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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN D. ASHCROFT, ATTORNEY GENERAL :  
Petitioner, :  
v. : No. 03-1454  
ANGEL McCLARY RAICH, et al. :

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Washington, D.C.  
Monday, November 29, 2004

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:04 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Acting Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the Petitioner.  
RANDY E. BARNETT, ESQ., Boston, Massachusetts; on behalf  
of the Respondent.

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P R O C E E D I N G S

[10:04 a.m.]

JUSTICE STEVENS: We will now hear argument in Ashcroft against Raich.

General Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF PETITIONER

MR. CLEMENT: Justice Stevens, and may it please the Court:

Through the Controlled Substances Act, Congress has comprehensively regulated the national market in drugs with the potential for abuse. And with respect to Schedule I substances, like marijuana, that have both a high potential for abuse and no currently accepted medical use in treatment, Congress categorically prohibits interstate trafficking outside the narrow and carefully controlled confines of federally approved research programs.

JUSTICE O'CONNOR: Well, Mr. Clement, the -- I think it is reasonably clear that Congress spoke very broadly in the Act, and the question, for me, turns on whether Lopez and Morrison dictate some concerns with its application in this context.

MR. CLEMENT: Well, with respect, Justice O'Connor, I don't think either Lopez or Morrison casts any

1 doubt on the constitutionality of the Controlled  
2 Substances Act, and I think, in particular, that's because  
3 the decisions in Lopez and Morrison cited, with approval,  
4 cases like Darby and Wickard, and preserved those cases.  
5 And, of course, the concurring opinion of Justice Kennedy  
6 did so, as well.

7 JUSTICE O'CONNOR: Well, but in Wickard, of  
8 course, you had a wheat grower, a small farmer, and his  
9 wheat did, in part, go in the national market. You don't  
10 have that here. As I understand it, if California's law  
11 applies, then none of this home-grown or medical-use  
12 marijuana will be on any interstate market. And it is in  
13 the area of something traditionally regulated by states.  
14 So how do you distinguish Morrison? And how do you  
15 distinguish Lopez?

16 MR. CLEMENT: Well, Justice O'Connor, let me  
17 first say that I think it might be a bit optimistic to  
18 think that none of the marijuana that's produced  
19 consistent with California law would be diverted into the  
20 national market for marijuana. And, of course, the  
21 Controlled Substances Act is concerned, at almost every  
22 step of the Act, with a concern about diversion, both of  
23 lawful substances from medical to non-medical uses and  
24 from controlled substances under Schedule I into the  
25 national market.

1 JUSTICE O'CONNOR: Well, in looking at this  
2 broad challenge, do we have to assume that the State of  
3 California will enforce its law? I mean, if it turns out  
4 that it isn't and that marijuana is getting in the  
5 interstate market, that might be a different thing.

6 MR. CLEMENT: Well, with respect, Justice  
7 O'Connor, on this record, I don't think that there's any  
8 reason to assume that California is going to have some  
9 sort of almost unnatural ability to keep one part of a  
10 fungible national drug market separate. And I think  
11 Congress, here, made important findings that you've  
12 alluded to, not just that there's a national market, not  
13 just that the intrastate and the interstate markets are  
14 linked, but that drugs are fungible, and that because  
15 drugs are fungible, it's simply not feasible, in Congress'  
16 words, to regulate and separately focus on only drugs that  
17 have traveled on interstate commerce.

18 JUSTICE STEVENS: Well, General Clement, what if  
19 we were to assume -- I'm not saying this is -- that the  
20 District Court could find that there is a narrow segment  
21 of the market in which they could prevent diversions, and  
22 they had -- say they made such findings. Would we have to  
23 disregard them, or say they were irrelevant?

24 MR. CLEMENT: I think you would say they were  
25 relevant, Justice Stevens, and that's because --

1 JUSTICE STEVENS: But then why do you need to  
2 rely on the possibility of diversion?

3 MR. CLEMENT: Well, because I think it is a  
4 reality, in responding to Justice O'Connor's question -- I  
5 think that in -- obviously, in all of these commerce --

6 JUSTICE STEVENS: Yeah, but in my hypothesis,  
7 it's a nonexistent reality.

8 MR. CLEMENT: Well, in your hypothetical -- and  
9 if I could turn to that -- I still think the analysis  
10 would not turn on whether or not the truth of the  
11 supposition that diversion could be prevented, because  
12 this Court, in a series of cases, including Darby,  
13 Wickard, Wirtz, and Perez, has made clear that the  
14 relevant focal point for analysis is not the individual  
15 plaintiff's activities and whether they have a substantial  
16 effect on interstate commerce, but whether the class of  
17 activities that Congress has decided to regulate has such  
18 a substantial effect. And, in this case, there's no  
19 question that the overall production, distribution, and  
20 possession of marijuana and other Schedule I substances  
21 has a profound effect on interstate commerce.

22 JUSTICE SCALIA: But it's not an interstate  
23 commerce that you want to foster. I mean, in these other  
24 -- in these other cases, Congress presumably wanted to  
25 foster interstate commerce in wheat, in Wickard v.

1 Filburn. Congress doesn't want interstate commerce in  
2 marijuana. And it seems rather ironic to appeal to the  
3 fact that home-grown marijuana would reduce the interstate  
4 commerce that you don't want to occur in order to regulate  
5 it. I mean, you know, doesn't that strike you as strange?

6 MR. CLEMENT: Well, no, it doesn't, Justice  
7 Scalia, but let me respond in two ways. First of all, I  
8 think it's been clear, at least since the lottery case,  
9 that Congress' authority to regulate interstate commerce  
10 includes the authority to prohibit items traveling in  
11 interstate commerce and to declare something contraband in  
12 interstate commerce.

13 JUSTICE SCALIA: Absolutely.

14 MR. CLEMENT: And I would suggest that it is a  
15 perfectly rational exercise of Congress' judgement to  
16 treat marijuana and other Schedule I substances not just  
17 as contraband in interstate commerce, but as contraband  
18 simpliciter, as contraband for all purposes.

19 JUSTICE SCALIA: But that's quite a different  
20 rational than Wickard v. Filburn. I mean, it seems to me  
21 you're not -- you're not appealing to the fact that it has  
22 a substantial impact on interstate commerce. You're  
23 appealing to the fact that the power which Congress has to  
24 prohibit the use of goods carried in interstate commerce  
25 cannot effectively be implemented without this law.

1                   MR. CLEMENT: Well, I think there's some truth  
2 to that, Justice Scalia, but let me say this. I think  
3 what I'm saying is, I'm taking the rationale that this  
4 Court accepted in Wickard, and I'm applying it to a  
5 different regulatory regime. Here, Congress --

6                   JUSTICE STEVENS: But you're applying it to the  
7 opposite kind of regulatory -- you're applying it to a  
8 regulatory regime in which the government wants to  
9 prohibit this subject -- substances from being sold or --  
10 in interstate commerce. And if you just follow the letter  
11 -- the letter of this law, this marijuana won't get into  
12 interstate commerce. In fact, it would reduce the demand  
13 for marijuana, because it would supply these local users  
14 and they wouldn't have to go into the interstate market.

15                   MR. CLEMENT: Well, with respect, Justice  
16 Stevens, if you took a look at the Controlled Substances  
17 Act, itself, and read it literally, you'd assume that  
18 there was absolutely no market, period, in Schedule I  
19 substances. But the reality is, there's a \$10.5 billion  
20 market -- illegal market, albeit -- but market in  
21 marijuana in the United States, on an annual basis. So --

22                   JUSTICE STEVENS: But to the extent that this  
23 statute has any impact, it will reduce the purchase in the  
24 interstate market and confine these to locally grown  
25 marijuana.



1                   MR. CLEMENT: Well, first of all, Justice  
2 Stevens, that's only true if there will be no diversion,  
3 to get back to --

4                   JUSTICE STEVENS: Then I'm assuming -- my  
5 hypothetical is that California could pass a law that  
6 would prevent diversions from occurring.

7                   MR. CLEMENT: Well, in the same way that the  
8 Federal Government has had trouble stamping out the  
9 marijuana market entirely, I think California is going to  
10 have parallel problems in absolutely preventing diversion.

11                  JUSTICE STEVENS: But just --

12                  JUSTICE KENNEDY: I suppose some -- one answer  
13 to that case is the Perez case, with loan sharking.

