No.

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

ANGEL MCCLARY RAICH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

LISA SCHIAVO BLATT
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
MARK T. QUINLIVAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, exceeds Congress's power under the Commerce Clause as applied to the intrastate cultivation and possession of marijuana for purported personal "medicinal" use or to the distribution of marijuana without charge for such use.

PARTIES TO THE PROCEEDING

Petitioners are John Ashcroft, Attorney General of the United States, and Karen P. Tandy, Administrator of the Drug Enforcement Administration.

Respondents are Angel McClary Raich, Diane Monson, John Doe Number One, and John Doe Number Two.

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The Solicitor General, on behalf of the Attorney General of the United States and the Administrator of the Drug Enforcement Administration, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-43a)[1] is reported at 352 F.3d 1222. The order of the district court denying respondents' motion for a preliminary injunction (App. 44a-69a) is reported at 248 F. Supp. 2d 918.

[1] "App." refers to the separately bound appendix to the petition for a writ of certiorari.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2003. A petition for rehearing was denied on February 25, 2004 (App. 70a-71a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce * * * among the several States."

STATEMENT

1. a. The Controlled Substances Act (CSA or Act), 21 U.S.C. 801 *et seq.*, establishes a comprehensive federal scheme to regulate the market in controlled substances. The CSA makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, "[e]xcept as authorized by [21 U.S.C. 801-904]." 21 U.S.C. 841(a)(1). The CSA similarly makes it a crime to possess any controlled substance except as authorized by the Act. 21 U.S.C. 844(a). The CSA thus establishes "a 'closed' system of drug distribution" for all controlled substances. H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 6 (1970). To effectuate that closed system, the CSA "authorizes transactions within 'the legitimate distribution chain' and makes all others illegal." *United States* v. *Moore*, 423 U.S. 122, 141 (1975) (quoting H.R. Rep. No. 1444, *supra*, at 3). Violations of the CSA are subject to criminal and civil penalties and may be enjoined. 21 U.S.C. 841-863, 882(a).

The restrictions that the CSA places on the manufacture, distribution, and possession of a controlled substance depend upon the schedule in which the drug

has been placed. 21 U.S.C. 821-829. Since Congress enacted the CSA in 1970, marijuana and tetrahydrocannabinols have been classified as schedule I controlled substances. See Pub. L. No. 91-513, Tit. II, § 202(c), 84 Stat. 1249 (schedule I(c)(10) and (17)); 21 U.S.C. 812(c) (schedule I(c)(10) and (17)).[2]

A drug is listed in schedule I, the most restrictive schedule, if it has "has a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use * * * under medical supervision." 21 U.S.C. 812(b)(1)(A)-(C). Under the CSA, it is unlawful to manufacture, distribute, dispense, or possess a schedule I drug, except as part of a strictly controlled research project that has been registered with the Drug Enforcement Administration (DEA) and approved by the Food and Drug Administration (FDA). 21 U.S.C. 823, 841(a)(1), 844(a); *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489-490, 492 (2001). By contrast, drugs listed in schedules II through V may be dispensed and prescribed for medical use. Physicians, pharmacies, and other legitimate handlers of drugs listed in schedules II through V must, however, comply with stringent statutory and regulatory provisions that control the manufacture and distribution of such drugs. 21 U.S.C. 821-829; 21 C.F.R. Pts. 1301-1306.

b. The CSA contains congressional findings and declarations regarding the effects of intrastate drug

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[2] Marijuana is defined under the CSA to include all parts of the cannabis plant and anything made therefrom, except for the mature stalks, fiber produced from the stalks, sterilized seeds, and oil from the seeds. 21 U.S.C. 802(16). Marijuana has been found to contain at least 483 separate chemicals, among which, delta-9-tetrahdyrocannabinol (delta-9-THC) is the primary psychoactive component. 66 Fed. Reg. 20,038, 20,041 (2001).

activity on interstate commerce. 21 U.S.C. 801. Congress found:

> 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 because—
>
> (A) after manufacture, many controlled substances are transported in interstate commerce,
>
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
>
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

21 U.S.C. 801(3). Congress similarly found that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances," 21 U.S.C. 801(4); that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate," and "[t]hus, it is not feasible to distinguish" between such substances "in terms of controls," 21 U.S.C. 801(5); and that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic," 21 U.S.C. 801(6). Congress also found that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and

general welfare of the American people." 21 U.S.C. 801(2).

