Form 6. Civil Appeals Docketing Statement

USCA DOCKET # (IF KNOWN)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL:

United States v. Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman and Mildred Lehrman

DISTRICT: N.D. Cal. JUDGE: Hon. Charles Breyer

DISTRICT COURT NUMBER: C 98-00087 CRB

DATE NOTICE OF APPEAL FILED: August 4, 2005

IS THIS A CROSS-APPEAL? ☐ YES

IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):
Please see attachment.

BRIEF DESCRIPTION OF ACTION AND RESULT BELOW:
Please see attachment.

PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:
Please see attachment.

PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POST-JUDGMENT MOTIONS):
Please see attachment.

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

☐ Possibility of settlement

☐ Likelihood that intervening precedent will control outcome of appeal

☐ Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (specify)

☐ Any other information relevant to the inclusion of this case in the Mediation Program

☐ Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges.

Attachment to Ninth Circuit Civil Appeals Docketing Statement

United States v. Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman and Mildred Lerhrman
Northern District of California, Case No. C-98-00087-CRB

I. If This Matter Has Been Before This Court Previously, Please Provide The Docket Number And Citation (If Any):

This matter has been before the Court three times before. First, in 1998, Nos. 98-16950, 98-17044, and 98-17137 were on appeal before this Court. The opinion resulting from the appeal is: *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999). Second, in 2000, the interveners in this case filed an appeal in No. 00-16411. The unpublished opinion resulting from that appeal is: *United States v. Oakland Cannabis Buyers' Coop.*, 221 F.3d 1349 (9th Cir. 2000). Third, in 2002, Nos. 02-16335, 02-16534, and 02-16715 were on appeal before this Court. No opinion resulted from this appeal; the case was remanded to the district court for reconsideration as set forth in Section II *infra*.

II. Brief Description of Nature of Action and Result Below:

In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996 (Proposition 215), to permit seriously ill patients and their primary caregivers to possess and cultivate cannabis with the approval or recommendation of a physician. To implement the will of California voters, Appellants organized a Cooperative to provide seriously ill patients with a safe and reliable source of medical cannabis. The Cooperative, a not-for-profit organization, operates in downtown Oakland, in cooperation with the City of Oakland and its police department. On July 28, 1998, the City of Oakland adopted, by ordinance, a Medical Cannabis Distribution Program, and on August 11, 1998, officially designated the Cooperative to administer the City's program.

On January 9, 1998, the United States sued in the United States District Court for the Northern District of California, seeking to enjoin Appellants from distributing cannabis to patient-members. On May 19, 1998, the district court issued a preliminary injunction enjoining Appellants from "engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1)."

On October 13, 1998, the district court held Appellants in contempt of the preliminary injunction. The district court then modified the injunction to permit the U.S. Marshal to seize Appellants' offices. Appellants informed the district court that they would comply with the injunction. Appellants also requested that the injunction be modified to permit distribution of cannabis to the limited number of patients who could demonstrate necessity under the standard set forth in *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) and submitted numerous declarations in support of this request. The district court denied that motion.

On September 13, 1999, this Court reversed the district court's denial of the motion to modify and remanded the case to the district court, holding that (1) the court could take into account a legally cognizable defense of necessity in considering the proposed modification (*United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1114 (9th Cir. 1999)), (2) in exercising its equitable discretion, the court must expressly consider the public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of persons with serious or fatal illnesses, and (3) the record before the district court justified the proposed modification. *Id.* at 1114-15.

On remand to the district court on May 30, 2000, Appellants renewed their motion to modify the preliminary injunction, submitting more declarations to establish that patient-members could meet all of the *Aguilar* requirements for a claim of necessity.

On July 25, 2000, the government noticed an appeal from the district court's order modifying the injunction. On November 27, 2000, the Supreme Court granted the government's petition for writ of *certiorari* to review this Court's September 13, 1999 opinion. This Court suspended proceedings to await the Supreme Court's ruling. On May 14, 2001, the United States Supreme Court reversed this Court's decision and remanded the case for further proceedings. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

On December 4, 2001, this Court remanded the case to the district court for "proceedings consistent with [the Supreme Court's] opinion." On January 7, 2002, Appellants moved after remand to dissolve or modify the

preliminary injunction order. On January 25, 2002, the government moved for summary judgment and permanent injunctive relief.

