Nos. 02-16335, 02-16534, 02-16715

Date of submission: September 17, 2003
Panel members: Chief Judge Schroeder, Judge Reinhardt, Judge Silverman

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,
Defendants-Appellants.

Appeal from Final Judgment by the United States District Court
for the Northern District of California
Case No. C 98-00088 CRB
entered on July 29, 2002, by Judge Charles R. Breyer.

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INTRODUCTION

Pursuant to this Court's order of March 24, 2004, Appellants submit this supplemental brief concerning the applicability of *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *petition for reh'g and reh'g en banc denied*, No. 03-15481, 2004 U.S. App. LEXIS 6141 (9th Cir. Feb. 25, 2004), *petition for cert. filed* (U.S. Apr. 20, 2004) (No. 03-1454).

Raich establishes that where patients either individually, or with the assistance of others, engage in the wholly intrastate cultivation, possession, acquisition, and use of medical cannabis pursuant to a physician's advice and in compliance with state law, the federal government has no authority to interfere with these activities. The undisputed facts in this case establish that Appellants' activities are wholly intrastate, that they consist of the cultivation, possession, and sharing of cannabis in a lawfully formed not-for-profit cooperative, and that these activities are sanctioned by California law. Accordingly, under *Raich*, the injunction in this case must be vacated. Finally, to the extent the injunction prohibits the possession and use of medical cannabis and its dispensation to patients without remuneration, under *Raich* the injunction is overly broad and unconstitutional and must be modified to permit these activities.

ARGUMENT

I. THE *RAICH* COURT'S COMMERCE CLAUSE ANALYSIS APPLIES TO APPELLANTS' ACTIVITIES.

In *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), this Court reversed the district court's denial of a preliminary injunction against the government precluding enforcement of the Controlled Substances Act ("CSA") "to prevent [individual patients] Raich and Monson from possessing, obtaining, or manufacturing cannabis for their personal medical use." *Id.* at 1226. The court held that the district court's denial of preliminary injunctive relief was reversible error, because the "CSA is an unconstitutional exercise of Congress'[s] Commerce Clause authority." *Id.* at 1227.

The opinion focused on two points to support this conclusion: (1) Angel Raich's and Diane Monson's activities fell within a class of activities distinct from Ninth Circuit cases upholding the constitutionality of the CSA; and (2) Angel Raich's and Diane Monson's defined class of activities had no substantial effect on interstate commerce. As discussed below, Appellants' activities fall within the same class of activities defined in *Raich* and similarly have no substantial effect upon interstate commerce. Accordingly, the CSA is equally unconstitutional as applied to Appellants.

A. Appellants' Activities Are Within the Class of Activities Protected by *Raich*.

The *Raich* court recognized that the definition of the class of activity in question is "critical." *Id.* at 1228. In *Raich,* the court defined the regulated class of activity as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." *Id.* at 1228-29. The court held that this class of activities was distinguishable from drug trafficking, the class of activities at issue in Ninth Circuit precedent upholding the constitutionality of the CSA under the Commerce Clause, for three reasons:

> We find that the appellants' class of activities — the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician — is, in fact, different in kind from drug trafficking. For instance, concern regarding users' health and safety is significantly different in the medicinal marijuana context, where the use is pursuant to a physician's recommendation. Further, the limited medicinal use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse. Moreover, this limited use is clearly distinct from the broader illicit drug market — as well as any broader commercial market for medicinal marijuana — insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce.

Id. at 1228.

Here, the class of activities at issue is identical to that in *Raich*. As in *Raich*, Appellants are engaged in the wholly intrastate, non-commercial cultivation and possession of medical cannabis. As such, these activities fall squarely within the ambit of the class of activities addressed in *Raich*. Appellants' dispensation of medical cannabis to their patient-members does not constitute "drug trafficking" and consequently does not remove Appellants' activities from the non-commercial activity protected by the *Raich* court. Because Appellants' activities fall within the class defined in *Raich*, Ninth Circuit precedent upholding the constitutionality of the CSA as applied to drug trafficking does not bind this Court.

