No. 03-1454

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

ANGEL MCCLARY RAICH, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Respondents are patients suffering from serious, painful, or life-threatening medical conditions, and caregivers to one of the patients, who possess or cultivate cannabis in California using only materials originating from or manufactured within that State. The cannabis is used solely by the patients, for medical purposes, as recommended by the patients' physicians and authorized by the California Compassionate Use Act, Cal. Health & Safety Code § 11362.5. The question presented is:

Whether Respondents are entitled to a preliminary injunction preventing Petitioners from taking action to enforce the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, against them based upon: (1) the findings of both courts below that the balance of hardships and the public interest tip sharply in favor of Respondents, such that a preliminary injunction is warranted based upon the existence of a serious question going to the merits; (2) the likelihood that Respondents will succeed on the merits of their claim that the Controlled Substances Act, if interpreted to apply to Respondents, exceeds Congress's power under the Commerce Clause; and (3) the likelihood that Respondents will succeed on the merits of their additional claims under the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments, and the medical necessity doctrine.

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 Commerce Clause (Article I, Section 8, Clause 3), the Due Process Clause of the Fifth Amendment, the Ninth Amendment, and the Tenth Amendment of the United States Constitution, and relevant provisions of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("CSA"), and the Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5 (West 2004), are reproduced at App. A, *infra*.

STATEMENT OF THE CASE

1. a. California is one of nine States that have enacted laws authorizing the use of cannabis for medical purposes. *See* Compassionate Use Act of 1996.[1] The purpose of the Compassionate Use Act is "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where the medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." Cal. Health & Safety Code § 11362.5(b)(1)(A). The Act permits a patient, or the patient's primary caregiver, to possess or cultivate cannabis solely for personal medical purposes of the patient upon the recommendation or approval of a physician. *Id.* § 11362.5(d). The Act expressly provides that it shall not "be construed to supersede legislation prohibiting persons from engaging in conduct that endangers

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[1] The other States are Alaska, Colorado, Hawaii, Maine, Nevada, Oregon, Vermont, and Washington. *See* App. B, *infra* (collecting citations). At least 26 States have taken steps in this direction. *See id.* This State legislation reflects strong popular support for allowing patients to use medical cannabis. *Id.* at 2b.

others, nor to condone the diversion of marijuana for nonmedical purposes." *Id.* § 11362.5(b)(2).[2]

b. The CSA makes it a federal crime to "possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice or except as otherwise authorized by this title." 21 U.S.C. § 844(a). The CSA defines a "practitioner" as "a physician . . . licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . ., to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice." 21 U.S.C. § 802(21). The CSA also provides that it should not be construed to "to … exclu[de] any State law on the same subject matter …, unless there is a positive conflict" between Federal and State law such that "the two cannot consistently stand together." 21 U.S.C. § 903.

c. For purposes of the CSA, marijuana is classified as a schedule I drug with "no currently accepted medical use in treatment in the United States," *id.* § 812(b)(1)(B), (c).[3] Despite this classification, "the public record reflect[s] a legitimate and growing division of informed opinion on this issue." *Conant v. Walters*, 309 F.3d 629, 640 (9th Cir. 2002)

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[2] California recently enacted additional legislation to clarify the scope of the Compassionate Use Act. The new legislation establishes a voluntary program under which the State will issue identification cards to qualified patients who satisfy State legal requirements. *See* S.B. 420 (Cal. 2003), codified at Cal. Health & Safety Code §§ 11362.7-11362.83 (2003).

[3] Federal law defines "marihuana" to mean "all parts of the plant Cannabis sativa L" except "the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, . . . or the sterilized seed of such plant." 21 U.S.C. § 802(16). In this brief, the term "cannabis" refers to any part of the plant Cannabis sativa L used for medical purposes.

(Kozinski, J., concurring), *cert. denied*, 124 S. Ct. 387 (2003). "A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs." *Id.* at 640-41. A report commissioned by the White House Office of National Drug Control Policy and carried out by the Institute of Medicine, the medical component of the National Academy of Sciences, concluded that "the accumulated data suggest a variety of indications, particularly for pain relief, antiemesis, and appetite stimulation," and that "[f]or patients such as those . . . who suffer simultaneously from severe pain, nausea, and appetite loss, cannabinoid drugs might offer broad-spectrum relief not found in any other single medication." Institute of Medicine, *Marijuana and Medicine: Assessing the Science Base* 177 (Janet E. Joy *et al.* eds., 1999) ("IOM Report"), *available at* http://www.nap.edu/books/0309071550/html. The IOM Report also concluded that currently "there is no clear alternative for people suffering from *chronic* conditions that might be relieved by smoking marijuana, such as pain and AIDS wasting." *Id.* at 179 (emphasis in original). Accordingly, the IOM Report endorsed treatment of such patients with smoked cannabis subject to an oversight mechanism. *See id.* Other reputable scientific and governmental bodies have reached similar conclusions. *See Conant*, 309 F.3d at 640-43 (Kozinski, J., concurring) (summarizing scientific evidence supporting medical use of cannabis, and its acceptance by, among others, the British House of Lords and the Canadian government).[4]

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[4] Petitioners' brief does not acknowledge any of this evidence. Instead, Petitioners quote, without qualification, statements that "there have been no studies that have scientifically assessed the efficacy of marijuana for any medical condition" and "there are no FDA-approved marijuana (...continued)

2. Respondents are California citizens who cultivate or use cannabis for medical treatment as recommended by a physician pursuant to the Compassionate Use Act. Pet. App. 46a. Respondents Angel Raich and Diane Monson each suffer from serious medical conditions. Both courts below found that "[t]raditional medicine has utterly failed these women." *Id.* at 5a, 46a. Respondents John Doe Number One and John Doe Number Two are Raich's caregivers.

a. Respondent Raich suffers from a daunting array of medical conditions including "life-threatening weight loss, nausea, severe chronic pain (from scoliosis, temporomandibular joint dysfunction and bruxism, endometriosis, headache, rotator cuff syndrome, uterine fibroid tumor causing severe dysmenorrheal, chronic pain combined with an episode of paralysis that confined her to a wheelchair), post-traumatic stress disorder, non-epileptic seizures, fibromyalgia, inoperable brain tumor (probable meningioma or Schwannoma), paralysis on at least one occasion (the diagnosis of multiple sclerosis has been considered), multiple chemical sensitivities, allergies, and asthma." J.A. 48 (Decl. of Frank Henry Lucido, M.D.). Raich's physician, a Board-certified family practitioner, states that she "has tried essentially all other legal alternatives to cannabis and the alternatives have been ineffective or result in intolerable side effects." J.A. 49. Raich's physician has provided a list of 35 medications that Raich has tried, all of which "resulted in unacceptable adverse side effects." *Id.* at 49-50. Raich's physician has

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products." Pet. Br. 41-42 n.5 (quoting 66 Fed. Reg. 20,038 (Apr. 18, 2001)). In fact, Marinol is an FDA-approved product, and the active ingredient of Marinol is the cannabinoid THC, one of the psychoactive compounds in cannabis. *See* IOM Report 137, 202-07. Not all patients can tolerate Marinol, and "[i]t is well recognized that Marinol's oral route of administration hampers its effectiveness because of slow absorption and patients' desire for more control over dosing." *Id.* at 205-06.

determined that his patient "has no reasonable legal alternative to cannabis for effective treatment or alleviation of her medical conditions or symptoms." *Id.* at 49.

From 1996 to 1999, Raich was partially paralyzed and confined to a wheelchair. J.A. 63, 73-76 (Decl. of Angel Raich). In August 1997, after her physician concluded that her pain could not be controlled using conventional medications, Raich attempted suicide to end her pain and suffering. *Id.* at 76, 41. Thereafter, Raich began using cannabis on her physician's recommendation, and her medical condition improved significantly. J.A. 87. She is no longer confined to a wheelchair. *Id.* at 74-75. She is better able to cope with her medical conditions and plays a more active role in the lives of her two children. *Id.* at 88, 90-94.

Raich's physician has concluded that she may suffer rapid death if she is denied medical cannabis. J.A. 51 ("It could very well be fatal for Angel to forego cannabis treatments."). "It is [his] opinion that Angel cannot be without cannabis as medicine because of the precipitous medical deterioration that would quickly develop." *Id.* at 48. "Angel becomes debilitated from severe chronic pain." *Id.* "[S]he clearly loses weight, and would risk wasting syndrome and death, without cannabis." *Id.*[5]

b. Respondent Monson suffers severe, chronic back pain and constant painful muscle spasms caused by a degenerative disease of the spine. J.A. 53 (Decl. of John Rose, M.D.). Her physician, also a Board-certified family practitioner, states that "Diane has tried other medical alternatives to

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[5] Petitioners refer in this Court to Respondents' "purported personal 'medicinal' use" of marijuana. *See* Pet. Br. I. Respondents and their physicians have submitted sworn statements that Respondents are using cannabis for medical purposes, in accordance with California law. Petitioners have not disputed that evidence and, at this interlocutory stage of the proceedings, must therefore accept the record as it stands.

medical cannabis, including Flexeril, a muscle relaxant, and Feldene, a powerful anti-inflammatory," but "those prescription drugs have proven to be either ineffective in relieving Diane's pain and suffering or produce intolerable side effects." *Id.* Dr. Rose "prescribed Vicodin and Vioxx to attempt to relieve Diane's pain and suffering," but "Vicodin, an addictive drug," leaves her with an "extremely sick stomach . . . for several days after any use." *Id.* Vioxx "appears to relieve Diane's inflammation associated with her back pain" but "does not relieve her painful spasms." *Id.* Dr. Rose determined "that medical cannabis use is deemed appropriate for Diane Monson, and that medical cannabis provides necessary relief for Diane's pain and suffering." *Id.* Accordingly, "pursuant to California State law, medical cannabis was recommended for Diane as treatment of her medical conditions, including her Chronic Back Pain and Spasms." *Id.* Cannabis "virtually eliminates" Diane's muscle spasms and "greatly relieves" her back pain. *Id.* at 58 (Decl. of Diane Monson). Without cannabis, Monson would suffer "intense," "debilitating" pain that would make working and sitting down "impossible," and would relegate her to lying down. *Id.*

c. Raich's cannabis is grown using only soil, water, nutrients, equipment, supplies, and lumber originating from or manufactured within California. Pet. App. 47a. Monson's "cultivation of marijuana is similarly local in nature." *Id.* Monson cultivates her own cannabis. *Id.* at 46a. Raich is unable to cultivate cannabis. *Id.*; J.A. 87-88. Raich therefore relies on two caregivers, Respondents John Doe Number One and John Doe Number Two, to cultivate it for her. Pet. App. 5a, 46a; J.A. 87-90. Raich processes some of the plants into cannabis oils, balm, and foods. J.A. 90-91. Raich's caregivers grow her cannabis specifically for her, pursuant to her instructions and on her physician's written

recommendation. *Id.* at 88-89. The caregivers cultivate Raich's cannabis completely free of charge. *Id.* at 88.[6]

d. On August 15, 2002, deputies from the Butte County Sheriff's Department and agents from the Drug Enforcement Administration ("DEA") came to Monson's home, where they found six cannabis plants. Pet. App. 6a. The deputies concluded that Monson's use of cannabis was legal under the Compassionate Use Act. *Id.* Following a three-hour standoff involving the Butte County District Attorney and the U.S. Attorney for the Eastern District of California, the DEA agents seized and destroyed Monson's cannabis plants. *Id.*

