No. 03-1454

IN THE
Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, *ET AL.*
Petitioners,
v.

ANGEL McCLARY RAICH, *ET AL.*,
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of The Leukemia & Lymphoma Society, Pain Relief Network, California Medical Association, AIDS Action Council, Compassion in Dying Federation, End-of-Life Choices, National Women's Health Network, Global Lawyers and Physicians, and AUTONOMY, Inc. as *Amici Curiae* in Support of Respondents

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[*]

Amici include organizations whose members, like Respondents, suffer from chronic, debilitating, and intensely painful medical conditions, as well as health care professionals who care for them, and associations committed to advancing understanding – in the medical community, legislatures, courts, and society at large – of pain and its humane medical treatment.

Although this case arises from the application of a particular federal statute, the Controlled Substances Act, to prohibit Respondents from pursuing a particular physician-recommended medical treatment, it raises issues not confined to that context, which are of urgent importance to *Amici*.

First, the principle that seriously ill individuals should have primary responsibility for determining, in consultation with the professionals who care for them, the course of their own medical treatment applies with special force when relief from extreme, intolerable pain is concerned. Intense pain is a direct assault on dignity and personality, and requiring an individual to forego effective relief and endure needless suffering is alien to our legal tradition and to the basic ethical norms that guide the practice of medicine.

Second, we are especially troubled that Respondents and those who treat them must make their medical decisions in the shadow of the *criminal* law. Centuries of Anglo-American law stand against the imposition of criminal liability on individuals for pursuing their own lifesaving pain relief and treatment.

As a practical matter, failure to recognize the difference between therapeutic use of a drug and its abuse has far-reaching, pernicious effects. As doctors, medical ethicists, and anthropologists have documented, the Nation remains in the grip of an "epidemic of undertreated pain." B. Rich, *A Prescription*

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[*]No counsel for any party authored any part of this brief. No person or entity, other than *Amici* and their counsel made a monetary contribution toward submission of this brief, which is filed with the parties' written consent.

for the Pain: The Emerging Standard of Care for Pain Management, 26 WM. MITCHELL L. REV. 1, 7 (2000).

As these commentators have explained, this serious, complex problem has many causes, but it is surely exacerbated by the thinness of the line separating provision of palliative care from violation of the criminal law – and by regulatory regimes that are often more reflective of fears and unfounded assumptions than of medical and scientific reality.

SUMMARY OF ARGUMENT

Although we do not believe that it is necessary or advisable to resolve this case on constitutional grounds, *Amici* submit that it cannot be resolved properly without an appreciation of the seriousness of the constitutional interests that Respondents' claim presents.

Without having settled the precise metes and bounds of the substantive right, this Court's precedents teach that the power asserted by the Government would be a serious encroachment on liberty interests safeguarded by the Due Process Clause. Not only is the right to make important decisions concerning the course of one's medical treatment of a piece with other rights recognized as "fundamental" in this Court's modern Due Process cases, the claim of medical necessity is analytically indistinguishable from rights of self-preservation, self-defense, and freedom from duress that were established in our tradition well before the Constitution was ratified. Moreover, Respondents' claim draws special force from the fact that the alternative to which the Government would relegate them is not some abstract loss of decisional autonomy, but rather a life of unremitting, unrelieved physical pain. Because the experience of pain can be so subversive of dignity – and even of the will to live – ethics and legal tradition recognize that individuals pursuing pain relief have special claims to non-interference.

Recognizing the substantiality of Respondents' liberty interest does not mean that the judgment below should be sustained exclusively or even primarily on that basis. But it

does lay bare the constitutional pitfalls of interpreting the CSA as the Government proposes: as authorizing prosecution of individuals, like Respondents, who would meet the stringent, long-established test for "necessity." Such a construction is unsound in any event, and to the extent a proper reading of the statute is in tension with *dicta* in *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001) ("*OCBC*"), we submit that it is the *dicta* that should give way.

We finally show that, contrary to the Government's suggestion, the reasons why Respondents possess marijuana are not "irrelevant" to the constitutional question on which review was sought: whether there is a substantial likelihood that the application here at issue is unlawful under Article I. The gravamen of Respondents' case is not merely that their activity is noncommercial or that its effect on interstate commerce is de minimis – although both are surely true – but that it is different in kind and in constitutional stature from that with which the Government seeks to have it "aggregated." Under this Court's precedents, questions concerning the scope of a particular congressional power are resolved in light of, not in isolation from, other important constitutional interests implicated. Given the seriousness of the infringement on liberty interests here (and the tenuous connection to any enumerated power), the power claimed by the Government could not be sustained as a necessary or proper interstate commerce regulation.

I. CRIMINAL RESTRICTIONS ON INDIVIDUALS' ABILITY TO OBTAIN MEDICAL TREATMENT FOR SEVERE PAIN AFFECT LIBERTY INTERESTS PROTECTED BY THE DUE PROCESS CLAUSE.

Although the case is presented as one principally involving the extent of Congress's legislative jurisdiction under the Interstate Commerce Clause, the Government's claimed power to prosecute persons such as Respondents Raich and Monson for possessing a drug determined, in consultation with their physicians, to be medically necessary to sustain themselves and

unenumerated rights, *Poe v. Ullman,* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), that constitutional "liberty" has been construed to encompass.

As much was essentially conceded in the Brief submitted by the United States in *Glucksberg* – and found recognition in each of the opinions in that case and its companion, *Vacco v. Quill*, 521 U.S. 793 (1997). The United States there acknowledged that, for terminally ill adults, there is

> a constitutionally cognizable liberty interest in avoiding the kind of suffering experienced by the plaintiffs in this case. That liberty interest encompasses an interest in avoiding not only severe physical pain, but also the despair and distress that comes from physical deterioration and the inability to control basic bodily or mental functions in the terminal stage of an illness.

Br. for U.S. as *Amicus Curiae,* No. 96-110, at 8.

