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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MARIN ALLIANCE FOR MEDICAL MARIJUANA, *et al.*,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
OAKLAND CANNABIS BUYERS' COOPERATIVE, *et al.*,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
UKIAH CANNABIS BUYER'S CLUB, *et al.*,
Defendants-Appellants.

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

SUPPLEMENTAL BRIEF FOR APPELLEE

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SUPPLEMENTAL BRIEF FOR APPELLEE

SUMMARY OF ARGUMENT

Under the Controlled Substances Act (the "CSA"), 21 U.S.C. § 801, *et seq.*, it is unlawful to manufacture, distribute, or possess marijuana. The uncontroverted record in these consolidated cases reveals that the defendants are engaged in the

commercial sale and distribution of marijuana. Their conduct therefore violates the plain terms of the CSA.

These cases were argued and submitted on September 17, 2003. On March 24, 2004, this Court vacated submission of these cases and directed the parties to file simultaneous briefs addressing the relevance of Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), *petition for certiorari filed*, No. 03-1454 (April 20, 2004). In that case, a divided panel of this Court held that, as applied to what it characterized as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician," the CSA likely exceeds Congress' authority under the Commerce Clause. We believe that Raich was wrongly decided. On April 20, 2004, the Solicitor General petitioned the Supreme Court for a writ of certiorari to review that decision. We acknowledge, however, that the decision in Raich case is controlling authority unless its holding is reconsidered by the full Court or reversed by the Supreme Court.

This Court's decision in Raich does not, however, support the defendants' contention that Congress lacks the power under the Commerce Clause to make the CSA applicable to their conduct. In contradistinction to Raich, these cases are not limited to the "cultivation, possession, and use of marijuana for medicinal purposes," or to situations in which there is no effort "to acquire marijuana from

others in a market." Id. at 1229, 1231. To the contrary, the uncontroverted record in these cases reveals that each of the three defendant cannabis "buyers" clubs engaged in the commercial distribution and sale of marijuana. Specifically, each of the defendant clubs offered marijuana for sale to the general public, and engaged in multiple cash sales of marijuana to undercover agents of the Drug Enforcement Administration ("DEA"). These cases, therefore, most assuredly ***do*** involve the "sale, exchange, or distribution" of marijuana for commercial gain, which this Court found lacking in Raich. The uncontroverted record in these cases also reveals that at least two of the defendant clubs sold what they identified as marijuana grown in Mexico. This Court's decision in Raich, consequently, does not undermine the conclusion that Congress acted well within its Commerce Clause authority in making the CSA applicable to defendants' conduct.

BACKGROUND

1. On December 16, 2003, a divided panel of this Court held in Raich that, as applied to what it characterized as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician," the CSA likely exceeded Congress' authority under the Commerce Clause. Judge Beam, sitting by designation from the Eighth Circuit, dissented.

The panel majority recognized that this Court had previously upheld the CSA against Commerce Clause challenges on six prior occasions,[1] and also acknowledged governing Supreme Court authority to the effect that, "'where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence.'" 352 F.3d at 1227-28 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995), in turn quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)) (emphasis omitted). In holding these precedents inapplicable, the panel majority concluded that the relevant class of activities was not the manufacture and possession of marijuana generally, but rather "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician," a class of activities that the panel reasoned was "different in kind from drug trafficking." Id. at 1229. The panel majority emphasized that "[t]his class of activities does not involve sale, exchange, or distribution," and that, although the Doe appellants were providing marijuana to appellant Raich, "there is no

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[1] See United States v. Bramble, 103 F.3d 1475, 1479 (9th Cir. 1996); United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997); United States v. Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996); United States v. Visman, 919 F.2d 1390, 1393 (9th Cir. 1990), *cert. denied*, 502 U.S. 969 (1991); United States v. Montes-Zarate, 552 F.2d 1330, 1331-32 (9th Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); United States v. Rodriquez-Camacho, 468 F.2d 1220, 1221-22 (9th Cir. 1972), *cert. denied*, 410 U.S. 985 (1973).

