITHOUT EVEN

1 HAVING TO GET INTO THE SUBSTANTIAL EFFECTS TEST. AND THAT'S
2 WHAT WE ARE IN OUR CASE, YOUR HONOR.

3 THE COURT: AND HOW DOES THE COURT SEE THAT? ISN'T
4 THERE SOME PARSING OF THE FINDINGS, WITH RESPECT TO THE
5 STATUTORY ENACTMENT AS A WHOLE IN MAKING THE ARGUMENT THAT
6 YOU'RE MAKING?

7 MR. BARNETT: YES. I MEAN, THIS IS A DIFFICULT
8 ISSUE, THE ISSUE OF WHAT IS THE RELEVANT CLASS. BUT HERE'S THE
9 PROPOSITION THAT CAN'T BE SQUARED WITH LOPEZ AND MORRISON; IT
10 CANNOT BE LEFT TO THE GOVERNMENT TO DEFINE THE CLASS AS IT
11 WISHES, SUCH THAT THE BIGGER THE CLASS IT CHOOSES TO
12 REGULATE --

13 THE COURT: YEAH, THAT WOULD TURN -- THERE WOULD BE
14 NO LIMITATION --

15 MR. BARNETT: RIGHT. I MEAN, THE LOGIC OF THE
16 GOVERNMENT'S POSITION IS THAT THE LARGER THE CLASS THAT IT
17 CHOOSES TO REGULATE, THE BIGGER THE SUBSTANTIAL EFFECT IT HAS,
18 THEREFORE THE GREATER ITS POWERS.

19 THE MORE POWER IT CLAIMS, THE GREATER IS ITS
20 JUSTIFICATION FOR CLAIMING IT; THAT JUST CAN'T BE RIGHT.

21 THE COURT: OKAY.

22 MR. MICHAEL: JUST A NOTE ON THAT, YOUR HONOR, IS
23 VISMAN, IF YOU REALLY LOOK AT VISMAN, IT WAS CULTIVATION FOR
24 THE PURPOSE OF TRAFFICKING AN ILLEGAL SUBSTANCE. THE
25 DEFENDANTS IN VISMAN READILY ADMITTED THAT THEY WERE GROWING

1 THOSE MARIJUANAS FOR THE PURPOSE OF DISTRIBUTION, FOR THE
2 PURPOSES OF SALES, I THINK THE DEFENDANT WAS GOING TO DO IT
3 WITH HIS BROTHER. HE CANDIDLY ADMITTED TO THE GOVERNMENT, I
4 THINK EVEN IN PRETRIAL, WHETHER OR NOT IT WAS A PLEA
5 DISPOSITION, THAT THAT'S, IN FACT, WHAT HIS INTENT WAS.

6 IF YOU LOOK AT THE CONTROLLED SUBSTANCES ACT, ALSO,
7 WHEN YOU LOOK AT THE HISTORY OF IT, AND I THINK WE'VE LAID IT
8 OUT IN OUR BRIEFS, EVERYWHERE THAT IT IS MENTIONED IN TERMS OF
9 A CONCERN THAT CONGRESS HAD FOR WHETHER OR NOT THEY WERE
10 TREADING ON STATE RIGHTS AND STATE SOVEREIGNTY, EVERYWHERE THAT
11 THE COMMERCE CLAUSE IS MENTIONED, IN TERMS OF THAT PARAGRAPH
12 THAT TALKS ABOUT THE PURE INTRASTATE ACTIVITY THAT THEY CHOOSE
13 TO REGULATE, THEY ALWAYS TALK ABOUT THE ILLEGAL TRAFFICKING,
14 ILLEGAL TRAFFICKING OF CONTROLLED SUBSTANCES.

15 WE ARE NOT IN THAT CLASS. THERE IS NO ECONOMIC
16 COMPONENT, AS PROFESSOR BARNETT HAS SAID. AND THERE IS NO
17 TRAFFICKING, THERE'S NO ILLEGAL TRAFFICKING.

18 SO IF CONGRESS WANTS TO SAY, UNDER THE CONTROLLED
19 SUBSTANCES ACT, THAT WE'RE CONCERNED ABOUT THE ILLEGAL
20 TRAFFICKING OF CONTROLLED SUBSTANCES, AND JUST BECAUSE IT'S
21 PURELY INTRASTATE ACTIVITY, IF IT'S TRAFFICKING, CONTROLLED
22 SUBSTANCES STILL APPLIES.

23 THE COURT: SO YOUR VIEW WOULD ALSO BE THAT THE
24 FINDINGS IN THE ACT ITSELF, WHICH CONGRESS PROMULGATED THAT
25 TALKS ABOUT THE SWELLING EFFECT OF PURELY INTRASTATE ACTIVITY,

1 WOULD BE SORT OF A BROAD TYPES OF FINDINGS THE COURT REJECTED
2 IN MORRISON, RIGHT? THAT'S YOUR VIEW?

3 MR. BARNETT: WELL, THE ARGUMENT IS THAT IF YOU'RE
4 GOING TO ACCEPT THAT, IT WOULD JUSTIFY ANYTHING ALL THE TIME,
5 AND THAT CAN'T PASS SCRUTINY UNDER MORRISON OR LOPEZ.

6 MR. RAICH: YOUR HONOR? IF WE MIGHT ADDRESS THE
7 SIZE OF THE CLASS THAT WE'RE TALKING ABOUT?

8 AND THIS IS ROB RAICH.

9 A REPORT ISSUED BY GOVERNMENT, THE GENERAL
10 ACCOUNTING OFFICE, JUST A COUPLE OF WEEKS AGO, SINCE WE FILED
11 OUR REPLY BRIEF, FOUND THAT IN THE STATES WHICH ALLOW MEDICAL
12 CANNABIS, THE POPULATION WHICH IS BENEFITING FROM THESE LAWS IS
13 VERY SMALL. IN FACT, IT IS ABOUT 0.05 PERCENT OF THE GENERAL
14 POPULATION THAT IS BENEFITING FROM MEDICAL CANNABIS. THAT'S
15 JUST FROM THE STATE LAWS, IN GENERAL, NOT EVEN CONSIDERING THE
16 VERY SMALL SUBSET OF THAT, WHICH WE HAVE IN THIS CASE,
17 INVOLVING PATIENTS WHO NEED MEDICAL NECESSITY AND HAVE THAT
18 DOCTRINE TO RELY UPON.

19 SO THIS CLASS IS EXTREMELY SMALL. THIS IS NOT THE
20 CLASS THAT CONGRESS HAD BEEN CONSIDERING WHEN IT PASSED THE
21 CONTROLLED SUBSTANCES ACT.

22 NOW, TO THE EXTENT THAT THERE IS NO COMMERCE
23 INVOLVED AT ALL IN THIS CASE, YOU TAKE AN EVEN SMALLER SUBSET
24 OF THAT CLASS. YOU MENTIONED EARLIER THAT YOU THOUGHT THAT
25 PLAINTIFF ANGEL WAS ACTUALLY INVOLVED WITH SOMETHING MORE

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1 SIMILAR TO THE OAKLAND CANNABIS BUYERS COOPERATIVE CASE,
2 BECAUSE SHE WAS OBTAINING CANNABIS FROM CAREGIVERS; IN FACT, IT
3 IS HER OWN CANNABIS WHICH IS BEING CULTIVATED FOR HER BY --

4 THE COURT: I DON'T KNOW THAT IS A PRINCIPLE
5 DISTINCTION TO MAKE, TO BE QUITE HONEST WITH YOU.

6 MR. RAICH: WELL, THERE'S CERTAINLY NO MONEY WHICH
7 IS CHANGING HANDS.

8 THE COURT: THAT'S A DIFFERENT --

9 MR. RAICH: -- AND THAT WOULD BE ANOTHER EASY WAY TO
10 DISTINGUISH THE WAMM CASE AND JUDGE FOGEL IN THAT CASE, EVEN
11 THOUGH HE ASSUMED, WITHOUT DECIDING, THERE WAS NO DISTRIBUTION,
12 IN FACT, IN THAT CASE. WE HAVE AN ORGANIZATION WITH AN
13 EXECUTIVE DIRECTOR AND AN AGRICULTURAL DIRECTOR, WHICH IS
14 PROVIDING THIS TO 250 PEOPLE IN SANTA CRUZ. THIS ORGANIZATION
15 SURVIVES ON FUNDING, ET CETERA; THESE ARE ALL FACTS WHICH
16 CLEARLY DISTINGUISH THE WAMM CASE FROM OUR CASE.

17 AND, AS I MENTIONED, NO MATTER HOW YOU LOOK AT IT,
18 THE VERY CLASS THAT WE'RE INVOLVED WITH IS MINISCULE BY
19 COMPARISON TO THE ACTIVITY INVOLVED IN ILLEGAL DRUG TRAFFICKING
20 IN COMMERCE ACROSS INTERSTATE LINES, WHICH IS WHAT CONGRESS WAS
21 ATTEMPTING TO REGULATE WITH THE CONTROLLED SUBSTANCES ACT.

22 THE COURT: RIGHT.

23 AND THEN THE CIRCUIT'S DECISION IN BRAMBLE, AND I
24 START WITH THIS DECISION, THERE'S NOT MUCH ANALYSIS HERE. AND
25 IT'S CERTAINLY PRE-MORRISON, BUT IT IS -- THIS IS THE -- THIS

1 GOES TO THE QUESTION OF WHETHER IT'S TRULY AN ISSUE OF FIRST
2 IMPRESSION, OR IF I'M BOUND, AS THE GOVERNMENT SAYS, BY
3 EXISTING NINTH CIRCUIT LAW.

4 THERE IS CERTAINLY A POSSESSION COMPONENT HERE.
5 FACTUALLY, WE DON'T HAVE IN THIS -- AT LEAST AS I READ BRAMBLE,
6 SOME OF THE FACTS THAT YOU HAVE AUGMENTED IN THE RECORD HERE
7 WITH RESPECT TO THE FACT THAT THERE IS NO MONETARY PAYOUT FOR
8 THE RECEIPT OF THE CANNABIS HERE.

9 AND SO THOSE FEATURES THAT AT LEAST BACK UP AGAINST
10 THE ISSUE OF WHETHER OR NOT THERE IS AN EFFECT ON COMMERCE ARE
11 NOT CLEARLY ENUNCIATED IN THE BRAMBLE OPINION. HOWEVER, THE
12 BRAMBLE OPINION DOES SPEAK TO THE ISSUE OF, IN THAT CONTEXT,
13 POSSESSION. AND IT INDICATES IN THAT LIGHT A DEFERENCE FOR
14 FINDINGS THAT HAVE BEEN MADE BY CONGRESS AND VERY CONCLUSORILY
15 INDICATES THAT, IN FACT, THESE SECTIONS ARE CONSTITUTIONAL
16 UNDER THE COMMERCE CLAUSE.

17 MR. RAICH: IN BRAMBLE, FOR ONE THING, THAT WAS, OF
18 COURSE, NOT A MEDICAL CASE. IN ANOTHER SITUATION THERE WAS A
19 LOT OF OTHER ILLEGAL ACTIVITY INVOLVED THERE, AND I THINK THE
20 COURT LOOKED BEYOND THAT AND ASSUMED THERE MAY BE ECONOMIC
21 ACTIVITY INVOLVED WITH ILLEGAL MARIJUANA IN THAT CASE. THE
22 COURT DID SAY IT WAS ILLEGAL, NOT COMPLETELY LEGAL UNDER STATE
23 LAW, AS THIS IS.

24 THE COURT: DO EITHER MORRISON OR LOPEZ OVERRULE THE
25 FINDINGS IN A LEGAL DETERMINATION MADE IN BRAMBLE?

1 MR. RAICH: YOUR HONOR, WHAT MORRISON AND LOPEZ
2 STAND FOR IS THE FACT THAT THE COURT MUST LOOK BEYOND THE MERE
3 WORDS THAT CONGRESS USED WHEN MAKING ITS, QUOTE/UNQUOTE,
4 "FINDINGS." CONGRESS COULD HAVE, IN 1970, PASSED A LAW BASED
5 ON A FINDING THAT THERE IS NO USE FOR COMPUTERS IN THE HOME.
6 WE WOULD KNOW NOW, IN THE YEAR 2002, THAT THAT FINDING WAS
7 INCORRECT.

8 CONGRESS COULD PASS A LAW STATING THAT THE MOON IS
9 MADE OF GREEN CHEESE. THE COURT COULD LOOK BEYOND THAT AND
10 DETERMINE, WELL, THERE IS SOME EVIDENCE THAT IS NOT CORRECT.

11 IN THIS PARTICULAR CASE, SITTING AS A CHANCELLOR IN
12 EQUITY WITH THE VERY LIVES OF THE PLAINTIFFS IN THE BALANCE,
13 YOUR HONOR IS PERFECTLY CAPABLE TO WEIGH THE EQUITIES, TO WEIGH
14 WHAT FACTS ARE TRUE ON THE FACTS THAT YOU WOULD DETERMINE, AND
15 WHICH FINDINGS ARE MERE WORDS WITHOUT ANY FACTS BEHIND THEM.

16 YOUR HONOR IS FREE TO CONSIDER WHAT HARM WOULD COME
17 TO THE GOVERNMENT FROM SIMPLY EXCLUDING THE FOUR PLAINTIFFS
18 WHICH SEEK THE COURT'S PROTECTION, VERSUS WHAT HARM WOULD COME
19 TO THE PLAINTIFFS IF THEY DON'T RECEIVE THAT PROTECTION, VERY
20 SERIOUS HARMS HERE. THAT IS ANOTHER BIG DISTINCTION.

21 AND IT'S WHEN THIS COURT SITS IN THAT CONTEXT, YOUR
22 HONOR, THAT YOU'RE ABLE TO LOOK BEYOND WHAT CONGRESS SAID, SEE
23 WHAT IT REALLY MEANT AND REALIZE THAT THE BRAMBLE SITUATION IS
24 NOT THE SITUATION WE HAVE HERE IN THIS COURT.

25 PERHAPS CONGRESS CONSIDERED THE BRAMBLE SITUATION

1 WHEN IT PASSED THE CONTROLLED SUBSTANCES ACT, BUT IT'S CLEAR
2 THAT CONGRESS WAS NOT CONSIDERING THE SITUATION OF THE
3 PLAINTIFFS BEFORE YOU TODAY.

4 MR. MICHAEL: IN A WAY, YOUR HONOR, WE CAN
5 SYMPATHIZE WITH THE NINTH CIRCUIT'S PREVIOUS DECISIONS
6 REGARDING THE ISSUE OF POSSESSION, OF CONTROLLED SUBSTANCES AND
7 THE CONCEPT FOR THE --

8 THE COURT: SEE, WHAT COMES UP FOR ME IS, THAT
9 ARGUMENT MAKES VERY GOOD SENSE TO ME. IT ALSO RUNS INTO THE
10 COMMERCE CLAUSE JURISPRUDENCE THAT SAYS IF I FIND THAT CONGRESS
11 HAS SOUGHT TO REGULATE A CLASS OF ACTIVITY, THE DIMINIMUS
12 IMPACT ON OTHERS, WHICH IS KIND OF WHAT YOU ARGUE BUT NOT
13 EXACTLY -- YOUR ARGUMENT REALLY IS THAT THE COURT OUGHT TO LOOK
14 AT THOSE FINDINGS AND REALLY MAKE A DETERMINATION AS TO WHETHER
15 OR NOT THOSE FINDINGS SUPPORT THE REGULATION ON THESE FACTS.

16 YOU JUST MADE AN ARGUMENT -- COUNSEL JUST MADE AN
17 ARGUMENT, ABOUT WHAT HAS TRANSPIRED IN THE INTERVENING 20
18 YEARS. AND YOU USED A COMPUTER ANALOGY IN THE HOME TO INDICATE
19 AS SUCH. AND I DON'T KNOW THAT I AGREE THAT THE COMMERCE
20 CLAUSE ANALYSIS RISES OR FALLS ON THAT. I THINK YOU WERE
21 REALLY TALKING ABOUT THE COURT'S EQUITY JURISDICTION MORE AND
22 SPEAKING MORE OF THE COMPONENTS OF THAT ANALYSIS.

23 BUT IT STRIKES ME THAT THERE IS, AND YOU'VE BOTH
24 DISCUSSED IT, THAT BODY OF CASE LAW THAT TALKS ABOUT THE
25 IMPACTS, REALLY, SORT OF AS APPLIED ARGUMENT, AND DEFERENCE TO

1 CONGRESS WITH RESPECT TO FINDINGS WHICH, IN THE FIRST INSTANCE,
2 SUPPORT THE EXERCISE OF ITS COMMERCE CLAUSE POWER. AND IT JUST
3 STRIKES ME THAT THAT IS REALLY WHERE THE ARGUMENT RISES OR
4 FALLS.

5 MR. MICHAEL: RIGHT. REAL BRIEFLY, YOU MENTIONED,
6 AND I JUST CAUGHT THAT, SOMETHING ABOUT THAT LOPEZ PEREZ
7 ANALYSIS ABOUT INDIVIDUAL MEMBERS OF A CLASS. AND I THINK THAT
8 IF WE GET CAUGHT IN THAT SORT OF A QUAGMIRE OF TRYING TO TALK
9 ABOUT THIS CASE IN TERMS OF THESE PLAINTIFFS AND ANYBODY WHO
10 THESE PLAINTIFFS IDENTIFY WITH, IN TERMS OF THAT PARTICULAR
11 CLASS THAT JUDGE KOZINSKI DEFINED, IF YOU TRY TO TALK ABOUT
12 THEM WITHIN THE CONTEXT OF BEING INDIVIDUALIZED MEMBERS OF THIS
13 BROAD CLASS THAT THE CSA HAS ALWAYS APPLIED TO AND THAT ALL THE
14 CASES HAVE DECIDED, YOU WILL NEVER BE ABLE TO GRAPPLE WITH THE
15 ESSENTIAL ISSUES.

