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OAKLAND CANNABIS BUYERS' COOPERATIVE
AND JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES,

Defendants.

AND RELATED ACTIONS.

No. 98-0088 CRB

DEFENDANTS' NOTICE OF MOTION AND MOTION AFTER REMAND TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION ORDER AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
(Fed R.Civ.P. 60(b), Local Rule 7-11)
Date: February 16, 2002
Time: 10:00 a.m.
Courtroom: 8
Hon. Charles R. Breyer

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TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

Pursuant to Federal Rule of Civil Procedure 60(b) and Local Rule 7-11, and the United States Supreme Court's recent opinion in this case, Defendants the Oakland Cannabis Buyers' Cooperative ("OCBC" or "the Cooperative") and Jeffrey Jones (collectively "OCBC") bring this motion after remand from the United States Supreme Court to dissolve or modify the preliminary injunction order entered in this case; said motion to be heard on February 16, 2002 at 10:00 a.m. in Courtroom 8 before the Honorable Charles Breyer.

INTRODUCTION

Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones hereby submit this motion for an order dissolving or modifying the injunction presently in effect in this case. This motion is necessitated by the decision of the United States Supreme Court in this action, which rejected this Court's modification of the injunction to exempt distribution to patients who can demonstrate legal necessity, but which declined to address the constitutional issues now presented by this case. The current unmodified injunction is unconstitutional because it exceeds the power of Congress and violates the fundamental rights of the Defendants. The constitutional issues raised by the unmodified injunction extend well beyond the narrow issue of medical cannabis. At stake in these proceedings is whether the federal government may exercise power in derogation of the Constitution, unrestrained by any recognition of the constitutionally protected sovereignty and autonomy of state and local governments or the fundamental rights of American citizens. To uphold the unmodified injunction would weaken each of these foundations of our Republic.

The Supreme Court confirmed that this court is *not* required to issue an injunction on the government's demand, but instead may exercise its discretion to determine whether the extraordinary remedy of injunction is appropriate. This court has not engaged in this analysis. If it were to do so, the court would conclude that other means of enforcement that do not violate the Constitution are available to the government. Accordingly, this court should dissolve the unmodified injunction and/or dismiss the action.

In the absence of a complete dismissal, defendants request that this court modify the injunction so that it complies with the Constitution: Specifically, (1) to exclude from the injunction's reach

any noneconomic activity such as the cultivation, possession, and use of medical cannabis, and (2) to hold an evidentiary hearing to determine if the wholly intrastate distribution of medical cannabis substantially affects interstate commerce and, (3) if not, to dissolve the injunction completely, or if it finds that the wholly intrastate distribution does substantially affect interstate commerce, to determine whether the government may properly interfere with State sovereignty or has a compelling interest to restrict the exercise of fundamental rights.

PROCEDURAL BACKGROUND

In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996 (Proposition 215), to permit seriously ill patients and their primary caregivers to possess and cultivate cannabis with the approval or recommendation of a physician. Cal. Health & Safety Code § 11362.5. A purpose of the measure is "To ensure that seriously ill Californians have the *right* to obtain and use marijuana for medical purposes." *Id.* § 11362.5(b)(1)(A) (emphasis added). The physician must determine "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." *Id.*

To implement the will of California voters, Defendants organized a Cooperative to provide seriously ill patients with a safe and reliable source of medical cannabis. A physician serves as Medical Director, and with registered nurses, staffs the Cooperative during business hours. (Amended Declaration of Michael M. Alcalay, M.D., M.P.H., p. 3, Exh. B).[1] The Cooperative's Protocols require prospective members to provide a written statement from a treating physician assenting to cannabis therapy, to submit to a screening interview by staff, and to obtain verification of the physician's approval. Those accepted as members are issued identification cards.

The Cooperative, a not-for-profit organization, operates in downtown Oakland, in cooperation with the City of Oakland and its police department. No smoking is permitted on the premises. (Declaration of Laura A. Galli, R.N., pp. 1-2, Exh. G; Exhibit 1 to the Declaration of Laura A. Galli, R.N., Exh. G; Amended Declaration of Michael M. Alcalay, M.D., M.P.H., pp. 2-3, Exh. B;

[1] All Exhibits are attached to the Declaration of Annette P. Carnegie In Support of Defendants' Motion After Remand To Dissolve or to Modify Preliminary Injunction Order.

Resolution No. 76885 C.M.S. of the City of Oakland, Exh. O; Resolution No. 74618 C.M.S. of the City of Oakland, Exh. M). On July 28, 1998, the City of Oakland adopted, by ordinance, a Medical Cannabis Distribution Program, and on August 11, 1998, officially designated the Cooperative to administer the City's program. (Ordinance No. 12076 C.M.S. of the City of Oakland, Exh. L; August 11, 1998 letter, from the Oakland City Manager designating the Oakland Cannabis Buyers' Cooperative and its agents, directors, and employees as a medical cannabis provider association pursuant to Ordinance No. 12076 C.M.S., Exh. N)

On January 9, 1998, the United States sued in the United States District Court for the Northern District of California, seeking to enjoin Defendants from distributing cannabis to patient-members. On May 19, 1998, this Court issued a preliminary injunction enjoining Defendants from "engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1)." (Preliminary Injunction Order, p. 1, Exh. S).

On October 13, 1998, this Court summarily held Defendants in contempt of the preliminary injunction without an evidentiary hearing or a jury trial. (Order Modifying Injunction in Case No. 98-00088, , Exh. U). The Court rejected a necessity defense, finding that only four patients to whom cannabis was allegedly distributed on the day covered by the Order to Show Cause submitted evidence sufficient to determine legal necessity. (Defendants' Notice of Motion and Motion to Dissolve or Modify Preliminary Injunction Order and Memorandum of Points and Authorities in Support Thereof, pp. 9-12, Exh. X). The Court then modified the injunction to permit the U.S. Marshal to seize Defendants' offices. (Memorandum and Order re: Motions in Limine and Order to Show Cause, p. 18, Exh. R). Defendants informed the Court that they would comply with the injunction. (Order re Ex Parte Motion, p. 2, Exh. V). Defendants also requested that the injunction be modified to permit distribution of cannabis to the limited number of patients who could demonstrate necessity under the standard set forth in *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) and submitted numerous declarations in support of this request. The Court denied that motion. *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1113-14 (9th Cir. 1999), *rev'd and remanded, United States v. Oakland Cannabis Coop.*, 121 S.Ct. 1711 (2001).

On October 27, 1998, the Oakland City Council adopted a resolution declaring a public health emergency, finding that the closure of the Cooperative "impairs public safety by encouraging a market for street narcotic peddlers to prey upon Oakland's ill residents" and that the closure will cause pain and suffering to thousands of seriously ill persons. The resolution urged the federal government to desist from actions that pose obstacles to access to cannabis for Oakland residents whose physicians have determined that their health will benefit from the use of cannabis. (Resolution No. 74618 C.M.S. of the City of Oakland, Exh. M). The City Council renews that resolution every two weeks. (Resolution No. 76885 C.M.S. of the City of Oakland, Exh. O).

On September 13, 1999, the Ninth Circuit reversed this Court's denial of the motion to modify and remanded the case, holding that (1) this Court could take into account a legally cognizable defense of necessity in considering the proposed modification (*Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1114), (2) in exercising its equitable discretion, this Court must expressly consider the public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of persons with serious or fatal illnesses, and (3) the record before this Court justified the proposed modification. *Id.* at 1114-15.[2]

On remand, on May 30, 2000, Defendants renewed their motion to modify the preliminary injunction, submitting more declarations to establish that patient-members could meet all of the *Aguilar* requirements for a claim of necessity. The evidence established that:

(1) Some patient-members face a choice of evils, requiring them to violate the law to gain relief from debilitating pain, life-threatening illness, or loss of sight. Patients described the agony of suffering from HIV/AIDS and its "wasting syndrome" (Declaration of Albert Dunham, Exh. E; Amended Declaration of Michael M. Alcalay, M.D., M.P.H., Exh. B; Declaration of Terry Stogdell, Exh. J), vomiting, loss of appetite, and dramatic weight loss accompanying cancer treatment (Declaration of Robert T. Bonardi, Exh. D; Declaration of Creighton W. Frost Jr., Exh. F; Declaration of Willie C. Beal, p. 1, Exh. C), and pain and deteriorating field of vision from glaucoma (Declaration of Harold Sweet, Exh. K).

[2] This Ninth Circuit dismissed Defendants' appeal of the contempt order as moot, on the ground the contempt was purged. *Id.* at 1112-13.

(2) Those patient-members will suffer imminent harm if deprived of cannabis, including loss of life (Amended Declaration of Michael M. Alcalay, M.D., M.P.H., pp. 1-2, Exh. B; Declaration of Willie C. Beal, p. 1, Exh. C), starvation (Declaration of Robert T. Bonardi, p. 2, Exh. D; Declaration of Terry Stogdell, Exh. J), and blindness (Declaration of Harold Sweet, p. 1, Exh. K).

(3) There is a direct, causal relationship between patient-members' use of cannabis and averting imminent harm. For example, Dr. Marcus Conant, M.D., who has treated 5,000 HIV-infected men and women, states:

> In my practice, marijuana has been of greatest benefit to patients with wasting syndrome. I do not routinely recommend marijuana to my patients, nor do I consider it the first line of defense against AIDS-related symptoms. However, for some patients, marijuana proves to be the *only* effective medicine for stimulating appetite and suppressing nausea, thus allowing the AIDS patient to recover lost body mass and become healthier.