'exchange' sufficient to make such activity commercial in character. As Raich states in her declaration: 'My caregivers grow my medicine specifically for me. They do not charge me, nor do we trade anything. They grow my medicine and give it to me free of charge.'" Id. at 1230 n.3, 1231.

The panel majority next reasoned that, "[a]s applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise. The cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity." Id. at 1229. Because the activity to be regulated was not itself economic, the panel majority deemed it irrelevant whether individual instances of the conduct could be aggregated to demonstrate a cumulative impact on interstate commerce. Id. at 1230. The panel majority further noted that, following the analysis of United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003), "the marijuana at issue in this case is similarly non-fungible, as its use is personal and the appellants do not seek to exchange it or acquire marijuana from others in a market." 352 F.3d at 1231.

The panel majority also found that the link between the class of activities at issue and any substantial effect on interstate commerce was attenuated. Id. at 1233-34. While recognizing that, "[p]resumably, 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," the majority found that "[i]t is far from clear that such an effect would be substantial." Id. at 1233. The panel majority therefore held that, "as applied to the appellants," the CSA was likely unconstitutional. 352 F.3d at 1234.

2. On March 24, 2004, this Court entered an order vacating submission of these cases and directing the parties to file simultaneous briefs on not more than 15 pages addressing the relevance of Raich. This Court further ordered that the cases would be resubmitted for decision upon completion of the filing of the supplemental briefs. On March 29, 2004, this Court granted the government's unopposed motion for an extension of time.

ARGUMENT

This Court defined the class of activities in Raich as the "cultivation, possession, and use of marijuana for medicinal purposes" and not for "sale, exchange, or distribution," and held that, as applied to that "limited class of activities," the CSA likely exceeded Congress' power under the Commerce Clause. 352 F.3d at 1229. The class of activities at issue in these cases is much different. As we demonstrate below, each of the defendant clubs made multiple cash sales of

marijuana to the general public and to undercover agents of the DEA. Because the class of activities in these cases is substantially broader than the "limited class of activities" in Raich, that decision does not call into question the district court's conclusion that defendants' sale and distribution of marijuana constitutes economic activity of a commercial nature, and therefore may be prohibited by Congress pursuant to its Commerce Clause authority.

1. In Raich, this Court held that, "[a]s applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise. The cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity." Id. at 1229. In doing so, this Court repeatedly emphasized that the class of activities at issue was limited to the "intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician," and did not involve "sale, exchange, or distribution." Id. at 1228, 1229. As this Court explained, "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 in this case is not intended for, not does it enter, the stream of

commerce." Id. In other words, "[l]acking sale, exchange, or distribution, the activity does not possess the essential elements of commerce." Id. at 1229-30.

This Court also emphasized that the "aggregation principle" of Wickard v. Filburn, 317 U.S. 111 (1942), was not applicable because "the marijuana at issue in this case is * * * non-fungible, as its use is personal and the appellants do not seek to exchange it or acquire marijuana from others in a market." Id. at 1231. This Court also noted that, although one of the individual appellants was supplied marijuana by two "John Doe" appellants, "there is no 'exchange' sufficient to make such activity commercial in character" because Ms. Raich had attested that her caregivers grew marijuana specifically for her and that they did not charge her for the marijuana or demand anything in trade. Id. at 1230 n.3 (emphasis supplied). Indeed, this Court noted that Ms. Raich had attested that her caregivers "grow my medicine and give it to me *free of charge*." Id. (emphasis supplied).

2. In contrast to the "limited class of activities" at issue in Raich, these cases most certainly do involve the "sale, exchange, or distribution" in a "broader commercial market for medicinal marijuana." The uncontroverted record in these cases reveals that each of the defendant clubs – the Marin Alliance for Medical Marijuana ("Marin Alliance"), the Oakland Cannabis Buyers' Cooperative ("OCBC"), and the Ukiah Cannabis Buyer's Club ("UCBC") – engaged in the

commercial sale of marijuana to the public, and that each of the defendant clubs made six cash sales of marijuana to undercover agents of the DEA.

