



**CITY OF HUNTINGTON BEACH**  
**Inter Office Communication**  
**Planning Department**

**TO:** Planning Commission

**FROM:** Scott Hess, AICP, Director of Planning *SH #1 RR*

**DATE:** August 28, 2007

**SUBJECT: ZONING TEXT AMENDMENT NO. 07-003 (MEDICAL MARIJUANA DISPENSARIES)**

---

---

On August 14, 2007 the Planning Commission continued Zoning Text Amendment No. 07-003 and requested additional information. Attachments 1-5 below are the items requested by the Planning Commission. Attachments 6-10 are additional items of information requested by Commissioners Dwyer and Shaw.

Attachments:

1. Gonzales v. Raich (United States Court of Appeals and Supreme Court decisions)
2. Section 3.5 of Article III of the California Constitution
3. Unruh Civil Rights Act (Civil Code Sec. 51 et seq.)
4. Proposition 215
5. Senate Bill 420 (2003)
6. California Health and Safety Code Sections 11362.5 through 11362.9
7. Request for City Council Action dated March 21, 2005 (zoning text amendment to include medical marijuana dispensaries)
8. Minutes of March 21, 2005 City Council Meeting
9. City of Anaheim Council Agenda Report dated July 31, 2007 (prohibiting medical marijuana dispensaries)
10. Attorney General Lockyer Statement on US Supreme Court's Medical Marijuana Ruling dated June 6, 2005

SH:MBB:RR

xc: Leonie Mulvihill, Senior Deputy City Attorney  
Herb Fauland, Principal Planner  
Mary Beth Broeren, Principal Planner  
File



--- F.3d ----

Page 1

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

**H**

Raich v. Gonzales  
C.A.9 (Cal.),2007.

United States Court of Appeals,Ninth Circuit.  
Angel McClary RAICH; John Doe, Number One;  
John Doe, Number Two, Plaintiffs-Appellants,  
v.

Alberto R. GONZALES, Attorney General, as  
United States Attorney General; Karen Tandy,<sup>FN\*</sup>  
as Administrator of the Drug Enforcement  
Administration, Defendants-Appellees.  
**No. 03-15481.**

Argued and Submitted March 27, 2006.  
Filed March 14, 2007.

**Background:** User and growers of marijuana for medical purposes under California Compassionate Use Act sought declaration that Controlled Substances Act (CSA) was unconstitutional as applied to them. The United States District Court for the Northern District of California, Martin J. Jenkins, J., 248 F.Supp.2d 918, denied plaintiffs' motion for preliminary injunction. Plaintiffs appealed and, following reversal, 352 F.3d 1222, remand was ordered, 125 S.Ct. 2195.

**Holdings:** The Court of Appeals, Pregerson, Circuit Judge, held that:

- (1) user had standing;
- (2) although user appeared to satisfy factual predicate for necessity defense, Court of Appeals could not issue preliminary injunction preventing enforcement of CSA on such basis;
- (3) application of CSA to growers and users did not violate substantive due process guarantees; and
- (4) user failed to demonstrate likelihood of success on her claim that CSA, as applied to prevent her use

of medical marijuana, violated Tenth Amendment.

Affirmed.

Beam, Circuit Judge, sitting by designation, filed opinion concurring and dissenting.

**[1] Federal Civil Procedure 170A ↪103.2**

170A Federal Civil Procedure  
170AII Parties  
170AII(A) In General  
170Ak103.1 Standing  
170Ak103.2 k. In General; Injury or  
Interest. Most Cited Cases

**Federal Civil Procedure 170A ↪103.3**

170A Federal Civil Procedure  
170AII Parties  
170AII(A) In General  
170Ak103.1 Standing  
170Ak103.3 k. Causation;  
Redressability. Most Cited Cases  
To satisfy the requirements of standing, under the constitutional article governing the judiciary, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. U.S.C.A. Const. Art. 3, § 1 et seq.

**[2] Federal Civil Procedure 170A ↪103.2**

170A Federal Civil Procedure  
170AII Parties  
170AII(A) In General  
170Ak103.1 Standing  
170Ak103.2 k. In General; Injury or  
Interest. Most Cited Cases  
For a plaintiff to satisfy the requirements of

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.1

--- F.3d ----

Page 2

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

standing, under the constitutional article governing the judiciary, the injury must be: (1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical. U.S.C.A. Const. Art. 3, § 1 et seq.

### [3] Constitutional Law 92 ⇨ 42.1(3)

#### 92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k41 Persons Entitled to Raise Constitutional Questions

92k42.1 Particular Statutes or Actions Attacked

92k42.1(3) k. Crime and Punishment. Most Cited Cases

User of medical marijuana pursuant to California Compassionate Use Act had standing to challenge constitutionality of Controlled Substances Act (CSA), even though user had not suffered past injury, where she was faced with threat that Government would seize her marijuana and prosecute her, her doctor testified that foregoing medical marijuana treatment might be fatal, and federal agents had previously seized and destroyed the medical marijuana of a former plaintiff. Controlled Substances Act, § 101 et seq., 21 U.S.C.A. § 801 et seq.; West's Ann.Cal.Health & Safety Code § 11362.5.

### [4] Federal Courts 170B ⇨ 767

#### 170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk763 Extent of Review Dependent on Nature of Decision Appealed from 170Bk767 k. Provisional Remedies; Injunctions; Receivers. Most Cited Cases

A district court's decision regarding preliminary injunctive relief is subject to limited review.

### [5] Federal Courts 170B ⇨ 767

#### 170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General  
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from 170Bk767 k. Provisional Remedies; Injunctions; Receivers. Most Cited Cases

### Federal Courts 170B ⇨ 815

#### 170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk814 Injunction

170Bk815 k. Preliminary Injunction; Temporary Restraining Order. Most Cited Cases

### Federal Courts 170B ⇨ 862

#### 170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)5 Questions of Fact, Verdicts and Findings

170Bk855 Particular Actions and Proceedings, Verdicts and Findings

170Bk862 k. Equity in General and Injunction. Most Cited Cases

A district court's decision regarding preliminary injunctive relief should be reversed only if the court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.