3. Respondents brought this action contending that applying the CSA to prevent them from possessing and cultivating cannabis for personal medical purposes, as recommended by their physicians and permitted by State law, would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth Amendment, the Tenth Amendment, and the doctrine of medical necessity. The district court found that the balance of hardships and the public interest tip sharply in favor of granting Respondents injunctive relief. Pet. App. 67a-68a (the interests asserted by Petitioners "wane in comparison with the public interests enumerated by plaintiffs and by the harm that they would

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[6] Although Petitioners assert that the activities at issue in this case include "the distribution of marijuana," Pet. Br. I, the CSA defines "distribute" to mean "to deliver (other than by administering or dispensing)," and defines "dispense," in turn, as "to deliver a controlled substance to an ultimate user . . . pursuant to the lawful order of, a practitioner." 21 U.S.C. § 802(10), (11). Monson cultivates cannabis for her own use. There clearly is no "distribution" in her case. Raich's caregivers, acting pursuant to a practitioner's recommendation authorized by California law, "dispense" her medication. It is therefore a significant stretch to say that there is any delivery of a controlled substance. Moreover, cultivating a neighbor's vegetable garden is not the same as distributing the vegetables.

suffer if denied medical marijuana"; Respondents have submitted "strong evidence that [they] will suffer severe harm and hardship if denied use of [cannabis]"). The district court nevertheless denied Respondents' motion for a preliminary injunction, on the ground that they were "unable, on this record, to establish the required 'irreducible minimum' of a likelihood of success on the merits." *Id.* at App. 68a.

4. The court of appeals reversed. It agreed with the district court that "[t]here can be no doubt on the record as to the significant hardship that will be imposed on the patient-appellants if they are denied a preliminary injunction," noting that Petitioners "do not dispute this." *Id.* at 24a. The court found that Petitioners' interests are "weak in comparison to the real medical emergency facing the patient-appellants in this case," *id.* at 26a, and that "[t]he public interest of the state of California and its voters in the viability of the Compassionate Use Act also weighs against the [Petitioners'] concerns," *id.* at 25a.

The court of appeals determined that Respondents are likely to prevail on the merits of their claim that the CSA, as applied to them, exceeds Congress' Commerce Power. Pet. App. 23a. The court noted that "the way in which the activity or class of activities is defined is critical." *Id.* at 11a. The court determined that "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician" should be considered a distinct class of activity, separate from drug trafficking. *Id.* The court observed that "concern regarding users' health and safety is significantly different in the medical marijuana context, where the use is pursuant to a physician's recommendation"; "limited medical use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse"; and "this limited use is clearly distinct from the broader illicit drug market – as well as any broader

commercial market for medical marijuana – insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." *Id.*

Applying the four-factor analysis in *United States v. Morrison*, 529 U.S. 598 (2000), the court held that the cultivation, possession, and use of cannabis for medical purposes is not properly characterized as commercial or economic activity because it does not involve an "'exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations.'" Pet. App. 14a (quoting *Black's Legal Dictionary* (7th ed. 1999) (defining "commerce")). *Second*, the CSA lacks a "jurisdictional hook" that would limit it to "cases that substantially affect interstate commerce." *Id.* 18a. *Third*, although the CSA includes general findings concerning the effects of intrastate activity on interstate commerce, those 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." *Id.* at 19a. *Fourth*, "the link between the regulated activity and a substantial effect on interstate commerce is 'attenuated.'" *Id.* at 20a. Even if the intrastate cultivation, possession, and use of medical cannabis on the recommendation of a physician could affect interstate commerce "at the margins," the court found, "[i]t is far from clear that such an effect would be substantial." *Id.* at 21a-22a.

Judge Beam dissented. *Id.* 26a-43a. He questioned whether Respondents' claims are ripe and whether they have standing to pursue this action. *Id.* at 27a. On the merits, Judge Beam concluded that "[i]t is simply impossible to distinguish" this case from *Wickard v. Filburn*, 317 U.S. 111 (1942). *Id.* at 26a.

SUMMARY OF ARGUMENT

This case is and always has been about federalism and State sovereignty. It is therefore remarkable that the word "federalism" does not appear in Petitioners' brief. This striking omission reveals the fatal weakness in Petitioners' analysis of the constitutional issues confronting the Court. When one considers principles of federalism and State sovereignty in the light of this Court's previous decisions, it is clear that either the CSA should not be interpreted to apply to Respondents' conduct (*see* Part III below), or the CSA if so interpreted exceeds Congress' Commerce Power as applied to Respondents.

This case, like prior Commerce Clause cases, "requires the Court . . . to appreciate the significance of federalism in the whole structure of the Constitution." *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring). In prior cases, the Court has held that the Federal Government exceeded its Commerce Power by "criminalizing conduct already denounced as criminal by the States." *Id.* at 561 n.3. In this case, the issue is whether the Federal Government may criminalize wholly intrastate, noncommercial conduct that is expressly authorized and supervised by a State exercising its core police powers to preserve the lives of its citizens and reduce their pain and suffering.

Petitioners' argument goes beyond the outer limits of *Wickard v. Filburn*, which involved regulation of commercial farming activity. If the Court upholds Petitioners' claim of federal power, this case will supplant *Wickard* to become the most expansive interpretation of the Commerce Clause since the Founding, and this Court's landmark decisions in *Lopez* and *Morrison* will become dead letters.

This case is an as-applied challenge under the Commerce Clause. This Court has always entertained such challenges. The relevant class of activity for purposes of this

challenge is the activity Respondents are actually engaged in, activity that is defined by State law. *Morrison*'s four "reference points" each indicate that the Commerce Power does not reach this far: (i) Respondents' activity is not commercial in nature; (ii) the CSA lacks a jurisdictional element; (iii) the generalized findings in the CSA do not support application of that Act to medical use of cannabis that is authorized and supervised by a State; and (iv) the link between Respondents' activities and interstate commerce is, at best, attenuated. In addition, prohibiting Respondents' activities is not essential to a larger regulation of interstate economic activity.

Applying the CSA to Respondents would contravene basic principles of federalism and State sovereignty. States possess broad powers to define criminal law, regulate medical practice, and protect the lives of their citizens. In *Lopez* and *Morrison*, the Court invalidated federal statutes that were consistent with achievement of goals shared by all the States. In this case, application of the CSA to Respondents would foreclose achievement of the State's substantive goal. Principles of federalism and State sovereignty have led the Court, in cases such as *Parker v. Brown*, 317 U.S. 341 (1943), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), to interpret federal laws as inapplicable to conduct that is authorized and supervised by a State or that involves the States' historic powers.

There are also additional grounds for affirmance. This case presents the "difficult issue" of whether the doctrine of "necessity is available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering," *United States v. Oakland Cannabis Buyer's Coop.,* 532 U.S. 483, 501 (2001) (Stevens, J., concurring in the judgment), and that alone is sufficient to uphold the preliminary injunction. In addition, Respondents have presented serious questions concerning due process, liberty, and fundamental rights.

ARGUMENT

I. THE COMMERCE POWER DOES NOT EXTEND TO REGULATION OF PATIENTS WHO USE LOCALLY CULTIVATED CANNABIS FOR MEDICAL PURPOSES, AS RECOMMENDED BY A PHYSICIAN AND AUTHORIZED BY STATE LAW.

This Court has "emphasized" that "Congress' regulatory authority" under the Commerce Clause "is not without effective bounds," *United States v. Morrison*, 529 U.S. 598, 608 (2000), and "'may not be extended . . . [to] effectually obliterate the distinction between what is national and what is local and create a completely centralized government,'" *Lopez*, 514 U.S. at 556-57 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). In this case, the Court is called upon to reaffirm once again that the Commerce Clause places effective limits on the power of the central government. As in *Morrison* and *Lopez*, Petitioners make no attempt to defend the federal statute at issue based on "use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Morrison*, 529 U.S. at 609 (internal quotations and citations omitted). Accordingly, application of the CSA to Respondents can be justified, if at all, only on the ground that Respondents' activities "substantially affect interstate commerce." *Id.*

A. Petitioners Seek To Expand The Commerce Power Substantially Beyond The Limits Of *Wickard*.

Should the Court rule for Petitioners, this case would immediately replace *Wickard v. Filburn*, 317 U.S. 111 (1942) as "the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 561. Over the years, *Wickard* has been subjected to powerful criticism. *See, e.g., Lopez*, 514 U.S. at 594, 602 (Thomas, J.,

concurring) (concluding that *Wickard* misconstrued *Gibbons v. Ogden*, 9 Wheat. 1 (1824), and stating, "At an appropriate juncture . . . we must modify our Commerce Clause jurisprudence"). If the Court were to conclude that *Wickard* is controlling, this case would indeed be an "appropriate juncture" to consider whether *Wickard* extended Congress' Commerce Power beyond its proper boundaries. *See* Amicus Br. of Institute of Justice (arguing that *Wickard* should be reconsidered). In fact, *Wickard* differs substantially from this case. Properly understood, it supports a decision for Respondents.

Wickard was a challenge to the Agricultural Adjustment Act of 1938 ("AAA"), a statute that authorized the Secretary of Agriculture to limit the number of acres of wheat planted by farmers in order to "control the volume [of wheat] moving in interstate and foreign commerce." 317 U.S. at 115. The plaintiff, Roscoe Filburn, owned a farm in Ohio, "maintaining a herd of dairy cattle, selling milk, raising poultry, . . . selling poultry and eggs," and growing wheat. *Id.* at 114. Filburn's practice was "to sell a portion of the [wheat] crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding." *Id.* In 1941, Filburn exceeded his acreage allotment under the AAA. *Id.* at 114-15. He refused to pay a penalty or turn the excess wheat production over to the government for storage, contending the AAA was an improper regulation of "production" rather than "commerce."

In upholding application of the AAA to Filburn, the Court held that Commerce Clause analysis does not turn on "nomenclature" (*e.g.*, whether to classify the activity in question as "production"), but instead requires "consideration of the actual effects of the activity in question upon interstate commerce." *Id.* at 120. The Court was able to consider these "actual effects," because the parties "stipulated a summary of the economics of the wheat industry." *Id.* at 125. The Court

relied on this evidence to conclude that while "[t]he total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant," "[c]onsumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production." *Id.* at 127. "It can hardly be denied," the Court concluded, "that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Id.* at 128.[7]

Wickard differs from this case in at least three respects. *First*, the AAA, unlike the CSA, exempted small farming operations – and thus, contrary to Petitioners' assertion (Pet. Br. 37), did not apply to every person who "produced a fungible commodity for which there is an established market." When the wheat at issue in *Wickard* was planted, the AAA exempted "small producers" who produced "less than 200 bushels" (about *six tons*) of wheat. *See* 317 U.S. at 130 & n.30. By the time the wheat was harvested, the AAA had been amended to exempt up to 15 acres, enough to produce 300 bushels (about *nine tons*) of wheat. *See* 54 Stat. 232. Consequently, families who grew wheat only for their own personal use – even large families who consumed large amounts of wheat – were not subject to the AAA at all. *Wickard* thus did not present the question of whether the Commerce Power extends to regulating agricultural products produced in small amounts for home consumption. This case *does* present that question, because the CSA, unlike the AAA, contains no exemption for small quantities intended

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[7] The Court's statement that wheat consumed on the farm could be regulated notwithstanding that it "may not be regarded as commerce," *Wickard,* 317 U.S. at 125, was made in the context of its rejection of previous holdings excluding "production" from the scope of the Commerce Clause. Thus, this statement should not be understood as authorizing Congress to regulate noneconomic local activity.

for personal use. *Wickard* is in no way controlling of this question.