14                  MR. CLEMENT: Oh, absolutely, Justice Kennedy.  
15 And, in that context, what this Court said is, even though  
16 it was focused on what was going to be an -- both in that  
17 case and generally, an interstate activity, Congress did  
18 not have to just look at the particular plaintiff's effect  
19 on interstate commerce, but, rather, the effect of the  
20 entire class of activities. And if I could --

21                  JUSTICE GINSBURG: But, as Justice O'Connor  
22 brought out earlier, all those cases -- Wickard, Perez --  
23 they all involved a commercial enterprise. And, here,  
24 we're told this is different, because nobody is buying  
25 anything, nobody is selling anything.

1                   MR. CLEMENT: Well, with respect, Justice  
2 Ginsburg, I think the whole point of the Wickard case was  
3 to extend rationales that it applied recently to commerce  
4 to activity that the Court described as economic, but not  
5 commercial. And I think the production and distribution  
6 and possession of marijuana is economic in the same way  
7 that the production of wheat was in the Wickard case.

8                   JUSTICE SOUTER: But you're -- no, I was going  
9 to -- your whole point, I take it, is that the two  
10 particular patients in this case are simply -- simply  
11 cannot be taken, for our purposes, as representative in  
12 the fact that they are getting the marijuana by, I think,  
13 growing it themselves or being given it. You're saying,  
14 you cannot take that fact as a fact from which to  
15 generalize in deciding this case.

16                   MR. CLEMENT: That's exactly right, Justice  
17 Souter, and that is the logic, not just of me, but of this  
18 Court's cases, in cases like Darby and Wickard and Wirtz  
19 and Perez. And I point to the Wickard case, in  
20 particular, only because it, too, involves a non-  
21 commercial enterprise or a non-commercial production of --

22                   JUSTICE O'CONNOR: Well, I do take issue with  
23 that. As I read the record in Wickard, it involved a  
24 small farmer. A portion of his wheat went on the  
25 interstate market. It also was fed to cattle, which, in

1 turn, went on the interstate market. He used some of it  
2 himself, but part of it was commercial. I think Wickard  
3 can be distinguished on the facts.

4 MR. CLEMENT: Well, Justice O'Connor, it could  
5 be -- I mean, any case can be distinguished on the facts,  
6 of course, but I think what's important is, this Court, in  
7 Wickard, itself, recognized that the case was -- it was  
8 only interesting because a portion of the regulated wheat  
9 involved wheat that was going to be consumed on the farm.  
10 And --

11 JUSTICE O'CONNOR: The other portion is a matter  
12 of [inaudible] interstate commerce.

13 MR. CLEMENT: Well, that's true, Justice  
14 O'Connor, but this Court, basically, in its opinion,  
15 Justice Jackson, for the Court, put aside -- to one side  
16 all of the grain that was going to go in interstate  
17 commerce, since that's easy under our existing precedents.  
18 This case is only interesting, he said, because it  
19 involves wheat that's going to be consumed on the farm.  
20 And he specifically talked about both the wheat that would  
21 be fed to the animals, but also the wheat that would be  
22 consumed by the family. And what he said is, the intended  
23 disposition of the particular wheat wasn't clear from the  
24 record of the case. And, by that, I take him to mean that  
25 it wasn't relevant to the Court's analysis in upholding

1 the Agricultural Adjustment Act to the wheat at issue  
2 there. And it's important to recognize that the way the  
3 Agricultural Adjustment Act worked is, it applied to all  
4 the wheat that was grown in excess of the quota, and so it  
5 applied to the wheat that was used by the family for  
6 consumption of their own bread. And, nonetheless, this  
7 Court upheld that as a valid Commerce Clause regulation.

8 And so I think, by parity of reasoning, all of  
9 the marijuana that's at issue and covered by the  
10 Controlled Substances Act, whether it's lawful under state  
11 law, whether it's involved in a market transaction or not,  
12 is fairly within the Congress' Commerce Clause --

13 JUSTICE KENNEDY: And is --

14 MR. CLEMENT: -- authority.

15 JUSTICE KENNEDY: -- this a harder or easier  
16 case than Wickard when we know that, in Wickard, it was  
17 lawful to buy and sell wheat, and, here, it is unlawful to  
18 buy and sell marijuana?

19 MR. CLEMENT: Well, Justice Kennedy --

20 JUSTICE KENNEDY: Does this make your case  
21 easier, in a sense, or --

22 MR. CLEMENT: I think it does, Justice Kennedy,  
23 because, as I said earlier, in responding to a question  
24 from Justice Scalia, I think if you're talking about a  
25 context where Congress has the undoubted power to prohibit

1 something in interstate commerce entirely, and has  
2 exercised that power, so it treats something as  
3 effectively contraband in interstate commerce, and then  
4 takes the complementary step, especially in light of the  
5 fungibility of the product, and says, "We're just going to  
6 treat this as contraband simpliciter." I think that  
7 judgement by Congress has a very definite link to  
8 interstate commerce and its unquestioned authority to  
9 regulate interstate commerce.

10           And I do think there's a sense in which when  
11 Congress is regulating the price of something, there's  
12 certainly a temptation to excise out relatively small  
13 producers and for Congress to say, "Well, we can still  
14 have effective regulation if we regulate the vast majority  
15 of production." But with respect to something that's  
16 unlawful to have and is -- and has very significant risks  
17 precisely because it's unlawful, any little island of  
18 lawful possession of non-contraband marijuana, for  
19 example, poses a real challenge to the statutory regime.

20           It would also, I think, frustrate Congress' goal  
21 in promoting health. And I think the clearest example of  
22 that is the fact that, to the extent there is anything  
23 beneficial, health-wise, in marijuana, it's THC, which has  
24 been isolated and provided in a pill form, and has been  
25 available as a Schedule III substance, called --

1 JUSTICE GINSBURG: But there's --

2 MR. CLEMENT: -- Marinol.

3 JUSTICE GINSBURG: -- but there is, in this  
4 record, a showing that, for at least one of the two  
5 plaintiffs, there were some 30-odd drugs taken, none of  
6 them worked. This was the only one that would. And it --  
7 Justice Souter asked you about these two plaintiffs. The  
8 law can't be made on the basis of those two plaintiffs.  
9 But let's suppose that you're right, generally. If there  
10 were to be a prosecution of any of the plaintiffs in this  
11 case, would there be any defense, if there were to be a  
12 federal prosecution?

13 MR. CLEMENT: Well, Justice Ginsburg, I think we  
14 would take the position, based on our reading of the  
15 Oakland cannabis case -- and, obviously, different  
16 justices on this Court read the opinion differently and  
17 had different views on the extent to which the medical-  
18 necessity defense was foreclosed by that opinion -- I  
19 would imagine the Federal Government, in that case, if it  
20 took the unlikely step of bringing the prosecution in the  
21 first place, would be arguing that, on the authority of  
22 Oakland cannabis, the medical-necessity defense was not  
23 available.

24 But I think, in any event, what is important, at  
25 this point, is that we don't have a prosecution; we have

1 an affirmative effort to strike down the Controlled  
2 Substances Act in an injunctive action. And I think, in  
3 that context, certainly Justice Souter is right, that this  
4 Court's precedents make clear that one doesn't consider  
5 only the individual's conduct, but the entire class of  
6 activities that's at issue.

7 I think, in this regard, it's also worth  
8 emphasizing that a deeper flaw in the Respondent's  
9 argument, that California law is somehow relevant here or  
10 the fact that their conduct is lawful under California  
11 law, is that there's a mismatch between what California  
12 law makes lawful and what might be considered relevant for  
13 arguing that there's an attenuated effect on interstate  
14 commerce. Because the California law makes the possession  
15 of marijuana for medical use lawful under state law,  
16 without regard to whether that marijuana has been involved  
17 in a cash transaction or has crossed state lines.

18 And so, if Respondents are right on their  
19 Commerce Clause theory, I don't see how they can be right  
20 because their conduct is lawful under state law or because  
21 their -- that marijuana use is medical. If they're right,  
22 then I think their analysis would extend to recreational  
23 use of marijuana, as well as medical use of marijuana, and  
24 would extend to every state in the nation, not just --

25 JUSTICE STEVENS: Well, I think --

1                   MR. CLEMENT:  -- those states that made it  
2 lawful.

3                   JUSTICE STEVENS:  Doesn't it depend on how you  
4 define the "relevant class of activities"?  Is it the  
5 entire class that Congress ought to regulate, or is it a  
6 narrower class, in which the Plaintiffs contend that the  
7 statute cannot constitutionally be applied to a particular  
8 very narrowly defined class?  And is it ever permissible  
9 to define the class narrowly to escape a -- the broad  
10 argument that you make?