Although the opinions in those cases declined to recognize a "generalized right to 'commit suicide,'" 521 U.S. at 736 (O'Connor, J., concurring), they placed substantial emphasis on the facial nature of the constitutional challenges presented – and on the fact that the plaintiff parties, although denied assistance in ending their lives, had not claimed to have been prevented from obtaining adequate palliative care. Thus, Justice O'Connor underscored that the Court's decision did not foreclose a claim by "a patient * * * suffering from a terminal illness and * * * experiencing great pain" who had not been permitted to obtain "medication, from qualified physicians, to alleviate that suffering," 521 U.S. at 736, and Justice Breyer's opinion explicitly recognized that the plaintiffs had a liberty interest in "avoidance of unnecessary and severe physical suffering," albeit one that was not "directly at issue," 521 U.S. at 792, because plaintiffs' access to pain relief was uncontested. Both Chief Justice Rehnquist's majority opinion in *Glucksberg* (521 U.S. at 735 n.24) and his concurrence in *Vacco* accepted that the Court's decisions did "'not foreclose the possibility that some

applications of the [challenged] statute[s] may impose an intolerable intrusion on the patient's freedom.'" 521 U.S. at 809 n.13 (quoting 521 U.S. at 751-52 (Stevens, J., concurring in judgments)). *See also id.* at 745 (Stevens, J.) ("Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly '[a]t the heart of [the] liberty' protected by the Due Process Clause") (citations omitted).

Indeed, to the extent that Respondents' interests differ from those of the claimants hypothesized in *Glucksberg*, it is in that they do not seek to escape unbearable suffering by *ending* their lives with their physicians' help. They seek to *prolong* their lives by using a drug, under doctors' care, that, among its other benefits, enables them to tolerate other necessary therapies. *Compare* 521 U.S. at 715-16 (discussing State interest in safeguarding life); *see also Cruzan*, 497 U.S. at 283 n.10.

This emphasis on individual medical circumstances – and on the individual interest in avoiding pain and suffering – follows the path charted in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). In that case, the Court sustained against a Due Process challenge the application of a Massachusetts statute mandating smallpox vaccination. But in so ruling, the Court stressed that it was not presented with the case of an individual who claimed to "be a[n un]fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death." *Id.* at 38. The Court strongly suggested, *id.* at 39, that a different result would obtain in the case of an adult whose "particular condition of * * * health or body" would make vaccination "cruel and inhuman in the last degree." Its resolution of Jacobson's case, the decision cautioned (*id.*), was:

> not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned.

Nor can Respondents' interest be meaningfully distinguished from those recognized in cases addressing governmental barriers to abortion, *see Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Planned Parenthood, Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992) (plurality opinion), or efforts to administer medicine against an individual's wishes, *see Cruzan*, 497 U.S. at 278-79; *see also United States v. Sell*, 539 U.S. 166, 179 (2003) ("an individual has a constitutionally protected liberty 'interest in avoiding involuntary administration of antipsychotic drugs'") (quoting *Riggins v. Nevada*, 504 U.S. 127, 134 (1992)); *Washington v. Harper*, 494 U.S. 210, 227 (1990).[1]

Governmental intrusions on individual decisionmaking in those circumstances are carefully scrutinized both because "our notions of liberty are inextricably entwined with our idea of *physical* freedom and self-determination," *Cruzan*, 497 U.S. at 287 (O'Connor, J., concurring) (emphasis added), and because they involve matters that are "central to personal dignity and autonomy." *Glucksberg*, 521 U.S. at 745 (Stevens, J., concurring in judgment); *see Casey*, 505 U.S. at 852 (a pregnant woman "is subject to anxieties, to physical constraints, to pain that only she must bear * * * * Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role").

Legal recognition of the principle that "[e]very human being of adult years and sound mind has the right to determine what shall be done with his own body," *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.), predates modern constitutional jurisprudence. In 1765, Blackstone described a common law right to bodily integrity as including a right to "the preservation of a man's health from such practices as may prejudice or annoy it." W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *134. And over

[1]Notably, *Riggins* and *Sell* recognized liberty interests – and carefully scrutinized governmental impositions – without expressly describing the interests as "fundamental."

a century ago, this Court observed that: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

That the Government would require Respondents and other individuals to endure *pain* is also constitutionally important. The imperative to avoid or alleviate severe pain is a "consensus value" shared by – indeed, central to – virtually all human beings.[2] Few interests more clearly reflect the "'basic values that underlie our society.'" *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) ((quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

Accordingly, the Due Process Clause has been construed to require the government to attend to the medical needs of those within its custody, *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983), and cases involving the guarantees enumerated in the Bill of Rights attach special importance to governmental complicity in – or indifference to – physical suffering. In *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976), this Court held that because infliction of unnecessary suffering "is inconsistent with contemporary standards of decency," deliberate indifference to inmates' medical needs – whether manifested "by prison doctors * * * or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed" – violates the Eighth Amendment. *See also Hudson v. Macmillan*, 503 U.S. 1, 6-9 (1992) (reaffirming that the Eighth Amendment proscribes "unnecessary and wanton infliction of pain," even if no serious physical injury eventuates); *Louisiana ex rel. Francis*

[2]S. Kreimer, *The Second Time as Tragedy: the Assisted Suicide Cases and the Heritage of Roe v. Wade*, 24 HASTINGS CONST. L. Q. 863, 895 (1997). *See also* S. HAMPSHIRE, INNOCENCE AND EXPERIENCE 90 (1989) (identifying physical pain and torture as among "the great evils of human experience, reaffirmed in every age").

substantive due process inquiry'") (quoting *Sacramento v. Lewis,* 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

For centuries, Anglo-American law has recognized that proof that an act was necessary as a matter of self-preservation precludes imposition of criminal liability – even for conduct that causes serious harm and plainly violates positive law (and even where no exception has been codified within the four corners of the statute, *see infra*). *See* E. Arnolds & N. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil,* 65 J. CRIM. L. & CRIMINOLOGY, 289, 291 (1974)) ("The concept of necessity as a defense to prosecution has been 'anciently woven into the fabric of our culture'") (quoting J. HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 416 (2d ed. 1960)); P. Glazebrook, *The Necessity Plea in English Common Law*, 30 CAMB. L.J. 87, 93 (1972) (citing *Reninger v. Fagossa*, 1 Plowden, 75 Eng. Rep. (1551)); C. Wells, *Necessity and the Common Law*, 5 OX. J. LEGAL STUD. 471, 472 (1985). Indeed, the Constitution has been construed to require that abortion restrictions contain an exemption for procedures that are medically necessary, even when supported by governments' "compelling" interest in potential life post fetal-viability. *E.g.*, *Stenberg*, 530 U.S. at 921; *id.* at. 951 (O'Connor J., concurring).

