

MAR 05 2003

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANGEL McCLARY RAICH, DIANE
MONSON, JOHN DOE No. ONE, JOHN DOE
No. 2,

No. C 02-4872 MJJ

Plaintiffs,

ORDER

v.

JOHN ASHCROFT, as UNITED STATES
ATTORNEY GENERAL, et. al.,

Defendants.

INTRODUCTION

Before the Court is plaintiffs Angel McClary Raich, Diane Monson, John Doe Number One, and John Doe Number Two's ("Raich," "Monson," or "Plaintiffs") motion for a preliminary injunction against Attorney General John Ashcroft ("Defendant" or "the government").¹ Plaintiffs seek to prevent the government from enforcing against them the provisions of the Controlled Substances Act prohibiting the manufacture, distribution, or possession of marijuana. Through California's Compassionate Use Act of 1996, plaintiffs are permitted to use and cultivate marijuana for their personal medical purposes upon a doctor's recommendation. This Act excepts "medical marijuana" from the usual statutory prohibition against possession of cultivation of marijuana found

¹The term "plaintiffs" shall refer to Angel McClary and Diane Monson, as their rights are at the core of the present case. The two John Does will be mentioned specifically when the analysis bears on them directly. The term "the government" denotes only the federal government. To avoid confusion, any reference to the state government of California will be made by using "California."

For the Northern District of California

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1 elsewhere in California law. Federal law has no corollary exceptions, however, for the Controlled
2 Substances Act ("CSA") does not recognize marijuana as having any legitimate medical purpose,
3 and any possession or cultivation of marijuana remains illegal under this act. Plaintiffs ask the Court
4 to enjoin defendant from applying federal law to their actions through a preliminary injunction.

5 According to plaintiffs, in resolving the constitutional issues raised by this motion, this Court
6 will delineate the limits of state and federal regulatory authority regarding controlled substances,
7 specifically marijuana, when grown locally and used for medical purposes. The government frames
8 the issue a bit more narrowly, and it argues that the Court is bound by existing Ninth Circuit
9 precedent to repel the constitutional challenges to the CSA mounted by plaintiffs. Because the Court
10 finds that the weight of precedent precludes a finding of likelihood of success on the merits,
11 plaintiffs' motion for a preliminary injunction is DENIED.

12 FACTUAL BACKGROUND

13 Plaintiffs Raich and Monson are two California citizens who currently use marijuana as a
14 medical treatment for a variety of serious physical conditions. While Monson cultivates the cannabis
15 she uses, Raich is unable to grow her own. Instead, her caregivers, the two John Doe plaintiffs,
16 cultivate several varieties and provide them to her without charge. (See Plaintiffs' Memorandum of
17 Law in Support of Motion for Preliminary Injunction ("Motion") at 5:17-22; see also Declaration of
18 Angel McClary Raich in Support of Preliminary Injunction ("Raich Decl."), ¶ 48-49.) It is
19 undisputed that both plaintiffs suffer from a number of severe medical conditions. Monson lives
20 with serious chronic back pain, coupled with constant muscle spasms that often prove debilitating.
21 (See Declaration of Diane Monson in Support of Motion for Preliminary Injunction ("Monson
22 Decl."), ¶¶ 2, 3.) Her doctor states that these symptoms are caused by a degenerative disease of the
23 spine. (Declaration of Dr. John Rose in Support of Motion for Preliminary Injunction ("Rose Decl."),
24 ¶ 3.) Raich suffers from a daunting litany of more than ten serious medical conditions, many of them
25 life-threatening. (See Raich Decl., ¶ 1.) Traditional medicine has utterly failed these women; none of
26 the treatments, prescription medications, or other interventions attempted by them and their
27 physicians has proven effective. (See Rose Decl., ¶ 5 (doctor for Diane Monson); see also
28 Declaration of Frank Henry Lucido, M.D. in Support of Preliminary Injunction ("Lucido Decl."), ¶ 7

1 (doctor for Angel McClary Raich.) The only thing that has provided any relief from symptoms
2 and/or improvement in their condition is medication with cannabis. (Rose Decl., ¶ 4; Lucido Decl., ¶
3 6.)

4 With regard to Raich's marijuana, plaintiffs claim that it is cultivated using only water and
5 nutrients originating from within California, and that it is grown exclusively with equipment,
6 supplies, and materials manufactured within the borders of the state. (Motion at 6:10-14.) No
7 similarly detailed statement of local pedigree is made for Monson's cannabis, but as she has grown it
8 herself, her cultivation of marijuana is similarly local in nature. (See *id.* at 5:21.)