11                   MR. CLEMENT:  Well, I don't think that is  
12 permissible, Justice Stevens.  I think that's what this  
13 Court's cases in *Wirtz*, in *Darby*, in *Wickard* --

14                   JUSTICE STEVENS:  So you're saying that this  
15 statute could never have an unconstitutional application.

16                   MR. CLEMENT:  Under the Commerce Clause, I --  
17 that's exactly right, that would be our position.  It is  
18 constitutional on its face, and it -- and because of that  
19 line of authority, an as-applied challenge can be brought,  
20 but the legal test that's applied in the as-applied  
21 challenge is one that considers the constitutionality of  
22 the statute as a whole --

23                   JUSTICE O'CONNOR:  But, in *Morrison*, did the  
24 Court's opinion not say that Congress cannot justify  
25 Commerce Clause -- Clause legislation by using a long but-



1 for causal chain from the activity in question to an  
2 impact on interstate commerce? I mean, the Court  
3 certainly made that statement.

4 MR. CLEMENT: Oh, absolutely, Justice O'Connor,  
5 but --

6 JUSTICE O'CONNOR: Which cuts against what  
7 you're saying.

8 MR. CLEMENT: Well, with respect, I don't think  
9 so. And I'd say two things about it. One, this Court, in  
10 Morrison and Lopez, was very important to emphasize --  
11 thought it was very important to emphasize two things:  
12 one, that the activity there was non-economic in a way  
13 that differentiated it, even from Wickard; and, second,  
14 the Court also made it clear that the regulation that  
15 there -- there was not essential to the effectiveness of  
16 an overall regulatory scheme. And I think, on both  
17 points, this case is on the constitutional side of the  
18 line that separates the Lopez and the Morrison case.

19 JUSTICE O'CONNOR: The argument on the other  
20 side is that this limited exception is a non-economic use  
21 -- growing for personal use, under prescription --

22 MR. CLEMENT: I understand that -- I understand  
23 that's their argument, Justice O'Connor, but I don't  
24 understand how this Court, in Lopez, could have said that  
25 Wickard involved non-economic activity if this activity is

1 not also covered. You're talking about --

2 JUSTICE SCALIA: Involved economic activity.

3 MR. CLEMENT: I'm sorry if I misspoke. Economic  
4 activity. Because what you're talking about here is the  
5 possession, the manufacture, the distribution of a  
6 valuable commodity for which there is a ready --  
7 unfortunately, a ready market, albeit an illicit market.

8 JUSTICE KENNEDY: If we rule for the Respondents  
9 in this case, do you think the street price of marijuana  
10 would go up or down in California?

11 MR. CLEMENT: I would be speculating, Justice  
12 Kennedy, but I think the price would go down. And I think  
13 that what -- and that, in a sense, is consistent with the  
14 government's position, which is to say, when the  
15 government thinks that something is dangerous, it tries to  
16 prohibit it. Part of the effort of prohibiting it is  
17 going to lead to a black market, where the prohibition  
18 actually would force the price up. And there is a sense  
19 in which this regulation, although not primarily designed  
20 as a price regulation -- the Controlled Substance Act, I  
21 think, does have the effect of increasing the price for  
22 marijuana in a way that stamps down demand and limits the  
23 -- and in a way that reduces demand. And I think that's  
24 all consistent with Congress' judgement here.

25 And if I could return for a second to the point

1 about Marinol, what's important there is that the process  
2 of manufacturing of Marinol, and isolating the one helpful  
3 component, does two things. One, the manufacturing  
4 process allows there to be a safe use for one of the  
5 components in marijuana. But it also provides an  
6 unambiguous hook for Congress to exercise its Commerce  
7 Clause authority. And yet the overall regime of trying to  
8 get people to use more healthful substances, and not use  
9 things like crude marijuana that have harmful effects, is  
10 undermined if Congress can't also address that which is  
11 more harmful, but is distinct only because it is capable  
12 of being locally produced. And that's exactly what crude  
13 marijuana is.

14 JUSTICE STEVENS: In other words, the statute is  
15 -- it trumps the independent judgement of the physicians  
16 who prescribe it for the patients at issue in this case.

17 MR. CLEMENT: Well, I think, in responding to  
18 that, Justice Stevens, I would say, obviously, for  
19 purposes of federal law, the idea of medical marijuana is  
20 something of an oxymoron, because the Federal Government  
21 treats it as a Schedule I substance. Now, notwithstanding  
22 that, some doctors may make a different judgement about a  
23 particular patient; but that's something that this Court,  
24 I think, has previously understood, that the federal  
25 regulatory regime does not allow individual patients or

1 doctors to exempt themselves out of that regime.

2 JUSTICE STEVENS: Right.

3 MR. CLEMENT: I think that's the import of the  
4 Rutherford decision with Laetrile.

5 JUSTICE STEVENS: Do you think there could be  
6 any state of facts on which a judicial tribunal could  
7 disagree with the finding of Congress that there's no  
8 acceptable medical use? Say they had a -- say there was a  
9 judicial hearing on which they made a contrary finding.  
10 Would we have to ignore that? Would we have to follow the  
11 congressional finding or the judicial finding if that  
12 happened?

13 MR. CLEMENT: Well, it depends on the exact  
14 hypothetical you have in mind. I think the -- the  
15 judicial finding that I think would be appropriate, and  
16 this Court would not have to ignore in any way, is a  
17 finding by the D.C. Circuit that, in a particular case  
18 where there's a rescheduling effort before the FDA, that  
19 the underlying judgement of the FDA refusing to reschedule  
20 is invalid, arbitrary, capricious. That's the way to go  
21 after the finding that marijuana is a Schedule I substance  
22 without a valid medical use in treatment. This is not a  
23 situation in -- and your hypothetical might respond to a  
24 different statute that raised a harder question, where  
25 Congress made such a medical finding, and then just left

1 it there without any mechanism to adjust the finding for  
2 changing realities. But, here, Congress made it clear  
3 that a process remains open to reschedule marijuana in a  
4 way that gets it onto Schedule II or Schedule III.

5 And I think it's wrong to assume that there's  
6 any inherent hostility to the substances at issue here. I  
7 mean, the FDA, for example, rescheduled Marinol from  
8 Schedule II to Schedule III in a way that had the effect  
9 of making it easier to prescribe and more available. But  
10 I think what's going on with the FDA is an effort to try  
11 to counterbalance the risk for abuse, the risk for  
12 diversion, with these other considerations of getting safe  
13 medicine --

14 JUSTICE GINSBURG: Have there --

15 MR. CLEMENT: -- available to patients --

16 JUSTICE GINSBURG: -- have there been any  
17 applications to change the schedule for marijuana to the  
18 FDA?

19 MR. CLEMENT: There have been a number of those  
20 petitions that have been filed. There was one recently  
21 rejected, I think as recently as 2001; it may be 1999.  
22 There was also a series of, kind of, a four- or five-  
23 iteration effort to change the rescheduling that  
24 culminated in a D.C. Circuit opinion in the early '90s.  
25 So there's definitely been these efforts. But on the

1 current state of the -- of the record, there just is not a  
2 justification for changing the schedule.

3 And I think both of the briefs talked a little  
4 bit about the Institute of Medicine's study about the  
5 medical efficacy of marijuana. And I think one thing  
6 that's important to keep in mind that that study comes to  
7 a conclusion about is, whatever benefits there may be for  
8 the individual components in marijuana, that smoked --  
9 smoked marijuana itself really doesn't have any future as  
10 medicine, because -- and that's true, I think, for two  
11 reasons. One, there's something like 400 different  
12 chemical components in crude marijuana that one would  
13 smoke, and it's -- it just, sort of, belies any logic that  
14 all 400 of those would be helpful. And a big part of the  
15 process of medicine, generally, is to take raw, crude  
16 material that somebody could grow in their garden, and  
17 actually have people who do this for a living get involved  
18 in a process of synthesizing and isolating the beneficial  
19 components, and then manufacturing and making that  
20 available.

