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

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 Entry of Final Judgment by the United States District Court
for the Northern District of California
Case Nos. C 98-00086, C 98-00087, C 98-00088 CRB
entered on July 29, 2002, by Judge Charles R. Breyer.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION.

Appellants' opening brief established that, in granting summary judgment and in issuing the permanent injunction, the district court abdicated completely its duty to ensure that the Controlled Substances Act (the "CSA") and any federal statute that interferes with the interests of state and local government, be interpreted to comply with the limitations on federal authority prescribed by the United States Constitution. The government's opposition does not come to grips with this basic proposition. Instead, the government posits an activity that is not at issue in this case — illicit drug trafficking — and devotes its arguments to justifying federal regulation of an activity that neither Appellants, nor the State of California, nor the City of Oakland has any interest in promoting. In adopting this result-oriented approach, the government relies upon unprincipled arguments that threaten the system of limited enumerated powers, significant attributes of federalism, and the fundamental liberties that are the bedrock of our system of constitutional government.

II. THE PERMANENT INJUNCTION VIOLATES THE COMMERCE CLAUSE BECAUSE CONGRESS HAS NO POWER OVER THE CLASS OF ACTIVITY ENJOINED: WHOLLY INTRASTATE DISTRIBUTION OF CANNABIS FOR MEDICAL PURPOSES.

In their opening brief, Appellants established that, because the government seeks to regulate wholly intrastate activities, the injunction is invalid, because it is neither a "necessary" nor a "proper" exercise of Congress's power under the Commerce Clause. Appellants established that under controlling Supreme Court precedent, the government must demonstrate that the class of activity at issue in this case — the wholly intrastate distribution of cannabis for medical purposes — substantially affects interstate commerce. In response, the government makes a series of analytical errors that are fatal to its arguments:

- The government ignores the fact that the Commerce Clause specifically *excludes* the power to regulate wholly intrastate commerce. That power is reserved to the States. The Supremacy Clause, on which the government relies, applies only to powers *actually granted* to Congress.

- The government misreads the New Deal cases that supply the test for determining whether Congress may reach intrastate commerce: the substantial effects doctrine. None of these cases suggests that Congress has plenary power over any intrastate commerce it may wish to prohibit.

- The government misapplies recent Supreme Court precedent requiring more than minimal rational basis scrutiny to determine whether intrastate activity substantially affects interstate commerce. Under both *Lopez* and *Morrison*, more is clearly required.

- The government misinterprets the aggregation principle and the doctrine requiring judicial identification of the relevant class. Under the substantial effects doctrine of *Wickard*, *Lopez*, and *Morrison*, a court must independently scrutinize whether the class of activities being regulated in the aggregate has a substantial effect on interstate commerce. Appellants do not challenge the application of a general regulatory scheme to an individual instance, but rather challenge Congress's power to apply its general regulatory scheme to a class of wholly intrastate activities where there is no showing that this class of activities has a substantial effect on interstate commerce.

In the opening brief, Appellants also established that the injunction does not represent a "proper" exercise of Congress's power under the Commerce Clause, because it interferes significantly with the sovereign powers reserved to the State of California by the Tenth Amendment. In response, the government mischaracterizes the scope of the powers reserved to the States by the Tenth Amendment and the specific state authority with which the injunction interferes. Contrary to the government's contention, the injunction in this case plainly intrudes upon powers reserved to California and each of the other States by the Tenth Amendment, because Congress is attempting to regulate activities that California, through the exercise of its police powers, has declared lawful and necessary for the protection of the public health and welfare.

Appellants also demonstrated that the injunction is not a "proper" exercise of Congress's power, because it infringes upon the fundamental rights of Appellants' patient-members and is not narrowly tailored to further a compelling government interest. The government fails to offer any justification for this infringement upon fundamental rights. Instead, the government mischaracterizes the nature of the rights at stake by improperly labeling them alternately as a right to distribute medical cannabis "free of the lawful exercise of the government's police power" or the "right to distribute and manufacture marijuana." (Appellee's Opposition Brief ("Opposition"), at 55 (emphasis omitted).)

The government is wrong. The rights at issue in this case are the fundamental rights of seriously ill patients to alleviate pain, to bodily integrity, and to rely upon their physicians' advice free of the undue burden on the exercise of these rights represented by the injunction in this case.

These rights are protected by both the Fifth and the Ninth Amendments. In asserting that Appellants' patient-members have no such rights, the government misconstrues the scope of the Ninth Amendment and ignores recent cases vindicating its relevance to the protection of the rights at issue in this case.

A. The Government Improperly Defines the Class of Activity as "Illegal Drug Trafficking."

The lynchpin of the government's argument is its general and overbroad definition of the class of activity at issue in this case. By defining Appellants' activities as "illegal drug trafficking" (Opposition, at 36-39), the government violates well-established precedent regarding how classes of activity sought to be regulated under the Commerce Clause must be defined. In *United States v. Lopez*, 514 U.S. 549, 563-67 (1995), and the aggregation cases cited therein, the Supreme Court defined the class of activity by the area of the federal/state conflict, rather than by the activity generally. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294,

300-01 (1964) (class of activity defined as restaurants utilizing substantial interstate supplies, not restaurants generally); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 254-61 (1964) (class of activity includes inns and hotels catering to interstate guests, not inns and hotels generally).

In *Lopez*, the Court rejected the argument that "Congress . . . could rationally conclude that schools fall on the commercial side of the line," *Lopez*, 514 U.S. at 565, and therefore are subject to its power over commerce. The Court warned that allowing so discretionary a definition of the class at issue would effectively obliterate the distinction between what is national and what is local because "depending on the level of generality, any activity can be looked upon as commercial." *Id.* Defining the class to be regulated as "schools" would conflict with the countervailing principle that Commerce Clause "authority, though broad, does not include the authority to regulate each and every aspect of local schools." *Id.* at 566. Here, in seeking to define the relevant class of activities subject to regulation as "drug trafficking" the government proposes to operate at a level of generality that obliterates the distinction between what is national and what is local. This it may not do "so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits . . . ." *Id.*; *see also United States v. Morrison*, 529 U.S. 598, 616-18 & n.7 (2000). The government has failed to adhere to this principle in seeking to characterize Appellants' activities as "illicit drug trafficking."

Close analysis of controlling Supreme Court precedent establishes that the class of activity to be evaluated in this case is the cultivation and distribution of cannabis for medical purposes by and for Californians in compliance with California state law, *not* distribution of controlled substances or cannabis generally. For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court defined the class

of activity as the production and consumption of *homegrown* wheat, which was the challenged practice of the appellee, even though the federal statute at issue regulated wheat production generally. *See id.* at 118-19. Similarly, in *Lopez*, the Court defined the class of activity as the *possession of firearms in a school zone*, not firearm possession in any place. The Court dismissed congressional findings regarding the commercial effects of firearm possession generally because those findings "[did not] speak to the subject matter of [the conflict]." *Lopez*, 514 U.S. at 563. And, in *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001), the Court stated: "[W]e would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." *Id.* at 173.

The government reveals its misunderstanding of cases concerning the manner in which the class of intrastate activity sought to be reached must be defined by citing the irrelevant proposition that "where a general regulatory scheme bears a substantial relation to commerce, the *de minimis* character of *individual instances* arising under that statute is of no consequence." (Opposition, at 37-38 (emphasis added) (quoting *Lopez*, 514 U.S. at 558).) Appellants do not challenge the application of a general regulatory scheme to an individual instance, however. Rather, Appellants challenge the power of Congress to apply its general regulatory scheme to a *class* of wholly intrastate activity (as properly defined under *Wickard*) with no showing that this *class* has any substantial effect on inter-state commerce or on Congress's ability to regulate interstate commerce.

Because Appellants do not challenge the application of a general regulatory scheme to an individual instance, the Supreme Court's statement in *Perez v. United States*, 402 U.S. 146 (1971), has no application here. In *Perez*, the Court stated that "[w]here the class of activities is regulated *and that class is within the reach of federal power*, the courts have no power 'to excise, as trivial, *individual instances*'

of the class." *Id.* at 154 (citation omitted) (emphasis added). Here, the class of activity is *not* within the reach of federal power at all. Nor are Appellants challenging the application of a *general* power to regulate illicit drug trafficking to *individual instances* of illicit drug trafficking.

Contrary to the government's contention, the fact that a regulatory scheme is "general" does not dispose of the need to satisfy the Commerce Clause. Were the government able to define any class it wants to satisfy the aggregation principle of *Wickard*, *Lopez*, and *Morrison*, the following constitutionally perverse result would ensue: *the more intrastate commerce it purports to regulate the stronger is Congress's claim of constitutional authority to do so. See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824). Such a result would stand the enumerated power doctrine, affirmed in *Gibbons*, and so strongly reaffirmed in *Lopez*, on its head. It simply cannot be that the larger the class of *intrastate* activities the federal government seeks to regulate, the stronger is its constitutional claim to do so.[1]

B. The Government Fails to Show that the Class of Intrastate Activity at Issue in This Case Substantially Affects Interstate Commerce and that Congress Has the Power to Regulate This Class.

The government presents no evidence that the class of activity it seeks to enjoin here substantially affects interstate commerce. Nor does the government offer any legal authority that establishes Congress's power to regulate Appellants' activities. Instead, the government relies upon pre-*Morrison* decisions of this and other courts in which applications of the CSA are found to be rational under the most minimal level of scrutiny. In these cases, as in the district court's decision in

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[1] The government does not dispute that the class of activity engaged in by Appellants, the distribution of medical cannabis to their patient-members, is a wholly intrastate activity. (Opposition, at 41 n.12.)

this case, the courts accepted at face value the general findings of Congress that apply to all illegal drug activity but did not address the smaller class of wholly intrastate activity erroneously enjoined here. The limited analyses in these previously decided cases do not, however, satisfy a *Morrison* inquiry, nor does the district court's analysis of this issue. Only by misinterpreting *Wickard*, *Lopez*, and *Morrison* can the government avoid (a) explaining how the class of activity enjoined here substantially affects interstate commerce, and (b) providing evidence to substantiate its claim.

1. Controlling Precedent Requires that the Articulated Class of Activity Have a "Substantial Effect" on Interstate Commerce.

Ignoring the wording of the Constitution and recent Supreme Court precedent limiting Congress's power to regulate interstate commerce, the government suggests that the powers of Congress under the Commerce Clause are still controlled by "such watershed Commerce Clause decisions as *N.L.R.B. v. Jones & Laughlin Steel Corp* . . . , [*United States v.*] *Darby*, and *Wickard v. Filburn* . . . ." (the "New Deal Cases"). (Opposition, at 42.) None even purport to recognize a plenary power of Congress over wholly *intrastate* commerce.

In *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), a major steel corporation challenged the National Labor Relations Act on the grounds that the Act was an unconstitutional exercise of congressional power under the Commerce Clause. The Court upheld the Act, citing the steel company's substantial involvement in interstate commerce. *See id.* at 26-28. Even in so doing, the Court nonetheless cautioned that "[u]ndoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the

distinction between what is national and what is local and create a completely centralized government." *Id.* at 37.

In *United States v. Darby*, 312 U.S. 100 (1941), the Supreme Court held that the Fair Labor Standards Act was a constitutional exercise of congressional power under the Commerce Clause.[2] The Court affirmed, however, that even where "Congress itself has said that a particular activity affects commerce," it remains the "function *of courts* . . . to determine whether the particular activity regulated or prohibited is within the reach of the federal power." *Id.* at 120-21 (emphasis added). The Court also confirmed that Congress may only "regulate intrastate activities where they have a *substantial* effect on interstate commerce." *Id.* at 119 (emphasis added).

Even in the most expansive of all the cases cited by the government, *Wickard*, the Supreme Court described the reach of Congress as limited to classes of intrastate activities "which *in a substantial way* interfere with or obstruct the exercise of the granted power. " 317 U.S. at 124 (citation omitted) (emphasis added). Such intrastate activity may "be reached by Congress if it exerts a *substantial* economic effect on interstate commerce." *Id.* at 125 (emphasis added).