On May 3, 2002, the district court granted the government's motion for summary judgment and requested that Appellants file further submissions with the Court "concerning the likelihood of future violations of the Act, and in particular, whether there is a threat that defendants, or any of them, will resume their distribution activity if the Court does not enter a permanent injunction." On May 22, 2002, Appellants filed a submission objecting to the procedure on the grounds of invasion of the attorney-client privilege and the violation of Jeffery Jones's Fifth Amendment privilege against self-incrimination. On June 10, 2002, Judge Breyer permanently enjoined Appellants from possessing with intent to distribute, manufacturing or distributing cannabis and judgment was entered thereon. On July 29, 2002, the district court granted Appellants' Motion for Partial Judgment Pursuant to Federal Rule of Civil Procedure 54(b).

On August 1, 2002, Appellants appealed this final judgment under 28 U.S.C. § 1291, as well as all other interlocutory orders. The appeal raised the issues identified in Section III *infra* in addition to the issue of whether the injunction exceeded the powers of Congress under the Commerce Clause or Necessary and Proper Clause because the government failed to establish that Appellants' economic activities have a substantial effect on interstate commerce, and because the injunction improperly applied to entirely non-economic activities. After full briefing on the merits and oral argument, a three-judge panel of this Court took the case under submission.

During the pendency of this appeal, a related case entitled *Raich v. Ashcroft*, No. 03-15481, was fully briefed, argued, and taken under submission by a separate three-judge panel of this Court. On December 16, 2003, the panel issued an opinion in which it reversed the district court's denial of a preliminary injunction against the government precluding enforcement of the Controlled Substances Act ("CSA") "to prevent [individual patients] Raich and Monson from possessing, obtaining, or manufacturing cannabis for their personal medical use." *Raich v. Ashcroft*, 352 F.3d 1222, 1226 (9th Cir. 2003). The Court reasoned that the district court's denial of preliminary injunctive relief was reversible error, because the "CSA is an unconstitutional exercise of Congress'[s] Commerce Clause authority." *Id.* at 1227. The federal government petitioned the United States Supreme Court for a writ of *certiorari*.

Pursuant to an order of this Court dated March 24, 2004, submission of the case was vacated to permit the parties to submit supplemental briefing regarding the applicability of this Court's opinion in *Raich*. The case was resubmitted as of April 30, 2004. After the resubmission of the case and before the panel issued an opinion, on June 28, 2004, the United States Supreme Court granted the government's petition for a writ of *certiorari* in *Raich*. *Ashcroft v. Raich*, 124 S. Ct. 2909 (2004). As a result, this Court issued an order remanding the case to the district court, stating: "The issues in *Raich* may control the outcome in this case. Accordingly, this case is remanded for the district court to reconsider after the Supreme Court has completed its action in *Raich*." *United States v. Marin Alliance for Med. Marijuana*, 372 F.3d 1047, 1048 (9th Cir. 2004).

On June 6, 2005, the United States Supreme Court reversed this Court's decision in *Raich* and remanded for further proceedings consistent with the opinion. *Gonzales v. Raich*, __ U.S. __, 125 S. Ct. 2195, 2215 (2005). On June 6, 2005, the same day on which the Supreme Court issued its opinion in *Raich*, the district court issued an order declining to reconsider its prior rulings in light of the Supreme Court's opinion. Appellants now appeal this final judgment under 28 U.S.C. § 1291, as well as all other interlocutory orders.

III. Issues Proposed to be Raised on Appeal:

1. Whether the district court erred when, under the purported authority of the federal Controlled Substances Act, it enjoined Appellants' wholly intrastate distribution of medical cannabis, when that distribution was undertaken pursuant to state and local laws designed to protect the public health and welfare of California citizens, and

a. where the injunction improperly infringed upon the police powers of the State of California to protect the health and safety of its citizens; and

b. where the injunction improperly infringed upon fundamental rights, by depriving seriously ill patients of an effective means to ameliorate their debilitating pain, blindness, starvation and possible death, and the government failed to offer any legitimate justification for depriving these patients of this necessary medicine.

