No. 03-15481

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,

v.

JOHN ASHCROFT, as United States Attorney General, and
WILLIAM SIMPKINS, as Administrator of the Drug Enforcement Administration,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Case No. C 02-4872 MJJ.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. INTRODUCTION 1

II. THE CSA IS UNCONSTITUTIONAL AS APPLIED TO APPELLANTS' CLASS OF ACTIVITIES BECAUSE IT EXCEEDS CONGRESS' POWER UNDER THE COMMERCE CLAUSE 1

A. The Government Ignores *McCoy*'s Recognition of an "As Applied" Challenge to Congressional Power. 1

B. Whether the CSA Constitutionally Reaches Appellants' Noneconomic Intrastate Conduct Is a Judicial Determination. 6

C. The Aggregation Principle of *Wickard v. Filburn* is Inapplicable to Appellants' Noneconomic Intrastate Activities. 8

III. THE DISTRICT COURT FAILED TO RESPECT SOVEREIGN POWERS RESERVED TO THE STATE OF CALIFORNIA UNDER PRINCIPLES OF FEDERALISM. 11

IV. THE CSA IMPERMISSIBLY INFRINGES UPON FUNDAMENTAL RIGHTS. 17

A. The Government Has Not Refuted Appellants' Key Arguments. . . . 17

B. The Government Mischaracterizes Appellants' Fundamental Rights. 18

C. The Constitution Protects Appellants' Rights to Bodily Integrity, to Ameliorate Pain, to Prolong Life, and to Act on Physicians' Recommendations. 19

D. The Government's Argument Concerning Fundamental Rights Rests Entirely on Inapplicable Cases. 21

1. *Carnohan* and *Rutherford* Did Not Address the Fundamental Rights At Issue in this case. 23

2. Appellants Are Using Remedies of Their Own Confection. . 25

E. The Judgement of the People is Evidence a Right is Fundamental. . 26

F. The Government Fails to Meet its Burden Under *Any* Standard of Review. 28

V. APPELLANTS MAY LAWFULLY POSSESS AND CULTIVATE CANNABIS PURSUANT TO THE MEDICAL NECESSITY DOCTRINE.. 29

VI. THE PUBLIC INTEREST FACTORS WEIGH IN FAVOR OF THE ENTRY OF A PRELIMINARY INJUNCTION. 30

VII. CONCLUSION 32

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases

Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980) 22, 23, 24, 25

Conant v. Walters, 309 F.3d 629 (9th Cir. 2002) 14, 16

Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) 19, 20, 21

Dataphase Systems. Inc. v. C L Systems, Inc.,
640 F.2d 109 (8th Cir. 1981) 31

Doi v. Halekulani Corp., 276 F.3d 1131 (9th Cir. 2002) 28

Gregory v. Ashcroft, 501 U.S. 452 (1991) 13, 17

Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.,
452 U.S. 264, 291 (1981) 15, 16

Kuromiya v. United States, 37 F. Supp.2d 717 (E.D. Pa. 1999) 22

Linder v. United States, 268 U.S. 5 (1925) 16

Mitchell v. Clayton, 995 F.2d 772 (7th Cir. 1993) 21

New York v. United States, 505 U.S. 144 (1992) 12, 13

Oregon v. Ashcroft, 192 F.Supp. 2d 1077, (D.Ore. 2002) 16

Pegram v. Herdrich, 530 U.S. 211 (2000) 16

People v. Bianco, 93 Cal.App.4th 748 22

People v. Privatera, 23 Cal.3d 697 (1979) 24

Romer v. Evans, 517 U.S. 620 (1996) 27

Rutherford v. United States, 616 F.2d 455 (10th Cir. 1980) 22, 23, 24, 25

Sammon v. New Jersey Bd. of Med. Exam'rs, 66 F.3d 639 (3d Cir. 1995) 21

Seeley v. Washington, 132 Wash. 2d 776 22

Smith v. Shalala, 954 F. Supp. 1 (D.D.C. 1996) 21

United States v. Burzynski, 819 F.2d 1301 (5th Cir. 1987) 21

United States v. Cannabis Cultivator's Club,
1999 WL 111893 (N.D. Cal.) 22, 26

United States v. Carolene Prods., 304 U.S. 144 (1938) 28

United States v. Cortes, 299 F.3d 1030 (9th Cir. 2002)
cert. denied, 123 S. Ct. 1333 (2003) 2

United States v. Darby, 312 U.S. 100 (1941) 2

United States v. Davis, 288 F.3d 359 (8th Cir.)
cert. denied, 123 S.Ct. 107 (2002) 8

United States v. Johnson, 14 Fed. Appx. 157 (4th Cir. 2001)
cert. denied, 534 U.S. 1085 (2002) 8

United States v. Kim, 94 F.3d 1247 (9th Cir. 1996) 5, 6, 8, 15

United States v. Lopez, 514 U.S. 549 (1995) .... *passim*

United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003) .... *passim*

United States v. Morrison, 529 U.S. 598 (2000) .... *passim*

United States v. Oakland Cannabis Buyers' Coop.,
532 U.S. 483 (2001) 29, 31

United States v. Oakland Cannabis Buyers' Coop.,
190 F.3d 1109 (9th Cir. 1999) 30

United States v. Pompey, 264 F.3d 1180 (10th Cir. 2001)
cert. denied, 534 U.S. 1117 (2002) 8

United States v. Price, 265 F.3d 1097 (10th Cir. 2001)
cert. denied, 535 U.S. 1099 (2002) 8