### [6] Federal Courts 170B ⇨ 862

#### 170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)5 Questions of Fact, Verdicts and Findings

170Bk855 Particular Actions and Proceedings, Verdicts and Findings

170Bk862 k. Equity in General and Injunction. Most Cited Cases

### Injunction 212 ⇨ 152

212 Injunction

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.2

--- F.3d ----

Page 3

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

212IV Preliminary and Interlocutory Injunctions  
212IV(A) Grounds and Proceedings to Procure

212IV(A)4 Proceedings  
212k152 k. Hearing and Determination. Most Cited Cases  
A preliminary injunction must be supported by findings of fact, reviewed for clear error.

A preliminary injunction must be supported by findings of fact, reviewed for clear error.

**[7] Federal Courts 170B ↪776**

170B Federal Courts  
170BVIII Courts of Appeals  
170BVIII(K) Scope, Standards, and Extent  
170BVIII(K)1 In General  
170Bk776 k. Trial De Novo. Most Cited Cases  
A district court's conclusions of law are reviewed de novo.

**[8] Injunction 212 ↪138.1**

212 Injunction  
212IV Preliminary and Interlocutory Injunctions  
212IV(A) Grounds and Proceedings to Procure  
212IV(A)2 Grounds and Objections  
212k138.1 k. In General. Most Cited Cases

**Injunction 212 ↪138.21**

212 Injunction  
212IV Preliminary and Interlocutory Injunctions  
212IV(A) Grounds and Proceedings to Procure  
212IV(A)2 Grounds and Objections  
212k138.21 k. Likelihood of Success, or Presence of Substantial Questions, Combined with Other Elements. Most Cited Cases  
Two different criteria are used for determining whether preliminary injunctive relief is warranted, in that, under the traditional criteria, a plaintiff must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a

balance of hardships favoring the plaintiff, and (4) advancement of the public interest in certain cases, and an alternative test is also used, whereby a court may grant the injunction if the plaintiff demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in his favor.

**[9] Injunction 212 ↪138.21**

212 Injunction  
212IV Preliminary and Interlocutory Injunctions  
212IV(A) Grounds and Proceedings to Procure  
212IV(A)2 Grounds and Objections  
212k138.21 k. Likelihood of Success, or Presence of Substantial Questions, Combined with Other Elements. Most Cited Cases  
The two alternative formulations for determining whether preliminary injunctive relief is warranted represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases; they are not separate tests but rather outer reaches of a single continuum.

**[10] Constitutional Law 92 ↪48(1)**

92 Constitutional Law  
92II Construction, Operation, and Enforcement of Constitutional Provisions  
92k44 Determination of Constitutional Questions  
92k48 Presumptions and Construction in Favor of Constitutionality  
92k48(1) k. In General. Most Cited Cases  
An act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.

**[11] Civil Rights 78 ↪1457(5)**

78 Civil Rights  
78III Federal Remedies in General  
78k1449 Injunction  
78k1457 Preliminary Injunction

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.3

--- F.3d ----

Page 4

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
 (Cite as: --- F.3d ----)

78k1457(5) k. Criminal Law Enforcement; Prisons. Most Cited Cases  
 Although user of medical marijuana appeared to satisfy factual predicate for necessity defense, in that if she were to obey Controlled Substances Act (CSA) rather than using marijuana pursuant to California Compassionate Use Act she would have to endure intolerable pain and perhaps would die, Court of Appeals could not issue preliminary injunction preventing enforcement of CSA on such basis, since oversight and enforcement of necessity-defense-based injunction would prove impracticable, in that ongoing vitality of injunction could hinge on factors including user's medical condition or advances in lawful medical technology. Controlled Substances Act, § 101 et seq., 21 U.S.C.A. § 801 et seq.; West's Ann.Cal.Health & Safety Code § 11362.5.

**[12] Criminal Law 110 ↻38**

110 Criminal Law  
 110II Defenses in General  
 110k38 k. Compulsion or Necessity; Justification in General. Most Cited Cases  
 The necessity defense is an affirmative defense that removes criminal liability for violation of a criminal statute.

**[13] Criminal Law 110 ↻38**

110 Criminal Law  
 110II Defenses in General  
 110k38 k. Compulsion or Necessity; Justification in General. Most Cited Cases  
 For purposes of the common law necessity defense to a criminal charge, necessity is essentially a justification for the prohibited conduct; the harm caused by the justified behavior remains a legally recognized harm that is to be avoided whenever possible.

**[14] Criminal Law 110 ↻38**

110 Criminal Law  
 110II Defenses in General  
 110k38 k. Compulsion or Necessity; Justification in General. Most Cited Cases  
 A common law necessity defense singles out

conduct that is otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure.

**[15] Constitutional Law 92 ↻251.2**

92 Constitutional Law  
 92XII Due Process of Law  
 92k251.2 k. Regulations and Deprivations in General. Most Cited Cases  
 Although the Fifth Amendment's Due Process Clause states only that "[n]o person shall be deprived of life, liberty, or property, without due process of law," it provides substantive protections for certain unenumerated fundamental rights. U.S.C.A. Const.Amend. 5.

**[16] Constitutional Law 92 ↻258(3.1)**

92 Constitutional Law  
 92XII Due Process of Law  
 92k256 Criminal Prosecutions  
 92k258 Creation or Definition of Offense  
 92k258(3) Particular Statutes and Ordinances  
 92k258(3.1) k. In General. Most Cited Cases

**Controlled Substances 96H ↻51**

96H Controlled Substances  
 96HIII Offenses  
 96Hk48 Defenses  
 96Hk51 k. Medical Necessity. Most Cited Cases  
 Application of Controlled Substances Act (CSA) to growers and users of marijuana for medical purposes, as otherwise authorized by California Compassionate Use Act, did not violate substantive due process guarantees, since right to decide on physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies had failed, was not deeply rooted in United States' history and tradition and implicit in concept of ordered liberty, even though 11 states had passed laws decriminalizing marijuana for the seriously ill, others had passed resolutions recognizing that marijuana might have

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.4

--- F.3d ----

Page 5

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
 (Cite as: --- F.3d ----)

therapeutic value, and yet others had permitted limited use through closely monitored experimental treatment programs. U.S.C.A. Const.Amend. 5; Controlled Substances Act, § 101 et seq., 21 U.S.C.A. § 801 et seq.; West's Ann.Cal.Health & Safety Code § 11362.5.