2. Whether the district court erred when it rejected the claim of Appellants, duly authorized officers of the City of Oakland, to statutory immunity when Appellants were lawfully engaged in enforcing laws related to controlled substances, as required by the statute granting such immunity.

3. Whether the district court erred when it granted the government's motions for summary judgment and permanent injunction when the government failed to meet its burden of proof and Appellants established legally valid defenses to both motions.

4. Whether the district court abused its discretion when it granted the government's motion for summary judgment and refused to permit Appellants to obtain discovery to be used in opposition to that motion.

IV. Other Legal Proceedings With a Bearing on This Case:

There are currently four related cases pending in this Court that may have a bearing on the outcome of this case. By order of this Court dated December 20, 2002, two of these cases, both related cases in the district court, were previously consolidated with this case: (1) *United States v. Marin Alliance for Medical Marijuana* et al., No. 02-16335; and (2) *United States v. Ukiah Cannabis Buyers Club* et al., No. 02-16715. A third pending case, *County of Santa Cruz v. Gonzales*, No. 04-16291, arises out of the same set of general facts as *Wo/Men's Alliance for Medical Marijuana v. United States*, No. 03-15062, which is currently on remand in the district court and was previously consolidated with this case for the limited purpose of oral argument by an order of this Court dated July 29, 2003. The fourth related case has not been consolidated with this case, *Raich v. Gonzales*, Nos. 03-15481 and 04-16296.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATORS CLUB; and DENNIS PERON,

Defendants.

AND RELATED ACTIONS

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

MEMORANDUM AND ORDER

INTRODUCTION

The issue presented by these related lawsuits is whether defendants' admitted distribution of marijuana for use by seriously ill persons upon a physician's recommendation violates federal law, 21 U.S.C. § 841(a), and if so, whether defendants' conduct in this regard should be enjoined pursuant to the injunctive relief provisions of the federal Controlled Substances Act. See 21 U.S.C. § 882(a). This is the only issue before the Court. These lawsuits, for example, do not challenge the constitutionality of Proposition 215, the medical marijuana initiative, as a whole. Nor do they reflect a decision on the part of the federal government to seek to enjoin a local governmental agency from carrying out the humanitarian mandate envisioned by the citizens of this State when they voted to approve this law.

COPIES MAILED TO PARTIES OF RECORD

These cases also do not present the question of whether all conduct exempt from prosecution under the state drug laws by Proposition 215 violates federal law. For example, the Court is not deciding whether a seriously ill person who possesses marijuana for personal use upon a physician's recommendation is in violation of federal law. Rather, the sole issue here is whether defendants' conduct, which may be lawful under state law, may nevertheless violate federal law and can thus be enjoined.

Finding that there is a strong likelihood that defendants' conduct violates the Controlled Substances Act, the Court concludes that the Supremacy Clause of the United States Constitution requires that the Court enjoin further violations of the Act.

BACKGROUND

A. Proposition 215 and the Federal Drug Laws.

In November 1996, 56% of those participating in the state-wide election voted in favor of Proposition 215, the "Medical Use of Marijuana" initiative, known also as the "Compassionate Use Act" (the "Act"). The Act makes it legal under California law for seriously ill patients and their primary caregivers to possess and cultivate marijuana for use by the seriously ill patient if the patient's physician recommends such treatment. In particular, it exempts a seriously ill patient, or the patient's primary caregiver, from prosecution under California Health and Safety Code § 11357, relating to the possession of marijuana, and § 11358, relating to the cultivation of marijuana. See California Health & Safety Code § 11362.5(d).

As a result of the passage of Proposition 215, several individuals, including defendants, organized "medical cannabis dispensaries" to meet the needs of seriously ill patients. These nonprofit dispensaries provide marijuana to seriously ill patients upon a physician's recommendation. According to defendants, these patients previously had to purchase marijuana, if they were able to purchase it at all, on the black market at exorbitant prices and of questionable quality.