Second, *Wickard*, unlike this case, involved a quintessential economic activity – a commercial farming operation. Filburn's farm produced substantial quantities of wheat for sale in the market and for use as an input to produce other agricultural products destined for sale. The farm's "wheat acreage allotment" for 1941 under the AAA was 11.1 acres, which at a "normal yield" of "20.1 bushels of wheat an acre," *Wickard,* 317 U.S. at 114, yielded 221 bushels of wheat. A bushel of wheat weighs about 60 pounds,[8] so the farm was expected to produce, and authorized to sell, 13,260 pounds – or over 6.6 *tons* – of wheat without penalty. Filburn actually planted 23 acres of wheat – twice the allotted amount. *Id.* The 11.9 excess acres produced 239 bushels of wheat, bringing the farm's total wheat production to 460 bushels (or 13.8 *tons*). *Id.*

"Contemporary lawyers often believe that Roscoe Filburn converted his excess wheat into home-baked loaves of bread." Jim Chen, *Filburn's Legacy*, 52 Emory L.J. 1719, 1759 (2003). A careful study of *Wickard* shows this to be a misconception. In addition to the facts recited above, the Solicitor General's brief in *Wickard* stated that wheat consumed on farms was used "as feed for livestock" and "as seed," but only "to a slight extent, as food" for the farmer's family. U.S. Br. in *Wickard* at 41. Simple arithmetic confirms this. "To consume the 239 excess bushels at issue in the July 1941 wheat harvest, the Filburns would have had to consume nearly forty-four one-pound loaves of bread each day for the following year." Chen*, supra*, at 1759. In fact,

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[8] *See* Wheat Foods Council, *Grains of Truth About Wheat*, *available at* http://www.wheatfoods.org/docs/Grains_Truth_Wheat_Facts.doc (last visited Oct. 10, 2004).

the vast majority of the farm's wheat production supported the farm's commercial operations, rather than feeding the farmer and his family.[9]

Unlike Roscoe Filburn, Respondents are not engaged in commercial farming. The cannabis at issue is not sold, bartered, exchanged, or used as an input to produce any other product that Respondents sell, barter, or exchange. Diane Monson cultivates only enough cannabis for her own medical use. Angel Raich's caregivers cultivate enough cannabis for her own medical use, without any charge, for compassionate rather than economic reasons. In contrast to *Wickard*, the quantities involved are minuscule and detached from any market. They are not part of a "home grown" crop principally intended for use in a commercial farming operation whose output will compete in the marketplace with, or enter into, interstate commerce.

Third, the Court in *Wickard*, having rejected a formalistic reliance in nomenclature, required *proof* of the actual effect of the regulated activity on interstate commerce. The Federal Government met this requirement by introducing detailed evidence showing that the activity of Filburn and other similarly situated farmers had a substantial aggregate effect on interstate commerce. As the government's brief explained, *in the years immediately before Congress enacted*

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[9] Between 1931 and 1936, the total average production of wheat in the United States was approximately 680.6 million bushels. U.S. Br. in *Wickard* at 12. "The amount of wheat consumed as livestock feed on the farm where grown … ranged from 28 million bushels . . . to 174 million" bushels, *i.e.*, between 4.5% and 28.6% of total production. U.S. Br. on Reargument in *Wickard* at 4. "The amount of wheat used for seed … ranged from a low of 73 million bushels . . . to a high of 97 million bushels," *i.e.*, between 12% and 15.9% of total production. *Id.* In contrast, "[t]he amount consumed as food by persons on the farm where grown" "stayed consistently between 11 and 16 million bushels," *i.e.*, between 1.8% to 2.6% of total production. *Id.*

the AAA, nearly 30 percent of the nation's wheat was used on the farm where it was grown. *See* U.S. Br. on Reargument in *Wickard* at 12.[10] The amount of wheat consumed on the farm also varied substantially from year to year, resulting in substantial effects on supply, demand, and prices. The Court's opinion in *Wickard* left no doubt that proof of the aggregate effect of this economic activity on interstate commerce was critical to the Court's decision. *See Wickard,* 317 U.S. at 128 ("It can hardly be denied that *a factor of such volume and variability* as home-consumed wheat would have a substantial influence on price and market conditions.") (emphasis added), *quoted in Lopez*, 514 U.S. at 560.

Setting aside for the moment the fact that Respondents' activity is noneconomic in nature, and therefore should not be subject to a *Wickard* "aggregate effects" analysis*, see infra* pp. 23-27, there exists no evidence in this case that the cultivation of cannabis solely for the personal medical use of seriously ill individuals, as recommended by their physicians and authorized by State law, has *any* aggregate effect on interstate commerce, much less a *substantial* effect. Medical cannabis patients grow and consume cannabis to meet their own personal medical needs and operate outside of any market. Further, they are "[r]elatively few" in number. *See* GAO, *Marijuana: Early Experiences with Four States' Laws That Allow Use for Medical Purposes* 21 (Nov. 2002), *available at* http://www.gao.gov/new.items/d03189.pdf (In Alaska, Hawaii and Oregon "the number of participants registered was 0.05 percent or less of the total population of each respective state."). Although the GAO's report does not include statewide data for California, it does include data for four California counties. In each of these counties, cannabis

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[10] By the time the Court decided Wickard, the percentage had dropped, but it still accounted for 22 percent of wheat produced nationwide in 1940. U.S. Br. on Reargument in *Wickard* at 3.

patients represent less than one-half of one percent of the population.[11] Medical cannabis patients' activities, in the aggregate, are minuscule by comparison to the national market for marijuana, which, according to Petitioners (Pet. Br. 19), totaled approximately $10.5 billion in 2000.

This case is thus quite different from *Wickard*, where consumption by the regulated enterprise and similarly-situated enterprises accounted for about one-fourth of the nationwide wheat supply, and farmers readily shifted back and forth between marketing their wheat and feeding it to farm animals, so that applying the AAA to all commercial farms above a specified size was "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561.[12]

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[11] This is so even though one of the four jurisdictions is San Francisco County, a county with an especially large number of AIDS patients.

[12] There are other pertinent differences between this case and *Wickard*. The AAA, unlike the CSA, did not conflict with a State law enacted to preserve the lives and health of the State's citizens. *Wickard* would be more closely on point if Congress had sought to displace a State law that authorized farmer Filburn to grow sufficient wheat to preserve the lives and health of his family in a time of economic depression. But no such State law existed (or was needed), and Congress was claiming no such power. In addition: (i) farmer Filburn *benefited* from the marketing quotas, which increased the price of his wheat; (ii) in a national referendum of wheat growers, 81% *voted for* the quotas, 317 U.S. at 116; and (iii) farmer Filburn faced only a $117.11 fine, *id*. at 115. Here, in contrast: (a) both courts below found that the CSA would severely *harm* Respondents; (b) the citizens of California *voted to permit* limited medical use of cannabis; and (c) Respondents face not a modest fine, but rather arrest, imprisonment, large fines and property forfeitures, severe pain and suffering, and even death.

B. The Relevant Class of Conduct In This Case Is Intrastate Medical Cannabis Activity Authorized By State Law And Recommended By A Physician.

Respondents are not challenging the constitutionality of the CSA on its face but only as it applies to the class of activities in which they are engaged. This Court "has always entertained" such challenges. *United States v. Stewart*, 348 F.2d 1132, 1141 (9th Cir. 2003); *accord United States v. Maxwell,* 2004 U.S. App. LEXIS 20610, *68 (11th Cir. Oct. 1, 2004). *Wickard* itself was an as-applied challenge. "Had the Court deemed regulation of the business of agriculture a sufficient basis for upholding the application of the [AAA] to Filburn, there would have been no need for it to analyze how his particular activities affected interstate commerce." *Stewart,* 348 F.2d at 1142. Similarly, in considering whether Title II of the Civil Rights Act exceeded Congress' powers under the Commerce Clause, the Court separately considered whether the statute was valid "as applied . . . to a motel which concededly serves interstate travelers," *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 261 (1964), and "as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce," *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964). If the Court had considered only the entire class of activities covered by Title II, it would not have inquired into "whether a single hotel or restaurant had a sufficient nexus to interstate commerce, and thus could be federally regulated." *Stewart*, 348 F.3d at 1141-42. *See also Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (to address Commerce Clause question, Court "would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce").

If Commerce Clause challenges were decided based on whether the category of conduct described by the statute substantially affects interstate commerce, there could be no

as-applied challenges under the Commerce Clause, and this Court's decisions entertaining such challenges would be overruled. Facial challenges, too, would always fail so long as a portion of the regulated activities were within the powers of Congress. *Lopez* would then be reduced to a sport case in which Congress foolishly attempted to reach *only* a class of activities that, on its face, was wholly outside its power. Adopting this position would move the Court beyond the fringes of *Wickard* and effectively confer on Congress a general police power. This result can be avoided only if the courts, not Congress, determine the relevant class of activities for purposes of Commerce Clause analysis.

In prior Commerce Clause cases, the Court has looked to the nature of the activities actually engaged in by the parties before the Court. *See, e.g., Wickard*; *Heart of Atlanta Motel*. In this case, however, the Court can also look to an objective source other than the actual activity of the litigants: State law. California has enacted a statute that specifies an appropriate class of activity for purposes of as-applied analysis under the Commerce Clause: *the intrastate possession or cultivation of cannabis by a patient, or the patient's primary caregiver, solely for the patient's medical use, as recommended by a State-licensed physician and authorized by State law*. Because a State has delimited this class of activities by statute, the Court need not consider a classification proposed by individual litigants, or based solely on their own activities, so long as those activities fall within the State-defined class.[13]

Looking to State law to define the relevant class of activities in this case is consistent with basic constitutional

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[13] Indeed, the CSA itself distinguishes between medical and non-medical uses of controlled substances. *See* Amicus Br. of Constitutional Law Scholars at 16-21.

doctrines concerning the relationship between the Federal Government and the States. It gives appropriate weight to the principles of federalism that inform this Court's Commerce Clause decisions. *See Morrison*, 529 U.S. at 617-19; *Lopez*, 514 U.S. at 567-68. It is also consistent with the Supremacy Clause, which provides that State law must give way to a *valid* exercise of federal power. Here, however, the question is *whether* the exercise of federal power is valid. To answer it, a court must identify the relevant class of activity, which here derives from a State exercising its police power.[14]

Apart from defining the relevant class, the fact that a sovereign State permits and regulates a class of activity also bears on a substantial effects analysis. For example, as discussed, *infra*, pp. 36-37, the existence and enforcement of statutorily-defined limits on the permitted class of activity may eliminate entirely any effect on interstate commerce or render any such effect trivial and insubstantial. That California has limited and regulates the conduct at issue in this case prevents that conduct from having a substantial effect outside California. In contrast, the cultivation or possession of cannabis in States that have not authorized it for medical use and do not regulate it would involve a factually distinct class of activity with a potentially different impact on interstate commerce. Similarly, cases involving illegal and unmonitored recreational uses of marijuana present significantly different issues that would markedly affect whether such activity is within Congress' Commerce Power.