21 The second reason that smoked marijuana doesn't  
22 have much of a future as medicine is, as I think people  
23 understand, smoking is harmful; and that's true of  
24 tobacco, but it's also true of marijuana. And so the idea  
25 that smoked marijuana would be an effective delivery

1 device for medicine, I think, is also something that  
2 really doesn't have any future as medicine.

3                   What does have a future for medicine, of course,  
4 is an effort to synthesize and isolate the beneficial  
5 component. That's been done with Marinol. It is true  
6 that some people have difficulty tolerating the pill form  
7 that Marinol is available in. And there's ongoing  
8 research to try to figure out different ways to deliver  
9 that substance. But there is, in a sense, a little bit of  
10 a -- and the Institute of Medicine's study has about five  
11 pages discussing Marinol, and it makes the point that  
12 there's something of a tradeoff. Because one of the  
13 downsides of Marinol, as opposed to marijuana, is that it  
14 takes longer to get into the bloodstream. But that's also  
15 one of the reasons why the FDA has made a judgement that  
16 Marinol is less subject to abuse, because it takes longer  
17 to get into the drug-stream, and so it doesn't have the  
18 characteristic of street drugs that tend to be abused,  
19 which is a very quick delivery time between the taking of  
20 the substance and the time that it has an effect on the  
21 system.

22                   JUSTICE SOUTER: May I go back to your point a  
23 few minutes ago about -- it was, sort of, a categoric  
24 point -- you, in effect, said, "If this argument succeeds  
25 with respect to medical use of marijuana, the next

1 argument is going to be recreational use, and there's no  
2 real way to distinguish between them." Wouldn't this be a  
3 way to distinguish between them? That in deciding what  
4 class you are going to -- or what subclass you're going to  
5 consider from which to generalize, you simply ask the  
6 question, "What good reasons are there to define a  
7 subclass this way?"

8 In this particular case, the good reasons to  
9 define a subclass of medical usage are the benefits --  
10 whether you accept the evidence is another thing -- but  
11 the benefits which the doctors say that, under present  
12 circumstances, you can get from smoking it, as opposed to  
13 taking the synthesized drug.

14 There's no such argument, I would guess, in  
15 favor of recreational marijuana usage as a separate  
16 category. And, for that reason, isn't there a -- isn't  
17 there a good reason to categorize this as narrowly as the  
18 Respondents are doing here, just medical usage, without  
19 any risk of generalizing the recreational usage?

20 MR. CLEMENT: With respect, Justice Souter, I  
21 don't think that it would be a good idea for this Court to  
22 get on a path of starting to second-guess Congress'  
23 judgement about defining a class of activities --

24 JUSTICE SOUTER: That may -- oh, that may be,  
25 but it seems to me that that's a separate argument,



1 because you're -- you were arguing before that if you  
2 recognize medical usage, you don't have any way of drawing  
3 the line against private recreational usage. And I'm  
4 suggesting that you do have a reason for drawing that  
5 line, and it's the benefit for medical usage, if you  
6 accept the evidence; whereas, there is no reason to  
7 categorize recreational usage separately, and that seems  
8 to me a category argument, rather than a respect-for-  
9 Congress argument.

10 MR. CLEMENT: Well, Justice Souter, I have no  
11 doubt that this Court could draw a line. I think it would  
12 find it very difficult to police that line over the broad  
13 variety of cases. I think it would find it every bit as  
14 frustrating as policing the line in Hammer against  
15 Dagenhart that this Court abandoned in Darby.

16 With that, I'd like to reserve my time for  
17 rebuttal.

18 JUSTICE STEVENS: Mr. Barnett?

19 ORAL ARGUMENT OF RANDY E. BARNETT

20 ON BEHALF OF RESPONDENTS

21 MR. BARNETT: Justice Stevens, and may it please  
22 the Court:

23 I have two points to make. First, the class of  
24 activities involved in this case are non-economic and  
25 wholly intrastate. Second, the federal prohibition of

1 this class of activities it not essential -- is not an  
2 essential part of a larger regulatory scheme that would be  
3 undercut unless the intrastate activity were regulated.

4 If you accept the government's contrary  
5 contentions on either of these two points, *Ashcroft v.*  
6 *Raich* will replace *Wickard v. Filburn* as the most far-  
7 reaching example of Commerce Clause authority over  
8 intrastate activity.

9 JUSTICE KENNEDY: Well, on your first point,  
10 can't we infer from the fact that there's an enormous  
11 market, commercial market, for any given commodity, that  
12 simple possession of that commodity is a form of  
13 participation in the market?

14 MR. BARNETT: It can be, or it might not be. If  
15 you possess an item that came from the market or is going  
16 to the market, simple possession could easily be a part of  
17 the marketplace. But if you're in possession of an item  
18 that you've made, yourself, that is disconnected from the  
19 market -- it didn't come from the market and it's not  
20 going to the market --

21 JUSTICE KENNEDY: Well, but it's fungible.

22 MR. BARNETT: That -- the fungibility issue is  
23 in this case, but the -- but a -- the fact that a good is  
24 fungible does not make it a market good, and it does not  
25 make the possession of that good an economic activity. Or

1 --

2 JUSTICE SCALIA: Well, you know, Congress has  
3 applied this theory in other contexts. One is the  
4 protection of endangered species. Congress has made it  
5 unlawful to possess ivory, for example. It doesn't matter  
6 whether you got it lawfully, or not; or eagle feathers,  
7 the mere possession of it, whether you got it through  
8 interstate commerce or not. And Congress' reasoning is,  
9 "We can't tell whether it came through interstate commerce  
10 or not, and to try to prove that is just beyond our  
11 ability; and, therefore, it is unlawful to possess it,  
12 period."

13 Now, are those -- are those laws, likewise,  
14 unconstitutional, as going beyond Congress' commerce  
15 power?

16 MR. BARNETT: Not if they're an essential part  
17 of a larger regulatory scheme that would be undercut,  
18 unless those activities are reached.

19 JUSTICE SCALIA: Well, why is that different  
20 from this?

21 MR. BARNETT: Because this class of activities  
22 -- because it's been isolated by the State of California,  
23 and is policed by the State of California, so that it's  
24 entirely separated from the market --

25 JUSTICE SCALIA: Isolated and -- I understand

1 that there are some communes that grow marijuana for the  
2 medical use of all of the members of the communes.

3 MR. BARNETT: That class of activities is not  
4 before the Court. That is actually before --

5 JUSTICE SCALIA: No, but it's before the Court  
6 when you -- when you raise the policing of the problem by  
7 California, and saying it's not a -- it's not a real  
8 problem, you brought it before the Court.

9 MR. BARNETT: But that class of activities could  
10 be -- could be -- if this Court limits its ruling to the  
11 class of activities that is before the Court, that class  
12 --

13 JUSTICE SCALIA: Which is -- which is what?

14 MR. BARNETT: Which is --

15 JUSTICE SCALIA: An individual grower?

16 MR. BARNETT: An individual who is growing it  
17 for her -- him- or herself, who has -- or has a caregiver  
18 growing it for her --

19 JUSTICE SCALIA: Gee, what basis --

20 MR. BARNETT: -- for --

21 JUSTICE SCALIA: -- what basis is there to draw  
22 it that narrowly? I mean, I guess if we -- we could say  
23 people whose last name begins with a Z. You know, that  
24 would narrow the category, too. But why does -- why does  
25 that make any sense?

1                   MR. BARNETT: Justice Scalia, we believe it  
2 makes sense because we are talking about a classification  
3 of activities that has been identified by the State of  
4 California, and which is rational to distinguish from --

5                   JUSTICE SCALIA: Oh, but California hasn't  
6 identified individual growers. Communes are okay, as far  
7 as California law is concerned.

8                   MR. BARNETT: Well, it's not entirely clear  
9 whether communes are okay, as far as the California laws  
10 are concerned.

11                  JUSTICE SCALIA: Why wouldn't it be?

12                  MR. BARNETT: Because if, in fact, commercial  
13 activity is taking place, if buying and selling is taking  
14 place --

15                  JUSTICE SCALIA: No, no, they're not buying and  
16 selling. I mean, you can't prove they're buying and  
17 selling. There are just a whole lot of people there, with  
18 alleged medical needs.