Moreover, principles of medical ethics require that physicians and other health care providers take measures to relieve the pain and suffering of those under their care – including recommending alternative therapies for individual patients for whom conventional approaches have proved ineffectual. Allowing a patient to experience unnecessary pain or suffering is considered substandard medical practice, regardless of the nature of the patient's condition or the goals of medical intervention. D. MORRIS, THE CULTURE OF PAIN 191 (1991) (observing that "not relieving pain brushes dangerously close to the act of willfully inflicting it").[3]

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[3]*See* L. Post, *et al., Pain: Ethics, Culture, and Informed Consent to Relief,* 24 J. LAW, MED. & ETHICS 348 (1996) ("Even when cure is impossible, the

There is a long tradition, in this Court's decisions and in the Nation's laws, of respecting and facilitating such medical decisionmaking. *See Harper*, 494 U.S. at 223 ("we will not assume that physicians will prescribe * * * drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to the contrary"); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 374 (2002) (declining to assume that physicians would prescribe "unnecessary medications"); *see also* 37 Fed. Reg. 16,503, 16,504 (1972) (FDA does not "regulate or interfere with the practice of medicine"); *accord* 21 U.S.C. § 396; 42 U.S.C. § 1395; *cf. Stenberg*, 530 U.S. at 937 ("*Casey*'s words 'appropriate medical judgment' must embody the judicial need to tolerate responsible differences of medical opinion").

For example, the Court in *Thompson* recognized that sale of "compounded" drugs, *i.e.*, those whose ingredients are altered by a pharmacist or doctor, served the "important interest" in assuring "that patients with particular needs may obtain medications suited to those needs," 535 U.S. at 369, and the FDA has long "recognized the legality of using drugs for purposes other than those for which they have been found safe and effective." *FTC v. Simeon Mgmt. Corp.*, 532 F.2d 708, 717 (9th Cir. 1976); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 n.5 (2001) ("'[o]ff-label use is widespread in the medical community and often is essential to giving patients optimal medical care, both of which medical ethics, FDA, and most courts recognize'") (quoting J. Beck & E. Azari, *FDA, Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions*, 53 FOOD & DRUG L.J. 71 (1998)).

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physician's duty of care includes palliation"); S. Wanzer, *et al.*, *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look*, 320 NEW ENGLAND J. MED. 844 (1989) ("[t]o allow a patient to experience unbearable pain or suffering is unethical medical practice * * * * [and t]o withhold any necessary measure of pain relief in a hopelessly ill person out of fear * * * of possible legal repercussions is unjustifiable"); R. Edwards, *Pain and the Ethics of Pain Management*, 18 SOC. SCI. MED. 515 (1984).

By contrast, there is no tradition whatsoever of bringing the weight of the criminal law down on individuals who pursue alternative therapies for relief from pain and suffering when no lawful or conventional medication is effective. *See Lawrence*, 123 S. Ct. at 2480 (noting heightened concerns when policies are enforced through "operation of] the criminal law"). Proscription of particular drugs was largely a twentieth century innovation, *see, e.g.*, S. DUKE & A. GROSS, AMERICA'S LONGEST WAR 83-86 (1992) – and even then, the primary legislative focus has been on preventing fraudulent commercial marketing, *see* 21 U.S.C. § 301 *et seq.*, and distribution for non-medical use, *i.e.*, to recreational (or habitual) users, *see infra*; *cf. United States v. Jin Fuey Moy,* 241 U.S. 394, 401 (1916).

Indeed, even if the interest here at issue is described, inappropriately, as a right to possess *marijuana* for medical purposes, the historical evidence on the government's side would be underwhelming. For the first 170 years of this Nation's history, there was no State or federal law preventing the recommendation of marijuana for medical purposes. *See* Marijuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (1937) (distinguishing between medical and non-medical transactions); L. Noah, *Challenges in the Federal Regulation of Pain Management Technologies*, 31 J. LAW, MED. & ETHICS 55, 59 (2003) (noting that "the United States Pharmacopeia (U.S.P.), which Congress has cross-referenced in other statutes as a source for information about therapeutic products, had listed marijuana as a drug for almost a century").

The first federal statute to categorically proscribe marijuana, in 1970, did not do so because of any determination that it lacked therapeutic benefit, *see* pp.20-24, *infra*; *see generally* R. BONNIE & C. WHITEBREAD, THE MARIJUANA CONVICTION 246 (1999), and in more recent years, voters, legislators, and courts in the majority of States have reaffirmed, with varying degrees of assertiveness, that those who use marijuana for genuinely medical reasons, when alternatives have been exhausted, should

induced to "reject[] conventional therapy in favor of a drug with no demonstrable curative properties," 442 U.S. at 556; *see also id.* at 553 n.9. By contrast, the primary evidence of marijuana's therapeutic value is not as a cure, but rather as a means for individuals suffering from serious illness to better respond to and tolerate potentially lifesaving conventional treatments, *see* IOM REPORT at 154, and the Government here offered no disproof of Respondents' evidence that marijuana is effective for them (in ways that conventional therapies alone have failed).

Finally, the interests on the Government's side are unusually insubstantial. *Compare Glucksberg*, 532 U.S. at 788-89 (Souter, J., concurring) (acknowledging weight of interests on both sides of assisted suicide debate). Respondents' claims present no conflict – as do most of the other liberty interests so far discussed – between the wishes of the individual and the dictates of medical judgment, *see Sell*, 539 U.S. at 179-80; *Harper*, 494 U.S. at 226-27, medical ethics, *Glucksberg*, 521 U.S. at 731, or broader societal interests in life, *id.* at 728; or "potential life," *Stenberg*, 530 U.S. at 921; *cf. Rutherford*, 442 U.S. at 557 (noting FDA Commissioner's conclusion that widespread distribution of laetrile "would lead to needless deaths and suffering among * * * patients characterized as 'terminal' who could actually be helped by legitimate therapy'") (quoting 42 Fed. Reg. at 39,805). Indeed, these interests uniformly *support* permitting access to drugs in circumstances like Respondents', that have proven the only effective means of treating an agonizing, debilitating or life-threatening condition.[5]

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[5]Even if broader "symbolic" purposes could ever justify burdening individuals in Respondents' position – or branding them criminals – *but see Casey*, 505 U.S. at 852; *Lawrence*, 123 S. Ct. at 2379, the authoritative IOM REPORT, commissioned by the Office of National Drug Control Policy, found "no convincing data to support th[e] concern that sanctioning medical use of marijuana might increase its use among the general population" and "no evidence that the medical marijuana debate has altered adolescents' perceptions of the risks associated with marijuana use," *id.* at 104.