United States v. Rodriquez-Camacho, 468 F.2d 1220 (9th Cir. 1972) 5, 8, 15

United States v. Rosenberg, 515 F.2d 190 (9th Cir. 1975) 15, 16

United States v. Tisor, 96 F.3d 370 (9th Cir. 1996)
cert. denied, 519 U.S. 1140 (1997) 5, 6, 8

United States v. Visman, 919 F.2d 1390 (9th Cir. 1990) 5, 8, 15

United States v. Vital Health Prods., Ltd.,
786 F. Supp. 761 (E.D. Wis. 1992) 21

Washington v. Glucksberg, 521 U.S. 702 (1997) 17, 19, 20, 21, 27

Wickard v. Filburn, 317 U.S. 111 (1942) 8, 9, 10

Codes and Statutes

18 U.S.C. § 2252 3-5

Age Discrimination in Employment Act 13

Agricultural Adjustment Act 8, 11

Cal. Health & Safety Code § 11362.5 24

Civil Rights Act of 1964 27

Controlled Substances Act . . . . *passim*

Violence Against Women Act 6

Other Authorities

Taber's Encyclopedic Medical Dictionary 1922 (18th ed. 1997) 24

ARGUMENT

I. INTRODUCTION

If the government denies Appellant Angel McClary Raich ("Angel") her medical cannabis, she faces an excruciating death. ER 064, 088-089. Beyond that gravely serious personal aspect, the outcome of this case implicates the very foundations of our system of constitutional government. The government argues here to: extend congressional Commerce Power to wholly intrastate noneconomic activity with no effect on interstate commerce, impose federal authority over areas of proper State sovereignty, and trample fundamental rights retained by the American people. Unless reined in by this Court, the government will loosen the underpinnings of our Republic and cause needless personal tragedy.

II. THE CSA IS UNCONSTITUTIONAL AS APPLIED TO APPELLANTS' CLASS OF ACTIVITIES BECAUSE IT EXCEEDS CONGRESS' POWER UNDER THE COMMERCE CLAUSE.

A. The Government Ignores *McCoy*'s Recognition of an "As Applied" Challenge to Congressional Power.

United States v. Lopez, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), and this Circuit's recent decision in *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), made clear that the Commerce Clause does not permit Congress to prohibit the purely intrastate non-commercial activity of cultivating and possessing medical cannabis having no substantial effect on

interstate commerce.

In response, the government invokes the propositions that, where a regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence, and where the class of regulated activities is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class. (Brief for Appellees ("Gov. Br.") at 23-24.)

These principles are inapplicable here. Appellants are not like "individualized carjacking members" of the national black market in stolen car parts, identified in *United States v. Cortes*, 299 F.3d 1030 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1333 (2003), or "a single case" undifferentiated from a "class of activities" that does substantially affect interstate commerce. (Gov. Br. at 25-26.) Nor do Appellants dispute that Congress may declare an entire class of activities affects interstate commerce though individual instances of the class may have scant affect on interstate commerce. *United States v. Darby*, 312 U.S. 100, 120-121 (1941). (Gov. Br. at 23.)

The government then goes beyond these uncontroversial and irrelevant principles to assert a novel and unsupported proposition: Once it is found that a statute is *facially* constitutional because it properly regulates *some* activities that are

within its power, no court can question the *application* of this statute to a separate and distinct set of activities over which Congress lacks power. The government contends that, because the Controlled Substances Act ("CSA") regulates a class of activities that *is* within the reach of Congress, this Court is foreclosed from examining whether the CSA properly applies to Appellants' type of conduct.

Under the government's theory, no court could assess whether a statute regulating commerce is overbroad when applied to a particular person, and all similarly situated persons, if the statute properly applies to other, differently situated persons. Thus, any "as applied" challenge to a statute that is, otherwise, a proper federal regulation pursuant to the Commerce Clause would be foreclosed. This Court recently rejected that theory in *McCoy*, which did exactly what the government suggests courts cannot do.

In *McCoy*, this Court did not limit itself to deciding whether the child pornography statute, 18 U.S.C. § 2252(a)(4)(B), was constitutional on its face. In addition, it evaluated whether the statute was unconstitutional "as applied" to McCoy herself. In other words, *McCoy* considered whether Mrs. McCoy was, in fact, a member of the class *properly reached* by § 2252(a)(4)(B).

To answer this question, *McCoy* employed the four *Morrison* factors:

> 1) whether the statute in question regulates commerce "or any sort of economic enterprise"; 2) whether the statute contains any "express

> jurisdictional element which might limit its reach to a discrete set" of cases; 3) whether the statute or its legislative history contains "express congressional findings" that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated." 529 U.S. 598, 610-612 (2000).

McCoy, 323 F.3d at 1119. *McCoy* used these four *Morrison* factors to decide whether the statute was unconstitutional, not on its face, but as applied: "We apply the four *Morrison* factors in order to decide whether § 2252(a)(4)(B) *as applied* is a constitutional exercise by Congress of its Commerce Clause power." *Id.* (emphasis added).

Fidelity to the Supreme Court's decision in *Morrison* requires this Court to do exactly what the government suggests it cannot do: examine the specific activity of Appellants, and others similarly situated, which Congress sought to regulate under an otherwise constitutional statute and determine if, "as applied" to their type of activities, the statute passes constitutional muster. In other words, this Court must decide whether Appellants are members of the class properly regulated by the CSA.

In *McCoy,* this Court decided that, although § 2252(a)(4)(B) regulated a class of activities within the reach of federal power, it was, nonetheless, unconstitutional as applied to the purely intrastate activities of McCoy herself.