None of the cases cited by the government expanded Congress's power under the Commerce Clause to give Congress plenary power over intrastate commerce. While for some time after the New Deal cases were decided, courts were deferential in applying the substantial effects standard, that period of deference ended with *Lopez* and *Morrison*. Both *Lopez* and *Morrison* affirm by their example that more than minimal rational basis scrutiny is now required. In

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[2] Although the *Darby* court recognized the "plenary power conferred on Congress by the Commerce Clause," the plenary power to which it refers is over *interstate* commerce, not intrastate commerce as the government suggests in its brief. *Darby*, 312 U.S. at 115.

Lopez, the Supreme Court reaffirmed the centrality of *Wickard*'s substantial effects doctrine. 514 U.S. at 557. Though the absence of any congressional findings in *Lopez* led many courts and commentators to assume that *any* findings by Congress would satisfy the Court under minimal rational basis scrutiny, in *Morrison*, the Court refused to accept extensive congressional findings that the activities in question substantially affected interstate commerce. 529 U.S. at 614. Therefore, a case purporting to apply *Lopez* decided before *Morrison* must be re-examined to determine whether more than minimal rational basis scrutiny was applied as is now required. In sum, any pre-*Morrison* case employing minimal rational basis scrutiny to assess the constitutionality of the CSA is of suspect authority today.

The government argues as though the watershed cases of *Lopez* and *Morrison* changed nothing about the degree of judicial deference owed to claims of congressional power under the Commerce Clause. (Opposition, at 28-34.) The Ninth Circuit cases relied upon by the government fail to apply *Morrison*-type scrutiny to ascertain whether the class of intrastate activities in question have a substantial effect on interstate commerce. They are therefore irrelevant to this Court's current Commerce Clause analysis. *See United States v. Bramble*, 103 F.3d 1475, 1479 (9th Cir. 1996) (pre-*Morrison* Commerce Clause challenge to the CSA), *as amended on reh'g at* 103 F.3d 1475 (9th Cir. 1997); *United States v. Tisor*, 96 F.3d 370, 373-75 (9th Cir. 1996) (same); *United States v. Kim*, 94 F.3d 1247, 1249-50 (9th Cir. 1996) (same); *United States v. Visman*, 919 F.2d 1390, 1393 (9th Cir. 1990) (pre-*Morrison* and pre-*Lopez*); *United States v. Montes-Zarate*, 552 F.2d 1330, 1331-32 (9th Cir. 1977) (same); *United States v. Rodriquez-Comacho*, 468 F.2d 1220, 1221-22 (9th Cir. 1972) (same).[3] These

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[3] The government also relies on authorities from other jurisdictions that are likewise inapposite as pre-*Morrison*. *See United States v. Edwards*, 98 F.3d 1364,

(Footnote continues on following page.)

"illegal drug trafficking" cases also involved interstate, rather than intrastate, commerce.[4]

2. The Government Presents No Findings Demonstrating How the Class of Activity at Issue in This Case Substantially Affects Interstate Commerce.

In their opening brief, Appellants established that, to succeed on its claim of authority to regulate Appellants' wholly intrastate activities, the government must provide evidence of the substantial effects of these activities on interstate commerce. Despite several opportunities to do so, the government has failed to sustain its burden of demonstrating how *this* properly defined class of activity substantially affects interstate commerce. Congress has not conducted any empirical studies, nor has it made any findings regarding the effect of medical cannabis on interstate commerce. *Contra Perez*, 402 U.S. at 147-48 & n.1, 153-56 (noting congressional findings regarding substantial effects of extortionate credit

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1369 (D.C. Cir. 1996); *United States v. Lerebours*, 87 F.3d 582, 584-85 (1st Cir. 1996); *Proyect v. United States*, 101 F.3d 11, 13-14 (2d Cir. 1996); *United States v. Orozoco*, 98 F.3d 105, 107 (3d Cir. 1996); *United States v. Leshuk*, 65 F.3d 1105, 1111-12 (4th Cir. 1995); *United States v. Lopez*, 459 F.3d 949, 953 (5th Cir. 1972); *United States v. Westbrook*, 125 F.3d 996, 1009-10 (7th Cir. 1997); *United States v. Patterson*, 140 F.3d 767, 772 (8th Cir. 1998); *United States v. Jackson*, 111 F.3d 101, 102 (11th Cir. 1997); *but see United States v. Brown*, 276 F.3d 211, 214-15 (6th Cir. 2002) (failing to cite *Morrison*), *cert. denied*, 122 S.Ct. 1964 (2002); *United States v. Price*, 265 F.3d 1097, 1106-07 (10th Cir. 2001) (distinguishing *Morrison* on the grounds that the case involved *non-economic* activities, whereas cocaine trafficking was *economic* activity), *cert. denied*, 122 S.Ct. 2299 (2002).

[4] *See Tisor*, 96 F.3d at 373-75 (sale of methamphetamine); *Kim*, 94 F.3d at 1249-50 (possession with intent to distribute 800 grams of crystal methamphetamine); *Visman*, 919 F.2d at 1393 (possession with intent to distribute, distribution of, and manufacturing recreational marijuana); *Montes-Zarate*, 552 F.2d at 1331-32 (possession with intent to distribute recreational marijuana); *Rodriquez-Comacho*, 468 F.2d at 1221-22 (possession with intent to distribute recreational marijuana).

transactions on interstate commerce supported by reports and hearings commissioned by Congress showing that millions of dollars are funneled to national criminal organizations through loan sharking each year).

The generalized findings regarding controlled substances as a whole,[5] like the case law regarding drug trafficking generally,[6] do not fill the void, because they "[do not] speak to the subject matter of [the conflict]." *Lopez*, 514 U.S. at 563. This absence of empirically-supported congressional findings counsels against the constitutionality of the CSA in this case. *See id.* (absence of congressional findings impedes the court's ability "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce").

3. Controlling Precedent Requires "Substantial Effects" to Be *Judicially* Scrutinized.

Under the substantial effects doctrine of *Wickard, Lopez,* and *Morrison*, before concluding that Congress has the power to regulate a wholly intrastate economic activity, a court must independently scrutinize whether the class of activity being regulated has, in the aggregate, a substantial effect on interstate commerce. *Morrison* requires that this Court carefully scrutinize the findings and arguments proffered by the government for Congress's exercise of the commerce power. 529 U.S. at 614. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez*, 514 U.S. at 557 n.2; *see also Morrison*, 529 U.S. at 614 ("[T]he existence

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[5] *See* 21 U.S.C. § 801(3).

[6] *Tisor*, 96 F.3d at 375; *United States v. Staples*, 85 F.3d 461, 463 (9th Cir. 1996), *overruled on other grounds by United States v. Foster*, 165 F.3d 689 (9th Cir. 1999).

of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

Congress has made no findings concerning the effects of medical cannabis on interstate commerce.[7] Nor has the government offered any evidence concerning its effects. In the face of this silence, there is no basis for a court to conclude that Appellants' activity had any effect on interstate commerce. Nonetheless, the district court improperly hypothesized two possible effects of the wholly intrastate activity on interstate commerce to justify the federal government's exercise of its commerce power. First, the court speculated that cannabis cultivated in California for medical purposes may leak to other states. ER 664. Second, the court speculated that cannabis grown in other states may be transported to California to sell to California patients. ER 664. Neither consequence, however, is likely to involve any significant quantity of cannabis crossing state lines. Even if it did, this would not constitute an economic effect on a federally regulated market necessary to

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[7] The general congressional findings set forth in the CSA are not rational *as applied to the class of activity in this case.* For this reason, the government's citations concerning these general findings in support of the CSA are meritless. *See United States v. Walker*, 142 F.3d 103, 111 (2d Cir. 1998) (citing "reasonable finding by Congress" that narcotics trafficking affects interstate commerce in context of cocaine and crack distribution ring); *Rodriquez-Comacho*, 468 F.2d at 1221-22 (3d Cir. 1972) (deferring to congressional findings where defendant convicted of trafficking in 99 pounds of recreational marijuana). Moreover, the government's citation to cases upholding the rationale for the Schoolyard Act (section 860(a)), which enhances penalties for narcotics trafficking within 1,000 feet of a school, are similarly inapplicable because they concern illicit drug trafficking — an activity not at issue in this case. *See United States v. Henson*, 123 F.3d 1226, 1232-33 (9th Cir. 1997) (trafficking in PCP), *overruled in part on other grounds by United States v. Foster*, 165 F.3d 689 (9th Cir. 1999); *United States v. McDougherty*, 920 F.2d 569, 572 (9th Cir. 1990) (trafficking in cocaine); *United States v. Thornton*, 901 F.2d 738, 741 (9th Cir. 1990) (congressional findings sufficient in context of trafficking in PCP).

sustain federal intrusion into otherwise wholly local activity. *See Wickard*, 317 U.S. at 139.

In determining whether a wholly intrastate activity substantially affects interstate commerce, a court must consider the legal and economic barriers that prevent the intrastate activity from having an interstate effect. Here, California courts have erected legal barriers to interstate cannabis trafficking by narrowly interpreting the legislation passed by California voters. The Compassionate Use Act now provides a defense to the transportation and sale of cannabis for medical purposes only if: (1) the quantity transported is reasonably related to the patient's medical needs; and (2) the sale is for *bona fide* reimbursement of costs. *See People v. Trippet*, 56 Cal. App. 4th 1532, 1550-51 (1997); *see also People ex rel. Lungren v. Peron*, 59 Cal. App. 4th 1383, 1399 (1997). As affirmed by this Court, "[i]t is unreasonable to believe that use of medical marijuana by this discrete population for this limited purpose will create a significant drug problem." *Conant v. McCaffrey*, 172 F.R.D. 681, 694 n.5 (N.D. Cal. 1997), *aff'd, Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002); *see also Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) ("Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce."), *pet. for reh'g en banc denied*, No. 00-17222 (Feb. 6, 2003); *Olsen v. DEA*, 878 F.2d 1458, 1463 n.4 (D.C. Cir. 1989) ("Government may allow use of marijuana in programs to lessen the negative side-effects of chemotherapy and to treat glaucoma, for example, without thereby opening the way to licenses for the use of marijuana by the healthy."); *see also United States v. Oakland Cannabis Buyers' Coop.* ("*OCBC*"), 532 U.S. 483, 495 (2001) (reserving "whether the [CSA] exceeds Congress's power under the Commerce Clause").

There are also other serious barriers to the wholly intrastate use of medical cannabis having an interstate effect. Most states have criminal laws prohibiting

marijuana cultivation and distribution, even for medical use, and the interstate transportation of medical cannabis remains illegal under federal law. *See* 21 U.S.C. § 841(b)(1)(B)(vii); *Amicus* brief of the State of California *et al.*, at 4 n.10. Lest one be lured by the promise of economic gain to risk prosecution under these laws, California courts have taken the profit out of the activity by requiring California providers to provide medical cannabis at cost. *See Peron*, 59 Cal. App. 4th at 1399. It thus comes as no surprise that there is no empirical evidence showing any increase in interstate cannabis transportation in the more than six years since the passage of Proposition 215. *See Conant*, 172 F.R.D. at 694 n.5 (noting that "the government's fears [of interstate cannabis transportation] in this case are exaggerated and without evidentiary support"); *cf. Perez*, 402 U.S. at 153-56 (describing hearings and detailed findings supporting interstate nexus).

Pure speculation, which flies in the face of established barriers to interstate commerce, cannot justify a finding of a substantial effect. *See United States v. Moghadam*, 175 F.3d 1269, 1275 (11th Cir. 1999) (to pass the substantial effects test, statute "must bear more than a generic relationship several steps removed from interstate commerce, and . . . be a relationship that is apparent, not creatively inferred"); *see, e.g., United States v. Lynch*, 282 F.3d 1049, 1053 (9th Cir. 2002) (the test "reserves to the States the prosecution of robberies and extortionate acts that have only a speculative, indirect effect on interstate commerce").

Even assuming a factual basis for the government's otherwise unfounded fears, *some* leakage of medical cannabis across state lines cannot justify the government's exercise of its commerce power in this case. Some leakage will occur with any form of commerce, whether it is books, stereos, firearms, or wheat, since we have not erected impenetrable barriers between the States. This is legally insignificant for purposes of a Commerce Clause analysis because "Congress may [not] use a relatively trivial impact on commerce as an excuse for broad general

regulation of state or private activities." *Lopez*, 514 U.S. at 558 (citation omitted); *see, e.g., Rewis v. United States*, 401 U.S. 808, 812 (1971) (defendants who ran illegal gambling operation near state lines could not be convicted of violating Travel Act simply because their operation was frequented by out-of-state bettors); *see also Morrison*, 529 U.S. at 617-18 ("The Constitution requires a distinction between what is truly national and what is truly local.").

