No. 03-15481

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL McCLARY RAICH, et al.,

Plaintiffs-Appellants,

v.

ALBERTO GONZALES, as United States Attorney General, et al.,

Defendants-Appellees.

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.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Codes and Statutes

Other Authorities

INTRODUCTION

Appellants' Opening Brief demonstrated that prohibiting Angel Raich's medical cannabis activities – which the *undisputed evidence* establishes are necessary to save her from intolerable pain and death – would unduly burden her fundamental rights and would thus violate the Fifth Amendment's Due Process Clause and the retained rights referred to in the Ninth Amendment.

The government does not attempt to refute Appellants' showing that the Due Process Clause and the Ninth Amendment protect not only the fundamental right to "life," but also the fundamental rights to make life-shaping decisions, preserve bodily integrity, and avoid severe pain. Nor does it dispute that its prohibition of Angel's medically necessary activities must be ruled unconstitutional if this Court applies the undue burden standard. Instead, it simply denies that *any* fundamental rights are at stake and insists that mere rationality review applies. The government's argument is untenable.

The government fails to cite *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court's most recent – and thus controlling – ruling on the substantive protections of the Due Process Clause. As a result of this omission and its misunderstandings of the Supreme Court's other applicable opinions, the government characterizes Angel's fundamental rights far too narrowly and fails to engage in the historical analysis that the Supreme Court's precedents demand. The

government compounds these errors by relying heavily on plainly inapplicable cases involving attempts to obtain laetrile in commerce as an elective treatment and persons seeking to select a healthcare provider who fails to satisfy basic licensing requirements.

Before examining the numerous omissions and flawed premises underlying the government's argument for rationality review, an important inaccuracy that pervades the government's brief must be corrected. The government repeatedly asserts that Angel seeks to use medical cannabis "free of the lawful exercise of the government's police power," *i.e.*, "free from government regulation." *E.g.*, Appellees' Br. at 15, 17, 19-20, 26, 28-30. That is simply not true. Appellants have made it abundantly clear that Angel challenges only the constitutionality of complete *prohibition* of her medical cannabis use, and that she does not object to reasonable regulations of such use. *See* Opening Br. at 9, 12-14.

The government also errs in dismissing the Ninth Amendment based on *United Public Workers v. Mitchell*, 330 U.S. 75, 95-96 (1947). Appellees' Br. at 33-34. *Mitchell* unjustifiably collapsed the Ninth and Tenth Amendments, which were adopted to address different problems. *See* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 234-52 (2004). *Mitchell* has been superseded by more recent cases – which the government fails to cite – in which the Supreme Court has expressly relied on the Ninth Amendment to support its

recognition of unenumerated rights. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992) (citing Ninth Amendment as textual support for holding); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579 & n.15 (1980) ("the Ninth Amendment" supports "recognition of important rights not enumerated"); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[t]he Ninth Amendment" supports "the right of privacy"). In any event, Appellants invoke the Ninth Amendment not because it alters the Supreme Court's Due Process Clause jurisprudence, but rather because it provides strong textual and historical support for that jurisprudence.

I. THE GOVERNMENT FAILS TO REFUTE APPELLANTS' SHOWING THAT PROHIBITING ANGEL'S MEDICALLY NECESSARY ACTIVITIES WOULD UNDULY BURDEN HER FUNDAMENTAL RIGHTS.

A. The Government Fails Even to Cite *Lawrence v. Texas*.

The government's failure to cite *Lawrence v. Texas* is inexplicable. The Supreme Court's opinion makes it clear that *Lawrence* is the latest in the long line of cases that recognize the "substantive reach of liberty under the Due Process Clause." 539 U.S. at 564. To support its ruling, the *Lawrence* Court engaged in a lengthy analysis of the leading cases that recognized fundamental rights. It said that *Griswold* was "the most pertinent beginning point" for its analysis, *Lawrence*, 539 U.S. at 564. It emphasized that *Casey* held that decisions "'involving the most intimate and personal choices a person may make in a lifetime" are "central to the

liberty protected by the [Due Process Clause].'" *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). And it identified the line of cases it was applying as "confirm[ing]" that the "protection of liberty under the Due Process Clause has a substantive dimension of *fundamental* significance." *Id.* at 565. By holding that *the government* bore the burden of proof – it had to "justify" the statutory prohibition at issue, *id.* at 578 – the Court made it clear that it was applying a more demanding standard than rationality review, under which *the challenger* bears the burden of proof.

For these reasons, the government makes a major error in failing to cite *Lawrence*. This error infects much of the government's flawed analysis, which repeatedly neglects to apply relevant aspects of *Lawrence* and its progenitors.