Here, we conclude that simple intrastate possession of home-grown

> child pornography not intended for distribution or exchange is "not, in any sense of the phrase, economic activity."
>
> * * *
>
> [A] thorough review of the *Morrison* factors persuades us that, *as applied* to McCoy and others similarly situated, § 2252(a)(4)(B) cannot be upheld as a valid exercise of the Commerce Clause power.

McCoy, 323 F.3d at 1122-23, 1133.

The *McCoy* analysis, mandated by *Lopez* and *Morrison*, is directly applicable here. Appellants' class of activity — the personal cultivation and personal possession of cannabis for medical purposes by California citizens as recommended by the patients' physicians pursuant to California State law — is entirely separate and distinct from the trafficking aspect of the prior cases cited by the government and is so utterly lacking in commercial or economic character that, as applied to Appellants' class of activities, the facially constitutional CSA cannot be upheld under *Morrison* as a valid exercise of the Commerce Clause power. For this reason, the pre-*Morrison* cases cited by the government, *United States v. Tisor*, 96 F.3d 370 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997), *United States v. Kim*, 94 F.3d 1247 (9th Cir. 1996), *United States v. Rodriquez-Camacho*, 468 F.2d 1220 (9th Cir. 1972), and *United States v. Visman*, 919 F.2d 1390 (9th Cir. 1990), are readily distinguishable.[1] The district court gravely erred in concluding that, due to these

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[1] In fact, although this Court in *McCoy* acknowledged that it had in the past rejected facial Commerce Clause challenges to the CSA, citing *Tisor*, *Kim*, and

prior decisions, it lacked the power to reach this conclusion.

B. Whether the CSA Constitutionally Reaches Appellants' Noneconomic Intrastate Conduct Is a Judicial Determination.

The government admits that this Court "has never relied upon the 'mere existence' of Congressional findings in sustaining the CSA against Commerce Clause challenges" (Gov. Br. at 28) thereby conceding, as it must under *Morrison*, that whether regulated activity affects interstate commerce is a judicial question rather than a legislative one, even where a statute or its legislative history contains "express congressional findings."

Nevertheless, the government then contends that the Court should determine whether "a rational basis exists for a congressional finding that a regulated activity sufficiently affects interstate commerce" (Gov. Br. at 29.), again citing pre-*Morrison* cases. This invocation of the "rational basis" standard of scrutiny misses the point in at least two respects.

First, the Supreme Court in *Morrison* rejected extensive congressional findings seeking to justify the Violence Against Women Act because they were premised on reasoning that would lead to unlimited congressional power. *See*

Visman, it explicitly made clear that it was expressing no view as to the effect of *Morrison* on those cases. *McCoy*, 323 F.3d at 1128 n.24. Appellants previously analyzed the facts and holdings in those cases and need not restate them here. (Opening Br. at 23-28.)

Morrison, 529 U.S. at 599 ("Congress therefore may not regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."). By so doing, the Court implicitly rejected the rational basis approach urged upon it by the dissent. See *id.* at 628 (Souter, J., dissenting). Likewise, this Court in *McCoy* rejected the government's claim that "Congress can reach purely intrastate conduct if it *rationally determines* that doing so is necessary to effectively regulate the national market," (*McCoy*, 323 F.3d at 1123 (emphasis added)) because, according to *Lopez* and *Morrison*, "accepting such findings would eliminate any barriers to federal power . . . ." *Id.* at 1124.

Second, the cases cited by the government upholding the CSA all deal with drug trafficking or drug sales, activity courts have consistently held substantially affects interstate commerce. The activities of Appellants here have nothing to do with drug sales or drug trafficking. Appellants' conduct, instead, represents a separate and distinct class of activity — the completely intrastate noneconomic personal cultivation and possession of cannabis for medical purposes as recommended by patients' physicians pursuant to State law — activity which, even in the aggregate, has no substantial effect on interstate commerce and is therefore beyond the reach of Congress under the Commerce Clause. This small class of activity is entirely separate and distinct from the large class of activity that

Congress sought to regulate: the class of activity involving trafficking in illegal drugs addressed in *Rodriquez-Camacho*, *Visman*, *Kim*, *Tisor*, and the other cases cited by the government.[2]

C. The Aggregation Principle of *Wickard v. Filburn* is Inapplicable to Appellants' Noneconomic Intrastate Activities.

In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court upheld the application of the Agriculture Adjustment Act to the regulation of intrastate "home-grown" and consumed wheat. The Court applied an "aggregation principle" based on the Act's legitimate purpose to regulate the national volume, variability, and market price of wheat and concluded that "home-grown" wheat competed with wheat in commerce. 317 U.S. at 128.

This Court in *McCoy*, rejected the application of *Wickard* to home-grown child pornography. 323 F.3d at 1120-21. *McCoy* correctly observed that the

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[2] The government cites post-*Morrison* decisions from other circuits in support of its claim that *Morrison* does not call into question the constitutionality of the CSA. (Gov. Br. at 31-32.) Yet, just as in *Tisor*, *Kim*, *Rodriquez-Camacho*, and *Visman*, each of these other cases only addressed drug trafficking and drug sales. *United States v. Davis*, 288 F.3d 359, 361-62 (8th Cir.), *cert. denied*, 123 S.Ct. 107 (2002) (drug manufacture and distribution); *United States v. Price*, 265 F.3d 1097 (10th Cir. 2001), *cert. denied*, 535 U.S. 1099 (2002) (cocaine sales and other drug trafficking); *United States v. Pompey*, 264 F.3d 1180 (10th Cir. 2001), *cert. denied*, 534 U.S. 1117 (2002) (drug trafficking); *United States v. Johnson*, 14 Fed. Appx. 157 (4th Cir. 2001), *cert. denied*, 534 U.S. 1085 (2002) (conspiracy to distribute cocaine). Furthermore, all of those cases involved facial challenges to the CSA. No case involved an "as applied" challenge, as there is here.