Medical cannabis use represents only a small fraction of all marijuana use.[8] The potential leakage of a small proportion of this tiny fraction across state lines would not even amount to a drop in the bucket of the annual illicit interstate marijuana trade. Accordingly, there is no legal or factual basis for concluding that Appellants' activities substantially affect interstate commerce. For this reason, if for no other, the injunction should be dissolved.

4. The Government Cannot Demonstrate the Requisite Economic Effect of Appellants' Non-Profit Distribution of Medical Cannabis to Their Seriously Ill Patient-Members.

The Supreme Court has upheld Congress's exercise of its Commerce Clause power where the government has demonstrated a significant *economic* effect either on a federally regulated, price-controlled market, *see, e.g., Wickard*, 317 U.S. at 127-29 (upholding regulation of production and consumption of homegrown wheat because regulation necessary to maintain price controls by limiting supply), or on a national corporation or syndicate, *see, e.g., Perez*, 402 U.S. at 156-57 (upholding statute reaching loan-sharking activities under the control of national

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[8] Whereas 5.4 percent of the American population are current recreational marijuana users, only 0.05 percent of the population are medical cannabis patients in the States studied that allow medical cannabis. Office of National Drug Control Policy, Drug Policy Information Clearinghouse, *Fact Sheet*, at 1 (Jan. 2003);

(Footnote continues on following page.)

crime syndicates). *See Morrison*, 529 U.S. at 613 (raising possibility of "categorical rule against aggregating the effects of any non-economic activity," while noting that "our cases have upheld Commerce Clause regulation of intrastate activity *only* where that activity is *economic* in nature") (emphasis added); *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("Congress can regulate in the *commercial* sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.") (emphasis added); *Wickard*, 317 U.S. at 125 (intrastate activity "may . . . be reached by Congress if it exerts a substantial *economic* effect on interstate commerce") (emphasis added).[9]

Rather than even attempt to make this necessary showing, the government relies upon general legislative findings to argue that it is entitled to *prohibit* all forms of a particular type of commerce to address what it perceives as a "national concern." (Opposition, at 36 (citation omitted).) This is *precisely* the type of argument *Morrison* and *Lopez* rejected as an invalid justification for Congress's exercise of its commerce power. *See Lopez*, 514 U.S. at 564 (rejecting "costs of crime" and "national productivity" arguments because they would permit Congress to intrude into areas of traditional state regulation); *see also Morrison*, 529 U.S. at 613 (rejecting expansive view of the Commerce Clause because "'it [would be]

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United States General Accounting Office, *Marijuana: Early Experiences with Four States' Laws that Allow Use for Medical Purposes*, at 3 (Nov. 2002).

[9] The government suggests that alleged cash sales to undercover agents transformed Appellants' activities into "economic" activities. (Opposition, at 34.) There is no basis for this statement. California law allows the *bona fide* reimbursement of the "actual expense of cultivating and furnishing marijuana for the patient's approved medical treatment." *Peron*, 59 Cal. App. 4th at 1399. Moreover, OCBC is a strictly not-for-profit cooperative; no dividends, rebates, or distributions are received by any of the cooperative's patient-members. ER 2989. Furthermore, OCBC often provided cannabis to members without any charge whatsoever.

difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states have historically been sovereign'") (quoting *Lopez*, 514 U.S. at 564). Although Congress has a limited power to prohibit certain forms of commerce, the Supreme Court has insisted that this power "does not assume to interfere with traffic or commerce . . . carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States." *Champion v. Ames*, 188 U.S. 321, 357 (1903). "To uphold the Government's contentions here, [the court] would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *see, e.g., United States v. Five Gambling Devices*, 346 U.S. 441, 451-52 (1953) (affirming dismissal of indictments against gaming device operators engaged in wholly local activity as beyond scope of commerce power).[10]

Because the government fails to demonstrate the requisite economic effect of Appellants' activities, the injunction must, at a minimum, be modified. As the Supreme Court made clear in *Morrison*, the *Wickard* doctrine has been extended to only *economic* activities.[11] "[T]hus far in our Nation's history our cases have

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[10] The Supreme Court's admonition in *Five Gambling Devices*, 346 U.S. at 451, bears emphasis here:

> [The FBI] entered a country club and seized slot machines not shown ever to have had any connection with interstate commerce in any manner whatever. If this is not substituting federal for state enforcement, it is difficult to know how it could be accomplished. A more local and detailed act of enforcement is hardly conceivable.

[11] Like *Staples* and *Tisor*, the cases cited by the government from other circuits are inapposite. (Opening Brief, at 32-33; Opposition, at 32.) These cases concern the inappropriately broad category of "illegal drug trafficking," as opposed to the non-profit, intrastate conduct at issue in this case. *See United States v. Goodwin*, 141 F.3d 394, 399 (2d Cir. 1997) (nationwide narcotics trafficking);

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upheld Commerce Clause regulation of intrastate activity *only where that activity is economic in nature.*" *Morrison*, 529 U.S. at 613 (emphasis added). As was explained in *Morrison*, "in every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character." *Id.* at 611 n.4. If the compensated non-profit transfers of medical cannabis are deemed to be non-commercial, then none of Appellants' activities are properly enjoined. But even were those transfers to be deemed economic, the injunction also restricts other indisputably non-economic activities, such as the possession and use of medical cannabis and its non-commercial distribution without remuneration. Applied to these non-economic activities, it is certainly overly broad and unconstitutional. The only rebuttal offered by the government is the perfunctory reiteration of its irrelevant contention that, "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." (Opposition, at 41 (citation omitted).)[12] As discussed in § II.A *supra*,

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United States v. Zorrilla, 93 F.3d 7, 8 (1st Cir. 1997) (drug trafficking in cocaine within 1,000 feet of a school); *United States v. Rogers*, 89 F.3d 1326, 1338 (7th Cir. 1996) (cocaine ring run out of "drug house").

[12] The government cites a host of distinguishable "illegal drug trafficking" authorities from other circuits for its erroneous contention that "*Morrison* does not call into question the constitutionality of section 841(a)(1)." (Opposition, at 33.) *Morrison* does call into question the constitutionality of the CSA *as applied to the class of activity at issue in this case*, which is *non-economic*, unlike the illegal drug trafficking at issue in the government's case citations. *See United States v. Davis*, 288 F.3d 359, 361-62 (8th Cir. 2002) (manufacturing methamphetamine held to be economic activity), *cert. denied*, 123 S.Ct. 107 (2002); *Price*, 265 F.3d at 1106-07 (trafficking in cocaine held to be economic activity); *United States v. Pompey*, 264 F.3d 1176, 1180 (10th Cir. 2001) (same), *cert. denied*, 534 U.S. 1117 (2002); *Bertoldo v. United States*, 145 F. Supp. 2d 111, 118-19 (D. Mass. 2001) (possessing firearm in connection with narcotics trafficking upheld as economic activity).

Appellants do not challenge the application of a general regulatory scheme to an individual instance but challenge the power of Congress to apply its general regulatory scheme to a *class* of wholly intrastate activity. Given the government's flawed response, the injunction must, at minimum, be modified.

III. THE PERMANENT INJUNCTION ENCROACHES UPON THE SOVEREIGN POWERS RESERVED TO THE STATE OF CALIFORNIA UNDER THE TENTH AMENDMENT.

Appellants have never denied that, where Congress is granted an enumerated power, the power is supreme over any conflicting claim of police power by the States. However, the existence of the police power of States influences the determination of whether the federal government indeed has an implied power under the Constitution, in this case the implied power to reach some intrastate commerce. In opposition to this proposition, the government cites *New York v. United States*, 505 U.S. 144, 156 (1992), and quotes the Court as stating, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." (Opposition, at 44.) By ending this quote with a period rather than ellipsis, the government falsely suggests that this is all it says. In fact, the passage continues as follows: "*if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.*" *New York*, 505 U.S. at 156 (citations omitted) (emphasis added). In other words, the Supreme Court in *New York v. United States* was *affirming* rather than denying Appellants' position that the existence of a state police power influences whether Congress indeed has an implied power. The very fact that the government chose to omit this portion of the sentence suggests how contrary, if not devastating, *New York* is to the government's claim.

The government also distorts the holding of *Printz v. United States*, 521 U.S. 898 (1997), in the following passage about commandeering:

> The *only exception* to this general rule is where the federal government has intruded on the sovereignty of the several States by "compell[ing] the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997).

(Opposition, at 45 (emphasis added).) Nowhere in *Printz,* however, does the Court say that commandeering is the "only exception" to any sort of "general rule." Instead, the Court found that, by commandeering a state official, Congress exceeded its enumerated power to regulate commerce among the several States. *Printz* is thus an *example* of Congress improperly attempting to exercise "a power [that] is an attribute of state sovereignty reserved by the Tenth Amendment, [and] . . . necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156. Appellants know of no Supreme Court case stating that "commandeering" is the "only exception" to the powers of Congress evidenced by intrusions on the sovereignty of the several States.

Nor is "commandeering" the only way in which Congress may improperly interfere with the sovereign powers reserved to a State. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), a case cited by the government, there was no commandeering. Had the Age Discrimination in Employment Act of 1967, enacted pursuant to the Commerce Clause, been construed to apply to state judges, it potentially would have contradicted a provision of the Missouri Constitution requiring mandatory retirement at a certain age. Despite the absence of commandeering, the Court applied a "plain statement" requirement to avoid an interference with

> the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at "'the heart of representative government.'" [*Bernal v. Fainter*, 467 U.S. 216, 221 (1984)] It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." [U.S. CONST., art. IV, § 4]

Id. at 463 (footnote omitted).

The Court in *Gregory* specifically affirmed that Congress should not interfere with the States' sovereign powers. "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. By so limiting the reach of the statute, the Court implicitly rejected the government's contention here that there exists some "general rule" by which any interference with the sovereign powers of a State will be automatically sustained without further analysis unless it falls within the "only exception" for commandeering.

Indeed, both *Lopez* and *Morrison* involved non-commandeering congressional interferences with the police powers of the States to regulate the intrastate actions of gun possession and rape. In *Lopez*, the Court bolstered its Commerce Clause analysis by focusing on how the government's theory, if accepted, would interfere with state sovereignty. "Under the theories that the government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education *where States historically have been sovereign.*" *Lopez*, 514 U.S. at 564 (emphasis added). Likewise, in *Morrison*, the Court reinforced its Commerce Clause analysis with the following: "Indeed, we can think of no better example of the *police power, which the Founders* denied the National Government and *reposed in the States*, than the suppression of violent crime and vindication of its victims." 529 U.S. at 618 (emphasis added).

As the Court explained in *New York*, a Tenth Amendment analysis of the sovereign powers of a State is the flip side of an analysis of whether Congress is acting within its enumerated powers. They are simply two complementary analytic means of addressing the same end: preserving federalism so that a healthy competition between sovereigns will result in better protection of individual liberties.

"The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (citation omitted), *superseded by statute on other grounds as stated in Seater v. California State Univ.*, No. 93-56688, 1995 U.S. App. LEXIS 3652 (9th Cir. Feb. 22, 1995).

Moreover, Judge Kozinski has found the very statute at issue here closely analogous to "commandeering," and, for this reason, a potentially improper interference with the sovereign power of the state to legislate on matters of health and safety:

> [T]he federal policy makes it impossible for the state to exempt the use of medical marijuana from the operation of its drug laws. In effect, the federal government is forcing the state to keep medical marijuana illegal. But *preventing the state from repealing an existing law is no different from forcing it to pass a new one*; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated.