At the time that California's voters approved the initiative, federal law -- the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the "Controlled Substances

Act") -- did, and still does, strictly prohibit the manufacture and distribution of marijuana, and the possession of marijuana with the intent to manufacture or distribute. See 21 U.S.C. § 841(a)(1). In particular, the Controlled Substances Act established a comprehensive regulatory scheme which placed controlled substances in one of five "Schedules" depending on each substance's potential for abuse, the extent to which each may lead to psychological or physical dependence, and whether each has a currently accepted medical use in the United States. See 21 U.S.C. § 812(b). Congress determined that "Schedule I" substances have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a lack of accepted "safety for use of the drug or substance under medical supervision." 21 U.S.C. § 812(b)(1). Schedule I substances are strictly regulated; no physician may dispense any Schedule I controlled substance to any patient outside of a strictly controlled research project registered with the DEA, and approved by the Secretary of Health and Human Services, acting through the Food and Drug Administration ("FDA"). See 21 U.S.C. § 823(f). Congress placed marijuana in Schedule I at the time it passed the Controlled Substances Act and its designation has not changed since then. See 21 U.S.C. § 812(c)(c)(10).

B. The California Courts and Proposition 215.

In People v. Trippet, 56 Cal. App. 4th 1532 (1997), the California Court of Appeal, First District, interpreted Proposition 215 for the first time in a published decision. It held that although Proposition 215 does not exempt a seriously ill patient and her primary caregiver from Health and Safety Code § 11360, which prohibits the transportation of marijuana, a defendant in a criminal case might have a Proposition 215 defense to a charge of illegally transporting marijuana if "the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." Trippet, 56 Cal. App. 4th at 1550-51. The court reasoned that Proposition 215 would make no sense if a patient's primary caregiver would be guilty of a crime for "carrying otherwise legally cultivated and possessed marijuana down a hallway to the patient's room." Id. at 1550.

Three months later, a different division of the same court decided People ex rel. Lungren v. Peron, 59 Cal. App. 4th 1383 (1997). A unanimous court held that the defendants in that action, Dennis Peron and the San Francisco Cannabis Cultivators Club, both defendants here, are not primary caregivers within the meaning of the statute. A majority of that court disagreed with Trippet by also holding that while Proposition 215 exempts seriously ill patients and their caregivers from California law prohibiting the possession and cultivation of marijuana (Health & Safety Code § 11357, § 11358), it does not, under any circumstances, exempt them from Health and Safety Code § 11359 and § 11360, which prohibit the sale or giving away of marijuana. Id. at 1392. The California Supreme Court denied review of that decision on February 25, 1998.

C. The Federal Lawsuits.

Less than a month after the Peron decision, and more than a year after California's voters approved Proposition 215, the United States filed six separate lawsuits against six independent cannabis dispensaries and individuals associated with the management of the dispensaries.[1] The federal government alleges that defendants' manufacture and distribution of marijuana, and possession with the intent to manufacture and distribute marijuana, violates 21 U.S.C. § 841(a)(1); defendants' use of a facility (i.e., the locations of the dispensaries) for the purpose of manufacturing and distributing marijuana violates 21 U.S.C. § 856(a)(1); and that the individual defendants' conspiracy to violate the Controlled Substances Act violates 21 U.S.C. § 846. The lawsuits seek to preliminarily and permanently enjoin defendants' conduct pursuant to the statute which provides the federal district courts with jurisdiction to enjoin violations of the Controlled Substances Act. See 21 U.S.C. § 882(a).

On the same day the federal government filed its lawsuits, it filed motions for a preliminary injunction, permanent injunction and summary judgment in each action. In support of its motions, the government submitted the affidavits of several government agents

[1]The defendants in the related actions are: Cannabis Cultivators Club and Dennis Peron (98-0085); Marin Alliance for Medical Marijuana and Lynette Shaw (98-0086); Ukiah Cannabis Buyers' Club, Cherrie Lovett, Marvin Leherman and Mildred Leherman (98-0087); Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (98-0088); Flower Therapy Medical Marijuana Club, John Hudson, Mary Palmer and Barbara Sweeney (98-0089); and Santa Cruz Cannabis Buyers Club (98-0245).

who attest to their undercover purchases of marijuana from defendants at the various defendant dispensaries.