Supreme Court, in *Lopez* and *Morrison*, carefully limited the reach of *Wickard* to only obvious economic activity. *Lopez*, 514 U.S. at 558; *Morrison*, 529 U.S. at 611, n.4 ("in every case where we have sustained federal regulation under the aggregation principle in *Wickard* . . ., the regulated activity was of an apparent commercial character."). *Morrison* further declared *Wickard* "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Id.* at 610.

Following the mandate of *Lopez* and *Morrison*, *McCoy* concluded that "simple intrastate possession of home-grown child pornography not intended for distribution or exchange is 'not, in any sense of the phrase, economic activity.'" *McCoy*, 323 F.3d at 1122-23 (quoting *Morrison*, 529 U.S. at 613).

Because *McCoy* is devastating to the government's theory of the Commerce Clause, the government seeks to distinguish this case from *McCoy* by claiming that, in one respect, *McCoy* relied on a determination that the photograph depicting child pornography was not a fungible item, as is wheat, a determination essential to the Supreme Court's Commerce Clause analysis in *Wickard*. (Gov. Br. at 26-27.) But, in applying the *McCoy* analysis to the facts in this case, it is clear that Appellants' medical cannabis, like McCoy's photograph, is not fungible. Furthermore, the government's argument gives too much weight to this factor.

As with the activity at issue in *McCoy*, Appellants' activities, viewed individually or as a class, are utterly lacking in commercial or economic character. The simple intrastate possession of home-grown medical cannabis not intended for distribution or exchange is not, in any sense of the phrase, economic activity. Therefore, as a threshold determination, the aggregation principle of *Wickard* simply does not apply to this case, regardless of whether Appellants' medical cannabis is fungible.

Moreover, even assuming the *Wickard* principle were applicable to noneconomic activities, *McCoy* correctly found that *Wickard* did not apply to "home-grown" child pornography because it was entirely for personal use and there existed no justification for assuming it would enter the interstate market. Consequently, the photo was not fungible.

> [W]e note that *Rodia* implicitly assumes that child pornography, like Filburn's wheat, is fungible, an essential element of the *Wickard* decision. We disagree. McCoy possessed a family photo (pornographic as it may have been) meant entirely for personal use, without having any intention of exchanging it for other items of child pornography, or using it for any other economic or commercial reasons. Nor is there any reason to believe that she had any interest in acquiring pornographic depictions of other children. There is thus no fungibility element present in cases such as hers.

McCoy, 323 F.3d at 1122..

Appellants' situation is identical to McCoy's in this regard. They possess

and cultivate home-grown medical cannabis meant entirely for personal use without any intention of exchanging it for other items of cannabis, or of using it for any other economic or commercial reasons. They need it solely for personal consumption, a fact undisputed in the record. Nor does the record show that Appellants have any interest in acquiring or exchanging any cannabis other than what they have grown and possess for personal use. Thus, as in *McCoy*, there is no fungibility element present in this case and *Wickard* is inapplicable under any rationale.[3]

III. THE DISTRICT COURT FAILED TO RESPECT SOVEREIGN POWERS RESERVED TO THE STATE OF CALIFORNIA UNDER PRINCIPLES OF FEDERALISM.

In the Opening Brief, Appellants established that federal prohibition of Appellants's activities would exceed federal authority under the Constitution because it would significantly interfere with the sovereign powers reserved to the

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[3] It is also noteworthy that, in contrast to the effect of Filburn's wheat on commerce, the only conceivable effect Appellants' medical cannabis could have would be to *reduce* demand for interstate marijuana, thereby facilitating, rather than undercutting, the purpose of the CSA. *Cf. McCoy* at 1122 ("Filburn's '[h]ome-grown wheat . . . compete[d] with wheat in commerce,' . . . and reduced the demand for the wheat grown for commercial sales, in direct contravention of the purposes of the Agricultural Adjustment Act . . . . McCoy's venture, in contrast, was purely non-economic and non-commercial, and had no connection with or effect on any national or international commercial child pornography market, substantial or otherwise.").

State of California. Through the exercise of its sovereign police power, California has declared the activity in this case lawful and necessary for the public health and safety. Appellants have never denied that where the Constitution grants Congress an enumerated power, that power is supreme over a conflicting claim of police power by the States. However, the exercise of the police power by States influences the judicial determination of whether the federal government indeed has an *implied* power under the Constitution—in this case the implied power to reach the Appellants' wholly intrastate non-commercial activity.

The government responds by quoting the Supreme Court in *New York v. United States*, 505 U.S. 144, 156 (1992), as saying, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." (Gov. Br. at 36-37.) By ending this quote with a period rather than an 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* at 156 (citations omitted) (emphasis added). In other words, the Supreme Court in *New York v. United States* was *confirming* rather than denying Appellants' position that the existence of 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 devastating this language is to its claim.

The government's reliance on *Gregory v. Ashcroft*, 501 U.S. 452 (1991) is similarly unavailing. (Gov. Br. at 37.) In fact, the Court in that case *upheld* the right of States to govern their own affairs, even in the face of a contrary federal statute with obvious applications to interstate commerce (the Age Discrimination in Employment Act). The Court in *Ashcroft* specifically affirmed that Congress should not interfere with a State's 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.