2. On October 9, 2002, respondents filed suit in the United States District Court for the Northern District of California against John Ashcroft, the Attorney General of the United States, and Asa Hutchinson, then the Administrator of the Drug Enforcement Administration, seeking injunctive and declaratory relief barring them from enforcing the CSA as applied to their conduct. The complaint alleges that respondents Angel McClary Raich and Diane Monson are California citizens who use marijuana for medical purposes based on the recommendations of their physicians. Such use is exempted from the coverage of California's criminal drug laws. App. 1a-2a, 45a; see California's Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5(b)(1)(A) and (d) (West Supp. 2004).

Raich, a resident of Oakland, California, alleges that she suffers from numerous severe and debilitating medical conditions for which marijuana alone provides relief, and that her physicians recommend that she "medicate" with marijuana every two hours. App. 5a, 76a, 79a. Raich alleges that she is unable to cultivate her own marijuana and that she obtains marijuana free of charge from two "caregivers," respondents John Doe Number One and John Doe Number Two, who are also residents of Oakland, California, and who sued anonymously to protect Raich's marijuana supply. *Id.* at 5a, 14a n.3, 77a-78a. Although the Does cultivate the marijuana, Raich processes some of the marijuana into cannabis oils, balm, and foods. *Id.* at 5a.

Diane Monson, a resident of Butte County, California, alleges that she suffers from severe chronic back pain and constant, painful muscle spasms, and that she has been using marijuana as a medication for more than

five years. App. 5a, 76a-77a, 80a-81a. Monson alleges that, in August 2002, federal agents came to her home and seized her six marijuana plants, over the objection of the Butte County District Attorney. *Id.* at 76a-77a.

Respondents' suit sought a preliminary injunction to bar the government from enforcing the Controlled Substances Act against them to the extent that it prevents Raich and Monson from possessing, cultivating, and processing marijuana for their purported medical use, and to the extent that it prevents the John Doe respondents from cultivating marijuana and providing it to Raich for her purported medical use. App. 89a-91a. Respondents urged that the CSA, as applied to their conduct, is unconstitutional and conflicts with the purported "doctrine of medical necessity." *Id.* at 6a.

On March 4, 2003, the district court denied the motion for a preliminary injunction, concluding that "the weight of precedent precludes a finding of likelihood of success on the merits." App. 45a.

3. A divided panel of the court of appeals reversed and remanded. App. 1a-43a.

a. The court of appeals concluded that respondents "have demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress's Commerce Clause authority." App. 9a. The court observed that its previous decisions that had uniformly rejected Commerce Clause challenges to the CSA were not controlling, because none of those decisions "involved the use, possession, or cultivation of marijuana for medical purposes." *Id.* at 10a.

The court found that the "intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician" "constitutes a separate and distinct class of activities"

that is beyond Congress's power to regulate under the Commerce Clause. App. 11a (emphasis omitted). The court found that class "different in kind from drug trafficking," reasoning that "this limited use is clearly distinct from the broader illicit drug market— as well as any broader commercial market for medicinal marijuana—insofar as the medical marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." *Ibid.*

The court of appeals also reasoned that "[t]he cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity." App. 14a. The court accordingly found "not applicable" the "aggregation principle" of *Wickard* v. *Filburn*, 317 U.S. 111 (1942), which allows for consideration of the cumulative impact on interstate commerce of individual instances of regulated conduct (in *Wickard*, the cultivation of wheat). App. 15a. The court also rejected the importance of Congress's findings in the CSA regarding the effects of intrastate drug activity on interstate commerce, reasoning that "[t]he findings are not specific to marijuana, much less intrastate medicinal use of marijuana that is not bought or sold and the use of which is based on the recommendation of a physician," and that in any event such findings should be taken "with a grain of salt." *Id.* at 19a-20a. Finally, the court concluded that the hardship of the parties and public interest factors "tip sharply" in favor of the entry of a preliminary injunction. *Id.* at 24a.

b. Judge Beam dissented. App. 26a-43a. In his view, "[i]t is simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation

and use of the wheat crop that affected interstate commerce in *Wickard* v. *Filburn*, [*supra*]." *Id.* at 26a. The dissent explained that the court of appeals' approach ignored "the fungible, economic nature of the substance at issue—marijuana plants—for which there is a well-established and variable interstate market, albeit an illegal one under federal law." *Id.* at 34a; accord *id.* at 34a-35a (Respondents "are growing and/or using a fungible crop which *could* be sold in the marketplace, and which is also being used for medicinal purposes in place of other drugs which would have to be purchased in the marketplace.").