19                  JUSTICE BREYER: I mean, I don't understand. Is  
20 there any authority in the commerce cases for -- an X,  
21 which is there in the middle of a state, and it doesn't  
22 move one way or the other -- now, Congress' power does  
23 extend to the X if the state doesn't say something about  
24 the X. But if the state says something about the X, then  
25 Congress' power does not extend to it. That's hard for me

1 to accept, because I don't see -- whether it's commerce or  
2 not commerce, whether it affects something or doesn't  
3 affect something, doesn't seem to me to have much to do  
4 with whether the state separately regulates it, and I  
5 can't find any support at all for that in any case.

6 MR. BARNETT: The support would come from the  
7 exception to Lopez and Morrison that the government is  
8 urging that the Court adopt, that the Congress can reach  
9 non-economic activity that's intrastate, that's wholly  
10 intrastate, if doing so is essential to a larger  
11 regulatory scheme that would be undercut if they can't  
12 reach it.

13 JUSTICE BREYER: Well, here, they say -- look, I  
14 take it you're using this because I was going to ask you.  
15 You know, he grows heroin, cocaine, tomatoes that are  
16 going to have genomes in them that could, at some point,  
17 lead to tomato children that will eventually affect  
18 Boston. You know, we can -- oil that's never, in fact,  
19 being used, but we want an inventory of it, federally.  
20 You know, I can multiply the examples --

21 MR. BARNETT: Well --

22 JUSTICE BREYER: -- and you can, too. So you're  
23 going to get around all those examples by saying what?

24 MR. BARNETT: By saying that it's all going to  
25 depend on the regulatory scheme, what the --

1 JUSTICE BREYER: Yeah.

2 MR. BARNETT: -- purpose of the --

3 JUSTICE BREYER: So now what you're saying is,  
4 in a Commerce Clause case, what we're supposed to do is to  
5 start to look at the federal scheme and the state scheme  
6 and see, comparing the federal scheme and the state  
7 scheme, whether, given the state scheme, the federal  
8 scheme is really necessary to include this. That's a  
9 task, and I'm trying to make it as complicated as I can in  
10 my question.

11 [Laughter.]

12 JUSTICE BREYER: But I see it very well. Here  
13 is what they say. They say that, "By the way, a hundred-  
14 thousand people using medical marijuana in California will  
15 lead to lower marijuana prices in the nation. Bad. And,  
16 second, when we see medical marijuana in California, we  
17 won't know what it is. Everybody'll say, 'Mine is  
18 medical.' Certificates will circulate on the black  
19 market. We face a mess. For both those reasons, it does  
20 have an impact," they say. Now, what's your response?

21 MR. BARNETT: Well, you've raised at least two  
22 different practical issues. One is the fact -- the number  
23 of people who are in the class, and the second is the  
24 ability to identify whether they properly belong in the  
25 class.

1                   As for the number of people, we are talking  
2 about a very small number of people. They say a hundred-  
3 thousand. They get their figures from the National  
4 Organization from Reform of Marijuana Laws. Our figures  
5 in our brief come from the government. The figures show  
6 it's a very small fraction of persons that would be  
7 involved. And their argument is basically -- and the  
8 logic of your hypothetical is premised on -- the more  
9 people that go into the illicit market, the better for  
10 federal drug policy, because that will drive the price up.  
11 You have to -- what we're take -- we're doing is, we're  
12 taking people out of the illicit drug market, which then,  
13 under your hypothetical, would lead to a reduction -- and  
14 Justice Kennedy's suggestion -- would lead to a reduction  
15 in the price of the illegal market, which, the opposite  
16 would be, they're -- it's good for federal policy to have  
17 more people in the illicit drug market, because that's  
18 going to drive the price up.

19                   JUSTICE BREYER: No, no, we don't want more  
20 people --

21                   MR. BARNETT: Of course not.

22                   JUSTICE BREYER: -- in the illicit drug market.

23                   [Laughter.]

24                   MR. BARNETT: Of course not.

25                   JUSTICE BREYER: And we don't want low prices,



1 either.

2 [Laughter.]

3 MR. BARNETT: But the -- but the -- but the  
4 scheme of -- but the class of activities that have been  
5 authorized by the State of California will take people out  
6 of --

7 JUSTICE BREYER: So, normally I would have said,  
8 it's up to Congress to figure out how to -- the way that  
9 -- you have one going one way, one going the other way,  
10 and balancing those factors would be for Congress. That's  
11 what we'd normally say.

12 MR. BARNETT: Well --

13 JUSTICE BREYER: And you say all that stuff is  
14 not for Congress; that's for us.

15 MR. BARNETT: Well, within this exception -- the  
16 threshold issue -- I do want to make sure that I focus on  
17 this -- the threshold issue, which is the issue that has  
18 occupied most of our time so far, is whether the activity  
19 here is economic or non-economic. The government claims  
20 it's economic, we claim it's non-economic.

21 JUSTICE BREYER: Well, what it is, is, it's non-  
22 economic, and it affects the economic.

23 MR. BARNETT: Right. So the threshold issue  
24 that is -- that -- upon which Lopez and Morrison terms --  
25 turns is whether it's economic or non-economic.

1 JUSTICE KENNEDY: Well, I should have thought  
2 that regular household chores of -- say, performed in an  
3 earlier time mostly by women, was classically economic --  
4 washing dishes, making bread. And now you say growing  
5 marijuana isn't?

6 MR. BARNETT: If you accept the government's  
7 definition of economic, then every -- then washing dishes,  
8 today, would be economic, and that --

9 JUSTICE SOUTER: No, but even --

10 MR. BARNETT: -- would be within the -- within  
11 the power of Congress to reach.

12 JUSTICE SOUTER: But even if we accept your  
13 definition of economic, I don't see that it is a basis  
14 upon which we ought to make a category decision. You say  
15 it's non-economic because one of these people is a -- is a  
16 self-grower, another one is getting it from a friend for  
17 nothing. But I don't see what reason that you have given,  
18 or any reason that you haven't given, for us to believe  
19 that, out of -- now I'm going to assume, for the sake of  
20 argument, a hundred-thousand potential users -- everybody  
21 is going to get it from a friend or from plants in the  
22 backyard. Seems to me the sensible assumption is, they're  
23 going to get it on the street. And once they get it,  
24 under California law, it's not a crime for them to have it  
25 and use it. But they're going to get it in the street.

1 Why isn't that the sensible assumption?

2 MR. BARNETT: Well, they have an -- they have a  
3 very strong incentive not to get it on the street, because  
4 getting it on the street is going to subject them to  
5 criminal prosecution, under both California and federal  
6 law, as well as the --

7 JUSTICE SOUTER: Yeah, but the -- it's also the  
8 case that approximately 10 percent of the American  
9 population is doing that every day, if I accept the  
10 figures in the government's brief, and they're not getting  
11 prosecuted.

12 MR. BARNETT: But we're talking -- in that case,  
13 we're talking about people who are using it for sport, for  
14 recreation. We are talking about a class of people here  
15 who are sick people, who don't necessarily want to violate  
16 the law.

17 JUSTICE SOUTER: And if I am a sick person, I'm  
18 going to say, "Look, if they're not prosecuting every kid  
19 who buys, what, a nickel bag or whatever you call a small  
20 quantity today, they're not going to prosecute me,  
21 either." I mean, there's not going to be any incentive,  
22 it seems to me, to avoid the street market.

23 MR. BARNETT: The government, in their brief,  
24 asserts that the -- that the possession statute that  
25 currently exists provides a deterrent effect, which is why

1 they -- which is their explanation for why they failed to  
2 enforce the possession statute that they say is so  
3 essential to the --

4 JUSTICE GINSBURG: If one --

5 MR. BARNETT: -- regulatory scheme.

6 JUSTICE GINSBURG: -- if one takes your view,  
7 that this is non-economic activity, so it's outside  
8 Congress' commerce power, then explain to me why, if you  
9 have someone similarly situated in a neighboring state,  
10 somebody whose doctor says, "This person needs marijuana  
11 to live," but that state doesn't have a compassionate-use  
12 act -- it's just as isolated -- no purchase, no sale,  
13 grown at home, good friend grows it -- and yet you say  
14 Congress could regulate that, if I understand your brief  
15 properly.

16 MR. BARNETT: Yes, Your -- yes, Your Honor,  
17 because there's the -- that's the second step of the  
18 analysis. The first step of the analysis is the  
19 economic/non-economic. If you don't -- if the Court stops  
20 there, then they could also apply in these other states.  
21 But then if the Court adopts --

22 JUSTICE GINSBURG: But if you -- if you buy that  
23 -- so your first answer is, yes, on your first argument,  
24 it would be equally impermissible for the feds to regulate  
25 medical use anywhere.