B. Supreme Court Precedent Condemns the Government's Mischaracterizations of Angel's Fundamental Rights.

The government wrongly suggests that the issues here resemble those in *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997), which held that there is no constitutional right to assisted suicide. The interests at issue here are diametrically opposite to those asserted in *Glucksberg*. This case involves not an asserted right to *die* or control the manner of one's *death*, *compare* Appellees' Br. at 22, but rather Angel's fundamental rights to life – which is expressly enumerated, and is the most fundamental right of all – and to obtain medical care that is necessary to avoid intolerable pain and *preserve life*.

Moreover, the *Glucksberg* Court was concerned that recognizing a right to die would result in "involuntary euthanasia" of the mentally incompetent and the severely disabled. 521 U.S. at 732-33. Here, in contrast, no innocent third party could be threatened if Angel is allowed to take the one medication that can save her from intolerable pain and death. Opening Br. at 5-8.

1. The government wrongly demeans Angel's fundamental rights by focusing only on the specific activities at issue and by describing those activities in misleading terms.

The government insists that "there must be a 'careful description' of the asserted fundamental liberty interest" – meaning that courts should focus only on the specific activities at issue – and characterizes Angel as seeking a right to "use marijuana." Appellees' Br. at 16, 22 (quoting *Glucksberg*, 521 U.S. at 721). Contrary to the government's suggestion, the Supreme Court has never equated a description that is "careful" with one that is "narrow." To the contrary, both before and after *Glucksberg*, the Court has made it clear that it is inappropriate to describe fundamental rights in overly narrow terms.

In *Casey*, the Court did not speak narrowly of "the right to abort a fetus before it becomes viable," but rather described the fundamental rights at issue in broad terms. The "choice" at issue was not merely whether to have an abortion or not, but rather was among "the most intimate and personal choices a person may make in a lifetime, [a] choice[ ] central to personal dignity and autonomy." 505

U.S. at 851. Similarly, the Court spoke of the woman's interest in "bodily integrity" and in "retain[ing] the ultimate control over her destiny and her body, claims implicit in the meaning of liberty." *Id.* at 858, 869. These broader interests, the Court held, were "central to the liberty protected by the [Due Process Clause]." *Id.* at 851.

In *Lawrence*, the Supreme Court reaffirmed and extended *Casey*'s approach of describing fundamental rights in broad terms. Rejecting the government's attempt to limit "liberty" by focusing narrowly on the specific activities at issue, the Court said that it "demean[ed] the claim the individual put forward" to say that he asserted merely "a fundamental right to engage in consensual sodomy." 539 U.S. at 567. Here, the government is using the same tactic condemned in *Lawrence*: It "demeans" Angel's right to life and her fundamental rights by characterizing her as seeking a right to "use marijuana," and thus "fail[s] to appreciate the extent of the liberty at stake." *Id.*

The government further demeans Angel's fundamental rights by describing her medically necessary activities misleadingly in two respects.

First, by putting the word "medical" in quotes and using the phrase "*asserted* medicinal purposes," the government insinuates that Angel is really seeking a right to "use marijuana" for *recreational* purposes. Appellees' Br. at 10, 23 (emphasis added). These insinuations are entirely inappropriate. The

undisputed evidence in the record shows that Angel takes cannabis because her physician has determined that only it can alleviate her intolerable pain and prevent her wasting syndrome from killing her. Opening Br. at 5-8. At this stage of the proceedings, the government – which failed to introduce any evidence before the District Court – must take the record as it stands. *See id.* at 37 n.12.

Second, the government misleadingly asserts that Angel asserts a right to "*obtain* marijuana." Once again, the undisputed evidence in the record is to the contrary: Angel is *unable to grow* the cannabis she needs, and thus relies on her two caregivers to grow her own specifically for her pursuant to her instructions. *Id.* at 8. Angel does not "obtain" the cannabis because *it belongs to her all along*; her caregivers simply perform the physical acts that she is unable to perform.

2. The government wrongly asserts that the fundamental right to obtain necessary medical care is limited to the abortion context.

The fundamental right to obtain necessary medical care does not apply only in "the specialized context of abortion." Appellees' Br. at 32. To begin with, the Court has recognized the fundamental right to obtain necessary medical care in cases that had nothing to do with abortion. For example, in *Whalen v. Roe* – which the government does not cite – the Court assumed that the Due Process Clause precludes "total prohibition" of one's "right to decide independently, with the advice of his physician, to acquire and to use needed medication." 429 U.S. 589,

603 (1977).

Moreover, the Supreme Court's reasoning in *Casey* and *Stenberg v. Carhart*, 530 U.S. 914 (2000), would be incoherent if the fundamental right to obtain necessary medical care were merely derivative of the right to obtain an abortion. *Casey* held that a woman has a "right to choose to terminate her pregnancy" *only* before her fetus becomes viable (*i.e.*, capable of surviving outside the womb). 505 U.S. at 870. The Court thus held that the "undue burden" standard applies *only* to laws that affect "a woman seeking an abortion of a *nonviable* fetus." *Id.* at 877 (emphasis added).

