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

AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, MARYLAND, AND WASHINGTON IN SUPPORT OF ANGEL McCLARY RAICH, ET AL.

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QUESTION PRESENTED

Whether the Controlled Substances Act, 21 U.S.C. § 801 *et seq*., properly applies under the Commerce Clause to state regulated noncommercial intrastate manufacture, possession, distribution, and use of marijuana for personal medicinal purposes under a physician's supervision.

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STATEMENT OF INTEREST

Amici Curiae States, like their sisters who have joined Alabama as amici curiae in support of respondents, believe that the Government exceeds its constitutional authority by enforcing the Controlled Substances Act (CSA), Pub.L. 91-513, 21 U.S.C. § 801, et seq., against possession of marijuana for regulated personal, medicinal use as authorized by California's Compassionate Use Act of 1996, Cal. Health & Safety Code, § 11362.5. Amici write separately, however, to emphasize that a State's policy choice to permit limited, medicinal usage of marijuana for compassionate ends may co-exist with the State's continued, vigorous enforcement of laws prohibiting *illicit* marijuana possession and trafficking consistent with the congressional purposes reflected in the CSA. Amici also write separately to emphasize that Congress, in enacting the CSA, did not purport to preclude State's from regulating wholly local, personal medicinal use of marijuana.

ARGUMENT

A. California's Compassionate Use Act Was Enacted in Exercise of California's Historic Police Powers, in Response to an Identified Need, and in Furtherance of a Constitutionally Permissible Purpose

In 1970, when the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq., was passed, the ravages of AIDS were unknown. By 1996, the year California enacted California's Compassionate Use Act of 1996, Cal. Health & Safety Code, § 11362.5 (Proposition 215), the AIDS epidemic had been revealed as one of the most horrific diseases in history, killing millions of people throughout the

world, becoming the eighth leading cause of death in the United States alone. *CDC Media Relations: HHS News,* Oct. 7, 1998. It was against this background, and presented with solid evidence that marijuana can relieve the suffering of those afflicted by certain types of illness, including glaucoma, multiple sclerosis, spasticity, severe pain, and nausea induced by the drugs used in chemotherapy and in the treatment of AIDS, that the citizens of California overwhelmingly adopted Proposition 215. *See*, generally, *Marijuana and Medicine: Assessing the Science Base*, National Academy Press 1999. More specifically, as one jurist has noted, evidence indicates that for some, marijuana is the only drug capable of reducing their anguish. *See, e.g.*, *Conant v. Walters*, 309 F.3d 629, 640-641 (9th Cir. 2002) (Kozinski, J., concurring) ("A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs.").[1] Eleven states now authorize the use of cannabis by seriously ill people.[2]

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[1] The development and use of Marinol, the trade name for a product containing synthetic tetrahydrocannabinol (THC), a psychoactive ingredient in marijuana, further belies the contention that cannabis *presently* has no accepted medical use. "Dronabinol, the active ingredient in Marinol, is synthetic delta-9-tetrahydrocannabinol (delta-9-THC). Delta-9-tetrahydrocannabinol is also a naturally occurring component of *Cannabis sativa L.* (Marijuana)." *Physicians Desk Reference* 55th ed. 2001, page 2828. Although the outer parameters of it may benefit from further clarification, they include " . . . treatment of: 1. anorexia associated with weight loss in patients with AIDS; and 2. nausea and vomiting associated with cancer chemotherapy in patients who have failed to respond adequately to conventional antiemetic treatments." *PDR* 55th ed. 2001, page 2829.

[2] Alaska, Ballot Measure #8 on November 3, 1998 Alaska Statutes, title 17, Chapter 37, § 17.37.010 et seq.; Arizona, Proposition 200, November 5, 1996, title 13, chapter 13,

(Continued on following page)

In our federal system States often serve as democracy's laboratories, trying out new, or innovative solutions to society's ills. *Washington v. Glucksberg* 521 U.S. 702, 737 (1997) (O'Connor, J., concurring); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting.) "The essence of federalism is that the state must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979). The Framers recognized from the very inception of the Republic that a federal government might find it hard to resist the temptation to overbear the interests of the States. They provided the means for diminishing that risk by imposing limitations on the federal government's power. As this Court has noted:

> [T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the Satates is in no case permissible except as to matters by the Constitution specifically authorized or delegated to

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A.R.S. § 13-3412.01; Colorado, Amendment 20, November 7, 2000, Co. Const. Art. 18, § 14; Hawaii, Senate Bill 862, June 14, 2000, took effect December 28, 2000, HI Statutes, D. 1, T. 19, Ch. 329, Pt. IX, §§ 329-121 et seq.; Louisiana, LSA-R.S. 40:1021, 40:1034; Maine, Question 2, November 2, 1999, took effect December 22, 1999, ME ST T. 15 § 5821-A; Maryland, MD Code, Criminal Law, § 5-601 (defense of medical necessity); Nevada, Question 9, November 7, 2000, took effect October 1, 2001, NV Statutes, T. 40, Ch. 453A, §§ 453A.010-453A.170, inclusive; Oregon, Measure 67, November 3, 1998, took effect on December 3, 1998, OR ST T. 37, Ch. 475, Prec. 475.300 et seq.; Vermont, Senate Bill 76, May 26, 2004; Washington, Measure 692, November 3, 1998, WA ST 69.51A.005.