Conant v. Walters, 309 F.3d at 646 (emphasis added). Notably, the government fails to respond to Judge Kozinski's analysis.[13]

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[13] Appellants do not dispute the propositions cited by the government in *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 291 (1981), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Both propositions assume what must be shown and what Appellants contest: that Congress is exercising a power granted to it by the Constitution. Neither case addresses Appellants' claim that, in enjoining a class of intrastate activity without a showing that this class substantially affects interstate commerce, Congress has interfered with the exercise of the State's police power to protect the health of its citizens, and has exercised "a power the Constitution has not conferred on Congress." *New York,* 505 U.S. at 156.

Nor do Appellants dispute the general proposition that the "federal government is empowered to regulate prescription drugs." *In re Grand Jury Proceedings*, 801 F.2d 1164, 1169 (9th Cir. 1986). Like *United States v. Rosenberg*, 515 F.2d 190 (9th Cir. 1975), *In re Grand Jury Proceedings* involved a physician trafficking

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The government also suggests that the injunction does not interfere with the state sovereign powers because Appellants' conduct is not authorized by state law. (Opposition, at 47-49.)[14] Contrary to the government's contention, California law indeed authorizes Appellants' activities. For example, Appellant OCBC is the City of Oakland's designated medical cannabis provider (ER 933), and has acted under that authority.

Moreover, the government incorrectly defines Appellants' activities as "distribution." Under California law, Appellants' activities are considered "possession," not "distribution." California state courts have adopted a broad

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in prescription drugs who claimed immunity because the practice of medicine is outside the power of Congress. These cases involve the sale of drugs in interstate commerce, and address activity that lies squarely within the enumerated power of Congress over interstate commerce; they do not implicate the limits of the federal government's power over the class of wholly intrastate production and distribution of medical cannabis that has been permitted by the State of California pursuant to its police power.

The government's reliance upon a footnote in *United States v. Kim*, 94 F.3d 1247, 1250 n.4 (9th Cir. 1996), is misplaced. A pre-*Morrison* case whose interpretation of *Lopez* is suspect, *Kim* merely asserts the uncontroversial proposition that a statute that is a proper exercise of the commerce power is not unconstitutional simply because it restricts conduct that is traditionally regulated by the States. The court in *Kim* does not consider, much less address, whether the government's attempt to regulate wholly intrastate activity exceeds its power because it *interferes with* the State's ability to excise its sovereign police powers — Appellants' assertion in this case.

[14] The question of Appellants' compliance with California law was not at issue in this litigation. The district court assumed that Appellants' activities complied with California law, reasoning that California law was irrelevant. ER 653-56, 661, 668 ("[W]hether defendants' conduct falls within the scope of Proposition 215 is immaterial."). In fact, when the government first raised the issue in the district court, in August of 1998, the district court admonished: "If your argument is that, gee, these people aren't in compliance with State law, and that's why the government thinks the — the statute doesn't apply, then I — I'll

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"joint use" defense, which reduces charges of distribution or sale to possession.[15] *See People v. Edwards*, 39 Cal. 3d 107, 113-14 (1985); *People v. Mayfield*, 225 Cal. App. 2d 263, 267 (1964). The California Supreme Court endorsed the "joint use" defense "where the individuals involved are truly 'equal partners' in the purchase and the purchase is made strictly for each individual's personal use. Under such circumstances, it cannot reasonably be said that each individual has 'supplied' [a regulated substance] to the others." *Edwards*, 39 Cal. 3d at 114. On this basis, Appellants' cooperative activities are considered "possession" and not "distribution."

None of the government's cited cases makes unlawful patient-members' access to medical cannabis through their own cooperative.[16] Indeed, the State of California has specifically supported Appellants' activities in this case. California law means what the State of California says it means in its *amicus* brief: "[U]nder the limited circumstances authorized by California voters, the recommendation,

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hold a hearing on that issue." ER 1098. The government never requested a hearing on this issue.

[15] The federal "joint user" defense is discussed in detail in § V.B.2 *infra*.

[16] The government principally relies on *People v. Galambos*, 104 Cal. App. 4th 1147 (2002), claiming that the defendant in that case had cultivated cannabis for OCBC. In fact, OCBC never procured cannabis from that defendant, who did not produce cannabis of medical quality, *id.* at 1152, and who did not even obtain a physician's recommendation to use cannabis until after his arrest, *id.* at 1153. The court never addressed, much less questioned, OCBC's authority to provide medical cannabis to its members. Additionally, *Galambos* and the other authorities on which the government relies confirm that Appellants' alleged activity (properly characterized as possession under the joint user doctrine) is authorized by California law. *See id.* at 1165; *see also People v. Mower*, 28 Cal. 4th 457, 474 (2002); *People v. Young*, 92 Cal. App. 4th 229, 237 (2001), *review denied, request denied*, 2001 Cal. LEXIS 8621 (Dec. 12, 2001); *People v. Rigo*, 69 Cal. App. 4th 409, 412-13 (1999); *Peron*, 59 Cal. App. 4th at 1399; *Trippett*, 56 Cal. App. 4th at 1550-51.

distribution, and use of marijuana are not criminal acts." *Amicus* brief of State of California *et. al.*, at 4 (emphasis added). Accordingly, state law authorizes Appellants' activities, and the injunction plainly and improperly interferes with California's ability to protect the health and welfare of its citizens.

IV. THE INJUNCTION IMPROPERLY INFRINGES UPON FUNDAMENTAL RIGHTS.

A. The Government Mischaracterizes the Fundamental Rights at Issue in This Case.

The government mistakenly contends that Appellants assert a right to distribute medical cannabis "free of the lawful exercise of the government's police power." (Opposition, at 55.) In addition to falsely suggesting that Congress possesses a general police power, this contention distorts Appellants' position. Should this Court find, contrary to *Wickard, Lopez,* and *Morrison*, that Congress may reach Appellants' wholly intrastate activity under the Commerce Clause, then due to the nature of the liberty with which the injunction interferes, the application of the CSA must be justified *by more than* minimal rational basis scrutiny. Appellants do not deny that laws *meeting this higher burden* would be a legitimate exercise of whatever power Congress is deemed to have over this activity under the Commerce Clause.

The government also mistakenly asserts that Appellants "are seeking the right to distribute and manufacture marijuana." (Opposition, at 55.) This is not the right identified and defended as fundamental throughout the entirety of this litigation. Rather, Appellants have maintained that the injunction barring distribution of medical cannabis (and more) improperly restricts the fundamental rights of seriously ill persons to alleviate their pain, to prolong their lives, to bodily integrity, and to an unimpeded physician-patient relationship, by placing an undue burden on the exercise of these rights. In cases involving abortion, the right at issue has never been characterized as a "right to provide abortions for a fee." Instead, to avoid

infringing upon the fundamental, unenumerated right of privacy, any restrictions upon abortion providers must satisfy heightened scrutiny to ensure the right is not unduly burdened. *See Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). Nor in abortion cases is it seriously contended that abortion providers cannot assert the fundamental rights of the persons to whom their services are essential. *See Singleton v. Wulff*, 428 U.S. 106, 118 & n.7 (1976) (physicians had standing on behalf of patients to challenge prohibition on use of Medicaid funds for non-therapeutic abortions).

Moreover, the government ignores well-established principles of organizational standing by suggesting that Appellants lack standing to challenge the undue burden that the injunction places upon the exercise of patient-members' fundamental rights. (Opposition, at 55-56.) As the United States Supreme Court has observed: "[A]n association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). OCBC is organized as a consumer cooperative under state law. CAL. CORP. CODE §§ 12200-12704. OCBC is its members. All of the cooperatives are "associations" that can represent their members. Accordingly, they have standing to assert the rights of their patient-members. *See NAACP v. Alabama*, 357 U.S. 449, 459 (1958) ("Petitioner [NAACP] is the appropriate party to assert these rights, because it and its members are in every practical sense identical."). Finally, organizational standing is particularly appropriate where, as in this case, individuals are reluctant to be named as plaintiffs for fear of criminal prosecution. *See* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.9, at 613-15 (2d ed. 1984). Given the patient-members' *bona fide* concerns regarding criminal prosecution, the cooperatives are the only means by which these patient-members can assert their fundamental rights.

B. Appellants' Fundamental Rights Are Secured by the Fifth and Ninth Amendments.

Relying on *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947), *overruled in part on other grounds by Adler v. Bd. of Education*, 342 U.S. 485 (1952), the government contends that, "because the CSA is a proper exercise of Congress' authority under the Commerce Clause . . . , any challenge to that authority on the ground that it infringes on rights founded in state law and reserved by the Ninth Amendment (or Tenth Amendment) necessarily 'must fail.'" (Opposition, at 61 (quoting *Mitchell*, 330 U.S. at 96).)

In *Mitchell,* the Supreme Court confusingly refers to an "invasion of those rights, *reserved* by the Ninth and Tenth Amendments." 330 U.S. at 96 (emphasis added). However, the Ninth Amendment speaks of "retained" rights, while the Tenth Amendment speaks of reserved "powers."[17]

In its more recent opinion in *Casey*, the Supreme Court confirmed that the Ninth Amendment is in fact a source of constitutional protection for the kind of unenumerated rights at issue here: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. *See* U.S. Const., Amdt. 9." 505 U.S. at 848; *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980) (relying in part on the Ninth Amendment to protect an unenumerated right of access to public trials). The same proposition applies with even greater force to the Fifth Amendment, given that the Ninth Amendment was among the amendments initially enacted to restrict

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[17] *See* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 5-8 (1988) (discussing *Mitchell* and explaining how constitutional rights can contain the *means* by which otherwise valid powers are exercised); *see gener-*

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federal power. *See Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 248 (1833), *overruled in part on other grounds as stated in Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002). The Fifth and Ninth Amendments do indeed offer protections of liberties against federal power beyond those protections enumerated in the Bill of Rights. Accordingly, the government's argument to the contrary is meritless.[18]

C. Appellants' Patient-Members Have a Fundamental Right to Life-Saving and Palliative Medical Treatment.

1. Recent Supreme Court Decisions as Well as This Nation's History, Traditions, and Practices Establish Patient-Members' Fundamental Liberty Interest in Ameliorating Pain, in Bodily Integrity, and in Prolonging Their Lives.

There can be no rights more fundamental than the rights to bodily integrity, to ameliorate pain, and to prolong one's life. In *Washington v. Glucksberg*,

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ally 2 RANDY E. BARNETT, THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1-46 (1993).

[18] The government's attempt to link Appellants' argument with the issue of racial discrimination is absurd and offensive. The government claims that "under defendant's theory, the opponents of the Civil Rights Act of 1964 could merely have sought the passage of state ballot initiatives protecting the 'liberty' to discriminate in places of public accommodation and, if successful, had that 'liberty' protected against federal enforcement by virtue of the Ninth Amendment." (Opposition, at 62-63.) As Appellants clearly noted in their opening brief, "this slippery slope has already been avoided by the limiting principle supplied in *Romer v. Evans*, 517 U.S. 620 (1996), which is that the People of a State can no more violate the United States Constitution than can their legislature. But where the People, or their representatives in State legislatures, act to protect a particular liberty, this provides invaluable guidance to judges who must distinguish fundamental rights from mere liberty interests." (Opening Brief, at 51-52 n.29.) In any event, the government fails to explain why a federal judge would owe deference to the representatives of the People when they seek to restrict the exercise of liberty but would be entirely free to ignore the expressed will of the People when asked to reach a judicial conclusion that a particular liberty is fundamental.

521 U.S. 702 (1997), at least five justices suggested that the Due Process Clause protects an individual's right to alleviate unnecessary pain. *See id.* at 736-37 (O'Connor, J., concurring; Ginsburg, J., concurring) ("[A] patient who is suffering from terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians . . . ."); *see id.* at 790 (Breyer, J., concurring) (right to die includes "avoidance of unnecessary and severe physical suffering"); *see id.* at 744 (Stevens, J., concurring) (liberty interest includes avoiding intolerable pain); *see id.* at 777 (Souter, J., concurring) ("liberty interest in bodily integrity" includes "'a right to determine what shall be done with [a patient's] own body' in relation to his medical needs") (citations omitted). And, in *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 281 (1990), the Court affirmed that the Due Process Clause confers upon all citizens a liberty interest in life. Appellants demonstrated in their opening brief that this concept of liberty is also deeply rooted in legal precedent, in natural rights principles, and in the professional and ethical standards of medical professionals and caregivers. (Opening Brief, at 49-52.)