Application of Controlled Substances Act (CSA) to growers and users of marijuana for medical purposes, as otherwise authorized by California Compassionate Use Act, did not violate substantive due process guarantees, since right to decide on physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies had failed, was not deeply rooted in United States' history and tradition and implicit in concept of ordered liberty, even though 11 states had passed laws decriminalizing marijuana for the seriously ill, others had passed resolutions recognizing that marijuana might have therapeutic value, and yet others had permitted limited use through closely monitored experimental treatment programs. U.S.C.A. Const.Amend. 5; Controlled Substances Act, § 101 et seq., 21 U.S.C.A. § 801 et seq.; West's Ann.Cal.Health & Safety Code § 11362.5.

**[17] Constitutional Law 92 ↪252.5**

92 Constitutional Law

92XII Due Process of Law

92k252.5 k. Rights, Interests, Benefits, or Privileges Involved, in General. Most Cited Cases  
 The mere enactment of a law, state or federal, that prohibits certain behavior does not necessarily mean that the behavior is not deeply rooted in this country's history and traditions, for purposes of determining whether the right is protected by substantive due process. U.S.C.A. Const.Amend. 5.

**[18] Civil Rights 78 ↪1457(5)**

78 Civil Rights

78III Federal Remedies in General

78k1449 Injunction

78k1457 Preliminary Injunction

78k1457(5) k. Criminal Law Enforcement; Prisons. Most Cited Cases

User of medical marijuana failed to demonstrate likelihood of success on her claim that Controlled Substances Act (CSA), as applied to prevent use of medical marijuana under California Compassionate Use Act, violated Tenth Amendment, and district court thus did not abuse its discretion in denying user's motion for preliminary injunction. U.S.C.A. Const.Amend. 10; Controlled Substances Act, § 101 et seq., 21 U.S.C.A. § 801 et seq.; West's Ann.Cal.Health & Safety Code § 11362.5.

**[19] States 360 ↪4.16(2)**

360 States

360I Political Status and Relations

360I(A) In General

360k4.16 Powers of United States and Infringement on State Powers

360k4.16(2) k. Federal Laws Invading State Powers. Most Cited Cases

Generally speaking, under the Tenth Amendment, a power granted to Congress trumps a competing claim based on a state's police powers. U.S.C.A. Const.Amend. 10.

**[20] Federal Courts 170B ↪611**

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review

170BVIII(D)1 Issues and Questions in Lower Court

170Bk611 k. Necessity of Presentation in General. Most Cited Cases

The general rule that the Court of Appeals will not consider arguments that are raised for the first time on appeal is subject to the exceptions that the Court may consider a new issue if: (1) there are exceptional circumstances why the issue was not raised in the trial court; (2) the new issue arises while the appeal is pending because of a change in the law; or (3) the issue presented is a pure question of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court.

**[21] Federal Courts 170B ↪611**

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.5

--- F.3d ----

Page 6

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
 (Cite as: --- F.3d ----)

170B Federal Courts  
 170BVIII Courts of Appeals  
 170BVIII(D) Presentation and Reservation in  
 Lower Court of Grounds of Review  
 170BVIII(D)1 Issues and Questions in  
 Lower Court  
 170Bk611 k. Necessity of Presentation  
 in General. Most Cited Cases  
 The Court of Appeals assesses prejudice to a party,  
 for purposes of deciding whether an issue is waived  
 if raised for the first time on appeal, by asking  
 whether the party is in a different position than it  
 would have been absent the alleged deficiency.

**[22] Federal Courts 170B ↪611**

170B Federal Courts  
 170BVIII Courts of Appeals  
 170BVIII(D) Presentation and Reservation in  
 Lower Court of Grounds of Review  
 170BVIII(D)1 Issues and Questions in  
 Lower Court  
 170Bk611 k. Necessity of Presentation  
 in General. Most Cited Cases  
 Even if a case falls within one of the exceptions to  
 the general rule that the Court of Appeals will not  
 consider arguments that are raised for the first time  
 on appeal, the Court must still decide whether the  
 particular circumstances of the case overcome the  
 presumption against hearing new arguments.

**[23] Federal Courts 170B ↪614**

170B Federal Courts  
 170BVIII Courts of Appeals  
 170BVIII(D) Presentation and Reservation in  
 Lower Court of Grounds of Review  
 170BVIII(D)1 Issues and Questions in  
 Lower Court  
 170Bk614 k. Nature and Theory of  
 Cause. Most Cited Cases  
 User of medical marijuana waived argument that  
 Controlled Substances Act (CSA) did not prohibit  
 her from possessing marijuana pursuant to a  
 doctor's order, even though such issue was pure  
 question of law and Government would suffer no  
 prejudice as result of failure to raise issue in trial  
 court, where user did not raise such argument  
 below, and Court of Appeals had instructed parties

to brief only certain claims that did not include such  
 argument. Controlled Substances Act, §§ 102(21),  
 404(a), 21 U.S.C.A. §§ 802(21), 844(a).

Robert A. Raich, (briefed) Oakland, CA and Randy  
 E. Barnett, (argued) Boston University School of  
 Law, Boston, MA, for the plaintiffs-appellants.  
 Mark T. Quinlivan, Assistant United States  
 Attorney, Boston, MA, for the defendants-appellees.

Appeal from the United States District Court for the  
 Northern District of California; Martin J. Jenkins,  
 District Judge, Presiding. D.C. No.  
 CV-02-04872-MJJ.

Before PREGERSON, C. ARLEN BEAM,<sup>FN\*\*</sup>  
 and PAEZ, Circuit Judges.  
 PREGERSON, Circuit Judge.

\*1 Plaintiff-Appellant Angel McClary Raich (“Raich  
 ”) is a seriously ill individual who uses marijuana  
 for medical purposes on the recommendation of her  
 physician. Such use is permitted under California  
 law. The remaining plaintiffs-appellants assist  
 Raich by growing marijuana for her treatment.

Appellants seek declaratory and injunctive relief  
 based on the alleged unconstitutionality of the  
 Controlled Substances Act, and a declaration that  
 medical necessity precludes enforcement of the  
 Controlled Substances Act against them. On March  
 5, 2003, the district court denied appellants' motion  
 for a preliminary injunction. We hear this matter on  
 remand following the Supreme Court's decision in  
*Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162  
 L.Ed.2d 1 (2005). For the reasons set forth below,  
 we affirm the district court.