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[14] Respondents are not claiming that the States may limit in any way federal power under the Constitution. Notwithstanding that State law permits a given class of activity, the class would still be within the scope of the Commerce Power if it consisted of economic activity that in the aggregate substantially affects interstate commerce. *See, e.g., Wickard*.

Although Petitioners never clearly articulate their view of how to define the class of activity for Commerce Clause analysis, they appear to assert that the relevant conduct is "the overall class of activities covered by the CSA – the manufacture, distribution, and possession of controlled substances." Pet. Br. 36. *See also id.* at 37. If the Court were to accept this argument, it would put an end to any judicially-enforceable limit on the reach of the Commerce Clause power, and the line drawn by the Court in *Lopez* and *Morrison* would be obliterated. "[O]ne always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Lopez*, 514 U.S. at 600 (Thomas, J., concurring). If Congress could define the class of activity, there would be nothing it could not regulate. *See Morrison*, 529 U.S. at 657 (Breyer, J., dissenting) (noting that if Commerce Clause analysis depends on the class of activities addressed by the federal statute, Congress could reverse the result in *Morrison* simply by incorporating VAWA "in a broader 'Safe Transport' or 'Workplace Safety' act"). By the same reasoning, Congress could enact a "Controlled Property Act," purporting to reach all privately-owned goods in the United States because, in the aggregate, the possession of property is "a class of activities" that "substantially affects interstate commerce." In *Lopez* and *Morrison*, this Court rejected reasoning under which "Commerce Clause authority would effectively know no limit." *Sabri v. United States*, 124 S. Ct. 1941, 1947 (2004). It should do so here as well.

Petitioners thus ignore the central issue facing the Court when they assert: "For purposes of defining Congress' power under the Commerce Clause *in enacting* the CSA, . . . there is no basis for distinguishing marijuana production, distribution, or other use for purported medicinal purposes, as opposed to recreational (or any other) purpose." Pet. Br. 40 (emphasis added). Respondents do not challenge the power of Congress "to enact" the CSA. They challenge the

CSA only *as applied* to their activities. In such a challenge, the existence of the Compassionate Use Act makes it necessary to consider the class of activity defined and authorized by State law, separate and apart from other activity.

C. *Morrison*'s "Reference Points" Indicate That The Commerce Power Does Not Extend To Personal Cultivation Or Use Of Cannabis Authorized By State Law And Recommended By A Physician.

A proper definition of the class of activity at issue, as well as an understanding of differences between this case and *Wickard*, clarifies analysis of the four "reference points" this Court has considered in determining whether prohibiting an activity "exceed[s] Congress' authority under the Commerce Clause": whether (1) the conduct at issue is "economic" or part of "some sort of economic endeavor"; (2) the federal statute contains an "express jurisdictional element which might limit its reach to a discrete set of . . . possessions that additionally have an explicit connection with or effect on interstate commerce"; (3) there are "express congressional findings regarding the effects upon interstate commerce" of the activity in question; and (4) "the link between [the activity] and a substantial effect on interstate commerce [i]s attenuated." *Morrison*, 529 U.S. at 609-13. Properly analyzed, each "reference point" favors Respondents.

1. Respondents' activities are not economic or part of an economic endeavor.

In each case in which this Court has upheld federal regulation of an activity based upon its substantial effect on interstate commerce, "the activity in question has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611; *see also id.* at 611 n.4 (intrastate activities held to be within the Commerce Power have "apparent commercial character"); *id.* at 613 ("thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity

only where that activity is economic in nature"). *See, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.,* 452 U.S. 264 (1981) (coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (loan sharking); *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 294 (1964) (restaurants and hotels); *Wickard*, 317 U.S. 111 (commercial farming).

In contrast, each time this Court has faced the question of whether to sustain federal regulation of noneconomic intrastate activities based on their purported aggregate effect on commerce, it has declined to do so. In *Lopez*, the Court invalidated the Gun-Free School Zones Act, which made possession of a firearm in a school zone a federal crime. "[C]entral" to this Court's decision to strike down the statute was the "noneconomic, criminal nature of the conduct at issue." *Morrison*, 529 U.S. at 610; *see also Lopez*, 514 U.S. at 561 (distinguishing gun possession law from "our cases upholding regulations of *activities that arise out of or are connected with a commercial transaction*, which viewed in the aggregate, substantially affects commerce") (emphasis added); *id.* at 580 (Kennedy, J., concurring) (Gun-Free School Zones Act did not involve "actors [or] conduct" that had "a commercial character"). Similarly, a key factor in *Morrison* that led to invalidation of the Violence Against Women Act's (VAWA) civil remedy was that the conduct at issue – "[g]ender-motivated crimes of violence" – was not, "in any sense of the phrase, economic activity." 529 U.S. at 613. *See also Jones v. United States*, 529 U.S. 848, 858 (2000) (interpreting federal arson statute "to avoid the constitutional question that would arise" if the statute covered owner-occupied dwellings).

Here, the conduct at issue is not of a "commercial character" or part of a larger "economic endeavor." Respondents do not sell, barter, or exchange the cannabis. They do not use cannabis as an input for any other product or service that they sell, barter, or exchange. They do not

cultivate cannabis as part of a business (such as hotels and restaurants) with an explicit connection to interstate commerce. Respondent Diane Monson grows and uses cannabis on her doctor's recommendation because her chronic back pain and spasms "cannot be relieved in any other way" and because prescription pharmaceutical medications "always" interfere with her ability to function. J.A. 58. She grows only enough cannabis to meet her own personal medical needs and cultivates it in her yard, using only local materials. J.A. 59; Pet. App. 6a. (federal agents seized six cannabis plants). Respondent Angel Raich, faced with dire, life-threatening medical conditions and severe allergies that prevent her from using conventional drugs, does the same, except that she relies on her caregivers to tend her plants for her because she is unable to do so by herself. Raich's caregivers tend her plants as an act of compassion. They do not receive payment or any item of economic value for their efforts. These limited activities, expressly authorized by State law and undertaken to avoid severe pain or even death, are simply "beyond the realm of commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

Petitioners forthrightly concede that Respondents' activities are "not commercial in the sense of involving a transaction for consideration." Pet. Br. 39. They assert, however, that Respondents' activities are "economic," "to at least the same extent as Roscoe Filburn's home-grown production of wheat in *Wickard*" because Respondents "are producing a fungible commodity for which there is an established market." Pet. Br. 37. As explained *supra* pp. 14-18, this argument goes well beyond the facts and holding of *Wickard*. Petitioners' argument, if accepted, would effectively obliterate the distinction between economic and noneconomic activity recognized in *Lopez* and *Morrison*.

"In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence."

Lopez, 514 U.S. at 580 (Kennedy, J., concurring). Thus, if the distinction between economic and noneconomic activity is to be effective, it must differentiate between intrastate activities that are part of a business endeavor, commercial transaction, or other economic enterprise and those that are not. A homeowner planting and tending roses in his or her backyard, for example, is readily distinguished from a nursery owner cultivating roses as part of a commercial operation. Similarly, a parent taking care of his or her own child is easily distinguished from a daycare center providing the same service for a fee. If Petitioners' definition of "economic activity" were accepted, the backyard gardener would be engaged in "economic activity," because there is "an established market" for roses, and homeowners could substitute purchased roses for home-grown roses. So would the parent, because there is an "established market" for child care, and parents could substitute purchased child care for do-it-yourself child care. *Compare Morrison*, 529 U.S. at 615-16 (rejecting an interpretation of the Commerce Clause that would permit federal regulation of "family law" even though "the aggregate effect of . . . childrearing on the national economy is undoubtedly significant"). Given the vast array of goods and services readily available in today's marketplace, no area of human activity would fall outside the realm of economic activity as defined by Petitioners.

In *Lopez* and *Morrison*, this Court rejected arguments by the Federal Government that would effectively eliminate "judicially enforceable outer limits" to the Commerce Power. *See Lopez*, 514 U.S. at 565-66; *Morrison*, 529 U.S. at 615-17. It should do so here as well. Thus far, this Court has had little difficulty charting a sensible division between commercial and noncommercial intrastate activity. While this distinction "may *in some cases* result in legal uncertainty," *Lopez*, 514 U.S. at 566 (emphasis added), there is no uncertainty in this case. The non-commercial, noneconomic character of Respondents' activity, like that of

the gardener and parent, is evident. Wherever the line between economic and noneconomic activity is drawn, Respondents' activities fall well on the noneconomic side.[15]

2. The CSA lacks a jurisdictional element.

It is undisputed that the CSA, like the laws in *Lopez* and *Morrison*, lacks any "jurisdictional element that would lend support to the argument that [it] is sufficiently tied to interstate commerce." *Morrison*, 529 U.S. at 613 (internal citation omitted); *see also Lopez*, 514 U.S. at 561-62 (jurisdictional element could "ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce"). Indeed, the CSA does not require a showing of any effect on commerce, let alone interstate commerce.

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[15] Petitioners seek to bolster their argument by invoking the Necessary and Proper Clause. The Federal Government also invoked this Clause without success in *Lopez* and *Morrison*. The economic/noneconomic distinction employed in *Lopez* and *Morrison* can be understood as a judicially administrable means of effectuating the Necessary and Proper Clause. *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 625 (2002) ("[L]imiting Congress to the regulation of *economic* activity ensures that such regulations will, in most circumstances, be plainly adopted and really calculated to achieve some legitimate end connected with the interstate economy."). By allowing Congress to go beyond the regulation of interstate commerce itself to reach intrastate economic activity that "substantially affects" commerce, and by also allowing Congress to aggregate the effects of intrastate economic activity to demonstrate their substantial effect on interstate commerce, the Court has already stretched the Commerce Power as far (or farther) than is warranted by the Necessary and Proper Clause. Allowing Congress to reach the class of activity identified in this case would violate the Necessary and Proper Clause by enabling Congress improperly to exercise its power over interstate commerce.

3. Congress' findings do not support the conclusion that Respondents' activities substantially affect interstate commerce.