9 Although both plaintiffs fear that federal agents may raid their homes and deprive them of the
10 marijuana they take on a daily basis, only Monson has actually experienced this. (See Raich Decl. ¶¶
11 56-57; see also Monson Decl. ¶ 10.) She reports that deputies from the Butte County Sheriff's
12 Department and agents from the DEA came to her home on August 15, 2002. (Monson Decl., ¶ 10.)
13 While the sheriff's deputies concluded that Monson's use of cannabis was legally permissible under
14 California's Compassionate Use Act, after a three-hour standoff, including an unsuccessful
15 intervention by the local District Attorney with the United States Attorney for the Eastern District of
16 California, the DEA agents seized and destroyed her six (6) marijuana plants. (*Id.*) To avoid a
17 similar occurrence in the future, and to ensure that they will be able to continue to use cannabis as
18 medication, plaintiffs filed suit in this Court on October 9, 2002, seeking declaratory relief and a
19 permanent injunction. The present motion for a preliminary injunction was filed on October 30,
20 2002, and a hearing on the motion was held on December 17, 2002.

21 LEGAL STANDARD

22 There are various standards the Court can apply to determine whether a preliminary
23 injunction should issue. To meet the "traditional" test, the movant must establish: (1) a strong
24 likelihood of success on the merits; (2) that the balance of irreparable harm favors its case; and (3)
25 that the public interest favors granting the injunction. *American Motorcyclist Ass'n v. Watt*, 714 F.2d
26 962, 965 (9th Cir. 1983). To prevail under the "alternate" test, the movant must demonstrate either a
27 combination of probable success on the merits and the possibility of irreparable injury, or that
28 serious questions are raised and that the balance of hardships tips sharply in its favor. *Id.*

1 *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990). The formulations under the "alternate" test
2 represent two points on a sliding scale in which the required degree of irreparable harm increases as
3 the probability of success decreases. *Diamontiney*, 918 F.2d at 795. Under either formulation,
4 however, an "irreducible minimum" is that the moving party must show a fair chance of success on
5 the merits. *Stanley v. University of Southern California*, 13 F.3d 1313, 1319 (9th Cir. 1994).

6 ANALYSIS

7 Plaintiffs' central argument for likelihood of success on the merits focuses on their
8 contention that it would be constitutionally improper to apply the CSA to individuals in their
9 situation. In addition, they also claim that they have a valid medical necessity defense to any
10 enforcement of the CSA against their use of medical marijuana. Plaintiffs' constitutional argument
11 assumes three forms: (1) when applied to purely intrastate, non-commercial use of medical
12 marijuana, the CSA represents an impermissible extension of Congress' power to regulate interstate
13 commerce; (2) enforcement of the CSA against medical use of marijuana is an infringement of rights
14 reserved to the States through the Tenth Amendment; and (3) federal criminalization of medical
15 marijuana violates fundamental rights of citizens that are protected by the Ninth Amendment.

16 1) **Federal Prohibition of Medical Marijuana Through The Controlled Substances Act As** 17 **an Impermissible Expansion of Congress' Commerce Clause Power**

18 In the wake of the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995)
19 and *United States v. Morrison*, 529 U.S. 598 (2000), plaintiffs argue that application of the
20 Controlled Substances Act to their cultivation and use of medical marijuana exceeds the legitimate
21 reach of congressional power. As these two decisions somewhat abridged Congress' exercise of its
22 Commerce Clause power, plaintiffs contend that the Commerce Clause does not apply to purely
23 intrastate, non-commercial activities, such as medication through cannabis that is permitted by state
24 law. (Motion at 6:24-7:1.) The CSA prohibits the manufacture, distribution, possession with intent
25 to deliver, and even simple possession of marijuana, and Congress is permitted to enact such a law
26 only under the mantle of its power to regulate interstate commerce. See 21 U.S.C. §§ 841(a)(1);
27 844(a); see also Motion at 7:21-22 (citing *United States v. Kim*, 94 F.3d 1247 (9th Cir. 1996)).
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1 As the Supreme Court in *Lopez* and *Morrison* instructs, Congress' Commerce Clause power
2 is not completely unfettered; it "is subject to outer limits." *Lopez*, 514 U.S. at 557. The limit
3 relevant to the present case is that the regulated activity must have a "substantial relation to interstate
4 commerce." *Id.* at 559. Further, Congress must conclude that the activity has an economic effect,
5 and this conclusion must be supported by sufficient findings, findings that are not the result of the
6 type of "attenuated analysis" found problematic in *Morrison*. (Motion at 9:12-15 (quoting *Morrison*,
7 529 U.S. at 613)².) Plaintiffs argue that the cultivation of medical marijuana, or at least the
8 cultivation and use by plaintiffs in this case, does not substantially affect interstate commerce.
9 (Motion at 10:26-28.) In addition, they assert that there are no congressional findings that local,
10 wholly intrastate cultivation and use of cannabis for medical necessity have any such effect. (*Id.* at
11 11:11-12.)