16 THE COURT: WELL, NO, AND THAT'S THE GOVERNMENT'S
17 POSITION.

18 MR. MICHAEL: RIGHT, THEY WANT THEM THERE. THEY
19 WANT THEM THERE.

20 BUT THE POINT WE'RE MAKING, AND I THINK THAT, QUITE
21 HONESTLY, JUDGE KOZINSKI GOT IT RIGHT, AND JUDGE FOGEL DIDN'T
22 GO FAR ENOUGH IN COMING TO THAT POSITION, IS THAT THE PEOPLE
23 THAT WE ARE TALKING ABOUT ARE MEMBERS OF A COMPLETELY DISTINCT
24 CLASS. AND IF THE COURT CAN DISTINGUISH THEM, IN TERMS OF THE
25 DESCRIPTION OF THAT DISTINCT CLASS AS BEING DEFINED AS

1 JUDGE KOZINSKI'S DEFINED THEM, THEN YOU CAN, IN FACT, SEPARATE
2 THEM FROM THE REACHES OF THE COMMERCE CLAUSE UNDER THE
3 CONTROLLED SUBSTANCES.

4 THE COURT: I DON'T DISAGREE. I THINK THAT THE
5 ANALYSIS WOULD THEN BE MORE APT UNDER MORRISON AT THAT
6 JUNCTURE.

7 MR. BARNETT: I JUST WANT TO REINFORCE ONE THING
8 THAT COUNSEL SAID, AND THAT IS THAT THE ISSUE ISN'T THE
9 DIMINIMUS IMPACT ON A PARTICULAR DEFENDANT OR A PARTICULAR
10 INDIVIDUAL'S BEHAVIOR. AND THE CASE LAW THAT SUGGESTS THAT
11 INDIVIDUAL CASES SHOULDN'T BE LITIGATED THAT WAY, WE DON'T
12 DISPUTE, WE DON'T DISAGREE WITH.

13 THE ISSUE DOES GET BACK TO THE CLASS ISSUE.

14 THE COURT: OKAY.

15 MR. BARNETT: ONCE YOU'VE DEFINED A CLASS, THEN
16 ANYBODY WITHIN THAT CLASS, WE DON'T CONSIDER THE DIMINIMUS
17 IMPACT OR NOT OF ANY -- SO THAT'S A VERY IMPORTANT THING.
18 THOSE CASES TAKE US AWAY FROM THE CENTRAL ISSUE THAT WE'RE
19 FACED WITH HERE.

20 THE OTHER POINT I WANTED TO BRING US BACK TO A
21 LITTLE BIT WAS SIMPLY THE LOPEZ/MORRISON DEVELOPMENT, BECAUSE
22 IF YOU HAVE CASES THAT ARE DECIDED IN BETWEEN LOPEZ AND
23 MORRISON, THOSE CASES ARE SUSPECT. AND THE REASON WHY THEY'RE
24 SUSPECT IS BECAUSE AFTER LOPEZ -- LOPEZ EMPHASIZED NOT ONLY THE
25 ECONOMIC/NONECONOMIC DISTINCTION, WHICH WAS THEN REAFFIRMED IN

1 MORRISON.

2 IT ALSO EMPHASIZED, OR AT LEAST IT WAS TAKEN TO
3 EMPHASIZE, THE LACK OF ANY FINDINGS WHATSOEVER. AND MANY OF
4 THE LOWER COURTS HAVE --

5 THE COURT: WHAT DO YOU MEAN? RUN THAT BY ME AGAIN.

6 MR. BARNETT: IN LOPEZ THERE WERE NO FINDINGS --

7 THE COURT: RIGHT. IN FACT, THE COURT EVEN SAYS
8 THEY'RE NOT NECESSARY, IF THEY COULD LOOK AT THE ENACTMENT THAT
9 TRANSPIRED AT THE TIME THAT FINDINGS WOULD NOT NECESSARILY BE
10 NECESSARY TO A DETERMINATION OF WHETHER IT PASSES MUSTER OR
11 NOT.

12 MR. BARNETT: WELL, THAT IS ALSO -- IT IS WHAT IT
13 SAYS, BUT AFTER LOPEZ, THAT'S NOT HOW THAT CASE WAS READ BY THE
14 LOWER COURTS.

15 THE COURT: THAT'S WHY I ASKED YOU WHETHER OR NOT
16 THOSE CASES ARE REALLY A WATERSHED FOR ANALYSIS UNDER THE
17 COMMERCE CLAUSE.

18 MR. BARNETT: LOPEZ AND MORRISON?

19 THE COURT: RIGHT, ABSOLUTELY.

20 MR. BARNETT: YEAH.

21 THE COURT: AND YOU PROBABLY KNOW THAT THERE ARE
22 PEOPLE WHO DISAGREE WITH YOU.

23 MR. BARNETT: WELL, EVERYBODY AGREES THEY'RE A
24 WATERSHED, THEY JUST DON'T NECESSARILY LIKE THE WATERSHED THAT
25 IT REPRESENTS.

1 THE ONE -- AFTER -- WELL, I SHOULD SAY THIS: AFTER
2 LOPEZ IT WAS DENIED OF ITS WATERSHED BECAUSE -- BY COMMENTATORS
3 AND BY LOWER COURTS. LOWER COURTS SAID AND COMMENTATORS SAID,
4 "LOOK, IF CONGRESS PASSES" -- "ALL CONGRESS HAS TO DO TO FIX
5 THIS PROBLEM IS TO MAKE FINDINGS." IF CONGRESS MAKES FINDINGS,
6 THE COURT IS NOT GOING TO SCRUTINIZE THOSE FINDINGS, UNDER
7 LOPEZ. THEREFORE, LOPEZ IS KIND OF A SPORT CASE, AND IT'S NOT
8 GOING ANYWHERE. IT WASN'T A WATERSHED, YOU'RE RIGHT, THAT IT
9 WAS THE REACTION.

10 THE REASON WHY MORRISON WAS SUCH A SIGNIFICANT CASE,
11 AND WHY MANY PEOPLE PREDICTED IT WAS GOING TO COME OUT THE
12 OTHER WAY, IS BECAUSE OF THE EXTENSIVE FINDINGS, WHICH THE
13 COURT THEN AFFIRMED WAS A JUDICIAL MATTER, THAT THE COURT HAS
14 TO SCRUTINIZE THE FINDINGS. AND THAT'S WHY ANY CASE THAT IS
15 DECIDED BETWEEN LOPEZ AND MORRISON IS VERY LIKELY TO BE WRONG,
16 TO HAVE WRONGLY INTERPRETED LOPEZ. MORRISON GREATLY CLARIFIED
17 WHAT LOPEZ MEANT.

18 THE OTHER LAST POINT I WANTED TO MAKE ON THE CLASS
19 ISSUE -- I THINK WE PRETTY WELL COVERED IT, BUT THERE WAS ONE
20 FURTHER ISSUE.

21 THE CLASS THAT'S AT ISSUE IN OUR CASE WAS NOT
22 DEFINED BY US. THE CLASS AT ISSUE IN OUR CASE WAS DEFINED BY
23 PEOPLE OF THE STATE OF CALIFORNIA IN PROP 215. SO THIS IS NOT
24 A SITUATION WHERE WE'RE COMING INTO COURT AND SAYING, "YOUR
25 HONOR, WE HAVE DEVISED A VERY CAREFULLY MAPPED CLASS THAT WE

1 WANT TO YOU RECOGNIZE. WE ARE COMING INTO COURT TO DEFEND OUR
2 CLIENTS IN LIGHT OF A CLASS THAT THE SOVEREIGN STATE OF
3 CALIFORNIA HAS DEFINED." THAT, THEN, DOESN'T MEAN THAT WE GET
4 INTO THE SUPREMACY ARGUMENT.

5 THE COURT: I DON'T KNOW THAT I QUITE AGREE WITH
6 YOU. I THINK THAT, FOR PURPOSES OF ANALYSIS, THAT THE COURT IS
7 REALLY LOOKING AT THE CLASS AS DEFINED BY CONGRESS, WHAT
8 CONGRESS SOUGHT TO REGULATE, IN TERMS OF THE CLASS OF
9 ACTIVITIES. AND THEN IT COMPARES, IT SEEMS TO ME, THAT WITH
10 THE ACTIVITY THAT IS SOUGHT, OR IMPLICATED, BY THE ENACTMENT TO
11 SEE IF, IN FACT, IT'S WITHIN THE AMBIT. SO I COME AT A LITTLE
12 BIT DIFFERENTLY THAN YOU.

13 IT STRIKES ME, YES, THAT THERE IS A STATE ENACTMENT
14 HERE. AND AS YOU'VE SAID MANY TIMES IN THE PAPERS, THAT IS THE
15 WILL OF THE PEOPLE OF THE STATE OF CALIFORNIA, NO DOUBT ABOUT
16 THAT.

17 BUT I'M LOOKING AT THE FINDINGS TO SEE IF, IN FACT,
18 THOSE FINDINGS REALLY DO COUNTENANCE AND ENCOMPASS A CLASS OF
19 ACTIVITIES THAT IN -- THAT REALLY READS ON WHAT IS SET FORTH IN
20 THE STATUTE. IF IT DOES NOT, IF YOU ARE SUCCESSFUL IN
21 CONVINCING ME THAT WE'RE REALLY TALKING ABOUT A CLASS THAT WAS
22 -- THAT IS NOT A PART OF THE REGULATORY SCHEME, THAT IS A
23 SEPARATE AND DISTINCT CLASS, THEN THE COURT ENGAGES IN SOME OF
24 THE ANALYSIS OF THE FINDINGS TO DETERMINE WHETHER OR NOT THERE
25 REALLY IS SOME SUBSTANTIAL EFFECT ON COMMERCE.

1 AND THE FACTS THAT YOU'VE JUST ARGUED, THE PURPOSES
2 FOR WHICH THE CULTIVATION AND POSSESSION OF MARIJUANA IS HAD,
3 SEEM TO ME WOULD BE SIGNIFICANT ON DETERMINING WHETHER OR NOT
4 THERE IS ANY ECONOMIC COMPONENT FOR PURPOSES OF THE SUBSTANTIAL
5 EFFECTS TEST.

6 MR. BARNETT: I'M AFRAID I AM NOT FOLLOWING THE --
7 THE COURT: I DON'T SEE WHERE -- I DON'T AGREE WITH
8 YOU THAT THE STATE IN ENACTING, BY WAY OF INITIATIVE 215, IS
9 THE DETERMINING -- DETERMINANT AS TO WHAT THE CLASS OF ACTIVITY
10 THAT CONGRESS SOUGHT TO REGULATE; THAT'S WHAT I HEARD YOU SAY.

11 MR. BARNETT: OKAY, I WASN'T MAKING THAT POINT. I
12 WASN'T ARGUING --

13 THE COURT: OKAY.

14 MR. BARNETT: SO I'M GLAD TO HAVE A CHANCE TO
15 CLARIFY THAT.

16 I WASN'T ARGUING THAT WHAT THE STATE OF CALIFORNIA
17 DOES HAS ANYTHING TO DO WITH WHAT CONGRESS WAS TRYING TO DO.

18 THE COURT: OKAY.

19 MR. BARNETT: IT MAY HAVE SOMETHING TO DO WITH WHAT
20 IS IN THE CONGRESS' POWER TO DO.

21 THE COURT: THAT IS WHY WE'RE HERE.

22 MR. BARNETT: RIGHT. AND CONGRESS ONLY HAS THE
23 POWER TO REACH THIS CLASS, NOT DEFINED BY US, BUT DEFINED BY
24 THE STATE OF CALIFORNIA IF IT'S ECONOMIC ACTIVITY THAT IS SHOWN
25 TO HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE, AND IF

1 THIS CLASS -- SOME PORTION OF THIS CLASS MIGHT BE, ALTHOUGH
2 IT'S NOT BEFORE YOU, YOUR HONOR. OR, CONGRESS MAY HAVE NO
3 POWER WHATSOEVER TO REACH THAT CLASS, NOT WITHSTANDING WHAT IT
4 TRIED TO DO, ALTHOUGH I SUSPECT IT REALLY WASN'T TRYING TO
5 REACH THESE CLIENTS WHEN IT PASSED THE LAW. BUT THEY DON'T
6 HAVE THE POWER TO REACH THE --

7 THE COURT: WE'RE ON THE SAME PAGE.

8 MR. BARNETT: OKAY, THANK YOU.

9 MR. MICHAEL: I THOUGHT FOR A SECOND THERE YOU WERE
10 KIND OF TEASING THE COMMANDEERING ISSUE, YOU KNOW, IN SOME OF
11 THAT DISCUSSION. YOU MENTIONED EARLIER --

12 THE COURT: NO, I SAID TO YOU WHAT I HAD TO SAY
13 ABOUT THE COMMANDEERING ISSUE. I WASN'T TRYING TO TEASE
14 ANYTHING.

15 MR. MICHAEL: OKAY. NO, I WASN'T SAYING THAT -- IN
16 SORT OF MORE OF A POETIC WAY, YOU KNOW, BECAUSE THERE IS SOME
17 SORT OF AN ALLURE TO THE COMMANDEERING ISSUE IN THE WAY THAT
18 JUDGE KOZINSKI ADDRESSED IT.

19 HERE'S HOW -- I WOULD LIKE TO MAKE SOME COMMENT
20 BEFORE THE GOVERNMENT TALKS ABOUT THAT ISSUE, BECAUSE YOU
21 EXPRESSED SOME CONCERN.

22 IT SEEMS TO ME, WHEN YOU TALK ABOUT THE PRINCE
23 DECISION IN THE -- THE NEW YORK VERSUS THE UNITED STATES
24 DECISION THAT TALKS ABOUT THE COMMANDEERING DOCTRINE, THAT
25 THERE IS SOME CONCEPT ABOUT WHETHER OR NOT THE FEDERAL

1 GOVERNMENT CAN COMMAND STATE OFFICERS OR THE POLITICAL
2 SUBDIVISIONS TO ADMINISTER AND ENFORCE THE ADMINISTRATIVE LAWS,
3 OR THE LAWS OF THE FEDERAL GOVERNMENT, AND THAT'S WHERE THAT
4 COMMANDEERING DISPUTE COMES IN.

5 THE COURT: RIGHT.

6 MR. MICHAEL: AND I DON'T KNOW WHERE TO PUT THIS,
7 BUT I WANT TO OFFER IT UP TO THE COURT, IN TERMS OF THAT
8 CONCEPT, AND I HAVEN'T REALLY DEVELOPED IT IN MY OWN MIND,
9 EVEN, YOU KNOW?

10 IT SEEMS ASTOUNDING TO ME THAT WHAT WE'RE REALLY
11 TALKING ABOUT HERE, IN THE WHOLE SCHEME OF THINGS, MAYBE NOT
12 JUST THE ISOLATED ISSUES IN THIS CASE, BUT IN THE WHOLE SCHEME
13 OF THINGS, IS THE FEDERAL GOVERNMENT TAKING A POSITION THAT
14 THEY, IN FACT, CAN, AND PROBABLY SHOULD, IF THEY RECOGNIZE
15 THEIR MANDATE AS A LAW ENFORCEMENT ORGANIZATION, PROSECUTE
16 EVERY PERSON IN THE STATE OF CALIFORNIA WHO IN ANY WAY IS
17 INVOLVED WITH THE IMPLEMENTATION OF COMPASSIONATE USE ACT, PROP
18 215 OF THE CALIFORNIA LAW.

19 WHY SHOULDN'T THE GOVERNMENT, FEDERAL GOVERNMENT,
20 SAY THAT THEY CAN BE IN A POSITION WHERE THEY COULD PROSECUTE
21 THE OFFICE OF THE DISTRICT ATTORNEY OF THE CITY OF SAN
22 FRANCISCO, IF THEY IMPLEMENT A PROGRAM TO ACTUALLY CAUSE THAT
23 OFFICE TO DISTRIBUTE AND BE RESPONSIBLE FOR THE PROVIDING OF
24 MEDICAL CANNABIS --

25 THE COURT: SEE, WHAT I SAID TO YOU ABOUT THE

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1 COMMANDEERING ISSUE, WHICH IS RAISED EXTENSIVELY IN THE PAPERS
2 THROUGH THE CONANT DECISION IS THAT ONE OF THE CRUCIAL PIECES
3 THAT ARE MISSING IS THAT THERE WAS NO ISSUE OF FEDERAL LAW
4 ENFORCEMENT WITH RESPECT TO AN ALLEGED VIOLATION OF A FEDERAL
5 STATUTE; THE DISCUSSION IS A STEP OR TWO REMOVED. IT IS
6 FOCUSED ON WHETHER OR NOT A DOCTOR, AS A MATTER OF FIRST
7 AMENDMENT EXPRESSION, COULD MAKE A RECOMMENDATION, AND IT'S UP
8 TO THE END USER TO DECIDE WHAT HE OR SHE WANTS TO DO WITH THAT.

9 AND SO I CAN READ THE OPINION I HAVE, AND CERTAINLY
10 THERE IS LANGUAGE IN THE OPINION THAT SUPPORTS THE ARGUMENT
11 YOU'RE MAKING, BUT IT'S CLEARLY -- ONE, IT'S AN INCONCURRENCE,
12 AND IT'S DICTUM, IT SEEMS TO ME, WITH RESPECT TO THE ULTIMATE
13 HOLDING IN THAT CASE.

14 MR. MICHAEL: RIGHT.

15 THE COURT: AND WHAT I PUT YOU ON HERE WAS THE FACTS
16 AS YOU ALLEGED THEM, WHICH IS THE WHOLE BASIS THAT YOU'RE HERE
17 SEEKING INJUNCTIVE RELIEF, IS THAT THERE IS CONCERN AND FEAR,
18 PROBABLY RIGHTFULLY SO, GIVEN WHAT TRANSPIRED, I THINK, WITH
19 MR. MONSON, THAT THE FEDERAL GOVERNMENT IS GOING TO COME IN AND
20 TRY TO SEIZE THESE PLANTS, AND DO SO UNDER ONE OR MORE
21 STATUTES, OR REGULATIONS UNDER THE CONTROLLED SUBSTANCES ACT.