In contrast, the *Casey* Court held that, once the fetus is viable, the government can promote its "substantial" interest in potential life by *prohibiting* the woman from obtaining an abortion – "except where it is necessary, in appropriate medical judgment, for the preservation of [her] life or health." *Id.* at 879 (internal quotation marks omitted). In other words, the right to *an abortion* expires once the fetus becomes viable. *See id.* at 870 ("We conclude the line should be drawn at viability, so that *before that time* the woman has a right to choose to terminate her pregnancy.") (emphasis added).

It follows that the right to an abortion cannot explain the "life or health" exception. The enumerated right to life could explain the "life" component of the exception, but *Casey* and *Stenberg* relied only on unenumerated fundamental

rights. In any event, the "health" component of the exception *must* have an independent constitutional basis. The fundamental right to obtain necessary medical care is the *only* post-viability interest the woman has that can justify the "life or health" exception to laws prohibiting the abortion of a viable fetus.

This point is confirmed by *Stenberg*, where the Supreme Court held that the law at issue violated the Due Process Clause for "two independent reasons": (i) it imposed an undue burden on "the right to choose abortion itself" *and* (ii) it lacked a health exception. 530 U.S. at 930. The Court recently reiterated that in *Stenberg* the "lack of a health exception was an '*independent* reaso[n]' for finding the ban unconstitutional." *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961, 969 (2006) (emphasis added) (alteration in original). Because the Court has thus clearly distinguished the woman's fundamental right to obtain necessary medical care from her "right to choose abortion itself," the government's attempt to limit the application of *Casey* and *Stenberg* is untenable.

Finally, to the extent that the government attempts to evade the logic of *Casey* and *Stenberg* by suggesting that abortion cases are somehow hermetically sealed off from the rest of constitutional law, *see* Appellees' Br. at 32, the Supreme Court has made it clear that its reasoning in abortion cases applies to non-abortion contexts. Perhaps the most notable example is *Lawrence*, where the Court relied heavily on the reasoning of *Casey* and concluded that it undermined "[t]he

foundations of *Bowers* [*v. Hardwick*]," which, of course, did not involve abortion. *Lawrence*, 539 U.S. at 573-74, 576-78.

C. The Government's Assertions About the Role of History and Tradition Under the Due Process Clause Are Inconsistent With Supreme Court Precedent.

1. The government wrongly suggests that "liberty" protects only the specific activities that are "deeply rooted" in our nation's history and tradition.

That a right is "deeply rooted" in our nation's history and tradition may be *sufficient* for it to be deemed fundamental, but it is not *necessary*. Regardless of history and tradition, a right is "fundamental" if it is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

In suggesting that a right can be "fundamental" only if it is "deeply rooted," Appellees' Br. at 17, the government wrongly ignores that – both before and after *Glucksberg* – the Supreme Court has recognized fundamental rights to engage in activities that our nation's laws historically prohibited. In addition to the examples cited in Appellants' Opening Brief (at 23-24 & n.7), post-*Glucksberg* examples include the Court's holding that "'the Constitution's guarantees of fundamental individual liberty" protect a pregnant woman's right to have a "partial birth abortion" when a physician has determined that this medical procedure is necessary to preserve her life or health, *Stenberg*, 530 U.S. at 921. Another recent example is *Lawrence*, where the Court recognized that "liberty" protects the

decision to enter into intimate same-sex relationships and thus protects the sexual acts typical of such relationships. 539 U.S. at 578. The words "deeply rooted" are strikingly absent from the majority opinion in *Lawrence*.

2. The government fails to mention that our nation has no longstanding history of prohibiting medical cannabis use.

Under the Due Process Clause, the proper historical analysis begins by determining whether there is a "longstanding history in this country of laws directed at" the specific activities at issue. *Lawrence*, 539 U.S. at 568; Opening Br. at 23. Just as the *Lawrence* Court began its historical analysis by examining whether our nation's sodomy laws have historically prohibited "homosexual conduct," 539 U.S. at 568, and just as the *Glucksberg* Court began by examining at length the extent to which the States have historically prohibited "assisted suicide," 521 U.S. at 710-16, the historical analysis here should begin by examining whether our nation's laws have historically prohibited medical cannabis use.

Unlike the "centuries"-old laws upheld in *Glucksberg*, 521 U.S. at 523 – but like the laws struck down in *Lawrence* – laws prohibiting medical cannabis use "did not develop until the last third of the 20th century," 539 U.S. at 570; Opening Br. at 24-28. The government, however, refuses to engage in the historical analysis required by the Supreme Court's opinions. Instead, it offers a wide-ranging history of "governmental regulation of drugs" *generally* and a selective account of the history of laws targeting *recreational* marijuana use, Appellees' Br.

at 23-26 – even though Appellants do not contest the constitutionality of those types of laws.