12 Plaintiffs acknowledge that Congress has made findings related to the issue of controlled
13 substances and their effect on interstate commerce, findings that are embodied in the statute itself.
14 See 21 U.S.C. § 801(1-7).³

15 (2) The illegal importation, manufacture, distribution, and possession and improper use of
16 controlled substances have a detrimental effect on the health and general welfare of the
American people.

17 (3) A major portion of the traffic in controlled substances flows through interstate and foreign
18 commerce. Incidents of the traffic which are not an integral part of the interstate or foreign
flow, such as manufacture, local distribution, and possession, nonetheless have a substantial
19 and direct effect upon interstate commerce because—

20 (A) after manufacture, many controlled substances are transported in interstate
commerce,

21 (B) controlled substances distributed locally usually have been transported in
interstate commerce immediately before their distribution, and

22 (C) controlled substances possessed commonly flow through interstate commerce
immediately prior to such possession.

23 (4) Local distribution and possession of controlled substances contribute to swelling the
interstate traffic in such substances.

24 (5) Controlled substances manufactured and distributed intrastate cannot be differentiated

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26 ²The principle that regulated activities must be economic in nature is indeed found in *Morrison*
27 at 613, but the specific passage quoted by plaintiffs at 9:12-15 of their Motion is found on page 615 of
the opinion.

28 ³See also the voluminous Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L.
91-513, reprinted in 1970 U.S.C.C.A.N. 4566.

1 from controlled substances manufactured and distributed interstate. Thus, it is not feasible to
2 distinguish, in terms of controls, between controlled substances manufactured and distributed
interstate and controlled substances manufactured and distributed intrastate.

3 (6) Federal control of the intrastate incidents of the traffic in controlled substances is
essential to the effective control of the interstate incidents of such traffic.

4 Id. at (2-6). Rather than ignore these findings, in effect, plaintiffs do two things: they challenge the
5 validity of the findings; and they seek to carve out an exception for people who use locally cultivated
6 medical marijuana that has not impacted interstate commerce in any way. (See Reply Memorandum
7 in Support of Preliminary Injunction ("Reply") at 2-3.) Thus, plaintiffs argue that since Congress
8 has failed to establish a nexus between the wholly intrastate, non-commercial use of medical
9 marijuana and interstate commerce, the CSA as applied to them fails constitutional scrutiny.

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11 However, defendant counters plaintiffs' arguments and asserts that the Ninth Circuit has
12 repeatedly held that the Controlled Substances Act is a permissible exercise of congressional
13 authority under the Commerce Clause.

14 Relying on the Supreme Court's decision in *Lopez*, defendant argues that Congress exceeded
15 its authority under the Commerce Clause when it enacted 21 U.S.C. § 841(a)(1). In
16 particular, defendant contends that possession of a controlled substance is not necessarily a
17 commercial activity that may be regulated under the Commerce Clause, § 841(a)(1)
impermissibly regulates intrastate activity, and states have primary authority to define the
penalties for possession of a controlled substance. We conclude that defendant's Commerce
Clause argument lacks merit.

18 *United States v. Kim*, 94 F.3d 1247, 1249 (9th Cir. 1996).⁴ The Court of Appeals has rejected
19 challenges to the CSA by a defendant whose marijuana plants were found rooted in the soil, a purely
20 intrastate activity. See *United States v. Visman*, 919 F.2d 1390, 1392 (9th Cir. 1990). The defendant
21 in this case was convicted of possession with intent to distribute marijuana, manufacture of
22 marijuana, and maintaining a place for the manufacture of marijuana. Importantly, he was convicted
23 on the basis of plants that law enforcement agents found rooted in the ground, which, by definition,
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While the quotation mentions only "possession," the crime at issue in *Kim* was not simple
possession, but possession with intent to deliver, as evidenced by the reference to 21 U.S.C. § 841(a)(1),
and not § 844.

1 are not moving in interstate commerce.⁵ The defendant argued that there is no reasonable basis to
 2 assume that these plants affect interstate commerce and that Congress exceeded its authority in
 3 regulating intrastate illegal conduct that affects interstate commerce. *See id.* The Ninth Circuit
 4 disagreed.

5 After considering precedent that upheld congressional regulation of intrastate drug activity
 6 under the CSA and other precedent that refused to excise individual instances from an entire class of
 7 permissibly regulated activity, the court upheld the conviction. *See id.* at 1392-93 (citing *United*
 8 *States v. Rodriguez-Camacho*, 468 F.2d 1220, 1221 (9th Cir. 1972) and *Perez v. United States*, 402
 9 U.S. 146, 154 (1971), respectively). The *Visman* court stated, "We defer to Congress' findings that
 10 controlled substances have a detrimental effect on the health and general welfare of the American
 11 people and that intrastate drug activity affects interstate commerce." *Id.* at 1393. Thus, the holding
 12 in *Visman*, which concerned purely intrastate drug activity, is equally applicable to plaintiffs'
 13 cultivation and use of marijuana, which allegedly is wholly intrastate as well. (*See* Motion at 6:10-
 14 14, 5:21.)