(Declaration of Marcus A. Conant, M.D., p. 5, Exh. P). Dr. Howard MacCabee, M.D., who directs the Radiation Oncology Center, and has treated 2,000 patients in various stages of radiation therapy for cancer, states:

> Because of the nature of some cancers, I must sometimes irradiate large portions of my patient's abdomens. Such patients often experience nausea, vomiting, and other side effects. Because of the severity of these side effects, some of my patients choose to discontinue treatment altogether, even when they know that ceasing treatment could lead to death. . . . I have witnessed cases where patients suffered from nausea or vomiting that could not be controlled by prescription anti-emetics. . . . As a practical matter, some patients are unable to swallow pills because of the side effects of radiation therapy or chemotherapy, or because of the nature of the cancer (for instance, throat cancer). For these patients, medical marijuana can be an effective form of treatment.

(Declaration of Howard D. MacCabee, Ph.D., M.D., ¶ 7-9, Exh. Q). Additionally, Dr. Lester Grinspoon, M.D., a leading researcher on the use of cannabis for medical purposes, and the author of 154 scholarly articles and 13 books on related subjects, summarized the published scientific evidence establishing the efficacy of cannabis as an anti-emetic for cancer chemotherapy, as a retardant to reduce intraocular pressure experienced by glaucoma sufferers, as an anticonvulsant to control seizures, as an analgesic to control pain, and as an appetite stimulant to combat the AIDS-wasting

syndrome. (Declaration of Lester Grinspoon, M.D., in Support of Defendants' Response to Show Cause Order, Exh. H; *see also* Declaration of Dr. John Morgan, M.D., Exh. I).

(4) There are no legal alternatives to cannabis for these patients. Patients described how they had tried alternative medications available by prescription, including the synthetic THC pill known as "Marinol," and found them ineffective. (Amended Declaration of Michael M. Alcalay, M.D., M.P.H., p. 2, Exh. B; Declaration of Creighton W. Frost, Jr., p. 2, Exh. F; Declaration of Terry Stogdell, p. 2, Exh. J). Dr. Conant, who served as one of the principal investigators when Marinol was approved by the FDA, testified that Marinol is ineffective for some patients suffering severe nausea because they cannot tolerate pills, and also that the body absorbs cannabis more quickly than Marinol. (Declaration of Marcus A. Conant, M.D., p. 7, Exh. P. *See also* Declaration of Lester Grinspoon, M.D., in Support of Defendants' Response to Show Cause Order, pp. 10-11, Exh. H; Declaration of John P. Morgan, M.D., Exh. I).

The government submitted no evidence in opposition, nor did it challenge Defendants' evidentiary showing. Instead the government relied upon its legal argument that a necessity defense was not available under the Controlled Substances Act (the "CSA"). On July 17, 2000, this Court modified the preliminary injunction to exempt the distribution of cannabis to patient-members who (1) suffer from a serious medical condition, (2) will suffer imminent harm if denied access to cannabis, (3) need cannabis to treat or alleviate the medical condition or its associated symptoms, and (4) have no reasonable legal alternative to cannabis for effective treatment or alleviation of symptoms, because all other legal alternatives have been tried and were ineffective or intolerable. (Amended Preliminary Injunction Order, Exh. W).

On July 25, 2000, the government noticed an appeal from this Court's order modifying the injunction. That appeal was fully briefed. On November 27, 2000, the Supreme Court granted the government's petition for writ of certiorari to review the Ninth Circuit's September 13, 1999, opinion. The Ninth Circuit suspended proceedings in the government's appeal to await the Supreme Court's ruling. On May 14, 2001, the United States Supreme Court reversed the September 13, 1999 decision and remanded the case for further proceedings.

On December 4, 2001, the Ninth Circuit remanded the case to the district court for "proceedings consistent with the Supreme Court's opinion." (Order of December 4, 2001, Exh. Y.)

THE SUPREME COURT OPINION

In its opinion, the Supreme Court made several determinations that are critical to the proceedings before this Court. First, the Supreme Court expressly left open the constitutional issues raised by Defendants, stating that "[b]ecause the Court of Appeals did not address these claims, we decline to do so in the first instance." *United States v. Oakland Cannabis Buyers' Coop.* ("*OCBC*"), 121 S.Ct. 1711, 1719 (2001). In assessing the constitutional issues raised in this case, three concurring Justices recognized

> the importance of showing respect for the sovereign states that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and State law, particularly in situations in which the citizens of a State have chosen to "serve as a laboratory" in the trial of "novel social and economic experiments without risk to the rest of the country."

Id. at 1723-4.

Second, the Supreme Court upheld Defendants' contention that this Court indeed has discretion when faced with a request by the government for an injunction:

> The Cooperative is also correct that the District Court in this case had discretion. The Controlled Substances Act vests district courts with jurisdiction to enjoin violations of the Act, 21 U.S.C. § 882(a). But a "grant of jurisdiction to issue [equitable relief] hardly suggests an absolute duty to do so under any and all circumstances." *Hecht [Co. v. Bowles*, 321 U.S. 321 (1944)], *supra,* at 329 (emphasis omitted). *Because the District Court's use of equitable power is not textually required by any "clear and valid legislative command," the Court did not have to issue an injunction.*
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> * * *
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> [W]ith respect to the Controlled Substances Act, criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance with the statute. *Congress' resolution of the policy issues can be (and usually is) upheld without an injunction.*

Id. at 1721 (emphasis added).

Finally, the Supreme Court recognized that in determining whether to issue an injunction, this Court must consider the effect of such an injunction on the public interest and on the parties:

> Consequently, when a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disadvantages of "employing the extraordinary remedy of injunction" (*Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982)) over the other available methods of enforcement. Cf. *id.* at 316 (referring to "discretion to rely on remedies other than an immediate prohibitory injunction"). To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.

Id. at 1721-22.

The Supreme Court's ruling also requires that this Court exercise its discretion to determine whether the extraordinary remedy of an injunction is necessary in this case to enforce the CSA. The Supreme Court's opinion also requires that this Court address the serious constitutional issues raised by an injunction with no provision for medical necessity. As discussed below, any injunction must exclude wholly intrastate noneconomic activities. Moreover, under recent Supreme Court authority, the federal government cannot proscribe the wholly intrastate manufacture and distribution of medical cannabis unless a hearing establishes their substantial effect on interstate commerce. Furthermore, no injunction may violate constitutional principles of State sovereignty or constitutionally protected fundamental rights.

ARGUMENT

I. THE CIRCUMSTANCES OF THIS CASE REQUIRE THAT THE COURT EXERCISE ITS INHERENT POWER TO DISSOLVE THE INJUNCTION

The Supreme Court's opinion plainly requires this Court to reconsider the basis upon which it issued the injunction, and to determine whether, given the circumstances of this case, such an injunction is warranted. This Court has inherent power to dissolve or modify a preliminary injunction pursuant to Federal Rule of Civil Procedure 60(b). Schwarzer, W. et al., *California Practice Guide, Federal Civil Procedure Before Trial*, ¶ 13:212 at pp. 13-71 (Rutter 2000). "Courts have been willing . . . to modify or dissolve an injunction in the interest of fairness and efficiency." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 911 F.2d 363, 366-67 (9th Cir. 1990) (citation omitted). The discretion of the court is "guided by traditional principles of equity jurisprudence." *Safe Flight*

Instrument Corp. v. United Control Corp., 576 F.2d 1340, 1343 (9th Cir. 1978). Judicial discretion allows modification of the terms of an injunctive decree if circumstances of law or fact have changed. *See, e.g., System Fed'n v. Wright*, 364 U.S. 642, 647 (1961); *Transgo, Inc.*, 911 F.2d at 367.

"While changes in fact or in law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purpose." *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F. 2d 31, 35 (2d Cir. 1969). As discussed below, the Supreme Court's opinion in this case, as well its most recent cases interpreting the reach of the Commerce Clause, provide a clear basis upon which this Court should exercise its inherent equitable power to dissolve or modify the preliminary injunction.

A. This Court Has Discretion Not To Issue An Injunction

The Supreme Court explicitly recognized in its opinion that this Court is not required to issue an injunction on the government's demand:

> Because the District Court's use of equitable power is not textually required by any "clear and valid legislative command," the court did not have to issue an injunction.

OCBC, 121 S.Ct. at 1721. Moreover, the Supreme Court stated that in determining whether to issue an injunction this Court *must* consider "the advantages and disadvantages of 'employing the extraordinary remedy of injunction,' *Romero-Barcelo*, 456 U.S. at 311, over other available methods of enforcement." *Id.* at 1722. This Court also must consider how "the public interest and the conveniences of the parties are affected by the selection of an injunction over other enforcement mechanisms." *Id.* This Court issued the injunction on the belief that it was required to do so. In this case, however, the Court clearly had discretion to decline to issue the broad injunction requested by the government, and compelling reasons exist for declining to do so here.

First, the government's tactical decision to proceed by civil injunction deprived Defendants of important procedural safeguards that normally accompany criminal prosecution. In this case, Defendants were charged with contempt under criminal statutes authorizing criminal penalties of up to five years in prison and $250,000 to $1,000,000 in fines. 21 U.S.C. § 841(b)(1)(D). Despite the criminal nature of the charges, Defendants were denied important rights including the right against self-

incrimination and the presumption of innocence unless proven guilty beyond a reasonable doubt. Moreover, over their objections, Defendants were held in contempt in a summary proceeding without a jury trial or even an evidentiary hearing. (Order Modifying Injunction in Case No.98-00088, Exh. U; Memorandum and Order re: Motions in Limine and Order to Show Cause, Exh. R) Given the importance of the right to a jury trial, particularly where as here the government has charged Defendants with criminal activity, this Court must carefully exercise its discretion to consider whether a civil injunction is the appropriate means of enforcing the CSA. *See* "Development in the Law — Injunction, The Changing Limits of Injunctive Relief," 78 Harv. L. Rev. at 996, 1004 (1965) (citing cases); *Codespoti v. Pennsylvania*, 418 U.S. 506, 515-16 (1974) ("the jury-trial guarantee reflects a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government" (omitting quotation).)