22 IN THAT CONTEXT, THEN IT SEEMS TO ME THE
23 COMMANDEERING ISSUE TAKES ON A LITTLE BIT DIFFERENT FEATURE,
24 BECAUSE YOU HAVE THE GOVERNMENT DOING, IN THIS CASE, EMPLOYING
25 ITS REGULATORY SCHEME AND SEEKING TO PROSECUTE UNDER THOSE

1 STATUTES IN A WAY THAT WAS TAKEN OFF THE TABLE IN CONANT; THAT
2 WASN'T THE ISSUE.

3 MR. BARNETT: BUT WHY WAS IT TAKEN OFF THE TABLE?
4 BECAUSE, AS YOU SAID, YOUR HONOR, IT WAS REMOVED. IT SEEMED
5 REMOVED FROM THE STATUTE.

6 THAT SEEMED OBVIOUS, EVEN OBVIOUS TO THE GOVERNMENT,
7 NOT WITHSTANDING THE FACT THAT THE GOVERNMENT TRIED TO REACH
8 THE PARTIES IN QUESTION THERE. BUT NEVERTHELESS, EVEN THEY
9 THOUGHT IT WAS BEYOND THEIR REACH.

10 OUR ARGUMENT HERE IS THAT WE'RE IN A SIMILAR CASE,
11 IT'S BEYOND THE REACH. IT'S NOT SO OBVIOUSLY BEYOND THE REACH
12 AS IT WAS THERE, BUT IT'S NEVERTHELESS BEYOND THE REACH. IT'S
13 AS -- I DON'T MEAN AS -- JUST AS IT'S BEYOND THE REACH TO REACH
14 THE PHYSICIANS WHO ARE COMMUNICATING WITH PATIENTS ABOUT PROP
15 215, IT'S ALSO BEYOND THE REACH TO REACH INDIVIDUALS WHO ARE
16 MAKING CANNABIS OF THEIR OWN CONFECTION IN CONFORMANCE WITH
17 PROP 215, IT'S BEYOND THE REACH, ALSO.

18 IT'S ALSO BEYOND THE REACH IF SOMEBODY NEEDS THE
19 HELP OF ANOTHER PERSON IN ORDER TO DO THAT, THAT'S BEYOND THE
20 REACH. SO IT'S ONLY THE WAY THAT WE CONSTRUCT WHAT IS BEYOND
21 THE REACH THAT DISTINGUISHES THAT CASE FROM THIS CASE.

22 THE COURT: BUT YOUR CONSTRUCTION OF IT RELIES IN
23 LARGE MEASURE ON YOUR VIEW THAT THE ENFORCEMENT MECHANISMS,
24 WHICH ARE CLEARLY IN OPERATION IF THERE IS AN ALLEGED VIOLATION
25 OF LAW, UPSETS THIS BALANCE, AND, IN FACT, WORKS THE SAME KIND

1 OF CONCLUSION AS YOU WOULD IF YOU HAD THE FEDERAL GOVERNMENT
2 REQUIRING A STATE TO DECLARE WHAT IS A LAWFUL ENACTMENT
3 UNLAWFUL.

4 MR. BARNETT: BUT THIS GOES TO THE LAST POINT YOU'VE
5 RAISED, WHICH MAYBE WE CAN TALK ABOUT NOW, IF YOU LIKE, AND
6 THAT HAS TO DO WITH THE CONFLICTING POLICIES BETWEEN THE
7 FEDERAL AND THE STATE GOVERNMENT, AND WHETHER THAT IS POSSIBLE
8 UNDER THE SUPREMACY CLAUSE, UNDER THE PREEMPTION DOCTRINE,
9 WHETHER IT'S POSSIBLE FOR A STATE TO HAVE A SEPARATE POLICY; I
10 THINK CLEARLY THAT IT IS.

11 THE WHOLE IDEA OF DUAL SOVEREIGNTY IS THAT WE ALLOW
12 STATES TO HAVE THEIR OWN POLICIES. AND THE PROBLEM WITH THE
13 INTERPRETATION OF THE CONTROLLED SUBSTANCES ACT, WHICH I DON'T
14 THINK IS NECESSARY, BUT IT'S WHAT THE GOVERNMENT INSISTS ON,
15 THE PROBLEM WITH THE INTERPRETATION OF THE CONTROLLED SUBSTANCE
16 ACT IS, IT'S CREATING A CONFLICT BETWEEN THE POLICIES OF THESE
17 TWO SOVEREIGNS, WHICH ISN'T NECESSARILY -- WHICH ISN'T
18 NECESSARY TO DO.

19 THE WAY THE CONSTITUTION WAS SET UP, THERE ARE
20 CERTAIN POWERS THAT THEY GET, AND THERE ARE CERTAIN POWERS THAT
21 THE STATE OF CALIFORNIA GETS. AND OUR CLIENTS ARE OPERATING
22 STRICTLY WITHIN THE POWERS OF THE STATE OF CALIFORNIA. THE
23 STATE OF CALIFORNIA CAN PROHIBIT WHAT THEY'RE DOING, IN WHICH
24 CASE THEY WOULD THEN HAVE TO PASS FUNDAMENTAL RIGHT SCRUTINY.
25 BUT THEY WOULDN'T HAVE TO PASS THE SCRUTINY THAT IS NOT WITHIN

1 THEIR POWER TO GET TO THIS ACTIVITY.

2 WHAT OUR ARGUMENT IS IS THAT IT'S NOT WITHIN THE
3 FEDERAL GOVERNMENT'S POWER, AND THEREFORE, YES, THERE CAN BE
4 CONFLICTING POLICIES. IN FACT, THAT'S REALLY WHAT THIS CASE IS
5 ABOUT. I MEAN, I'M TALKING ABOUT LEGALLY, I'M TALKING ABOUT
6 WHAT IT'S REALLY ABOUT. WHAT IT'S REALLY ABOUT IS A
7 FUNDAMENTAL DISAGREEMENT BETWEEN CERTAIN MEMBERS OF THE FEDERAL
8 GOVERNMENT AND THE STATE OF CALIFORNIA OVER WHAT POLICY SHOULD
9 BE. THEY DON'T LIKE CALIFORNIA POLICY. THEY DON'T LIKE OTHER
10 STATE'S POLICIES, AND THEN THEY WANT TO DO EVERYTHING -- YOU
11 KNOW, THEY WANT TO DO EVERYTHING IN THEIR POWER, WHICH
12 ISN'T WITHIN THEIR POWER, IT'S BEYOND THEIR POWER.

13 THE COURT: WELL, I THINK THAT YOU ARE RIGHT, THAT
14 CONFLICT ISSUES RESONATE. THERE IS IN BETWEEN THAT CONFLICT A
15 SET OF STATUTES THAT HAS TO BE ANALYZED AND REVIEWED TO
16 ULTIMATELY REACH WHATEVER DETERMINATION THIS COURT MAKES ABOUT
17 WHETHER OR NOT THAT CONFLICT ACTUALLY MEANS THAT THEY'VE
18 EXCEEDED THEIR POWER IN THE COMMERCE CLAUSE, OR IN ANOTHER WAY
19 VIOLATED THE CONSTITUTION.

20 MR. BARNETT: I ENTIRELY AGREE, BUT I THINK YOU HAVE
21 TO READ JUDGE KOZINSKI'S CONCURRENCE IN LIGHT OF THIS -- WHAT
22 I'VE JUST SAID ABOUT THE CONFLICT. HE SEES THIS CONFLICT, AND
23 THEN HE'S TRYING TO USE PRINCE, TO USE LOPEZ, TO USE MORRISON,
24 IN ORDER TO --

25 THE COURT: RIGHT.

1 MR. BARNETT: -- IN ORDER TO.

2 THE COURT: WE KNOW THAT THERE WAS AT LEAST ONE
3 JUDGE WHO SEES IT THAT WAY, AND TWO OTHERS WHO DIDN'T GO THAT
4 FAR, WE KNOW THAT.

5 MR. BARNETT: RIGHT, IT'S NOT JUST US.

6 THE COURT: ALL RIGHT. SO THERE MIGHT BE A MINOR
7 DEBATE, DEPENDING UPON WHAT THEY DO IN THE NINTH CIRCUIT ABOUT
8 THAT.

9 MR. RAICH: I THINK THE FACT THAT THE OTHER TWO
10 JUDGES DIDN'T JOIN JUDGE KOZINSKI'S CONCURRENCE DOES NOT MEAN
11 THEY DISAGREED WITH IT. THEY DIDN'T NEED TO GO FOR THAT IN
12 ORDER TO DECIDE THE CASE IN FRONT OF THEM.

13 THE COURT: THAT'S AN INTERESTING PARSE OF THE
14 DECISION, BUT I LEARNED THAT CASES STAND FOR THE PROPOSITION
15 BESIDE IT, SO I WILL DRAW THE LINE THERE. AND I WILL CONSIDER
16 MIGHTILY YOUR VIEWS AND JUDGE KOZINSKI'S VIEWS WITH RESPECT TO
17 THE COMMANDEERING ISSUE, UNDERSTANDING THAT THAT IS NOT THE LAW
18 OF THE CASE.

19 MR. BARNETT: NO DISPUTE ON THAT.

20 MR. MICHAEL: JUST THAT ONE FINAL POINT I WAS
21 DRIVING TOWARDS ON THE COMMANDEERING ISSUE, IS THAT IT SEEMS TO
22 ME THAT -- WHETHER OR NOT THIS FALLS UNDER THE COMMANDEERING
23 ANALYSIS -- THE GOVERNMENT CAN NOW TAKE A POSITION THAT IF THE
24 COMMERCE CLAUSE DOES NOT DISTINGUISH, OR IF THE ANALYSIS OF THE
25 COMMERCE CLAUSE DOES NOT DISTINGUISH THIS UNIQUE CLASS OF

1 PEOPLE OPERATING UNDER STATE LAW, THEN THE GOVERNMENT'S
2 POSITION CAN BE THAT THEY COULD PROSECUTE ANYBODY AS A
3 CO-CONSPIRATOR, AS AN AIDER AND ABETTER, AS AN ACCESSORY AFTER
4 THE FACT, FOR ANYBODY WHO TRIES TO FOLLOW THE MANDATES OF
5 CALIFORNIA LAW UNDER THE COMPASSIONATE USE ACT.

6 CAN YOU IMAGINE THE QUAGMIRE THAT THAT CAN ACTUALLY
7 CREATE, YOU KNOW, IN TERMS OF WHAT ALL THESE POLITICAL AND LAW
8 ENFORCEMENT ENTITIES ARE TRYING TO DO TO IMPLEMENT CALIFORNIA
9 LAW? WE ALL READ THE PAPER, AND WE KNOW THAT DIFFERENT
10 COUNTIES AND DIFFERENT LAW ENFORCEMENT ORGANIZATIONS ARE TRYING
11 IN GOOD FAITH TO IMPLEMENT THE LAW OF THE STATE FOR SOME YEARS.

12 THAT HAS BEEN RECOGNIZED BY CALIFORNIA APPELLATE
13 COURT, AND ULTIMATELY THE CALIFORNIA SUPREME COURT IN THE
14 MALLER (PHONETIC) DECISION. EVERYBODY IS TRYING TO IMPLEMENT
15 THIS LAW. WHAT IS THE IMPLICATION OF THAT IN TERMS OF THE
16 FEDERAL GOVERNMENT'S POSITION. AND WHETHER OR NOT THIS IS AN
17 ANALYSIS THE COURT WANTS TO MAKE UNDER THE COMMANDERING
18 PRINCIPLE OR NOT, I DON'T KNOW.

19 THE COURT: YOU PUT IT BEFORE ME.

20 MR. RAICH: EVEN BEYOND WHETHER YOU CALL IT
21 COMMANDERING, THE BROADER ISSUE HERE IS FEDERALISM. AND I
22 DIDN'T QUITE HEAR YOUR HONOR SAY IN YOUR --

23 THE COURT: I SAID THAT WHEN I STARTED.

24 MR. RAICH: OKAY. THIS IS BEYOND MERELY THE
25 COMMERCE CLAUSE.

1 THE COURT: RIGHT, THAT THIS IS A SEPARATE
2 INDEPENDENT BASIS FOR WHICH YOU SEEK TO HAVE THIS COURT FIND
3 THAT YOU SHOULD BE GRANTED INJUNCTIVE RELIEF; I THINK THAT'S
4 PRETTY CLEAR IN THE PAPERS. THAT'S WHY I TRIED TO RAISE FOR
5 YOU SOME CONCERNS I HAD, IN TERMS OF THE SCENARIO IN WHICH IT
6 PLAYS HERE, AS DISTINGUISHED FROM CONANT. AND YOUR RESPONSE
7 HAS BEEN, "WE UNDERSTAND THAT THAT WASN'T ON THE TABLE, BUT WE
8 THINK THAT IT IS JUST AS BROAD TO THE EFFECT OF -- ALLOWING
9 ENFORCEMENT OF THESE STATUTES IS JUST AS BROAD, AND SO THE
10 DOCTRINE APPLIES APPROPRIATELY IN THE CASE"; THAT'S WHAT I'VE
11 HEARD YOUR ARGUMENT TO BE.

12 MR. BARNETT: EXACTLY.

13 MR. MICHAEL: THAT'S RIGHT.

14 MR. RAICH: EVEN THOUGH IN THE CONANT CASE, THE
15 FEDERAL GOVERNMENT WAS TRYING TO PROHIBIT THE STATE OF
16 CALIFORNIA FROM ENACTING THE POLICY IT HAS CHOSEN THROUGH
17 DOCTORS. IN THIS CASE THE ISSUE IS THE FEDERAL GOVERNMENT
18 TRYING TO PROHIBIT THE SAME POLICY, BUT IT'S DIRECTED DIRECTLY
19 TOWARDS PATIENTS.

20 THE COURT: OKAY, OKAY.

21 MR. BARNETT: DO YOU WANT US TO ADDRESS THE
22 NINTH AMENDMENT DUE PROCESS CLAUSE ISSUES YOU'VE RAISED?

23 THE COURT: YES.

24 MR. BARNETT: WHAT YOU TOUCH UPON IN YOUR QUESTIONS
25 TO US ON THAT ISSUE IS SOMETHING THAT COMES UP EVERY TIME

1 UNENUMERATED RIGHTS ARE SOUGHT TO BE PROTECTED. AND WHAT
2 HAPPENS IS THIS: THE CRITICS ARE PROTECTING UNENUMERATED
3 RIGHTS IN ORDER TO DETERMINE WHETHER IT'S ROOTED IN OUR
4 NATION'S HISTORY AND TRADITIONS. THEY ALWAYS TRY TO DEFINE
5 THAT RIGHT AS NARROWLY AS POSSIBLE, BECAUSE IF YOU DEFINE THE
6 RIGHT AS NARROWLY AS POSSIBLE, YOU'RE JUST --

7 THE COURT: ISN'T THAT -- THE SUPREME COURT DOESN'T
8 SAY THAT EXACTLY, WHAT IT SAYS, THOUGH, IS THAT EVERYTHING THAT
9 LEADS UP TO THAT ULTIMATE POSITION, WHICH IS THAT THE COURT
10 REALLY NEEDS TO MAKE SURE THAT IT HAS SOME WELL-CONFINED
11 BOUNDARIES AND RESORT TO HISTORICAL TRADITIONS AND NOTIONS
12 BEFORE IT FORGES AHEAD AND DEVELOPS AND FINDS A FUNDAMENTAL
13 LIBERTY INTEREST.

14 MR. BARNETT: WELL, THAT'S CERTAINLY WISE AND
15 PRUDENT. THAT PROPOSITION DOESN'T DECIDE CONCRETE CASES ABOUT
16 WHETHER SOMETHING IS OR IS NOT A PROTECTED RIGHT.

17 IF YOU TAKE THE TROXEL VERSUS GRANVILLE SITUATION
18 FOR EXAMPLE, WHICH IS THE RIGHT OF PARENTS TO RAISE THEIR
19 CHILDREN, YOU CAN DEFINE THAT RIGHT TWO WAYS; YOU CAN DEFINE IT
20 THE WAY THAT THE MAJORITY DID, WHICH IS THE RIGHT OF PARENTS TO
21 SAFEGUARD OR TO SEE HOW THEIR CHILDREN ARE RAISED, OR YOU CAN
22 DEFINE IT AS THE RIGHT OF A PARENT TO ENSURE THAT GRANDPARENTS
23 DON'T INTERFERE WITH THE RAISING OF THAT CHILD.

24 IT WOULD BE VERY EASY TO SAY, "WELL, WHERE IS THAT
25 FUNDAMENTAL RIGHT," YOU KNOW, "SHOW US THE HISTORY OR TRADITION

1 OF WHERE GRANDPARENTS HAVE BEEN INTERFERING." BUT THAT IS NOT
2 THE WAY THE COURT CHOSE TO DO IT.

3 NOW, IT IS THE WAY THAT CRITICS -- IN ANY GIVEN CASE
4 YOU'LL FIND, INCLUDING TROXEL, WITH JUSTICE SCALIA IN DISSENT,
5 EVERY TIME THERE IS AN OPPOSITION THEY'RE PROPOUNDING ON AN
6 UNENUMERATED RIGHT, THE CRITIC IS GOING TO PHRASE IT AS
7 NARROWLY AS POSSIBLE AND THEN ASK, "WHERE IS THAT IN OUR
8 HISTORY?"

9 IN OUR CASE THAT WOULD BE A TRAGEDY, BECAUSE IN OUR
10 CASE WHAT WE'RE REALLY TALKING ABOUT ARE THE KINDS OF RIGHTS
11 THAT HAVE BEEN DISCUSSED IN THE RIGHT TO DIE CASES, THE KIND OF
12 RIGHTS THAT HAVE BEEN DISCUSSED IN THE REPRODUCTIVE RIGHTS
13 CASES, AND THAT IS THE RIGHT THAT A PERSON HAS OVER THEIR OWN
14 BODY. THERE CANNOT BE A MORE FUNDAMENTAL RIGHT THAN THAT. AND
15 THERE CANNOT BE A MORE FUNDAMENTAL RIGHT TO BE ABLE TO --

16 THE COURT: BUT YOU DON'T -- DO YOU DISAGREE THAT
17 THAT CHOICE IS -- IT SEEMS TO ME TO BE DISTINCTIVELY
18 DIFFERENT -- AND THIS IS A QUESTION THAT I DIDN'T RAISE, BUT I
19 WILL TO THE GOVERNMENT, DISTINCTIVELY DIFFERENT FROM
20 DETERMINING WHETHER ONE WILL ACCEPT TREATMENT, PERHAPS
21 TREATMENT FOISTED UPON THEM, THAT IT'S ON THE SIDE OF CHOICE,
22 IT SEEMS TO ME.