Specifically, the uncontroverted record reveals that the Marin Alliance made six separate cash sales of marijuana to undercover agents of the DEA in amounts ranging from $35 to $70. See SER 9-13 (cash sale by Marin Alliance of one-sixteenth ounce of marijuana for $35); SER 14-18 (cash sales by Marin Alliance of one-eighth ounce of marijuana for $65, and approximately one-eighth ounce of marijuana for $70); SER 19-22 (cash sale by Marin Alliance of one-eighth ounce of marijuana for $65); SER 23-29 (cash sales by Marin Alliance of one-eighth ounce of marijuana for $65, and one-eighth ounce of marijuana for $65); SER 33-35 (declaration by chemist confirming that purchases by undercover agents from the Marin Alliance identified the presence of marijuana).

The uncontroverted record likewise reveals that the OCBC made six separate cash sales of marijuana to undercover agents of the DEA in amounts ranging from $7 to $60. See ER 32-39 (cash sales by OCBC of one-eighth ounce of what was identified as Mexican-grown marijuana for $7, one-eighth ounce of what was identified as "AA" Mexican-grown marijuana for $15, and one-eighth ounce of marijuana for $45; ER 40-44 (cash sale by OCBC of one-eighth ounce of marijuana for $40); ER 45-49 (cash sale by OCBC of one-eighth ounce of

marijuana from OCBC for $25); ER 50-54 (cash sale by OCBC of one-eighth ounce of marijuana for $60); SER 55-57 (declaration by chemist confirming that purchases by undercover agents from the OCBC identified the presence of marijuana). The uncontroverted record also reveals that, following the entry of the preliminary injunction by the district court on May 19, 1998, an undercover agent of the DEA observed defendant Jeffrey Jones distribute marijuana to four individuals, and observed an additional ten over-the-counter sales of marijuana by OCBC personnel. See ER 769-71.[2]

Finally, the uncontroverted record reveals that the UCBC made six separate cash sales of marijuana to undercover agents of the DEA in amounts ranging from $25 to $50. See SER 54-57 (cash sale by UCBC of one-quarter ounce of what was identified as Mexican-grown marijuana of marijuana for $30); SER 58-63 (cash sales by UCBC of one-quarter once of what was identified as Mexican-grown marijuana for $25, and one-eighth ounce of marijuana for $40); SER 64-68 (cash sale by UCBC of one-eighth ounce of marijuana for $50); SER 69-74 (cash sales

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[2] As the district court specifically found in holding the OCBC defendants in civil contempt, the government had presented "uncontroverted evidence that defendants issued a press release announcing that they were going to distribute marijuana on May 21, 1998," and had presented "uncontroverted evidence that a government agent visited the OCBC at the time defendants announced they were going to distribute marijuana and that the agent personally witnessed fourteen marijuana transactions." ER 1825.

by UCBC of one-eighth ounce of marijuana for $40, and one-eighth ounce of marijuana for $35); SER 75-77 (declaration by chemist confirming that purchases by undercover agents from the UCBC identified the presence of marijuana).

That the defendants engaged in the commercial sale and distribution of marijuana fundamentally distinguishes these cases from the "limited class of activities presented" in Raich. Indeed, because these cases involve the commercial sale and distribution of marijuana, defendants' activities most certainly ***do*** possess the "essential elements of commerce," which this Court found lacking in Raich. See 352 F.3d at 1229-30. The district court therefore correctly determined that Congress may regulate defendants' activities because "the manufacture and distribution of marijuana is economic activity; indeed, the Ninth Circuit has specifically held that 'drug trafficking is a commercial activity which substantially affects interstate commerce.'" ER 4414 (quoting Staples, 85 F.3d at 463, and citing Tisor, 96 F.3d at 375).