Second, permitting the government to pursue injunctive relief in this context also deprives Defendants of the immunity to which they are otherwise entitled under 21 U.S.C. § 885. Section 885(d) immunizes from civil and criminal liability duly authorized state and local government officers who are engaged in the enforcement of laws relating to controlled substances. On July 28, 1998, the Oakland City Council passed Ordinance No. 12076 — An Ordinance of the City of Oakland Adding Chapter 8.42 to the Oakland Municipal Code Pertaining to Medical Cannabis ("Oakland Ordinance"). (Ordinance No. 12076 C.M.S. of the City of Oakland, Exh. L; August 11, 1998 letter, from the Oakland City Manager designating the Oakland Cannabis Buyers' Cooperative and its agents, directors, and employees as a medical cannabis provider association pursuant to Ordinance No. 12076 C.M.S., Exh. N). The Oakland Ordinance specifically provides "immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code . . . ." (Ordinance No. 12076 C.M.S. of the City of Oakland, p. 2, Exh. L).

Section 3 of the Oakland Ordinance establishes a Medical Cannabis Distribution Program and requires that the Oakland City Manager designate one or more entities as medical cannabis provider associations. (Ordinance No. 12076 C.M.S. of the City of Oakland, pp. 2-3, Exh. L). The Oakland Ordinance further provides that a designated medical cannabis provider association and its agents,

employees, and directors "shall be deemed officers of the City of Oakland." (Ordinance No. 12076 C.M.S. of the City of Oakland, p. 2, Exh. L).

On August 11, 1998, the Oakland City Manager designated the Cooperative as a medical cannabis provider association pursuant to Section 3 of Ordinance No. 12076. (August 11, 1998 letter, from the Oakland City Manager designating the Oakland Cannabis Buyers' Cooperative and its agents, directors, and employees as a medical cannabis provider association pursuant to Ordinance No. 12076 C.M.S., Exh. N). Once the Oakland City Manager designated Defendants as duly authorized officers of the City engaged in the enforcement of laws relating to controlled substances, Defendants were entitled to the immunity provided by Section 885(d).

In denying Defendants' motion to dismiss based on Section 885(d), the Court interpreted Section 885(d) to provide immunity only against civil or criminal liability, and not against a suit for equitable relief. (Order re: Motion to Dismiss in Case No. 98-0088 CRB, p. 4, Exh. T). Thus, the government has deprived Defendants of immunity by seeking injunctive relief.

Finally, as discussed below, the broad injunction originally issued by this Court unconstitutionally exceeds the powers of Congress under the Commerce Clause. The injunction also interferes with powers reserved to the State and to the People under the Tenth Amendment and impermissibly disparages the fundamental rights retained by the People and protected by the Ninth Amendment and the Due Process Clause of the Fifth Amendment. Given these constitutional infirmities, this Court should exercise its discretion to dismiss the case or to dissolve or modify the injunction.

II. THE UNMODIFIED INJUNCTION IS UNCONSTITUTIONAL

A. The Injunction Unconstitutionally Prohibits Defendants' Wholly Intrastate Activities

The injunction exceeds the powers of Congress under either the Commerce Clause or the Necessary and Proper Clause by prohibiting the wholly intrastate distribution of cannabis for medical purposes.

1. Defendants' Activities Are Wholly Intrastate and Therefore Outside the Power of Congress to Regulate Commerce "Among the Several States"

The first question that must be considered is whether Defendants' activities lie within reach of the enumerated powers of Congress. If they do not, the Court need not consider other issues, such as whether the injunction violates principles of state sovereignty or the fundamental rights of Defendants or others.

Congress has no general police powers. *United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation"). As both Article I[3] and the Tenth Amendment[4] make plain, the Constitution confines Congress to an enumeration of powers and exeeution of those powers by means of laws that are necessary and proper. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers"). As explained in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803):

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed . . . .

Id. at 176.

The activity prohibited here takes place wholly within the borders of the State of California. It consists of the acquisition of cannabis by seriously ill persons on recommendation of physicians licensed by the State of California, and the intrastate cultivation and distribution of cannabis for this limited purpose by an organization authorized and regulated by a local municipality pursuant to California law.

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[3] *See* Art. I, sec. 1 ("All legislative Powers *herein granted* shall be vested in" Congress [emphasis added].).

[4] "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." U.S. Const. Amend. X.

These wholly intrastate activities are beyond the power of Congress "to regulate Commerce . . . among the several States," U.S. Const. Art. I, sec. 8. *See* The Federalist 42, at 267-69 (J. Madison) (Rossiter ed.) (referring to the power "to regulate between State and State"). If Article I had included the power to regulate wholly intrastate commerce, it would simply have read "Congress shall have power to regulate commerce." The only reason for the tripartite breakdown[5] specified was to exclude the power to regulate wholly intrastate commerce. As Chief Justice Marshall explained in *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 195 (1824): "The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself." In sum, protecting wholly intrastate commerce from the reach of Congress is a constitutional imperative in our federal system.

In *Champion v. Ames,* 188 U.S. 321 (1903), the Supreme Court first decided that the power to regulate commerce among the States included a limited power of prohibition. The Court insisted, however, that this extension of Congressional power "does not assume to interfere with traffic or commerce . . . . carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States." *Id.* at 357.

Had Congress the power under the Commerce Clause to regulate wholly intrastate commerce, it would have been unnecessary to adopt the Eighteenth Amendment to prohibit the intrastate "manufacture, sale, or transportation of intoxicating liquors." U.S. Const. Amend. XVIII (repealed). Section 1 of the Twenty-First Amendment, repealing the Eighteenth, would have no purpose or effect if Congress could reach the very same activity under its power to regulate commerce among the States.[6] Moreover, Section 2 of the Twenty-First Amendment protects the discretion of States to prohibit or legalize intoxicating liquors (subject, of course, to other constitutional restrictions on state

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[5] Article I, Section 8 permits Congress to regulate "Commerce with foreign Nations, and among the several States, and with the Indian tribes."

[6] Significantly, Section 1 of the Twenty-First Amendment is explicitly worded as a repeal of the Eighteenth rather than as an exception to the power of Congress over commerce.

power).[7] The Twenty-First Amendment remains an enforceable part of the Constitution and the powers of Congress to regulate commerce among the States must be interpreted in a manner that does not contradict it.

The government does not dispute that the Cooperative provided cannabis grown entirely in California, by California cultivators, and distributed wholly within California, only by California residents, exclusively to California patients, who had recommendations or approvals issued solely by California-licensed physicians, for use only within California. To the extent the injunction prohibits these wholly intrastate activities, it is unconstitutional.[8]

2. The Government Has Not Established a Legal Justification for Reaching This Wholly Intrastate Activity Under the Necessary and Proper Clause

If Congress is to reach the intrastate distribution of cannabis to patients who may suffer without access to this medicine, it must do so under its power to pass laws that are "necessary and proper" to execute its enumerated powers. U.S. Const. Art. I, sec. 8. *See New York v. United States*, 505 U.S. 144, 158 (1992) ("The Court's broad construction of Congress' power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause. . . ."). As has long been recognized, this provision could not have been intended to render the enumeration of powers redundant or superfluous. As James Madison explained to the first Congress: "Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers." 2 Annals of Cong. 1898 (statement of Rep. Madison).[9]

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[7] Section 2 states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." U.S. Const. Amend. XXI, sec. 2 (emphasis added). Thus, the Twenty-First Amendment recognizes the fundamental principle that whether or not intoxicating liquors are prohibited *within a State* depends on state law.

[8] Should it so desire, the Court can modify the injunction to clarify that any activity not fitting this description remains enjoined.

[9] Although there came to be disagreement between Madison, Jefferson, and Randolph on the one hand, and Hamilton and Marshall on the other, about the degree of necessity that must be shown,

(Footnote continues on following page.)

In *Lopez* and again in *United States v. Morrison,* 529 U.S. 598 (2000), the Supreme Court held that Congress may reach wholly intrastate economic activity under the Necessary and Proper Clause only if that activity is shown to "substantially [a]ffect[] interstate commerce." *Lopez*, 514 U.S. at 560.[10] Here, however, as in *Lopez,* there has been no showing either by Congress or by the government that the activity in question (here, the wholly intrastate distribution of cannabis solely for medical use) substantially affects interstate commerce.[11] As with the statute at issue in *Lopez,* neither the CSA "'nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce'" (*Id.* at 562, quoting the government's brief in that case) of the wholly intrastate sale of cannabis solely for medical purposes.

The question of whether the wholly *intrastate* sale of cannabis solely for medical use substantially affects interstate commerce is, at least partially, one of fact. In this case, neither Congress nor any court has made any factual findings whatsoever regarding the effect on interstate commerce of the intrastate distribution of cannabis solely to seriously ill patients. In any such inquiry, it would matter greatly that the intrastate activity at issue here is the distribution of cannabis for the limited purpose of medical use by persons who are acting under advice of a licensed physician, rather than for recreational use. The government would have a much harder task to show that this narrowly confined activity, carved out by the State of California, substantially affects interstate commerce than it would if the activity involved were more extensive. The more limited the intrastate

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all agreed that, for a measure to be "necessary," there must be a sufficient fit between the means chosen and the enumerated end. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 421 (stating that means chosen must be "plainly adapted" to an enumerated end).

[10] This case does not fall under either of the first two categories of permissible commerce clause regulation identified in *Lopez:* the "use of channels of interstate commerce" or the regulation and protection of "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S. at 558. Thus, only the third category is arguably at issue here: "the power to regulate . . . those activities that substantially affect interstate commerce." *Id.* at 558-59.