II. THE CSA SHOULD NOT BE CONSTRUED TO AUTHORIZE PUNISHMENT OF INDIVIDUALS WHO CAN SHOW MEDICAL NECESSITY.

This case raises serious constitutional questions only if – as the Government argues and as *OCBC* suggested, in *dicta* – the CSA does not allow individuals like Respondents to invoke medical necessity to shield themselves from sanctions. Because there is no sign Congress intended to punish gravely ill individuals for marijuana use under medical supervision, after conventional therapies are ineffectual, the Court should reject the Government's position.

In addition to reflecting a correct understanding of the CSA, that approach would be consistent with this Court's long practice of deferring difficult constitutional questions until they are squarely and unavoidably presented. *E.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

The usual prudence is especially warranted in this case, because it raises questions about the scope of individual liberties that the Court has only begun to delineate, *cf. Glucksberg*, 521 U.S. at 781-82 (Souter, J., concurring), and because rulings concerning the scope of Congress's Article I powers can reverberate far beyond the case and statute at hand.

Refraining from reaching the constitutional questions here would likewise reflect the appropriate relationship between this Court and Congress. There is no indication in the CSA that Congress intended the statute to reach as far as the Government now claims, or that it specifically considered the plight of individuals for whom use of a controlled substance is genuinely necessary as a therapeutic last resort. The Court should not assume that Congress intended to act so sweepingly; rather, and consistent with its prior practice, *see Jacobson*, it should demand that Congress express its (supposed) intent to uncompromisingly criminalize gravely ill individuals' medical

choices – before resolving the constitutional questions such an enactment would present.

A. The Necessity Doctrine is a Settled Part of Federal Law.

As this Court recognized in *United States v. Bailey*, 444 U.S. 394, 410 (1980), courts have "traditionally" recognized a defense of necessity in "situation[s] where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils," leaving the actor "no reasonable, legal alternative to violating the law," *id.* *See also* MODEL PENAL CODE § 3.02(1)(a) ("the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged").[6] It precludes imposition of criminal liability on an individual who: (1) was faced with a choice of evils and chose the lesser evil; (2) acted to prevent imminent harm; (3) reasonably anticipated a direct causal relationship between her conduct and the harm to be averted; and (4) had no legal alternative prevent the harm.[7] The defense has roots stretching back more than 700 years and has been

[6] In *Bailey*, all eight participating Justices assumed, as lower courts had held, see 444 U.S. at 410, that necessity or duress could provide a defense to a prison inmate charged with escape even though the relevant statute, 18 U.S.C. § 751(a), did not expressly so provide. *See, e.g.*, 444 U.S. at 397, 410-11; *id.* at 427-28 (Blackmun, J., dissenting). The majority held that the defendants could not avail themselves of the defense only because "in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of § 751(a) was his only reasonable alternative." *Id.* at 410.

[7] *See United States v. Sued-Jimenez*, 275 F. 3d 1, 6 (1st Cir. 2001); *United States v. Cassidy*, 616 F.2d 101, 102 (2d Cir.1979); *United States v. Romano*, 849 F.2d 812, 816(3d Cir. 1988); *United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir. 1979); *United States v. Gant*, 691 F.2d 1159, 1162 (5th Cir. 1982); *United States v. Milligan*, 17 F.3d 177, 181 (6th Cir.1994); *United States v. Jocic*, 207 F.3d 889, 892 (7th Cir.2000); *United States v. Griffin*, 909 F.2d 1222, 1224 (8th Cir. 1990); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001); *United States v. Turner*, 44 F.3d 900, 902 (10th Cir. 1995); *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir.2000); *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2000).

consistently recognized in this country for centuries.[8]

Like its companions, duress and self-defense, necessity avoids punishment of persons who commit acts violative of the criminal law, but who do so under circumstances or for reasons that the legislature did not deem (or would not have deemed) blameworthy. *See* J. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUSTON L. REV. 397, 457 (1999); G. FLETCHER, RETHINKING CRIMINAL LAW 792 (1978). This role as a time-honored check against reflexive punishment of those who have acted in circumstances arguably not within the contemplation of the positive law suggests that courts should approach with caution the argument that a legislature has foreclosed a necessity defense, by making its own balance of competing values. *See, e.g.*, MODEL PENAL CODE, § 3.02(1)(c) (legislative purpose to exclude the justification must "plainly appear" in statute).

B. *OCBC* Should Not Preclude Respondents from Invoking Medical Necessity.

In *OCBC*, the Court held that "medical necessity is not a defense to manufacturing and distributing marijuana." 532 U.S. at 494. The respondents in that case were a medical marijuana cooperative and its executive director, who had "distribut[ed] marijuana to numerous persons" and sought to justify their own violations of the CSA based on the medical needs of third-party patients, none of whom was before the Court. *See* 532 U.S. at 487. As Justice Stevens explained in concurrence, the

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[8] *See Note, Necessity: The Right to Present a Recognized Defense*, 21 NEW ENG. L. REV. 779, 781-84 (1986); M. Conde, *Necessity Defined: A New Role in the Criminal Defense System*, 29 U.C.L.A. L. REV. 409 (1981); Arnolds & Garland, *supra*, p. 10; G. Williams, *The Defence of Necessity*, 6 CURRENT LEGAL PROBLEMS 216, 224 (1953). For early examples from this country, see *The William Gray*, 29 F. Cas. 1300 (C.C.D.N.Y. 1810); *United States v. Ashton*, 24 F. Cas. 873 (C.C.D. Mass. 1834); *Surocco v. Geary*, 3 Cal. 69 (1853); *Conwell v. Emrie*, 2 Ind. 35 (1850); *Field v. City of Des Moines*, 39 Iowa 575 (1874); *Seavey v. Preble*, 64 Me. 120 (1874); *State v. Jackson*, 53 A. 1021 (N.H. 1902).

cooperative and its director did not qualify for the necessity defense under its standard formulation because they had not themselves been confronted with an unavoidable "choice of evils," but had instead "elected to become distributors" to patients. 532 U.S. at 500 n.1.

Respondents' situation is markedly different from that of the marijuana distributors in *OCBC*. Raich and Monson *personally* face the choice between physical suffering and breaking the law, and did not choose their afflictions. Both, moreover, consulted with their physicians, tried numerous lawful medications without success before turning to marijuana, and use the drug pursuant to their physicians' recommendations and under their supervision. J.A. 51, 53, 55-59, 65-91.