Ignoring the wealth of authority establishing patient-members' fundamental liberty interest in bodily integrity, ameliorating pain, and prolonging life, the government instead attempts to distinguish *Cruzan* in a manner that ultimately confirms Appellants' position. (Opposition, at 54-55.) The government cites *Glucksberg* for the proposition that *Cruzan* is distinguishable insofar as it was based on a "right to refuse medical treatment, which in turn was grounded in the rule that 'forced medication was a battery.'" (Opposition, at 54.) Contending that neither *Glucksberg* nor the present case involves an invasion of the body, the government concludes that the reasoning of *Cruzan* does not apply.

Even if one of the bases for the Supreme Court's decision in *Cruzan* was common law battery, this explains only the Supreme Court's recognition of a

fundamental right to *refuse* life-sustaining medical treatment. However, in addition to recognizing the right to *refuse* life-sustaining medical treatment, the *Cruzan* court explicitly recognized a basic liberty interest in *life,* which was in no way tied to concepts of common law battery. *See Cruzan*, 497 U.S. at 281 ("It cannot be disputed that the Due Process Clause protects *an interest in life* as well as an interest in refusing life-sustaining medical treatment.") (emphasis added). For this reason, *Cruzan*'s recognition of a fundamental liberty interest in life supports Appellants' patient-members' fundamental liberty interests in bodily integrity, ameliorating pain, and prolonging their lives.

Moreover, the government's own characterization of *Glucksberg* demonstrates that the recognition of a fundamental liberty interest in alleviating pain applies with even greater force in this case. The government states that, in *Glucksberg*, the "Court held that there is no fundamental right to obtain medical treatment which would alleviate suffering *by causing death*." (Opposition, at 54 (emphasis added).) While not incorrect, this formulation of the issue is needlessly confusing. The *Glucksberg* plurality held that States "'have an unqualified interest in the preservation of human life,'" 521 U.S. at 728 (citation omitted), which overrides a recognizable liberty interest in "[a]voiding intolerable pain and the indignity of living one's final days incapacitated and in agony." *Id.* at 745 (Stevens, J., concurring). In other words, the plurality found that, due to the compelling state interest in preserving life, the fundamental right to ameliorate pain and suffering was not infringed by a prohibition on physician-assisted suicide.

In this case, unlike *Glucksberg*, the government's paramount interest in preserving life is not in conflict with the right to ameliorate pain and prolong life. Appellants' patient-members have not asserted an interest in alleviating their suffering by causing their own deaths with or without the assistance of others. Accordingly, the government's interest in preserving life *supports* Appellants'

assertion of a fundamental liberty interest in preserving life and ameliorating pain and certainly does not justify any interference with this liberty. Additionally, *Glucksberg* involved an affirmative choice between life and death. However, in this case, Appellants presented extensive evidence in the district court that their patient-members have no choice between medical treatments: they face an involuntary and agonizing death without access to medical cannabis. ER 2947, 2966-67, 2971, 3045-46. Because Appellants' patient-members have no choice and the medical treatment at issue may prolong human life instead of curtailing it, *Glucksberg*'s discussion of a fundamental liberty interest in ameliorating pain applies with particular force in this case.

2. None of the Authorities Relied on by the Government Address the Fundamental Rights at Issue in This Case.

The government incorrectly contends that two laetrile cases from the Ninth and Tenth Circuits "foreclose[]" Appellants' contention that their patient-members have a fundamental right to the sole method of life-saving treatment. (Opposition, at 50-51.) However, neither *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980), nor *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980), addresses the rights at stake in this case.

In its two-page *per curium* opinion, the Ninth Circuit in *Carnohan* never systematically addressed the claim of fundamental rights asserted in this case. Its entire discussion is as follows:

> We need not decide whether defendant Carnohan has a constitutional right to treat himself with home remedies of his own confection. Constitutional rights of privacy and personal liberty do not give individuals *the right to obtain laetrile* free of the lawful exercise of *government police power*. [*Rutherford* and other citations] Carnohan has failed to show that government *regulation of laetrile* traffic bears no reasonable relation to the legitimate state purpose of protecting public health. His claim that the requirements of state and federal law deny him due process are premature since he has not availed himself of the procedures which

> those laws afford. The FDA and the California State Department of Health Services have primary jurisdiction to determine whether persons may traffic in new drugs. If Carnohan wishes to obtain laetrile, he must exhaust his administrative remedies before seeking judicial relief.

616 F.2d at 1122 (citations omitted) (emphasis added). The *Carnohan* court clearly confined its holding to "the right to obtain laetrile," and it cited *Rutherford v. United States* for this limited holding. Moreover, it is clear that both state and federal law prohibited the use of laetrile. *See id.* Finally and most importantly, this Court refused even to consider Carnohan's Due Process challenge — the very challenge being made by Appellants — on the grounds that it was "premature." *Id.*

The Tenth Circuit's two-page opinion in *Rutherford* is equally cursory in its treatment of fundamental rights. Its entire discussion consists of a single unsupported sentence: "It is apparent in the context with which we are here concerned that *the decision by the patient whether to have a treatment or not is a protected right*, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health." 616 F.2d at 457 (emphasis added). Again, the court clearly confined its analysis to an asserted right to obtain laetrile.

The most important fact distinguishing this case from *Carnohan* and *Rutherford* — that California has authorized medical cannabis use — is conspicuously absent from the government's analysis. In fact, twenty-one percent of the United States population live in a state that has passed a law legalizing medical cannabis.[19] This is in stark contrast to the individual cancer patients who

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[19] This percentage is based upon the 2001 population estimates published by the United States Census Bureau and includes the populations of Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington.

sought to use laetrile in *Carnohan* and *Rutherford*, which neither the state nor the federal government approved for sale, a fact upon which this Court specifically focused in *Carnohan*. 616 F.2d at 1122. Nor was there any claim in *Rutherford* that laetrile had been approved for use by state authorities. Neither case addresses the present situation in which a state has authorized a particular form of treatment, but the federal government has not.[20]

Moreover, the government has no credible response to Appellants' observation that *Carnohan* and *Rutherford* are distinguishable insofar as laetrile was the patients' *preferred* method of treatment, not the *sole effective* method of treatment. The government attempts to recast *Carnohan* and *Rutherford* as cases involving a sole method of effective treatment, claiming that "[b]y definition, a terminally ill cancer patient has no other treatment available." (Opposition, at 57.) The government's argument is fatally flawed. "Terminal illness" means "[a]n illness that, because of its nature, can be expected to cause the patient to die. . . . for which

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[20] If, as the government contends, all medical treatments require approval by the FDA before becoming available to the public, state agencies regulating health would be superfluous. As discussed in § III *supra*, this is antithetical to the traditional police powers reserved to the States under the Constitution, which include the regulation of public health and the practice of medicine. *See Conant*, 309 F.3d at 639 (Schroeder, C.J.) ("[P]rinciples of federalism . . . have left states as the primary regulators of professional conduct."); *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) ("It is, of course, well settled that the State has broad police powers in regulating the administration of drugs by health professions."); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905) ("The authority of the State to enact this statute is to be referred to what is commonly called the police power — a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description' . . . ."); *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1092 (D. Or. 2002) ("The determination of what constitutes a legitimate medical practice or purpose traditionally has been left to the individual states. The CSA was never intended . . . to establish a national medical practice or act as a national medical board.").

there is no known cure." TABER'S ENCYCLOPEDIC MEDICAL DICTIONARY 1922 (18th ed. 1997).[21] A terminally ill patient has an illness for which there is no cure, *not* an illness for which there is no palliative treatment.[22]

In this case Appellants have established, and the government has not disputed, that medical cannabis is the only effective treatment, as determined by a licensed physician, for *certain* seriously and terminally ill patients.[23] ER 2947, 2966-67, 2971, 3045-46. Therefore, to deny Appellants' patient-members use of medical cannabis is to burden the right explicitly recognized by *Rutherford* as "protected": whether to have medical treatment at all. 616 F.2d at 457.[24]

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[21] The "Nursing Implications" section of the definition of "terminal illness" requires a nurse to "support[] the patient and family by . . . help[ing] the patient to deal with major concerns: pain, fear . . . . The patient receives caring comfort and help in adjusting to decreased quality of life to ensure that death is with dignity." TABER'S ENCYCLOPEDIC MEDICAL DICTIONARY 1922.

[22] A "cure" is defined as a "[r]estoration to health," whereas a "palliative treatment" is defined as "designed for the relief of symptoms . . . rather than curing the disease." TABER'S ENCYCLOPEDIC MEDICAL DICTIONARY 470, 1990.

[23] For seriously ill patients medical cannabis may be a life-saving treatment, while terminal patients may only hope for palliative treatment.

[24] The other cases cited by the government are inapposite because they all involved attempts to have a particular *type* of treatment declared to be a fundamental right without any allegation or proof that the medication at issue had been demonstrated to be the only effective medication available or that the medication had been approved for use by the state. (Opposition, at 51.) *See People v. Privitera*, 23 Cal. 3d 697, 701 (1979) (laetrile not approved by state); *Sammon v. New Jersey Bd. of Med. Exam'rs*, 66 F.3d 639, 644-45 (3d Cir. 1995) ("direct entry" midwifery services not licensed by state); *Mitchell v. Clayton*, 995 F.2d 772, 773 (7th Cir. 1993) (acupuncture treatments by unlicensed acupuncturists not authorized by state); *United States v. Burzynski Cancer Research Inst.*, 819 F.2d 1301, 1304-05, 1313-14 (5th Cir. 1987) (cancer research institute manufacturing procedure not authorized by state or federal regulation); *Smith v. Shalala*, 954 F. Supp. 1, 3 (D.D.C. 1996) (antineoplastons not "approved for general use" by the federal government or authorized by the state); *United States v. Vital Health Prods., Ltd.*, 786 F. Supp. 761, 774, 779 (E.D. Wis. 1992) (hydrogen peroxide solutions

(Footnote continues on following page.)

Similarly, the government's reliance on inapposite cases that are not controlling in this circuit for the proposition that "there is no fundamental right to distribute, cultivate, or use" medical cannabis mischaracterizes the fundamental right at stake in this case. (Opposition, at 53.) Appellants do not ask this Court to declare a fundamental right to "distribute, cultivate, or use" medical cannabis, as the government suggests. If the right to the sole method of life-saving treatment is fundamental, then to the extent that the CSA interferes with this right, the government must establish a compelling interest for this interference.

D. The Injunction Interferes with the Constitutionally Protected Relationship Between Patient-Members and their Physicians.

Appellants established in their opening brief that the injunction significantly interferes with the relationship between patient-members and their physicians. Appellants also established that the federal government cannot substitute its judgment for that of a treating physician acting under the authority of state law. (Opening Brief, at 52-55.) *See also Amicus* brief of the California Medical Association, at 21 ("[T]he federal government's role as market regulator has never been, and cannot now be, transmuted into medical expertise that overrides a particular physician's judgment as to a particular patient's needs."); *Oregon v. Ashcroft*, 192 F. Supp. 2d at 1092 ("The CSA was never intended . . . to establish a national medical practice or act as a national medical board.").