At the same time, the government inexplicably ignores the history of *medical* use of cannabis – and that is the only history that matters. For example, the government fails to mention that:

- during the 19th century, American physicians often prescribed cannabis and medical journals published over 100 articles attesting to its therapeutic effectiveness;
- the same book that the government cites as reporting that "every State . . . had restricted or prohibited marijuana use" by 1937, Appellees' Br. at 25, also reported that these prohibitions applied only to "*nonmedical* purposes," Richard J. Bonnie & Charles H. Whitebread, *The Marihuana Conviction* 51 (1974) (emphasis added);
- through at least "late 1965," "almost all States" *declined* to prohibit the medical use of cannabis, as the Supreme Court recognized in *Leary v. United States*, 395 U.S. 6, 16-17 (1969); and

The government's omissions of these facts are especially striking because Appellants' Opening Brief (at 24-28) discusses them at length.

3. The government wrongly asserts that it is irrelevant that eleven States and a number of other Western nations have authorized medical cannabis use during the past decade.

The government asserts that the increasing number of States that have authorized medical cannabis use in recent years is irrelevant, Appellees' Br. at 26, and it fails even to acknowledge the fact that a number of other Western nations have done likewise. *See* Opening Br. at 31-32. Once again, the government's

position is inconsistent with the analysis in *Lawrence.*

In *Lawrence*, the Supreme Court held that where, as here, "there is no longstanding history in this country of laws directed at [the activities at issue]," the historical analysis should focus on whether there is an "emerging awareness" that liberty protects those activities. 539 U.S. at 568, 572. The Court relied on the recent repeals of sodomy prohibitions by twelve States and a number of Western nations to find that there was an "emerging awareness" that liberty protects same-sex intimate conduct. *Id.* at 570, 572.

Here there is evidence similar to that in *Lawrence* of an "emerging awareness that liberty offers substantial protection" to the activities at issue. *Id.* at 572. Appellants previously demonstrated that ten States and a number of other Western nations had authorized the medical use of cannabis – all since 1996 – and predicted that the number of States would likely increase because polls show that roughly four out of every five Americans favor it. Opening Br. at 29-30. Just weeks ago, Rhode Island became the eleventh State to authorize the medical use of cannabis. M.L. Johnson, *Rhode Island Legalizes Medical Marijuana*, ABC News (Jan. 3, 2006), *available at* http://abcnews.go.com/Health/wireStory?id=1466475. Twenty-eight States – a majority that is steadily increasing – now recognize the medical benefits of cannabis in some form. Opening Br. at 29 n.8. Under *Lawrence*, the powerful and undeniably growing trend of allowing seriously ill

patients like Angel to use cannabis on a physician's recommendation provides strong support for recognizing the fundamental rights at issue here.

D. The Government's "Slippery-Slope" Argument Ignores the Objective Markers that Readily Distinguish Substances Without Legitimate Medical Benefits.

The government argues that, if this Court recognizes Angel's fundamental rights, "there is no limiting principle" that would prevent others from claiming a right to use "other Schedule I controlled substances or unapproved drugs – such as heroin or laetrile." Appellees' Br. at 31. A unanimous Supreme Court recently rejected a similar "slippery-slope" argument in terms that are apt here: "The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, – S. Ct. –, 2006 WL 386374, at *11 (Feb. 21, 2006).[1] The government's "slippery-slope" argument fails here as well.

As Appellants have demonstrated, there are easily ascertainable objective markers for distinguishing legitimate claims like Angel's from claims to use

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[1] In *O Centro Espirita*, the Supreme Court rejected the government's claim that the CSA establishes a "closed" sytem that allows no exceptions. The Court explained that this claim – which the government resurrects here, Appellees' Br. at 3 – was "fatally undermined" by "[t]he well-established peyote exception," which has allowed "hundreds of thousands" of Native Americans to use that Schedule I controlled substance for religious purposes. 2006 WL 386374, at *10-11; *see also* Opening Br. at 46-47 (making same points about peyote exception).

substances such as heroin and laetrile.

First, "substantial medical authority," *Stenberg*, 530 U.S. at 938, supports the medical use of cannabis by seriously ill patients like Angel who are among the small class of patients for whom available prescription drugs are ineffective or cause intolerable side effects, Opening Br. at 34-38 (discussing medical evidence). Contrary to the government's misleading suggestion, *see* Appellees' Br. at 32 n.9, the medical authorities that have recognized the therapeutic benefits of cannabis for patients like Angel include not only the Institute of Medicine, but also reports in *Scientific American* and other established medical journals. Opening Br. at 36. Indeed, "numerous" studies "support the use of medical marijuana" by patients like Angel. *Conant v. Walters*, 309 F.3d 629, 642 (9th Cir. 2002) (Kozinski, J., concurring).[2]

Second, substantial numbers of States and other Western nations allow seriously ill patients to take cannabis when (as in Angel's case) the patient has tried numerous conventional medications without success and a physician has determined that only cannabis can alleviate the patient's conditions. Opening Br.