Judge Beam also concluded that Congress's power to regulate respondents' activities is essential to Congress's ability to regulate "the larger commercial activity" covered by the CSA. App. 36a. He reasoned that, "[i]f Congress cannot reach individual narcotics growers, possessors, and users, its overall statutory scheme will be totally undermined." *Id.* at 38a. Judge Beam also observed that the court's decision to carve out from Congress's general regulatory scheme individual instances of activity based on their ostensibly *de minimis* relation to commerce conflicts with the decisions of *Proyect* v. *United States*, 101 F.3d 11 (2d Cir. 1996), and *United States* v. *Leshuk*, 65 F.3d 1105 (4th Cir. 1995). App. 35a-37a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Ninth Circuit has held that the Controlled Substances Act cannot constitutionally be applied to the manufacture, possession, and distribution without charge of marijuana for purported medicinal use. The court of appeals' partial invalidation of that Act of Congress is erroneous and seriously undermines Congress's comprehensive

scheme for the regulation of dangerous drugs. The court of appeals' reliance on the purported medical purposes of respondents' activities also conflicts with this Court's decision in *Oakland Cannabis*, 532 U.S. at 491, 494, which held that the CSA does not countenance any medical use of marijuana. The Ninth Circuit's decision, moreover, cannot be reconciled with the decisions of other courts of appeals that have held that Congress has the power under the Commerce Clause to prohibit the manufacture or possession of controlled substances, including marijuana, for personal use.

A. THE NINTH CIRCUIT ERRED IN DECLARING THAT CONGRESS CANNOT REGULATE THE MANUFACTURE, POSSESSION, AND FREE DISTRIBUTION OF MARIJUANA

1. The Commerce Clause grants Congress the power to regulate a class of activities that substantially affects commerce, regardless of whether an individual instance within the class has a significant effect on interstate commerce. "[W]here a *general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence." *United States* v. *Lopez*, 514 U.S. 549, 558 (1995) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)); accord *Perez* v. *United States*, 402 U.S. 146, 154 (1971) ("[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class") (quoting *Wirtz*, 392 U.S. at 193); *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) (per curiam).

For example, in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), the Court upheld federal regulation of wheat grown and consumed on a family farm in order to

control the volume of wheat moving in interstate and foreign commerce. *Wickard* establishes that activity occurring within a market is subject to Congress's commerce power even when the activity may itself not be commercial. This Court explained in *United States* v. *Lopez*, *supra*, that the production of wheat that Congress chose to regulate in *Wickard* is economic activity even though it was produced for personal use and "may not be regarded as commerce." *Lopez*, 514 U.S. at 556 (quoting *Wickard*, 317 U.S. at 125). In distinguishing the statute in *Wickard* from the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q), at issue in *Lopez*, the Court explained that "*Wickard* * * * involved economic activity in a way that the possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560. The Court further explained that Section 922(q) is not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561; see *United States* v. *Morrison*, 529 U.S. 598, 610 (2000).

2. The Ninth Circuit held in this case that *Wickard* has no application to the intrastate cultivation, possession, and distribution without charge of marijuana for purported medical purposes because, in the court of appeals' view, that class of activities neither involves economic activity nor substantially affects interstate commerce. App. 11a-12a, 16a-17a. That conclusion is fundamentally flawed. Regulation of intrastate possession, manufacture, and distribution of any controlled substance, including marijuana, is an integral and essential part of Congress's *comprehensive* regulation of the interstate possession, manufacture, and distribution of such substances generally, which unquestionably

take place in large part *in* interstate commerce and categorically *affects* interstate commerce.