15 The Ninth Circuit has also specifically upheld the validity of the CSA in light of the Supreme
 16 Court decision in *Lopez*, distinguishing the CSA from the Gun-Free School Zones Act found
 17 unconstitutional in that case through the presence of congressional findings to support the CSA.
 18 *United States v. Tisor*, 96 F.3d 370, 374 (9th Cir. 1996). The Ninth Circuit has also endorsed the
 19 validity and adequacy of Congress' findings supporting the CSA.⁶
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21 ⁵Evidence of growing equipment and an indoor growing facility were also discovered at the
 22 defendant's house, but the focus of the opinion was only on the purely intrastate nature of plants rooted
 in the soil.

23 ⁶"Appellant urges that Congress may not constitutionally regulate the intrastate distribution of
 24 controlled substances. We disagree. Congress may regulate not only interstate commerce but also those
 25 wholly intrastate activities which it concludes have an effect upon interstate commerce. Marijuana is
 26 listed among the controlled substances in the challenged statute, and Congress has made specific
 findings as to the effect of intrastate activities in controlled substances on interstate commerce. 'This
 court will certainly not substitute its own judgment for that of Congress in such a matter unless the
 relation of the subject to interstate commerce and its effect are clearly nonexistent.' Such is not the case
 as regards controlled substances.

27 Congress has concluded that ... controlled substances have a substantial and detrimental effect
 28 on the health and general welfare of the American people. [quoting 21 U.S.C. § 801(2)] Appellant urges
 that this assertion is inapplicable to marijuana. This is a matter, however, whose ultimate resolution lies
 in the legislature and not in the courts. It is sufficient that Congress have a rational basis for its

1 Plaintiffs assert that *Lopez* is not dispositive of the Commerce Clause issue raised herein
 2 because the Supreme Court has implicitly overruled the Ninth Circuit authority relied on by the
 3 government through its decision in *Morrison*. In *Morrison*, the Supreme Court rejected a provision
 4 of the Violence Against Women Act of 1994 ("VAWA") not because of a lack of congressional
 5 findings, as in *Lopez*, but rather, because of the inadequacy of those findings. *Morrison*, 529 U.S. at
 6 614. As importantly, plaintiffs argue that the Supreme Court's decision did not invalidate the entire
 7 VAWA, but just the portion giving victims of gender-based violence a civil remedy against their
 8 assailants. *See id.* at 613, n.5. The Supreme Court only found Congress' findings in support of this
 9 particular section to be inadequate. Similarly, plaintiffs ask this Court to determine that the findings
 10 made by Congress in support of a particular provision of the CSA are inadequate. They charge that
 11 the findings are insufficient to support the exercise of Commerce Clause power over the wholly
 12 intrastate, non-economic possession and cultivation of marijuana for personal medical use, use that
 13 has been made legal under state law. (*See Motion* at 10.)

14 Contrary to plaintiffs' wishes, the Court is constrained from such a determination by the
 15 weight of precedent. As discussed above, the Ninth Circuit has repeatedly upheld the
 16 constitutionality of the CSA as applied to marijuana. *See Tisor*, 96 F.3d. at 374; *Rodriguez-*
 17 *Camacho*, 468 F.2d at 1221. The Court of Appeals has confirmed the validity and adequacy of
 18 Congress' findings in support of the CSA, including its application to wholly intrastate cultivation of
 19 marijuana. *Visman*, 919 F.2d at 1392. This Court may not overrule a decision of the Ninth Circuit in
 20 the absence of an intervening Supreme Court decision that undermines the existing precedent, and
 21 both cases are closely on point.

22 As a general rule, one three judge panel of this court cannot reconsider or overrule the
 23 decision of a prior panel. An exception to this rule arises when "an intervening Supreme
 24 Court decision undermines an existing precedent of the Ninth Circuit, and both cases are
 25 closely on point."
 26 *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992)(citing *United States v. Mandel*, 914 F.2d -
 27 1215, 1220-21 (9th Cir. 1990) (quoting *United States v. Lancellotti*, 761 F.2d 1363, 1366-67 (9th
 28 findings." *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1221 (9th Cir. 1972) (quoting *Stafford*
v. Wallace, 258 U.S. 495 (1922)); accord *Visman* 919 F.2d at 1390.