Further, by limiting the reach of the statute in *Ashcroft*, the Court implicitly rejected the government's unsupported contention (Gov. Br. at 37) 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. As demonstrated in Appellants' Opening Brief, commandeering is just one *example* of the sorts of federal interference with State powers that Courts have found to be suspect under the Tenth Amendment; it is not the "only" such situation, as the government claims. Moreover, the government

fails to respond at all to Judge Kozinski's analysis that, regarding medical cannabis, "the federal government's policy runs afoul of the 'commandeering' doctrine . . . ." *Conant v. Walters*, 309 F.3d 629, 645 (9th Cir. 2002).

Both *Lopez* and *Morrison* also confirm that principles of federalism, as embodied in the Tenth Amendment, have greater relevance than the government is willing to concede:

> The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.
>
> * * *
>
> While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.

Lopez, 514 U.S. at 583 (Kennedy, J., concurring). Similarly, in *Morrison*, the Court observed:

> With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.

Morrison, 529 U.S. at 619 n.8.

Despite such clear judicial commands, the government urges this Court now to forego any analysis of the scope of the activity actually involved in this case and to ignore the considered judgment of the People of California exercising the police power of the sovereign State of California to protect the public health and safety. Instead, the government cites cases concerning economic activities with a substantial affect on commerce, such as *Bramble*, *Visman*, *Rodriguez-Comancho*, and *Kim*. (Gov. Br. at 37-38.) All of those cases, however, involved trafficking of illegal contraband in commerce. None of those cases involved medicine, or its wholly intrastate non-commercial possession or cultivation, as explicitly authorized by a State for the promotion of public health and safety.

Likewise inapposite is *United States v. Rosenberg*, 515 F.2d 190 (9th Cir. 1975). Appellants do not contend that States' "control of medical practice" automatically makes the prosecution of doctors "beyond the power of the federal government." (Gov. Br. at 38.) *Rosenberg* involved a physician trafficking in prescription drugs. Unlike here, the case involved the sale of drugs in interstate commerce and thus addressed activity that lies squarely within the enumerated power of Congress over interstate commerce.

Nor do Appellants dispute the proposition cited by the government in *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 291 (1981). (Gov.

Br. at 36.). In *Hodel*, the Court assumed what has not been shown in this case and what Appellants vigorously contest: that Congress validly exercised a power granted to it under the Commerce Clause. *Hodel* therefore is irrelevant to Appellants' argument that Congress has interfered with the exercise of the State's police power to protect the health and safety of its citizens.

The State of California, not the federal government, is the sovereign with legitimate authority to regulate the conduct at issue in this case. "[P]rinciples of federalism . . . have left states as the primary regulators of professional conduct." *Conant*, 309 F.3d at 639. "[D]irect control of medical practice in the states is beyond the power of the federal government . . . ." *Id.*, *quoting Linder v. United States*, 268 U.S. 5, 18 (1925). "[T]he field of health care" is a "subject of traditional state regulation . . . ." *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000).[4] *Amici curiae* in this case capsulize the salient concept eloquently:

> It is one thing for the federal government to dictate what items may be transacted in interstate commerce . . . . It is quite another for it to impose its particular notions of medical propriety upon a State whose people have clearly and unequivocally exercised their discretion in a different direction."

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[4] *Accord, Oregon v. Ashcroft,* 192 F.Supp. 2d 1077, 1092 (D.Ore. 2002) ("State statutes, state medical boards, and state regulations control the practice of medicine. The CSA was never intended . . . to establish a national medical practice or act as a national medical board.").

Brief of *Amici Curiae* State of California, County of Alameda, and City of Oakland at 10.

The government's posture in this case disregards the first principles of federalism. "[A] healthy balance of power the between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ashcroft*, 501 U.S. at 458. "In the tension between federal and state power lies the promise of liberty." *Id.* at 459. Our system of dual sovereignty prevents one sovereign from obstructing the vital jobs assigned by the Constitution to the other, while imposing on both sovereigns the obligation to respect the fundamental rights of citizens.

IV. THE CSA IMPERMISSIBLY INFRINGES UPON FUNDAMENTAL RIGHTS.

A. The Government Has Not Refuted Appellants' Key Arguments.

As an initial matter, Appellants note that the government's brief neither refutes nor even mentions the key arguments extensively set forth (Opening Br. at 38-50) establishing the fundamentality of the rights for which Appellants require protection from this Court. Appellants, therefore, deem these arguments conceded by the government due to its failure to address them.

The government entirely ignores the analytical framework required by the Supreme Court to identify fundamental rights: an examination of "our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702,

710 (1997). By applying those criteria to the undisputed facts in the record, the Opening Brief established how deeply rooted Appellants' rights are in our society. To this, the government provides no refutation and does not even attempt to distinguish the cases discussed.[5]

B. The Government Mischaracterizes Appellants' Fundamental Rights.

Rather than contest the existence of the fundamental rights to bodily integrity, to ameliorate pain, to prolong life, and to act on physicians' recommendations — or present a compelling justification to infringe upon them — the government instead mischaracterizes the asserted rights as a right to "unapproved and unproven medical treatments," and denies that such a right exists. (Gov. Br. at 39.)