Congress could reasonably determine that regulation of intrastate possession, manufacture, and distribution of all controlled substances, including marijuana, is a necessary and proper measure to ensure the effectuation of its comprehensive system of regulation, which falls squarely within Congress's power under the Commerce Clause. U.S. Const. Art. I, § 8, Cl. 18; see, *e.g.*, *Jinks* v. *Richland County*, 538 U.S. 456, 461-464 (2003). As the Fourth Circuit has explained:

> Like the production of home-grown wheat, the manufacture of marijuana for personal use is an economic activity in a general sense. Further, such manufacture is prohibited pursuant to a comprehensive statutory scheme bearing on all aspects of the illegal-drug trade, which is assuredly both commercial and interstate. Thus, like the regulation of home-grown wheat, the prohibition of home-grown marijuana is 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'

Brzonkala v. *Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 836 n.7 (1999) (internal citation omitted) (quoting *Lopez*, 514 U.S. at 561), aff'd *sub nom. United States* v. *Morrison*, 529 U.S. 598 (2000); accord *United States* v. *Lopez*, 2 F.3d 1342, 1367 n.51 (5th Cir. 1993) ("The [CSA's] possession proscription [is] a necessary means to regulate the interstate commercial trafficking in narcotics."), aff'd, 514 U.S. 549 (1995).

a. Marijuana is a commodity that is readily purchased and sold in a well-defined market of drug trafficking. "U.S. marijuana users spent approximately

$10.5 billion on marijuana in 2000." Executive Office of the President, Office of Nat'l Drug Control Policy, *Marijuana Fact Sheet*, 5 (Feb. 2004); see National Drug Intelligence Center, *National Drug Threat Assessment 2003* 3 (Jan. 2003) ("Marijuana is the most widely available illicit drug in the United States. * * * Prices are relatively stable, although they do range considerably from market to market."); *Illicit Drug Prices July 2003-December 2003*, Narcotics Digest Weekly, Dec. 16, 2003, at 1 & Table 4, at 19-25 (listing, for all 50 States and District of Columbia, wholesale, mid-level, and retail prices for BC Bud, commercial grade, domestic, hydroponic, locally produced, imported, Mexico-produced, and sinsemilla marijuana). The Ninth Circuit accordingly erred in seizing on the fact that respondents' activities involve the production, possession, and free distribution of marijuana that is not intended to enter the stream of commerce. App. 11a, 14a n.3. The salient point is that those activities are part of the overall class of activities regulated by Congress under the CSA—the manufacture, possession, and distribution of controlled substances—that involves economic activity and substantially affects commerce. Accordingly, an assertedly "trivial" impact of an "individual instance" regulated by the statute is of "no consequence." *Maryland* v. *Wirtz*, 392 U.S. at 197.

Congress reasonably viewed intrastate drug activity, including possession and manufacture, as significantly affecting the overall interstate market of drug trafficking. Significantly, Congress found that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances"; that "after manufacture, many controlled substances are transported in interstate commerce"; that "controlled substances distributed locally usually

have been transported in interstate commerce immediately before their distribution"; and that "controlled substances possessed commonly flow through interstate commerce immediately prior to such possession." 21 U.S.C. 801(3) and (4).

Those findings comport with common sense. Local manufacturing, possession, and use of controlled substances increase the demand for such drugs, which in turn leads to increased supply and marketing to users. The manufacturing and use of controlled substances also pose an appreciable risk of diversion to others for further drug use or distribution, a result that leads to more swelling of the illicit market. Congress's unquestionable power to eradicate drug trafficking and distribution also includes the power to ban the production, possession, and use that feeds the illicit drug market. As the Ninth Circuit itself has explained: "Laws criminalizing the possession of a good decrease the demand for that good. This decreased demand results in a decrease of supply as production becomes less profitable and therefore less attractive." *United States* v. *Adams*, 343 F.3d 1024, 1033 (9th Cir. 2003), petition for cert. pending, No. 03-9072 (filed Feb. 17, 2004).[3]

Similarly, Congress rationally applied the CSA to all drug activity because it may be impossible to ascertain in any given case whether a drug, including marijuana, has either been purchased or is intended to be offered for sale. Similarly, Congress specifically found that, given the fungible nature of marijuana and drugs