1 Cir. 1985)).^{7,8}

2 While plaintiffs no doubt consider *Morrison* to be the type of an intervening Supreme Court
3 decision required by the holding in *Gay*, and notwithstanding plaintiffs' attempt to create a factual
4 record that would render their "as applied" attack successful under *Morrison*, the decision in
5 *Morrison* is insufficiently on point to permit this Court to overrule the *Visman, Rodriguez-Camacho*,
6 and *Tisor* line of cases. While the Supreme Court in *Morrison* provided some insight into its
7 analysis of what congressional findings are necessary to meet the "substantially affects" test in the
8 context of a commerce clause challenge, *see id.*, 529 U.S. at 614-18, the case does not speak to or
9 address the specific findings attendant to the CSA in a way that allows this Court to depart from
10 existing Ninth Circuit precedent on this question. Therefore, this Court is not at liberty to depart
11 from current authority holding that Congress' findings are sufficient to overcome a Commerce
12 Clause challenge, even one involving a purely intrastate possession of a controlled substance.

13 In the final analysis, neither *Lopez* nor *Morrison* answer definitively the question posed to
14 this Court: whether the Controlled Substances Act, as applied in this case, is beyond the purview of
15 Congress' power to regulate activity under the Commerce Clause. Therefore, the Court is still bound
16 by existing Ninth Circuit authority on this issue.⁹

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18 ⁷*United States v. Gay* set forth the rule for a three-judge panel of the Ninth Circuit in overruling
19 the decision of another three-judge panel. The need for an applicable higher-court decision is even more
pronounced in the case of a district court, such as this one, overruling Ninth Circuit precedent.

20 ⁸The Court notes the similar conclusion reached by Judge Fogel in *Wo/Men's Alliance for*
21 *Medical Marijuana v. United States*, No. 02-MC-7012 JF (N.D. Cal 2002), a case presented to the Court
22 and discussed at the hearing on the motion. The Court also notes that defendant has filed a number of
23 Notices of Recent Case after the hearing date, attempting to draw the Court's attention to other decisions
in this Circuit in which courts have declined to accept constitutional challenges to the CSA's application
to medical cannabis. Plaintiffs have registered their objections to the timing of these notices, but the
objections are moot, as the Court has not considered these cases.

24 ⁹Interestingly, the Supreme Court deliberately chose not to address this question in *Oakland*
25 *Cannabis Club*. *See United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494, n.7
26 (2001) ("Nor are we passing today on a constitutional question, such as whether the Controlled
27 Substances Act exceeds Congress' power under the Commerce Clause."). Thus, the existing Ninth
Circuit cases are still binding law. Since the Supreme Court has deliberately chosen not to address the
question of whether the CSA represents a constitutionally permissible exercise of Congress' Commerce
Clause power, this Court must rely on the precedent provided by the Ninth Circuit.

28 As plaintiffs point out, Judge Kozinski, in his dissent in *Conant v. Walters*, 309 F.3d 629 (9th
Cir. 2002), raises interesting and substantial questions, albeit in the context of the First Amendment,
regarding the constitutionality of the CSA. However, the dissent in *Conant* is not the law of this Circuit

1 By arguing that the provisions of the CSA should not be applied to those who cultivate
2 wholly intrastate medical marijuana that has not been circulated in commerce, plaintiffs are asking
3 the Court to ignore valid Ninth Circuit decisions that have endorsed two of Congress' specific
4 findings: (1) controlled substances manufactured and distributed intrastate cannot be differentiated
5 from controlled substances manufactured and distributed interstate; and (2) federal control of the
6 intrastate incidents of the traffic in controlled substances is essential to the effective control of the
7 interstate incidents of such traffic. 21 U.S.C. § 801(5),(6). In the final analysis, this Court cannot
8 undertake the resolution of this important issue as it is constrained from doing so by existing Circuit
9 precedent – precedent which has found that the CSA passes constitutional muster.

10 **2) The Controlled Substances Act As a Violation of the 10th Amendment**

11 Plaintiffs correctly state that Congress' power to regulate interstate commerce, while plenary
12 within the field, is nonetheless confined within limits. (Motion at 16:4-9). An important restriction
13 on congressional power is found in the Tenth Amendment, which is designed to proscribe the
14 encroachment of the federal government into areas reserved for the States. Arguing that the
15 Supreme Court has upheld the States' power to enact wholly intrastate measures protecting public
16 health and to regulate professions that closely concern public health, plaintiffs assert that "under the
17 Tenth Amendment, the wholly intrastate activity of possessing and cultivating medical cannabis
18 pursuant to state law, is an exercise of the police power reserved to the State of California, primarily
19 responsible for the health and safety of its citizens, a power central to the sovereignty of the States."
20 (Motion at 17:13-16 (earlier quoting *Jacobsen v. Massachusetts*, 197 U.S. 11, 48-49 (1905), and
21 *Watson v. Maryland*, 218 U.S. 173, 176 (1910)).)

22 Defendant argues that since the passage of the Controlled Substances Act was a valid
23 exercise of Congressional power under the Commerce Clause, plaintiffs' Tenth Amendment
24 argument is overcome. The Supreme Court has held that a valid exercise of Commerce Clause
25 authority that displaces States' exercise of their police powers or curtails the States' ability to
26 legislate on matters they may consider important does not constitute an invasion of sovereign areas
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on the important questions currently before this Court.