The viability of a necessity defense for individuals themselves afflicted with serious illness and chronic pain was not before the Court in *OCBC*, and was not decided in that case. The majority opinion does, however, contain *dicta* on which the Government now seizes. First, the Court termed it an "open question whether federal courts ever have authority to recognize a necessity defense not provided by statute." 532 U.S. at 490. Second, the Court said that "Congress has made a determination that marijuana has no medical benefits worthy of an exception." *Id.* at 493. *See also id.* at 499 ("in the Controlled Substances Act, the balance already has been struck against a medical necessity exception"). And, finally, the Court stated in a footnote that "nothing in our analysis suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act." *Id.* at 494 n. 7. None of these *dicta* should preclude the Court from recognizing necessity here.

First, there has never been any requirement that affirmative defenses like necessity, duress, or self-defense be spelled out by statute. To the contrary, such defenses have been "routinely allowed against federal criminal prosecutions without explicit statutory basis." G. CALABRESI, A COMMON LAW FOR THE AGE

OF STATUTES 287 n.33 (1982).[9] The necessity defense has been understood to accord both with legislative expectations, see *Bailey*, 444 U.S. at 416-17 n.11 (recognizing "that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law"); *United States v. Schoon*, 971 F.2d 193, 197 (9th Cir.1991) ("by allowing prisoners who escape a burning jail to claim the justification of necessity, we assume the lawmaker, confronting this problem, would have allowed for an exception to the law proscribing prison escapes"), and basic notions of fairness and human decency, *supra,* pp. 3-14; *see also Jacobson*, 197 U.S. at 39 ("The reason of the law in [case where compulsory vaccination would cause illness] should prevail over its letter") (citation omitted).

Because doctrines such as self-defense, necessity and duress are traditionally (and, in the federal system, invariably) defined and administered by the courts, the CSA's silence by no means cuts against a necessity defense for individuals who can satisfy its requirements. Indeed, to our knowledge Congress has never enacted a statute that explicitly foreclosed the common law defenses of necessity, duress, or entrapment, nor – at least prior to the decision in *OCBC* – had this Court ever found that a federal statute had abrogated any of these defenses. *Cf.* D. Meltzer, 2002 S. CT. REV. at 355 (noting that "insanity defense * * * was a common law rule until Congress in 1984 supplanted the judge-made defense with a statutory version"). Nothing in the CSA's text or history warrants singling it out as the only federal criminal prohibition against which a citizen cannot assert a necessity defense – despite satisfying the traditional elements.

Furthermore, in many circumstances, it would raise serious constitutional questions for a government to prosecute a person

[9]The same is true of other settled (but also statutorily unmentioned) federal defenses, including entrapment, selective prosecution, infancy, outrageous government conduct, public authority, impossibility, and vindictive prosecution. *See, e.g.*, D. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 355; P. Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 AM. CRIM. L. REV. 457 (1990).

who had been forced at gunpoint to open a bank vault without allowing him recourse to a duress defense, or to bar a necessity plea by a person charged with larceny for taking his neighbor's hose to put out a potentially deadly fire. *Cf.* 3 W. BLACKSTONE, COMMENTARIES at 3 ("Self-defense * * * is justly called the primary law of nature, (and therefore) it is not, neither can it be * * * taken away by the law of society"); *Jackson v Senkowski,* 817 F. Supp. 6, 7 (S.D.N.Y. 1993) (noting that "[a]ll states appear to recognize a defense of self-defense," and that "[o]ne might well be deprived of liberty without due process if incarcerated for attempting to defend one's life").[10]

There is in fact no evidence that Congress intended to punish persons like Respondents – individuals actually faced with a wrenching "choice of evils," between violating the drug laws or continuing to experience severe physical pain. The *dicta* in *OCBC* are in error to the extent they suggest that the CSA worked such a result, and they should not be extended in a case involving persons actually facing such a choice. First, there is nothing in the text of the statute that arguably addresses the necessity defense (or other potentially relevant defenses). Nor is Congress's placement of a drug on Schedule I equivalent to a finding that it has no "accepted medical use," 21 U.S.C. § 812(b). When Congress directly classifies a drug, as it did marijuana in 1970, it is not bound by the criteria in section 812(b). In fact, Congress has directly placed drugs on Schedule I precisely because they *did* have an accepted medical use, and for that very reason could not, consistently with the terms of §

[10]To the extent that *OCBC* implied that constitutional avoidance applies only in situations where the meaning of particular *words* is disputed, precedent is to the contrary. The preference for a constitutionally unproblematic alternative construction is no less applicable to cases where the uncertainty relates to whether the legislature intended to abrogate or retain a traditional limitation or requirement – whether or not there are individual words whose meaning might otherwise be described as "ambiguous." *Cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 358 (1998) (Scalia, J., concurring in judgment); *Staples v. United States,* 511 U.S. 600 (1994) (silence is inadequate to infer elimination of *mens rea* requirement).

812, be reclassified *administratively.*[11] Even more clearly, the scheduling decision implies no legislative judgment regarding the exceptional, extenuating circumstances of individuals – who are seriously ill and have exhausted conventional, alternative therapies – in circumstances far removed from the paradigmatic "recreational" or "abusive" drug user.[12]

The suggestion that Congress's scheduling decision should be understood as a "finding" about a drug's lack of therapeutic value (or unsafety) is especially implausible in the case of marijuana. Months before enacting the CSA, and citing the "lack of * * * authoritative * * * information involving the

[11] *See* Pub. L. 98-329, 98 Stat. 280 (1984) (transferring methaqualone from Title II to Title I despite accepted medical use and prior FDA approval); H.R. Rep. No. 98-534 at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 543-44 (DEA "may not, in the absence of Congressional action, subject drugs with a currently accepted medical use in the United States to Schedule I controls").