The six lawsuits were randomly assigned to various judges of this District. Pursuant to Local Rule 3-12, all six were reassigned to this Court as related cases. The Court held a status conference on January 30, 1998, to address defendants' request for additional time to respond to the federal government's motions. At the status conference, and in their papers in support of their request for a continuance, defendants advised the Court that they strenuously dispute the factual assertions in the affidavits with respect to the sale of marijuana to non-seriously ill persons and persons without a physician's recommendation, and contend that much of the federal government's evidence was obtained in violation of the fourth amendment. Over the federal government's objection, the Court granted defendants an extension of time to respond. The Court further ordered that

> [f]or purposes of plaintiff's motions, the parties shall assume that defendants' alleged conduct falls squarely within that permitted by California Proposition 215, California Health & Safety Code § 11362.5. For example, the parties shall assume that all defendants are "primary caregivers" within the meaning of the statute, that all persons to whom defendants distribute or dispense marijuana are seriously ill, and that a physician has determined that the person's health would benefit from the use of marijuana and has made an oral or written recommendation to that effect. Whether the government illegally obtained the evidence upon which it bases its motions shall not be addressed at this time.

February 9, 1998 Order. By its Order, the Court sought to avoid a factual dispute as to whether Proposition 215 applies to defendants' conduct.

Prior to the hearing on the federal government's motions, defendants filed a motion to dismiss for lack of jurisdiction on the ground that Congress does not have authority under the Commerce Clause to regulate defendants' conduct. Defendants also moved to dismiss on the ground that the Court should abstain pursuant to various abstention doctrines.

The Court also received memoranda in opposition to the federal government's motion from *amici curiae* City and County of San Francisco, as represented by the San Francisco District Attorney, and other cities in which defendant dispensaries are located. The City and County of San Francisco and the other cities urge the Court not to adopt the injunctive relief sought by the federal government because of the adverse consequences an injunction would

is appropriate. These factors include, "the desireabilty of avoiding piecemeal litigation," and "the order in which the jurisdiction was obtained by the concurrent forums," Colorado River, 424 U.S. at 818-19; whether the state court proceedings are adequate to protect the federal litigant's rights," Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. at 23; and the risk of conflicting results. See Colorado River, 424 U.S. at 818.

Defendants assert that the state proceeding in People v. Peron is substantially similar to these actions since it involves a challenge to the same conduct at issue here and seeks the same relief sought here -- an injunction.

The Court concludes, however, that the People v. Peron proceeding is not substantially similar. First, it does not involve all the parties to this lawsuit. Thus, the federal government's interests in these actions with respect to the defendants who are not defendants in Peron may not be adequately represented by that proceeding. Second, the issues are different. In Peron, the State seeks to enjoin defendant Peron's conduct on the ground that it violates state law; that is, that it does not fall within the conduct permitted by Proposition 215. Here, in contrast, the federal government seeks to enjoin defendants' conduct on the ground that it violates federal law; it is immaterial whether that conduct falls within that permitted by Proposition 215. Since the issues are not similar there is no risk of conflicting results. None of the cases cited by defendants involved a situation like here, where the federal government seeks to enforce federal law in federal court. In such a situation, this Court is required to exercise its jurisdiction.

B. Interstate Commerce Clause.

Since there is no basis for abstention, we now turn to the question of jurisdiction. Congress has the authority to regulate an activity pursuant to the Commerce Clause of the United States Constitution if the activity regulated falls into one of three categories:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

United States v. Lopez, 514 U.S. 549, 558-59 (1995) (citations omitted). In Lopez, the Supreme Court held that the Gun-Free School Zones Act of 1990 ("School Zones Act") exceeds Congress's Commerce Clause authority. The School Zones Act made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A)(1988 ed. Supp. V). The Court held that the School Zones Act "has nothing to do with 'commerce' or any sort of economic activity . . . . and is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." Id. at 561. It noted that neither the statute nor the legislative history included any congressional findings regarding the effects of gun possession in a school zone on interstate commerce, and rejected the government's theories as to such effects. Id. at 562.