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[2] As part of its effort to avoid confronting the medical evidence supporting Angel's use of cannabis, the government misleadingly focuses on "smoking." Appellees' Br. at 32. Angel takes cannabis largely through such other delivery mechanisms as a vaporizer, oils, balm, and food. Opening Br. at 7. In any event, the Institute of Medicine found that smoked cannabis can be appropriate for patients like Angel for whom "the long-term risks are not of great concern" in light of the "debilitating symptoms" they would otherwise suffer. *Id.* at 35.

at 28-32.

The Supreme Court said in *Casey* that "[l]iberty must not be extinguished for want of a line that is clear." 505 U.S. at 869. Here, however, the line is clear: The substantial support for Angel's medical cannabis use from medical authorities, the States, and other Western nations – as well as the overwhelming endorsement of the American public – enables courts easily to distinguish and reject claims to use substances such as heroin and laetrile for purported medical purposes.

E. Congress's Placement of Cannabis in Schedule I Cannot Justify Prohibiting Angel From Taking the Only Medication that Enables Her to Avoid Intolerable Pain and Death.

The government cannot rely on Congress's bare assertion that cannabis has no medical value to override Angel's fundamental rights. To begin with, the placement of cannabis in Schedule I in 1970 cannot fairly be deemed a "finding," because Congress never held a single hearing or considered any evidence before it put cannabis in Schedule I. *See* Amicus Br. of ACLU and DPA at 16-19. Nor has Congress made any "finding" regarding the medical value of cannabis since 1970. The government uses the term "provision" (*not* "finding") to describe the 1998 congressional declaration it cites, Appellees' Br. at 8, because that declaration – which was buried in an omnibus bill of several hundred pages – did not purport to make any finding as to the medical value of cannabis.

In any event, even an actual congressional "finding" must give way to

substantial medical authority when fundamental rights are at stake, as evidenced by this Court's recent opinion in *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006). In that case, the Court applied *Stenberg* to hold that it "cannot defer to Congress's finding that the procedures banned by the [Partial-Birth Abortion Act of 2003] are *never* required to preserve the health of women" because "a substantial disagreement exists in the medical community regarding whether those procedures are necessary in certain circumstances for that purpose." *Id.* at 1175-76 (emphasis added).

As in *Planned Parenthood Federation*, here Appellants have demonstrated that "substantial medical authority," *Stenberg*, 530 U.S. at 938, supports Angel's medical cannabis use, Opening Br. at 34-37; *see also Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005) (acknowledging the "strong arguments" that "marijuana does have valid therapeutic purposes"). Just as this Court refused to defer to Congress's finding in *Planned Parenthood Federation*, it should not allow Congress's placement of cannabis in Schedule I to trump Angel's fundamental constitutional rights.

F. *Carnohan* and Other Laetrile Cases Do Not Support the Government's Position.

While ignoring the Supreme Court's opinion in *Lawrence*, the government relies very heavily (Appellees' Br. at 17-22, 26-30, 32) on the short *per curiam* opinion in *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980), which the

government insists "foreclose[s]" Appellants' Due Process Clause argument (Appellees' Br. at 20). *Carnohan*, however, differs from this case in so many ways that it is hard to know where to begin.

First, the *Carnohan* Court expressly said that it was *not deciding* whether the Constitution protects the right to take a home-grown medication. *See* 616 F.2d at 1122 ("We need not decide whether Carnohan has a constitutional right to treat himself with home remedies of his own confection."). That issue was not presented in *Carnohan* because the plaintiff challenged the government's prohibition of "laetrile *traffic*" – he sought to obtain laetrile in commerce. *Id.* (emphasis added). In contrast, Angel's own cannabis is grown in home gardens by her personal caregivers, free of charge, for use only by her. It is thus among the "home remedies" that *Carnohan* expressly declined to address.

Second, the government wrongly asserts that *Carnohan* involved a "terminally ill cancer patient" who wanted to "use laetrile for the treatment of cancer." Appellees' Br. at 28. As this Court's opinion makes clear, however, the *Carnohan* plaintiff sought to "use laetrile *in a nutritional program* for the *prevention* of cancer." 616 F.2d at 1121 (emphases added).[3] In contrast, Angel

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[3] To support its assertion that the patient in *Carnohan* was terminally ill, the government does not cite *Carnohan*, but instead cites the dissent in *People v. Privitera*, 591 P.2d 919 (Cal. 1979). Appellees' Br. at 29 n.8. Nothing in this Court's opinion in *Carnohan* supports the statement in the *Privitera* dissent that (continued...)

will likely die a quick and very painful death if she is denied cannabis, because it is the only medication that can stave off her life-threatening wasting syndrome and alleviate her other serious medical conditions.