**STATUTORY SCHEMES**

*I. The Controlled Substances Act*

Congress passed the Comprehensive Drug Abuse  
 Prevention and Control Act of 1970, Pub.L. No.  
 91-513, 84 Stat. 1236, to create a comprehensive  
 drug enforcement regime it called the Controlled  
 Substances Act, 21 U.S.C. § 801-971. Congress

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.0

--- F.3d ----

Page 7

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

established five “schedules” of “controlled substances.” See 21 U.S.C. § 802(6). Controlled substances are placed on a particular schedule based on their potential for abuse, their accepted medical use in treatment, and the physical and psychological consequences of abuse of the substance. See 21 U.S.C. § 812(b). Marijuana is a Schedule I controlled substance. 21 U.S.C. § 812(c), Sched. I(c)(10). For a substance to be designated a Schedule I controlled substance, it must be found: (1) that the substance “has a high potential for abuse”; (2) that the substance “has no currently accepted medical use in treatment in the United States”; and (3) that “[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.” 21 U.S.C. § 812(b)(1). The Controlled Substances Act sets forth procedures by which the schedules may be modified. See 21 U.S.C. § 811(a).

Under the Controlled Substances Act, it is unlawful to knowingly or intentionally “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance,” except as otherwise provided in the statute. 21 U.S.C. § 841(a)(1). Possession of a controlled substance, except as authorized under the Controlled Substances Act, is also unlawful. See 21 U.S.C. § 844(a).

## II. California's Compassionate Use Act of 1996

California voters passed Proposition 215 in 1996, which is codified as the Compassionate Use Act of 1996 (“Compassionate Use Act”). See Cal. Health & Safety Code § 11362.5. The Compassionate Use Act is intended to permit Californians to use marijuana for medical purposes by exempting patients, primary caregivers, and physicians from liability under California's drug laws. The Act explicitly states that its purpose is 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.

\*2 *Id.* § 11362.5(b)(1)(A). Another purpose of the Compassionate Use Act is “[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.” *Id.* § 11362.5(b)(1)(B). The Compassionate Use Act strives “[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.” *Id.* § 11362.5(b)(1)(C).

To achieve its goal, the Compassionate Use Act exempts from liability under California's drug laws “a patient, or ... a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.” *Id.* § 11362.5(d).

## FACTUAL & PROCEDURAL HISTORY

Appellant Angel McClary Raich is a Californian who uses marijuana for medical treatment. Raich has been diagnosed with more than ten serious medical conditions, including an inoperable brain tumor, a seizure disorder, life-threatening weight loss, nausea, and several chronic pain disorders. Raich's doctor, Dr. Frank Henry Lucido, testified that he had explored virtually every legal treatment alternative, and that all were either ineffective or resulted in intolerable side effects. Dr. Lucido provided a list of thirty-five medications that were unworkable because of their side effects.

Marijuana, on the other hand, has proven to be of great medical value for Raich. Raich has been using marijuana as a medication for nearly eight years, every two waking hours of every day. Dr. Lucido states that, for Raich, foregoing marijuana treatment may be fatal. As the district court put it, “[t]raditional medicine has utterly failed[Raich].” *Raich v. Ashcroft*, 248 F.Supp.2d 918, 921 (N.D.Cal.2003).

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.7

--- F.3d ----

Page 8

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
 (Cite as: --- F.3d ----)

Raich is unable to cultivate marijuana for her own use. Instead, Raich's caregivers, John Doe Number One and John Doe Number Two, cultivate it for her. They provide marijuana to Raich free of charge. They have joined this action as plaintiffs anonymously in order to protect Raich's access to medical marijuana.

This action arose in response to a law enforcement raid on the home of another medical marijuana user, former plaintiff-appellant Diane Monson.<sup>FN1</sup> On August 15, 2002, Butte County Sheriff's Department deputies, the Butte County District Attorney, and agents from the federal Drug Enforcement Agency ("DEA") came to Monson's home. After DEA agents took control of Monson's six marijuana plants, a three-hour standoff between state and federal authorities ensued. The Butte County deputies and district attorney concluded that Monson's use of marijuana was legal under the Compassionate Use Act. The DEA agents, after conferring with the U.S. Attorney for the Eastern District of California, concluded that Monson possessed the plants in violation of federal law. The DEA agents seized and destroyed Monson's six marijuana plants.

\*3 Fearing raids in the future and the prospect of being deprived of their medicinal marijuana, Raich, Monson, and the John Doe plaintiffs sued the United States Attorney General and the Administrator of the DEA in federal district court on October 9, 2002. The suit sought declaratory and injunctive relief. Specifically, plaintiffs-appellants argued: (1) that the Controlled Substances Act was unconstitutional as applied to them because the legislation exceeded Congress's Commerce Clause authority; (2) that through the Controlled Substances Act, Congress impermissibly exercised a police power that is reserved to the State of California under the Tenth Amendment; (3) that the Controlled Substances Act unconstitutionally infringed their fundamental rights protected by the Fifth and Ninth Amendments; and (4) that the Controlled Substances Act could not be enforced against them because their allegedly unlawful conduct was justified under the common law doctrine of necessity.

On October 30, 2002, the plaintiffs-appellants moved for a preliminary injunction. On March 4, 2003, the district court denied the motion by a published order. *See Raich v. Ashcroft*, 248 F.Supp.2d 918. The district court found that, "despite the gravity of plaintiffs' need for medical cannabis, and despite the concrete interest of California to provide it for individuals like them," the appellants had not established the required " 'irreducible minimum' of a likelihood of success on the merits under the law of this Circuit." *Id.* at 931.

On December 16, 2003, we reversed and remanded this matter to the district court to enter a preliminary injunction. *See Raich v. Ashcroft*, 352 F.3d 1222, 1235 (9th Cir.2003). We held that the plaintiffs-appellants had demonstrated a strong likelihood of success on the merits of their claim that the Controlled Substances Act, as applied to them, exceeded Congress's Commerce Clause authority. *See id.* at 1234. We did not reach plaintiffs-appellants' remaining arguments in favor of the preliminary injunction. *See id.* at 1227. The Government timely petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted certiorari on June 28, 2004. *See Ashcroft v. Raich*, 542 U.S. 936, 124 S.Ct. 2909, 159 L.Ed.2d 811 (2004).