In response to this authority, the government relies upon *Privitera* and *Rutherford* for the proposition that the injunction does not unconstitutionally interfere with the physician-patient relationship. Neither case discusses, much less supports,

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(Footnote continued from previous page)

marketed without federal or state approval), *aff'd sub nom. United States v. Lebeau*, 985 F.2d 563 (7th Cir. 1993); *Kuromiya v. United States*, 37 F. Supp. 2d 717, 725, 731 (E.D. Pa. 1999) (no fundamental right "to use marijuana" where not adopted by state "through referenda and ballot measures").

this proposition. As discussed in § IV.C.2 *supra*, the laetrile cases are inapposite, because laetrile was neither state nor federal government-approved for use. Therefore, any physician's recommendation of such treatment was necessarily subject to state police power regulation. In this case, the State of California has authorized use of medical cannabis upon the recommendation of a patient's licensed physician. *See* CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) ("The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are . . . [t]o ensure that seriously ill Californians have the *right to obtain and use* marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician . . . .") (emphasis added).[25]

In *Conant*, this Court held that the federal government may not interfere with the communications between a physician and his or her patient concerning the propriety of medical cannabis as a treatment. *See Conant*, 309 F.3d 629. This Court upheld the injunction prohibiting the federal government from revoking a physician's license if he or she recommended medical cannabis to a patient, reaffirming that "[a]n integral component of the practice of medicine is the communication between a doctor and a patient." *Id.* at 636. Not only did this Court recognize a physician's First Amendment right to communicate with patients about medical cannabis, but Judge Kozinski also emphasized that the patient's right to receive the information concerning medical cannabis treatment is even stronger than the physician's interest in conveying the same information. *See id.*

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[25] The government supports its assertion that the laetrile cases are not distinguishable on these grounds by citing an inapposite case involving congressional power to regulate the sale of illegal (under both state and federal law) narcotics for recreational use. *See Kim*, 94 F.3d at 1250 n.4 (9th Cir. 1996) (affirming conviction for intent to distribute 800 grams of crystal methamphetamine, on grounds that the CSA did not intrude into area traditionally regulated by the States pursuant to Congress's "power to regulate *illegal* drugs") (emphasis added).

at 643 (Kozinski, J., concurring) ("[T]he right to hear — the right to receive information — is no less protected by the First Amendment than the right to speak. . . . the harm to patients from being denied the right to receive candid medical advice [concerning medical cannabis] is far greater than the harm to doctors from being unable to deliver such advice.").

Ultimately, this Court must decide the issue left open in *Conant*: that Appellants' patient-members have a right to be free from governmental interference with their ability to act upon their doctors' treatment recommendations, a right based in significant part on imperatives established by the physician-patient relationship. The Due Process Clause must guarantee the right to open communication with a physician *and* the freedom to act upon the physician's medical advice, in order to give effect to the widely recognized fundamental rights to ameliorate pain, bodily integrity, and prolong life. *See, e.g., Casey*, 505 U.S. at 877 (finding a law with "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" is an undue burden on a woman's fundamental right to decide whether to have an abortion). This is particularly so where the State of California has specifically authorized the treatment recommended by the physician.

E. The Government Has Failed to Demonstrate that the CSA Is Narrowly Tailored to Further a Compelling Governmental Interest.

The CSA plainly infringes upon the fundamental rights of Appellants' patient-members. Accordingly, the government must justify this infringement on fundamental rights by showing that the CSA is narrowly tailored to further a compelling governmental interest. *See Reno v. Flores*, 507 U.S. 292, 302 (1993); *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938). Because the government never addressed the heightened standard of "strict scrutiny" in either the district court (ER 3171-218, 4123-270) or its opposition brief on appeal,

despite having been urged repeatedly by Appellants to do so, if this Court finds a fundamental right, it may find that the government has not satisfied its constitutional burden. *See Doi v. Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir. 2002) (arguments not made in the district court deemed waived).

Rather than addressing the foregoing burden, the government contends that this Court should simply defer without analysis to Congress's findings. There is no basis for the government's contention that this Court must abdicate its responsibility to subject congressional findings accompanying the CSA to searching judicial scrutiny. "That a legislative body cannot for all time insulate its determinations from judicial inquiry into the continued existence of the legislative facts upon which the constitutionality of the legislation is dependent is well settled." *Kress, Dunlop & Lane, Ltd. v. Downing*, 286 F.2d 212, 215 (3d Cir. 1960). Although congressional findings are generally accorded deference, both the United States Supreme Court and this Court have held that federal courts retain the power to inquire into the underlying congressional determination to decide whether a federal statute is justified on a rational basis. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978); *Cal. Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999). Judicial scrutiny of congressional findings is particularly appropriate in cases in which the federal statute infringes upon fundamental rights. *Cf. Scully*, 989 F. Supp. at 1299 (finding that courts "employ[] 'greater judicial scrutiny' [of congressional findings] 'when an enactment intrudes upon a constitutional right'") (citation omitted). Accordingly, this Court is not required to take Congress's findings concerning the CSA at face value.

The government's attempt to justify the CSA's infringement upon patient-members' rights under a rational basis standard is equally unavailing. The findings relied on by the government do not apply to the narrow class of activity in this

case. The government improperly conflates drug trafficking with medical cannabis consumption in its explanation of the "rational basis" for the CSA in this case. (Opposition, at 64-65.) The government's citations concerning the "rational basis" for the CSA are inapplicable, insofar as the cases decided this issue in the context of the overly broad category of illicit drug trafficking.[26] None of these cases involved the present situation in which the liberty interest is bodily integrity, the amelioration of pain, and the preservation of life. Even if these rights are not deemed to be fundamental, there still must be a rational basis for refusing to make an exception for these liberty interests. The general findings cited by the government simply do not address these rights.

In further support of its "rational basis" argument, the government claims that the CSA is rational insofar as it affords Appellants a judicially reviewable administrative remedy. (Opposition, at 65-66.) This remedy is not a viable option for the patient-members who suffer on a daily basis because the government has chosen to deny them access to necessary medicine. A petition to reschedule cannabis was first brought in 1972, resulting in an Administrative Law Judge recommending, *over sixteen years later*, that the DEA reschedule cannabis. ER 3478-3501; *see also Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1133 (D.C. Cir. 1994). Despite the Administrative Law Judge's finding that "marijuana has been accepted as capable of relieving the distress of great numbers of very ill people," the DEA Administrator rejected the recommendation. ER

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[26] *See, e.g., United States v. Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978) (affirming rational basis for "marijuana laws" where defendant convicted of importing 580 pounds of marijuana for sale to presumably recreational users); *United States v. Rodgers*, 549 F.2d 107, 108 (9th Cir. 1976) (trafficking in over 4,293 pounds of marijuana); *see also Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668, 674 (1989) (stating that drug "smuggling" and "drug abuse" generally are "great[]" and "serious problems").

3478-3501. The D.C. Circuit upheld the DEA Administrator's decision. *See Alliance for Cannabis Therapeutics*, 15 F.3d at 1137. Although the administrative option exists in theory, rescheduling cannabis is not a viable option in practice. It is certainly no option for Appellants' patient-members, as even the district court has recognized. ER 671 ("[I]t hardly seems reasonable to require an AIDS, glaucoma, or cancer patient to wait twenty years if the patient requires marijuana to alleviate a current medical problem.").

Additionally, the FDA approval process for rescheduling "should scientific or medical evidence warrant such a change" is also futile. (Opposition, at 66.) As Appellants demonstrated in the district court, the government has blocked scientific research regarding medical uses for cannabis. ER 3982-83. Because only the government may have access to cannabis for the purposes of conducting research, and that research has been stymied, rescheduling by the FDA is unlikely at best. The lack of meaningful administrative relief discredits the government's "rational basis" argument.

Appellants also presented uncontroverted evidence in the district court demonstrating the effectiveness of cannabis as a medicine.[27] ER 3267-3738. Because the government failed to address this evidence at any point either in the district court or on appeal, the government has failed to establish a rational basis for a prohibition against state-sanctioned, wholly intrastate medical acquisition of cannabis.

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[27] The government's assertion that Appellants waived any "rational basis" argument is unfounded, because Appellants argued in their opening brief that a fundamental right exists, triggering strict scrutiny, and the "rational basis" test was therefore inappropriate. (Opening Brief, at 43-59 n.35, n.36; Opposition, at 63 n.20.)

V. THE GOVERNMENT FAILS TO ADEQUATELY DEFEND THE DISTRICT COURT'S ERRORS IN GRANTING SUMMARY JUDGMENT.

A. Entry of Summary Judgment Was Improper, Because the CSA Is Unconstitutional as Applied.

For the reasons stated in §§ II-IV supra, the government's fails to effectively controvert Appellants' argument that the CSA is unconstitutional as applied. Therefore, the district court's entry of summary judgment in favor of the government was improper.

B. Appellants Established Defenses that Precluded Entry of Summary Judgment.

1. The Government's Construction of Appellants' Immunity Defense Under 21 U.S.C. § 885(d) Ignores the Plain Language of the Statute.

In its desperation to avoid the broad sweep of immunity granted by section 885(d), the government offers a startling proposition. Immunity from all civil and criminal liability, it suggests, does not include immunity from suits for injunctive relief. This is startling because many other congressional enactments use the same language as section 885(d) to confer or restrict immunity. The beneficiaries of those immunity grants may be quite surprised to learn they are now vulnerable to lawsuits seeking injunctive relief.

At least seven other congressional grants of immunity utilize identical language, protecting various government officials and employees from "civil or criminal liability." Those who respond to interrogatories in proceedings for garnishment of pay, 5 U.S.C. § 5520a(e), in efforts to reach the retirement pay of members of the Armed Forces, 10 U.S.C. § 1408(f)(2), and in enforcement of obligations to pay child support or alimony, 42 U.S.C. § 659(f)(2), are protected from liability for wrongful disclosures of information. Surely Congress did not intend those immunized persons to remain vulnerable to actions to enjoin them

from such disclosures. The same can be said for the immunity conferred upon those reporting child abuse in Indian country, 18 U.S.C. § 1169(d), those reporting child abuse in federal facilities, 42 U.S.C. § 13031(f), and those serving as guardians *ad litem* for child victims, 18 U.S.C. § 3509(h)(3), as well as those donating food to the needy 42 U.S.C. § 1791(c). In each of these settings, it is readily apparent that in granting immunity from "civil and criminal liability," Congress intended a qualified grant of immunity that would be available in all legal proceedings, whether suits for damages or suits for injunctive relief. Significantly, Congress utilizes the same language in expressing its intention that immunity *not* be conferred by other enactments. Congressional regulation of Naval Petroleum Reserves, for example, provides:

> Nothing in this chapter [10 U.S.C.S. §§ 7420 *et seq.*] shall be deemed to confer on any person immunity from civil or criminal liability, or to create defenses to actions, under the antitrust laws.

10 U.S.C. § 7430(h).[28] The government would have this Court believe that Congress deliberately left open the possibility that immunity *was* conferred in suits for injunctive relief, because Congress only referred to "civil or criminal liability" in such enactments. The government's reasoning is untenable.

The government suggests that when Congress grants immunity from all proceedings, including injunctive actions, it refers to immunity *from suit*, pointing to the language of 15 U.S.C. § 37(b), 19 U.S.C. § 3432(f), and 22 U.S.C. § 288a. (Opposition, at 69-70 & n.22.) Each of these provisions, however, is clearly intended to grant *absolute* immunity of the type enjoyed by international diplo-

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[28] Virtually identical language is used in the "anti-immunity" clauses found at 30 U.S.C. § 184; 35 U.S.C. § 211; 38 U.S.C. § 3685; 42 U.S.C. §§ 5909, 8235f, 12007, 13294; 43 U.S.C. §§ 1337, 2005; 45 U.S.C. § 791; *cf.* 31 U.S.C. §§ 3333, 3343.

mats, giving full protection from service of process. Appellants do not contend that 21 U.S.C. § 885(d) confers absolute immunity in the sense that it immunizes them from service of process. Section 885(d) is a grant of conditional immunity that can be asserted as a defense against a claim of civil or criminal liability, by showing the required conditions. But to say, as the government does, that the defense is unavailable when liability is imposed through a claim for injunctive relief finds no support in the language used by Congress, nor in any previous reported decision of the courts. All of the reported decisions relied upon by the government to distinguish between immunity in suits for damages and suits for injunctive relief involve application of *common law* immunity conferred upon prosecutors in suits pursuant to 42 U.S.C. § 1983.[29] Here, on the other hand, we deal with a *statutory* grant of immunity by Congress.

If the statute were to be construed as the government urges, it would *permit* injunctive relief to be granted against federal and state officers who violate the CSA to engage in controlled sales and sting operations, despite their immunity from civil and criminal liability. The government completely ignores this consequence of its interpretation in its brief, although Appellants presented this argument. (Opening Brief, at 64.)