1 MR. BARNETT: Yes, Your Honor.

2 JUSTICE GINSBURG: All right. Now you're going  
3 to have some limiting --

4 MR. BARNETT: But a limiting principle is the  
5 one that I -- was identified by the Court in Lopez in  
6 which the government is asserting that if it's an  
7 essential part of a broader regulation of economic  
8 activity to reach this activity, then it may be reached.  
9 And the difference between states in which there is a  
10 state law enforcement that's confining the class, and that  
11 there is a discrimination between legal and non-legal use,  
12 is completely different from a practical enforcement  
13 standpoint than a state in which there is no  
14 differentiation. Just think of the existence, for  
15 example, of identification cards, which the State of  
16 California is going to be issuing, like driver's license  
17 cards.

18 JUSTICE GINSBURG: Yeah, but it doesn't right  
19 now, and that doesn't make the scheme less valid, in your  
20 view.

21 MR. BARNETT: Well, because -- but this is the  
22 sort of regulation -- the sort of effectiveness of the  
23 regulation that will be at issue and which is, in fact --  
24 I believe the Court should be in the position of trusting  
25 the State of California to be able to administer its

1 regime. There is no regime in other states to trust, and,  
2 therefore, the argument that it is necessary to reach that  
3 activity, and a lot of other activity in states in which  
4 the states are not attempting to pursue the health of  
5 their citizens -- the goal of preserving the health of  
6 their citizens this way, that would fall under the  
7 exception which this Court suggested in Lopez --

8 JUSTICE BREYER: So this is a new framework, I  
9 take it, and it's very interesting. And one of the things  
10 that interests me -- I guess, on your framework, Lopez  
11 should have come out my way.

12 [Laughter.]

13 MR. BARNETT: Well --

14 JUSTICE BREYER: Because it's essential to  
15 regulate guns in schools as part of a national gun-control  
16 regulatory scheme.

17 MR. BARNETT: Justice Breyer, that's the reason  
18 why that exception has to be narrowly treated, so it  
19 doesn't reach your result.

20 [Laughter.]

21 MR. BARNETT: If that exception were treated as  
22 broadly as you suggested that it should be in your dissent  
23 in Morrison, then the game is up, the exception will  
24 swallow the rule, and Lopez and Morrison will be limited  
25 to their facts.

1 JUSTICE BREYER: Well, I thought we didn't need  
2 to reach all that here, for the reason that the connection  
3 here, which is an enforcement-related connection and a  
4 market-related connection, is actually, I have to confess,  
5 a little more obvious and a little more close than what I  
6 had to -- what I had to say in Lopez to -- was the  
7 connection between guns, education, communities, and  
8 business. So I would have thought, given the -- and I  
9 believe that, you know -- but, I mean -- but that was far  
10 further than this, which is just direct.

11 MR. BARNETT: But this case is completely unlike  
12 those cases. This case is completely isolated. In Lopez,  
13 that gun probably did come through interstate commerce,  
14 not that I believe it should have made any difference, but  
15 it probably did. Here, we're talking about substances  
16 that don't. So there's just no literal connection between  
17 this class of activities and this interstate market.

18 JUSTICE SCALIA: Well, we didn't decide that, in  
19 Lopez, on the basis of whether the gun had come in  
20 interstate commerce. If the statute in question had  
21 applied only to guns that had been transported in  
22 interstate commerce, the case might have come out  
23 differently.

24 MR. BARNETT: I -- no doubt, Your -- I -- and I  
25 wasn't suggesting otherwise, Justice Scalia. I'm just

1 suggesting that, here, we have -- exactly, that if there  
2 had been that interstate connection in Lopez, the case  
3 might have come out different. There is no interstate  
4 connection whatsoever in this class of cases. None. The  
5 only way to make it an interstate connection is through  
6 some sort of hypothetical economic substitution effect in  
7 which somebody who's doing something over here is going to  
8 have an affect on somebody else who's doing something over  
9 there. There is no connection.

10 JUSTICE SCALIA: Sounds like Wickard to me.

11 MR. BARNETT: Well, Wickard, Your Honor --

12 JUSTICE SCALIA: I always used to laugh at  
13 Wickard, but that's -- that's what Wickard said.

14 MR. BARNETT: Wickard --

15 JUSTICE SCALIA: Had he not eaten the wheat, it  
16 would have been in interstate commerce.

17 MR. BARNETT: Had that case been about eating  
18 wheat, that case would never have arisen.

19 JUSTICE SCALIA: Well, that's what it was about,  
20 as far as the Court's analysis was concerned. To be sure,  
21 there were a lot of -- there was a lot more use of the  
22 wheat on his farm, other than just human consumption, but  
23 it seems to me the analysis of the case said, "You take it  
24 -- you take it out of the stream of commerce by growing it  
25 yourself, you make it unnecessary for your -- to buy it in



1 interstate commerce."

2 MR. BARNETT: It's -- the entire analysis -- the  
3 entire proof that the court relied upon in Wickard was  
4 proof of the economic impact of home-consumed wheat on the  
5 farms. And by "home-consumed," it did not mean eating at  
6 the family -- at the family table; it meant feeding to  
7 your livestock and then putting it -- your livestock --

8 JUSTICE SCALIA: Strange phrase, to mean  
9 "feeding to livestock"?

10 MR. BARNETT: But the --

11 JUSTICE SCALIA: "Home-consumed" is feed it to  
12 your pig?

13 MR. BARNETT: But, yes, that's exactly what --

14 JUSTICE SCALIA: I don't think so.

15 MR. BARNETT: -- that's exactly what that  
16 general term -- how that general term was used in this  
17 case.

18 JUSTICE BREYER: But what the Court said, I take  
19 it -- and I have quoted a lot of the language there -- it  
20 says that the wheat farmer's consumption of home-grown  
21 wheat, not the part that went in -- quote, "though it may  
22 not be regarded as commerce" --

23 MR. BARNETT: Yes, Your Honor.

24 JUSTICE BREYER: -- end quote, still can be  
25 regulated, quote, "whatever its nature," so long as,

1 quote, "it exerts a substantial economic effect on  
2 interstate commerce." Now, that's the language, and I  
3 take it that Justice Scalia is exactly right, I thought,  
4 from that language, it's about the analysis, home-grown  
5 wheat, which is not economic, having an effect on  
6 something that is.

7 MR. BARNETT: With all respect --

8 JUSTICE BREYER: Which is not commerce. Sorry,  
9 not commerce.

10 MR. BARNETT: With all respect, what -- that's  
11 -- I was about to make that --

12 JUSTICE BREYER: Well, the Commerce Clause  
13 speaks in terms of commerce.

14 MR. BARNETT: Right. Right. What the Court was  
15 using here was the narrower -- the traditional definition  
16 of "commerce" that Justice Thomas has been urging this  
17 Court to adopt. And they were saying that, "We are not  
18 going to limit ourselves to that narrow definition of  
19 'commerce.'" It would include, for example, agriculture  
20 and production. That's all going to be reachable, even  
21 though it's not commerce, in the traditional sense. But  
22 what we would call it today, and I believe what the Court  
23 correctly called it, in Lopez, was "economic activity."  
24 Production is economic activity. Manufacturing is  
25 economic activity. But -- it's not commerce, but it's

1 economic activity that can be reached. And that is the  
2 activity -- that's not only the activity that Farmer  
3 Filburn was engaged in; that was the activity that the  
4 statute was aimed at. The statute --

5 JUSTICE SCALIA: Well, why is this not economic  
6 activity, if you use the term in that broad sense? This  
7 marijuana that is grown, just like the wheat that was  
8 grown, in Wickard, since it's grown on the farm, doesn't  
9 have to be bought elsewhere, and that makes it an economic  
10 activity.

11 MR. BARNETT: What made it an economic activity  
12 in Wickard was the fact that it was part of commercial  
13 enterprise, that it was being used on the farm -- not in  
14 interstate commerce, but part of the commercial enterprise  
15 of the farm.

16 JUSTICE SCALIA: Again, I don't think that's --  
17 that faithfully represents what the opinion said. I think  
18 the opinion covered -- including the amount that he  
19 consumed himself, and his family consumed.