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[3] Local illicit drug use for purported medicinal purposes also may induce the user to refrain from consuming lawful drugs, App. 34a-35a, 36a (Beam, J., dissenting), and similarly could decrease the incentives for research and development into new legitimate drugs.

generally, "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate," especially "in terms of controls" of such substances. 21 U.S.C. 801(5).

b. The intrastate manufacture, possession, and free distribution of marijuana for purported medical purposes also significantly interferes with the CSA's purpose to establish a national, comprehensive, uniform —and closed—statutory scheme to prevent the abuse and diversion of controlled substances. The CSA is designed to "significantly reduce the widespread diversion of these drugs out of legitimate channels into the illicit market, while at the same time providing the legitimate drug industry with a unified approach to narcotic and dangerous drug control." H.R. Rep. No. 1444, *supra*, at 6; see *Moore*, 423 U.S. at 135 (describing CSA's purpose to guard against the "diversion of drugs from legitimate channels to illegitimate channels").

In furtherance of that central purpose, the CSA thus controls *all* manufacturing, possession, and distribution of any scheduled drug. That is why marijuana, like all other listed drugs, is a "controlled" substance under the CSA. The CSA thus "provides for control * * * of problems related to drug abuse through registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions outside the legitimate distribution chain illegal." H.R. Rep. No. 1444, *supra*, at 3. That goal cannot be achieved if the intrastate manufacturing, possession, and distribution of a drug may occur without any federal regulation. Indeed, Congress included in the CSA the specific finding that "[f]ederal control of the intrastate incidents of the traffic in controlled sub-

stances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. 801(6).

The adverse effect of the court of appeals' decision on the administration and enforcement of the CSA is easily illustrated as applied to the manufacture, possession, and free distribution of drugs listed in schedules II through V (such as cocaine, methadone, codeine and opium), which may be dispensed and prescribed for medical use. 21 U.S.C. 812(b)(2)(B), (3)(B), (4)(B) and (5)(B). Although such drugs (unlike marijuana and other schedule I substances) have an accepted medical use in treatment, the CSA requires physicians, manufacturers, pharmacies, and other legitimate handlers of such drugs to comply with stringent statutory and regulatory provisions that mandate registration with the DEA, require compliance with specific production quotas, establish security controls to guard against the theft or diversion of drugs, impose recordkeeping and reporting obligations, and permit the drug to be distributed and dispensed only pursuant to specific orderform and prescription requirements. 21 U.S.C. 821-829; 21 C.F.R. Pts. 1301-1306.

Were Congress to lack the power under the Commerce Clause to apply the CSA to the intrastate manufacture, possession, and free distribution of controlled substances on schedules II through V, persons operating intrastate could function essentially as unregulated and unsupervised drug manufacturers and pharmacies without being subject to *any* of the federal controls under the CSA. That regime would substantially undermine the CSA's purposes to establish a comprehensive and unified approach to "dangerous drug control" and to guard against the risks of drug abuse and the diversion of controlled substances from

"legitimate channels into the illicit market." H.R. Rep. No. 1444, *supra*, at 6.

Ironically, the Ninth Circuit's decision undermines the CSA to an even greater degree because it prohibits federal regulation of marijuana, a schedule I drug (like LSD and heroin), that Congress has determined has *no* accepted medical use and may not be manufactured, possessed, or distributed under *any* circumstances other than a strictly controlled research project. 21 U.S.C. 812(b), 823(f). Thus, for schedule I substances, the comprehensive statutory regime Congress has put in place is even more tightly closed than it is for substances in schedules II through V.

c. For purposes of defining Congress's power under the Commerce Clause, there is no basis for distinguishing drug activity for purported medicinal purposes and that same activity for recreational or any other purpose. The court of appeals thus critically erred in relying on the fact that respondents' activities are for purported medical purposes and that Congress's findings in 21 U.S.C. 801 do not specifically address the use of marijuana for purported medical purposes. App. 11a, 19a. The court was of the view that "concern regarding users' health and safety is significantly different in the medicinal marijuana context, where the use is pursuant to a physician's recommendation," *id.* at 11a, and that "the limited medicinal use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse." *Ibid.* Congress has rejected those very propositions. The CSA specifies that marijuana, as a schedule I drug, has "no currently accepted medical use in treatment in the United States," a "high potential for abuse," and "a lack of accepted safety for use * * *

under medical supervision." 21 U.S.C. 812(b)(1)(A)-(C).[4]