23 NOW, THE DISTINCTION IN THIS RECORD IS THAT, AT
24 LEAST WITH RESPECT TO ONE OF THE PLAINTIFFS, THAT THERE IS A
25 VERY GOOD FACTUAL ARGUMENT HERE THAT, IN FACT, THERE IS -- THIS

1 IS THE ONLY METHOD OF TREATMENT THAT DEALS WITH THE BURDEN OF
2 THE SCOPE OF MALADIES THAT SHE SUFFERS FROM. AND SO IN THAT
3 WAY IT'S A CLOSER ANALOG TO THE ARGUMENT THAT YOU'VE JUST MADE.

4 IT STILL MAY NOT BE WHOLLY EMBRACED BY CASES THAT I
5 SEE, AND I DON'T KNOW THAT CARNOHAN IS -- THE LAETRILE ISSUE IS
6 DISPOSITIVE IN THIS QUESTION, I THINK THAT'S A BIT DIFFERENT
7 BECAUSE OF FACTS THAT I HAVE IN THE RECORD HERE.

8 MR. BARNETT: WELL, ALSO THE FACT THAT THEY WERE
9 SEEKING A REGULATORY CHANGE, WHICH IS SOMETHING THAT THE COURT
10 DENIED.

11 THE COURT: AND A REMAND.

12 MR. BARNETT: AND IT WAS AN ECONOMIC ACTIVITY THAT
13 WAS INVOLVED.

14 THE COURT: AT BOTTOM, ONE OF HIS ARGUMENTS IS THAT
15 THAT IS, IN ESSENCE, WHAT YOU'RE DOING, THAT THERE ARE FINDINGS
16 THAT HAVE BEEN MADE, AND THE FDA WEIGHS IN ON THIS AND THE AG
17 WEIGHS IN ON THIS, AND THOSE FINDINGS ARE -- THIS COURT OUGHT
18 TO REALLY DEFER TO THOSE WITH RESPECT TO THAT ISSUE.

19 IT REALLY THEN IS, ONE, THAT THERE IS AT LEAST A
20 QUESTION AS TO WHETHER OR NOT THERE IS -- IT'S MEDICALLY
21 ACCEPTED; AND TWO, LOOKING AT THE UNDERLYING FACTS, THE
22 DECLARATIONS IN THE CASE, THERE IS STILL THE QUESTION OF
23 WHETHER OR NOT THIS ISN'T JUST AN ALTERNATIVE TREATMENT, AND SO
24 IT'S A MATTER OF CHOICE.

25 AND IN THAT RESPECT RUTHERFORD AND THOSE CASES READ

1 ON TO SAY THAT, IN FACT, THAT DOESN'T IMPLICATE A FUNDAMENTAL
2 LIBERTY INTEREST.

3 MR. MICHAEL: THERE IS A SCHEME AND A PROCEDURE THAT
4 IS SET UNDER CALIFORNIA LAW FOR THAT KIND OF DETERMINATION.
5 AND IN THAT SCHEME, THAT DISCUSSION THAT YOU'RE TALKING ABOUT,
6 ISN'T THAT THE INTIMATE DECISION THAT IS DEALT WITH BETWEEN THE
7 PATIENT AND THE DOCTOR? AND DON'T THE COURTS WANT TO TREAD
8 VERY LIGHTLY ABOUT GETTING IN THERE AND TRYING TO INTERPRET
9 WHAT HAS OCCURRED BETWEEN A DOCTOR AND THAT DOCTOR'S PATIENT,
10 IN TERMS OF WHETHER OR NOT THIS IS AN ALTERNATIVE OR SOME OTHER
11 KIND OF TREATMENT, OR MAYBE THERE'S SOMETHING ELSE THAT COULD
12 HAVE WORKED? ISN'T THAT REALLY DANGEROUS TERRITORY?

13 THE COURT: THAT'S WHY THE LINE THAT GETS DRAWN AS
14 TO WHETHER IT'S A FUNDAMENTAL LIBERTY INTEREST HAS BEEN IN
15 THOSE CASES TO FIND THAT IT DOES NOT, THAT IT FALLS ON THE
16 CHOICE SIDE, AND THAT IT DOESN'T IMPLICATE IT.

17 MR. MICHAEL: DOESN'T CONANT SOMEWHAT ADDRESS THAT?
18 I MEAN, DON'T THE COURTS WANT TO STAY AWAY FROM A DETERMINATION
19 THAT IS MADE BETWEEN A PATIENT AND THAT PATIENT'S DOCTOR? AND
20 PERHAPS IT MIGHT BE WISER FOR THIS COURT IN THAT ANALYSIS TO
21 SAY THAT IF THE DOCTOR HAS DETERMINED THAT THIS PERSON IS A
22 PATIENT UNDER PROP 215, AND WHATEVER QUALIFIERS THERE ARE --

23 THE COURT: WELL, I THINK COURTS DO -- I MEAN, JUDGE
24 BREYER STAYED AWAY FROM THAT QUESTION. HE DIDN'T DECIDE, AS A
25 MATTER OF LAW, WHETHER IT WAS A FUNDAMENTAL INTEREST OR NOT. I

1 ASKED THE QUESTION BECAUSE I WANTED TO SEE WHAT YOU HAD TO SAY
2 ABOUT IT.

3 MR. MICHAEL: YEAH. THAT'S JUST MY -- WHEN YOU
4 RAISE THAT FLAG, IT JUST OPENS THAT WHOLE CANS OF WORMS THAT
5 MAY BE HARD TO REALLY HAVE THE TOOLS, JUDICIALLY, TO DEAL WITH,
6 WHEN YOU'RE TALKING ABOUT THAT PATIENT/DOCTOR RELATIONSHIP.

7 MR. BARNETT: SO I WOULD JUST SUMMARIZE BY SAYING
8 THAT THERE'S JUST TWO POINTS ON THIS FUNDAMENTAL RIGHTS THAT I
9 WANT TO EMPHASIZE. ONE I ALREADY SAID, WHICH IS THAT HOW YOU
10 DEFINE THE RIGHT HAS A LOT TO DO WITH THE OUTCOME. AND
11 OPPONENTS OF ANY UNENUMERATED RIGHT WILL DEFINE IT AS NARROWLY
12 AS POSSIBLE IN ORDER TO DISPARAGE IT.

13 SECONDLY, ONCE YOU'VE IDENTIFIED THE FUNDAMENTAL
14 RIGHT, IT DOESN'T END THE ANALYSIS.

15 THE COURT: NO.

16 MR. BARNETT: IT SIMPLY SHIFTS THE BURDEN, UNDER
17 CAROLENE PRODUCTS, AND ALL THE OTHER CASES. SO IT ISN'T LIKE
18 THE -- IT ISN'T THE LAST WORD TO SAY THAT IT IS A FUNDAMENTAL
19 RIGHT, BUT ONCE YOU'VE RECOGNIZED THAT THIS IS A SERIOUS RIGHT,
20 THAT IT'S NOT JUST OUR OPINION, IT'S THE OPINION OF THE STATE
21 OF CALIFORNIA, IT'S THE OPINION OF THE PEOPLE OF THE STATE OF
22 CALIFORNIA. THIS IS A SERIOUS RIGHT, AND NOW THE GOVERNMENT
23 HAS TO COME FORWARD AND DO WHAT THEY HAVE NOT HAD TO DO UP TO
24 NOW, JUSTIFY WHAT THEY'RE DOING IN THIS CASE, THAT'S THE
25 IMPLICATION.

1 MR. RAICH: YOUR HONOR, I WANTED TO PROVIDE YOU SOME
2 FRAMEWORK WHICH MIGHT ALSO HELP YOU WHEN YOU GRAPPLE WITH THESE
3 ISSUES.

4 YOU CORRECTLY STATED THAT WHEN LOOKING FOR A
5 FUNDAMENTAL RIGHT, THE CASES SAY YOU MUST LOOK TO OUR HISTORY,
6 OUR LEGAL TRADITIONS. IN FACT, IN THIS COUNTRY, THE HISTORY
7 AND LEGAL TRADITION OF MAKING CANNABIS ILLEGAL IS VERY SHORT
8 LIVED. MEDICAL CANNABIS WAS NOT ILLEGAL IN THE UNITED STATES
9 UNTIL 1970.

10 BY COMPARISON, CANNABIS HAS BEEN A MEDICINE IN THE
11 UNITED STATES SINCE ITS FOUNDING, AND, FRANKLY WAS A MEDICINE
12 GOING BACK THROUGH OUR COMMON-LAW TRADITION, AND EVEN BEFORE
13 THAT FOR THOUSANDS OF YEARS. THAT IS THE HISTORY, THAT IS THE
14 TRADITION THAT WE ARE UP AGAINST, AND MERELY A 32-YEAR HISTORY
15 OF PERHAPS OVERBROADLY, WHEN FIGHTING ILLEGAL DRUG TRAFFICKING,
16 WIPING OUT THE MEDICAL ASPECT OF CANNABIS AS WELL, THAT'S --
17 THOSE ARE THE TWO HISTORIES OF LEGAL TRADITIONS.

18 ADDITIONALLY, THE PEOPLE HAVE, THEMSELVES, HAD THE
19 OPPORTUNITY TO DECLARE THAT THIS IS A RIGHT IN CALIFORNIA, AND,
20 INDEED, IN EVERY STATE IN WHICH THEY'VE HAD THE OPPORTUNITY TO
21 DO SO. AND SO YOU CAN SEE --

22 THE COURT: THAT'S JUST A FACTOR, THOUGH, RIGHT?

23 MR. RAICH: THAT'S A FACTOR, RIGHT, THESE ALL ARE.

24 MR. BARNETT: THAT'S A FACTOR.

25 MR. RAICH: YOU MENTIONED YOU HAD SOME TROUBLE

1 DETERMINING WHAT THE FUNDAMENTAL RIGHT IS, HOW WE ENUNCIATE IT;
2 IT'S TO AMELIORATE PAIN, TO PROLONGED LIFE, TO BODILY
3 INTEGRITY, AND TO THE SANCTITY OF THE PHYSICIAN/PATIENT
4 RELATIONSHIP, THOSE ARE THE ISSUES THAT ARE INVOLVED HERE.

5 FINALLY, TO DISTINGUISH CARNOHAN AND RUTHERFORD FROM
6 THIS CASE, IT'S NOT MERELY A CHOICE THAT THE PLAINTIFF HAS.
7 SHE HAS TO USE CANNABIS. THE REPERCUSSIONS OF NOT USING
8 CANNABIS ARE THE MOST EXTREME. ANGEL WOULD DIE, WERE IT NOT
9 FOR CANNABIS. IT CANNOT BE THE LAW IN THE UNITED STATES THAT A
10 PERSON MUST UNDERGO DEATH, BECAUSE SHE CAN'T GET THE MEDICINES
11 SHE NEEDS AS A RESULT OF SOME LAW CONGRESS PASSED FOR OTHER
12 PURPOSES ENTIRELY; THAT IS THE REASON THAT THE COURTS AND
13 EQUITIES SIT THE WAY THEY DO AND ARE ABLE TO LOOK AT WHAT THE
14 FACTS ARE HERE, AND WHAT IS REALLY AT ISSUE IN THIS CASE. IT
15 CANNOT BE THE LAW THAT A PERSON HAS TO DIE FOR LACK OF MEDICINE
16 WHEN THERE IS ABSOLUTELY NO OTHER CHOICE.

17 THE COURT: YOU HAD SOMETHING ELSE?

18 MR. BARNETT: I JUST WANTED -- IF WE'RE -- HAVE WE
19 SATISFIED --

20 THE COURT: YES, YOU HAVE.

21 MR. BARNETT: I WOULD BASICALLY SUMMARIZE OUR
22 POSITION AS THIS: LOPEZ AND MORRISON CHANGED THE LEGAL
23 LANDSCAPE FROM WHAT HAD EXISTED BEFORE THAT, BEFORE THEY WERE
24 DECIDED. THEY HAVE GIVEN YOUR HONOR THE TOOLS TO DO EQUITY IN
25 THIS CASE THAT YOU WOULDN'T HAVE HAD, IF THOSE CASES WERE NOT

1 DECIDED BY THE SUPREME COURT. AND NOTHING IN THE PRECEDENT IN
2 THE NINTH CIRCUIT PREVENTS YOU FROM ACTING ACCORDING TO WHAT
3 THOSE CASES ALLOW YOU TO DO.

4 THANK YOU, YOUR HONOR.

5 MR. QUINLIVAN: GOOD MORNING, YOUR HONOR.

6 MAY IT PLEASE THE COURT, I WANT TO ADDRESS EACH OF
7 THE ISSUES THAT YOU HAVE ASKED, AND I'LL ALSO RESPOND TO THE
8 ARGUMENT RAISED BY PLAINTIFF'S COUNSEL.

9 I THINK IT'S IMPORTANT, HOWEVER, TO JUST TAKE A STEP
10 BACK FOR A MOMENT AND NOTE THAT IN CONTRAST TO WHAT THE
11 PLAINTIFFS CLAIM IS A NARROW CLASS AND A NARROW INJUNCTION, IN
12 FACT, WHAT THEY ARE ASKING IS TO REALLY GO TO THE HEART OF THE
13 INTEGRITY OF THE DRUG APPROVAL PROCESS THAT WAS ESTABLISHED BY
14 CONGRESS IN 1937 IN THE FOOD, DRUG & COSMETIC ACT AND THE
15 CLOSED SYSTEM FOR THE DISTRIBUTION AND CULTIVATION OF
16 CONTROLLED SUBSTANCES SET FORTH IN THE CONTROLLED SUBSTANCES
17 ACT.

18 THE REASON WHY I SAY THAT IS BECAUSE IF THE
19 PLAINTIFFS IN THIS CASE CAN COME TO THIS COURT AND ASK FOR
20 RELIEF TO ALLOW THEM TO USE A TREATMENT WHICH TO DATE CONGRESS
21 AND THE ATTORNEY GENERAL HAVE NOT MOVED FROM SCHEDULE 1 OF THE
22 CONTROLLED SUBSTANCES ACT, WHICH REFLECTS A DETERMINATION THAT
23 IT HAS NO ACCEPTED VALUE FOR MEDICAL TREATMENT IN THE UNITED
24 STATES, AND WITHOUT HAVING BEEN APPROVED BY THE FDA FOR
25 TREATMENT IN THE UNITED STATES, THEN THERE IS NOTHING THAT

1 WOULD PROHIBIT A PLAINTIFF OR A PLAINTIFF CLASS IN OTHER CASES
2 ALSO COMING IN AND ASKING FOR THIS VERY SAME KIND OF RELIEF.

3 THAT IS WHY, WHEN THE SUPREME COURT DECIDED THE
4 RUTHERFORD CASE IN THE LATE 1970S INVOLVING LAETRILE, THE
5 SUPREME COURT FOUND THAT THE PROVISIONS IN THE FOOD, DRUG &
6 COSMETIC ACT COVERED EVEN THOSE WHO WERE TERMINALLY ILL, THAT
7 THERE WAS NO EXCEPTION SET FORTH IN THE ACT.

8 SIMILARLY, THE SUPREME COURT, IN THE OAKLAND
9 CANNABIS CASE, WHEN CONSTRUING THE CONTROLLED SUBSTANCES ACT,
10 ALSO FOUND THAT THE PROVISIONS OF THAT ACT COVERED EVEN THOSE
11 WHO MIGHT HAVE WHAT MIGHT BE TERMED AS A MEDICAL NECESSITY.
12 AND I THINK THAT JUSTICE MARSHAL'S OPINION, WHICH WAS --

13 THE COURT: I MEAN, I SAW THAT LANGUAGE IN THE
14 OPINION, AND, CERTAINLY, THERE IS SOME DISCUSSION IN THAT
15 OPINION ABOUT DEFERENCE TO THOSE -- THE FINDINGS BY CONGRESS
16 AND A REJECTION OF THE REQUEST TO CONSIDER THE INDIVIDUAL
17 PLAINTIFFS IN THAT CONTEXT. IT'S RAISED IN A DIFFERENT
18 CONSTITUTIONAL SETTING HERE.

19 MR. QUINLIVAN: IT IS, YOUR HONOR. AND I DO THINK,
20 HOWEVER, THAT FAITHFUL APPLICATION OF THAT CASE AND THE OTHER
21 CASES OF THE SUPREME COURT WHICH HAVE TALKED ABOUT THAT WHEN
22 CONGRESS REGULATES AN ENTIRE CLASS OF ACTIVITIES, A COURT
23 CANNOT EXERCISE ITS TRIVIAL INDIVIDUAL INSTANCES OF THE CLASS.
24 THAT FORECLOSES THE KIND OF CLASS THAT THEY'RE ADVOCATING HERE.