[11] This case is thus distinguishable from cases generally upholding the constitutionality of the CSA as applied to intrastate trafficking in *recreational* drugs, an activity that dwarfs in scope the use of cannabis *for medical purposes. See, e.g., United States v. Tisor*, 96 F.3d 370 (9th Cir. 1996). Defendants do not here dispute the federal government's power to regulate or prohibit interstate commerce in recreational drugs, or their importation from foreign Nations, nor the continued police power of States to prohibit the intrastate possession, manufacture, or distribution of recreational drugs.

activity at issue, the less impact, even taken in the aggregate, it could have on interstate commerce. Moreover, a subdivision of the State of California is regulating this limited activity, thereby further mitigating the scope of the intrastate commerce in question and any impact it may have on interstate commerce.

There is nothing in the record concerning the effect of this limited form of intrastate activity on interstate commerce other than the government's unsupported assertions. The findings in the CSA with respect to jurisdiction over intrastate activity are general and do not address the effect on interstate commerce of distribution of cannabis *to seriously ill patients who require this medicine.* Further, the rationales advanced for extending the jurisdiction of Congress to intrastate activity are so broad as to give Congress power over all commerce. *See, e.g.*, 21 U.S.C. § 801(4) ("Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances"). Therefore, these rationales cannot be constitutionally acceptable.

The government has relied upon a "sense of the Congress" resolution that Schedule I drugs "are unsafe, even under medical supervision." (Pub. L. No. 105-277, Div. F, 112 Stat. 2681-760). This is not a finding of fact at all, nor is it based on any hearings or an empirical investigation meriting judicial deference. Instead, it is a line of text from the *Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999*. Though captioned "Not Legalizing Marijuana for Medical Use," it contains no specific findings with respect to the medical use of cannabis or anything else. Instead, it merely reasserts the legal criteria for Schedule I drugs. Nothing in this "sense of the Congress" resolution constitutes a finding of fact *made by Congress* with respect to *anything* including the medical uses of cannabis.

Further, neither the general "findings" in the CSA, nor this "sense of the Congress" statement buried within an appropriations act, addresses the standard articulated in *Lopez* or *Morrison:* whether the intrastate production and distribution of cannabis for medical purposes *substantially affects* interstate commerce. Moreover, these "findings" ignore the distinction between commercial and noncommercial activity specified by the Court in *Lopez* and reaffirmed in *Morrison.* If these sorts of "findings" satisfy the standard of *Lopez* and *Morrison* then Congress could simply accompany every prohibition of intrastate activity, whether economic or not, with a blanket assertion that "intrastate

activity X substantially affects interstate commerce," thereby rendering these two decisions of the Supreme Court inoperative. As the Court stated in *Morrison*: "[t]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." 529 U.S. at 614.[12] In the final analysis a court must pass upon such findings if our Republic is to preserve the scheme of enumerated and limited congressional powers.

The intrastate activities reached by Congress in *Wickard v. Filburn,* 317 U.S. 111 (1942), are not at all analogous to the wholly intrastate activities subject to the injunction in this case. In *Wickard* the Court found that Congress may regulate the intrastate production and consumption of wheat because such production and consumption were in competition with wheat sold interstate and therefore only by reaching these intrastate activities could Congress successfully increase the market price of wheat in interstate commerce. *See Lopez,* 514 U.S. at 560, quoting *Wickard,* 317 U.S. at 128.

Here there is no federal scheme of price maintenance with which the intrastate production of medical cannabis could possibly interfere. Rather, the CSA is a scheme to prohibit completely the *interstate* commerce in marijuana. The Necessary and Proper Clause does not permit Congress to use its power over interstate commerce as a pretext to reach activities that lie outside that power. As John Marshall affirmed in *McCulloch v. Maryland*, "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land." 17 U.S. at 423. Under *Wickard*, Congress may only reach those intrastate economic activities that substantially impede its ability to regulate an activity that is *within* its powers. The availability of cannabis for medical purposes through wholly intrastate production and distribution, however, should *reduce* the demand for cannabis supplied from outside the state and thereby *diminish* the interstate commerce in illegal marijuana. In this manner, it advances rather than obstructs the only legitimate objective of the CSA.

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[12] In *Tisor*, the court distinguished *Lopez* on the ground that, in that case, there had been no Congressional findings whereas the CSA was supported by Congressional findings. However, in the later case of *Morrison*, where such "findings" existed, the Supreme Court made clear that the mere existence of conclusory findings was insufficient. Here, there have been no findings that the wholly intrastate sale of medical cannabis substantially affects interstate commerce.

If in seeking to prohibit some form of interstate commerce, Congress can prohibit the wholly intrastate commerce of particular goods on the unsupported speculation that such goods might leak out of a state and into interstate commerce,[13] or because there is no way to distinguish between goods produced within a state and those imported from other states,[14] then this would give Congress the plenary power over all commerce that the Constitution explicitly denies it. There is no evidence that cannabis grown and distributed for the limited purpose of medical use by seriously ill Californians would be traded between states. Should this occur, Congress retains the power to detect and prosecute those persons moving cannabis in interstate commerce. The supposition that this might occur does not give Congress a police power over persons (such as Defendants) who deliberately limit themselves to wholly intrastate activities.

In sum, when the government by injunction, seeks to prohibit commerce that is wholly intrastate, it must justify this prohibition as necessary and proper to the exercise of Congress's power to regulate interstate commerce. Unless courts require such a showing, Congress will possess the general police power it was denied both by the founders' Constitution and by decisions of the Supreme Court. Because no such showing has been made, the unmodified injunction violates the Constitution.

3. Some of Defendants' Intrastate Activities Are Noneconomic and Therefore Cannot Be Prohibited Under Either the Commerce Clause or the Necessary and Proper Clause

Even were the intrastate sale of cannabis for medical purposes found to substantially affect the illegal sale of cannabis between States, Congress would still lack power to reach that portion of Defendants' activities that are noneconomic. The Court must therefore modify the injunction to exclude such activities.

The unmodified injunction prohibits the acquisition of cannabis by seriously ill persons upon recommendation of their physicians, and the intrastate cultivation and distribution of cannabis for this

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[13] *See* 21 U.S.C. § 801 (4) ("Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances").

[14] *See* 21 U.S.C. § 801 (5) ("Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate").

limited purpose. Yet the private possession, use, and cultivation of cannabis for medicinal purposes are not economic activities at all. Nor is it an economic activity to supply or distribute cannabis to another without charge or gain.[15]

In *Lopez*, the Supreme Court held that the regulatory power of Congress did not extend to the noneconomic intrastate act of possessing a firearm within 1,000 feet of a school. In *Morrison*, it held that this power did not extend to the noneconomic intrastate act of rape. In *Morrison* it noted that, "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*." *Morrison,* 529 U.S. at 613 (emphasis added).

Just as regulation of gun possession and rape lies solely within the police power of the States, so too does the regulation and prohibition of the noneconomic activities now covered by the injunction. As explained in *Morrison*, at 618, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." What is true for rape and gun possession is equally true for the noneconomic and nonviolent possession, use, cultivation, and acquisition of cannabis for medical purposes. Like gun possession and rape, this is a matter most appropriately regulated by local authorities with intimate knowledge of local conditions and attitudes. *GMC v. Tracy*, 519 U.S. 278, 306 (1997) ("[T]he Commerce Clause, . . . was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country.") Such noneconomic conduct, therefore, lies squarely within the police power of the States and outside the power of Congress to regulate "commerce."

Moreover, the "aggregation principle" of *Wickard* discussed above is completely inapplicable to the mere possession, use, acquisition, and cultivation of cannabis for medical purposes. As was

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[15] Thus, these activities are not "commerce" whether one adopts the original meaning of the term as "selling, buying, and bartering, as well as transporting for these purposes" *Lopez,* 514 U.S. at 585 (Thomas, J. concurring) or extends the term to include all "economic" activities. Under either definition, the private possession, use, and cultivation of cannabis — or distributing cannabis to another *without charge* — for medical purposes is not an economic activity.

explained in *Morrison*, "in every case where we have sustained federal regulation under *Wickard's* aggregation principle, the regulated activity was of an apparent commercial character." *Morrison,* 529 U.S. at 611 n.4. Because these acts are not "economic" or "commercial," they are outside the power of Congress under both the Commerce Clause and the expansive reading of the Necessary and Proper Clause adopted in *Wickard.*[16]

The government does not dispute that Defendants often provided medical cannabis to qualified members without charge.[17] To the extent the injunction prohibits these noneconomic activities, it is unconstitutional and must be modified accordingly.

B. The Injunction Unconstitutionally Infringes Upon the Police Power of the States and Upon Fundamental Rights

Assuming *arguendo* that the injunction in this case is "necessary" to effectuate Congress's power over interstate commerce, it must also be "proper" insofar as it does not intrude upon either the reserved powers of the States or the fundamental liberties of the People. In *Printz v. United States,* 521 U.S. 898 (1997), the Supreme Court noted that one aspect of the "propriety" of a law is whether it intrudes into the sovereignty of a State.

> When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty . . . it is not a 'Law . . . *proper for* carrying into Execution the Commerce Clause, and is thus, in the words of The Federalist, merely [an] act of usurpation' which 'deserves to be treated as such.' The Federalist No. 33, at 204 (A. Hamilton).

Id. at 923-24 (citing also Lawson & Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297-326, 330-33 (1993)).

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[16] In *Tisor*, 96 F.3d at 374, the court, in *dicta*, interpreted *Lopez* as allowing the aggregation principle of *Wickard* to apply to "wholly intrastate activity" which "has nothing to do with 'commerce,'" a proposition later explicitly rejected by the Supreme Court in *Morrison*.

[17] Moreover, the Cooperative is legally organized as a California Consumer Cooperative Corporation (Oakland Cannabis Buyers' Cooperative Internet site, Exh. Z) pursuant to the California Consumer Cooperative Corporation Law. Cal. Corp. Code §§ 12200-12704. No person receives any dividends, rebates, or distributions from the Cooperative. The Cooperative members are the only owners of the Corporation. In law, and in fact, the Cooperative *is* its members. As such, *all* of its activities could be noneconomic.