20 MR. BARNETT: The -- look, I -- for whatever  
21 it's worth, it's worth remembering that the statute  
22 exempted small commercial farms. People who had backyard  
23 gardens weren't even included within the regulatory  
24 regime. The regulatory regime was about regulating or  
25 stopping or restricting the supply of wheat that got into

1 the market, or that could have --

2 JUSTICE SCALIA: Did the opinion make a point of  
3 that?

4 MR. BARNETT: Pardon me?

5 JUSTICE SCALIA: Did the opinion make a point of  
6 that?

7 MR. BARNETT: It -- it was mentioned in the  
8 opinion. It was not -- it was not a major point of this  
9 opinion. But --

10 JUSTICE SCALIA: I don't think it was a point of  
11 the Court's analysis at all.

12 MR. BARNETT: This --

13 JUSTICE SCALIA: Could I -- could I --

14 JUSTICE STEVENS: Let me ask this question.  
15 What is your view with respect to the impact of the  
16 activities concerned in this case on the interstate market  
17 for marijuana? Is it your view that it will have no  
18 impact, that it will increase the interstate demand, or  
19 decrease the interstate demand? So there are three  
20 alternatives. Which is the one we should follow?

21 MR. BARNETT: Can I pick "trivial impact"?

22 [Laughter.]

23 JUSTICE STEVENS: No, but if it -- "trivial  
24 impact," is it a trivial impact that enhances the price of  
25 marijuana or decreases the price of marijuana, in your

1 view?

2 MR. BARNETT: The only effect it could have on  
3 the price would be a slight trivial reduction, if it has  
4 any effect at all, because it's going to withdraw users  
5 from the illicit drug market. And to the extent that they  
6 are now in the illicit drug market -- and we don't know  
7 whether they are or not --

8 JUSTICE STEVENS: Well, that would reduce demand  
9 and increase price, it seems to me. It's the other way  
10 around.

11 MR. BARNETT: Well, it would reduce demand and  
12 reduce prices, I think. But --

13 JUSTICE STEVENS: If you reduce demand, you  
14 reduce prices? Are you sure?

15 MR. BARNETT: Yes.

16 [Laughter.]

17 JUSTICE STEVENS: Oh, you're right. You're  
18 right. Okay. Yeah. Yeah.

19 JUSTICE SOUTER: Your whole argument for  
20 triviality, though, goes -- your whole argument for  
21 triviality, though, goes back to your disagreement with  
22 the government about how many people are involved, because  
23 I take it you accept the assumption that the more people  
24 who are involved -- if there are millions and millions, it  
25 is unlikely that this licensed activity is going to be

1 without an effect on the market. So the whole argument  
2 boils down to how many people are going to be involved.  
3 You don't accept the government's 100,000-dollar figure.  
4 Let me ask you a question that would -- that would get to,  
5 maybe, a different number, and that is, Do you know how  
6 many people there are in California who are undergoing  
7 chemotherapy at any given time?

8 MR. BARNETT: I do not know the answer to that.

9 JUSTICE SOUTER: Isn't that number going to be  
10 indicative of the demand for marijuana?

11 MR. BARNETT: It could be, Your Honor, but that  
12 also illustrates --

13 JUSTICE SOUTER: But if you -- if you accept  
14 that, then there's nothing implausible about the  
15 government's hundred-thousand number, is there?

16 MR. BARNETT: But whatever -- I don't know,  
17 because I don't know the number of people using  
18 chemotherapy. But whatever the number --

19 JUSTICE SOUTER: How many people are there in  
20 California? What's the population?

21 JUSTICE KENNEDY: Thirty-four million.

22 MR. BARNETT: Thank you, Justice Kennedy.

23 JUSTICE SOUTER: Lots -- lots --

24 [Laughter.]

25 JUSTICE SOUTER: -- lots and lots. They -- a

1 hundred-thousand cancer patients undergoing chemotherapy  
2 does not seem like an implausible number. And, in fact,  
3 if that number is a plausible one today, its plausibility  
4 reflects, among other things, the fact that there is a  
5 controversy as to whether California's law, in fact, is  
6 enforceable, or not. And the reason -- there is reason to  
7 assume that -- if we ruled your way, that that number  
8 would go up.

9                   So, if you accept that line of argument, then  
10 your argument, that the effect, whatever it may be, is  
11 going to be trivial, seems to me unsupportable. Am I  
12 missing something?

13                   MR. BARNETT: Well, two things. First of all,  
14 whatever number it is, it's going to be confined to people  
15 who are sick, who are sick enough to use this. That is  
16 not an infinitely expandable number, the way, for example,  
17 recreational activity is, where lots of people could just  
18 decide to do it. We're talking about people who qualify,  
19 on a physician's recommendation, for this particular  
20 activity. That will limit the number.

21                   But the amount of the people -- the effect on  
22 commerce only matters if the Wickard v. Filburn  
23 aggregation principle applies to the class of activities  
24 in this case, and it does not apply to the class of  
25 activities in this case if they are non-economic, as we

1     assert that they are.

2                   JUSTICE SOUTER:  Well -- but that is circular  
3     reasoning, because the whole -- your whole argument that  
4     it's non-economic is based on the claim that there are --  
5     the numbers are so few -- the number of people involved,  
6     from what you could generalize, are so few that it would  
7     not be reasonable to infer an effect on the market.  If  
8     there would be a large market effect, it makes no more  
9     sense to call this non-economic than Filburn's use, non-  
10    economic.

11                   MR. BARNETT:  Lopez and Morrison stand for the  
12    proposition that activities that simply have an effect on  
13    the market are not necessary -- that does not make them  
14    economic.  This Court rejected that proposition, that just  
15    because an activity has an effect -- an economic effect  
16    makes the activity, itself, economic.  It adopted a  
17    principle that's less than --

18                   JUSTICE SCALIA:  Remote, remote, remote economic  
19    effect.

20                   JUSTICE SOUTER:  It was inference upon inference  
21    upon inference.  That's not what we're talking about here.

22                   MR. BARNETT:  But just -- just have it -- just  
23    -- whether an activity is economic, you have to look to  
24    the activity, itself, and an economic activity is one  
25    that's associated with sale, exchange, barter, the



1 production of things for sale and exchange, barter. This  
2 whole Court's jurisprudence since The New Deal has been  
3 premised on the ability to tell the difference between  
4 economic activity, on the one hand, and personal liberty,  
5 on the other.

6 JUSTICE SOUTER: Your whole jurisprudence in  
7 this case is premised on the assumption that we have got  
8 to identify the entire range of potential effect based on  
9 the particular character of two individuals in their -- in  
10 their supply of marijuana. And the whole point of this  
11 argument is that that does not seem to be a realistic  
12 premise on which to base constitutional law.

13 MR. BARNETT: The premise of our -- the premise  
14 of our economic claim is the nature of the activity  
15 involved, not necessarily its effect, but the kind of  
16 activity it is. The idea -- for example, you --  
17 prostitution is an economic activity. Marital relations  
18 is not an economic activity. We could be talking about  
19 virtually the same act. And there is a market overhang  
20 for -- from private sexual relations to prostitution, but  
21 we don't say that because there is a market for  
22 prostitution, that, therefore, everything that is not in  
23 that market is economic. We look at the activities, and  
24 we --

25 JUSTICE BREYER: I'd like to ask you one

1 question about the activity --

2 MR. BARNETT: Yes.

3 JUSTICE BREYER: -- which was brought up before,  
4 and I just -- I've never understood this. I'm not an  
5 expert. I don't honestly know, if I really think about  
6 it, despite all the papers and so forth, whether it's true  
7 that medical marijuana is helpful to people in ways that  
8 pills are not. I really don't know.

9 So I would have thought that the people, like  
10 your clients, who have a strong view about it, would go to  
11 the FDA, and they would say to the FDA, "FDA, take this  
12 off the list. You must take it off the list if it has an  
13 accepted medical use and it isn't lacking in safety."

14 The FDA will say yes or it will say no. If it  
15 says yes, they win. If they say no, they can come right  
16 into court and say, "That's an abuse of discretion."

17 The Court says yes or no. If it says yes, they  
18 win. If it says no, it must be because it wasn't an abuse  
19 of discretion, in which case, I, as a judge, and probably  
20 as a person, would think it isn't true that marijuana has  
21 some kind of special use.