25 THE COURT: YOU BASICALLY -- YOU TRUMPET TO ME

1 MIGHTILY JUDGE BREYER'S DISTRICT COURT DECISION.

2 MR. QUINLIVAN: THAT'S RIGHT.

3 THE COURT: AND HE ACKNOWLEDGES IN THAT DECISION,
4 WITHOUT DECIDING THE QUESTION, AS HE HAD ISSUE OF DISTRIBUTION
5 SQUARELY BEFORE HIM, UNDER 841, BUT HE ALLUDES TO THE FACT THAT
6 HE BELIEVES THAT THE FINDINGS THAT WERE MADE BY CONGRESS WERE
7 REALLY MORE ON THE TRAFFICKING SIDE; THAT'S REALLY WHAT
8 CONGRESS WAS ADDRESSING. AND THAT SORT OF RELATES TO THE KIND
9 OF ARGUMENT THAT THE PLAINTIFFS ARE MAKING HERE, IN TERMS OF
10 THESE FACTS AND WHAT HAS TRANSPIRED AND WHETHER OR NOT, AS AN
11 INITIAL MATTER, THIS COURT CAN -- CERTAINLY CAN, BUT SHOULD,
12 DETERMINE THE SCOPE OF THOSE FINDINGS AS IT RELATES TO THE
13 ACTIVITIES SOUGHT TO BE REGULATED HERE WHICH, IN THEIR VIEW,
14 DOESN'T IMPLICATE CONGRESS. NO ECONOMIC ACTIVITY.

15 MR. QUINLIVAN: YOUR HONOR, I UNDERSTAND YOUR
16 QUESTION, AND I THINK THERE ARE TWO ANSWERS. FIRST, I GO TO
17 JUDGE BREYER'S OPINION, BECAUSE TO THE EXTENT HE DID RECOGNIZE
18 THAT IN HIS INITIAL DECISION GRANTING THE PRELIMINARY
19 INJUNCTIONS, HE NONETHELESS SAID THAT EVEN IF THAT WERE THE
20 CASE, IT IS NOT THE CASE THAT MEDICAL MARIJUANA, AS A CLASS OF
21 ACTIVITIES, CANNOT AFFECT COMMERCE AND IS LIMITED SOLELY TO
22 INTRASTATE TRAFFICKING.

23 THE COURT: HE ALSO SAYS, "I'M NOT REACHING THE
24 QUESTION OF PURE POSSESSION."

25 MR. QUINLIVAN: THAT'S RIGHT. PURE POSSESSION,

1 THOUGH, THAT CASE -- I WAS COUNSEL FOR THE UNITED STATES IN
2 THAT CASE. THAT CASE WAS NOT JUST ABOUT DISTRIBUTION, IT WAS
3 ABOUT CULTIVATION, AS WELL. SO THE INJUNCTIONS THAT WERE
4 ENTERED IN THAT CASE COVERED DISTRIBUTION AND CULTIVATION.

5 BUT YOUR HONOR IS ENTIRELY RIGHT, HAO DID NOT REACH
6 POSSESSION. I THINK, HOWEVER --

7 THE COURT: AND THAT'S THE ISSUE I HAVE BEFORE ME,
8 RIGHT?

9 MR. QUINLIVAN: I DO -- YOU DO, YOUR HONOR.

10 THE COURT: SO JUDGE BREYER'S OPINION IS NOT
11 NECESSARILY, EVEN THOUGH I WOULD NOT BE BOUND BY IT, IT DOESN'T
12 ADDRESS THE SPECIFIC ISSUE SQUARELY PUT BEFORE ME.

13 I HEAR YOUR POSITION, I HEAR YOUR ARGUMENT, I THINK,
14 BECAUSE I ASKED YOU WHEN I CAME OUT; DO BRAMBLE AND VISMAN AND
15 THOSE CASES, AM I BOUND? IF I'M NOT BOUND BY THOSE
16 DETERMINATIONS, THEN IT STRIKES ME WE'RE INTO AN ANALYSIS WHERE
17 THE COURT LOOKS AT THE FINDINGS AND MAKES SOME DETERMINATIONS
18 OF THE SUBSTANTIAL EFFECTS TEST.

19 MR. QUINLIVAN: UNDERSTOOD, YOUR HONOR. AND I THINK
20 THE ANSWER IS, FIRST, WE CERTAINLY BELIEVE THAT YOU ARE BOUND
21 BY BRAMBLE, BY VISMAN AND THAT JUDGE FOGEL'S DECISION IN THE
22 WOMEN'S ALLIANCE CASE IS PERSUASIVE ON THOSE POINTS.

23 WE ALSO THINK THAT, YOU KNOW, IF YOUR HONOR WERE TO
24 ANALYZE THIS INDEPENDENTLY, WHICH, AGAIN WE DO NOT THINK YOU
25 HAVE THE AUTHORITY TO DO, BUT IF YOU WERE TO ANALYZE THIS

1 INDEPENDENTLY, YOU WOULD COME TO THE VERY SAME CONCLUSION.

2 NOW, I BEGIN WITH BRAMBLE BECAUSE, IN THAT CASE --
3 WHICH IS THE MOST RECENT ITERATION BY THE NINTH CIRCUIT ON THIS
4 ISSUE, IN BRAMBLE, ALL THAT WAS INVOLVED IN THAT CASE ON THE
5 CHARGES OF THE CONTROLLED SUBSTANCES ACT WERE CULTIVATION AND
6 POSSESSION; THERE WAS NO DISTRIBUTION CHARGE, AND THERE WAS NO
7 POSSESSION WITH THE INTENT TO DISTRIBUTE CHARGE.

8 JUDGE SCHROEDER'S OPINION WAS, AS YOU NOTED, VERY
9 CONCLUSORY. MY INTERPRETATION WAS THAT IT WAS CONCLUSORY
10 BECAUSE THE ISSUE WAS SO WELL-SETTLED AT THAT POINT.

11 THE COURT: SO WHAT ABOUT THE PLAINTIFF'S POSITION
12 THAT THAT CASE IS SUSPECT NOW, IN LIGHT OF -- THAT'S WHY I
13 ASKED THE QUESTION WHETHER OR NOT MORRISON AND LOPEZ OVERRULED
14 BRAMBLE.

15 MR. QUINLIVAN: WELL, CERTAINLY LOPEZ -- I THINK
16 IT'S QUITE CLEAR THAT LOPEZ DOESN'T, BECAUSE BOTH IN KIM AND IN
17 TISOR THE NINTH CIRCUIT CLEARLY REAFFIRMED ITS PRIOR DECISIONS
18 UPHOLDING THE CONSTITUTIONALITY OF SECTION 841(A) (1) AFTER
19 LOPEZ. THEY RELIED ON AN EARLIER DECISION IN THE STAPLES CASE;
20 ALTHOUGH IT DOESN'T MENTION LOPEZ, AGAIN REAFFIRMED THOSE
21 DECISIONS.

22 AND, AS JUDGE FOGEL NOTED IN HIS DECISION, IN ITS
23 DECISION OF KIM THE NINTH CIRCUIT EXPRESSLY REAFFIRMED ITS
24 HOLDING IN VISMAN. SO I THINK WE CAN PUT LOPEZ TO THE SIDE.

25 MORRISON DOES NOT CALL THE HOLDINGS OF THOSE CASES

1 INTO QUESTION, BECAUSE THE FOCUS THAT THE SUPREME COURT --

2 THE COURT: BUT DOESN'T IT CHART A DIFFERENT COURSE
3 WITH RESPECT TO A LOT OF THE LANGUAGE IN THE PREVIOUS NINTH
4 CIRCUIT DECISIONS THAT TALK ABOUT DEFERENCE TO THOSE FINDINGS?

5 MR. QUINLIVAN: WELL, I THINK THAT IT DOESN'T, AND
6 HERE'S WHY --

7 THE COURT: OKAY.

8 MR. QUINLIVAN: WHAT THE SUPREME COURT SAID IN
9 MORRISON WAS THAT IT WOULD NOT DEFER TO CONGRESS' FINDINGS,
10 BECAUSE THERE WAS NO RATIONAL CONNECTION BETWEEN CONGRESS'
11 FINDINGS AND INTERSTATE COMMERCE.

12 THE COURT: SO WHAT'S THE RATIONAL CONNECTION HERE?

13 MR. QUINLIVAN: WELL, THEY'RE -- I MEAN, I HATE TO
14 SOUND LIKE A BROKEN RECORD, BUT THE NINTH CIRCUIT HAS ALREADY
15 HELD ON NUMEROUS OCCASIONS THAT CONGRESS' FINDINGS UNDER THE
16 CONTROLLED SUBSTANCES ACT ARE RATIONAL.

17 IN ITS INITIAL DECISION, WHICH WE CITE IN OUR BRIEF,
18 RODRIGUEZ CAMACHO WHICH IS 468 FED. 2D 1220, THE NINTH CIRCUIT
19 RECOGNIZED THAT IT DID NOT HAVE TO DEFER TO CONGRESS' FINDINGS
20 IF THE RELATION TO INTERSTATE COMMERCE WAS NOT RATIONAL. BUT
21 IT SAID, "SUCH IS NOT THE CASE WITH CONTROLLED SUBSTANCES,
22 CONGRESS' FINDINGS WERE RATIONAL."

23 I'LL CITE YOUR HONOR TO ANOTHER CASE. IT WASN'T
24 CITED IN OUR BRIEFS, BUT IT IS A MORE RECENT STATEMENT --

25 THE COURT: HOW RECENT?

1 MR. QUINLIVAN: IT'S ANOTHER ONE OF THE PRE- -- POST
2 LOPEZ/PRE-MORRISON CASES. IT'S DECIDED IN 1997. IT'S UNITED
3 STATES VERSUS HENSON. THE CITATION IS 123 FEDERAL THIRD
4 SERIES, 1226.

5 ONE OF THE THINGS THAT THE NINTH CIRCUIT SAID, AND
6 I'M CITING FROM PAGE 1233 OF THAT DECISION, IS THAT, "SECTION
7 841 OF THE CONTROLLED SUBSTANCES ACT, REGULATION OF THE
8 DISTRIBUTION AND CULTIVATION OF CONTROLLED SUBSTANCES IS
9 PERMISSIBLE BECAUSE CONGRESS HAS FOUND," COMMA, "AND THE COURTS
10 HAVE CONSISTENTLY ACCEPTED AS RATIONAL, THAT INTRASTATE DRUG
11 TRAFFICKING SUBSTANTIALLY AFFECTS COMMERCE." CITING THEN TO
12 ITS EARLY DECISION --

13 THE COURT: IT'S NOT REALLY DIFFERENT THAN THE MIX
14 OF CASES THAT I HAVE ON THE TRAFFICKING SIDE.

15 MR. QUINLIVAN: NO, IT ISN'T, EXCEPT FOR THE FACT
16 THAT WHAT IS DIFFERENT IN MORRISON IS IN MORRISON THERE WAS NO
17 UNDERLYING -- IN MORRISON THERE WAS NO UNDERLYING FINDINGS, OR
18 A COURT HAD NOT PREVIOUSLY HELD THAT THOSE FINDINGS BY CONGRESS
19 ARE RATIONAL. CERTAINLY, OF COURSE, THE SUPREME COURT CAN
20 DECIDE THAT AS AN INITIAL MATTER.

21 THE COURT: OTHER THAN -- LET'S TAKE OFF THE TABLE
22 NINTH CIRCUIT PRECEDENT YOU BELIEVE IS BINDING; IS IT YOUR VIEW
23 THAT THIS COURT IS PRECLUDED, BASED ON EXISTING LAW, SUPREME
24 COURT OR OTHERWISE, FROM DETERMINING WHETHER OR NOT THE
25 FINDINGS THAT ENABLE THE CSA TO PASS MUSTER UNDER THE COMMERCE

1 CLAUSE?

2 MR. QUINLIVAN: I THINK --

3 THE COURT: THAT SHOULD BE A "YES" OR A "NO."

4 MR. QUINLIVAN: I -- OUTSIDE NINTH CIRCUIT
5 AUTHORITY, YOU'RE ASKING?

6 THE COURT: RIGHT.

7 MR. QUINLIVAN: WELL, CERTAINLY IF THERE WAS NO
8 NINTH CIRCUIT DECISION SO HOLDING, THEN, YES, YOUR HONOR WOULD
9 CERTAINLY BE WITHIN HIS POWER. AND I THINK IT WOULD BE YOUR
10 DUTY TO MAKE THAT FINDING.

11 THE COURT: OKAY.

12 MR. QUINLIVAN: I THINK IF YOUR HONOR WERE TO DO
13 THAT, YOUR HONOR WOULD REACH THE SAME CONCLUSION THAT
14 JUDGE BREYER DID. IN HIS DECISION, AGAIN, ALTHOUGH NOTING THAT
15 IN HIS VIEW THE CONTROLLED SUBSTANCES ACT WAS FOCUSED ON
16 TRAFFICKING, HE THEN NOTED THAT MEDICAL MARIJUANA, AS A CLASS
17 OF ACTIVITIES, CANNOT BE SAID TO BE SOLELY LIMITED TO
18 INTRASTATE DISTRIBUTION OR CULTIVATION, NOR CAN IT BE SAID TO
19 BE A SOLELY NONECONOMIC ACTIVITY.

20 AND I THINK WHAT IS ALSO INTERESTING, AND THIS IS A
21 POINT THAT THE PLAINTIFFS HAVE NOTABLY FAILED TO RESPOND TO IN
22 THEIR REPLY BRIEF, THAT FOLLOWING THE PASSAGE OF THE
23 COMPASSIONATE USE ACT IN CALIFORNIA AND A SIMILAR INITIATIVE IN
24 ARIZONA, CONGRESS SPOKE TO THIS VERY POINT.

25 IN AN ENACTMENT, WHICH WE CITED ON PAGE 6 OF OUR

1 BRIEF THAT WAS PASSED IN 1998, CONGRESS ENACTED A STATUTORY
2 PROVISION ENTITLED, "NOT LEGALIZING MARIJUANA FOR MEDICINAL
3 USE" NOTED THAT MARIJUANA WAS REGULATED UNDER THE CONTROLLED
4 SUBSTANCES ACT, AND THAT IT SIMILARLY HAD NOT OBTAINED APPROVAL
5 FOR ANY TREATMENT BY THE FOOD AND DRUG ADMINISTRATION.

6 AND THEN IT CONCLUDED BY SAYING, AND I QUOTE,
7 "CONGRESS CONTINUES TO SUPPORT THE EXISTING FEDERAL LEGAL
8 PROCESS FOR DETERMINING THE SAFETY AND EFFICACY OF DRUGS AND
9 OPPOSES EFFORTS TO CIRCUMVENT THIS PROCESS BY LEGALIZING
10 MARIJUANA AND OTHER SCHEDULE 1 DRUGS FOR MEDICINAL USE WITHOUT
11 VALID SCIENTIFIC EVIDENCE AND THE APPROVAL OF THE FOOD AND DRUG
12 ADMINISTRATION." SO I THINK IT'S ENTIRELY WRONG FOR THE
13 PLAINTIFFS TO SUGGEST THAT CONGRESS HAS NOT SPOKEN TO THIS
14 ISSUE, BECAUSE IT HAS.

15 NOW, GOING BACK TO THE CONTROLLED SUBSTANCES ACT, AS
16 AN INITIAL MATTER, IT'S CLEAR, AND I THINK THE SUPREME COURT'S
17 DECISION IN OAKLAND CANNABIS MADE THAT CLEAR, THAT THE CONDUCT
18 THAT WAS REGULATED BY CONTROLLED SUBSTANCES ACT COVERS EVEN THE
19 CONDUCT THAT IS ALLEGED IN THIS CASE. IN FACT, JUSTICE THOMAS'
20 CONCLUDING PARAGRAPH, IF I CAN GET IT IN FRONT OF ME SAYS,
21 QUOTE, "BECAUSE THE STATUTORY PROHIBITIONS COVER EVEN THOSE WHO
22 HAVE WHAT COULD BE TERMED A 'MEDICAL NECESSITY,' THE ACT
23 PRECLUDES CONSIDERATION OF THIS EVIDENCE."

24 NOW, TO BE SURE, THAT DID ARISE IN A DIFFERENT
25 SITUATION, BUT IF IT WERE THE CASE THAT THIS CLASS OF

1 ACTIVITIES WAS NOT ENCOMPASSED BY TERMS OF CONTROLLED
2 SUBSTANCES ACT, THEN I DON'T SEE HOW THE SUPREME COURT COULD
3 HAVE REACHED THE DECISION IT DID.

4 THE COURT: WELL, I THINK THE WAY I READ THAT
5 LANGUAGE IS THAT THAT LANGUAGE IS YOUR BEST ARGUMENT THAT THE
6 MEDICAL NECESSITY DEFENSE, IN TERMS OF HOW THE COURT SHOULD
7 ANALYZE THAT IN THE FACE OF THE STATUTE, THAT THERE IS
8 CERTAINLY A STRONG ARGUMENT THAT LEAVES JUSTICE THOMAS, AND
9 THOSE JUDGES WHO SIGNED ON TO THAT OPINION, BELIEVE THAT IT
10 REALLY DOESN'T MAKE A DIFFERENCE WHETHER IT'S DISTRIBUTION OR
11 POSSESSION FOR THAT ISSUE.

12 MR. QUINLIVAN: RIGHT.

13 THE COURT: BUT, OF COURSE, HE'S NOT SPEAKING AT ALL
14 TO THE CONGRESS CLAUSE ANALYSIS.

15 MR. QUINLIVAN: HE ISN'T, AND I'M NOT SUGGESTING HE
16 IS. AND, IN FACT, THEY EXPRESSLY RESERVE THAT PARTICULAR
17 POSITION.

18 I GUESS WHAT I'M SAYING IS THIS, THOUGH, THAT THE
19 LOGIC OF THAT ANALYSIS FORECLOSES THE IDENTIFICATION OF THE
20 CLASS THAT THE PLAINTIFFS HAVE PROPOSED, BECAUSE IF IT WERE THE
21 CASE THAT THE CONTROLLED SUBSTANCES ACT DOESN'T COVER
22 INDIVIDUALS WHO HAVE A MEDICAL NECESSITY, AND, OF COURSE, THIS
23 CASE AROSE IN THE CONTEXT OF THE CALIFORNIA LAW, THEN THE
24 SUPREME COURT WOULDN'T HAVE HELD THAT MEDICAL NECESSITY WAS
25 FORECLOSED BY THE CONTROLLED SUBSTANCES ACT. PRESUMABLY, THEY

1 WOULD HAVE DECIDED IT ON SOME OTHER BASIS, BUT THEY WOULD HAVE
2 HAD TO SAY THAT THE CONTROLLED SUBSTANCES ACT DOESN'T APPLY IN
3 THIS SET OF CIRCUMSTANCES. SO I THINK THAT THE LOGIC OF THAT
4 OPINION FORECLOSES THE KIND OF CLASS THAT THE PLAINTIFFS HAVE
5 PROPOSED.