Moreover, even for those controlled drugs that (unlike marijuana) have been determined to have an accepted medical use in treatment and therefore are on one of the other schedules, the CSA imposes comprehensive restrictions on the manufacture, distribution, and possession of the drugs—including restrictions on the activities of physicians and pharmacies—in order to maintain the closed system of distribution and to protect the public health and safety. The court of appeals' conclusion that the manufacture, possession and free distribution for purported personal "medicinal" use justify excluding those activities altogether from the reach of the CSA is flatly inconsistent with the fundamental premises and purposes of the CSA.

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[4] The CSA contains provisions under which a controlled substance that has been placed in schedule I (or any other schedule) may be transferred to another schedule or entirely removed from the schedules. 21 U.S.C. 811. In 2001, DEA denied a petition to reschedule marijuana, based on an evaluation of the medical and scientific evidence demonstrating that marijuana continues to meet the criteria for placement in schedule I. 66 Fed. Reg. at 20,038. The DEA relied in significant part on the medical and scientific analysis by the FDA, as well as the FDA's conclusions that "[t]here are no FDA-approved marijuana products" and "there have been no studies that have scientifically assessed the efficacy of marijuana for any medical condition." *Id.* at 20,051, 20,052. The DEA previously had rejected a petition to reschedule marijuana in 1992 (57 Fed. Reg. 10,499), and that denial was affirmed by the D.C. Circuit. *Alliance for Cannabis Therapeutics* v. *DEA*, 15 F.3d 1131, 1137 (1994) ("[T]he Administrator's findings are supported by substantial evidence," including the "testimony of numerous experts that marijuana's medicinal value has never been proven in sound scientific studies.").

The court of appeals' reliance on the purported medical purposes of respondents' drug activities also is inconsistent with this Court's decision in *Oakland Cannabis*. In holding that the CSA forecloses a medical necessity defense to an enforcement action under the CSA, the Court explained that the CSA

> reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, see 21 U.S.C. § 829, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has "no currently accepted medical use" at all.

532 U.S. at 491. The Court emphasized that, "[l]est there be any confusion, we clarify that nothing in our analysis, or the statute, 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. In short, the Ninth Circuit has constitutionalized under the Commerce Clause the very medical necessity defense that was rejected in *Oakland Cannabis*.

3. The court of appeals' decision also conflicts with the decisions of other court of appeals that have upheld the constitutionality of the CSA as applied to the manufacture and simple possession of a controlled substance. In *Proyect* v. *United States*, 101 F.3d 11 (1996), the Second Circuit sustained against a Commerce Clause challenge the conviction of a defendant who grew marijuana plants on his property. The court of appeals rejected the defendant's contention that the class of activities to be examined for an effect on interstate commerce was the production of marijuana

"only for personal consumption" and "*without intent to distribute in commerce*." *Id.* at 12, 14. The Second Circuit instead held that "[t]he nexus to interstate commerce * * * is determined by the class of activities regulated by the statute *as a whole*, not by the simple act for which an individual defendant is convicted." *Id.* at 13. The court also explained that "the class of regulated activities, even if narrowly defined as the manufacture of controlled substances, undoubtedly has a substantial impact on interstate commerce," and "[t]he fact that certain intrastate activities within this class, such as growing marijuana solely for personal consumption, may not actually have a significant effect on interstate commerce is therefore irrelevant." *Id.* at 13-14.

Similarly, in *United States* v. *Leshuk*, 65 F.3d 1105, 1112 (1995), the Fourth Circuit held that the CSA may be constitutionally applied to the "possession and cultivation" of marijuana for "personal use" that "did not substantially affect interstate commerce." The court reasoned that "*Lopez* expressly reaffirmed the principle that 'where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Ibid.* (quoting *Lopez*, 514 U.S. at 558). Likewise, the Eighth Circuit in *United States* v. *Davis*, 288 F.3d 359, cert. denied, 537 U.S. 882 (2002), sustained against a Commerce Clause challenge the conviction of a defendant who engaged in the wholly intrastate manufacture of homemade methamphetamine. The court of appeals looked to the class of activities regulated by the CSA as a whole and relied on the extensive findings by Congress that "demonstrate that local manufacture and distribution of controlled sub-

stances substantially affect interstate traffic in those substances." 288 F.3d at 362.