Third, the *Carnohan* plaintiff did not offer evidence (or even allege) that he had tried conventional medications without success or that laetrile was the only substance that could provide the "nutritional" and "prevent[ative]" benefits he desired. Instead, he simply asserted a right to use one of many treatments that were available to him. Here, in contrast, Angel's physician determined that cannabis was necessary for her *only after she tried more than 35 conventional medications*, all of which caused her "unacceptable adverse side effects." ER 89-90 (Decl. of Dr. Frank Lucido ¶ 7) (listing 35 medications and stating that Angel tried "others" as well). Angel's physician further determined that cannabis is the *only* medication that can alleviate her intolerable pain and avert her death.

In addition to *Carnohan*, the government relies (Appellees' Br. at 18-21, 28-30) on two laetrile opinions from other jurisdictions that were cited in *Carnohan*: *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980), and *People v. Privitera*, 591 P.2d 919 (Cal. 1979). Neither supports the government's position.

In *Rutherford*, the Tenth Circuit held that terminally ill cancer patients did

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the patient in *Carnohan* was deemed terminally ill when this Court considered his claims.

not have a right to use laetrile because the Constitution does not protect the "*selection* of a particular treatment." 616 F.2d at 457 (emphasis added). In contrast, it said, "the decision by the patient *whether to have a treatment or not* is a protected right." *Id.* (emphasis added). Here, unlike *Rutherford*, the issue is whether Angel can "have a treatment or not," *id.*, because cannabis is the *only* medication that can save her from intolerable pain and death. Moreover, whereas the *Rutherford* patients did not allege – let alone submit a physician's declaration – that no substance other than laetrile could alleviate their symptoms, here the undisputed evidence in the record shows that only cannabis can save Angel from intolerable pain and death.[4]

As for *Privitera*, it was "not an action on behalf of the class of terminally ill cancer patients." 591 P.2d at 925. In fact, it did not address the claims of *any* patient. *Privitera* addressed the claims of a *doctor* and his *laetrile suppliers* who were "convicted of *selling* laetrile" to patients *regardless of whether they were terminally ill*. 591 P.2d at 921, 925 (emphasis added). The doctor "sometimes neither took a medical history from nor personally examined the patients for whom

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[4] Without citing *Rutherford* itself, the government quotes the unpublished opinion in *United States v. Cannabis Cultivator's Club*, 1999 WL 111893 (N.D. Cal. Feb. 25, 1999), to assert that "'[t]he *Rutherford* plaintiffs had no other treatment available.'" Appellees' Br. at 29 (quoting *Cannabis Cultivator's Club*, 1999 WL 111893, at *3) (alteration in original). That is not accurate. The Tenth Circuit indicated that "no *cure* [was] presently available" for the patients, 616 F.2d at 456 (emphasis added), but it never suggested that no available conventional medication could alleviate their conditions or prolong their lives.

he prescribed laetrile" and his suppliers were "not qualified to diagnose cancer." *Id.* There was "[s]ubstantial evidence" that such actions led cancer patients who could be helped by conventional treatments to eschew such treatments in favor of laetrile, and to experience "'needless deaths and suffering'" as a result. *Id.* at 924-25 (quoting 42 Fed. Reg. 39805). No similar concerns are present here. Angel tried more than 35 conventional medications – and experienced unacceptable side effects from each – before her physician determined that only cannabis can alleviate her painful conditions and enable her to avoid succumbing to her life-threatening wasting syndrome. The only way that Angel will experience "needless death[ ] and suffering" is if the federal government succeeds in its efforts to prohibit her from taking cannabis.

Finally, in all of the laetrile cases – including *Carnohan* – there was no *evidence* that laetrile would be *effective* (*i.e.*, that it would provide medical benefits) for the patients who sought to use it. In contrast, here the undisputed evidence in the record shows that cannabis alleviates Angel's numerous medical conditions and keeps her life-threatening wasting syndrome at bay.[5]

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[5] For the reasons stated above, the District Court's opinion below wrongly relied on *Carnohan* and *Rutherford*. *See Raich v. Ashcroft*, 248 F. Supp. 2d 918, 928 (N.D. Cal. 2003). The other district court opinions that the government cites (*see* Appellees' Br. at 20-21) lack persuasive value for the same reason. *See, e.g.*, *County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1204 (N.D. Cal. 2003); *Cannabis Cultivator's Club*, 1999 WL 111893, at *1. Moreover, cooperatives with numerous members – not individual patients – were involved in *County of Santa*
(continued...)

G. *NAAP* and Other Cases Sustaining Regulations of Healthcare Providers Do Not Support the Government's Position.

Cases upholding *regulations* of healthcare providers do not support the government's assertion that it may completely *prohibit* Angel from taking the only medication that can save her from intolerable pain and death. Appellants freely *acknowledge* that the government can constitutionally regulate – indeed, *heavily* regulate – medical cannabis use. Opening Br. at 13. The availability of regulations to ensure that such use is for legitimate medical purposes is a major reason why a blanket prohibition on such use is unjustifiable. *Id.* Appellants have never suggested that other reasonable regulations, such as educational and training standards, would raise constitutional concerns.