On June 6, 2005, the Supreme Court vacated our opinion and held that Congress's Commerce Clause authority includes the power to prohibit purely intrastate cultivation and use of marijuana. *See Gonzales v. Raich*, 125 S.Ct. at 2215. The Court remanded the case to us to address plaintiffs-appellants's remaining legal theories in support of a preliminary injunction. *See id.* On remand, Raich renews her claims based on common law necessity, fundamental rights protected by the Fifth and Ninth Amendments, and rights reserved to the states under the Tenth Amendment. She also argues for the first time that the Controlled Substances Act, by its terms, does not prohibit her from possessing and using marijuana if permitted to do so under state law. We have jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(a)(1).

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.8

--- F.3d ----

Page 9

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
 (Cite as: --- F.3d ----)

## STANDING & STANDARD OF REVIEW

\*4 [1][2] To satisfy the requirements of constitutional standing, “the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.” *Mujahid v. Daniels*, 413 F.3d 991, 994 (9th Cir.2005) (citing *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998)). Furthermore, the injury must be: (1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical. *See United States v. Antelope*, 395 F.3d 1128, 1132 (9th Cir.2005).

[3] We are convinced that the requirements of constitutional standing have been met here.<sup>FN2</sup> Although Raich has not suffered any past injury, she is faced with the threat that the Government will seize her medical marijuana and prosecute her for violations of federal drug law. The threat posed by deprivation of her medical treatment is serious and concrete: Raich's doctor testified that foregoing medical marijuana treatment might be fatal. The threat is not speculative or conjectural: DEA agents previously seized and destroyed the medical marijuana of former plaintiff-appellant Diane Monson. Monson's withdrawal from this action does not change the fact that DEA agents have-and may again-seize and destroy medical marijuana possessed by gravely ill Californians, including Raich. Finally, it is clear that Raich's threatened injury may be fairly traced to the defendants, and that a favorable injunction from this court would redress Raich's threatened injury.

[4][5][6][7] A district court's decision regarding preliminary injunctive relief is subject to limited review. *See Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir.2004). The court should be reversed only if it abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See id.* A preliminary injunction must be supported by findings of fact, reviewed for clear error. *See Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1239 (9th Cir.2001). The district court's conclusions of law are reviewed de novo. *See Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1221 (9th

Cir.2003).

## DISCUSSION

[8] “The standard for granting a preliminary injunction balances the plaintiff's likelihood of success against the relative hardship to the parties.” *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir.2003). We have two different criteria for determining whether preliminary injunctive relief is warranted. “Under the traditional criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to [the] plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).” *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir.2005) (internal quotations omitted). We also use an alternative test whereby a court may grant the injunction if the plaintiff demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in his favor. *See id.*

\*5 [9] The two alternative formulations “represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum.” *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir.1998) (internal quotation marks and citations omitted).

### I. Common Law Necessity

[10] Raich first argues that she has a likelihood of success on the merits of her claim that the common law doctrine of necessity bars the federal government from enforcing the Controlled Substances Act against her medically-necessary use of marijuana.<sup>FN3</sup> Raich avers that she is faced with a choice of evils: to either obey the Controlled Substances Act and endure excruciating pain and possibly death, or violate the terms of the

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.9

--- F.3d ----

Page 10

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

Controlled Substances Act and obtain relief from her physical suffering.

The necessity defense “traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils” and the actor had no “reasonable, legal alternative to violating the law.” *United States v. Bailey*, 444 U.S. 394, 410, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980); *see also* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.1 at 116 (2d ed. 2003 & Supp.2005). As we have recognized,

In some sense, the necessity defense allows us to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it, subject to court review, when a real legislature would formally do the same under those circumstances. For example, by allowing prisoners who escape a burning jail to claim the justification of necessity, we assume the lawmaker, confronting this problem, would have allowed for an exception to the law proscribing prison escapes.

*United States v. Schoon*, 971 F.2d 193, 196-97 (9th Cir.1991).

The Supreme Court has recognized that a common law necessity defense exists even when a statute does not explicitly include the defense. *See Bailey*, 444 U.S. at 425, 100 S.Ct. 624 (Blackmun, J., dissenting) (having “no difficulty in concluding that Congress intended the defenses of duress and necessity to be available” to prison escape defendant); *id.* at 415 n. 11, 100 S.Ct. 624 (Rehnquist, J., majority opinion) (noting that the majority's “principal difference with the dissent, therefore, is not as to the existence of [the necessity] defense but as to the importance of surrender as an element of it”).<sup>FN4</sup>

#### A. *Whether Raich Satisfies the Requirements of the Common Law Necessity Defense*<sup>FN5</sup>

Here, although we ultimately conclude that Raich is not entitled to injunctive relief on the basis of her common law necessity claim, we briefly note that, in light of the compelling facts before the district court, Raich appears to satisfy the threshold

requirements for asserting a necessity defense under our case law. We have set forth the following general standards for a necessity defense:

\*6 As a matter of law, a defendant must establish the existence of four elements to be entitled to a necessity defense: (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.

*United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir.1989).

We first ask whether Raich was faced with a choice of evils and whether she chose the lesser evil. Raich's physician presented uncontroverted evidence that Raich “cannot be without cannabis as medicine” because she would quickly suffer “precipitous medical deterioration” and “could very well” die. If Raich obeys the Controlled Substances Act she will have to endure intolerable pain including severe chronic pain in her face and jaw muscles due to temporomandibular joint dysfunction and bruxism, severe chronic pain and chronic burning from fibromyalgia that forces her to be flat on her back for days, excruciating pain from non-epileptic seizures, heavy bleeding and severely painful menstrual periods due to a uterine fibroid tumor, and acute weight loss resulting possibly in death due to a life-threatening wasting disorder.<sup>FN6</sup> Alternatively, Raich can violate the Controlled Substances Act and avoid the bulk of those debilitating pains by using marijuana. The evidence persuasively demonstrates that, in light of her medical condition, Raich satisfies the first prong of the necessity defense.