> the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Alden v. Maine, 527 U.S. 706, 754 (1999), quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

B. Congress Did Not Intend the CSA to Be Used to Preclude Wholly Local, Medicinal Usage of Marijuana Subject to State-regulated Medical Supervision.

On its face, the CSA does not purport to regulate medical usage of marijuana. Indeed, in 1970, as Congress found, marijuana had "no currently accepted medical use in treatment in the United States," and there was "a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1). These legislative findings must be understood in the context of their time. The word "currently" suggests not a broad, medical absolute, but recognition that the future may provide other information bearing on that description. Congress's findings properly address the integrated interstate trade in *illicit* drugs. As Senator Dodd said at the time of its enactment "[It] cannot be overemphasized that the . . . [CSA] is designed to crackdown hard on the narcotics pusher and the illegal diverters of pep pills and goof balls." 116 Cong. Rec. 977-78 (Comments of Sen. Dodd, Jan. 23, 1970). The findings are completely silent regarding lawfully enacted, state authorized, intrastate cultivation, distribution, possession and use of medicinal cannabis.

The CSA, therefore, cannot reasonably be read to evince a congressional intent to preclude *state regulated* medical cultivation and usage of Schedule 1 drugs – provided, at least, that the activity is wholly local in scope – should the relevant science evolve and states determine that such drugs are not only medically useful but may safely be used under medical supervision. In the absence of clear statement to that effect, courts will not presume that Congress intended to exclude States from the exercise of their historic police powers. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996); *see also*, *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.,* 519 U.S. 316, 325 (1997) ("[W]here federal law is said to bar state action in fields of traditional state regulation, . . . [courts] have worked on the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress."). In any event, Congress made clear its intent *not* to preempt the field of regulating marijuana usage to the exclusion of the States, "unless there is a positive conflict between [the] subchapter and that State law so that the two cannot consistently stand together." 21 U.S.C. § 903. No such "positive conflict" exists when, as here, the state-regulated possession is wholly local in its scope and effect.

Amici submit that possession of marijuana for bona fide medicinal purposes, subject to state-regulated physician recommendation and oversight, is not the sort of possession contemplated by Congress in enacting the CSA. Congress made no findings regarding state regulated medical usage of Schedule 1 drugs, because such an activity did not exist in 1970. There was, therefore, no

evidence upon which Congress might have based a finding that local, state-regulated medicinal usage of marijuana (or any other Schedule 1 drug) affects interstate commerce. In the absence of any evidence whatsoever concerning state-regulated medicinal usage of marijuana, the CSA cannot reasonably be construed to reflect Congress' belief that such state-regulated usage affects interstate commerce. *Cf.*, *Alabama v. Garrett,* 531 U.S. 356, 369-70 (2001) (noting absence of evidence of state violations to support exercise of congressional power under section 5 of the Fourteenth Amendment).

C. To Construe the CSA as Precluding Even State-regulated Possession of Marijuana for Medicinal Purposes Would Render the Statute Unconstitutional as Applied under the Tenth Amendment, Especially in View of the Lack of Congressional Findings Regarding Such Usage.

The federal government has limited authority to interfere with State legislation enacted for the protection of citizen health, safety, and welfare. "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity, or their ability to function effectively in a federal system. . . . " *Fry v. United States*, 421 U.S. 542, 547, Fn. 7 (1975). And it cannot reasonably be doubted the regulation of health and safety matters is primarily and historically a matter of state concern. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens"); *see also*, *Hillsborough County v. Automated Medical Lab. Inc.*, 471 U.S. 707, 719, 105 (1985) ("the

regulation of health and safety matters is primarily and historically a matter of state concern"); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons").

As noted above, Congress itself never purported to divest the States of their police power to regulate wholly local usage of marijuana for medicinal purposes. But the Executive Branch's determination to pursue criminal prosecutions of persons availing themselves of the protections granted under California's law, "alter[s] the 'usual constitutional balance between the States and the Federal Government.'" *Cf., Gregory v. Ashcroft,* 501 U.S. 452, 561 (1991), quoting *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985) ("'[I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."'").