The government thus errs in claiming support (Appellees' Br. at 18-20, 27) from *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* ("*NAAP*"), 228 F.3d 1043 (9th Cir. 2000), which rejected a challenge by unqualified psychoanalysts to the State's licensing requirements of "a doctorate, or a degree deemed equivalent" and "at least two years of supervised professional experience." *NAAP* did *not* hold that a State may *prohibit* a patient

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Cruz and *Cannabis Cultivator's Club*, and there was no evidence that the cooperative members had tried conventional medications without success before seeking to use cannabis, or that only cannabis would prevent them from dying. Finally, none of these district court opinions considered the implications of Casey, *Stenberg*, and *Lawrence* for "last-resort" medical cannabis patients like Angel.

from obtaining psychoanalysis as a method of treatment. Rather, it held that "there is no fundamental right to choose a mental health professional *with specific training*." *Id.* (emphasis added). Because *NAAP* did not involve an attempt to prohibit a treatment – let alone a treatment that, as here, is necessary to avert intolerable pain and death – it is consistent with Appellants' argument.

Similarly, the government is wrong in claiming support (Appellees' Br. at 19 & n.6) from *Mitchell v. Clayton*, 995 F.2d 772 (7th Cir. 1993), and *Sammon v. New Jersey Board of Medical Examiners*, 66 F.3d 639 (3d Cir. 1995), because both cases involved basic education and training requirements similar to those upheld in *NAAP*. *See Mitchell*, 995 F.2d at 775 (patients had no "constitutional right to have acupuncturists who have not been to chiropractic school treat their ailments"); *Sammon*, 66 F.3d at 644-46 (rejecting challenge to regulations that required aspiring midwives to complete 1800 hours of study at a school of midwifery or a maternity hospital). Moreover, in *Sammon*, the Third Circuit indicated that a statute *prohibiting* midwifery *would* violate the Due Process Clause: "The statute regulates who may engage in practicing midwifery in New Jersey. It does *not* prohibit midwifery. . . . It thus does not foreclose the parents from engaging the services of a midwife or from electing birth at home, natural child birth, or any particular procedure in the course of delivery." 66 F.3d at 644 (emphasis in original).

II. THE GOVERNMENT PLACES UNDUE WEIGHT ON *DICTA* IN *OCBC* THAT WERE MEANT TO ENSURE THAT *COOPERATIVES* COULD NOT INVOKE THE DOCTRINE OF NECESSITY.

Appellants have shown that the Supreme Court's ruling in *United States v. Oakland Cannabis Buyers' Cooperative* ("*OCBC*"), 532 U.S. 483 (2001), did not decide whether the CSA allows a medical cannabis *patient* to invoke the doctrine of necessity, because the case involved the claims of a cooperative and its executive director, and they had violated the terms of the CSA out of choice rather than necessity. Opening Br. at 49-50 & n.160. Nevertheless, the government asserts that this Court should follow a comment – in *dicta*, in a footnote – that "'there is no medical necessity exception to the prohibitions [in the CSA], even when the patient is 'seriously ill' and lacks alternative avenues for relief.'" Appellees' Br. at 39 (quoting *OCBC*, 532 U.S. at 494 n.7). *OCBC*, however, concerned only the "necessity" doctrine as applied to cooperatives, not genuine medical necessity patients. In any event, *dicta* in Supreme Court opinions carry "great weight" *only* "'as prophecy of what *that Court* might hold.'" *Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004) (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n. 17 (9th Cir. 2000)).

For three reasons, the *dicta* in *OCBC* do not carry "great weight." *First*, two of the five Justices who joined the relevant footnote (Chief Justice Rehnquist and Justice O'Connor) are no longer on the Court. *Second*, three of the current Justices

(Justice Breyer, who was recused in *OCBC*, and Chief Justice Roberts and Justice Alito, who just joined the Court) have not considered the issue. *Third*, three Justices who remain on the Court strongly indicated in *OCBC* that individual patients *can* invoke the necessity doctrine under the CSA. *See* 532 U.S. at 502 (Stevens, J., concurring in the judgment, joined by Souter & Ginsburg, JJ.).

III. THE GOVERNMENT WRONGLY DENIES THAT WHETHER AN "ORDER" IS "VALID" UNDER § 844(a) DEPENDS ON THE LAW OF THE STATE IN WHICH THE "PRACTITIONER" IS LICENSED.