We next ask whether Raich is acting to prevent imminent harm. All medical evidence in the record suggests that, if Raich were to stop using marijuana, the acute chronic pain and wasting disorders would immediately resume. The Government does not dispute the severity of her conditions or the likelihood that her pain would recur if she is deprived of marijuana. Raich has therefore established that the harm she faces is imminent.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1-10

--- F.3d ----

Page 11

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

Prong three asks whether Raich reasonably anticipated a causal connection between her unlawful conduct and the harm to be avoided. We believe that Raich's belief in the causal connection is reasonable. Here, Raich's licensed physician testified to the causal connection between her physical condition and her need to use marijuana. The Government did not dispute this medical evidence. Because Raich has clearly demonstrated the medical correlation, she has satisfied prong three.<sup>FN7</sup>

Finally, we ask whether Raich had any legal alternatives to violating the law. Dr. Lucido's testimony makes clear that Raich had no legal alternatives: Raich "has tried essentially all other legal alternatives to cannabis and the alternatives have been ineffective or result in intolerable side effects." Raich's physician explained that the intolerable side effects included violent nausea, shakes, itching, rapid heart palpitations, and insomnia. We agree that Raich does not appear to have any legal alternative to marijuana use.<sup>FN8</sup>

\*7 Although Raich appears to satisfy the factual predicate for a necessity defense, it is not clear whether the Supreme Court's decision in *United States v. Oakland Cannabis Buyers' Cooperative* forecloses a necessity defense to a prosecution of a seriously ill defendant under the Controlled Substances Act. 532 U.S. 483, 484 n. 7, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001). Similarly, whether the Controlled Substances Act encompasses a legislative "determination of values," *id.* at 491, 121 S.Ct. 1711, that would preclude a necessity defense is also an unanswered question. These are difficult issues, and in light of our conclusion below that Raich's necessity claim is best resolved within the context of a specific prosecution under the Controlled Substances Act, where the issue would be fully joined, we do not attempt to answer them here.

*B. Whether a Viable Necessity Defense Gives Raich a Likelihood of Success on the Merits on this Action for Injunctive Relief*

[11] Irrespective of the compelling factual basis for

Raich's necessity claim, whether Raich has a likelihood of success on the merits in this action for injunctive relief is a different question. We conclude that Raich has not demonstrated that she will likely succeed in obtaining injunctive relief on the necessity ground.

[12][13][14] The necessity defense is an affirmative defense that removes criminal liability for violation of a criminal statute. *See* 2 LaFave, *Substantive Criminal Law* § 9.1(a) (2d ed. 2003 & Supp.2005). Necessity is essentially a justification for the prohibited conduct: the "harm caused by the justified behavior remains a legally recognized harm that is to be avoided whenever possible." Paul H. Robinson, *Criminal Law Defenses* § 24(a) (1984 & Supp.2006-2007). A common law necessity defense thus singles out conduct that is "otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure." LaFave, *Substantive Criminal Law* § 9.1(a)(3) (2d ed. 2003 & Supp.2005) (quotation omitted). The necessity defense serves to protect the defendant from criminal liability.

Though a necessity defense may be available in the context of a criminal prosecution, it does not follow that a court should prospectively enjoin enforcement of a statute. Raich's violation of the Controlled Substances Act is a legally recognized harm, but the necessity defense shields Raich from liability for criminal prosecution during such time as she satisfies the defense. Thus, if Raich were to make a miraculous recovery that obviated her need for medical marijuana, her necessity-based justification defense would no longer exist. Similarly, if Dr. Lucido found an alternative treatment that did not violate the law—a legal alternative to violating the Controlled Substances Act—Raich could no longer assert a necessity defense. That is to say, a necessity defense is best considered in the context of a concrete case where a statute is allegedly violated, and a specific prosecution results from the violation. Indeed, oversight and enforcement of a necessity defense-based injunction would prove impracticable: the ongoing vitality of the injunction could hinge on factors including Raich's medical

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.11

--- F.3d ----

Page 12

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

condition or advances in lawful medical technology. Nothing in the common law or our cases suggests that the existence of a necessity defense empowers this court to enjoin the enforcement of the Controlled Substances Act as to one defendant.

\*8 Because common law necessity prevents criminal liability, but does not permit us to enjoin prosecution for what remains a legally recognized harm, we hold that Raich has not shown a likelihood of success on the merits on her medical necessity claim for an injunction.<sup>FN9</sup>

## II. Substantive Due Process

Raich contends that the district court erred by failing to protect her fundamental rights. Her argument focuses on unenumerated rights protected by the Fifth and Ninth Amendments to the Constitution under a theory of substantive due process.<sup>FN10</sup>

### A. Substantive Due Process, Generally

[15] Although the Fifth Amendment's Due Process Clause states only that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law," see U.S. Const. amend. V, it unquestionably provides substantive protections for certain unenumerated fundamental rights.<sup>FN11</sup> "The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); see also *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 847, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) ("It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view." (internal citation omitted)). As Justice Harlan put it over forty years ago: [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited

by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

*Poe v. Ullman*, 367 U.S. 497, 543, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting) (citations omitted); see also *Casey*, 505 U.S. at 849, 112 S.Ct. 2791 (noting that Justice Harlan's position was adopted by the Court in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)). These contentions find support in the Ninth Amendment, which provides that "[t]he 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.

In *Glucksberg*, the Supreme Court set forth the two elements of the substantive due process analysis. First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.

\*9 *Glucksberg*, 521 U.S. at 720-21, 117 S.Ct. 2258 (citations omitted).

The Supreme Court has a long history of recognizing unenumerated fundamental rights as protected by substantive due process, even before the term evolved into its modern usage. See, e.g., *Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (to have an abortion); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (same);

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.12

--- F.3d ----

Page 13

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

*Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (to use contraception); *Griswold*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (to use contraception, to marital privacy); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (to marry); *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (to bodily integrity); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (to have children); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (to direct the education and upbringing of one's children); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (same). But the Court has cautioned against the doctrine's expansion. See *Glucksberg*, 521 U.S. at 720, 117 S.Ct. 2258 (stating that the Court must restrain the expansion of substantive due process "because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended" and because judicial extension of constitutional protection for an asserted substantive due process right "place[s] the matter outside the arena of public debate and legislative action" (citations omitted)); *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (noting that "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field" (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992))).

Bearing that rubric in mind, we consider Raich's substantive due process claim. In the present case, it is helpful to begin with the second step—the description of the asserted fundamental right—before determining whether the right is deeply rooted in this nation's history and traditions and implicit in the concept of ordered liberty.