Congress' powers under the Commerce Clause are not unlimited. For example, absent a demonstrable nexus to interstate commerce, Congress may not ban the possession of a weapon within a prescribed distance of a school, *United States v. Lopez*, 514 U.S. 549 (1995), impose civil remedies for gender-based violence, *United States v. Morrison*, 529 U.S. 598 (2000), or may it make mere possession of a firearm by an ex-felon a federal crime, *United States v. Bass*, 404 U.S. 336 (1971). Generally, Congress may regulate three categories of activity under its commerce power: (1) it may regulate the use of the *channels* of interstate commerce, (2) it may regulate and protect the *instrumentalities* of interstate commerce and finally, (3) it

may regulate those activities having a *substantial relation* to interstate commerce. *See Lopez,* 514 U.S. at 552.

To satisfy the Tenth Amendment, then, application of the Controlled Substances Act must be restricted to the regulation of activities employing the channels and instrumentalities of, and having a substantial relationship to, interstate commerce. These foundational jurisdictional elements are present with respect to the illicit interstate drug trade; they are missing with respect to the activity regulated by California's Compassionate Use Act, which is wholly *intra*-state.

Amici acknowledge that the CSA recites: "Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce." 21 U.S.C. § 801(3). However, by its own terms, this Congressional finding relates to the *trafficking* of illicit drugs, not regulated personal medical usage.[3]

The United States argues that "intrastate drug distribution and use are subject to congressional regulation because Congress rationally determined that such activities as a class substantially affect the marijuana market as a whole." (Br. of the U.S. at 20). The assertion lacks merit. The CSA antedates the Compassionate Use Act and state-regulated medical usage by more than a

[3] Furthermore, Congress was manifestly concerned with "*illegal*" possession of controlled substances, *see* 21 U.S.C. § 801(2), not with state-regulated *lawful* possession for medicinal purposes. By its terms, California's act precludes construction of the statute to authorize "diversion of marijuana for nonmedical purposes." Cal. Health & Safety Code, § 11362.5(b)(2).

quarter century. Congress could not have determined that state-regulated, personal medicinal marijuana usage had an effect on the interstate marijuana trafficking as a whole, because there was no state-regulated medical marijuana program in existence at the time. Moreover, Congress in 1970 would have had no way to assess the beneficial effect that continued state enforcement of state laws prohibiting *illicit* drug use has on ensuring that personal medicinal usage does not "swell[ ]the interstate traffic" in marijuana. *See* 21 U.S.C. § 801(4).[4] There are two separate and distinct classes of intrastate activity having to do with marijuana. One, the classic illicit drug trade, unquestionably is an incident of the otherwise wholly unlawful *interstate* commerce in marijuana, is consistent with the Congress's findings. The other is an entirely separate class of activity expressly authorized by the state of California. It is entirely confined to the regulated *intrastate* cultivation and use of marijuana for the limited medical purpose permitted by Proposition 215 and was not within the contemplation of Congress when the CSA was enacted.

[4] For example, California's Department of Justice, Bureau of Narcotics Enforcement (BNE) operates the "Campaign Against Marijuana Planting" (CAMP), an aggressive marijuana interdiction and eradication effort. CAMP was established in 1983 under the direction of the Attorney General and BNE. This multi-agency law enforcement task force provides personnel to remove marijuana growing operations and promote public information and education on marijuana. Member agencies, comprising local, state and federal law enforcement representatives, carry out the enforcement operations of this program. In 2004 alone, as of September 9, CAMP had seized and destroyed 471,128 plants worth an estimated $1.88 billion. http://caag.state.ca.us/newsalerts/2004/04-103.htm; *see also*, generally, http://caag.state.ca.us/bne/content/camp1.htm.

Amici respectfully submit that the Executive Branch's naked assertion that wholly local, state-regulated personal medicinal marijuana usage affects interstate commerce does not make it so. *Cf.*, *Lopez*, 514 U.S. at 557 n. 2, quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.") Congress's findings regarding the scope of the CSA must be interpreted in their proper context. At the time of its enactment no state had instituted a regulated statutory scheme authorizing the medicinal use of marijuana under a physician's care. All trade in marijuana was illicit, but that is no longer the case and the Executive Branch's attempt to cast state authorized medical use in the same light goes beyond the scope of the CSA.

"All great truths begin as blasphemies." *Hoffman v. Cargill*, 142 F.Supp.2d 1117, 1118 (D. Me. 2001), quoting George Bernard Shaw. The question here is whether deference should be paid to California's "heretical" decision to test the medical efficacy of marijuana for the purpose of relieving suffering caused by illness or disease. The Congressional purposes underlying the CSA are not inconsistent with the legitimate state police-power purposes underlying California's Compassionate Use Act; in enacting the former, Congress could not reasonably have intended to preclude the latter.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

October 13, 2004

Respectfully submitted,

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