Contrary to the government's suggestion (Appellees' Br. at 42), the Supreme Court's opinion in this case did *not* consider the statutory interpretation argument presented in Appellants' Opening Brief.[6] Indeed, none of the Court's opinions has considered the meaning of "valid . . . *order*" under 21 U.S.C. § 844(a) (emphasis added). It has considered "Congress's express determination that marijuana had no

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[6] Appellants have not "waived" their argument that the CSA allows Angel's medical cannabis use. Appellees' Br. at 40-41. An exception to the waiver rule is proper when failing to address the newly-raised issue "would result in manifest injustice" *or* "the failure to raise the issue properly did not prejudice the defense of the opposing party." *Koerner v. Grigas*, 328 F.3d 1039, 1048-49 (9th Cir. 2003) (internal quotation marks omitted). Both exceptions apply here. *First*, Appellants' argument shows that the CSA does not apply to Angel. Especially in light of *Gonzales v. Oregon* – which was decided after Appellants filed their Opening Brief – it would be a "manifest injustice" to allow the government to prohibit Angel's medically necessary activities pursuant to a statute that does not apply to those activities. *Second*, because the government's brief "responded to" and "fully addressed the issue" of statutory interpretation raised by Appellants, the failure to raise this issue earlier "did not impair the government's position on appeal." *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992).

accepted medical use" *only* for purposes of "statutory coverage of drugs available by a doctor's *prescription*." *Gonzales v. Oregon*, 126 S. Ct. 904, 922 (2006) (discussing *OCBC*) (emphasis added). (The Court's choice of the word "determination" – rather than "finding" – confirms that Congress did not make a "finding" regarding medical value when it put cannabis in Schedule I. *See supra* at 16.)

Nevertheless, citing *dicta* stating that an FDA-approved research program is the "'sole exception'" to the CSA's prohibitions on using a Schedule I controlled substance, the government contends that the Supreme Court has ruled that Angel's physician cannot write a "valid . . . order" for cannabis. Appellees' Br. at 42 (quoting *Raich*, 125 S. Ct. at 2204). This argument is incorrect. It is true that 21 U.S.C. § 823(f) – which discusses FDA-approved research programs – is the only provision of the CSA that *affirmatively authorizes* the use of a Schedule I controlled substance. But the fact remains that the plain text of § 844(a), when read in conjunction with the definition of "practitioner" in 21 U.S.C. § 802(21), makes an *exception* to the CSA's prohibitions. That exception applies when, as here, a patient has a "valid . . . order" written by a physician "otherwise permitted" by "the jurisdiction in which he practices" to "administer . . . a controlled substance in the course of [his] professional practice." Opening Br. at 52.

Contrary to the government's suggestion, *see* Appellees' Br. at 41-42, the

CSA nowhere defines the word "valid." The reason it does not define this word is because its meaning depends on the law of "the jurisdiction in which [the physician] practices." Thus, whether the "order" written by Angel's physician is "valid" depends on California law, which in this case provides that it is indeed "valid." *See* Cal. Health & Safety Code § 11362.5(c) ("Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.").

To be clear, the CSA does prohibit medical cannabis use as a *general* matter. But when – and only when – a State has a law governing the practice of medicine that *differs* from this federal policy, the CSA provides an exception for use pursuant to an "order" that is "valid" under that State's law.

The recent opinion in *Gonzales v. Oregon*, which addressed a question of statutory interpretation that presented a similar federalism problem, supports Appellants' position. In its opinion, the Supreme Court explained that:

> [The CSA] regulates medical practice *insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood.* Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism, which allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons. *The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers.*

126 S. Ct. at 923 (emphases added) (internal quotation marks omitted). The Court's opinion demonstrates that, when possible, the CSA should be interpreted to avoid interfering with the States' regulation of the legitimate practice of medicine.

Similarly, in *OCBC*, three Justices emphasized that courts must show "respect for the sovereign States that comprise our Federal Union" and that "whenever possible" courts should "*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.'" *OCBC*, 532 U.S. at 502 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) (emphasis added); *see also Raich*, 125 S. Ct. at 2238-39 (Thomas, J., dissenting) (same); *Conant*, 309 F.3d at 639 (same), *cert denied*, 540 U.S. 946 (2003).[7]

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[7] To preserve the issue for consideration by the Supreme Court, Appellants continue to assert their Tenth Amendment "federalism" claim. *See Gonzales v. Oregon*, 126 S.Ct. at 941 (Thomas, J. dissenting) ("I agree with limiting the applications of the CSA in a manner consistent with the principles of federalism and our constitutional structure.").

CONCLUSION

For the reasons stated above and in Appellants' Opening Brief, this Court should direct the District Court preliminarily to enjoin the federal government from interfering with Angel's medical cannabis activities.

Respectfully submitted,

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CERTIFICATION 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 proportionally spaced and has a typeface of 14 points. According to the word processing software used to prepare the brief (Microsoft Word 2000), the brief – including both text and footnotes, and excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, and the Certificate of Service – contains 6,946 words.

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