#### B. Breadth of the Fundamental Right

*Glucksberg* instructs courts to adopt a narrow definition of the interest at stake. See 521 U.S. at 722, 117 S.Ct. 2258 ("[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases."); see also *Flores*, 507 U.S. at 302[, 113 S.Ct. 1439] (noting that the

asserted liberty interest must be construed narrowly to avoid unintended consequences). Substantive due process requires a "careful description of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721, 117 S.Ct. 2258 (quotation and citations omitted).

*Glucksberg* involved a substantive due process challenge to Washington state's ban on assisted suicide. See *id.* at 705-06, 117 S.Ct. 2258. The Court in *Glucksberg* rejected the suggestion that the interest at stake was the "right to die" or "the right to choose a humane, dignified death," and instead held that the narrow question before the Court was "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." *Id.* at 722-23, 117 S.Ct. 2258.

\*10 Another case that considered and rejected several asserted fundamental rights involved unaccompanied alien juveniles who are in the custody of immigration authorities. See *Flores*, 507 U.S. at 294[, 113 S.Ct. 1439]. The *Flores* Court rejected the proposed fundamental right of "freedom from physical restraint" because it was not an accurate depiction of the true issue in the case. See *Flores*, 507 U.S. at 302[, 113 S.Ct. 1439]. The Court also rejected the formulation of the "right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives." *Id.* Instead, the *Flores* Court examined the narrow "right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Id.*; see also *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (recognizing narrowly defined fundamental right to engage in consensual sexual activity, including homosexual sodomy, in the home without government intrusion).

#### C. Raich's Asserted Fundamental Interest

Raich asserts that she has a fundamental right to "mak[e] life-shaping medical decisions that are

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.13

--- F.3d ----

Page 14

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
 (Cite as: --- F.3d ----)

necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life.” We note that Raich's carefully crafted interest comprises several fundamental rights that have been recognized at least in part by the Supreme Court. See *Lawrence*, 539 U.S. at 574, 123 S.Ct. 2472 (recognizing that “the Constitution demands [respect] for the autonomy of the person in making [personal] choices”); *Casey*, 505 U.S. at 849, 112 S.Ct. 2791 (noting importance of protecting “bodily integrity”); *id.* at 852, 112 S.Ct. 2791 (observing that a woman's “suffering is too intimate and personal” for government to compel such suffering by requiring woman to carry a pregnancy to term).

Yet, Raich's careful statement does not narrowly and accurately reflect the right that she seeks to vindicate. Conspicuously missing from Raich's asserted fundamental right is its centerpiece: that she seeks the right to use *marijuana* to preserve bodily integrity, avoid pain, and preserve her life. <sup>FN12</sup> As in *Glucksberg*, *Flores*, and *Cruzan*, the right must be carefully stated and narrowly identified before the ensuing analysis can proceed. Accordingly, we will add the centerpiece—the use of marijuana—to Raich's proposed right. <sup>FN13</sup>

Accordingly, the question becomes whether the liberty interest specially protected by the Due Process Clause embraces a right to make a life-shaping decision on a physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed.

*D. Whether the Asserted Right is “Deeply Rooted in This Nation's History and Tradition” and “Implicit in the Concept of Ordered Liberty”*

\*11 [16] We turn to whether the asserted right is “deeply rooted in this Nation's history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” *Glucksberg*, 521 U.S. at 720-21, 117 S.Ct. 2258.

It is beyond dispute that marijuana has a long

history of use-medically and otherwise-in this country. Marijuana was not regulated under federal law until Congress passed the Marihuana Tax Act of 1937, Pub.L. No. 75-348, 50 Stat. 551 (repealed 1970), and marijuana was not prohibited under federal law until Congress passed the Controlled Substances Act in 1970. See *Gonzales v. Raich*, 125 S.Ct. at 2202. There is considerable evidence that efforts to regulate marijuana use in the early-twentieth century targeted recreational use, but permitted medical use. See Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L.Rev. 971, 1010, 1027, 1167 (1970) (noting that all twenty-two states that had prohibited marijuana by the 1930s created exceptions for medical purposes). By 1965, although possession of marijuana was a crime in all fifty states, almost all states had created exceptions for “persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person.” *Leary v. United States*, 395 U.S. 6, 16-17, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

[17] The history of medical marijuana use in this country took an about-face with the passage of the Controlled Substances Act in 1970. Congress placed marijuana on Schedule I of the Controlled Substances Act, taking it outside of the realm of all uses, including medical, under federal law. As the Supreme Court noted in *Gonzales v. Raich*, 125 S.Ct. at 2199, no state permitted medical marijuana usage until California's Compassionate Use Act of 1996. Thus, from 1970 to 1996, the possession or use of marijuana-medically or otherwise-was proscribed under state and federal law. <sup>FN14</sup>

Raich argues that the last ten years have been characterized by an emerging awareness of marijuana's medical value. She contends that the rising number of states that have passed laws that permit medical use of marijuana or recognize its therapeutic value is additional evidence that the right is fundamental. Raich avers that the asserted right in this case should be protected on the “emerging awareness” model that the Supreme Court used in *Lawrence v. Texas*, 539 U.S. at 571, 123 S.Ct. 2472.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.14

--- F.3d ----

Page 15

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

The *Lawrence* Court noted that, when the Court had decided *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), “[twenty-four] States and the District of Columbia had sodomy laws.” *Lawrence*, 539 U.S. at 572, 123 S.Ct. 2472. By the time a similar challenge to sodomy laws arose in *Lawrence* in 2004, only thirteen states had maintained their sodomy laws, and there was a noted “pattern of nonenforcement.” *Id.* at 573, 123 S.Ct. 2472. The Court observed that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.” *Id.* at 579, 123 S.Ct. 2472.

\*12 Though the *Lawrence* framework might certainly apply to the instant case, the use of medical marijuana has not obtained the degree of recognition today that private sexual conduct had obtained by 2004 in *Lawrence*. Since 1996, ten states other than California have passed laws decriminalizing in varying degrees the use, possession, manufacture, and distribution of marijuana for the seriously ill. *See* Alaska Stat. § 11.71.090; Colo.Rev.Stat. § 18-18-406.3; Haw.Rev.Stat. § 329-125; Me.Rev.Stat. Ann. tit. 22, § 2383-B; Mont.Code Ann. § 50-46-201; Nev.Rev.Stat. § 453A.200; Or.Rev.Stat. § 475.319; R.I. Gen. Laws § 21-28.6-4; Vt. Stat. Ann. tit. 18, § 4474b; Wash. Rev.Code § 69.51A.040. Other states have passed resolutions recognizing that marijuana may have therapeutic value, and yet others have permitted limited use through closely monitored experimental treatment programs.<sup>FN15</sup>

We agree with Raich that medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law as well. But that legal recognition has not yet reached the point where a conclusion can be drawn that the right to use medical marijuana is “fundamental” and “implicit in the concept of ordered liberty.” *See Glucksberg*, 521 U.S. at 720-21, 117 S.Ct. 2258 (citations omitted). For the time being, this issue remains in “the arena of public debate and legislative action.” *Id.* at 720, 117 S.Ct. 2258; *see also Gonzales v. Raich*, 125 S.Ct. at 2215.