6 I THINK IT'S ALSO FORECLOSED BY, YOU KNOW, THE OTHER
7 CASES WE'VE CITED, THE PEREZ CASE, WHICH TALKS ABOUT THE FACT
8 THAT YOU CAN'T TRY TO IDENTIFY INDIVIDUAL INSTANCES OF THE
9 CLASS AND SEPARATE THEM OUT. THE TERMS OF THE CONTROLLED
10 SUBSTANCES ACT TALK ABOUT DISTRIBUTION, CULTIVATION AND
11 POSSESSION UNDER ANY SET OF CIRCUMSTANCES. THEY'RE QUITE
12 CLEAR. AGAIN, IN THE CONTEXT OF MEDICAL NECESSITY THE SUPREME
13 COURT THOUGHT THEY WERE CLEAR. AND IN OUR VIEW, THEY DO NOT
14 ALLOW FOR THIS EXCEPTION.

15 THE COURT: THE CONCERN THAT I HAVE IS, IT STRIKES
16 ME THAT THAT IS THE KIND OF THING THAT MORRISON WAS TRYING TO
17 GET AT, WHETHER OR NOT, IN THE FACE OF SOME VERY BROAD, I THINK
18 THE COURT DOESN'T USE THIS TERM BUT, CERTAINLY, BOOTSTRAPPING
19 FINDINGS BACK TO SOME GENERAL IMPACT WITH RESPECT TO COMMERCE,
20 IF IT'S NOT SUFFICIENT.

21 MR. QUINLIVAN: WELL, I'LL GIVE YOU, IN OUR VIEW,
22 THREE REASONS WHY MORRISON DOESN'T ALTER OUR ANALYSIS.

23 THE FIRST IS THAT, OF COURSE, MORRISON FOCUSED
24 PRIMARILY ON THE FACT THAT THE CONDUCT AT ISSUE IN THAT CASE
25 WAS NONECONOMIC IN CHARACTER. AND THEY NOTED THAT ANY EFFORT

1 TO DOWNPLAY THE EFFECT OF ECONOMICS IS WRONG.

2 THE COURT: AND THEY ARGUED BASED ON THE FACT IT'S
3 NONECONOMIC.

4 MR. QUINLIVAN: WELL, YOU KNOW, AND I'M SURE THAT A
5 -- THERE ARE SEVERAL DRUG DEFENDANTS IN CRIMINAL CASES WHO
6 WOULD COME IN AND SAY, "I WAS JUST GIVING MARIJUANA TO MY
7 FRIEND, I WASN'T SELLING IT TO HIM." IF IT'S THE CASE THAT IN
8 EVERY CASE THE GOVERNMENT WOULD HAVE TO SHOW THAT THERE WAS A
9 MONETARY ELEMENT, THEN -- WELL, I THINK IT'S SAFE TO SAY THAT
10 NO CASE STANDS FOR THAT PROPOSITION. I THINK, IN FACT --

11 THE COURT: THAT'S WHAT JUDGE BREYER SAID.

12 MR. QUINLIVAN: THAT'S WHAT JUDGE BREYER SAID. AND
13 I LIKE THE LANGUAGE THAT WAS USED BY SECOND CIRCUIT IN THE
14 GENAO CASE WHICH SAYS THAT THE -- HOW A PARTICULAR SET OF
15 CIRCUMSTANCES AFFECTS INTERSTATE COMMERCE IS, QUOTE,
16 "CONSTITUTIONALLY IRRELEVANT," WHEN YOU'RE TALKING ABOUT A
17 BROAD STATUTORY SCHEME.

18 THE SECOND DISTINCTION IS THAT IN -- THE VIOLENCE
19 AGAINST WOMEN ACT WAS, I WOULD SAY, SORT OF A STAND-ALONE
20 STATUTE, NOT PART OF THE BROAD REGULATORY SCHEME. AND, OF
21 COURSE, THE CONTROLLED SUBSTANCES ACT IS. THE SUBSET OF
22 ACTIVITIES HERE IS PART OF A BROADER CONTROL ON THE
23 DISTRIBUTION, CULTIVATION AND POSSESSION OF CONTROLLED
24 SUBSTANCES. AND THAT IS SOMETHING THAT JUDGE BREYER --

25 THE COURT: NOW, LET ME JUST -- THAT'S INTERESTING.

1 LOPEZ, WHICH YOU ALL SEEM TO AGREE IS NOT AS
2 SIGNIFICANT ON THE DETERMINATION OF THE COMMERCE CLAUSE ISSUE,
3 ALTHOUGH IT'S THERE, AS MORRISON. LOPEZ IS A CASE WHERE THERE
4 WERE NOT FINDINGS. BUT IF I RECALL RIGHT, SORT OF IN SETTING
5 UP THE CATEGORICAL ANALYSIS THAT LOPEZ DOES, THE SUPREME COURT
6 COMMENTED ON THE FACT THAT -- IT PICKED 922(Q), SORT OF A
7 SUBSET OF A BROADER REGULATORY SCHEME, AND ANALYZED EVEN THOUGH
8 THERE WEREN'T FINDINGS, THAT PARTICULAR SUBSET OF THE STATUTE
9 AND FOUND THAT IT RAN AFOUL OF CONGRESS' COMMERCE CLAUSE
10 POWERS.

11 IT'S INTERESTING TO ME -- I KNOW THE DISTINGUISHING
12 FACTORS, THAT THERE WERE NO FINDINGS BY CONGRESS, BUT IT DOES
13 SEEM THAT THE COURT DID LOOK AT THE UNDERLYING SUBDIVISION OF A
14 PARTICULAR STATUTORY ENACTMENT IN DETERMINING WHETHER OR NOT
15 THAT PARTICULAR FACET OF THE STATUTE PASSED MUSTER UNDER THE
16 COMMERCE CLAUSE.

17 MR. QUINLIVAN: I THINK THAT'S RIGHT, YOUR HONOR,
18 BUT, AGAIN, EVEN UNDER THAT ANALYSIS, WHICH I THINK IS WHAT
19 JUDGE BREYER ENGAGED IN IN CANNABIS CULTIVATORS, HE LOOKED,
20 AGAIN, AT THE CLASS OF ACTIVITIES AND SAID, "IS IT THE CASE
21 THAT MEDICINAL MARIJUANA, A, IS NONECONOMIC IN NATURE OR, B, IS
22 SOLELY INTRASTATE IN NATURE, AND WE'LL NEVER SEE AN INSTANCE
23 WHERE IT CROSSES STATE LINES?" AND HE SAID THAT CONGRESS, EVEN
24 IF YOU WERE LOOKING AT THAT NARROW SET OF ACTIVITIES, CONGRESS
25 WOULD HAVE HAD A RATIONAL BASIS FOR INCLUDING THAT WITHIN THE

1 LARGER REGULATORY SCHEME.

2 THE COURT: OKAY.

3 AND THE THIRD?

4 MR. QUINLIVAN: THE THIRD, I GO BACK TO THE FACT
5 THAT IN DISTINCTION FROM THE SITUATION INVOLVED IN MORRISON THE
6 NINTH CIRCUIT, ON REPEATED OCCASIONS, HAS FOUND THE CONTROLLED
7 SUBSTANCES ACT'S FINDINGS TO BE RATIONAL. AND THERE'S NOTHING
8 IN MORRISON THAT WOULD UPSET THOSE ANALYSES OF THE ISSUE.

9 WHAT MORRISON SAYS IS THAT YOU HAVE TO TAKE A LOOK
10 AND DETERMINE -- YOU CAN'T JUST BLINDLY DEFER TO CONGRESS'
11 FINDINGS. AND WHAT I HAVE BEEN SUGGESTING, AND WHAT THE
12 INITIAL DECISION BY THE NINTH CIRCUIT IN RODRIGUEZ CAMACHO
13 EXPRESSLY SAID IS, "WE DON'T HAVE TO DEFER TO CONGRESS'
14 FINDINGS IF THERE IS NO SUBSTANTIAL RELATION TO INTERSTATE
15 COMMERCE."

16 SUCH IS NOT THE CASE WITH CONTROLLED SUBSTANCES,
17 CONGRESS HAD A RATIONAL BASIS FOR MAKING ITS FINDINGS. AND
18 THAT ANALYSIS HAS BEEN ADHERED TO AND REAFFIRMED ON SEVERAL
19 SUBSEQUENT OCCASIONS.

20 LET ME JUST TURN BRIEFLY TO YOUR HONOR'S QUESTION
21 ABOUT THE -- JUDGE FOGEL'S DECISION IN THE WOMEN'S ALLIANCE
22 CASE BECAUSE I THOUGHT I HEARD YOUR HONOR SUGGEST THAT THAT
23 CASE WAS LIMITED TO CULTIVATION. IN FACT, IT WAS A CASE
24 INVOLVING BOTH CULTIVATION AND POSSESSION.

25 I THINK THAT THE TERMS THAT JUDGE FOGEL USED WAS

1 THAT WHAT THE PLAINTIFFS WERE ASKING WAS FOR A DECLARATION THAT
2 THE CONTROLLED SUBSTANCES ACT DOESN'T APPLY TO THE CULTIVATION
3 AND USE OF MEDICINAL MARIJUANA, THAT THAT ENCOMPASSES
4 POSSESSION.

5 I WAS COUNSEL ON THAT CASE, AS WELL, AND THAT
6 CERTAINLY WAS HOW THE CASE WAS PRESENTED TO JUDGE FOGEL. AND,
7 IN FACT, WE WERE HAVING VERY MUCH THE SAME DISCUSSION WITH
8 JUDGE FOGEL AS WE'RE HAVING WITH YOU HERE TODAY.

9 TURNING TO THE TENTH AMENDMENT ARGUMENT, IT
10 CERTAINLY IS OUR POSITION THAT THE CONCLUSION, WHICH WE THINK
11 IS QUITE CLEAR, THAT THE CONTROLLED SUBSTANCES ACT IS LAWFUL
12 EXERCISE OF CONGRESS' AUTHORITY, NECESSARILY FORECLOSES THEIR
13 TENTH AMENDMENT ARGUMENT, BECAUSE THERE IS NOT A SERIOUS
14 COMMANDEERING ISSUE HERE.

15 THE ONLY EXCEPTION TO THE GENERAL POSITION THAT IF
16 CONGRESS IS ACTING WITHIN ITS DELEGATED POWERS THERE'S NO
17 TENTH AMENDMENT VIOLATION IS IN COMMANDEERING CASES. THIS IS
18 NOT LIKE THE PRINCE SITUATION, WHERE THE FEDERAL GOVERNMENT IS
19 COMPELLING STATE OFFICERS TO ENFORCE FEDERAL LAW. IN FACT, TO
20 GIVE YOUR HONOR AN EXAMPLE, IT'S COME TO OUR ATTENTION THAT THE
21 CITY OF SAN JOSE, FOLLOWING THE EVENTS IN THE WOMEN'S ALLIANCE
22 CASE, REMOVED THEIR OFFICERS FROM A JOINT FEDERAL/STATE DRUG
23 TASK FORCE. AND THE CITY OF SAN JOSE HAS EVERY RIGHT TO DO SO.
24 AND THE FEDERAL GOVERNMENT CERTAINLY IS NOT TAKING ANY ACTION,
25 BECAUSE, AGAIN, THERE IS NO ISSUE OF COMMANDEERING HERE, AND

1 THEREFORE, THE TENTH AMENDMENT ARGUMENT FALLS AWAY, AS WELL.

2 I'D LIKE TO NOW TURN TO THE FUNDAMENTAL RIGHTS
3 ARGUMENT, BECAUSE IT'S OUR POSITION THAT THE LAETRILE CASES ARE
4 DISPOSITIVE ON THIS ISSUE.

5 LET ME FIRST NOTE THAT THE CONTENTION THAT THE
6 LAETRILE CASES DID NOT INVOLVE -- OR, THERE WAS A CHOICE
7 INVOLVED THERE, AND THAT THERE IS NO CHOICE INVOLVED HERE, THAT
8 SIMPLY DOESN'T PASS THE SNICKER TEST.

9 BOTH THE PLAINTIFF IN CARNOHAN AND THE PLAINTIFF
10 CLASS IN RUTHERFORD WERE TERMINALLY ILL CANCER PATIENTS.
11 THAT'S NOT CLEAR FROM THE NINTH CIRCUIT'S DECISION IN CARNOHAN,
12 BUT THE CARNOHAN DECISION RELIED ON THE CALIFORNIA SUPREME
13 COURT'S DECISION IN PEOPLE VERSUS PRIVITERA.

14 IN THAT CASE, IN JUSTICE ROSE BIRD'S DISSENT, SHE
15 NOTES THE PROCEEDINGS IN THE CARNOHAN CASE AND NOTES THAT IT
16 WAS A TERMINALLY ILL PATIENT. AND, OF COURSE, IT'S CLEAR IN
17 THE RUTHERFORD CASES THAT IT WAS A CLASS OF TERMINALLY-ILL
18 CANCER PATIENTS.

19 BY DEFINITION, A TERMINALLY-ILL CANCER PATIENT HAS
20 NO AVAILABLE ALTERNATIVE REMEDY. AND SO THE ARGUMENT THAT THIS
21 CASE IS SOMEHOW DIFFERENT FROM THOSE IN THAT RESPECT JUST
22 SIMPLY DOESN'T WITHSTAND SCRUTINY.

23 WHAT THE NINTH CIRCUIT SAID, AND WHAT EVERY COURT TO
24 HAVE CONSIDERED THIS QUESTION HAS HELD, IS THAT PEOPLE HAVE A
25 RIGHT TO TREATMENT IN GENERAL, BUT THEY DON'T HAVE A RIGHT TO

1 ANY PARTICULAR TREATMENT, AND PARTICULARLY NOT OF AN UNPROVEN
2 MEDICAL TREATMENT. IT'S NOT JUST THE FEDERAL COURTS THAT HAVE
3 SAID THAT; AS WE NOTE IN OUR BRIEF, THE CALIFORNIA SUPREME
4 COURT SAID THAT IN THE PRIVITERA CASE, AND MORE RECENTLY, THE
5 CALIFORNIA COURT OF APPEALS UPHELD AND REAFFIRMED PRIVITERA IN
6 THE CONTEXT OF MEDICINAL MARIJUANA. AND THAT WAS THE PEOPLE
7 VERSUS BIANCO CASE. IT SAID THAT THERE WAS NO FEDERAL OR STATE
8 CONSTITUTIONAL RIGHT TO TREAT ONESELF WITH MARIJUANA. SO I
9 THINK THAT THAT IS A KEY DISTINCTION, AS WELL.

10 I WOULD ALSO POINT OUT, YOUR HONOR, THAT THERE HAVE
11 BEEN THREE DISTRICT COURTS THAT HAVE CONSIDERED THIS PARTICULAR
12 QUESTION; JUDGE BREYER, WE CITED THE OTHER TWO, JUDGE BRYANT IN
13 THE PIERSON CASE IN THE DISTRICT OF COLUMBIA, AND JUDGE KATZ,
14 IN THE KUROMIYA CASE IN THE EASTERN DISTRICT OF PENNSYLVANIA,
15 ALL OF WHOM HAVE COME TO THE SAME CONCLUSION. AND, IN FACT,
16 BOTH DECISIONS IN THE DISTRICT OF COLOMBIA, AND I BELIEVE THE
17 EASTERN DISTRICT OF PENNSYLVANIA, CITED TO RUTHERFORD,
18 CARNOHAN, AND THE OTHER CASES WHICH HAVE HELD THAT THERE IS NO
19 SUCH FUNDAMENTAL RIGHT.

20 SO IT'S NOT JUST ME THAT IS SAYING THAT THESE CAUSES
21 ARE DISPOSITIVE, THE OTHER JUDGES THAT HAVE CONSIDERED THIS
22 SPECIFIC ISSUE HAVE FOUND THEM TO BE DISPOSITIVE, AS WELL.

23 I DON'T THINK I NEED TO SPEAK TOO MUCH ABOUT THE
24 MEDICAL NECESSITY CLAIM, I THINK THAT THAT CLAIM IS CLEARLY
25 FORECLOSED BY OAKLAND CANNABIS. AND I THINK THAT JUSTICE

1 THOMAS' FOOTNOTE -- FOOTNOTE 7 IN JUSTICE THOMAS' OPINION, MADE
2 IT CLEAR, AS WELL, THAT WHILE POSSESSION MAY NOT HAVE BEEN AN
3 ASPECT OF THAT PARTICULAR CASE, THAT THEIR ANALYSIS WOULD COVER
4 THAT SITUATION, AS WELL. IN FACT, THERE IS NO PRINCIPLED WAY
5 TO DISTINGUISH POSSESSION FROM THE COURT'S ANALYSIS OF THE
6 BROADER ISSUES OF DISTRIBUTION AND CULTIVATION.

7 THE COURT: OKAY.

8 MR. QUINLIVAN: I JUST WANTED TO ADD ONE LAST POINT,
9 YOUR HONOR, AND THAT'S THAT WE HAVE HAD A LOT OF DISCUSSION
10 HERE THIS MORNING ABOUT THE DIFFERENCE BETWEEN FEDERAL AND
11 STATE LAW ON THIS ISSUE, AND THEREFORE, I WOULD LIKE TO
12 ACTUALLY QUOTE A RECENT DECISION BY THE CALIFORNIA COURT OF
13 APPEALS. THIS IS ACTUALLY THE PEOPLE VERSUS BIANCO DECISION,
14 WHICH INVOLVED THE ISSUE OF MEDICAL MARIJUANA.