1. Appellants' Activities Are Wholly Intrastate.

One of the defining characteristics of the *Raich* appellants' activities is their intrastate nature. Appellants' activities are similarly intrastate. Pursuant to California law, California-licensed physicians may advise their California patients regarding the use of medical cannabis. A patient may bring the recommendation to Appellants to verify the California physician's license and recommendation. ER 2983. Once approved, some patient-members may pay a nominal fee for medical cannabis of California origin.[1] ER 1668, 3754. Because all of these

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[1] The government incorrectly suggested in oral argument that Appellants cultivate medical cannabis from Mexico. The term "Mexican" refers to the grade of cannabis, not its place of origin. And, even if the seeds used by Appellants were not from California, *Raich* found that "the origin of the seeds is too attenuated an

activities take place in California, Appellants' activities, like those in *Raich*, are wholly intrastate.

2. Appellants' Activities Are Non-Commercial.

The second defining characteristic of the *Raich* class of activities is their non-commercial nature. Insofar as Appellants are engaged in cultivation and possession of medical cannabis, the *Raich* decision holds that these activities are not necessarily commercial. Whether any activity, be it cultivation, possession, or distribution, is commercial or not ultimately depends on the purpose for which it is undertaken. In *Raich*, the cultivation and possession of cannabis for medical purposes were found to be non-commercial. *See Raich*, 352 F.3d at 1229-30. The court did not consider the caregivers who supply Angel Raich with cannabis to be engaged in an economic activity, as they received no remuneration, and therefore their actions were not motivated by material gain. *See id.* at 1230 n.3.

As in prior briefing, the government may contend that Appellants' activities are commercial because patient-members sometimes pay a nominal fee when they receive medical cannabis. It is undisputed that the Appellant cooperatives are not-for-profit organizations who gain no profit whatsoever from their activities. ER 1223, 3142, 3145. Like those who supply cannabis to Angel Raich, Appellants are

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issue to form the basis of congressional authority under the Commerce Clause." *Raich*, 352 F.3d at 1233 n.8.

not motivated by material gain.[2] Although money may be involved in defraying the expenses of some members of the cooperatives by other members, none of the activities enjoined by the lower court is undertaken for material gain.

As the court recognized in *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), "[a]t some level, of course, everything we own is composed of something that once traveled in commerce. This cannot mean that *everything* is subject to federal regulation under the Commerce Clause, else that constitutional limitation would be entirely meaningless." *Id.* at 1135 (emphasis in original) (internal footnote omitted). In *Raich*, the court did not ask whether those who supplied Angel Raich with medical cannabis might have spent money to purchase cultivation equipment. Nor did the court deem it material that Diane Monson might have spent money to obtain the fertilizer with which she cultivated her own cannabis. These facts were never raised because they are immaterial to the non-commercial purposes of these activities. Likewise, that some members of the cooperatives reimburse others for their expenses in cultivating medical cannabis does not, by itself, convert these non-commercial activities into commercial activities conducted for material gain.

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[2] Oakland Cannabis Buyers' Cooperative ("OCBC") is organized under California law as a California Consumer Cooperative Corporation (Cal. Corp. Code §§ 12700-12704). ER 2988-89. In law and in fact the members *are* the Cooperative.

Nor is the dispensing of cannabis to patient-members a form of commercial distribution that takes this case outside *Raich.* In *Raich*, appellant Raich did not cultivate her own medical cannabis. Rather, others grew the cannabis and supplied it to her.[3] The court did not conclude that this activity constituted a form of commercial distribution that could be regulated under Congress's commerce power. The court indicated that "exchange" is an essential element of commerce, and generally requires transportation between cities, states, and nations. *See Raich*, 352 F.3d at 1229-30. Accordingly, the court concluded that there was no exchange sufficient to make the act of supplying medical cannabis to Raich a commercial activity.