The Ninth Circuit's decision cannot be reconciled with those decisions of other courts of appeals. App. 35a-36a (Beam, J., dissenting). The Ninth Circuit narrowly defined the relevant class of activities in question to include only the intrastate production, possession, and free distribution of marijuana that is intended for personal consumption and not sale (*id.* at 11a-12a, 16a-17a), without regard to the fact that the CSA comprehensively controls specified *substances* and creates a closed system of manufacture, distribution and possession of those substances. It therefore reasonably applies comprehensively to all instances of activity involving those substances. Such regulation is permissible under the Commerce Clause because that activity as a class is either in or substantially affects commerce and because regulation of its intrastate aspects is necessary and proper to effectuate the regulatory scheme.

B. THE COURT OF APPEALS' DECISION WARRANTS THIS COURT'S REVIEW BECAUSE IT CONFLICTS WITH DECISIONS OF OTHER COURTS, PARTIALLY INVALIDATES AN ACT OF CONGRESS, AND SUBSTANTIALLY UNDERMINES THE GOVERNMENT'S ENFORCEMENT OF THE CONTROLLED SUBSTANCES ACT

1. The Ninth Circuit's decision warrants review by this Court. As explained above, that decision conflicts with decisions of other courts of appeals. It conflicts as well with the Court's decision in *Oakland Cannibas* in finding that the asserted medicinal purpose for smoking marijuana furnishes a basis for placing respondents' manufacture, distribution, and possession of marijuana

beyond the reach of the CSA. But in addition, for the first time since Congress's enactment of the CSA in 1970, a court of appeals has held that the CSA, as applied to the manufacture, possession, and distribution of a controlled substance, is unconstitutional under the Commerce Clause. That unprecedented holding of unconstitutionality warrants this Court's review. Although the court of appeals' decision arises in the context of a request for a preliminary injunction (App. 8a-9a), the court's ruling leaves no doubt that it held the CSA unconstitutional as applied to "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law." *Id.* at 11a; cf. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 317-319 (1985) (finding that a court's preliminarily enjoining of an Act of Congress on constitutional grounds constitutes a "holding" for purposes of a direct appeal statute).

2. The decision is also significant because it substantially undermines the government's ability to enforce the CSA in the nine States within the Ninth Circuit, which have a population of nearly 50 million people. U.S. Department of Commerce, *Statistical Abstract of the United States* 27 (1994). As discussed above (at 11-16), the CSA's prohibition against respondents' activities is essential to effectuate the CSA's purpose to establish a unified and closed system of controls. The court of appeals' decision not only prevents the government from enforcing the CSA with respect to the intrastate manufacture, possession, and free distribution of controlled substances for purported medical purposes; the court's decision also threatens a substantial increase in the level of prohibited drug activity in the States covered by the Ninth Circuit by

individuals purporting to engage in that activity for alleged medical purposes.

Indeed, the court of appeals' decision takes on added significance in light of the fact that a number of States in the Ninth Circuit—Alaska, California, Hawaii, Nevada, Oregon, and Washington—have enacted legislation permitting the use of marijuana for purported medicinal purposes as a matter of state law. Alaska Stat. §§ 11.71.090, 17.37.010-17.37.080 (Michie 2002); Haw. Rev. Stat. Ann. § 329-121 (Michie Supp. 2003); Nev. Rev. Stat. Ann. § 453A.005-453A.510 (Michie Supp. 2003); Or. Rev. Stat. 475.300-475.346 (2001); Wash. Rev. Code Ann. § 69.51.010-69.51.080 (West 1997).[5] Thus, unless the CSA can be constitutionally enforced with respect to that activity, persons in those States will be able to possess marijuana with impunity for purported medicinal use, even though the CSA reflects Congress's deliberate judgment that *all* instances of marijuana possession, manufacture, and distribution should be banned outside the specific confines of the Act itself.