15 THE COURT THERE SAID THAT, "REASONABLE PERSONS MAY
16 DISAGREE ABOUT WHETHER THE FEDERAL PROHIBITION IS A GOOD
17 POLICY, BUT THE PEOPLE OF THE UNITED STATES, THROUGH THEIR
18 ELECTED REPRESENTATIVES IN CONGRESS, HAVE SPOKEN. AND CONGRESS
19 HAD NOT SEEN FIT TO CHANGE THE LAW, DESPITE A GROWING MOVEMENT
20 IN SEVERAL STATES THAT SUPPORT THE MEDICAL USE OF MARIJUANA."

21 CONGRESS HAD SPOKEN ON THIS ISSUE. IT DID SO WHEN
22 IT PASSED THE CONTROLLED SUBSTANCES ACT. IN THE CONTROLLED
23 SUBSTANCES ACT IT ADOPTED THE FDA DRUG APPROVAL PROCESS THAT
24 HAD BEEN ESTABLISHED IN 1937. AND IN PUBLIC LAW NUMBER
25 105-277, WHICH I HAD QUOTED EARLIER, CONGRESS REAFFIRMED THAT

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1 THE PROHIBITIONS OF THE CONTROLLED SUBSTANCES ACT APPLY IN THIS
2 PARTICULAR INSTANCE, AND THAT CONGRESS OPPOSED EFFORTS TO
3 CIRCUMVENT THAT PROCESS UNLESS AND UNTIL MARIJUANA IS PROVEN
4 MEDICALLY EFFECTIVE BY THE FDA THROUGH RIGOROUS SCIENTIFIC AND
5 MEDICAL ANALYSES.

6 THE COURT: WHY DON'T YOU THINK THAT JUDGE
7 KOZINSKI'S CONCERNS THAT I DESCRIBE GENERALLY AS FEDERALISM,
8 MORE SPECIFICALLY THE ANALYSIS THAT HE ENGAGES IN, BASED ON THE
9 NEW YORK CASE, IN THE PRINCE CASE AT LEAST RESONATE ON THIS
10 RECORD, WHERE YOU HAVE THE ENFORCEMENT OF STATUTES WHICH,
11 EVENTS OF POLICY, THAT IS, THAT DOES SEEM TO BE CONFLICTUAL,
12 NOT WITHSTANDING WHAT YOU JUST QUOTED TO ME FROM BIANCO?

13 MR. QUINLIVAN: WELL, I THINK -- LET ME ANSWER THAT
14 IN TWO WAYS. FIRST OFF, I DON'T WANT TO REPEAT YOUR HONOR,
15 BUT, OBVIOUSLY, JUDGE KOZINSKI'S CONCURRENCE WAS NOT JOINED BY
16 THE OTHER TWO MEMBERS OF THE COURT, AND THE OTHER TWO MEMBERS
17 OF THE COURT, ACTUALLY, THE DECISION --

18 THE COURT: I WAS TOLD BY COUNSEL IT JUST MEANS THEY
19 DIDN'T GO AS FAR.

20 MR. QUINLIVAN: WELL, THAT COULD BE THE CASE, BUT
21 WHAT'S CLEAR FROM THAT --

22 THE COURT: HE'S NOT THE LAW PROFESSOR, SO --

23 MR. QUINLIVAN: THAT'S CORRECT.

24 THE COURT: I DON'T KNOW IF THE LAW PROFESSOR
25 TEACHES STARE DECISIS IN THAT WAY.

1 MR. QUINLIVAN: THAT'S RIGHT.

2 THE COURT: GO AHEAD.

3 MR. QUINLIVAN: THAT'S RIGHT.

4 I THINK WHAT THE DECISION DOES STAND FOR IS THE
5 PROPOSITION THAT THE FEDERAL PROHIBITION DOES COVER AIDING AND
6 ABETTING. AND I THINK YOUR HONOR IS EXACTLY RIGHT, THAT ONE
7 THING THAT CONANT DOES STAND FOR IS THAT IF YOU'RE VIOLATING
8 FEDERAL LAW, OR IF YOU'RE AIDING AND ABETTING IN THE VIOLATION
9 OF FEDERAL LAW, THEN THE INJUNCTION SET FORTH IN THAT CASE
10 DOESN'T COVER THAT PARTICULAR SITUATION.

11 I THINK THERE ARE SEVERAL ISSUES WHY I WOULD SAY
12 THAT WE DISAGREE WITH JUDGE KOZINSKI'S CONCURRENCE AND HIS
13 ANALYSIS THEREIN. FIRST OFF, ONE OF THE THINGS HE NOTED WAS
14 THAT THERE WAS COMMANDEERING BECAUSE THE FEDERAL GOVERNMENT WAS
15 FORCING STATE DOCTORS TO HUE TO A PARTICULAR LINE. WELL, TO
16 BEGIN WITH, I'M NOT SURE OF ANY CASE THAT HAS HELD THAT PRIVATE
17 INDIVIDUALS, NOT STATE OR LOCAL OFFICIALS, FALL UNDER THE
18 COMMANDEERING DOCTRINE.

19 EVEN SO, JUDGE KOZINSKI MADE IT -- HE DIDN'T REACH
20 AN ULTIMATE CONCLUSION. IN FACT, I THINK SOME OF THE LANGUAGE
21 HE USED IS, "WHEN CONGRESS IS ACTING IN THE OUTER REACHES OF
22 ITS AUTHORITY" --

23 THE COURT: WELL, THAT IS ANOTHER PRONG OF WHY HE
24 BELIEVES THAT THE INTERESTS THAT ARE IMPLICATED IN THIS
25 CONFLICT SUPPORT, AND WOULD SUPPORT, THE ISSUANCE OF THE

1 INJUNCTION IN THAT CASE. IT'S ENGRAFTED ONTO THE ARGUMENT
2 HERE. I READ THAT, REALLY, AS JUST FURTHER SUPPORT FOR HIS
3 VIEWS ON THAT ISSUE.

4 MR. QUINLIVAN: I THINK THAT'S RIGHT, BUT, AGAIN,
5 JUDGE KOZINSKI --

6 THE COURT: SO ONE, IT ASSUMES A FINDING THAT
7 CONGRESS IS AT THE PERIPHERY OF ITS CONGRESS CLAUSE POWERS.
8 AND THAT, THEN, DOVETAILS RIGHT INTO, TO ME, WHAT IS SORT OF
9 HORNBOOK COMMERCE CLAUSE JURISPRUDENCE, IS THAT CONGRESS IS
10 ONLY EMPOWERED TO ENGAGE THE REACH OF ITS CONGRESS CLAUSE
11 POWERS THAT ARE CONSISTENT WITH THE CONSTITUTION, BECAUSE
12 OTHERWISE, IT RUNS AFOUL OF THE DELICATE BALANCE.

13 MR. QUINLIVAN: I AGREE. AND I GO BACK TO THE POINT
14 THAT JUDGE KOZINSKI WASN'T CONCURRING IN THE JUDGMENT. I MEAN,
15 HE JOINED THE MAJORITY OPINION, BUT CONCURRED. AND THEREFORE,
16 HE, AS WELL, JOINED THE IDEA THAT IF YOU'RE AIDING AND ABETTING
17 FEDERAL LAW, THE TERMS OF THAT INJUNCTION WOULD NOT COVER YOUR
18 CONDUCT.

19 HE CERTAINLY WOULD HAVE HAD THE OPPORTUNITY -- AND
20 WE ALL KNOW THAT JUDGE KOZINSKI KNOWS HOW TO DISSENT OR CONCUR
21 IN THE JUDGMENT, OR CONCUR IN THE PARTICULAR CASE. IF HE
22 DISAGREED WITH THE REACH OF THAT INJUNCTION OR THAT LIMITATION
23 HE COULD HAVE DONE SO, BUT HE DID NOT.

24 GOING BACK TO THE, I GUESS THE HEART OF YOUR HONOR'S
25 QUESTION, IS WHEN YOU'RE ACTUALLY ANALYZING THE STATUTORY

1 FINDINGS, AGAIN, WHAT YOU HAVE TO LOOK AT IS THE CLASS OF
2 ACTIVITY AS DEFINED BY CONGRESS, NOT AS DEFINED BY PEOPLE OF
3 CALIFORNIA, BUT AS DEFINED BY CONGRESS.

4 WHEN YOU LOOK AT THE CLASS OF ACTIVITY AS DEFINED BY
5 CONGRESS, IT CLEARLY IS RATIONAL THAT THAT CONDUCT COULD BE
6 ECONOMIC IN CHARACTER AND COULD CROSS STATE LINES. TO GIVE YOU
7 ONE EXAMPLE, IN THE CANNABIS CLUB LITIGATION --

8 THE COURT: WHY ON THIS RECORD? WHY ON THIS RECORD?
9 I MEAN, WE COULD HIT IT, AND YOU CAN ARGUE, AS YOU HAVE, THAT
10 THERE IS A RATIONAL NEXUS, AND THE NINTH CIRCUIT HAS FOUND
11 THAT, BUT IN SOME WAYS THAT BEGS THE QUESTION. AND THE
12 UNDERLYING QUESTION IS, WHY IS IT RATIONAL?

13 MR. QUINLIVAN: WELL, I DON'T THINK YOU CAN LOOK AT
14 IT ON THE BASIS OF THIS RECORD, I GUESS THAT'S THE ANSWER TO
15 YOUR QUESTION.

16 THE COURT: WELL, BUT THAT, THEN, TAKES ME BACK TO
17 THE LINE OF CASES THAT BASICALLY SAY IF CONGRESS HAS SOUGHT TO
18 REGULATE A CLASS OF ACTIVITIES THE DIMINIMUS EFFECT IS REALLY
19 OF NO EFFECT, FOR PURPOSES OF COMMERCE CLAUSE ANALYSIS. BUT
20 THEY'VE RAISED A BIT OF A DIFFERENT ISSUE, IT'S A DIFFERENT
21 ISSUE.

22 THE CONTEXT IN WHICH THEY RAISE THE QUESTION HERE AT
23 LEAST INVITES THIS COURT, AND SAYS, BASED ON MORRISON, THIS
24 COURT OUGHT TO LOOK AT, WHETHER YOU CALL IT RATIONALITY OR NOT,
25 THE FINDINGS TO DETERMINE WHETHER OR NOT THERE IS SOME NEXUS,

1 SUBSTANTIAL EFFECT WITH RESPECT TO COMMERCE.

2 MR. QUINLIVAN: I AGREE, BUT NOT AS TO THIS
3 PARTICULAR SET OF CIRCUMSTANCES. YOU HAVE TO LOOK AT THE CLASS
4 OF ACTIVITIES, AS DEFINED BY CONGRESS.

5 MORRISON DID NOT UNDERMINE THAT AUTHORITY. AND SO I
6 AGREE WITH YOU, YOU DO LOOK AT THAT, AND YOU DO DETERMINE
7 WHETHER CONGRESS WAS RATIONAL. BUT DON'T LOOK AT IT BASED ON A
8 PARTICULAR SET OF FACTS.

9 I'M NOT AWARE OF ANY CASE THAT HAS EVER HELD THAT
10 YOU CAN ISOLATE OUT A PARTICULAR CIRCUMSTANCE UNDER THE
11 CONTROLLED SUBSTANCES ACT AND SAY THAT, "MY PARTICULAR SET OF
12 CIRCUMSTANCES DOESN'T AFFECT INTERSTATE COMMERCE."

13 SO I AGREE WITH YOUR HONOR, OUR ONLY DISAGREEMENT --
14 OR, I GUESS MY ANSWER IS THAT HOW YOU ANALYZE IT IS THE CLASS.

15 THE COURT: YOU CAN DISAGREE. YOU DON'T HAVE TO
16 COUCH IT IN THOSE TERMS.

17 MR. QUINLIVAN: WELL, I'M NOT SURE YOUR HONOR WAS
18 ACTUALLY SAYING THAT. YOUR HONOR WAS JUST POSITING A QUESTION
19 TO ME, SO I DIDN'T MEAN TO SUGGEST THAT THAT WAS YOUR HONOR'S
20 ANALYSIS.

21 THE COURT: ALL RIGHT. OKAY. ALL RIGHT. THANKS.

22 HE DID RAISE A COUPLE OF ISSUES, AND ONE, REALLY, I
23 THINK HAS TO DO WITH THE -- I THINK WE'VE ACTUALLY TALKED ABOUT
24 THE NINTH AMENDMENT ISSUE IN SOME DETAIL. HE HAS RAISED A
25 QUESTION THAT WAS IN THE BRIEF, AND I THINK I KNOW THE ANSWER

1 TO IT, ABOUT CONGRESS' MORE RECENT FINDINGS, IN LIGHT OF THE
2 ADVANCES IN STATES OF THE MOVEMENT FOR -- TO USE MARIJUANA FOR
3 MEDICINAL PURPOSES, AND HOW YOU MIGHT VIEW THAT IN THE CONTEXT
4 OF THE COMMERCE CLAUSE ANALYSIS.

5 I'M SORT OF INTERESTED IN YOUR VIEW OF THE POINT
6 THAT THE LOPEZ CASE ACTUALLY DOES SEEM TO PICK A PARTICULAR
7 STATUTE AS A PART OF A SCHEME AND ANALYZE IT IN THAT RESPECT AS
8 TO HOW THAT READS ON THE ULTIMATE ANALYSIS. AND THEN, IF YOU
9 HAVE OTHER POINTS, SO BE IT. IT'S BEEN A FULL MORNING.

10 MR. BARNETT: ALL RIGHT, LET ME TAKE THE FIRST
11 POINTS YOU RAISED ABOUT THE DECLARATION OF CONGRESS.

12 FIRST OF ALL, IT WAS ONE PAGE IN AN OMNIBUS BILL
13 THAT HAD SEVERAL HUNDRED PAGES INVOLVED. IT WAS NOT A PRODUCT
14 OF ANY HEARINGS. IT WAS NOT A PRODUCT OF ANY FACT-FINDING OF
15 THE KIND YOU SAW -- IT WAS ONE PAGE IN A VERY LONG OMNIBUS
16 BILL. IT WAS NOT A PRODUCT OF ANY HEARINGS OR FACT-FINDINGS,
17 UNLIKE IN THE MORRISON CASE, WHERE THERE WERE HEARINGS, THERE
18 WAS FACT-FINDING. THOSE WERE REJECTED AS INADEQUATE. HERE,
19 YOU HAVE ONE STATEMENT OF SOMETHING.

20 SECONDLY, MOST IMPORTANTLY, IT WAS NOT A FINDING OF
21 ANYTHING. WHEN YOU READ IT, YOU WILL SEE THAT IT'S SIMPLY A
22 RESTATEMENT OF THE REQUIREMENTS OF WHAT IT TAKES TO HAVE A DRUG
23 BE SCHEDULED. IT DIDN'T SAY ANYTHING SPECIFICALLY FACTUAL
24 ABOUT MARIJUANA.

25 AND THEN IT HAS THE CONCLUDING LANGUAGE THAT SAYS

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1 THEY REAFFIRM THE IMPORTANCE OF THE CONTROLLED SUBSTANCES ACT
2 SCHEME, EVEN IN LIGHT OF THESE LEGISLATIVE INITIATIVES. BUT IT
3 SIMPLY WASN'T A FINDING.

4 SO I THINK IT DOES STATE AN INTENT OF CONGRESS, TO
5 THE EXTENT THAT MATTERS, WEEKLY, I BELIEVE. BUT IT'S NOT A
6 FINDING OF ANYTHING TO BE DEFERRED TO.

7 MR. MICHAEL: IN ADDITION, ON THAT ISSUE, YOUR
8 HONOR, EVEN THOUGH IT WASN'T PART OF OUR REPLY BRIEF, THERE IS
9 AMPLE AUTHORITY THAT SAYS, AND I'VE CITED IT IN OTHER CASES
10 WHERE WE'VE ARGUED THIS ISSUE, THAT THE INTENT OF CONGRESS THAT
11 THE GOVERNMENT IS REFERRING TO HERE IS NOT BINDING ON THIS
12 COURT, AND IT'S NOT BINDING ON ANY COURT. IT'S NO MORE BINDING
13 THAN IF A CONGRESSMEN GOT UP AND MADE A PARTICULAR SPEECH THAT
14 WENT INTO THE CONGRESSIONAL RECORD.

15 MR. BARNETT: THE INTENT OF CONGRESS RESOLUTION, YOU
16 MEAN.

17 MR. MICHAEL: YEAH. IT'S GOT TO BE TAKEN BY THIS
18 COURT FOR WHAT IT REALLY IS. IT HAS NOTHING TO DO WITH A
19 JUDICIAL DETERMINATION AS TO ANY PARTICULAR ISSUE.

20 MR. BARNETT: SECONDLY, WITH RESPECT TO THE
21 GOVERNMENT'S ARGUMENT RELATED -- CLOSELY RELATED TO THIS, THAT
22 YOU ARE PRECLUDED FROM DOING A MORRISON INQUIRY BY PRIOR CASES
23 THAT HAVE FOUND THE CONTROLLED SUBSTANCE ACT RATIONAL, WITHOUT
24 GETTING BACK INTO THE CLASS, BECAUSE THERE'S NO REASON TO
25 REHASH THAT, OBVIOUSLY, YOU HAVE TO DISTINGUISH CASES THAT TALK

1 ABOUT RATIONAL FROM CASES THAT TALK ABOUT RATIONAL. THERE IS
2 THE RATIONALE BASIS TEST WHICH SAYS THAT IF ANY HYPOTHETICAL
3 LEGISLATURE MIGHT HAVE HAD A GOOD REASON FOR THIS, THAT'S
4 RATIONAL.

5 THEN THERE IS THE POST-LOPEZ, POST-MORRISON INQUIRY;
6 IF THAT WAS STANDARD RATIONALITY, WHICH YOU CAN FIND LOTS OF
7 CASES PRE-LOPEZ STATING, IF THAT WERE THE STANDARD OF
8 RATIONALITY, MORRISON WOULD MAKE NO SENSE. IT WAS THAT RECORD,
9 IT WAS THAT HISTORY, THAT CAUSED --

10 THE COURT: OR IT WOULD BE PRETTY DEFERENTIAL.

11 MR. BARNETT: RIGHT. IT WAS THAT HISTORY THAT
12 CAUSED PEOPLE TO THINK THAT LOPEZ WASN'T GOING TO GO ANYWHERE,
13 BECAUSE IF YOU COUPLE LOPEZ WITH THAT STATEMENT OF DEFERENCE,
14 IT DOESN'T MEAN MUCH. MORRISON IS A REJECTION OF THAT
15 STATEMENT OF DEFERENCE.