"[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 614. "[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question." *Id.* (quoting *Lopez,* 514 U.S. at 557 n.2). Here, the CSA's legislative findings do not support applying the statute to Respondents. *First*, the findings are extremely general, purporting to address all manufacture, distribution, and possession of all controlled substances. Congress made no finding that medical use of locally-grown cannabis, when recommended by a physician and authorized by State law, has a substantial effect on interstate commerce. *Second*, in sharp contrast to other cases in which this Court has accepted congressional findings, there is no legislative record to support the conclusion that allowing medical use of locally-grown cannabis pursuant to State law substantially affects interstate commerce. To the contrary, the legislative record indicates that Congress did not consider the issue at all.

a) The generalized legislative findings of the CSA are inadequate.

i. Not all controlled substances move in interstate commerce. Congress found that: "(A) after manufacture, *many* controlled substances are transported in interstate commerce," "(B) controlled substances distributed locally *usually* have been transported before their distribution," and "(C) controlled substances *commonly* flow through interstate commerce immediately prior to such possession." 21 U.S.C. § 801(3) (emphasis added). These findings do not even purport to determine whether medical cannabis permitted by

the Compassionate Use Act has a substantial effect on interstate commerce. It is undisputed that the cannabis used by Respondents for medical purposes *does not* move, *is never* transported, and *has never* flowed through interstate commerce. Congress implicitly recognized that *some* cannabis falls into this category.

ii. There is no "swelling" of interstate traffic. Petitioners seek to rely on Congress' finding that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." 21 U.S.C. § 801(4). Petitioners hypothesize a multi-step causal chain: [1] Local possession and cultivation increases the supply of cannabis; [2] an increased supply leads to increased demand; [3] this in turn leads to further increases in supply and marketing. Pet. Br. 24. Petitioners' speculative causal chain cannot withstand analysis.

Petitioners emphasize the vast size of the market for illicit marijuana in the United States. Pet. Br. 19-20 (marijuana is "pervasive[]" in the United States, with a U.S. market totaling $10.5 billion in 2000; "[m]arijuana prices, an indication of marijuana's steady availability, have been stable for years."). In an interstate market of such enormous size, there is no basis for concluding that wholly intrastate activities by a small group of patients involving small quantities of cannabis, subject to State supervision, will have any effect on interstate commerce in marijuana, let alone a substantial effect. By contrast, in *Wickard*, farm-consumed wheat amounted to around 30% of total supply.[16]

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[16] Although there is no evidence that the Compassionate Use Act has any effect on interstate commerce in marijuana, much less a substantial one, it is worth noting that if there were any effect, it would be to decrease rather than "swell" such commerce. By authorizing only local cultivation of cannabis by a patient or the patient's primary caregiver, California law (...continued)

Even apart from the requirements of the California law, medical cannabis patients are less likely than other users to purchase cannabis that has moved in interstate commerce. Patients who use cannabis to prolong their lives or mitigate debilitating pain are far more likely than other users to be concerned about the quality and consistency of the cannabis they consume. *See* J.A. 87, 88 (Raich Decl.) ("[b]lack market marijuana" is an unknown quantity that may contain impurities, and therefore "is just not safe" for medical use). For these reasons, patients who use medical cannabis are more likely than other consumers of marijuana to use only cannabis that they or their caregivers have grown themselves.[17] This factor further distinguishes the class of medical cannabis patients from those who use marijuana recreationally.

iii. The "differentiability" finding is immaterial. Petitioners also seek to rely on the finding that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate." 21 U.S.C. § 801(5). But so too could it be said that tomatoes grown in a backyard garden cannot be differentiated from those grown on commercial farms and shipped in interstate commerce. Standing alone, this sort of finding cannot constitutionally justify federal prohibition of Respondents' medical cannabis unless there is a basis for concluding that this class of activity somehow increases the flow of interstate marijuana transactions. For this reason, Petitioners are forced to hypothesize (Pet. Br. 25-26) that there is an "appreciable" risk that cannabis cultivated for

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discourages purchases of cannabis that has moved illegally in interstate commerce.

[17] Patients may be too ill to cultivate cannabis themselves, but California law accommodates this situation by allowing a patient's primary caregiver to provide assistance.

medical use will be diverted to nonmedical uses. Congress made no such finding with respect to diversion of medical cannabis; Petitioners cite no evidence to support their hypothesis; and there is none in the record. Instead, they simply speculate that patients or their caregivers "may" raise and sell surplus cannabis to raise additional funds (*id.*), even though it is undisputed that Respondents do not engage in such activities. At this point in their argument, as at other crucial points in their brief, Petitioners completely ignore the role of State law and State law enforcement. Diversion is expressly prohibited by California law,[18] and California engages in extensive efforts to enforce its law. *See infra* pp. 36-37. There is no basis for assuming that patients violate State law or that State law enforcement efforts will be so ineffective that any diversion would have a substantial effect on the enormous interstate marijuana market.

iv. Prohibiting Respondents' conduct is not "essential" to control "incidents" of interstate traffic. Finally, Petitioners seek to rely on the finding 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). In the specific context of medical use of cannabis as authorized by State law, however, there is nothing to support such a finding, and compelling evidence is to the contrary.

The activities at issue in this case have no appreciable impact on the larger scheme of federal law enforcement. The Federal Government rarely brings prosecutions against individuals for possession or cultivation of small amounts of

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[18] The Compassionate Use Act states, "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone diversion of marijuana for nonmedical purposes." Cal. Health & Safety Code § 11362.5(b)(2).

marijuana. The DEA's San Francisco office "target[s] the most significant drug traffickers" – in fact, "[t]he threshold for DEA involvement in marijuana arrests, set by the U.S. attorney, is in the range of 1,000 pounds or 500 plants."[19] In 1999 (the most recent year for which data are publicly available) 38,288 persons whose most serious alleged offense involved a controlled substance were evaluated for federal prosecution by United States Attorneys nationwide. Of these persons, only 471 (1.2%) were evaluated for prosecution for simple possession of marijuana.[20] This pattern of federal prosecution indicates that exempting application of the CSA to medical cannabis patients and caregivers – a small subset of the set of all individuals with small quantities of marijuana – would have virtually no impact on the effectiveness of the federal regulation of controlled substances. The prohibition of Respondents' small-scale personal activities is in no way "essential" to federal "control" over the interstate "incidents" of drug traffic.

b) In contrast to other "substantial effects" cases, the legislative record of the CSA provides scant support for the legislative findings.

The legislative record of the CSA is barren of any indication that Congress considered the situation presented by this case. Petitioners cite no evidence in the hearings on the CSA that would support them, and we are aware of none. This is in sharp contrast to prior cases in which this Court

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[19] Eric Brazil, *Federal Marijuana Law Will Be Enforced Here,* San Francisco Examiner, Nov. 7, 1996, at p. A (reporting statements of Stan Begar, spokesman for the DEA's San Francisco office).

[20] *See* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Federal Drug Offenders, 1999 with Trends 1984-99*, at 3 (Aug. 2001), *available at* http://www.ojp.usdoj.gov-/bjs/pub/pdf/fdo99.pdf.

upheld federal legislation against a Commerce Clause challenge, where the legislative record has demonstrated that the activity at issue substantially affects interstate commerce.

In *McClung*, 379 U.S. at 299, for example, Congress held "prolonged hearings" and the "record [was] replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants." Similarly, in *Heart of Atlanta Motel*, the Court discussed the "voluminous testimony [that] presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel." 379 U.S. at 253. In *Hodel v. Virginia Surface Mining*, Congress compiled a massive record, "after six years of the most thorough legislative consideration," documenting the ways in which surface coal mining operations harmed interstate commerce. 452 U.S. at 279-80. In *Perez*, 402 U.S. at 155-56, congressional action "grew out of a 'profound study of organized crime, its ramifications, and its implications' undertaken by some 22 Congressmen," a report by the President's Commission on Law Enforcement and Administration of Justice, and an investigation of the loan shark racket undertaken by New York. The record showed that organized crime, which is interstate and international in character, "controlled" the loan shark racket; "through loan sharking the organized underworld has obtained control of legitimate businesses"; and "loan sharking was the second largest source of revenue for organized crime." *Id.* at 155-56 (internal citation omitted).

In sharp contrast, the legislative record of the CSA provides scant support for its conclusory findings, and no support with respect the particular activity at issue in this case. As this Court said in *Lopez*, "'Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so'". 514 U.S. at 557 n.2 (quoting *Hodel*, 452 U.S. at 311 (Rehnquist, J., concurring)). Moreover, the congressional findings in the CSA are directly at odds with the factual

record in this case. As in *Lopez*, "To uphold the Government's contentions here" would be "*to pile inference upon inference* in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 514 U.S. at 567 (emphasis added).

4. The link between Respondents' activities and interstate commerce is "attenuated" at best.

Petitioners try to avoid the now-discredited argument that Respondents' activity is subject to federal regulation because it has "effects on employment, production, transit or consumption," *Morrison*, 529 U.S. at 615, but they still seek to construct and "follow the but-for causal chain" from the initial crime ("the suppression of which has always been the prime object of the States' police power"), through multiple links, to an "attenuated effect upon interstate commerce." *Id.* As explained above, Respondents' activity is non-commercial in nature, and has no effect, substantial or otherwise, on interstate commerce. Petitioners' argument that the activities of California cannabis patients will, in the aggregate, have a substantial effect on interstate commerce depends on unproven speculation that: (1) patients and their caregivers will disobey State law, despite strong incentives not to do so; (2) State law enforcement efforts will be inadequate to prevent such violations; and (3) any such violations will be on such a large scale that they will have a substantial effect on the vast illegal interstate commerce in marijuana. It is far from obvious that any of the links in this attenuated casual chain are valid.

D. Prohibiting Respondents' Activities Is Not Essential To A Larger Regulation Of Interstate Economic Activity.

Petitioners (Pet. Br. 16) seek to rely on a sentence in *Lopez* in which the Court observes that the Gun Free School Zone Act was "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." *Lopez*, 514 U.S. at 561 (emphasis added). Nothing in *Lopez* suggests that, by this single sentence, the Court was providing an escape route by which Congress may expand its powers to reach wholly intrastate *non*economic activity with no substantial effect on interstate commerce. Indeed, the very next sentence in the Court's opinion reaffirmed that the federal statute "cannot, therefore, be sustained under our cases upholding regulations of *activities that arise out of or are connected with a commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce." *Id.* (emphasis added). The sentence relied upon by Petitioners does not dispense with the need to show that the activities "arise out of or are connected with a commercial transaction."[21] Indeed in *Morrison*, the provision at issue

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[21] Likewise, Petitioners twice quote (Pet. Br. 14-15 & 36) the statement in *Lopez* 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." 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197, n.27 (1968)). The full quote from *Lopez*, however, reveals the Court's meaning:

> "[T]he *Wirtz* Court replied that . . . "neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities" . . . *Rather,* "*the Court has said only 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."

Lopez, 514 U.S. at 558 (emphasis added and citations and quotations omitted). In context, the Court affirmed that Congress may not reach a class of activities that has only "a relatively trivial impact on commerce *as an excuse* for broad general regulation of state or private activities," *id.* (emphasis added). This language does not allow a generally constitutional regulatory statute, such as the CSA, to be applied to an entire class of activities bearing no relation to interstate commerce.

was not saved by the fact it was part of a larger scheme regulating interstate commerce.