For the Appellants, cannabis is neither "unapproved" nor "unproven." First, medical cannabis is "approved" by the State of California, nine other states,[6] and by the patients' physicians. It is true that the CSA's placement of marijuana on

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[5] Appellants will not repeat the uncontested arguments made in the Opening Brief, except to reiterate that for many centuries throughout our Common Law tradition, and continuously in this country since the founding of the United States — *except* for the past 33 years since the passage of the CSA in 1970 — cannabis has been legally available as a medicine.

[6] The States with medical cannabis laws include Alaska, Arizona, California, Colorado, Hawaii, Maine, Maryland, Nevada, Oregon, and Washington.

Schedule I makes it an unapproved substance for medical use *under federal law*, but the constitutionality of the CSA's application to the Appellants is the very subject of this litigation.

Second, cannabis is not an "unproven" medication for the Appellants. The undisputed evidence in this case establishes that cannabis is the only medication that has "proven" to be effective for Angel and Diane Monson ("Monson"). Moreover, cannabis enjoys a long history as a medication of "proven" effectiveness. *See, e.g.*, *Conant*, 309 F.3d at 640-43, (Kozinski, J., concurring) and sources cited therein.

C. The Constitution Protects Appellants' Rights to Bodily Integrity, to Ameliorate Pain, to Prolong Life, and to Act on Physicians' Recommendations.

The government attempts weakly and in vain to distinguish two Supreme Court cases recognizing some of the fundamental rights involved in this case, *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990). (Gov. Br. at 43-44.) While the government admits that *Glucksberg* calls for analyzing fundamental rights "at a high level of specificity and with reference to historical tradition" (Gov. Br. at 43), it then does neither.

Instead it characterizes *Glucksberg* as holding merely "that there is no fundamental right to obtain medical treatment which would alleviate suffering by

causing death." (Gov. Br. at 43.) While not incorrect, this formulation is misleading. The *Glucksberg* plurality held that States have an "unqualified interest in the preservation of human life," 521 U.S. at 728, which overrides a recognizable right 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 this case, the central conflict that so wretched the Supreme Court in *Glucksberg* does not exist. The preservation of human life (the compelling state interest) is in complete harmony with the avoidance of pain and agony (the fundamental right). Accordingly, here the government's interest in preserving life *supports* Appellants' fundamental rights to bodily integrity, ameliorating pain, and prolonging life.

The government dismisses *Cruzan* as merely "recognizing a right to refuse medical treatment." (Gov. Br. at 44.) The Supreme Court, however, also explicitly recognized a fundamental liberty interest in *life*. "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." *Cruzan*, 497 U.S. at 281 (emphasis added). *Cruzan*'s recognition of a fundamental liberty interest in life again *supports* Appellants' fundamental liberty interests in bodily integrity, ameliorating pain, and prolonging life.

Finally, Appellants note that the government does not mention — nor distinguish the authorities relied upon by Appellants in support of — the other fundamental right for which Appellants require protection: the right to act upon a physician's recommendation. (*See* Opening Br. at 47-50.)

D. The Government's Argument Concerning Fundamental Rights Rests Entirely on Inapplicable Cases.

The government responds to Appellants' careful analysis, not by examining "our Nation's history, legal traditions, and practices," *Glucksberg*, 521 U.S. at 710, but by citations to cases that are not controlling in this Circuit and are, in any event, inapposite. Some involved attempts to have a particular *type* of treatment declared a fundamental right (which is not the claim made by Appellants) without any allegation or proof that the patients had demonstrated the treatment as the only effective treatment or that the State had approved the treatment.[7] (Gov. Br. at 40-41.) The cases the government cites concerning medical cannabis are similarly

[7] *See Sammon v. New Jersey Bd. of Med. Exam'rs*, 66 F.3d 639, 644-45 (3d Cir. 1995) (midwifery not licensed by State); *Mitchell v. Clayton*, 995 F.2d 772, 773 (7th Cir. 1993) (acupuncturists not authorized by State); *United States v. Burzynski*, 819 F.2d 1301, 1304-05, 1313-14 (5th Cir. 1987) (commercial interstate distribution of drugs not State or federally authorized); *Smith v. Shalala*, 954 F. Supp. 1, 3 (D.D.C. 1996) (no right *to obtain* drugs, not State or federally approved, when patient refuses to try standard treatment); *United States v. Vital Health Prods., Ltd.*, 786 F. Supp. 761, 774, 779 (E.D. Wis. 1992) (products *marketed* without federal or State approval).

inapplicable.[8] (Gov. Br. at 42-43.) Primarily, however, the government relies on the irrelevant laetrile cases of *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980) and *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980). (Gov. Br. at 39-48.)

1. *Carnohan* and *Rutherford* Did Not Address the Fundamental Rights At Issue in this case.

The government's repeated reliance on *Carnohan* and *Rutherford* is unavailing. The government cites *Carnohan*, blithely ignoring the fact that this Court explicitly declined to address the issue presented here. ("We need not decide whether Carnohan has a constitutional right to treat himself with home remedies of his own confection." *Carnohan*, 616 F.2d at 1122.) As stated in the Opening Brief (at 52), but glaringly ignored by the government, American citizens remain free to manufacture and possess laetrile for their own personal use. No statute prohibits patients from growing apricots, pulverizing the pits, and extracting laetrile for

[8] *See Kuromiya v. United States*, 37 F. Supp.2d 717, 725, 731 (E.D. Pa. 1999) (no right "to use marijuana" where not permitted by State "through referenda and ballot measures"); *United States v. Cannabis Cultivator's Club*, 1999 WL 111893 (N.D. Cal.) (no constitutional right *to obtain* cannabis in commerce from cooperatives); *Seeley v. Washington*, 132 Wash. 2d 776 (no fundamental right to cannabis as "preferred treatment," where cannabis not *only* effective treatment); *People v. Bianco*, 93 Cal.App.4th 748, (probation conditions permissible after conviction for cultivating nonmedical marijuana, despite claimed right to privacy [an issue not in question here]).

personal treatment, nor has any case held that the government could constitutionally prohibit such activity. Certainly not *Carnohan.*

The government distorts the holding of *Carnohan* by implying that this Court reached the merits of Carnohan's due process challenge. (Gov. Br. at 44.) In fact, the limited holding of that case was that Carnohan had not exhausted administrative remedies:

> [Carnohan's] 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. . . . If Carnohan wishes *to obtain* laetrile, he must *exhaust his administrative remedies* before seeking judicial relief.