16 SO THERE'S RATIONAL, AND THEN THERE'S RATIONAL, LIKE
17 THE CITY OF CLAYBURN'S FAMOUS HEIGHTENED RATIONAL BASIS.
18 CLEARLY SOMETHING ABOVE MERE RATIONAL BASIS SCRUTINY IS
19 HAPPENING POST-MORRISON. AND IT'S NOT CLEAR AT ALL THAT THE
20 NINTH CIRCUIT ENGAGED IN THAT KIND OF ANALYSIS. THERE'S
21 NOTHING IN THEIR OPINIONS THAT SUGGEST THAT THEY WERE ACTUALLY
22 TAKING A HARD LOOK AT THE REASONS THAT CONGRESS WAS GIVING,
23 WHOLLY APART FROM THE FACT THAT THE RATIONAL BASIS THAT THEY
24 WERE LOOKING FOR WAS A RATIONAL BASIS WITH RESPECT TO THE
25 ENTIRE CONTROLLED SUBSTANCES ACT. THEY WEREN'T LOOKING AT A

1 RATIONAL BASIS AS APPLIED TO THE CLASS OF ACTIVITIES HERE.

2 THERE WAS A COUPLE OF OTHER POINTS THAT -- YOUR
3 HONOR, DO YOU HAVE ONE OTHER POINT THAT YOU ASKED US ABOUT?

4 THE COURT: NO. I ASKED YOU -- NO, I JUST -- I
5 THINK IT'S ENCOMPASSED IN THE ARGUMENT YOU JUST MADE, BUT I WAS
6 JUST CURIOUS; IT DOESN'T REALLY READ ON THIS IN A WAY THAT IS
7 DISPOSITIVE ABOUT THE SUPREME COURT'S VIEW OF THE PARTICULAR
8 STATUTE IN LOPEZ.

9 MR. BARNETT: RIGHT, AND FOR THAT MATTER, IN
10 MORRISON, AS WELL. THEY ONLY STRUCK DOWN ONE PART OF THE
11 VIOLENCE AGAINST WOMEN ACT AND UPHELD THE REST OF THE ACT.
12 THEY SINGLED OUT THE ONE PART WHERE THEY THOUGHT CONGRESS
13 REACHED TOO FAR AND SAID THE REST OF THE ACT WILL STAND. AND
14 THAT IS WHAT THEY DID IN LOPEZ, AS WELL. LOPEZ IS A LITTLE
15 DIFFERENT, BECAUSE IT'S AN ACT THAT AIMED AT A PARTICULAR KIND
16 OF ACTIVITY.

17 BUT, AS YOU RIGHTLY POINTED OUT, IT WAS IN A
18 COMPREHENSIVE SCHEME OF REGULATING THE INTERSTATE COMMERCE IN
19 FIREARMS. THIS IS JUST THE ONE TIME, THE ONE PART OF THAT
20 OVERALL STATUTORY SCHEME WHICH THEY FOUND WAS ABRIDGED TOO FAR.
21 SO I WOULD THINK WHAT YOU SAY ABOUT LOPEZ APPLIES EQUALLY WELL
22 TO MORRISON.

23 FINALLY, I WOULD SAY THAT IN RESPONSE TO COUNSEL'S
24 SUGGESTION THAT THE LOGIC OF THE SUPREME COURT'S REJECTION OF
25 THE NECESSITY DEFENSE IN OCBC SUGGESTS THAT THEY WOULD REJECT

1 OUR ARGUMENT. THAT MIGHT CONCEIVABLY HAVE BEEN THE CASE, HAD
2 THE COURTS NOT EXPRESSLY SAID THEY WERE NOT CONSIDERING THE
3 ARGUMENTS WE RAISED THERE, WHICH --

4 THE COURT: IT WOULD CERTAINLY BE MORE AMBIGUOUS.

5 MR. BARNETT: RIGHT, RIGHT. I WOULD HAVE TO SAY, I
6 WOULD SAY THE SAME THING ABOUT RUTHERFORD OR CARNOHAN.

7 THE GOVERNMENT'S ARGUMENT ABOUT WHAT THOSE CASES
8 STOOD FOR MIGHT BE MORE PLAUSIBLE IF THE COURT IN CARNOHAN HAD
9 NOT SPECIFICALLY SAID, "WE ARE NOT ADDRESSING THE PLAINTIFF'S
10 RIGHT TO USE SUBSTANCES OF THEIR OWN CONFECTION." EVERYTHING
11 ELSE THEY SAY HAS TO BE READ IN LIGHT OF THAT STATEMENT. AND
12 THAT'S CLEARLY WHAT WE HAVE IN OUR CASE, YOUR HONOR, REMEDIES
13 OF THEIR OWN CONFECTION.

14 MR. MICHAEL: JUST ONE OTHER THING, YOUR HONOR. AND
15 I WANT TO REFER IN OUR REPLY IN FOOTNOTE 2, WE SPECIFICALLY
16 ADDRESS ONE OF THE ISSUES RAISED BY QUINLAN REGARDING WHAT
17 JUDGE BREYER SAID IN THE DISTRICT COURT FINDING -- WE REALIZE
18 IT'S NOT BINDING ON THIS COURT -- THE STATEMENTS HE MADE ABOUT
19 THE CONTROLLED SUBSTANCES ACT IN REGARDS TO SPECIFIC CONDUCT IS
20 A PRE-MORRISON STATEMENT. HE MADE THAT STATEMENT IN HIS
21 DECISION IN 1998 WHICH IS PRE-MORRISON, POST-LOPEZ.

22 IF YOU LOOK AT THAT DECISION, AS I'VE EXPLAINED IN
23 OUR FOOTNOTE 2, IT REALLY IS ERRONEOUS IN THE LIGHT OF
24 MORRISON. IT IS SUCH A NARROW HOLDING THAT WHEN YOU LOOK AT
25 MORRISON, AS PROFESSOR BARNETT SAYS, IT COMPLETELY CHANGED THE

1 WHOLE LANDSCAPE, IN TERMS OF HOW YOU ADDRESS THE ISSUES IN
2 LOPEZ.

3 SO ONCE YOU HAVE -- YOU'VE GOT LOPEZ, AND THEN YOU
4 HAVE JUDGE BREYER'S DECISION IN THE OCBC CASE, AT LEAST THE
5 DISTRICT COURT, AND THEN YOU HAVE MORRISON; IF YOU LOOK BACK,
6 AS SUGGESTED BY PROFESSOR BARNETT, WHEN YOU LOOK BACK ON THESE
7 PRE-MORRISON DECISIONS, IN FACT, THEY WERE EXTREMELY NARROW.
8 AND JUDGE BREYER FELL INTO THAT SAME LOPEZ, QUOTE, "TRAP."

9 NOW, I DON'T MEAN TRAP IN THE TERMS OF, LIKE, THE
10 PHYSICAL SENSE, BUT, YOU KNOW, JUST IN TERMS OF THE LEGAL
11 ANALYSIS OF NARROWLY INTERPRETING LOPEZ THAT MORRISON EXPANDED
12 ON AND MADE HIS DECISION PRE-MORRISON SORT OF ILLOGICAL AND
13 IRRATIONAL, YOU KNOW? MORRISON DOES, IN FACT, SAY THAT YOU
14 HAVE TO LOOK AT THE SPECIFIC CONDUCT AT ISSUE IN EACH CASE.

15 THE COURT: I DON'T KNOW HOW HE CAN MAKE THE
16 DECISION IRRATIONAL, BUT --

17 MR. MICHAEL: AND I APOLOGIZE. I DON'T MEAN TO SAY
18 IT WAS IRRATIONAL.

19 THE COURT: OKAY.

20 MR. MICHAEL: BUT, CERTAINLY, TOO NARROW --

21 THE COURT: YOUR POINT IS --

22 MR. MICHAEL: TOO NARROW IN THE LIGHT OF MORRISON.

23 THE COURT: YOUR POINT IS WHAT YOU'VE ALREADY
24 MADE --

25 MR. MICHAEL: THAT'S CORRECT.

1 THE COURT: -- THAT THE COURT HAS TO LOOK AT CASES
2 WITH AN EYE TOWARDS WHAT MORRISON TEACHES GOING FORWARD.

3 MR. BARNETT: I HAVE ONE LITTLE FOOTNOTE TO THAT
4 BASED ON WHAT YOUR HONOR HAD SAID IN TALKING TO THE GOVERNMENT,
5 AND THAT IS THAT WE DO NOT CONTEND THAT LOPEZ IS UNIMPORTANT.

6 THE COURT: RIGHT.

7 MR. BARNETT: WE CONTEND THAT LOPEZ WAS UNDERRATED
8 BY COURTS AFTERWARDS. AND MORRISON MADE CLEAR THAT THOSE
9 INTERPRETATION OF LOPEZ WERE IN ERROR.

10 MR. RAICH: YOUR HONOR, THERE ARE JUST A FEW THINGS
11 I WOULD LIKE TO MENTION WHICH HAVEN'T BEEN --

12 THE COURT: NO, NO, COUNSEL.

13 WHAT IS IT -- IF IT'S TRUE REBUTTAL NOW -- WE'VE
14 SPENT QUITE A BIT OF TIME, BECAUSE THEY ARE SIGNIFICANT ISSUES.

15 ARE THERE THINGS THAT HAVE NOT BEEN COVERED ALREADY?

16 MR. RAICH: THERE WERE THREE ISSUES I WANTED TO
17 MENTION. IF YOUR HONOR DOES NOT --

18 THE COURT: NO, I JUST WANT TO MAKE SURE THAT WE'RE
19 COVERING NEW GROUND.

20 MR. RAICH: ONE WOULD BE HAVING TO DO WITH THE
21 GOVERNMENT'S MENTIONING OF A STATE LAW CASE, PEOPLE VERSUS
22 BIANCO.

23 THE COURT: YEAH, BUT YOU'VE BRIEFED THAT.

24 MR. RAICH: YES.

25 AND THE OTHER ONE HAS TO DO WITH THE GOVERNMENT'S

1 CONTENTION HERE THAT THIS COULD CROSS STATE LINES; THAT IS
2 SOMETHING WE HAVEN'T MENTIONED IN THE BRIEF. IF I MIGHT JUST
3 SPEND A COUPLE OF SENTENCES WITH THAT?

4 THE COURT: SURE. SURE.

5 MR. RAICH: IN THIS CASE WE HAVE A SITUATION
6 DIFFERENT THAN ANY OTHER CASE INVOLVING A CRIMINAL PROSECUTION
7 IN THAT WHAT WE'RE ASKING HERE IS PROSPECTIVELY AN INJUNCTION.
8 YOUR HONOR CAN FASHION AN INJUNCTION ANY WAY YOU WISH TO KEEP
9 THIS ACTIVITY WHOLLY WITHIN THE CONFINES OF THE BORDERS OF
10 CALIFORNIA. AND IF ANY WERE TO SOMEHOW SPILL OUT OF THE
11 BORDERS OF CALIFORNIA, THEN THAT WOULD BE VIOLATING THE
12 INJUNCTION THAT YOUR HONOR WOULD ISSUE.

13 THE COURT: NO, THAT'S A GOOD POINT.

14 MR. BARNETT: THANK YOU, YOUR HONOR.

15 THE COURT: I KNOW YOU'RE TIRED.

16 THE REPORTER: THANK YOU.

17 THE COURT: AND I APOLOGIZE.

18 THE REPORTER: NO PROBLEM.

19 MR. QUINLIVAN: THREE VERY BRIEF POINTS AND THEN
20 JUST ONE HOUSEKEEPING MATTER.

21 ON THE LOPEZ POINT I JUST WANTED TO POINT OUT THAT
22 THERE IS ANOTHER PART OF THAT STATUTE WHICH PROHIBITS THE USE
23 OF A DRUG IN CONNECTION WITH A DRUG TRAFFICKING OFFENSE UNDER
24 THE CONTROLLED SUBSTANCES ACT, AND THAT HAS UNIFORMLY --

25 THE COURT: 924?

1 MR. QUINLIVAN: I BELIEVE SO. AND THAT,
2 NOTWITHSTANDING THE ANALYSIS OF LOPEZ HAS WITHHELD
3 CONSTITUTIONAL SCRUTINY BY EVERY COURT TO HAVE CONSIDERED IT.

4 ON THE SECOND POINT, OUR ANALYSIS OF THE MORRISON
5 ISSUE IS NOT -- THIS IS NOT THE FIRST COURT THAT HAS BEEN FACED
6 WITH THIS ISSUE. WE CITED THE EIGHTH TO TENTH CIRCUITS AND THE
7 DISTRICT OF MASSACHUSETTS, WHO HAVE ALREADY CONSIDERED THIS
8 QUESTION.

9 AND FINALLY, JUDGE BREYER'S DECISION IN THE INITIAL
10 PRELIMINARY INJUNCTION HEARING WAS PRE-MORRISON, BUT HIS
11 DISCUSSION GRANTING SUMMARY JUDGMENT TO THE UNITED STATES IN
12 MAY OF THIS YEAR SPECIFICALLY CONSIDERED THE MORRISON CASE AND
13 HELD THAT IT DID NOT CHANGE HIS ANALYSIS OF THE COMMERCE CLAUSE
14 ISSUE.

15 I JUST WANTED TO RAISE ONE HOUSEKEEPING MEASURE,
16 YOUR HONOR.

17 THE COURT: SURE.

18 MR. QUINLIVAN: WE HAD MOVED TO DISMISS --

19 THE COURT: YEAH. WHEN IS THAT? IT'S ON THE 17TH,
20 OR SOMETHING.

21 MR. QUINLIVAN: IF I RECALL CORRECTLY, I BELIEVE IT
22 WAS JANUARY 14TH. IN OUR VIEW, THE ISSUES THAT ARE PRESENTED
23 IN THAT ARE ENTIRELY -- ARE IDENTICAL TO THE ISSUES IN THAT,
24 AND SO WE --

25 THE COURT: YEAH, I APOLOGIZE. I'VE BEEN IN TRIAL,

1 SO I WAS UP QUITE LATE LAST NIGHT READING THE PAPERS AND OVER
2 THE WEEKEND. AND I REALIZED A BIT LATE THAT THE MOTION TO
3 DISMISS -- IT'S STRIKES ME THAT -- LET ME CHOP INTO THIS AND
4 GET YOU SOMETHING ON THIS. AND THAT WILL, I THINK, IN LARGE
5 MEASURE, GIVE YOU A PREVIEW OF WHAT MAY TRANSPIRE WITH RESPECT
6 TO YOUR MOTION TO DISMISS, WHICH TAKES UP SOME OF THE SAME
7 ISSUES.

8 MY SENSE IS THAT ONCE THE COURT ISSUES THIS
9 DECISION, I WOULD PROBABLY SET UP A STATUS CONFERENCE WITH YOU,
10 DEPENDING UPON WHAT HAPPENS, BEFORE WE WOULD GO TO THE ISSUE OF
11 DISMISSAL.

12 MR. QUINLIVAN: VERY GOOD, YOUR HONOR.

13 MR. MICHAEL: YOUR HONOR, IS THE COURT THEN ALLOWING
14 US TO DEFER BRIEFING ON THE MOTION TO DISMISS SO THAT WE DON'T
15 HAVE TO FILE --

16 THE COURT: YOUR INITIAL BRIEF IS IN, I SUSPECT.

17 MR. QUINLIVAN: YES. WE JUST ADOPTED BY REFERENCE
18 THE ARGUMENTS SET FORTH IN --

19 THE COURT: AND I CAN'T IMAGINE YOU WOULD DO MUCH
20 DIFFERENT. BUT NO, IT'S NOT GOING TO TAKE US LONG TO TEE THAT
21 UP, DEPENDING UPON WHAT HAPPENS WITH THIS. SO, YEAH, WHY DON'T
22 WE JUST INDICATE THERE'S NO NEED TO FILE AN OPPOSITION AT THIS
23 JUNCTURE PENDING THE COURT'S RESOLUTION OF THE ISSUES IN THE
24 PRELIMINARY INJUNCTION AND A DISCUSSION AT A SUBSEQUENT STATUS
25 CONFERENCE AS TO THE PROPRIETY OF THAT MOTION AND THE CONTOURS

1 OF IT.

2 MR. MICHAEL: YOUR HONOR, DO YOU WANT THE PARTIES TO
3 MEET AND CONFER REGARDING OUR AVAILABILITY FOR A STATUS
4 CONFERENCE --

5 THE COURT: NO, NO. I WILL SET A DATE.

6 MR. MICHAEL: OKAY.

7 THE COURT: AND WE WILL MAKE SURE THAT WE GIVE
8 PROFESSOR BARNETT AN OPPORTUNITY TO BE HERE. WE'LL SET A DATE
9 IN THE ORDER, THAT'S PROBABLY THE WAY THAT I'LL DO IT.

10 MR. MICHAEL: FINE. THANK YOU, YOUR HONOR.

11 THE COURT: OKAY.

12 THANK YOU VERY MUCH. THE ARGUMENT WAS EXTREMELY
13 ENLIGHTENING. AND THE BRIEFING WAS VERY WELL DONE. AND THERE
14 ARE SIGNIFICANT ISSUES, AND THAT IS -- IT'S NOT LOST ON ME IN
15 ANY CASE, BUT IT'S CERTAINLY NOT LOST ON ME WITH RESPECT TO
16 THIS ONE. OKAY.

17 MR. QUINLIVAN: THANK YOU, YOUR HONOR.

18 (PROCEEDINGS ADJOURNED AT 11:45 A.M.)

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CERTIFICATE OF REPORTER

I, SAHAR MCVICKAR, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

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SAHAR MCVICKAR, RPR - OFFICIAL COURT REPORTER

DECEMBER 17, 2002

