EXHIBIT K

7/8

Nos. 03-15481 and 04-16296

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL McCLARY RAICH, DIANE MONSON,
JOHN DOE NUMBER ONE, and JOHN DOE NUMBER TWO,
Plaintiffs-Appellants in No. 03-15481,
Plaintiffs-Appellees in No. 04-16296,

v.

ALBERTO GONZALES, as United States Attorney General, and
KAREN TANDY, as Administrator of the Drug Enforcement Administration,
Defendants-Appellees in No. 03-15481,
Defendants-Appellants in No. 04-16296.

Remand from the United States Supreme Court
Case No. 03-1454
and
Appeal from the United States District Court
for the Northern District of California
Case No. C 02-4872 MJJ.

PLAINTIFFS' MOTION TO CONSOLIDATE PROCEEDINGS

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PLAINTIFFS' MOTION TO CONSOLIDATE PROCEEDINGS

Pursuant to Federal Rule of Appellate Procedure 27 and Ninth Circuit Local Rule 27-1, and for the reasons set forth below, Plaintiffs respectfully request that the Court consolidate proceedings in this matter.

Introduction

Case No. 04-16296 is the Defendants' appeal of a preliminary injunction entered following this Court's ruling in Case No. 03-15481, *Raich v. Ashcroft*, 352 F.3d 1222, 1235 (9th Cir. 2003). On August 6, 2004, in Case No. 04-16296, this Court granted Plaintiffs' motion to stay the proceedings pending action by the United States Supreme Court, ordering that "[w]ithin seven days of the disposition by the Supreme Court, the parties shall file in this court a status report or a motion for appropriate relief." On July 1, 2005, the Supreme Court was to issue its certified copy of its judgment, remanding the case to this Court. On July 6, 2005, this Court issued an order setting a briefing schedule in Case No. 04-16296.

Plaintiffs interpreted the phrase "Within seven days of the disposition by the Supreme Court," in this Court's August 6, 2004, order to mean within seven days after the Supreme Court issues a certified copy of the judgment 25 days after entry of its opinion, pursuant to Supreme Court Rule 45, which would have allowed Plaintiffs sufficient time to file a petition for rehearing pursuant to Supreme Court

Rule 44. Plaintiffs chose not to petition for rehearing, and the certified copy of the judgment was to issue on July 1, 2005. Accordingly, Plaintiffs are under the impression that, pursuant to this Court's August 6, 2004, order, the "motion for appropriate relief" is not due in this Court until July 8, 2005 (the day it is hereby being filed).

For the reasons stated herein, Plaintiffs respectfully request that this Court consolidate the proceedings in this matter, maintain jurisdiction over both Case No. 03-15481 and Case No. 04-16296, schedule a new oral argument, and vacate the Court's July 6, 2005, order. Consolidating proceedings in this matter would further the interests of justice and would ultimately promote judicial economy because the issues to be decided are identical in both cases, and because segmenting the matter would result in unnecessary duplicative efforts by the parties and the courts. Moreover, as discussed below, there is a strong likelihood that the Plaintiffs will prevail on the other theories raised in the Complaint but not decided by this Court previously. Those theories are summarized infra:

Federalism

As a result of the Supreme Court's opinion in this case, we now know that at least six justices agree that principles of federalism protect the Plaintiffs' activity within the State of California. This cornerstone of State sovereignty is embodied in

the Tenth Amendment, independent of the Commerce Clause. For example, in her dissenting opinion, Justice O'Connor, joined by Justices Rehnquist and Thomas, explains that

> Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment. . . . Likewise, that authority must be used in a manner consistent with the notion of enumerated powers – a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command.

Gonzales v. Raich, 125 S.Ct. 2195, 2226 (2005). In his separate dissent, Justice Thomas pointedly observes, "This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter." *Id.* at 2237. Similarly, in his concurrence in the judgment in *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001), Justice Stevens, joined by Justices Souter and Ginsburg (Justice Breyer recused), noted that courts must show

> respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which citizens of a State have chosen to "serve as a laboratory" in the trial of "novel social and economic experiments without risk to the rest of the country."

Id. at 502 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See also*, *Gonzales v. Raich*, 125 S.Ct. at 2238-39 (Thomas, J., dissenting) (same); for treatment in the Ninth Circuit, *see*, *Conant v.*

Walters, 309 F.3d 629, 639 (9th Cir. 2002), *cert denied*, 540 U.S. 946 (2003) (same).

Some recent cases interpreting the Tenth Amendment have addressed the "commandeering" issue. *See, e.g., Printz v. United States*, 505 U.S. 144 (1997); *New York v. United States*, 505 U.S. 144 (1992). There is, however, no reason doctrinally that the application of the Amendment should be so limited, and, in any event, as Judge Kozinski has explained, federal interference in California's medical cannabis law does constitute "commandeering." "The federal government's policy deliberately undermines the state . . . . [T]he federal government's policy runs afoul of the 'commandeering' doctrine . . . ." *Conant* at 645 (Kozinski, J., concurring).

Accordingly, at least six justices of the Supreme Court, and this Court's own precedent, require a ruling in favor of Plaintiffs based upon principles of federalism. This issue is particularly relevant in the Ninth Circuit, where fully eight of the nine States comprising this Circuit now have State laws protecting medical cannabis patients: Alaska, Arizona,[1] California, Hawaii, Montana, Nevada, Oregon, and Washington.