As Lawson & Granger have shown, the historical meaning of "proper" had other dimensions as well:

> In view of the limited character of the national government under the Constitution, Congress's choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the "proper" allocation of authority within the federal government; second, such a law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the people's retained rights. In other words, . . . *executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.*

Id. at 297 (emphasis added). Thus, even if the unmodified injunction is found to be "necessary" to execute the power of Congress to regulate commerce among the States, the Court must still examine the injunction to determine whether it "improperly" (a) encroaches upon the sovereign power of the State of California or (b) infringes upon fundamental individual rights.

1. The Injunction Unconstitutionally Interferes With the Exercise of State Sovereignty as Confirmed in the Tenth Amendment

As the Supreme Court observed in *New York v. United States*, 505 U.S. at 157 "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." While the Constitution delegates to Congress the power over interstate commerce and other national concerns, the States are primarily responsible for the health and safety of their citizens, a power known as the police power. Traditionally, no power is more central to the sovereignty of the States; and the Court has always acknowledged that Congress lacks such a power. *See Lopez*, 514 U.S. at 566.

The power of Congress over interstate commerce is plenary. *See Gibbons v. Ogden,* 22 U.S. (9 Wheat) at 197. As noted by St. George Tucker, learned jurist and author of the earliest treatise on the Constitution: "The congress of the United States possesses no power to regulate, or interfere with the domestic concerns, or police of any state." Tucker, 1 Appendix to *Blackstone's Commentaries* 315-6 (1803). These propositions are not inconsistent. As stated in *Printz*, the power over interstate commerce, while plenary, cannot be exercised in a manner that improperly "violates the principle of

state sovereignty" (521 U.S. at 924) by intruding into the traditional sovereign powers of States. Moreover, Congress cannot properly claim an *incidental* power to reach wholly *intrastate* activity under the Necessary and Proper Clause when doing so would interfere with the exercise of State sovereign powers.

The United States Supreme Court has long recognized the authority of state and local governments to enact measures reasonably necessary to protect public health. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court rejected a constitutional challenge to a Massachusetts law requiring compulsory vaccinations. *See id.* at 48-49. The Supreme Court confirmed that States may enact wholly intrastate measures to protect public health.

> The authority of the State to enact this statute is . . . commonly called the police power — a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this Court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.

Id. at 24-25.

Similarly, the Court has upheld State regulations of professions that "closely concern" public health. *See, e.g., Watson v. Maryland*, 218 U.S. 173, 176 (1910). In *Watson*, the Supreme Court noted:

> It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine.

See id. at 176. *See also Williams v. Arkansas*, 217 U.S. 79 (1910) (regulation of businesses or professions, essential to the public health or safety, falls within the police power of the State so long as such regulations are reasonable and necessary).[18]

[18] After *Watson*, the Supreme Court upheld other regulations of professions related to the public health as a legitimate exercise of the State's police power to protect public health. *See, e.g.,*
(Footnote continues on following page.)

The State's police power over health and safety is not limited to telling citizens what activities they may *not* engage in; it includes specifying activities in which they *may* (or must) engage. Under the Supremacy Clause, States cannot exercise their police power to interfere with *interstate* commerce. Similarly, under the Necessary and Proper Clause, Congress cannot exercise its power over interstate commerce to interfere with a state's police power by prohibiting *wholly intrastate* conduct that the state mandates in the interest of health and safety.

Here the State of California and its voters, through the initiative process, have determined that the health and safety of its citizens are best served by allowing seriously ill persons access to cannabis for medical purposes. The City of Oakland has declared a public health emergency, finding that lack of access to medical cannabis impairs public health and safety. (Resolution No. 74618 C.M.S. of the City of Oakland, pp. 2-3, Exh. M). Under the circumstances of this case, the Court should respect the choice made both by a sovereign State and by the sovereign people of a State. As observed in the concurring opinion in this case:

> That respect [for the sovereign States that comprise our Federal Union] imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to "serve as a laboratory" in the trial of "novel social and economic experiments without risk to the rest of the country."

OCBC, 121 S.Ct. at 1723-24.

The power claimed by the government to interfere with State police power would extend to traditional State functions such as licensing of doctors, attorneys, and other professionals. All these activities are "economic." The only doctrine preventing federal usurpation of these traditionally State-regulated activities is that such federal laws would violate the principles of federalism affirmed in *Printz*.

Ramifications of the principle at stake in these proceedings extend beyond the narrow issue of medical cannabis. Unless this Court enforces the limits that the Constitution clearly places on the

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Barsky v. Board of Regents, 347 U.S. 442 (1954) (affirming suspension of a physician based on New York law prohibiting the practice of medicine by those convicted of a crime); *Douglas v. Noble*, 261 U.S. 165 (1923) (affirming injunction preventing unlicensed dentists from practicing dentistry).

federal government's power to interfere with purely local matters, State governments and municipalities could lose their ability to create vital public health and other programs designed to meet the unique needs of their citizenry. Local law enforcement agencies could be unable to develop enforcement measures that reflect their informed assessment of the priorities within their communities. Instead, under the power claimed by the government in seeking this injunction, the FBI, DEA, and other federal law enforcement agencies could become a national police force, depriving local authorities of the autonomy traditionally exercised by them. The federal government would override the power of voters to enact measures by initiative that do not interfere with constitutionally-protected rights and that are designed to further the public good. None of these results are contemplated by the Constitution.

2. The Injunction Violates Fundamental Constitutional Rights Protected by the Fifth and Ninth Amendments

Even if this Court concludes that the injunction neither exceeds the powers of Congress nor improperly interferes with State sovereignty, this Court must still consider whether the injunction improperly infringes upon constitutionally protected liberties. Although the protection of unenumerated liberties traditionally has been afforded against the federal government under the Due Process Clause of the Fifth Amendment, it would also be both textually and historically warranted under the Necessary and Proper Clause (for reasons already discussed) and under the Ninth Amendment's express injunction that: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. Amend. IX. As Madison explained in his speech to the House discussing the Bill of Rights, the Ninth Amendment was intended to negate any inference that "those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." 1 Annals of Cong. 456 (1789). Cf. *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 848 (1992) (citing the Ninth Amendment in support of the proposition that the "substantive sphere of liberty" protected by Due Process extends beyond "the Bill of Rights [or] the specific practices of States at the time of the adoption of the Fourteenth Amendment").

The Ninth and Tenth Amendments perform distinct functions. The Tenth Amendment reads, "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." U.S. Const. Amend. X. Madison explained that, while the Tenth Amendment "exclude[s] every source of power not within the Constitution itself," the Ninth Amendment "guard[s] against a latitude of interpretation" of those enumerated powers. 2 Annals of Cong. 1951 (1791) (referring to the 11th and 12th articles proposed to the states for ratification).[19] Thus, whereas the Tenth Amendment limits Congress to its delegated powers,[20] the Ninth Amendment prohibits an unduly broad interpretation of these powers.

Infringements upon fundamental liberties call for heightened scrutiny of the means by which Congress exercises its enumerated powers. The Supreme Court recognized this in *United States v. Carolene Products,* 304 U.S. 144 (1938), which famously states that "[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *Id.* at 153, n.4. As the Supreme Court has long held, unenumerated liberties can be as fundamental as enumerated liberties. *See, e.g., Meyer v. Nebraska,* 262 U.S. 390 (1923) (right of parents to educate their children in the German language); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to send their children to private Catholic school); *United States v. Troxel*, 530 U.S. 57 (2000) (right of parents to make decisions concerning care).

To receive constitutional protection, an unenumerated liberty must be "'deeply rooted in this Nation's history and tradition,' [*Moore v. East Cleveland,* 431 U.S. 494, 503 (1977)] . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed,' [*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)]." *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997). In Due Process cases, the Supreme Court has emphasized that a

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[19] Any claim that the Ninth Amendment was purely a "federalism" provision that merely underscored the scheme of limited and enumerated federal powers is undermined by its incorporation into a number of *state* constitutions, as early as 1794 in Georgia. Today many states have Ninth Amendment-like provisions. *See* Appendix B.

[20] *See also* Art. I, sec. 1 ("All legislative Powers *herein granted* shall be vested in" Congress [emphasis added]).

claimed right can have roots in "our Nation's history, legal traditions, and practices." *Id.* at 710. An analysis of the history and tradition of a right "tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Id.* at 722. As outlined below, this Nation's history, legal tradition, and practice demonstrate that the rights infringed by the unmodified injunction are "fundamental." Moreover, the People of nine States — including *every* state in which the issue has been put to a popular vote — have expressed approval of the liberty asserted here, thereby adding their weight to a judicial conclusion that the liberty at stake in this case is fundamental.

a. The Rights to Bodily Integrity, to Ameliorate Pain, and to Prolong Life Are Constitutionally Protected

The rights to bodily integrity, to ameliorate pain, and to prolong life are so closely related that it is difficult to say if they are distinct rights or merely specific aspects of the famous trinity of "life, liberty, and the pursuit of happiness" in the Declaration of Independence. The substance of the Constitution's protection, however, should not turn on the particular linguistic formulation employed to express this most fundamental right.

The unmodified injunction improperly infringes the Cooperative's patient-members' fundamental right to use effective medical treatment available to them pursuant to their physicians' recommendations.[21] This right has deep roots in our Nation's history, legal tradition, and practice of permitting decisions about one's body to be made free from governmental intervention. The right articulated by the patient-members is concomitant with the established rights to bodily integrity, to ameliorate pain and suffering, and to prolong life.