Defendants contend that this Court is without jurisdiction to hear these related cases because Congress does not have the authority to regulate defendants' conduct under the Commerce Clause, just as it does not have authority to regulate possession of a firearm in a school zone. They submit that all of their activities are purely intrastate; therefore, pursuant to Lopez, the Controlled Substances Act is unconstitutional as applied to them.

Congress has the power "to declare that an entire class of activities affects commerce." Maryland v. Wirtz, 392 U.S. 183, 192 (1968). "The only question for the courts then is whether the class is within the reach of the federal power." Id.; see also United States v. Darby, 312 U.S. 100, 120-21 (1941) (where "Congress itself has said that a particular activity affects the commerce," the only function of a court "[i]n passing on the validity of legislation . . . is to determine whether the particular activity regulated or prohibited is within the reach of the federal power"). "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." Perez v. United States, 402 U.S. 146, 154 (1971).

Congress has made detailed findings that the intrastate manufacture, distribution, and possession of controlled substances, as a class of activities, "have a substantial and direct

effect upon interstate commerce." 21 U.S.C. § 801(3). In particular, Congress found that, "after manufacture, many controlled substances are transported in interstate commerce, id. § 801(3)(A), that "controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution," id. § 801(3)(B); that "controlled substances possessed commonly flow through interstate commerce immediately prior to such possession," id. § 801(4); that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances," id. § 801(4); and that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate," id. § 801(5). Therefore, "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." Id. § 801(6). Since Lopez was decided, the Ninth Circuit has held that Congress's enactment of the Controlled Substances Act is constitutionally permissible under the Commerce Clause. See United States v. Bramble, 103 F.3d 1475, 1479-80 (9th Cir. 1996); United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), cert. denied, 117 S.Ct. 1012 (1997); United States v. Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996); United States v. Staples, 85 F.3d 461, 463 (9th Cir.), cert. denied, 117 S.Ct. 318 (1996).

Defendants respond that the Ninth Circuit cases are inapplicable to the facts of these actions because those cases involved (1) conduct that was prohibited under state law; and (2) intrastate illicit drug trafficking activities in the same "class of activities" as those interstate activities prohibited by the Controlled Substances Act. Here, in contrast, defendants argue that their conduct -- the distribution of marijuana to seriously ill patients for the patient's personal medical use -- is not within that class of activities and does not substantially effect interstate commerce.

There can be no debate that when Congress passed the Controlled Substances Act it was primarily concerned with traditional for-profit drug trafficking rather than the not-for-profit supply of medical marijuana to seriously patients in accordance with state law. Even assuming, however, that defendants' activities are within a different "class of activities" from

that which Congress expressly considered, their activities are not within a class that, by its nature, does not have a substantial effect on interstate commerce. Whereas defendants' conduct in the particular instances at issue here may not have had any effect on intrastate commerce, and for purposes of the federal government's motion the Court assumes that at an evidentiary hearing defendants could prove that all marijuana was cultivated locally, distributed locally, and consumed locally by California residents, it is not true that the class of activities within which defendants' conduct falls -- non-profit distribution of medical marijuana -- necessarily does not affect interstate commerce.

Medical marijuana may be grown locally, or out of the state or country, and there is nothing in the nature of medical marijuana that limits it to intrastate cultivation. Similarly, it may be transported across state lines and consumed across state lines. In Lopez, in contrast, the class of activities prohibited -- mere possession of a firearm near a school -- does not have a substantial effect on interstate commerce. This case, unlike Lopez, is not about mere possession but rather about distribution, a class of activities that, even if done for the humanitarian purpose of serving the legitimate health care needs of seriously ill patients, can affect interstate commerce.

To hold that the Controlled Substances Act is unconstitutional as applied here would mean that in every action in which a plaintiff seeks to prove a defendant violated federal law, an element of every case-in-chief would be that the defendant's specific conduct at issue, based on facts proved at an evidentiary hearing or trial, substantially affected interstate commerce. No case so holds and the Court declines to do so for the first time here. Accordingly, the Court has jurisdiction to hear this matter.

II. The Federal Government's Motion.

We now turn to the relief sought by the federal government and whether the federal government has met its burden.

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