For the Northern District of California

1 reserved to the States by the Tenth Amendment. *Hodel v. Virginia Surface Mining and Reclamation*
2 *Ass'n, Inc.*, 452 U.S. 264, 291 (1981). The Constitution has given Congress various enumerated
3 powers, including the power to regulate interstate commerce. If that power, surrendered to the
4 federal government, is validly exercised, it does not infringe upon any sovereignty that has been
5 retained by the States. See *New York v. United States*, 505 U.S. 144, 156-57 (1992) ("It is in this
6 sense that the Tenth Amendment 'states but a truism that all is retained which has not been
7 surrendered.'") (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

8 Examples of where the Supreme Court has curtailed federal power under the Tenth
9 Amendment are found when Congress has compelled some sort of state action. See *New York*, 505
10 U.S. at 166 ("We have always understood that where Congress has the authority under the
11 Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel
12 the States to require or prohibit those acts."); *Reno v. Condon*, 528 U.S. 141, 149 (2000) (preventing
13 the federal government from "commandeering" the state legislative process); and *Printz v. United*
14 *States*, 521 U.S. 898, 925 (1997) ("[T]he federal government may not compel the States to
15 implement, by legislation or executive action, federal regulatory programs."). This type of
16 "commandeering" is not at issue in this case, for the federal government is not forcing California, or
17 any other State, to take any action. The CSA regulates individual behavior, and plaintiffs are asking
18 the Court to prevent the government from applying those regulations to their conduct. As the
19 promulgation of the CSA was a legitimate exercise of Congressional power under the Commerce
20 Clause, the Tenth Amendment is not implicated.

21 **3) The Controlled Substances Act As a Violation of the Ninth Amendment**

22 Plaintiffs argue that while the Tenth Amendment limits Congress solely to the powers
23 enumerated by the Constitution, the Ninth Amendment prohibits an overly broad interpretation of
24 those powers, in order to preserve individual liberties. (Motion at 18:3-11.) Plaintiffs assert that
25 these liberties are not only those delineated in the Bill of Rights, but consist of unenumerated
26 liberties as well. (Id. at 17-18.) For this reason, recognized rights such as the right to bodily
27 integrity, the right to amelioration of pain, and the right to prolong one's life, while not listed by the
28

1 Constitution, nonetheless equally enjoy its protection. (See *id.* at 19:4-9.) Plaintiffs argue that in
2 determining what constitutes one of these unenumerated, yet fundamental rights, the courts should
3 defer to the judgment of the people. (See *id.* at 23-24.) "Moreover, the People of California and the
4 State of California have expressly determined that 'seriously ill Californians have *the right* to obtain
5 and use marijuana for medical purposes....' Cal. Health & Safety Code § 11362.5(b)(1)(A) (emphasis
6 added)." (*Id.* at 24:13-16.) When it infringes such a fundamental right, including the right of patients
7 to use medication of a kind and quantity adequate to address their pain or prolong their lives, the
8 federal government must provide a compelling reason. (*Id.* at 21:6-14 (citing *Washington v.*
9 *Glucksberg*, 521 U.S. 702, 766 (1977).) Plaintiffs argue that application of the CSA deprives them
10 of their fundamental right to use the only medication adequate to sustain them, thereby infringing
11 their rights to bodily integrity, to ameliorate their pain, and to prolong their lives, and that the federal
12 government has failed to provide a sufficiently compelling justification for this deprivation.

13 Defendant counters by asserting that the CSA only deprives plaintiffs of the right to use
14 lawfully a *type of treatment*, not the right to treatment itself. (See Defendant's Opposition to
15 Plaintiffs' Motion for Preliminary Injunction ("Opp.") at 16-17.) Defendant directs the Court to
16 *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980), in which the court found that a terminally
17 ill cancer patient could not seek a declaratory judgment that he had the right to obtain and use
18 laetrile, a non-approved drug for the treatment of cancer. The Court held that Constitutional rights of
19 privacy and personal liberty did not afford the plaintiff the right "to obtain laetrile free of the lawful
20 exercise of government police power." *Id.* at 1122. In this case, the Court also cited with approval
21 the Tenth Circuit's decision in *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980). The latter
22 case also dealt with cancer patients' ability to obtain laetrile for treatment. The Tenth Circuit stated
23 that:

24 It is apparent in the context with which we are here concerned that the decision by the patient
25 *whether to have a treatment or not* is a protected right, but his selection of a *particular*
26 *treatment*, or at least a medication, is within the area of government interest in protecting
27 public health.