The right to be free of government intrusion with respect to one's body has roots in natural rights' principles and the philosophy of individual autonomy. *See* Mill, *On Liberty,* pp. 60-69

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[21] The Cooperative has standing to assert the constitutional rights of patient-members. *NAACP v. Alabama*, 357 U.S. 449, 459 (1958). The patient-members have standing to assert these rights on their own behalf, the interests protected are germane to the Cooperative's purpose, and the direct participation of patient-members is not required to decide these issues at this time. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Moreover, the Cooperative's officers and agents include patients whose substantive due process rights are themselves affected by the injunction. (*See, e.g.*, Amended Declaration of Michael M. Alcalay, M.D., M.P.H., pp. 1, 6, Exh. 8).

(Penguin Books 1985) (1859) (concluding that "[o]ver himself, over his own body and mind, the individual is sovereign"). American legal precedent in the past century has consistently upheld legal protection for this individual right.[22] In fact, the origin of this precedent in the Anglo-American legal tradition pre-dates decisions in this country by at least two hundred years.[23]

The right to be free of pain likewise finds its source in both legal precedent and important historical traditions of this Nation. Four concurring opinions in *Glucksberg* strongly suggest that the Due Process Clause protects an individual's right to obtain medical treatment to alleviate unnecessary pain. Justice O'Connor's opinion makes clear that suffering patients should have access to any palliative medication that would alleviate pain even where such medication might hasten death. "[A] patient who is suffering from a terminal illness and who is experiencing great pain has *no legal barriers* to obtaining medication, from qualified physicians." *Glucksberg*, 521 U.S. at 736-37 (emphasis added).

Similarly, Justice Breyer's concurrence suggests that a "right to die with dignity" includes a right to "the avoidance of unnecessary and severe physical suffering." *Id.* at 790 (Breyer, J., concurring). Referring to the protected "substantive sphere of liberty," Justice Stevens wrote:

> Whatever the outer limits of the concept may be, it definitely includes protection for matters "central to personal dignity and autonomy." It includes, "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as

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[22] *See, e.g., Cruzan v. Mo. Dep't of Health,* 497 U.S. 261, 281 (1990) (Due Process Clause protects interest in life as well as interest in refusing life sustaining medical treatment); *Winston v. Lee*, 470 U.S. 753, 766 (1985) (involuntary surgery to remove bullets from defendant's shoulder unreasonable invasion of his body), *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) ("The liberty preserved from deprivation without due process include[s] . . . a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security. . . . [This] encompass[es] freedom from bodily restraint and punishment"); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (stating in the context of prisoners' rights that "denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. . . . The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation."); *Rochin v. California,* 342 U.S. 165, 172 (1952) (violation of bodily integrity when police took defendant to hospital and administered an emetic to recover pill swallowed upon arrest unconstitutional).

[23] Blackstone recognized a right to personal security which "consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." 1 Wm. Blackstone, *Commentaries* *128 (1765). Blackstone extended protection to the "preservation of a man's health from such practices as may prejudice or annoy it." *Id.* at *133.

> implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition.

Id., at 744 (Stevens, J., concurring) (citation omitted).

At the heart of this traditionally recognized liberty, Justice Stevens noted, was that of "[a]voiding intolerable pain and the indignity of living one's final days incapacitated and in agony." *Id.* at 745. Justice Souter likewise recognized that this "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 777 (Souter, J., concurring).

The arguments of the government itself in other, related contexts are in accord. A majority of the Supreme Court in *Casey*, 505 U.S. at 852; *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992); and *Ingraham,* 430 U.S. at 673-74, assumed the existence of a fundamental right of a seriously ill patient to be free from unnecessary pain and suffering. In the United States' *amicus* brief for the petitioners in *Glucksberg*, the Solicitor General cited these decisions to assert that the infliction of severe pain or suffering on an individual implicates a fundamental liberty interest:

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

Brief for the United States as *Amicus Curiae* Supporting Petitioners, available in 1996 WL 663185, at *8, 12-13 (1996), in *Glucksberg.*[24]

Outside of the legal context, the right to ameliorate pain is embedded in the professional and ethical standards of physicians and other caregivers. Allowing a patient to experience unnecessary pain and suffering of any form is considered substandard medical practice, regardless of the nature of

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[24] In its *amicus* brief, the United States also argued that a state cannot prevent a person in extreme pain from obtaining medication demonstrated to be safe and effective in relieving that pain (*see id.* 1996 WL 663185 at *13) and listed loss of appetite and nausea as conditions of a terminally ill person that would trigger this liberty interest. *See id.* at *15-16. Solicitor General Dellinger reiterated the existence of this fundamental liberty interest in oral argument. Transcript of Oral Argument, *Washington v. Glucksberg*, 521 U.S. 702 (No. 96-110), *available in* 1997 WL 1367 1, at *18, 20-21 (Jan. 8, 1997).

the patient's condition or the goals of medical intervention.[25] Likewise, physicians have a moral and ethical duty to provide relief from pain and suffering.[26] This standard has in fact been recognized since the inception of medical ethics in western culture.[27]

The right to ameliorate severe pain and suffering and to prolong life is thus a fundamental liberty that is central to the Nation's history, legal traditions, and practices.[28] Moreover, the uncontradicted record in this case establishes the ancient and long-accepted use of cannabis as a medicine. (Declaration of Lester Grinspoon, M.D., in Support of Defendants' Response to Show Cause Order, pp. 3-6, Exh. H). The common law contained no proscription against medical cannabis, and when the original 13 States ratified the Bill of Rights, cannabis was in use as a medicine. (Declaration of Lester Grinspoon, M.D., in Support of Defendants' Response to Show Cause Order, pp. 3-4, Exh. H). Until 1941, cannabis was indicated for numerous medical conditions in the pharmacopoeia of the United States. While the liberty to use cannabis for medical purposes has a long tradition in America, the same cannot be said for the claim of federal power to control it. (Declaration of Lester Grinspoon, M.D., in Support of Defendants' Response to Show Cause Order, pp. 4-5, Exh. H). Indeed, the first federal restriction on its sale was the Marihuana Tax Act of 1937.

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[25] *See, e.g.,* Ben A. Rich, *A Prescription for the Pain: The Emerging Standard of Care for Pain Management*, 26 Wm. Mitchell L. Rev. 1, 4 (2000).

[26] *See, e.g.*, Post et al., *Pain: Ethics, Culture, and Informed Consent to Relief*, 24 J. Law, Med. & Ethics 348 (1996) ("[O]ne caregiver mandate remains as constant and compelling as it was for the earliest shaman - - the relief of pain. Even when cure is impossible, the physician's duty of care includes palliation."); Wanzer, et al., *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look*, 320 New England J. Med. 844 (1989) (concluding that "[t]o allow a patient to experience unbearable pain or suffering is unethical medical practice.")

[27] *See, e.g.,* Amundsen, *Medicine, Society, and Faith in the Ancient and Medieval Worlds,* 33 (Johns Hopkins Univ. Press 1996) ("The treatise entitled *The Art* in the Hippocratic Corpus defines medicine as having three roles: doing away with the sufferings of the sick, lessening the violence of their diseases, and refusing to treat those who are overmastered by their diseases, realizing that in such cases medicine is powerless"); Cassell, *The Nature of Suffering and the Goals of Medicine,* 306 New England J. Med. 639 (1982) ("[T]he obligation of physicians to relieve human suffering stretches back into antiquity").

[28] *Cf. Vacco v. Quill*, 521 U.S. 793, 808 n.11 (1997) ("[J]ust as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen but unintended 'double effect' of hastening the patient's death").

(Declaration of Lester Grinspoon, M.D., in Support of Defendants' Response to Show Cause Order, p. 5, Exh. H).

The uncontradicted evidence in this case also establishes that for many patients, access to medical cannabis is the reason they are alive today. (Declaration of Robert T. Bonardi, p. 2, Exh. D; Declaration of Michael M. Alcalay, M.D., M.P.H. in Support of Motion to Dissolve or Modify Preliminary Injunction Order, pp. 1, 3, Exh. A; Declaration of Terry Stogdell, p. 2, Exh. J; Declaration of Willie C. Beal, Exh. C). For these reasons, in the absence of a compelling interest that would be furthered by such a proscription, the government cannot, consistent with the Due Process Clause, abridge the rights of seriously ill patients by preventing or deterring their obtaining medicine in kind and quantity sufficient to relieve their pain or prolong their lives. In the face of an interest as powerful as the avoidance of physical suffering, the restoration of health, and the preservation of life,

> a state may not rest on threshold rationality or presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted.

Glucksberg, 521 U.S. at 766. If any right is implicit in the concept of "ordered liberty," *Poe v. Ullman*, 367 U.S. 497, 549 (1961) (Harlan J., dissenting), it is the right to seek medical assistance and to protect one's health and life by reasonable means that do not harm others.

b. The Right to Consult With and Act Upon a Doctor's Recommendation is a Protected Right Rooted in the Traditionally Sanctified Physician-Patient Relationship

The right to consult with one's doctor about one's medical condition is also a fundamental right deeply rooted in our history, legal traditions, and practices. The right asserted by the patient-members — to prevent governmental interference with their ability to act on their doctors' treatment recommendations — is based in significant part on imperatives established by the physician-patient relationship. For this reason as well, the patient-members' rights must be accorded constitutional status.

The Supreme Court has acknowledged the sanctity of the physician-patient relationship in numerous substantive due process cases, beginning with *Griswold v. Connecticut,* 381 U.S. 479 (1965). In *Griswold*, doctors from Planned Parenthood violated a Connecticut law making it a crime

to distribute contraceptives. *Id.* at 480. In finding that the criminalization of contraception violated a right guaranteed by the Due Process Clause, the Supreme Court relied on the fact that "[t]his law operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." *Id.* at 482.

The importance of the physician-patient relationship also has been stressed in reproductive rights cases. For example, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court emphasized that myriad and fundamental privacy and personal liberty interests, such as medical, physical, social, and spiritual choice, were impugned by the criminalization of abortion. *Id.* at 153. The *Roe* decision also stressed that such a violation of privacy interests, although personal to the woman, detrimentally affected the physician-patient relationship. *Id.* at 153, 156.