3. The record also is uncontroverted in these cases that the OCBC and UCBC clubs sold what they identified as marijuana grown in Mexico to undercover agents of the DEA. See ER 32-39 (cash sales by OCBC of one-eighth ounce of what was identified as Mexican-grown marijuana for $7, and one-eighth ounce of what was identified as "AA" Mexican-grown marijuana for $15); SER

54-57 (cash sale by UCBC of one-quarter ounce of what was identified as Mexican-grown marijuana of marijuana for $30); SER 58-63 (cash sale by UCBC of one-quarter once of what was identified as Mexican-grown marijuana for $25). See also SER 19-22 (employee of Marin Alliance stating that that club was "out of Mexican" marijuana). In enacting the CSA, Congress specifically found that "[a] major portion of the traffic in controlled substances flows through interstate and *foreign* commerce," and that "[i]ncidents of the traffic or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce * * * *." 21 U.S.C. § 801(3) (emphasis supplied). Defendants have placed no evidence in the record contradicting their self-identification of this marijuana as having been grown in Mexico. In Raich, by contrast, there was no suggestion that the marijuana cultivated or used by the appellants had been grown interstate or internationally.

4. That the defendants engaged in the commercial sale and distribution of marijuana, including marijuana grown in Mexico, also distinguishes these cases from the situations presented in United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000). In Morrison, the Supreme Court explained that "Lopez's review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based

upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." 529 U.S. at 611. The Court struck down the statutes at issue in Lopez and Morrison because, "[a]t bottom," those statutes had "nothing to do with commerce or any sort for economic enterprise." United States v. Cortes, 299 F.3d 1030, 1035 (9th Cir. 2002).

In contrast to the "noneconomic" conduct at issue in Lopez and Morrison, the commercial sale and distribution of marijuana possesses the essential elements of commerce, and therefore may be regulated by Congress under the Commerce Clause. This Court has expressly held that the "[i]ntrastate distribution and sale of [controlled substances] are commercial activities," and that, by contrast, "[t]he activity condemned by the statute interpreted in Lopez did not involve a commercial transaction." Tisor, 96 F.3d at 373, 375. Indeed, the market in marijuana, from the purchase of seeds to its cultivation, manufacture, distribution, and possession, takes place in the context of an interstate market that is comprehensively regulated by Congress, and Congress has found that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. § 801(6). The district court therefore correctly determined that, "[t]his case, unlike Lopez, is not about mere possession but rather about distribution, a class of

activities that, even if done for the humanitarian purpose of serving the legitimate health care need of seriously ill patients, can affect interstate commerce." ER 664.

5. We note that, in their reply brief, the OCBC defendants argued (Joint Reply Br. at 16 n.9) that their sale of marijuana did not constitute economic activity because the OCBC allegedly is a "strictly not-for-profit cooperative." Even assuming *arguendo* the truth of this assertion, it is entirely beside the point. The Supreme Court has held that "[t]he nonprofit character of an enterprise does not place it beyond the purview of federal laws regulating commerce." Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564, 584 (1997). See also id. ("We see no reason why the nonprofit character of an enterprise should exclude it from the coverage of either the affirmative or the negative aspect of the Commerce Clause."); id. at 585 ("Nothing intrinsic to the nature of nonprofit entities prevents them from engaging in interstate commerce."); id. at 586 ("For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore *wholly illusory*." (emphasis supplied)). The assertion that the alleged non-for-profit character of the defendant clubs somehow immunizes their activities from the reach of the Commerce Clause, consequently, is entirely without foundation.

Defendants also assert (Joint Reply Br. at 16 n.9) that "OCBC often provided cannabis to members without any charge whatsoever." There is no evidence in the record supporting this assertion, nor have defendants cited to any. This unsupported assertion, therefore, provides no basis upon which to reverse or modify the permanent injunctions entered by the district court.

CONCLUSION

For the foregoing reasons, the judgments of the district court should be affirmed.

Respectfully submitted,

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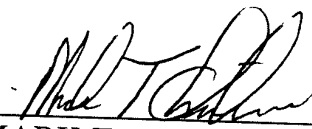

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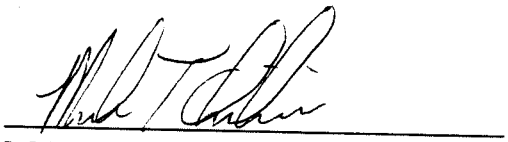

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