28 *Id.* at 457 (emphasis added). While plaintiffs may vehemently disagree with the wisdom of the
federal government's determination that marijuana has no medical efficacy and therefore, that

1 federal law renders it unavailable for prescription to patients, they do not have a fundamental,
2 constitutional right to obtain and use it for treatment. See 21 U.S.C. § 812, Schedule I (c)(10)
3 (placing marijuana in Schedule D); see also 21 U.S.C. § 812(b)(1)(B) (describing Schedule I drugs as
4 having “no currently accepted medical use in treatment in the United States”); and *Rutherford*, 616
5 F.2d at 457. Therefore, Congress’ outlawing of marijuana, even for medical uses, does not run afoul
6 of the Ninth Amendment.

7 4) Availability of the Medical Necessity Defense

8 Plaintiffs’ final argument rests of the defense of medical necessity. Medical necessity was
9 raised as a defense to enforcement of federal marijuana laws in the Ninth Circuit’s decision in *United*
10 *States v. Oakland Cannabis Buyers’ Cooperative*, 190 F.3d 1109 (9th Cir. 1999). While the Ninth
11 Circuit accepted the possibility of a medical necessity defense to criminal prosecution for
12 distribution of marijuana for medical purposes, see *id.* at 1115, the Supreme Court overruled this
13 decision in *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483 (2001)
14 (“*OCBC*”). Nonetheless, plaintiffs maintain that the opinion has been preserved for those people
15 who are not distributors of marijuana. (Motion at 25:6-7.) They rely for this proposition on the
16 wording of Justice Stevens’ concurring opinion, who states that since the issue before the Court in
17 *OCBC* was a medical necessity defense to distribution, the reversal of the Ninth Circuit’s decision
18 dealt only with this possible offense, leaving the use of medical necessity by persons such as
19 plaintiffs – “seriously ill patient[s] for whom there is no alternative means of avoiding starvation or
20 extraordinary suffering” – as an open question. *OCBC*, 532 U.S. at 501 (Stevens, J., concurring).¹⁰
21 However, the language of the majority opinion in *OCBC*, delivered by Justice Thomas, is dispositive
22 on this question.

23
24 Lest there be any confusion, we clarify that nothing in our analysis, or the statute, suggests
25 that a distinction should be drawn between the prohibitions on manufacturing and

26 ¹⁰Even if this reading of *OCBC* were correct, this would not shield John Does Number One and
27 Two from possible prosecution. As they are caregivers who distribute marijuana, they would not be able
28 to avail themselves of the necessity defense, unless they were considered to be a single “unit” with Raich
for the purpose of criminal liability. While the Compassionate Use Act excludes caregivers as well as
patients from California state law criminal liability, it is not clear how broad the protection a medical
necessity defense would cast in a federal prosecution.

1 distributing and the other prohibitions in the Controlled Substances Act. Furthermore, the
2 very point of our holding is that there is no medical necessity exception to the prohibitions at
issue, even when the patient is "seriously ill" and lacks alternative avenues for relief.

3 *Id.* at 494, n.7 (Thomas, J.) As there is no distinction between manufacturing and distribution, for
4 which there is no medical necessity defense, it follows that there is no medical necessity defense for
5 other prohibitions in the CSA, such as possession of marijuana.

6 The main foundation for the Supreme Court's position in *OCBC* rests upon Congress'
7 findings that marijuana has no currently accepted medical use. *See id.* at 491 (citing 21 U.S.C. §
8 811). The original placement of marijuana in Schedule I, the most restrictive schedule of the CSA,
9 means that it was determined that marijuana has no current medical use for treatment in the United
10 States, has a high potential for abuse, and has a lack of accepted safety for use under medical
11 supervision. *Id.* (citing 21 U.S.C. § 812(b)(1)(A-C)).

12 It is clear from the text of the Act that Congress has made a determination that marijuana has
13 no medical benefits worthy of an exception. The statute expressly contemplates that many
14 drugs "have a useful and legitimate medical purpose and are necessary to maintain the health
15 and general welfare of the American people," § 801(1), but it includes no exception at all for
16 any medical use of marijuana. Unwilling to view this omission as an accident, and unable in
any event to overrule a legislative determination manifest in a statute, we reject the
Cooperative's argument [that a drug in Schedule I can be medically necessary,
notwithstanding that it has "no medical use"].

17 *Id.* at 493. Plaintiffs vigorously contest Congress' finding that medical marijuana has no medical
18 application, and the evidence in their declarations is powerful testimony to support their position.
19 Nonetheless, as the Supreme Court was not in a position to overturn the legislative determination
20 that placed marijuana in Schedule I, and thus, made it unavailable for prescription to seriously ill
21 people, much less so is this Court. The Court must also follow the dictate of the Supreme Court in
22 its finding that there is no medical necessity defense for any of the prohibitions contained in the
23 CSA, including even possession for medicinal use.