<u>Substantive Due Process, Individual Rights, Liberty</u>

The Due Process Clause of the Fifth Amendment protects against deprivation

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[1] Arizona's law authorizes cannabis use only by "prescription."

of the fundamental rights to "life, liberty, or property." The basic rights entitled to protection need not be specifically enumerated in the Constitution, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), but this case involves one right the Due Process Clause *does* enumerate – the most basic of all rights: the right to life itself. Plaintiffs also identify three additional fundamental rights implicated in this case, the rights: 1) to bodily integrity, 2) to ameliorate pain, and 3) to the sanctity of the physician-patient relationship.

At least five members of the Supreme Court have indicated these rights are constitutionally protected. *See id.* at 736-37 (O'Connor, J.) (a patient "suffering from a terminal illness who is experiencing great pain" may have a "constitutionally cognizable interest" in "obtaining medication, from qualified physicians, to alleviate that suffering"); *id.* at 789 (Ginsburg, J.) (agreeing with Justice O'Connor); *id.* at 745 (Stevens, J.) ("Avoiding intolerable pain and . . . agony is certainly [a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."); *id.* at 777 (Souter, J.) ("liberty interest in bodily integrity" includes "right to determine what shall be done with his own body in relation to his medical needs"); *id.* at 790 (Breyer, J.) (Due Process Clause may protect right to "personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering

– combined."). Each of these rights has deep roots in "our Nation's history, legal traditions, and practices." *Id.* at 710.

The Ninth Amendment's proscription against denying or disparaging other "rights . . . retained by the people" implicates even broader protection for Plaintiffs' rights than those secured by the Due Process Clauses. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 848 (1992) ("Neither the Bill of Rights nor the specific practices of the States at the time of the adoption of the Fourteenth Amendment mark the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. *See* U.S. Const., Amdt. 9.")

Finally, the Plaintiffs' plight in this case involves a concept so important that it permeates the entire Constitution, a concept that every part of the Constitution is ultimately designed to protect – the concept "liberty." In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court protected the "liberty" to engage in the conduct at issue without deeming it a "fundamental right" and without applying a "fundamental rights" analysis. This concept of "liberty" also protects the Plaintiffs. Their decisions to follow physicians' advice are "within the liberty of persons to choose without being punished as criminals." *Id.* at 567. Current practices, particularly those authorized by an increasing number of States, are significant. *Id.* at 570 (describing State laws). In short, the federal government has no compelling

interest in condemning Angel Raich and Diane Monson to avoidable suffering and even death. To deny them the medication recommended by their physicians as necessary to relieve excruciating pain, preserve bodily integrity, and extend their lives is to "demean their existence or control their destiny." *Id.* at 578. If our Constitution protects the "liberty" to engage in homosexual sodomy, the Constitution manifestly protects the "liberty" to avert death and to promote health.

A clear majority of justices on the Supreme Court would rule for the Plaintiffs on one or more these grounds.

Medical Necessity

The law in this Circuit specifically and expressly applies the medical necessity doctrine to those suffering patients who require medical cannabis. The doctrine is "a legally cognizable defense that likely would pertain in the circumstances." *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1009, 1114 (9th Cir. 1999) ("*OCBC*"). The doctrine is "modeled on this court's recognition of a necessity defense to violations of federal law in *United States v. Aguilar*, 883 F.2d 662, 692 (9th Cir. 1989)." *Id.*

Although the Supreme Court has determined the doctrine is not available to a medical cannabis *distribution cooperative*, the applicability of the doctrine for seriously ill *patients* was not before the Court and was notably preserved by the

concurrence in *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001). In their concurrence in the judgment, Justice Stevens, joined by Justices Souter and Ginsburg (Justice Breyer recused), accurately characterized "the Court's narrow holding" and correctly termed other statements in the majority opinion as "pure dictum," noting that "whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that [was] not presented" there. *Id.* at 499, 502, 501. This case, however, presents precisely that question. The undisputed evidence in the record shows that Angel Raich is seriously ill and has no alternative means of avoiding starvation and extraordinary suffering.

"Pure dictum" in *not* binding precedent; thus, except with respect to a contrary *holding* from the Supreme Court, the law of this Circuit continues to protect individual cannabis *patients* under the doctrine of medical necessity. Using the following multi-pronged test, this Court described the characteristics of the doctrine as it applies to

> a class of people with serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms; who will suffer serious harm if they are denied cannabis; and for whom there is no legal alternative to cannabis for the effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects.

OCBC at 1115. The undisputed evidence in the record is that Angel Raich cannot be without cannabis because she would quickly suffer precipitous medical deterioration and would risk death. Similarly, only cannabis will relieve Diane Monson's symptoms. In these circumstances, and pursuant to binding authority in this Circuit, the doctrine of necessity continues to protect those patients.

Conclusion

To promote judicial economy and avoid duplication of effort, the Court should grant Plaintiffs' motion to consolidate the proceedings and vacate the Court's July 6, 2005, order in Case No. 04-16296. For the reasons discussed above, it is highly likely that the Plaintiffs will prevail in this litigation. Maintaining jurisdiction over both parts of the case, consolidating them, and scheduling a new oral argument will serve the interests of justice, will conserve judicial resources, and will therefore benefit the Court, as well as result in savings to the parties.

Dated: July 8, 2005

Respectfully submitted,

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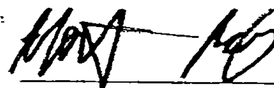

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CERTIFICATE OF SERVICE

I am not a party to the within action and am over eighteen years of age. My business address is 1970 Broadway, Suite 1200, Oakland, California 94612. I hereby certify that on the date this certificate is signed, I served the attached

PLAINTIFFS' MOTION TO CONSOLIDATE PROCEEDINGS

by Federal Express, for next business day delivery, to the following counsel:

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Mark T. Quinlivan
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and by inserting a true copy thereof in a sealed envelope, with postage fully prepaid, to be placed in the United States mail addressed to the following:

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