[12] Any claim that placement on Schedule I reflects a "determination" that marijuana use is unsafe in every individual case is irreconcilable with the fact that the federal government has operated, for most of the statute's life, a Compassionate Investigative New Drug ("I.N.D.") Program, whereby patients whose serious medical conditions could be alleviated only by marijuana are supplied with a government-grown supply of the drug. Several patients still receive a regular supply of medical marijuana from the United States under this program, which was initiated as part of a settlement of a lawsuit filed by glaucoma patient Robert Randall after he was acquitted of unlawful marijuana cultivation based upon a showing of necessity. *See supra,* p.4; R. Isenberg, *Medical Necessity As a Defense to Criminal Liability: United States v. Randall,* 46 GEO. WASH. L. REV. 273 (1978). By 1983, the FDA had approved seventy-nine I.N.D. plans to permit therapeutic use of marijuana for conditions including chemotherapy-induced nausea and vomiting, glaucoma, spasticity, and weight loss. *See* H. JONES & P. LOVINGER, THE MARIJUANA QUESTION 136 (1985); *see also United States v. Burton,* 894 F.2d 188, 191 (6th Cir. 1990) (rejecting glaucoma patient's necessity defense, on the ground that the I.N.D. program at that time provided a reasonable legal alternative to violating the law). Despite the program's name, these plans were *not* clinical trials to test the drug for eventual approval; rather they were means for the government to administer a program of medical use by patients demonstrating necessity. *See Despite Marijuana Furor, 8 Users Get Drug from the Government,* N.Y. Times A33 (Dec. 1, 1996). The government has not allowed any new patients into the program since 1992. *Id.*

health consequences of using marihuana," Congress passed the Marijuana and Health Reporting Act, Pub. L. No. 91-296, which directed the HEW Secretary to prepare a report, within 90 days (and annually thereafter), containing "current information on the health consequences of using marihuana" and "such recommendations for legislative and administrative action as he may deem appropriate." On August 14, 1970, during the CSA debates – but before the report was completed – HEW advised Congress that because "there [was] still a considerable void in our knowledge of the plant and effects of the active drug contained in it, our recommendation is that marijuana be retained within schedule I at least until the completion of certain studies now underway to resolve this issue." H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4579.

Consistent with that recommendation, Congress placed marijuana on Schedule I, but, to resolve uncertainty, established a bipartisan Commission on Marihuana and Drug Abuse (later known as the "Shafer Commission"), *see* Act of Oct. 27, 1970, Pub. L. No. 91-513, § 601, to prepare (1) a report on "the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological" and (2) proposals for legislation and administrative action, *id.* In its report, the Shafer Commission recommended that Congress amend the CSA, and States amend their laws, so that *any* possession of marijuana for personal use would not subject the possessor to punishment, even as a misdemeanor. *See* MARIJUANA: A SIGNAL OF MISUNDERSTANDING; FIRST REPORT OF THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE 152-53 (1972). While Congress did not adopt this recommendation, this course of action leaves no room for arguing that the initial scheduling decision should be construed as a legislative determination that marijuana is unsafe for all individuals, let alone that traditional common law principles, such as necessity, should be inapplicable.

Nor is recognizing the common law doctrine of necessity inconsistent with the statutory procedures for administrative reclassification of drugs. Administrative reclassification is a process that addresses the availability of drugs for general medical use, not the appropriateness of its use by an individual patient who has no other alternative to avoid imminent harm. *Cf. Thompson*, 535 U.S. at 361 (noting importance of compounded drugs for "individual patient[s]" whose needs are not met by commercially available, mass-produced medications).[13] In the context of administrative reclassification, the statutory criteria of "currently accepted medical use" serves a fundamentally different purpose than does the necessity defense, and it is unreasonable to expect a patient who demonstrates true legal necessity to await a drug's administrative reclassification.[14] Rather, the necessity doctrine has always operated as a "safety valve," to accommodate urgent needs of individuals facing imminent harm and to prevent rigid application of the law in extreme circumstances. *See* Arnolds & Garland, *supra* at 291. There is no sign that Congress in 1970 intended to take away that traditional safety valve.

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[13]In denying a petition to reclassify marijuana in 2001, 66 Fed. Reg. 20,038, 20,047 (Apr. 18, 2001), the DEA stated that:

> There is suggestive evidence that marijuana may have beneficial therapeutic effects in relieving spasticity associated with multiple sclerosis, as an analgesic, as an antiemetic, as an appetite stimulant and as a bronchodilator, but there is no data from controlled clinical trials to support a new drug application for any of these indications. Data of the risks and potential benefits of using marijuana for these various indications must be developed to determine whether botanical marijuana, or any cannabinoid in particular, has a therapeutic role.

[14]In *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994), the court upheld a five-part test formulated by the DEA to determine whether a drug is in "currently accepted medical use," and therefore eligible for administrative re-scheduling – one which required: a "known and reproducible" chemical composition; adequate studies of safety and efficacy; acceptance by "qualified experts," and "widely available" scientific evidence. *Id.* at 1135 (citing 57 Fed. Reg. at 10,506).

Nor can there be any doubt that Respondents satisfy the traditional requirements of the necessity doctrine. Persons who violate the CSA's letter by possessing medical marijuana – on a physician's advice after exhausting lawful alternatives – as an indispensable means of treating severe pain face the very "choice of evils" the necessity doctrine contemplates.[15]

III. THE COURT OF APPEALS CORRECTLY RESOLVED THE CONGRESSIONAL POWER QUESTION.

The Court need not go further here than deciding that Congress did not intend the CSA to reach seriously ill individuals whose possession of a drug is a matter of medical necessity. But if the Court concludes that the statute must be construed as having foreclosed all consideration of medical necessity – and proceeds to decide the broader question of Congress's power to enact such a law – it should uphold the judgment of the court of appeals that, as applied to Respondents, the statute is likely unconstitutional.

A. The Issue of Legislative Power Is Not Properly Decided in Isolation from the Affected Liberty Interest.

As explained above, the circumstances under which Respondents possess marijuana are fundamentally – constitutionally – different from those of a "recreational" user. Respondents' use of marijuana is in consultation with their

[15]Although Respondents raise necessity as a basis for granting injunctive relief, rather than as an affirmative defense, they satisfy the doctrine's elements. Indeed, the government has not attempted to challenge the gravity of Respondents' medical problems; the imminence of their need to obtain relief; the efficacy of marijuana in treating their symptoms, or the reasonableness of their prior efforts to secure relief through lawful means. The government's intent to take enforcement action against them is equally clear. *See* Pet. App. 6a (discussing prior seizure of Respondent Monson's medical marijuana supplies). In these circumstances, and given their already dire personal circumstances, it would be inequitable to require Respondents to await criminal prosecution before protecting themselves.

physicians, as a matter of self-preservation, because available conventional therapies have failed them. Moreover, it is compliant with their State's law, enacted pursuant to its core authority over matters of health and medical practice, recognizing the appropriateness of such use. *See Jacobson*, 197 U.S. at 38 ("the safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take"); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring); *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (Kozinski, J., concurring).