24 5) Public Interest Factors

25 Since the binding effect of prior decisions indicates that plaintiffs have demonstrated no
26 likelihood of success on the merits, the Court need not address the issue of irreparable harm, the
27 balance of hardships, or the impact of an injunction upon the public interest. *See Stanley v.*
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1 *University of Southern California*, 13 F.3d at 1319. However, the importance of this case dictates
2 that these factors merit some brief attention.¹¹

3 This case has a clear impact on the public interest of all Californians, and it obviously is of
4 paramount interest to plaintiffs. The enactment of the Compassionate Use Act of 1996 manifests
5 the express will of California voters to permit individuals with a medical need for marijuana
6 treatment to have access to the drug, subject to a doctor's supervision. Federal enforcement of the
7 Controlled Substances Act, plaintiffs assert, serves to thwart this will. This conflict between state
8 and federal law is far from a purely theoretical quandary, as Monson's incident with the sheriff's
9 deputies and the DEA amply demonstrates. Plaintiffs' list of medical conditions, and their
10 statements that marijuana is the only medication that has proven effective to ameliorate their
11 symptoms, provide strong evidence that plaintiffs will suffer severe harm and hardship if denied use
12 of it.

13 Countering plaintiffs' argument, the government contends that the public interest and the
14 other equities actually favor denial of the injunction. The only interests to which it points, though,
15 are the presumption of constitutionality of congressional statutes and the potential of an injunction
16 permitting the use of medical marijuana "to significantly undermine the FDA drug approval
17 process." (Opp. at 24.)¹² In the government's view, Congress has opposed efforts to legalize
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19
20 ¹¹The Court notes the divergence of opinion regarding analysis of the public interest in the history
21 of the *Oakland Cannabis Buyer's Cooperative* case. In *OCBC*, 190 F.3d 1109, 1114 (9th Cir. 1999),
22 the Ninth Circuit found that Judge Breyer's failure to "expressly consider the public interest on the
23 record" in *OCBC*, 5 F.Supp.2d 1086 (N.D.Cal. 1998), was an abuse of discretion. However, the
24 Supreme Court reversed the Ninth Circuit in its own *OCBC* decision, 532 U.S. 483 (2001). In
25 discussing the Ninth Circuit's decision, the Supreme Court held that the district court was not at liberty
26 to consider "any and all factors that might relate to the public interest or the conveniences of the parties,
27 including the medical needs of the Cooperative's patients." *Id.* at 497. "On the contrary, a court sitting
28 in equity cannot ignore the judgment of Congress, deliberately expressed in legislation. A district court
cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior
should be prohibited." *Id.* (citations omitted). The Supreme Court held that an analysis of the public
interest is appropriate only in considering an injunction versus other means of enforcing a statute. "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 498.

¹²Defendant also argues that no irreparable injury to plaintiffs is possible if they are denied access
to medical cannabis because they lack the right to obtain a drug that is not approved by the government
for medical use. (Opp. at 22 (citing *Carnohan*, 616 F.2d at 1122, and *Rutherford*, 616 F.2d at 457).)

1 marijuana and other Schedule I drugs without valid, scientific evidence that they are safe and
2 effective and without the approval of the Food and Drug Administration. (Id. (quoting Pub. L. No.
3 015-277, Div. F, 112 Stat. 2681, 760-61 (1998).) While there is a public interest in the presumption
4 of constitutional validity of congressional legislation, and while regulation of medicine by the FDA
5 is also important, the Court finds that these interests wane in comparison with the public interests
6 enumerated by plaintiffs and by the harm that they would suffer if denied medical marijuana.

7 However, despite the gravity of plaintiffs' need for medical cannabis, and despite the
8 concrete interest of California to provide it for individuals like them, the Court is constrained from
9 granting their request. Plaintiffs are unable, on this record, to establish the required "irreducible
10 minimum" of a likelihood of success on the merits under the law of this Circuit, and accordingly, the
11 request for injunctive relief must be denied. See *American Motorcyclist Ass'n v. Watt*, 714 F.2d at
12 965; *Stanley v. University of Southern California*, 13 F.3d at 1319. Since both the "traditional" and
13 "alternative" tests for preliminary injunction require plaintiffs to demonstrate a likelihood of success
14 on the merits, their failure to meet this requirement dictates that their motion for preliminary
15 injunction must be denied under either standard. The fact that, in this Court's view, the equitable
16 factors tip in plaintiff's favor does not alter the Court's conclusion.


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CONCLUSION

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2 All of plaintiffs' arguments in support of their position are unavailing: the weight of
3 precedent precludes this Court from determining that Congress' findings in support of the CSA are
4 insufficient to survive constitutional challenge; the CSA is not a violation of the Tenth Amendment
5 or the Ninth Amendment; and plaintiffs cannot successfully mount a medical necessity defense.
6 Since plaintiffs are unable to establish any likelihood of success on the merits, their motion for
7 preliminary injunction is DENIED.

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9 IT IS SO ORDERED.

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13 Dated: March 4, 2003


MARTIN J. JENKENS
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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