Raich and other recent Ninth Circuit cases instruct that "commerce" should not turn on the mere fact that some form of exchange takes place but on whether the exchange is isolated from the open market. In *Raich*, the court distinguished the cultivation, possession, and use of medical cannabis from drug trafficking on the grounds that "the marijuana in the instant case never entered into and was never intended for interstate or foreign commerce." 352 F.3d at 1233 n.7. In *United States v. McCoy*, 323 F.3d 1114 (9th Cir.), *petition for reh'g and reh'g en*

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[3] California Health and Safety Code section 11362.775 specifically exempts patients and caregivers who associate within the State of California collectively or cooperatively to cultivate cannabis for medical purposes. Similarly, section 11362.765(c) permits caregivers to receive compensation for services that enable a patient to use cannabis.

banc denied, No. 01-50495, 2003 U.S. App. LEXIS 17573 (9th Cir. June 24, 2003), the court focused on the fact that the "homegrown" pornography at issue was not a part of the child pornography market. *Id.* at 1132 ("McCoy's 'homegrown' photograph never entered in and was never intended for interstate or foreign commerce.") (emphasis omitted); *see also Raich*, 352 F.3d at 1230 ("[T]he photograph in *McCoy* stood in contrast to the commercial nature of the larger child pornography industry . . . ."). In *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), the court relied upon the fact that "Stewart functioned outside of the commercial gun market" by crafting his own guns at home in holding that the "link between Stewart's activity and its effect on interstate commerce [was] simply too tenuous to justify federal regulation." *Id.* at 1138.

Under the reasoning of *Raich*, *McCoy*, and *Stewart,* Appellants' activities clearly do not involve participation in an open market of illicit activity. The collective cultivation and dispensation of medical cannabis for Appellants' patient-members are completely detached from the commercial purchase and sale of drugs, or even marijuana, in the open market. As in *Raich,* Appellants' medical cannabis is intended for personal consumption and never enters the stream of commerce or a commercial market for marijuana. The cooperatives, comprised exclusively of patient-members, are a closed system. ER 1668. Being completely detached from

at 1229. Appellants' cultivation and possession of medical cannabis fall squarely within the class of activities defined and protected in *Raich*. And, as discussed in section I.A.2 *supra*, Appellants' dispensation of medical cannabis within the cooperatives does not render their activities commercial, even when some patients pay a nominal fee.

2. Even if Appellants' Activities Are Deemed "Commercial," They Have No "Substantial Effect" on Interstate Commerce.

The non-commercial nature of the class of activities regulated in this case makes the aggregation principle of *Wickard v. Filburn*, 317 U.S. 111 (1942), inapplicable. *See Raich*, 352 F.3d at 1230. Even if this Court finds that Appellants' activities are "commercial," in the aggregate, however, *Raich* held that this class of activities does not obviously have a *substantial* effect on interstate commerce. "Presumably, the intrastate cultivation, possession and use of medical marijuana on the recommendation of a physician could, at the margins, have an effect on interstate commerce by reducing the demand for marijuana that is trafficked interstate. It is far from clear that such an effect would be substantial." *Id.* at 1233. The government has made no showing in this case that Appellants' activities substantially affect interstate commerce.

Even assuming that Appellants' intra-cooperative dispensing of medical cannabis could theoretically decrease market demand for illegal marijuana, the

evidence in this case establishes conclusively that this effect is minimal or non-existent. Some patient-members indicated that they would not turn to "street dealers" for cannabis if the cooperatives were not functioning. ER 1884, 2971, 2974, 2985, 3050. Others cited barriers to doing so, such as safety reasons, the non-medical-grade quality of street-bought cannabis, and higher prices. ER 1841, 1868, 1882, 1885, 1890, 1896, 2984-85. Moreover, the fact that the class at issue here and in *Raich* is limited solely to medical cannabis pursuant to a doctor's recommendation means that it remains very small as compared with the market as a whole. Thus, demand for illicit drugs is not affected by any appreciable percentage as a result of the class of activity encompassing Appellants' medical cannabis allocations.[5] The government has presented no evidence that it is affected. As in *Raich*, the first *Morrison* factor compels a finding that the CSA is unconstitutional as applied to Appellants.

3. The CSA Contains No Jurisdictional Hook.

The second *Morrison* factor examined in *Raich* was whether the CSA contains a jurisdictional hook. *See Raich*, 352 F.3d at 1231. The court concluded

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[5] Apart from its minimal effect on the price of illicit interstate marijuana, any hypothesized reduction of demand for interstate marijuana would further the only proper purpose of the statute: the prohibition of interstate marijuana trade. Under the Necessary and Proper Clause, Congress may reach intrastate transactions solely to effectuate this purpose, which Appellants' activities promote by facilitating whatever slight reduction in demand for interstate marijuana may occur.

that "[n]o such jurisdictional hook exists in relevant portions of the CSA." *Id.* This holding applies with equal force to the present case.