The nub of the Government's submission is that the circumstances of Respondents' use are "irrelevant," Pet. Br. 29, to whether the statute's application is lawful under Article I. Because Congress has been held entitled to regulate conduct that "substantially affects" interstate commerce and because Congress has "determined" that possession of drugs belongs to a "class of activity" – also including distribution and manufacturing – that has such an effect, the Government argues, the Court must sustain the CSA's application to all those who fall within that "class." On this view, the liberty interests implicated by applying the statute against Respondents are beside the point – unless the Court is prepared to squarely hold that the application violates Due Process.

At the outset, this all-or-nothing theory of congressional power invites perverse results. Were it adopted, the more omnibus a statute's sweep – and the less care and attention Congress devoted to its specific applications – the more invulnerable to judicial scrutiny it would become. *See United States v. Stewart*, 348 F.3d 1132, 1141 (9th Cir. 2003). It would also be contrary to this Court's established approach to resolving congressional power questions. The Court has

repeatedly considered whether a particular application of a statute exceeded the Commerce power, *see, e.g.*, *Jones v. United States*, 529 U.S. 848 (2000); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and just last Term, rejected contentions that it is bound to decide wholesale whether a statute is a lawful exercise of congressional power. *See Tennessee v. Lane*, 124 S. Ct. 1978, 2003 (2004) ("nothing in our case law requires us to consider Title II [of the ADA], with its wide variety of applications, as an undifferentiated whole").

And it would require resolution of broad constitutional questions that are neither necessarily presented by the case nor necessary to decide. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (declining to reach Due Process question, when case could be resolved with respect to *federal* judicial power); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (declining to reach Tenth Amendment question, in absence of "clear statement" that Congress intended to reach State judges); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (similar, with respect to Eleventh Amendment).

In general, the Court does not determine the scope of a particular power in isolation from other pertinent constitutional interests. *See Printz v. United States*, 521 U.S. 898, 923 (1997) ("When a 'Law for carrying into Execution' the Commerce Clause violates the principle of state sovereignty * * * it is not a 'Law * * * proper for carrying into Execution the Commerce Clause.'"); *Lopez*, 514 U.S. at 560 & n.3; *Jones*, 529 U.S. at 857; *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102-103, 112 (1976); *Kent v. Dulles*, 357 U.S. 116, 126-27 (1957); *Reid v. Covert*, 354 U.S. 1, 16, 21 (1957) (plurality opinion). As these cases establish, it matters greatly whether the application before the Court arises from the heartland of the power asserted or its periphery. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring) ("'[t]he great ordinances of the Constitution do not establish and divide fields of black and white'") (quoting *Springer v. Philippine Islands*,

277 U.S. 189, 209 (1928) (Holmes, J., dissenting)); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (noting "spectrum" of federal executive power).[16]

This is true – indeed especially true – with respect to the relationship between congressional power and individual liberty. Far from being logically or legally independent, individual liberty and enumerated power are two sides of the same coin: the "Federal Government of enumerated powers" established in the Constitution "'was adopted by the Framers to ensure protection of our fundamental liberties.'" *Lopez*, 514 U.S. at 552 (quoting *Gregory*, 501 U.S. at 458). Indeed, the Framers treated the combination of the exclusive listing of the powers available to the government, judicial enforcement of those limitations, and scrutiny of the "necessity and propriety" of ancillary laws, as safeguards for the rights and liberties of the people. THE FEDERALIST NO. 84, at 515 (Rossiter ed., 1961) (describing the body of Constitution, as "in every rational sense, and to every useful purpose, A BILL OF RIGHTS"); D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON 45 (1998) (describing "[t]he enumerated powers strategy" as "the framers' principal method of protecting individual rights"); R. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 435 (2004) (noting that, during period between ratification of the Constitution and adoption of Bill of Rights, almost all individual rights were "unenumerated").

B. Application of the CSA Against Gravely Ill Persons Possessing Marijuana for Therapeutic Purposes is Not a Lawful Means of Regulating Interstate Commerce.

The power claimed by the Government, to punish

[16]The Court likewise considers other individual rights, both those enumerated in the Bill of Rights and those not, in giving meaning to particular guarantees. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (plurality opinion); *Chavez v. Martinez*; *See generally Poe*, 367 U.S. at 543 (Harlan, J., dissenting) (asserting that rights are arrayed along a"rational continuum").

Respondents for possessing marijuana for personal, medical use, is not easily described as an exercise of the authority delegated by the Constitution: to regulate the "commerce among the states." U.S. CONST. art. I § 8, cl. 3. Possession of drugs is not itself "commerce," let alone "commerce among the states," and Respondents are not engaged in "economic activity" in any ordinary sense of that term – let alone in a commercial enterprise. *Compare Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Rather, application of the CSA is defended as an "essential part of a larger regulation," Pet. Br.10 (quoting *Lopez*, 514 U.S. at 561), *i.e.*, as a necessary and proper means of effectuating Congress's unquestioned power to regulate the interstate and international market in drugs. *See New York v. United States*, 505 U.S. 144, 158 (1992) (Court's "broad construction" of Interstate Commerce power "has of course been guided * * * by the Constitution's Necessary and Proper Clause"); *accord United States v. Darby*, 312 U.S. 100, 118 (1941).[17]

But such an application would be neither constitutionally "proper" nor "necessary." As to the former, as *Printz* acknowledged, a law is not "proper" unless consistent "with

[17]As *Lopez* makes clear, judicial deference to congressional regulation of economic actors – including their in-State activity – reflects a recognition that there is a single national market, *see Lopez*, 524 U.S. at 574 (Kennedy, J., concurring), over which Congress has a unique responsibility, *id.*; *see also H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (describing premise of "dormant" Commerce jurisprudence).

Respondents do not challenge Congress's power to proscribe possession of marijuana for recreational use – an application that would touch on neither a recognized liberty interest nor States' traditional powers over health and welfare. Nor would invalidating this application call into question possession prohibitions that play a more than symbolic role in effectuating some national interest. *E.g.*, 18 U.S.C. § 175b (prohibiting certain persons from possessing biological agents or toxins); 42 U.S.C. § 2077(a) (prohibiting unauthorized possession of "special nuclear material"). Just as *Wickard* discarded conceptual distinctions between "production" and "commerce," it would be unsound to mint a categorical rule that in-State possession is beyond Congress's power to regulate.

principles of separation of powers, principles of federalism, and individual rights." G. Lawson & P. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297-333 (1993).