The government suggests that an injunction does not impose "civil or criminal liability" because it "requires only compliance with federal law," and can be enforced through the inherent judicial power to compel compliance through

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[29] *See Roe v. City & County of San Francisco*, 109 F.3d 578, 584 (9th Cir. 1997) (applying absolute immunity under § 1983, which "rests on the existence of common law immunities"); *Fry v. Melaragno*, 939 F.2d 832, 835 n.6 (9th Cir. 1991) (identifying factor for conferring absolute immunity upon prosecutor under § 1983 as "whether there is 'a historical or common law basis for the immunity in question'") (citation omitted).

civil contempt. (Opposition, at 70 n.23.) Yet it is precisely this exposure to contempt enforcement that imposes "liability" upon Appellants. Civil contempt can be punished by substantial fines, and even confinement in jail. Violations of an injunction can also give rise to criminal contempt. The United States Supreme Court has repeatedly held "that criminal contempt, at least in its nonsummary form, 'is a crime in every fundamental respect.'" *United States v. Dixon*, 509 U.S. 688, 699-700 (1993) (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)); *New Orleans v. S.S. Co.*, 87 U.S. (20 Wall.) 387, 392 (1874). How can any court hold that being convicted of "a crime in every fundamental respect" is not the imposition of criminal "liability"?

Finally, the government conjures up a parade of horribles, such as cities legalizing heroin or LSD and "deputizing" illicit drug dealers, or distributing marijuana for recreational use. Such collective madness would have to infect an entire state, however, for section 885 immunity to apply. A city official would not be "lawfully engaged in the enforcement of any . . . municipal ordinance relating to controlled substances" if the ordinance violated state law. The immunity claimed by Appellants here requires the existence of both a state law validly promoting the health and safety of its citizens *and* a municipal ordinance designed to implement that state law.

The government simply fails to comprehend the significance of a statutory grant of immunity. Far from giving municipalities the power to "nullify" the federal law, it is simply a congressional recognition that the federal law is not intended to limit the lawful activities of States and municipalities relating to controlled substances. Thus, the alleged "conflict" between state and federal law is illusory. The fact that the state activity would otherwise "violate" the federal law is assumed and accepted: that is the very purpose for the grant of immunity. It is the government that seeks to "nullify" federal law by rendering the grant of

immunity contained in section 885 completely meaningless, limiting it to those whose activity would not violate federal law in the first place.

2. The Government Misconstrues Appellants' Reliance upon the "Joint User" Defense of *Swiderski.*

The government insists that "Defendants next contend . . . that summary judgment was improper because they established a 'joint user' defense under [*Swiderski*]." (Opposition, at 74-75.) Appellants do not contend that an alleged sale of cannabis to an undercover agent falls within the defense available under *United States v. Swiderski,* 548 F.2d 445 (2d Cir. 1977). The *Swiderski* defense is a *partial* defense to a charge of distribution. It recognizes that the punishment for mere possession is all that the law demands when two users purchase drugs from another for their joint use, and then share the drugs between themselves. They are still guilty of possession, but the sharing they previously agreed to does not escalate their offense to distribution.

The application of this defense to the injunction in this case is not only logical, it actually furthers the underlying purpose of the CSA. The government never sought to enjoin mere possession and/or use of medicinal cannabis by Appellants in these proceedings. Appellants have only been enjoined from *distributing* or from possessing *for the purpose of distribution*. Thus, whether the joint sharing of medicinal marijuana by Appellants' members would be *distribution* or mere *possession* is critical. Under *Swiderski*, it would be possession. Regardless of whether mere possession under these circumstances is still a violation of federal law, the fact remains that it is *not* a violation encompassed by the injunction issued.

Swiderski's rationale is logical because it advances the underlying purpose of the CSA, which draws a significant line between mere possession by users and distribution by dealers. Distribution is a serious felony, while mere possession is a

misdemeanor. To allow possession to be elevated to distribution merely because users share possession would obliterate that distinction. The number of users who are sharing should make no difference in applying this principle.

Here, in the context of the injunction sought by the government, the distinction is even more critical, because distribution violates the injunction but mere possession is not included at all, and is left to be dealt with within the ordinary operations of the law. Hence, recognition of the *Swiderski* joint user defense would treat the possession and use of cannabis by the actual patients who are sharing it as mere possession, beyond the reach of the injunction.

3. The Government Fails to Refute Appellants' Evidentiary Objections.

The government offers very little substantive defense of the legally deficient evidence upon which summary judgment was granted, and instead argues that Appellants did not present their objections to this Court in the proper form. (Opposition, at 78.) Appellants summarized their objections in the opening brief rather than repeating the twenty pages of line-by-line objections made in the district court. ER 3241-3260. Appellants' presentation of their arguments concerning the evidentiary issues was entirely proper, and there is no reason for this Court to ignore them.

To the limited extent that the government does respond to Appellants' evidentiary objections, the government's arguments lack merit. First, the government argues, citing the district court, that a valid physician's recommendation is irrelevant to an entrapment defense. (Opposition, at 77.) The government does not dispute that its agents stole an actual California physician's license number, forged recommendations using this number, and set up a fake phone number for the "phony" physician's office in order to gain access to the OCBC and to enable the agents to impersonate patient-members. ER 32-54, 58-59, 177, 2983, 4174-99. By

defining the "crime" as a violation of the CSA's blanket prohibition on marijuana, the government fails to address the critical question of first impression before this Court: whether the government's attempt to prohibit conduct authorized by California law represents an overreaching exercise of federal power. If this Court answers the question in the affirmative, then the government's attempts to lure Appellants into violating California law, and by implication appropriately defined federal law, constitutes entrapment.

Second, the government argues that the district court correctly ruled that the agents' declarations were generally based on personal knowledge. (Opposition, at 78.) As Appellants argued in the district court, the agents offered speculative testimony not based on personal knowledge regarding the alleged presence of cannabis (ER 34, 36, 38, 43, 53, 3246, 3251, 3254, 3256, 3258), whether persons present were actually purchasing cannabis (ER 34, 48, 53, 3249, 3251, 3254), and whether certain persons were actually employed or were agents authorized to act on behalf of OCBC (ER 42-43, 59, 3245-46, 3253). The agents offered no testimony that anything was seized from OCBC to confirm that cannabis was actually present, or that persons involved in the alleged transactions were OCBC's agents. The district court should have evaluated personal knowledge on a line-by-line basis, rather than summarily concluding that the declarations were generally based on personal knowledge. ER 4409.

Appellants also advanced three other categories of evidentiary objections that the district court did not directly address. ER 4409 ("Defendants' other objections are equally without merit."). First, the government relied upon several unauthenticated documents in violation of Federal Rule of Evidence 901. ER 60-80, 3242, 3244-45. Second, the declarations contained improper opinion testimony in violation of Federal Rules of Evidence 701 and 702. ER 33-39, 41, 43, 46-48, 51, 53-54, 3245-60. Third, statements purportedly made by "unidentified males"

or "unidentified females" at the Appellant cooperatives are inadmissible hearsay; the government never established the requisite agency relationship with Appellants. ER 33, 36, 46-48, 53, 60-80, 3242, 3244-45, 3248-50, 3251-53, 3256-57; FED. R. EVID. 801, 802. Because the district court granted summary judgment based entirely on these legally deficient declarations, summary judgment was improper.

4. Appellants Were Entitled to Further Discovery Under Rule 56(f).

This Court has held that it is an abuse of discretion to deny a Rule 56(f) motion where the record shows that: (1) "the movant diligently pursued its previous discovery opportunities"; and (2) the movant demonstrated "how allowing additional discovery would have precluded summary judgment." *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994). The government has never disputed the first of the two requirements. (Opposition, at 79-80.) The government's arguments as to why Appellants failed to meet the second factor do not withstand scrutiny.

The government first asserts that Appellants failed to meet the requirement that the requesting party identify "specific facts" that would preclude summary judgment. (Opposition, at 79.) The government is wrong. Appellants filed the requisite declaration setting forth the *precise facts* that Appellants anticipated deposition of the Special Agents would reveal. ER 3262. The government omits any discussion of these facts. (Opposition, at 79.)

As an alternative argument, the government claims that all of Appellants' legal defenses are foreclosed as a matter of law, making any further factual discovery irrelevant to a ruling on summary judgment. (Opposition, at 79-81.) As demonstrated in §§ II-IV *supra*, because the CSA is an unconstitutional exercise of congressional power, Appellants' request for further discovery as to the effect of

"intrastate cultivation, distribution, and consumption . . . [on] interstate commerce" is justified. ER 3263. For the reasons set forth in § VI.E *infra*, the government's unclean hands are also an appropriate defense. For the reasons set forth in § V.B.3 *supra*, Appellants' entrapment defense is viable.

The government misconstrues Appellants' mistake of law defense. A defendant can claim a mistake of law defense where he or she in good faith relied upon a statute or judicial decision. *See Cheek v. United States*, 498 U.S. 192, 206-07 (1991) (holding that a mistake of law defense encompasses a reasonable or a subjective good-faith reliance upon the law); *People v. Marrero*, 507 N.E.2d 1068, 1071 (N.Y. 1987) ("[M]istake of law is a viable exemption in those instances where an individual demonstrates an effort to learn what the law is, relies on the validity of that law and, later, it is determined that there is a *mistake in the law itself*."). Appellants reasonably relied upon a California statute, justifying a mistake of law defense. The cases cited by the government do not address the novel situation in which a state law and a federal law conflict and the defendant relies upon the state statute. *See Cheek*, 498 U.S. at 199 (allowing mistake of law defense for subjective misunderstanding of federal tax laws); *United States v. de Cruz*, 82 F.3d 856 (9th Cir. 1996) (ignorance of federal statute not in conflict with state law).

Finally, the government relies upon erroneous circular reasoning, creating an unjustifiable Catch-22. Citing the district court, the government asserts that Appellants' failure to offer a "scintilla" of evidence controverting the agents' declarations precludes any right to depose the agents. (Opposition, at 80.) The district court denied Appellants the opportunity to depose the agents, whose declarations were the sole evidence upon which summary judgment was premised. ER 4404-10. The government and the district court justified this denial on the grounds that Appellants "are in the possession" of any evidence available to controvert the

agents' declarations. (Opposition, at 80 (citing ER 4410).) However, the agents' declarations do not identify the members of the cooperatives who allegedly distributed cannabis. ER 32-59; SER 9-32, 54-74. The cooperatives have no way of identifying the "unidentified female" or "unidentified male" allegedly involved in the various sting operations. ER 1667. Deposing the agents would have provided Appellants with the opportunity to identify the persons allegedly involved and to supply declarations contesting the agents' version of the facts. Without the opportunity to depose the agents, Appellants are unable to present any evidence controverting the declarations. "Rule 56(f) motions should be liberally granted, especially where, as here, all of the allegedly material facts are within the exclusive knowledge of the opposing party." *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 94 (S.D.N.Y. 1964) (internal citations omitted), *aff'd sub nom. Waldron v. Cities Servs. Co.*, 361 F.2d 671 (2nd Cir. 1966).

VI. THE PERMANENT INJUNCTION IS NOT WARRANTED UNDER EXISTING LAW.

A. Entry of the Permanent Injunction Was Improper, Because the CSA Is Unconstitutional as Applied.

For the reasons stated in §§ II-IV *supra*, the government fails to effectively controvert Appellants' argument that the CSA is unconstitutional as applied. Therefore, the district court's entry of the permanent injunction was improper.

B. The District Court Failed to Weigh the Advantages and Disadvantages of Issuing the Injunction.

1. The District Court Failed to Consider the Disadvantages of Civil Enforcement of a Criminal Statute, Including Deprivation of Numerous Procedural Safeguards.

The government's contention that "the district court carefully weighed that government's choice of proceeding by way of civil injunctive actions as opposed to criminal prosecutions, and concluded, in its discretion, that the entry of permanent injunctive relief was an appropriate remedy in the circumstances of these

cases" is meritless. (Opposition, at 83.) While the district court did consider the *advantages* of injunctive relief, it never considered the *disadvantages* of injunctive relief, as the United States Supreme Court's decision required it to do. *See OCBC*, 532 U.S. at 498. The government, like the district court, fails to address *any* of the significant disadvantages of suffering enforcement of a criminal statute via an injunction. Instead, citing the federal sentencing guidelines, it ominously intimates that Appellants were fortunate to have escaped federal criminal prosecution.[30] (Opposition, at 84-85 & n.29.) The government does not and cannot defend the district court's reversible error in failing to weigh the deprivations of critical procedural protections, including Appellants' right to confront their accusers, the right to a trial by jury, and the advantage of a higher burden of proof in criminal cases.