Moreover, as explained above, *see supra* pp. 21, 36, even if one were to assume for the sake of argument that *Lopez* authorizes Congress to reach some noneconomic intrastate activity as part of a broader regulatory scheme, the federal scheme is not "undercut" by medical use of locally-grown cannabis supervised by a physician and State officials, and therefore regulation of such activity is not "essential" to the federal scheme.

Petitioners introduced no evidence in the courts below, and they have represented to this Court that consideration of factual issues is unnecessary. Pet. Reply Br. 4. Yet, in their brief on the merits, Petitioners seek to bolster their argument with unsupported factual assertions. For example, they assert that if the decision below is upheld, "persons operating intrastate could function essentially as unregulated and unsupervised drug manufacturers and pharmacies." Pet. Br. 34. In making such a sweeping assertion, Petitioners completely ignore that activities of Respondents and other patients, and their physicians and caregivers, are, in fact, regulated and supervised by State law and State officials.

Petitioners speculate that there will be widespread violations of California law, but there is no evidence to support this speculation. This Court "presume[s] that [State] law enforcement officers are ready and able to enforce" the law. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988). The evidence indicates that California is doing just that.[22]

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[22] Other States that have enacted Compassionate Use laws appear to be doing the same. *See, e.g., Washington v. Shepherd*, 41 P.3d 1235, 1238-39 (Wash. Ct. App. 2002) (affirming conviction for felony marijuana possession because defendant, who claimed he was a "designated primary caregiver" for patient, did not comply with the Washington Medical Use of Marijuana Act's requirements); KATU News, Medical marijuana (...continued)

See, e.g., Office of the Attorney General, State of California, *Attorney General Lockyer Issues Statement on Federal Threat to Cut State's Share of Anti-Drug Funds* (May 21, 2003), *available at* http://caag.state.ca.us/newsalerts/2003/03-062.htm ("Our CAMP program has continued to break records every year in the amount of marijuana seized. Since 1999, we have seized more than 1.25 million illegal marijuana plants worth more than $4 billion."). In addition, California has directed its Attorney General to "develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the Compassionate Use Act of 1996." Cal. Health & Safety Code § 11362.81.

Petitioners also contend that application of the CSA to Respondents is essential to maintain the "comprehensive" "closed system" of federal regulation of all possession, distribution, and manufacturing of controlled substances. Pet. Br. 32-35. This is simply bootstrapping. If Congress could overcome a Commerce Clause challenge merely by stating that it wished to create a "comprehensive" and "closed" system of federal regulation, it could easily erase the dividing line "between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. The dual sovereignty that comprises the American system of federalism is not a "closed system" and cannot be made so by a federal statute. To create a completely "closed system" of regulation requires a constitutional amendment. *E.g.,* U.S. Const. amend. XVIII.

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leader convicted of drug charges (June 9, 2003), www.katu.com/news/story.asp?ID=58243 (Oregon defendant jailed for possessing 37 cannabis plants and over one pound of dried cannabis at his home, in violation of Oregon medical cannabis law limit of seven plants or seven ounces of dried cannabis).

Finally, Petitioners contend that applying the CSA to persons such as Respondents is essential to avoid intractable problems of proof. *See* Pet. Br. 30 ("difficult, if not impossible, questions of proof" would arise "if the government were required to demonstrate that a given quantity of marijuana . . . had previously entered, or would enter, the stream of monetary commerce"); *id.* at 31 ("It would often be difficult to prove whether relatively small quantities of marijuana were being held, produced, or distributed for commercial, recreational, or medicinal use."). In the instant case, there are no "questions of proof" because the uncontroverted facts in the record are that Respondents' activities are authorized by State law and that there is *no* interstate activity and *no* commerce.[23]

Respondents are raising an as-applied challenge to the CSA; they are not challenging the constitutionality of the CSA on its face. If Respondents prevail, they will not invalidate the CSA. Instead, in future prosecutions, defendants wishing to assert similar as-applied challenges, not the Federal Government, would bear the burden of

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[23] Petitioners also assert (Pet. Br. 26) that "local illicit drug use for purported medicinal purposes significantly affects … drug commerce … by inducing the 'medicinal' user to refrain from consuming lawful drugs . . . or by decreasing incentives for research and development into new legitimate drugs." (Internal citation omitted). Once again, Petitioners are speculating without evidence. There is no effective alternative to cannabis for Angel Raich. J.A. 49, 72. The responsible physicians for both Angel Raich and Diane Monson recommended that they use medical cannabis only after they tried conventional medicines and found that they were ineffective, had intolerable side effects, or both. There is no factual basis for concluding that allowing Respondents, and other similarly situated individuals, to use medical cannabis on a physician's recommendation would affect incentives for research and development into new drugs. It is ironic that Petitioners would advance such an argument, because the federal government has placed substantial obstacles in the way of pursuing scientific research involving medical cannabis. *See* Amicus Br. of Rick Doblin, Ph.D., *et al.*

showing that they possessed or cultivated small quantities of cannabis intrastate solely for personal medical use, in conformity with State law. *See, e.g.*, *Spence v. Washington*, 418 U.S. 405, 409 (1974) (defendant raising as-applied First Amendment challenge must show his activity is entitled to First Amendment protection). Such defendants could meet their burden, in part, on the basis of a State-issued identification card, showing that they are recognized by the State as bona fide medical cannabis patients or caregivers.[24] Defendants could also provide other forms of proof, such as testimony from their physicians. But the burden of proof would be on the defendant, not the Federal Government. *See id.*[25]

II. APPLYING THE CSA TO RESPONDENTS CONTRAVENES CORE PRINCIPLES OF FEDERALISM AND STATE SOVEREIGNTY.

The scope of the Commerce Power "must be considered in light of our dual system of government" and interpreted so as not to "obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and

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[24] As noted *supra* p. 2 n.2, California has enacted legislation that will allow medical cannabis patients to obtain State-issued identification cards. *See also* App. A, 7a-11a (reproducing relevant statutory provisions).

[25] Even under California law, a defendant must prove that his or her activity is protected under the Compassionate Use Act. *People v. Mower*, 28 Cal. 4th 457, 471, 473 (2002) (Compassionate Use Act provides affirmative defense at trial and allows indictment to be set aside upon affirmative showing by defendant).

the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also New York v. United States*, 505 U.S. 144, 181 (1992) ("Federalism secures to citizens the liberties that derive from the diffusion of sovereign power") (internal quotation and citation omitted); U.S. Const. amend. X.

In both *Lopez* and *Morrison*, the Court took account of principles of federalism and State sovereignty in holding that the federal laws at issue exceeded Congress' Commerce Power. *See Lopez*, 514 U.S. at 564 (rejecting Commerce Clause theories that would extend federal power to areas "where States historically have been sovereign"); *id.* at 567 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."); *Morrison*, 529 U.S. at 618 (VAWA concerned "the police power, which the Founders denied the National Government and reposed in the States"). This case likewise "requires [the Court] . . . to appreciate the significance of federalism in the whole structure of the Constitution." *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).

"Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). In *Lopez*, the Court recognized that there are limits on federal legislative power to criminalize local activity, even "[w]hen Congress criminalizes conduct *already denounced* by the States." 514 U.S. at 561 n.3. (emphasis added). When federal law encroaches on an area traditionally regulated by States, it "effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Id.* (quoting *United States v. Emmons*, 410 U.S. 396, 411-12 (1973)).

In addition to their power to enact local criminal laws, the States possess "broad" powers to regulate "the administration of drugs by the health professions." *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977). Indeed, this Court has said that "direct control of medical practice in the states is beyond the power of the federal government." *Linder v. United States*, 268 U.S. 5, 18 (1925). California has exercised its police power by enacting the Compassionate Use Act, and other States have followed a similar path. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social experiments without risk to the rest of the country.").

As Justice Kennedy has explained, even where the Federal Government and the States share a common goal, such as gun-free schools, there is room for disagreement about how to achieve the goal. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). "If a State or municipality determines that harsh criminal penalties are necessary and wise, . . . the reserved powers of the States are sufficient to enact those measures." *Id*. In *Lopez*, this Court invalidated a federal law that "foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, . . .by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." "Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce." *Id.* at 583.

This case presents a more direct and serious interference with State sovereignty than either *Lopez* or *Morrison*. This is

not a situation in which all States agree with the substantive policy goals to be achieved (gun-free schools or an end to violence against women) leaving room for disagreement only as to the appropriate means to achieve those goals. Nor is this a situation in which a State's law is merely silent. Instead, California has adopted a substantive policy – medical use of cannabis in limited circumstances – that is incompatible with application of the CSA to Respondents. The clash between State and federal sovereignty therefore is starker here than it was in either *Lopez* or *Morrison*.[26]

III. THE CSA SHOULD NOT BE INTERPRETED TO APPLY TO ACTIVITY AUTHORIZED AND SUPERVISED BY STATE LAW.

Where principles of federalism and State sovereignty are directly implicated, as they are in this case, this Court has interpreted federal statutes – even statutes framed in broad terms – so as not to reach activity clearly authorized by the States. In *Parker v. Brown*, 317 U.S. 341 (1943), for example, the Court held that the Sherman Act (which by its terms applies to "every contract, combination . . . , or conspiracy in restraint of trade or commerce among the several States," 15 U.S.C. § 1) should not be interpreted to

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[26] The decision below is also supported by the principles of State sovereignty that provide "external limits" on the Commerce Power. *See* Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 178-79 (15th ed. 2004). By directly obstructing the State's exercise of its broad police power to protect the health, safety, and welfare of its citizens – a power that Congress lacks – the Federal Government exceeds the external limits on its Commerce Power every bit as much as if it had directly commandeered an aspect of State government. *See Conant*, 309 F.3d at 645-47 (Kozinski, J., concurring). Therefore the CSA, if interpreted to apply to wholly intrastate activity expressly authorized and supervised by a State in the constitutional exercise of its police power, would be an "improper" and unconstitutional exercise of the Commerce Power.

apply to actions by one of the States.[27] The Court based its holding squarely on principles of federalism. "In a dual system of government," the Court said, "in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpected purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. *See also City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991) (*Parker* rests on "principles of federalism and state sovereignty"). The Court noted that "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action." 317 U.S. at 351. Similarly, "[t]here is no suggestion of a purpose to restrain state action in the Act's legislative history." *Id.* Accordingly, the Court held, where "[t]he state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application," the Court would assume that Congress did not intend the Sherman Act, despite its general language, to apply. This "State action doctrine" is not limited to acts of a State and its officials, but extends to private actions that otherwise would violate federal law, so long as (i) those actions are authorized by State law pursuant to a "clearly articulated and affirmatively expressed state policy," and (ii) the policy is "actively supervised" by the State. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

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[27] Consideration of the *Parker* State action doctrine, although not directly raised below, is required by the "cardinal principle" that before addressing constitutional issues "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander v. TVA*, 297 U.S. 288, 348-49 (1936). *See also Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984) (Court "may affirm on any ground that the law and the record permit").