616 F.2d at 1122 (emphasis added).

Carnohan and the Tenth Circuit's decision in *Rutherford* merely rejected patients' claimed constitutional rights *to force the government* to permit patients *to obtain* laetrile by prescription, through marketing and distribution, *in commerce.* Similarly, *People v. Privatera,* 23 Cal.3d 697 (1979), a California state laetrile case, concerned an "asserted right *to obtain*" laetrile *in commerce. Id.* at 702 (emphasis added). In contrast, Appellants do not assert any right to prescribe, market, or distribute any drug, or to do anything in commerce. Appellants do not seek to force the government to take any action, except to *leave them alone*, so that they may tend to serious medical conditions without the constant threat of unconstitutional

arrests and raids by government agents.

Glaringly absent from the government's brief is any refutation of the "crucial factor distinguishing this case" from the laetrile cases. (*See* Opening Br. at 55-56.) In *Carnohan, Rutherford,* and *Privatera,* neither the State nor the federal government approved laetrile for sale. In contrast, California law expressly recognizes that "seriously ill Californians have *the right* to obtain and use marijuana for medical purposes . . . ." Cal. Health & Safety Code § 11362.5(b)(1)(A) (emphasis added). Whereas Congress has no general police power, the State of California has exercised its sovereign powers to permit Appellants' activities in the interest of public health and safety. This case raises vital constitutional issues simply not addressed by *Carnohan, Rutherford,* and *Privatera.*

The government has no credible response to Appellants' observation that *Carnohan* and *Rutherford* are distinguishable insofar as laetrile was those patients' *preferred* method of treatment, not the *sole effective* method of treatment. The government ignores the significance of this distinction by reciting that the patients in those cases "were terminally ill cancer patients." (Gov. Br. at 47.) The government's argument is fatally flawed. "Terminal illness" means "[a]n illness . . . expected to cause the patient to die . . . for which there is no known cure." *Taber's Encyclopedic Medical Dictionary* 1922 (18th ed. 1997). A terminally ill patient

thus has a deadly illness for which there is no cure, not an illness for which there is no palliative treatment. There is no indication in the cases that laetrile was the only effective method to provide those patients palliative relief, and as "terminally ill" patients, there was *no* effective cure.

2. Appellants Are Using Remedies of Their Own Confection.

Astonishingly, the government asserts that Appellant patients are not treating themselves with "home remedies of [their] own confection." (Gov. Br. at 46.) The government first claims that Angel is only asserting a right to obtain cannabis from the John Doe Appellants. In fact, the John Does cultivate Angel's own plants for her; although she cannot grow them herself, they are her own plants. Under any circumstance, the cannabis cooking oil, food, massage oil, and skin balm that Angel processes certainly qualify as home remedies of her own confection. (Opening Br. at 54.)

Next, the government contends that the cannabis plants Monson personally grew herself were not home remedies of her own confection because, "she cannot engage in such activity without first *obtaining* the means to cultivate . . . in addition to cultivation implements." (Gov. Br. at 46.) This claim is preposterous. *Carnohan* neither says nor implies anything about "implements" or "means to" confect home remedies. Indeed, Appellants can think of no home remedy of one's

own confection that would not require "means" or "implements" to make it.

Moreover, *United States v. Cannabis Cultivator's Club*, 1999 WL 111893 (N.D. Cal.), a case relied on by the government, directly contradicts the government's meritless argument. The government quotes from that opinion at pages 42-43 of its brief, but immediately before the quoted language, appears the following clause: "Regardless of whether the Intervenors have a right to treat themselves with marijuana which they themselves grow (a remedy of their own confection), ..." *Id.* Here as elsewhere, the government has selectively omitted language from quoted sentences that directly contradict its claims.

E. The Judgement of the People is Evidence a Right is Fundamental.

The government misconstrues Appellants' argument that, in identifying unenumerated rights, courts should defer to the judgment of the People. (Gov. Br. at 48-52) Under existing Supreme Court doctrine, judges are to assess, not whether *they* approve or disapprove of a particular claim of right, but whether such a right is accepted by the People as fundamental.

Here the People of California expressly recognize "the right to obtain and use marijuana for medical purposes . . . ." Indeed, in *every State* in which voters have had the opportunity, they overwhelmingly passed initiatives similar to California's Proposition 215. Though not dispositive, these factors are irrefutable indicators that

rights threatened by the government in this case are fundamental.

The government's attempt to link Appellants' argument with the issue of racial discrimination is offensive. The government claims, "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 . . . ." (Gov. Br. at 51.) As clearly noted in the Opening Brief, this slippery slope has already been avoided by the limiting principle supplied in *Romer v. Evans*, 517 U.S. 620 (1996), which held that the People of a State cannot violate the United States Constitution. But where the People act to protect a particular liberty, this provides invaluable guidance to judges who must distinguish fundamental rights.