4. The CSA's Legislative Findings Did Not Contemplate the Medicinal Use of Cannabis.

The third *Morrison* factor considered in *Raich* was whether the CSA's legislative history contains congressional findings regarding the effects of cultivation, possession, and use of medical cannabis on interstate commerce. As the court held, "Congress clearly made findings in the CSA regarding the effects of intrastate activity on interstate commerce." *Id.* at 1231-32. These findings were subject to two caveats, however. First, the congressional findings did not contemplate medicinal use. *See id.* at 1232. Second, *Raich* admonished that "*Morrison* counsels to take Congressional findings with a grain of salt," particularly in light of the fact that "it is not the existence of congressional findings, but rather the first and fourth factors . . . that are considered most significant in this analysis." *Id.* at 1232-33 (citing *McCoy*, 323 F.3d at 1119). Even though, as in *Raich*, this factor may support the constitutionality of the CSA, it is not the crux of the analysis of substantial effects under *Morrison*.

5. The Link Between a Substantial Effect on Interstate Commerce and Appellants' Activities is Sufficiently Attenuated.

The final (and one of the two most important) *Morrison* factor considered in *Raich* was whether the link between the regulated activities and interstate

commerce is "attenuated." *Raich* found that the link was indeed attenuated. *Raich* allowed the cultivation and possession of medical cannabis, as well as the provision of cannabis from caregivers to patients. The effect of this class of activities on interstate commerce is not determined by how these activities are formally organized. For example, in *Raich*, there would be no greater effect on interstate commerce if Diane Monson and Angel Raich shared their medical cannabis with each other. Likewise, that the cultivation, acquisition, and possession take place within a lawfully formed cooperative does not increase the effect of these activities on interstate commerce.

As Judge Kozinski observed: "Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce." *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring), *cert. denied*, 124 S. Ct. 387 (2003). Consequently, the relationship between interstate commerce and intra-cooperative cultivation, dispensation, acquisition, and possession is just as attenuated as the relationship between interstate commerce and cultivation, possession, and use in *Raich*. Therefore, the first, second, and fourth *Morrison* factors compel the conclusion that the CSA is unconstitutional as applied to Appellants' class of activities.

II. UNDER *RAICH*, THE PERMANENT INJUNCTION IS UNCONSTITUTIONAL.

Under *Raich*, the district court's permanent injunction (and underlying summary judgment order) is unconstitutional. The injunction prohibits Appellants from "engaging in the distribution of marijuana, the possession of marijuana with the intent to distribute, or the manufacture of marijuana with the intent to distribute." ER 4442. These are precisely the activities that were at issue in *Raich*. As in *Raich*, the injunction unlawfully interferes with Appellants' wholly intrastate activities. Moreover, the government does not dispute that Appellants sometimes provided medical cannabis to qualified members without charge. At a minimum, the injunction sweeps too broadly because it prohibits the intrastate possession and use of medical cannabis and its non-commercial dispensation to patients without remuneration. Accordingly, the injunction must be dissolved or modified.

Dated: April 29, 2004

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sf-1692599

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule of Appellate Procedure 32-3(3), Appellants hereby certify that their Supplemental Brief is prepared in proportionately spaced Times New Roman typeface in fourteen point.

The brief, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, and the Proof of Service, contains 3,303 words based on a count by the word processing system at Morrison & Foerster LLP, which, divided by 280 lines, does not exceed fifteen pages in accordance with the requirements of Ninth Circuit Rule of Procedure 32-3(3).

Dated: April 29, 2004

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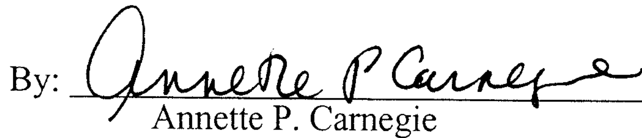
By: 
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