The principles of federalism and State sovereignty that underlie the State action doctrine of *Parker v. Brown* apply in this case as well. Here, as in *Parker*, the Court is reviewing a broadly-worded criminal statute. As in *Parker*, there is no indication in the text or legislative history that Congress intended to prohibit State action. As in *Parker*, a State law clearly authorizes the activity in question, and State officials both "have and exercise power to review particular . . . acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). California law permits patients to use medical cannabis only upon the recommendation of a State-licensed physician and only subject to supervision by State law enforcement officers. The principles of federalism and State sovereignty that guided this Court's decision in *Parker* lead to the conclusion that the CSA, like the Sherman Act, should not be interpreted to prohibit conduct clearly authorized and actively supervised by a State in the exercise of its sovereign police powers.

Additional support for interpreting the CSA in this manner comes from *Gregory v. Ashcroft*, 501 U.S. 452 (1991), where this Court held that a State-enacted mandatory retirement age for State judges did not violate the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. The Court reached this result by applying a "plain statement" requirement, reasoning that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Id.* at 461 (internal citations omitted).

The CSA does not satisfy the "plain statement" requirement. The CSA defines a "practitioner" as "a physician . . . licensed, registered, or otherwise permitted, by the United States *or the jurisdiction in which he practices* . . ., to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice." 21 U.S.C. § 802(21) (emphasis added). The CSA also provides that it

is "unlawful for a person knowingly or intentionally to possess a controlled substance *unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice*." 21 U.S.C. § 844(a) (emphasis added). Because this language appears to authorize patients to possess medical cannabis pursuant to a State-licensed physician's valid order, the CSA does not state a "clear and manifest" intention to divest the States of their historic police powers to protect the lives and health of citizens. Accordingly, principles of federalism and State sovereignty – which are entitled to decisive weight if the Court decides the Commerce Clause issue – also support interpreting the CSA in a way that avoids that issue. *See Jones v. United States*, 529 U.S. 848 (2000) (interpreting federal arson statute to avoid Commerce Clause issue). *See also* 21 U.S.C. § 903 (CSA should not be construed to "exclude any state law . . . unless there is a positive conflict" such that Federal and State law "cannot consistently stand together").

IV. THERE ARE ADDITIONAL GROUNDS FOR AFFIRMING THE PRELIMINARY INJUNCTION.

A prevailing party may defend the decision of the lower court "on any ground properly raised below." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979); *see also Thigpen v. Roberts*, 468 U.S. 27 (1984). In this case, the court of appeals has decided only that it is appropriate to enter a preliminary injunction pending a final decision on the merits. Under the governing standard, a preliminary injunction is warranted where the balance of hardships tips sharply in favor of the moving party and there are "serious questions going to the merits." *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1381 (9th Cir. 1987). Both courts below found that that hardship and public interest factors tip sharply in Respondents' favor, Pet. App. 24a, 68a, and Petitioners do not challenge those findings in this Court. Thus, Respondents are entitled to prevail if a majority of the

Members of this Court conclude that there are serious questions going to the merits. In addition to the issues discussed above, Respondents have asserted two other grounds for relief, each of which raises a serious question going to the merits.[28]

A. This Case Presents The "Difficult Issue" Of Whether The Doctrine Of Necessity Protects Respondents.

This Court will avoid decision of serious constitutional issues when it is fairly possible to do so. *See Jones v. United States*, 529 U.S. 848, 857 (2000) (construing federal statute to avoid a "grave and doubtful constitutional questions" under the Commerce Clause); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). In the courts below, Respondents raised a claim based on the non-constitutional doctrine of medical necessity. In *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) ("*OCBC*"), a case involving a medical cannabis cooperative, this Court held that "medical necessity is not a defense to *manufacturing and distributing* marijuana.") *Id.* at 494 (emphasis added). In a separate opinion, Justice Stevens, joined by Justices Souter and Ginsburg, emphasized that "whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that [was] not presented" in *OCBC*. *Id.* at 501. This case

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[28] If a majority of the Members of this Court conclude that Respondents have raised a serious question going to the merits, the preliminary injunction should remain in effect, even if a majority do not agree on which particular issue raises the serious question. *See, e.g., Eastern Enters. v. Apfel*, 524 U.S. 498, 537, 550 (1998) (resting judgment on multiple grounds); *Welsh v. United States*, 398 U.S. 333, 335, 345 (1970) (same); *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (same).

presents precisely that "difficult issue." The undisputed record evidence shows that Angel Raich is seriously ill, and she has no alternative means of avoiding starvation or extraordinary suffering.[29]

The doctrine of necessity "traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils" and the actor had no "reasonable, legal alternative to violating the law." *United States v. Bailey*, 444 U.S. 394, 410 (1980). In *Bailey*, no Member of the Court doubted "the existence of such a defense," even though the statute at issue did not mention necessity. *Id.* at 415 n.11.

In *OCBC*, the Court held that the necessity doctrine does not apply when invoked by persons who are not *themselves* facing physical harm. 532 U.S. at 486-87, 494. In *OCBC*, unlike this case, no patient was a party to the litigation. The cooperative and its executive director had not "been forced to confront a choice of evils." *Id.* at 500 n.1 (Stevens, J., concurring in the judgment). Instead, they had "thrust that choice upon themselves by *electing* to become distributors for [seriously ill] patients." *Id.* (emphasis added).

In this case, in contrast, Raich's physician has determined that she "*cannot* be without cannabis as medicine" because she would "quickly" suffer "precipitous medical deterioration" and "could very well" die. J.A. at 48, 51 (emphasis added). Diane Monson's physician has

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[29] The Court's opinion in *OCBC* states in a footnote that "nothing in our analysis suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act." 532 U.S. at 494 n.7. As the concurring Justices noted, however, that statement is clearly dictum, and the medical necessity question presented by this case as a "difficult" one. *Id.* at 501 (opinion of Stevens, J.). In *OCBC*, the Court did not encounter individual patients facing severe pain, starvation, and death.

determined that only cannabis will relieve her symptoms. J.A. at 53. In these circumstances, the doctrine of necessity precludes enforcement of the CSA against Respondents.

B. This Case Raises Serious Questions Involving Due Process, Basic Concepts Of Liberty, And Fundamental Rights.

The Fifth Amendment's Due Process Clause precludes the Federal Government from applying the CSA to Respondents' activities. This Court has held "[i]n a long line of cases" that the Due Process Clause protects basic rights and liberties not specifically enumerated in the Constitution. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). *See also Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 848 (1992) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment mark the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. *See* U.S. Const., Amdt. 9.").

This case involves a right that *is* enumerated in the Due Process Clause – the right to life itself. *See* J.A. 51 ("It could very well be fatal for Angel to forego cannabis treatment."). It also implicates the rights to avoid or mitigate severe pain and protect bodily integrity − rights that at least five Members of this Court have indicated may well be constitutionally protected. *See Glucksberg* 521 U.S. at 736-37 (opinion of O'Connor, J.) ("A patient who is suffering from a terminal illness and who is experiencing great pain" may have a "constitutionally cognizable interest" in "obtaining medication, from qualified physicians, to alleviate that suffering"); *id.* at 789 (opinion of Ginsburg, J.) (agreeing with Justice O'Connor); *id.* at 745 (opinion of Stevens, J.) ("Avoiding intolerable pain and . . . agony is certainly [a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."); *id.* at 777 (opinion of Souter, J.) ("liberty

interest in bodily integrity" includes "a right to determine what shall be done with his own body in relation to his medical needs"); *id.* at 790 (opinion of Breyer, J.) (Due Process Clause may protect right to "personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering – combined."). Each of these rights has deep roots in "our Nation's history, legal traditions, and practices." *Id.* at 710.[30]

"'History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'" *Lawrence v. Texas*, 123 S. Ct. 2472, 2480 (2003) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). Current practices – particularly those authorized by an increasing number of States – are also significant. *Lawrence* 123 S. Ct. at 2480. *See* App. B, *infra*. (describing State laws). In *Lawrence,* moreover, this Court did not apply the "fundamental rights" analysis of *Bowers v. Hardwick*, 478 U.S. 186 (1986), or *Glucksberg*. Instead, it protected the "liberty" to engage in the conduct at issue, without ever deeming the liberty in question a "fundamental right." The same type of analysis leads to protection of Respondents. Their decisions to follow physicians' advice are "within the liberty of persons to

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[30] Respondents are asserting the basic rights described in text, rather than a narrow "right to use medical cannabis." But even if the Court were to focus narrowly on the historical treatment of cannabis, there would still be a strong case for affording constitutional protection to Respondents. There is a long history of medical cannabis use in this country, but no such history for the recent claim of federal power to prohibit it. Medical cannabis did not become illegal under federal law until the CSA was enacted in 1970. *See* Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition,* 56 Va. L. Rev. 971, 1010, 1027, 1165 (1970).

choose without being punished as criminals." *Lawrence*, 123 S. Ct. at 2478.

The Federal Government has no compelling interest in condemning Angel Raich and Diane Monson to avoidable suffering and even death.[31] To the contrary, the Federal Government "has an important interest" in enabling "patients with particular needs" that cannot be addressed with mass-produced conventional medications to use "medications suited to those needs." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 369 (2002). At stake are some of "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Casey*, 505 U.S. at 851. To deny Raich and Monson the medication recommended by their physicians as necessary to relieve excruciating pain, preserve bodily integrity, and extend their lives is to "demean their existence" and "control their destiny." *Lawrence*, 123 S. Ct. at 2484. Such "suffering is too intimate and personal for the [Federal Government] to insist . . . upon its own vision." *Casey*, 505 U.S. at 852.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[31] In *United States v. Rutherford*, 442 U.S. 544, 551 (1979), the Court, without deciding any constitutional issue, held that the Food, Drug and Cosmetic Act did not require the FDA to permit laetrile to be *marketed in commerce* to terminally-ill cancer patients. In this case, unlike in *Rutherford*, Respondents are not seeking to compel the federal government, or any of its agencies, to authorize the marketing of cannabis, or to take any other affirmative action. Instead, Respondents are seeking the right to be left alone so that patients may follow their physicians' recommendations by using a medication they or their caregivers produce for themselves. This case also differs from *Rutherford* in that no peer-reviewed medical study had ever found that laetrile has medical benefits. *Cf. supra* pp. 2-3 (describing medical evidence concerning cannabis).

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October 2004

APPENDIX A

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides that "The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Fifth Amendment of the United States Constitution provides that "No person …shall be …deprived of life, liberty, or property, without due process of law."

The Ninth Amendment of the United States Constitution provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Tenth Amendment of the United States Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

SELECTED PROVISIONS OF THE CONTROLLED SUBSTANCES ACT (21 U.S.C. § 801 *et seq.*)

§ 802. Definitions

* * *

(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a

controlled substance to an ultimate user or research subject.

* * *

(21) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

* * *

§ 844. Penalty for Simple Possession

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III.

* * *

§ 903. Application of State Law

No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.

SELECTED PROVISIONS OF THE CALIFORNIA COMPASSIONATE USE ACT
(Cal. Health & Safety Code § 11362.5 *et seq.*)

§ 11362.5. Medical use

(a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or

privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

§ 11362.7. Definitions

For purposes of this article, the following definitions shall apply:

(a) "Attending physician" means an individual who possesses a license in good standing to practice medicine or osteopathy issued by the Medical Board of California or the Osteopathic Medical Board of California and who has taken responsibility for an aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient and who has conducted a medical examination of that patient before recording in the patient's medical record the physician's assessment of whether the patient has a serious medical condition and whether the medical use of marijuana is appropriate.