Likewise, in his concurrence in *Glucksberg*, Justice Souter relied upon the view that medical assistance falls within the scope of a cognizable liberty interest: "Without physician assistance in abortion, the woman's right would have too often amounted to nothing more than a right to self-mutilation." 521 U.S. at 778.

State legislation granting a statutory physician-patient privilege further demonstrates the importance of the physician-patient relationship. Currently, 41 states recognize some form of a physician-patient testimonial privilege. [*See* Appendix A.] Many of the statutory privileges are a very old aspect of our Nation's history and legal traditions, with New York passing a physician-patient testimonial privilege in 1828. *See* 8 Wigmore on Evidence, § 2380 (rev. ed. 1961). Though physician-patient communication is "subject to reasonable licensing and regulation by the State" (*Casey*, 505 U.S. at 884), when such regulation defeats the purpose of the physician-patient relationship by preventing the physician from fulfilling his or her duties, such regulation is impermissible. *See, e.g., Conant v. McCaffrey*, 172 F.R.D. 681, 694-95 (N.D. Cal. 1997) (holding that government's statutory authority to regulate distribution and possession of drugs did not allow government to quash protected speech between physician and patient).

In this case, the interests arising within the physician-patient relationship are of the highest order. Moreover, unless the Due Process Clause guarantees the unfettered communication and the freedom to act on one's physician's advice concerning the treatment of serious illness, the related

fundamental rights of bodily integrity, amelioration of pain and suffering, and prolonging life will be rendered nugatory.

c. In Assessing Whether a Liberty is Fundamental, Courts Should Defer to the Judgment of the People

The Supreme Court has strongly affirmed the judiciary's power to identify and protect "fundamental" unenumerated liberties in the same manner as those that are enumerated. *See, e.g., Casey,* 505 U.S. at 848 (1992) (opinion of the Court relying in part on the Ninth Amendment). Others have expressed doubts that judges should be entrusted with the task of identifying whether a particular liberty interest is or is not fundamental. *See, e.g., Troxel,* 530 U.S. at 91 (Scalia, J., dissenting) ("[T]he Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judge's list against laws duly enacted by the people").

This case, however, is both unusual and distinguishable from other unenumerated rights cases. Here it is *the People themselves,* and not judges, who have recognized that the liberty interest in using cannabis to promote bodily integrity, to alleviate pain and suffering, and to prolong life, and in preserving the sanctity of the physician-patient relationship is fundamental. In eight states — Alaska (Measure 8), Arizona (Proposition 200), California (Proposition 215), Colorado (Amendment 19), Maine (Question 2), Nevada (Question 9), Oregon (Measure 67), and Washington (Initiative 692) — voters have protected this liberty directly by popular referenda or ballot initiative, while in Hawaii they have done it indirectly through their elected representatives. Proposition 215 states, for example,

> 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 recom-

> mendation of a physician are not subject to criminal prosecution or sanction.

Cal. Health & Safety Code § 11362.5(b)(1) (emphasis added).

In his dissent in *Troxel,* Justice Scalia observed that it is "entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has no power to interfere with parents' authority over the rearing of their children. . . ." 530 U.S. at 92. For the same reason, it is entirely compatible with the commitment to representative democracy for the People of a State, acting through the initiative process, to declare that a particular liberty — especially one that could not otherwise claim a long tradition of *judicial* protection — is fundamental and for this Court to acknowledge and defer to their judgment. Indeed, four members of the Supreme Court concluded that the people of a State, amending their state constitution by popular vote, could impose additional qualifications on their Representatives to Congress. *See United States Term Limits v. Thornton,* 514 U.S. 779, 845 (1995) (Thomas, J., dissenting).

Defendants agree that: "The States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere." *United States Term Limits,* 514 U.S. at 841 (Kennedy, J., concurring). Rather, what the people in these States have done is to recognize a liberty to be worthy of legal protection. This more than justifies a federal court to subject a federal exercise of an implied power to meaningful scrutiny to determine whether it is indeed "within its proper sphere" to restrict such a liberty.

Moreover, in this case, after the liberty was expressly protected by the People of the State of California, the government of the City of Oakland, a political subdivision of the State, then implemented a formal "Medical Cannabis Distribution Program" to distribute cannabis for this limited medical purpose and designated Defendants its "duly authorized officer." Defendants have ever since been operating under the auspices of this governmentally sanctioned plan.[29]

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[29] This represents the intersection of the Ninth and Tenth Amendments. Pursuant to the Tenth Amendment, the People have reserved to themselves the power of initiative and then exercised that power to protect a "retained" liberty of the sort acknowledged by the Ninth Amendment. They then exercised their reserved police powers to designate Defendants the agents of their state government.

(Footnote continues on following page.)

Here the federal government has asked this Court to reject the People's and their State's declaration that a particular liberty merits legal protection. Surely the normal skepticism of *judicially*-recognized unenumerated fundamental rights should not extend also to a liberty that has been expressly protected by the People and their State exercising their reserved powers. Add to this the fact that the People of not only one State, but at least nine States (seven of which are in the Ninth Circuit), have reached the same conclusion and a court should not lightly set aside this judgment.

In strongly affirming that the People may exercise their reserved powers to declare a liberty interest to be fundamental and therefore protected under the Fifth and Ninth Amendments, Defendants do not suggest that the Court has no power to protect the rights of individuals and minorities from popular referenda and initiatives. On the contrary, this slippery slope has already been avoided by the limiting principle supplied in *Romer v. Evans,* 517 U.S. 620 (1996), in which the Court invalidated an initiative amending the Colorado constitution, on the ground that it violated the Equal Protection Clause. The limiting principle is this: People of the state can no more violate the United States Constitution than can their legislature. But where the People, or their representatives in state legislatures, act to protect a particular liberty, this provides invaluable guidance to judges who must distinguish fundamental rights from mere liberty interests. Such popular action indicates that a particular liberty is fundamental just as surely as a judicial inquiry into its historical roots.

d. The Government Has Not Met Its Burden to Justify Restricting a Fundamental Liberty

Of course, finding a liberty interest to be "fundamental" does not end the inquiry. It merely shifts the presumption to one favoring the individual that the government may then overcome with an adequate showing. *See United States v. Carolene Products,* 304 U.S. at 152, n.4. Defendants agree with Justice Thomas's opinion that interference with unenumerated fundamental rights should be subject to strict scrutiny. *Troxel* 530 U.S. at 80 (Thomas, J., concurring) ("I would apply strict scrutiny to infringements of fundamental rights"). But the application of the CSA to prohibit the

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Footnote continued from previous page.
It is with both the exercise of the "power reserved" by the People and the State and with the "rights retained" by the people that the federal government now seeks to interfere by means of an unwarranted extension of its limited enumerated powers.

medical use of cannabis also would fail intermediate scrutiny, an "undue burden" standard, and even the sort of rational basis test employed in the context of Equal Protection by the Court in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), or in *Romer*.

The government has offered no specific empirical findings whatsoever concerning the medical use of cannabis nor shown how complete prohibition (rather than regulation) is necessary to effectuate whatever governmental interest may allegedly exist. Both morphine — a Schedule I substance[30] — and opium — a Schedule II substance[31] — are also listed by the government as Schedule III controlled substances that doctors can prescribe to their patients in therapeutic quantities. *See* 21 U.S.C. § 812 (c), Schedule III(d)(7) & (d)(8). Indeed, the fact that many states now recognize the right of their citizens to use cannabis for medical purposes, and the fact that thousands of American physicians now recommend or approve cannabis therapy for their patients, support the conclusion that cannabis has been improperly placed in Schedule I because it clearly has "currently accepted medical use in treatment in the United States." *See* 21 U.S.C. § 812(b)(1)(B). In the words of Justice White, "the record does not reveal any rational basis," *City of Cleburne*, 473 U.S. at 448, why cannabis is not available in the same manner and for the same purpose as other therapeutic substances; and the government has offered no justification for this distinction.

If the government were truly interested in *regulating* the dispensation of cannabis to ill patients by licensed physicians, it could reschedule cannabis in limited quantities under Schedule III as it has done with morphine, opium, amphetamine, and methamphetamine.[32] What it cannot do is simply prohibit all use of medical cannabis at its own discretion without a showing that such a prohibition is truly necessary to achieve some compelling or important governmental interest.

3. The *Carnohan* and *Rutherford* Cases Do Not Apply

The government has argued that the right the patient-members assert here cannot exist because courts have held that there is no fundamental right to use an unapproved drug for medical

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[30] 21 U.S.C. § 812(b)(14)-(b)(16) (Schedule I).

[31] 21 U.S.C. § 812(a)(1)-(a)(4) (Schedule II).

[32] Defendants do not deny that Congress may regulate under the Commerce Clause the last step of the *interstate* sale of pharmaceuticals: the sale of drugs to patients by pharmacies.

treatment. Reply Brief for Appellant at 18-24 (9th Cir.) (No. 00-16411) (citing *Carnohan v. United States,* 616 F.2d 1120, 1122 (9th Cir. 1980), *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980), and other cases). The government's argument is incorrect.

None of the cases invoked by the government involved the fundamental right asserted by the patient-members, as described in section I.B.2, *supra*. Moreover, in all of the cases, the proponents of the asserted constitutional rights sought not simply to protect their liberties, but to compel action by the government. In contrast, the patient-members here are the *targets* of government action, who simply wish to exercise their substantive due process rights free of government interference.[33]

In *Carnohan*, for example, the plaintiff brought a declaratory action "to secure the right to obtain and use laetrile [commercially] in a nutritional program for the prevention of cancer." 616 F.2d at 1121. "An individual who wishes to introduce into interstate commerce any 'new drug' must first seek approval from the Secretary of Health and Welfare." *Id.* at 1122. The relief sought (a declaration that laetrile was not a "new drug" within the meaning of the Federal Food, Drug and Cosmetic Act) fell squarely within the rule-making authority of the Food and Drug Administration (the "FDA"). *Id.* at 1121. Specifically, the claim in *Carnohan* was that the "state and federal regulatory schemes which require [filing a new drug application] are so burdensome when applied to private individuals as to infringe upon constitutional rights." *Id.* at 1122.