The government quotes *Glucksberg* for the proposition that "[t]here is no reason to think the democratic process will not strike the proper balance" between the interests of the government and patients who require medical cannabis. (Gov. Br. at 55.) In fact, the democratic process *has* resoundingly decided — everywhere it has been put to a vote — that medical patients should have the cannabis they need. The federal government, however, arrogantly thwarts their will with every resource at its disposal.

F. The Government Fails to Meet its Burden Under *Any* Standard of Review.

The government must justify infringements on Appellants' fundamental rights under the CSA by showing they are narrowly tailored to further a compelling governmental interest. *See 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 or on appeal, despite repeated urging by Appellants, if this Court finds a fundamental right, it may find that the government has not satisfied this constitutional burden. *See Doi v. Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir. 2002) (arguments not made in the district court deemed waived).

However, even if Appellants' rights were not deemed to be fundamental, there would still need to be a rational basis for refusing to make an exception for those nonfundamental rights. The general findings cited by the government simply do not address the rights asserted by Appellants in any way. By failing to address Appellants' uncontroverted evidence demonstrating the effectiveness of cannabis, the government has failed to establish a rational basis for prohibiting the exercise of their liberty.

The government's claims that the CSA is rational insofar as it affords a judicially reviewable administrative remedy (Gov. Br. at 54) are in conflict with the

facts explained in the *Amicus Curiae* Brief of Marijuana Policy Project, Rick Doblin, Ph.D., and Ethan Russo, M.D. The lack of meaningful administrative relief discredits the government's "rational basis" argument.

The government claims, "Neither the CSA nor the FDCA deprives citizens of the ability to obtain medication to treat disease or relieve pain and suffering." (Gov. Br. at 53.) That statement is absolutely false. Angel would die an agonizing death without cannabis. ER 064, 088-089. Monson would face the choice between debilitating pain and debilitating pharmaceutical side-effects without cannabis. ER 093-095.

Under color of the authority of the CSA, the government is blatantly exceeding its proper role as "market regulator" and is using the CSA — a criminal statute intended to combat *illegal drug abuse* — as a substitute for the professional medical opinions of physicians. Appellants require this Court to provide protection against such government overreaching.

V. APPELLANTS MAY LAWFULLY POSSESS AND CULTIVATE CANNABIS PURSUANT TO THE MEDICAL NECESSITY DOCTRINE.

In its brief, the government quotes selected portions of *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001). (Gov. Br. at 55-57.) Those quoted portions were not unanimous, as the government implies, but were

the views of five justices. As noted by the concurrence, the language the government quotes is "unwarranted and unfortunate", "gratuitous[]", and "completely unnecessary". 532 U.S. at 500-01 (Stevens, J., concurring in judgment). "Because necessity was raised in this case as a defense to *distribution*, the Court need not venture an opinion on whether the defense is available to anyone other than *distributors*." *Id.* at 501 (emphasis added). Accordingly, the language the government quotes of the "Court's opinion on this point is pure dictum." *Id.* at 502. As such, it is not binding precedent on this Court or on the Supreme Court should this case ever reach it.

Consequently, except as to medical cannabis *distribution*, this Court's decision in *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999), remains the law of this Circuit, protecting Appellants and their activities.

VI. THE PUBLIC INTEREST FACTORS WEIGH IN FAVOR OF THE ENTRY OF A PRELIMINARY INJUNCTION.

The district court found that the issues in this case have "a clear impact on the public interest of all Californians," and that the government's interests "wane in comparison with the public interests enumerated by plaintiffs and by the harm they would suffer if denied medical marijuana." 248 F. Supp. 2d at 930, 931, ER 264,

265. The district court reluctantly concluded that prior decisions of this Court restrained Appellants from establishing the "irreducible minimum" of a likelihood of success on the merits under the law of this Circuit. *Id.* at 931, ER 265.

The district court, in its pre-*McCoy* decision, made clear that it believed this Court is the more appropriate forum to apply the recent changes in Supreme Court jurisprudence (as this Court did in *McCoy*) to the application of the CSA presented here: "In the final analysis, this Court cannot undertake the resolution of this important issue as it is constrained from doing so by existing Circuit precedent . . . ." *Id.*, at 926, ER 259.

In view of the changed constitutional landscape following the decisions in *Lopez*, *Morrison*, and *McCoy*, Appellants have, in fact, made their necessary low showing of success on the merits (*Dataphase Systems. Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)), especially where, as the district court found, the risk to the government is low and the harm to Appellants is substantial. 248 F. Supp. 2d at 931, ER 265.

The government's additional reliance on the Supreme Court's decision in *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) to advance its public interest argument is also unavailing. In that decision, the Supreme Court specified that it was not addressing the constitutional issues present here. *Id.*, at

495. Consequently, the matter is now ripe for this Court of Appeals.

VII. CONCLUSION

For the foregoing reasons, the district court's order should be reversed.

Dated: June 11, 2003

ROBERT A. RAICH
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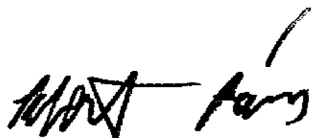

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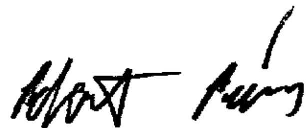
CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Appellants' Reply Brief is proportionately spaced and has a typeface of 14 points. The brief, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, and the Certificate of Service, contains 6,998 words as counted by WordPerfect.



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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

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