(b) "Department" means the State Department of Health Services.

(c) "Person with an identification card" means an individual who is a qualified patient who has applied for and

received a valid identification card pursuant to this article.

(d) "Primary caregiver" means the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person, and may include any of the following:

(1) In any case in which a qualified patient or person with an identification card receives medical care or supportive services, or both, from a clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2, a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01) of Division 2, a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569) of Division 2, a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2, the owner or operator, or no more than three employees who are designated by the owner or operator, of the clinic, facility, hospice, or home health agency, if designated as a primary caregiver by that qualified patient or person with an identification card.

(2) An individual who has been designated as a primary caregiver by more than one qualified patient or person with an identification card, if every qualified patient or person with an identification card who has designated that individual as a primary caregiver resides in the same city or county as the primary caregiver.

(3) An individual who has been designated as a primary caregiver by a qualified patient or person with an identification card who resides in a city or county

other than that of the primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card.

(e) A primary caregiver shall be at least 18 years of age, unless the primary caregiver is the parent of a minor child who is a qualified patient or a person with an identification card or the primary caregiver is a person otherwise entitled to make medical decisions under state law pursuant to Sections 6922, 7002, 7050, or 7120 of the Family Code.

(f) "Qualified patient" means a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article.

(g) "Identification card" means a document issued by the State Department of Health Services that document identifies a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver, if any.

(h) "Serious medical condition" means all of the following medical conditions:

(1) Acquired immune deficiency syndrome (AIDS).
(2) Anorexia.
(3) Arthritis.
(4) Cachexia.
(5) Cancer.
(6) Chronic pain.
(7) Glaucoma.
(8) Migraine.
(9) Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis.
(10) Seizures, including, but not limited to, seizures associated with epilepsy.
(11) Severe nausea.

(12) Any other chronic or persistent medical symptom that either:

(A) Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).

(B) If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

(i) "Written documentation" means accurate reproductions of those portions of a patient's medical records that have been created by the attending physician, that contain the information required by paragraph (2) of subdivision (a) of Section 11362.715, and that the patient may submit to a county health department or the county's designee as part of an application for an identification card.

§ 11362.71. Establishment and maintenance of voluntary program for issuance of identification cards to qualified patients; access to necessary information; duties of county health departments; arrests for possession, transportation, delivery or cultivation

(a)(1) The department shall establish and maintain a voluntary program for the issuance of identification cards to qualified patients who satisfy the requirements of this article and voluntarily apply to the identification card program.

(2) The department shall establish and maintain a 24-hour, toll-free telephone number that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of an identification card issued by the department, until a cost-effective Internet Web-based system can be developed for this purpose.

(b) Every county health department, or the county's designee, shall do all of the following:

(1) Provide applications upon request to individuals seeking to join the identification card program.

(2) Receive and process completed applications in accordance with Section 11362.72.

(3) Maintain records of identification card programs.

(4) Utilize protocols developed by the department pursuant to paragraph (1) of subdivision (d).

(5) Issue identification cards developed by the department to approved applicants and designated primary caregivers.

(c) The county board of supervisors may designate another health-related governmental or nongovernmental entity or organization to perform the functions described in subdivision (b), except for an entity or organization that cultivates or distributes marijuana.

(d) The department shall develop all of the following:

(1) Protocols that shall be used by a county health department or the county's designee to implement the responsibilities described in subdivision (b), including, but not limited to, protocols to confirm the accuracy of information contained in an application and to protect the confidentiality of program records.

(2) Application forms that shall be issued to requesting applicants.

(3) An identification card that identifies a person authorized to engage in the medical use of marijuana and an identification card that identifies the person's designated primary caregiver, if any. The two identification cards developed pursuant to this paragraph shall be easily distinguishable from each other.

(e) No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article.

(f) It shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5.

§ 11362.72. Duties of county health department or county's designee after receipt of application for identification card; approval of application; issuance of card

(a) Within 30 days of receipt of an application for an identification card, a county health department or the county's designee shall do all of the following:

(1) For purposes of processing the application, verify that the information contained in the application is accurate. If the person is less than 18 years of age, the county health department or its designee shall also contact the parent with legal authority to make medical decisions, legal guardian, or other person or entity with legal authority to make medical decisions, to verify the information.

(2) Verify with the Medical Board of California or the Osteopathic Medical Board of California that the attending physician has a license in good standing to practice medicine or osteopathy in the state.

(3) Contact the attending physician by facsimile, telephone, or mail to confirm that the medical records

submitted by the patient are a true and correct copy of those contained in the physician's office records. When contacted by a county health department or the county's designee, the attending physician shall confirm or deny that the contents of the medical records are accurate.

(4) Take a photograph or otherwise obtain an electronically transmissible image of the applicant and of the designated primary caregiver, if any.

(5) Approve or deny the application. If an applicant who meets the requirements of Section 11362.715 can establish that an identification card is needed on an emergency basis, the county or its designee shall issue a temporary identification card that shall be valid for 30 days from the date of issuance. The county, or its designee, may extend the temporary identification card for no more than 30 days at a time, so long as the applicant continues to meet the requirements of this paragraph.

(b) If the county health department or the county's designee approves the application, it shall, within 24 hours, or by the end of the next working day of approving the application, electronically transmit the following information to the department:

(1) A unique user identification number of the applicant.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(c) The county health department or the county's designee shall issue an identification card to the applicant and to his or her designated primary caregiver, if any, within five working days of approving the application.

(d) In any case involving an incomplete application, the applicant shall assume responsibility for rectifying the deficiency. The county shall have 14 days from the receipt of information from the applicant pursuant to this subdivision to approve or deny the application.

§ 11362.735. Serially numbered identification cards; contents; copy given to primary caregiver

(a) An identification card issued by the county health department shall be serially numbered and shall contain all of the following:

(1) A unique user identification number of the cardholder.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(4) A 24-hour, toll-free telephone number, to be maintained by the department, that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of the card.

(5) Photo identification of the cardholder.

(b) A separate identification card shall be issued to the person's designated primary caregiver, if any, and shall include a photo identification of the caregiver.

§ 11362.79. Places where medical use of marijuana is prohibited

Nothing in this article shall authorize a qualified patient or person with an identification card to engage in the smoking of medical marijuana under any of the following circumstances:

(a) In any place where smoking is prohibited by law.

(b) In or within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the medical use occurs within a residence.
(c) On a schoolbus.
(d) While in a motor vehicle that is being operated.
(e) While operating a boat.

§ 11362.81. Penalties; application of section; development and adoption of guidelines to ensure security and nondiversion of marijuana grown for medical use

(a) A person specified in subdivision (b) shall be subject to the following penalties:

(1) For the first offense, imprisonment in the county jail for no more than six months or a fine not to exceed one thousand dollars ($1,000), or both.

(2) For a second or subsequent offense, imprisonment in the county jail for no more than one year, or a fine not to exceed one thousand dollars ($1,000), or both.

(b) Subdivision (a) applies to any of the following:

(1) A person who fraudulently represents a medical condition or fraudulently provides any material misinformation to a physician, county health department or the county's designee, or state or local law enforcement agency or officer, for the purpose of falsely obtaining an identification card.

(2) A person who steals or fraudulently uses any person's identification card in order to acquire, possess, cultivate, transport, use, produce, or distribute marijuana.

(3) A person who counterfeits, tampers with, or fraudulently produces an identification card.

(4) A person who breaches the confidentiality requirements of this article to information provided to,

or contained in the records of, the department or of a county health department or the county's designee pertaining to an identification card program.

(c) In addition to the penalties prescribed in subdivision (a), any person described in subdivision (b) may be precluded from attempting to obtain, or obtaining or using, an identification card for a period of up to six months at the discretion of the court.

(d) In addition to the requirements of this article, the Attorney General shall develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the Compassionate Use Act of 1996.

APPENDIX B

STATE LAWS REGARDING MEDICAL CANNABIS

A total of 26 States have recognized the medical benefits of cannabis in some form:

(1) Nine States have enacted laws allowing medical use of cannabis. *See* Alaska Stat. §§ 11.71.090, 17.37.010 (2004) (Michie 2004); Cal. Health & Safety Code § 11362.5 (West 2004); Colo. Rev. Stat. Const. Art. 18, § 4 (2003); Haw. Rev. Stat. Ann. § 329-121 (2004) (Michie 2004); Me. Rev. Stat. Ann. tit. 22, § 2383-B (West 2004); Nev. Rev. Stat. Ann. § 453A.200 (Michie 2004); Or. Rev. Stat. §§ 475.300-.346 (2004); Vt. Stat. Ann. tit. 18 § 4272 (2004); Wash. Rev. Code Ann. §§ 69.51.010-.080 (West 2004).

(2) Five additional States have enacted laws recognizing the therapeutic benefits of cannabis but authorizing use only by prescription, *see* Ariz. Rev. Stat. § 13-3412.01 (West 2004); La. Rev. Stat. Ann. § 40:1201 (West 2004); N.H. Rev. Stat. Ann. § 318-B:10(VI) (2004); Va. Code Ann. § 18.2-251.1 (Michie 2004), or classifying cannabis as having "currently accepted medical uses," *see* Iowa Code §§ 124.205, 124.206(7)(a) (West 2004).

(3) Two additional States have passed resolutions urging the federal government to allow the medical use of cannabis. *See* Mo. Sen. Con. Res. 14 (1994); New Mexicans for Compassionate Use, N.M. Senate Memorial 42 (1982), *available at* http://www.sumeria.net/nmcu/memorial.html.

(4) Seven additional States have enacted laws recognizing cannabis's potential medical benefits for persons suffering from conditions including cancer, nausea, and glaucoma, and establishing therapeutic research programs for the benefit of such persons. *See* Ala. Code § 20-2-111 (2004); Ga. Code Ann. §§ 43-34-120 (2004); 720 Ill. Comp. Stat. 550/11 (2004); Mass. Gen. Law ch. 94D, §§ 1-3 (2004); N.Y. Pub. Health Law §§ 3328(4) 3397-a to 3397-f (McKinney 2004);

Minn. Stat. § 152.21 (2004); S.C. Code Ann. §§ 44-53-620 (Law. Co-op. 2004).

(5) The courts of two additional States have allowed cannabis patients to raise a necessity defense to charges of marijuana possession. *See Sowell v. State*, 738 So.2d 333, 334 (Fla. Dist. Ct. App. 1998); *State v. Hastings*, 801 P.2d 563, 565 (Idaho 1990). A third State recently limited the penalty for possessing cannabis for medical purposes to a $100 fine. *See* Md. Code Crim. Law § 5-601(c)(3) (2004).

This State legislation reflects strong popular support for medical use of cannabis in appropriate circumstances. *See, e.g.,* The Polling Report, Inc., Illegal Drugs, available at http://www.pollingreport.com/drugs.htm (last visited Oct. 10, 2004) (CNN/Time poll) 80 percent of Americans favor allowing adults to use cannabis for medical purposes on a physician's recommendation).