The Government likewise fails to demonstrate that punishing gravely ill individuals for possession of a drug under circumstances of medical necessity is important, let alone necessary or "essential" to advancement of its legitimate interests in combating drug abuse or the evils associated with an interstate black markets in drugs. It points to no evidence that Congress, in enacting the CSA, even considered the plight of persons for whom a drug is medically indispensable, let alone determined that exempting such individuals would undercut the statutory scheme. On the contrary, the legislative history reveals that Congress's principal concern was with recreational drug abuse and addiction, particularly by young people. *See Oregon v. Ashcroft,* 368 F.3d 1118, 1128 (9th Cir. 2004) (citing H.R. Rep. No. 91-1444).

In fact, claims that prosecution for medically necessary possession is an "essential part"of a larger scheme blink reality. The Government trumpets the fact that 28.5 million individuals use marijuana annually, Pet.Br.32, yet the "fact sheet" it references, *see id.*, records that only 186 persons were convicted of violating the federal possession statute – and even that minuscule number must include many who (a) have no medical necessity claim whatsoever and/or (b) were charged with or at least suspected of serious distribution offenses. *Cf. Wickard.*[18]

The congressional findings accompanying the CSA, *see* 21 U.S.C. § 801, can not fill the void. Although the Government invokes (Br. 23-25) "findings" [1] that the "local * * *

[18]The Government's enforcement activities against Respondent Monson and other participants in California's Compassionate Use program are exceptional – presumably spurred by an intent to "prove a point" with respect to the federal government's purported power, as against California's effort to allow medicinal use of marijuana.

possession" of "controlled substances" will "contribute to swelling the interstate traffic in such substances," 21 U.S.C. § 801(4) and [2] that drugs possessed in one place "cannot be differentiated" from drugs that have been shipped across state lines, *id.* § 801(5), the latter "finding" does not reference "possession" at all, and the former is stated in compound terms, *i.e.*, including "local distribution and possession," so as to stack aggregation upon aggregation. In fact, individuals in Respondents' position are particularly unlikely to "swell" the interstate market: they have no interest in purchasing marijuana from traffickers – and the logical implication of their position (like any similar assertion of duress or self-defense) is that they will pursue the same course of conduct *even if* the shadow of criminal prosecution were not lifted. Finally, the "findings" imputed to Congress are not easily squared with the fact that California has determined that permitting possession by individuals in Respondents' situation does not even undercut its ongoing and energetic efforts to combat illegal *intra*state trafficking.

Under these circumstances – where the relationship to enumerated power is tenuous at best and the adverse effects on individual liberty are real and subsatantial – the Court would need no novel or highly restrictive theory of congressional power to sustain the conclusion that the application at issue is likely unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

APPENDIX

DESCRIPTION OF *AMICI CURIAE*

Amicus Curiae **The Leukemia & Lymphoma Society** is the world's largest voluntary health organization dedicated to funding blood cancer research and providing education and services for blood cancer patients. Founded more than 50 years ago and headquartered in White Plains, New York, the Society operates through 63 chapters in the U.S. and additional branches in Canada. Its mission is to cure leukemia, lymphoma, Hodgkin's disease and myeloma, and improve the quality of life of patients and their families.

Amicus Curiae **Pain Relief Network** ("PRN") is a network of pain patients, family members of people in pain, physicians, attorneys, and activists working toward a day when people in pain will be afforded the simple dignity and compassion due all ill Americans. PRN seeks to empower the over 50 million Americans living in untreated, disabling pain to advocate for improved care, and to strengthen the integrity of the doctor-patient relationship.

Amicus Curiae **California Medical Association** ("CMA") is a national association of physicians in California and is the largest state medical association in country. CMA's mission is to promote the science and art of medicine, the care and well-being of patients, the protection of the public health, and the betterment of the medical profession. Founded in 1856 to set medical standards and create a forum for exchanging information and experience, CMA has become a leading advocate for improving the quality of health care, and has earned a national reputation for its advocacy on behalf of physicians and patients.

Amicus Curiae **AIDS Action Council** ("AIDS Action") is the Washington, D.C. representative of over 1,000 community-based organizations and the hundreds of thousands of persons living with HIV/AIDS whom these organizations serve. As the only national organization devoted entirely to federal advocacy on behalf of people living with HIV/AIDS, AIDS Action works

to ensure that effective national initiatives are undertaken for prevention, care, and research, and that policies are established that support the autonomy of people living with HIV/AIDS to make informed decisions about their health care needs.

Amicus Curiae **Compassion in Dying Federation** ("COMPASSION") is a national advocacy organization providing client service, legal advocacy and public education to improve pain and symptom management, increase patient empowerment and self-determination and expand end-of-life choices to include aid-in-dying for terminally ill, mentally competent adults. COMPASSION works toward improved care and expanded options at life's end, with goals of comprehensive, effective comfort care for every dying person, and legal and humane aid-in-dying if suffering is unbearable and cannot be relieved.

Amicus Curiae **End-of-Life Choices** is a national organization working to assure freedom of choice at the end of life. Founded as The Hemlock Society in 1980, the organization supports the rights of terminally ill, mentally competent adults to hasten death under careful safeguards. The organization supports legislation to maximize end-of-life options and provides education, information and advice about choices at the end. End-of-Life Choices believes that each individual is entitled to choose within the law both how to live and how to die.

Amicus Curiae **National Women's Health Network** ("the Network") is the only national public-interest membership organization devoted solely to women and health. Founded in 1974, the Network has influenced national policy as a women's voice dedicated to humane, responsive health care. The Network improves the health of all women by developing and promoting a critical analysis of health issues in order to affect policy and support consumer decision-making. The Network aspires to a health care system that is guided by social justice and reflects the needs of diverse women.

Amicus Curiae **Global Lawyers and Physicians** ("GLP") is a non-profit non-governmental organization that focuses on health and human rights issues. Founded in 1996 at the 50th Anniversary of the Nuremberg Doctors Trial, GLP was formed to reinvigorate the collaboration of the legal and medical/public health professions to protect the human rights and dignity of all persons, an important collaboration that gave rise to and inexorably shaped the Nuremberg Code. GLP believes that lawyers and physicians are better able to fulfill their sworn obligations to improving the well-being of their communities when members of these two professions work in partnership to promote both health and justice.

Amicus Curiae **AUTONOMY, Inc.** is a national disability rights organization representing the interests of individuals with disabilities who believe that people with disabilities should be able to exercise choices in all aspects of their lives. AUTONOMY, Inc. supports the right of people with terminal illnesses to have a full range of choices, including aggressive pain treatment and physician-assisted dying. The organization believes that people with disabilities who have struggled to maintain control over their own lives and bodies should maintain this decision-making autonomy throughout the process of living and dying.