2. The Government Improperly Defines the "Public Interest" as a Federal Interest, Exclusive of the Competing Interests of the Citizens of California.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Conceding that the public interest must be weighed by a district court in issuing an injunction, the government then defines the "public interest " as exclusively federal. (Opposition, at 93-94.) As Appellants noted in their opening brief, "the district court should have considered whether *Californians* are best served by permanently enjoining conduct expressly sanctioned by California law." (Opening Brief, at 73

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[30] In support of its "lucky" theory, the government cites an excerpt from oral argument on April 19, 2002, in which counsel for the Marin Alliance for Medical Marijuana expressed his client's gratitude for the government's decision to pursue injunctive relief in lieu of criminal prosecution. (Opposition, at 85.) Marin's position was not adopted by the Oakland Cannabis Buyers' Cooperative or by the Ukiah Cannabis Buyer's Club. ER 4361-4403.

(emphasis added).) When considering the public interest, a district court must take into account both *the public interest that would be harmed by the entry of the injunction* and the public interest that would be furthered by the entry of the injunction. *See Yakus v. United States*, 321 U.S. 414, 440 (1944). The government's assertion of speculative harm to the federal drug approval process is not a surrogate for the district court's affirmative duty to consider the injunction's harm to the interest of Californians permanently enjoined from enforcing their own law. Because the government failed to show that the district court considered the public interest in California, the district court abused its discretion by issuing the permanent injunction.

3. A Decision Not to Enforce a Criminal Statute by Injunction Would Not Violate the "Take Care" Clause of the Constitution.

The government intimates that the district court was obliged[31] to issue an injunction for fear of "the very serious separation of powers concerns that might arise if the court were to have denied to the Executive Branch the authority to enforce the CSA by means of civil injunction action." (Opposition, at 86.) Unquestionably, the Executive Branch has the "exclusive authority and absolute discretion to decide whether to prosecute." *United States v. Nixon*, 418 U.S. 683, 693-94 (1974), *superseded by statute on other grounds as stated in Bourjaily v. United States*, 483 U.S. 171 (1987). This principle does not apply to the government's strategic decision to seek injunctive relief against Appellants. Precluding the government's preferred legal strategy does not fall within the ambit of the "take

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[31] "The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Romero-Barcelo*, 456 U.S. at 313.

care" clause. Cases construing the clause only prohibit a court from directing the government's prosecution of a criminal case or dictating the government's choice of statutes under which to prosecute a defendant. *See, e.g., United States v. Edmonson*, 792 F.2d 1492, 1497 (9th Cir. 1986); *see also United States v. Batchelder*, 442 U.S. 114, 123-25 (1979) (affirming that the government controls choice of statute under which it wishes to charge in criminal prosecution). Neither scenario existed here. An injunction was merely the government's preferred legal strategy and did not affect its power to prosecute. To hold otherwise would be to eliminate the judicial discretion expressly recognized by the United States Supreme Court in this case. *See OCBC*, 532 U.S. at 497-98 (when faced with an injunction to enforce a statute, court's choice "is . . . whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all"); *cf. Oregon v. Ashcroft*, 192 F. Supp. 2d at 1080, 1093 (ordering Attorney General to refrain from criminally prosecuting physicians and others who act in compliance with the Oregon Death With Dignity Act). By choosing to proceed by civil injunction, the government willingly invoked the traditional equitable jurisdiction of the district court, including its equitable discretion not to issue an injunction.

4. The Palpable Risk of Jury Nullification Explains the Government's Choice of Civil Enforcement over Criminal Enforcement.

Although Appellants made no arguments in the district court (ER 4381) or in their opening brief concerning jury nullification, the government states that "a court likewise has no discretion to refrain from enjoining ongoing violations of the CSA because a jury in a criminal action might find the violations sympathetic and therefore nullify the Act." (Opposition, at 87.) The government's mention of this issue is instructive. Clearly, fear of jury nullification of the CSA improperly motivated the government's election of remedies in this case. Indeed, in oral argument

before the Supreme Court in this case, the Court was adamant that a fear of jury nullification is a wholly unacceptable reason for the government to have proceeded by way of injunctive action if so doing was to prevent Appellants from presenting their case to a jury: "That would make a big difference to a jury who doesn't want to convict this person. I mean, at the end of the road there's a jury, which is going to let you off if it wants to let you off . . . so that *if the U.S. attorney here were only trying to avoid a jury, he ought to be replaced.*" *OCBC*, No. 00-151, 2001 U.S. TRANS LEXIS 23, at *20 (Mar. 28, 2001) (emphasis added). As the United States Supreme Court noted, "Congress's resolution of the policy issues [in the CSA] can be (and usually is) upheld without an injunction." *OCBC*, 532 U.S. at 497.

5. Injunctive Relief Deprived Appellants of an Immunity Defense.

For the reasons stated in § V.B.1 *supra*, the government fails to effectively controvert Appellants' argument that the district court failed to consider that permitting the government to pursue injunctive relief deprived Appellants of the immunity to which they are otherwise entitled under 21 U.S.C. § 885(d).

C. The "Opportunity" to File Further Submissions Concerning Prospective Activity Deemed Criminal by the Government Presented Appellants with an Impermissible Hobson's Choice.

The government argues that the district court afforded Appellants an "opportunity" to file further submissions, which is an acceptable method of satisfying its own burden of proof in a suit to enjoin a crime. (Opposition, at 88-91.) The government cites a string of distinguishable cases in support of its argument.[32]

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[32] The cases all involve activity constituting non-compliance with federal regulatory law. *See United States v. Laerdal Mfg. Corp.*, 73 F.3d 852 (9th Cir. 1995) (Medical Device Recording regulations); *Fed. Election Comm'r v. Furgatch*, 869 F.2d 1256 (9th Cir. 1989) (Federal Election Campaign Act); *Brock v. Big Bear Mkt. No. 3*, 825 F.2d 1381 (9th Cir. 1987) (Fair Labor Standards Act). The non-

(Footnote continues on following page.)

Injunctions of civil infractions do not have the same implications as injunctions of a criminal act, rendering assurances against future violations an inappropriate criterion upon which to predicate an injunction of a criminal act. Applying the government's logic, any injunction of a criminal act involving criminal penalties would allow the judge to ask for future assurances of non-violation, with permissible inferences being drawn from a defendant's silence on Fifth Amendment grounds (because the proceeding is a civil case). This impermissibly implicates the sacred constitutional right against self-incrimination and demonstrates the fundamental unfairness of enforcing a criminal law via injunction. The Hobson's choice with which the district court's "opportunity" presented Appellants is impermissible.

Moreover, the procedure adopted by the district court impermissibly required Appellants to reveal the contents of a court-ordered privileged communication in order to avoid adverse consequences. The district court made it clear that if Appellants wished to avoid an injunction, Appellants' attorneys would be required to ask whether Appellants intended to distribute cannabis in the future, and this privileged conversation would then be disclosed to the court. Appellants thus were forced to choose between their Fifth Amendment rights, their attorney-client privilege, and the injunction. The district court abused its discretion insofar as it based the permanent injunction on Appellants' refusal to file a submission. ER 4435.

(Footnote continued from previous page)

controlling cases from other jurisdictions are equally inapposite. *See N.Y. NOW v. Terry*, 159 F.3d 86 (2d Cir. 1998) (violations of civil rights laws); *Weigand v. Vill. of Tinley Park*, 129 F. Supp. 2d 1170 (N.D. Ill. 2001) (enjoining municipality from re-enacting repealed ordinance).

D. The Government Failed to Demonstrate Likelihood of Success on the Merits, Precluding a Finding of Irreparable Harm.

Because Appellants did not concede a violation of the CSA, *and* because the government did not show a probability of success on the merits, the presumption of irreparable injury does not apply. *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992); *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 459 (9th Cir. 1994); *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir. 1987). Accordingly, the district court was required to balance the hardships between the parties. As set forth in Appellants' opening brief, the pain, suffering, and agonizing deaths faced by patient-members far outweigh any interest the government may have in prohibiting conduct the State of California expressly has determined to be in the best interest of its citizens.

E. The Government Fails to Refute Appellants' Evidence that the Government Acted with Unclean Hands.

The government contends that "there is nothing inherently suspect about Congress's medical and policy judgments regarding marijuana." (Opposition, at 66.) This statement is demonstrably false. Appellants provided the district court with ample, uncontroverted evidence of the government's unclean hands during the enactment and implementation of the CSA. ER 937-39, 3171-3218, 3261-3745, 3762-3879, 3981-84, 4285-4316. The government did not deny that it prevented medical studies designed to evaluate cannabis as a cure for various illnesses from taking place. ER 3171-3218, 4123-4270. Nor did it deny that recently released Oval Office tapes reveal that the placement of marijuana in Schedule I was not based upon scientific findings but rather on the irrational biases of then-President Nixon. ER 4285-4318.

The government fails to address the voluminous, non-government-sponsored studies of the medical efficacy of cannabis.[33] ER 937-39, 3261-3745, 3762-3879. Tellingly, the government has never refuted the fact that every objective, independent study for over a century has recommended permitting patients access to medical cannabis. ER 4047-4055. Instead, the government suggests that Congress (not medical science) is the sole judge of whether cannabis has any medical efficacy. The government also suggests a remedy that is effectively unavailable to the patient-members who need relief now: a petition to reschedule cannabis. For the reasons stated in § IV.E *supra*, this is not a meaningful administrative remedy.

VII. THE DISTRICT COURT IMPROPERLY DENIED APPELLANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION.

For the reasons stated in §§ II-IV *supra*, the government fails to effectively controvert Appellants' argument that the district court incorrectly concluded that the CSA is a constitutional exercise of Congress's power under the Commerce Clause to regulate the conduct at issue here — the wholly intrastate distribution of medical cannabis to seriously ill Californians pursuant to state law.

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[33] The government also accuses Appellants of making the "somewhat contradictor[y]" statements that the government has placed obstacles in the path of medical research yet Appellants provided the district court with voluminous studies concerning the efficacy of medical cannabis. (Opposition, at 96.) There is no contradiction. The studies presented by Appellants to the district court either were sponsored by entities other than the United States government or predate the enactment of the CSA. ER 937-39, 3261-3745, 3762-3879. After the enactment of the CSA, placing cannabis in Schedule I, the government blocked further studies.

VIII. THE DISTRICT COURT IMPROPERLY DENIED APPELLANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. Appellants Established Their Entitlement to Statutory Immunity.

For the reasons stated in § V.B.1 *supra*, which are incorporated herein by reference, the government fails to effectively controvert Appellants' argument that the district court erred in rejecting Appellants' claim of statutory immunity.

B. The CSA Is Unconstitutional as Applied Under the Fifth and Ninth Amendments.

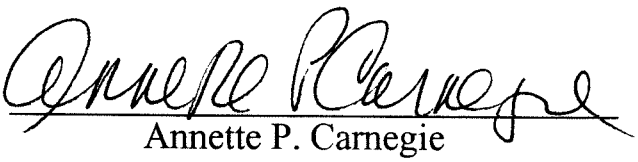
For the reasons stated in § IV *supra*, which are incorporated herein by reference, the government fails to effectively controvert Appellants' argument that the district court erred in holding that the CSA is not unconstitutional as applied under the Fifth and Ninth Amendments.

IX. CONCLUSION.

For all of the foregoing reasons, Appellants respectfully request that the district court's orders be reversed.

Dated: March 6, 2003

MORRISON & FOERSTER LLP

By: 
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Appellants hereby certify that their Reply 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, the Statement of Related Cases, the Corporate Disclosure Statement, and the Proof of Service, contains 18,430 words based on a count by the word processing system at Morrison & Foerster LLP.

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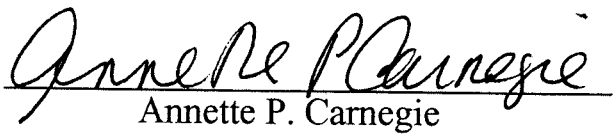
By: 
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DECLARATION OF ANNETTE P. CARNEGIE IN SUPPORT OF APPELLANTS' MOTION FOR LEAVE TO FILE A REPLY BRIEF EXCEEDING THE TYPE-VOLUME LIMITATION OF FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(B)

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