The court rejected this claim, finding that the plaintiff was required to exhaust his administrative remedies to seek reclassification of the drug laetrile by filing a new drug application with the FDA. *Id.* The court, however, expressly declined to consider whether the plaintiff had "a constitutional right to treat himself with home remedies of his own confection." *Id.*

Unlike *Carnohan,* the patient-members here do not seek reclassification of any drug and do not seek to compel the government affirmatively to give them access to any medication. The patient-members simply assert the fundamental right to be free of governmental interference with their obtaining and using intrastate, upon their physicians' recommendations in accordance with

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[33] Moreover, the plaintiffs in both *Carnohan* and *Rutherford* were seeking to shield interstate commerce from the reach of Congress, not merely to obtain medication for their own use, through their own cooperative, operating exclusively intrastate.

California's Compassionate Use Act, the medication that has been demonstrated to be effective in alleviating their pain and suffering. These key facts are absent in *Carnohan*.

The government also has relied on *Rutherford*, another laetrile case. *Rutherford* explicitly affirmed that "*The decision by the patient whether to have a treatment or not is a protected right*, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health." 616 F. 2d at 457 (emphasis added). There is no indication that the plaintiff in *Rutherford* attempted to establish that the drug at issue represented the only effective treatment for him. Instead, he simply sought to have a particular type of treatment option declared to be a fundamental right.

This is a crucial distinction. Here, uncontroverted evidence from patient-members and their physicians establishes that cannabis is the only effective treatment for the patient-members. (Declaration of Robert T. Bonardi, p. 2, Exh. D; Declaration of John P. Morgan, M.D., pp. 1-2, , Exh. I; Declaration of Harold Sweet, p. 1, Exh. K; Declaration of Marcus A. Conant, M.D., p. 5, Exh. P; Amended Declaration of Michael M. Alcalay, M.D., M.P.H., pp. 1-2, Exh. B; Declaration of Creighton W. Frost, Jr., p. 2, Exh. F; Declaration of Terry Stogdell, p. 2, Exh. J). Therefore, to permit the government to interfere with the patient-members' use of cannabis is to deny them the right explicitly recognized by *Rutherford* as "protected": the right to decide whether or not to have medical treatment. Because cannabis is the *only* effective treatment for the patient-members, to deny them the right to use cannabis is to deny them any medical treatment at all. Cannabis is not simply the "medication of choice," it is the only medication for the patient-members.

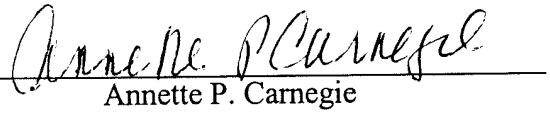
Finally, as discussed in Sections II.A-II.B.2, *supra*, this case, unlike the laetrile cases, presents a federal threat to the sovereign powers of the States. Unlike *Carnohan* and *Rutherford*, it is not merely an individual or small group who have asserted the value of cannabis to alleviate their suffering or prolong their lives. Here, the People of the State of California and their elected governments at the state and local level have made this judgment in exercising their reserved police power. To this judgment, federal courts should defer.

CONCLUSION

This is not a drug case. The government is making arguments and asserting powers that cannot be limited to medical cannabis and that, if accepted, would undermine the basic constitutional principles of our Republic: limited and enumerated federal powers, the sovereignty of States, and fundamental individual rights. At stake in this case is whether this Court will permit the federal government to exercise power in derogation of the limitations on power imposed by the Constitution, unrestrained by any recognition of constitutionally protected autonomy of State governments, and without regard to the rights and liberties abiding with the people. Moreover, here the federal government has sought to evade the requirements of criminal procedure by seeking an equitable injunction. This Court should exercise its discretion to dismiss the action or dissolve the injunction, or hold an evidentiary hearing to amend the unmodified injunction to avoid clear constitutional infirmities.

Dated: January 7, 2002

MORRISON & FOERSTER LLP

By: 
Annette P. Carnegie

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES

APPENDIX

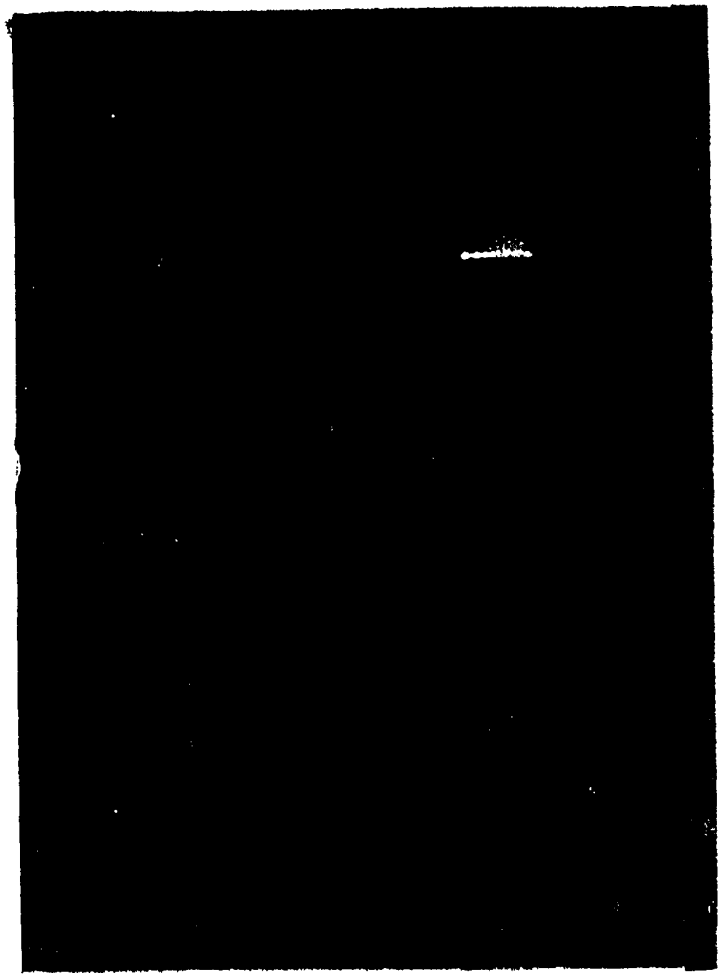
A

APPENDIX A

United States Jurisdictions With a Statutory Physician-Patient Testimonial Privilege

State	Code #
Alaska	Alaska R. Evid. 504
Arizona	Ariz. Rev. Stat. § 12-2235
Arkansas	Ark. R. Evid. 503
California	Cal. Evid. Code §§ 990-1007
Colorado	Col. Rev. Stat. § 13-90-107
Delaware	Del. R. Evid. 503
District of Columbia	D.C. Code Ann. § 14 –307
Hawaii	Haw. Rev. Stat. § 504
Idaho	Idaho Code § 9-203
Illinois	735 Ill. Comp. Stat. 5/8-802
Indiana	Ind. Code § 34-46-3-1
Iowa	Iowa Code § 622.10
Kansas	Kan. Stat. Ann. § 60-427
Louisiana	La. Code. Evid. Art. 510
Maine	Me. R. Rev. 503
Michigan	Mich. Stat. Ann. § 600.2157
Minnesota	Minn. Stat. § 595.02
Mississippi	Miss. Code Ann. § 13-1-21
Missouri	Mo. Rev. Stat. § 491.060
Montana	Mont. Code. Ann. § 26-1-805
Nebraska	Neb. Rev. Stat. § 27-504

State	Code #
Nevada	Nev. Rev. Stat. Ann. § 49.225
New Hampshire	N.H. Rev. Stat. Ann. § 329:26
New Jersey	N.J. Stat. Ann. § 2A:84A-22.2
New Mexico	N.M. R. Evid. 11-504
New York	N.Y. Civ. Prac. L. & R. § 4504
North Carolina	N.C. Gen. Stat. § 8-53
North Dakota	N.D. R. Evid. 503
Ohio	Ohio Rev. Code. § 2317.02
Oklahoma	Okla Stat. § 2503
Oregon	Or. Rev. Stat. § 40.235
Pennsylvania	42 Pa. Code § 5929
Rhode Island	R.I. Gen. Laws §5-37.3-6.1
South Dakota	S.D. Codified Laws § 19-13-7
Texas	Tex. R. Evid. 509
Utah	Utah R. Evid. 506
Vermont	Vt. Stat. Ann. §1612
Virginia	Va. Code Ann. § 8.01-399
Washington	Wash. Rev. Code § 5.60.060
Wisconsin	Wis. Stat. § 905.04
Wyoming	Wyo. Stat. Ann. § 1-12-101



B

APPENDIX B

ARIZ. CONST. art. II, § 33
COLO. CONST. art. II, § 28
FLA. CONST. art. I, § 1
ILL. CONST. art. I, § 24
IOWA CONST. art. I, § 25
KAN. CONST. bill of rights, § 20
LA. CONST. art. I, § 24
ME. CONST. art. I, § 24
MD. CONST. declaration of rights, art. 45
MICH. CONST. art. I, § 23; MISS. CONST. art. 3, § 32
NEB. CONST. art. I, § 26
NEV. CONST. art. I, § 20
N.J. CONST. art. I, para. 21
N.M. CONST. art. I, § 23
N.C. CONST. art. I, § 36
OHIO CONST. art. I, § 20
OKLA. CONST. art. II, § 33
OR. CONST. art. I, § 33
R.I. CONST. art. I, § 24
UTAH CONST. art. I, § 25
VA. CONST. art. I, § 17
WYO. CONST. art. I, § 36.