22 So that would seem to me to be the obvious way  
23 to get what they want. That seems to me to be relevant to  
24 the correct characterization. And while the FDA can make  
25 mistakes, I guess medicine by regulation is better than

1 medicine by referendum.

2 MR. BARNETT: Well --

3 JUSTICE BREYER: So that's -- I just want to  
4 know why.

5 MR. BARNETT: Well, Your Honor, first of all,  
6 that whole process wouldn't dictate what the power of  
7 Congress is to reach this activity --

8 JUSTICE BREYER: That's all true, but as long as  
9 that hasn't been done, don't I have to take this case on  
10 the assumption that there is no such thing as medical  
11 marijuana that's special and necessary?

12 MR. BARNETT: I would --

13 JUSTICE BREYER: If has been done, maybe I  
14 shouldn't make it.

15 MR. BARNETT: -- I would simply ask Your Honor  
16 to read the amicus brief by Rick Doblin, in which it  
17 describes the government's obstruction of scientific  
18 research that would establish the safety and efficacy of  
19 cannabis by denying supplies of cannabis -- of medical --  
20 of cannabis for medical experimentation.

21 And then I'd ask Your Honor to read the  
22 Institute for Medicine's report, that both the government  
23 and I -- and we have relied upon in our briefs. There has  
24 been no impeachment of this report by the National Academy  
25 of Sciences on the medical effect. And what they say is

1 that the -- that what information we have is that cannabis  
2 does have a substantial medical effect. Smoked cannabis  
3 does carry with it harms associated with it, as the -- as  
4 General Clement correctly pointed out. It does carry with  
5 it these ancillary harms. But when people are sick and  
6 people are suffering and people are dying, they may be  
7 willing to run the risk of these long-term harms in order  
8 to get the immediate relief, the life-saving relief that  
9 cannabis has demonstrably been able to provide. I'd just  
10 ask Your Honor to look at that, which is in the record.

11 JUSTICE KENNEDY: Are prescriptions, under  
12 California law, limited only to those people with life-  
13 threatening illnesses?

14 MR. BARNETT: They are limited to a list of  
15 illnesses that are in the statute.

16 JUSTICE GINSBURG: Some of the illnesses --

17 MR. BARNETT: Some of which are life-threatening  
18 and some of which are not, Your Honor.

19 JUSTICE GINSBURG: In one -- in one plaintiff's  
20 case, I think, there isn't a life-threatening --

21 MR. BARNETT: That's correct, Your Honor. She  
22 has -- she has severe back spasms and pain that cannot be  
23 controlled by conventional medicines. She's a law-abiding  
24 citizen. This goes back to the issue of what the --  
25 incentives there are that are created by this. This is a

1 law-abiding woman, who has never been interested in the  
2 illicit-drugs market.

3 JUSTICE GINSBURG: May I just ask you one  
4 procedural question?

5 MR. BARNETT: Yes.

6 JUSTICE GINSBURG: And this is -- this is a suit  
7 for an injunction. And it -- basically an injunction  
8 against a criminal prosecution.

9 MR. BARNETT: And seizure --

10 JUSTICE GINSBURG: And --

11 MR. BARNETT: -- of these plants.

12 JUSTICE GINSBURG: -- and there's an old saying,  
13 in equity, that courts don't enjoin criminal prosecutions.  
14 So how is your injunction suit appropriate, given that old  
15 saying there that you have to make your defense in the  
16 criminal proceeding and not enjoin this operation?

17 MR. BARNETT: Well, it is -- it is an -- we're  
18 seeking an injunction to prevent the enforcement of the  
19 statute against these two persons, which includes  
20 forfeiture, which has already happened in this case.  
21 We've already had Diane Monson's plants seized by the Drug  
22 Enforcement Authority. That is not something that we --  
23 that we -- that has anything to do with criminal  
24 prosecution, and yet that puts at risk her supply of  
25 medicine, the supply of medicine she needs to get by, to

1     relieve her suffering.

2                     I see my time --

3                     JUSTICE STEVENS: Thank you.

4                     MR. BARNETT: -- is up.

5                     JUSTICE STEVENS: Thank you, Mr. Barnett.

6                     General Clement, you have four minutes.

7                     REBUTTAL ARGUMENT OF PAUL D. CLEMENT

8                     ON BEHALF OF PETITIONER

9                     MR. CLEMENT: Thank you, Justice Stevens, and  
10     may it please the Court:

11                    As I understand Respondents' position, it's  
12     effectively that their clients, and clients like them, in  
13     their use of medical marijuana, is somehow so hermetically  
14     sealed from the rest of the market on marijuana that it  
15     has no effect on that market on marijuana and no effect on  
16     the government's overall regulatory regime. And I  
17     understand that to be true largely because of state law.

18                    And one of the many problems with that mode of  
19     analysis is that the state law is not designed only to  
20     carve out those transactions that have no effect on  
21     interstate commerce or no effect on the federal regulatory  
22     regime. Proposition 215 was not tasked as an exercise in  
23     cooperative federalism; it was passed as an effort to make  
24     medical marijuana lawful to possess, whether you bought it  
25     in interstate commerce, whether you bought it with the

1 marijuana having traveled in interstate commerce, whether  
2 you bought it, whether you grew it yourself. There's a  
3 fundamental mismatch with their theory that really, I  
4 think, undermines their theory.

5                   Now, there's the question now about what kind of  
6 impact this would have on the federal enforcement scheme.  
7 Now, we, in our reply brief, try to use the numbers from  
8 one of Respondents' own amici, and we suggest that there's  
9 a hundred-thousand people that might be lawful medical  
10 users, if their position prevails. Now, obviously, this  
11 is all an effort in, sort of, counter-factual speculation,  
12 so the numbers may be a bit off. But they suggest that  
13 our own government numbers are somehow better, and they  
14 cite them on page 18 of the red brief. But the only  
15 numbers on the red brief for California suggest that, in  
16 the four counties for which there are data, there was --  
17 .5 percent of the people use marijuana. Now, if you  
18 extend that out statewide to the 34 million people in  
19 California, that gives you 170,000 people. So their  
20 numbers -- using the government numbers actually give you  
21 more potentially affected people.

22                   I think in trying to figure out how many people  
23 would be affected, it's worth considering what medical  
24 conditions are covered. And this responds to Justice  
25 Kennedy's last question, Is this just limited to AIDS or

1 people with terminal cancer? And it's not. And if you  
2 want to look at what is covered as serious medical  
3 condition under the statute, you can turn to page 7(a) of  
4 the red brief, in the appendix to the red brief, and it  
5 suggests that a serious medical condition -- there's a  
6 catchall at the end that includes subsection 12 -- "Any  
7 other chronic or persistent medical system that, if not  
8 alleviated, may cause serious harm to the patient's safety  
9 or physical or mental health." Now, I think that is an  
10 exceedingly broad definition of a serious medical  
11 condition for which somebody could be -- get a  
12 recommendation for marijuana for medical uses.

13 Another point worth considering, in considering  
14 the impact on the federal regulatory regime or the  
15 effectiveness of California in preventing any diversion,  
16 is to take a look at two cases we cite in our reply brief.  
17 One is the People against Wright. There's somebody who's  
18 arrested with 19 ounces, over a pound, of marijuana.  
19 They're packaged such that he has one small bag in his  
20 pocket, six other small bags wrapped with a scale in his  
21 backpack, two other larger bags in that backpack, and then  
22 a pound wrapped in a shirt in the back of his truck. And  
23 yet the Appellate Court in California said that he was  
24 entitled to go to the jury with the theory that that was  
25 for medical use. The fact that he had a scale, and the



1 fact that it was packaged the way it was, could be  
2 explained to the jury because he had just boughten it, and  
3 that he used the scale to make sure he wasn't ripped-off.  
4 I think that shows that it's going to be very hard to  
5 enforce the regulatory regime.

6 The other case in the reply brief worth  
7 mentioning is the Santa Cruz case, because that's a case  
8 where a Federal District Court, after Raich came out, said  
9 that it could not enforce the DA and the Controlled  
10 Substances Act against a 250-person cooperative. And that  
11 just shows that this is not something that will be limited  
12 to one or two users at a time, but will have a substantial  
13 impact on the government's ability to enforce the  
14 Controlled Substances Act.

15 Thank you.

16 JUSTICE STEVENS: Thank you, General Clement.

17 The case is submitted.

18 [Whereupon, at 11:04 a.m., the case in the  
19 above-entitled matter was submitted.]

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