The court of appeals' decision has already had a significant adverse impact by creating substantial confusion over whether the CSA may be constitutionally applied in a variety of contexts and by inviting defendants engaged in illegal drug activity to raise the

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[5] A medical marijuana ballot measure likewise was approved by voters in Maine in November 1999 and codified as state law. Me. Rev. Stat. Ann. tit. 22, § 2383-B (West 2004). Colorado has authorized medical use of marijuana with an amendment to the state constitution. Colo. Const. Art. 18, § 14. Efforts are additionally underway, either through ballot initiatives or proposed state or local legislation, to authorize medical use of marijuana in Connecticut, the District of Columbia, Florida, Missouri, New York, Rhode Island, Vermont, Utah, and Detroit, Michigan.

decision below as a complete obstacle to prosecutions or other enforcement actions under the CSA. For example, in an appeal by a criminal defendant convicted of manufacturing marijuana in violation of 21 U.S.C. 841(a)(1), the Ninth Circuit has directed the parties to address whether the defendant's conduct "[w]as * * * of a 'commercial character' or 'not commercial.'" *United States* v. *McWilliams*, No. 03-50211, at 1 (9th Cir. Feb. 10, 2004) (Order).

Moreover, in an appeal by three cannabis clubs and their operators engaged in the *commercial* manufacture and sale of marijuana (including the club at issue in *Oakland Cannabis*, *supra*), the Ninth Circuit has directed the parties to address the relevance of the decision below to the district court's power to issue an injunction against the distribution and cultivation of marijuana by the cannabis clubs. *United States*. v. *Marin Alliance for Med. Marijuana*, No. 02-16335, *United States* v. *Oakland Cannabis Buyers' Coop.*, No. 02-16534, *United States* v. *Ukiah Cannabis Buyer's Club*, No. 02-16715, at 2 (Mar. 24, 2004) (Order). Similarly, in an appeal by a marijuana collective and its operators with 250 members seeking the return of 167 marijuana plants seized by the DEA pursuant to 21 U.S.C. 881, the Ninth Circuit has directed the parties to file briefs addressing the relevance of the decision below. *Wo/Men's Alliance for Medical Marijuana* v. *United States*, No. 03-15062, at 1 (9th cir. Mar. 24, 2004) (Order). In a related case pending before the district court, the collective and its operators have invoked the decision below in seeking reconsideration of the district court's denial of their request for a preliminary injunction against further enforcement efforts by the DEA. Plaintiff's Mot. for Reconsideration of August 28, 2003

Order, *County of Santa Cruz* v. *Ashcroft*, No. 03-CV-1802 JF (N.D. Cal.) (filed Feb. 23, 2004).[6]

3. Immediate review by this Court is warranted. Further proceedings in the lower courts are not needed to clarify the issues presented. The court of appeals' ruling leaves no factual or legal questions open on remand. Indeed, the court of appeals remanded this case to the district court "for entry of a preliminary injunction." App. 26a. Moreover, as explained above, there already is rapidly increasing litigation, both civil and criminal, that invokes the Ninth Circuit's decision in seeking similar or broader relief in various settings, and that decision creates an incentive for widespread violation of the CSA in the Ninth Circuit by persons who might claim medical reasons for manufacturing, distributing, or possessing marijuana or other controlled substances. The constitutionality of the Act of Congress prohibiting such conduct should not be left in doubt.

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[6] Likewise, the decision below has been cited by an individual seeking to force the DEA to return 5 ounces of marijuana seized by the DEA. Don Nord's Response Opposing the Gov't Mot. to Dismiss at 10, *People of the State of Colorado* v. *Nord*, No. 04-CR-26 (D. Colo. filed Mar. 29, 2004). The court of appeals' decision has also been invoked by two churches seeking an injunction preventing the United States from enforcing the CSA with respect to their cannabis activities. Complaint (Count 6), *Religion of Jesus Church* v. *Ashcroft*, CV 04-00200HG (D. Haw. filed Mar. 24, 2004).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

LISA SCHIAVO BLATT
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
MARK T. QUINLIVAN
Attorneys

APRIL 2004