As stated above, Justice Anthony Kennedy told us

that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.” *Lawrence*, 539 U.S. at 579, 123 S.Ct. 2472. For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected. Until that day arrives, federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering.<sup>FN16</sup>

### III. Tenth Amendment

[18] Third, Raich contends that the Controlled Substances Act infringes upon the sovereign powers of the State of California, most notably the police powers, as conferred by the Tenth Amendment. The district court found that, as a valid exercise of Congress's Commerce Clause powers, the Controlled Substances Act could curtail the states' exercise of their police powers without violating the Tenth Amendment. *See Raich v. Ashcroft*, 248 F.Supp.2d at 927. The district court further held that the Controlled Substances Act regulates individual behavior and does not force the state to take any action. *Id.*

The Tenth Amendment reads, in its entirety: “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. Police power is unquestionably an area of traditional state control.

\*13 Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, ... matter[s] of local concern, the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.

*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 116

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.15

--- F.3d ----

Page 16

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

S.Ct. 2240, 135 L.Ed.2d 700 (1996) (internal citations and quotation marks omitted). The Compassionate Use Act, aimed at providing for the health of the state's citizens, appears to fall squarely within the general rubric of the state's police powers.

[19] Generally speaking, however, a power granted to Congress trumps a competing claim based on a state's police powers. "The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981); see also *United States v. Jones*, 231 F.3d 508, 515 (9th Cir.2000) ("We have held that if Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment.").

The Supreme Court held in *Gonzales v. Raich* that Congress acted within the bounds of its Commerce Clause authority when it criminalized the purely intrastate manufacture, distribution, or possession of marijuana in the Controlled Substances Act. See 125 S.Ct. at 2215. Thus, after *Gonzales v. Raich*, it would seem that there can be no Tenth Amendment violation in this case. Raich concedes that recent Supreme Court decisions have largely foreclosed her Tenth Amendment claim, and she also concedes that this case does not implicate the "commandeering" line of cases.<sup>FN17</sup>

The Supreme Court's recent decision in *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed.2d 748 (Jan. 17, 2006) is not to the contrary. In that case, the Court invalidated an Interpretive Rule issued by the Attorney General on the basis of statutory construction, not on the basis of constitutional invalidity under the Tenth Amendment. See *id.* at 925. Because the Attorney General's Rule was "incongruous with the statutory purposes and design" of the Controlled Substances Act, the Rule had to be nullified. *Id.* at 921 (emphasis added). Although *Gonzales v. Oregon* undoubtedly implicates federalism issues, its holding is inapposite to Raich's Tenth Amendment claim.

We hold that Raich failed to demonstrate a likelihood of success on her claim that the Controlled Substances Act violates the Tenth Amendment. Accordingly, the district court did not abuse its discretion in denying Raich's motion for preliminary injunction on that basis.

#### IV. *The Controlled Substances Act, By Its Terms*

Finally, Raich argues that the plain text of the Controlled Substances Act does not prohibit her from possessing marijuana pursuant to a doctor's order. She observes that the Controlled Substances Act prohibits possession of a controlled substance "unless such substance was obtained ... pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice." 21 U.S.C. § 844(a). The Controlled Substances Act defines "practitioner" as "a physician ... licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices ... to distribute, dispense, [or] administer ... a controlled substance in the course of professional practice." *Id.* § 802(21). Raich contends that her doctor is a licensed physician who may, in the jurisdiction in which he practices, administer controlled substances, including marijuana under the Compassionate Use Act, pursuant to a valid prescription. Accordingly, she argues that her possession of marijuana is legal under the Controlled Substances Act.

\*14 [20] Raich raises this argument for the first time in her opening brief to our second review of her case. It is a long-standing rule in the Ninth Circuit that, generally, "we will not consider arguments that are raised for the first time on appeal." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir.1999). That rule is subject to the exceptions that we may consider a new issue if: (1) there are exceptional circumstances why the issue was not raised in the trial court; (2) the new issue arises while the appeal is pending because of a change in the law; or (3) the issue presented is a pure question of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court. See *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir.1990).

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.16

--- F.3d ----

Page 17

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
 (Cite as: --- F.3d ----)

[21] Raich does not address the waiver issue in her opening brief, nor does she cite any relevant exception that might apply to her argument. We observe that there do not appear to be any exceptional circumstances concerning why Raich did not raise the argument below, and that there has been no change in the law relevant to this argument. Thus, Raich's only argument against waiver of this claim is that it is a purely legal question, and that the Government will suffer no prejudice as a result of Raich's failure to raise the issue below.<sup>FN18</sup>

[22] Even if a case falls within one of the exceptions to waiver enunciated in *Carlson*, we must "still decide whether the particular circumstances of the case overcome our presumption against hearing new arguments." *Dream Palace*, 384 F.3d at 1005. Although Raich's Controlled Substances Act claim appears to fall within the third exception, we conclude that this claim is waived because of the "particular circumstances" surrounding the claim.

[23] Raich failed to raise this claim before the district court and before this court in her appeal in *Raich v. Ashcroft*, 352 F.3d 1222. Furthermore, when we requested renewed briefing for this appeal by our order of September 6, 2005, we directed the parties to brief the "remaining claims for declaratory and injunctive relief on the basis of the Tenth Amendment, the Fifth and Ninth Amendments, and the doctrine of medical necessity, as set forth in their complaint." *Raich v. Gonzales*, No. 03-15481 (9th Cir. Sept.6, 2005) (order directing renewed briefing). Because Raich did not raise this issue below, and because our order instructed the parties to brief only the three claims set forth above, we hold that Raich's claim based on the plain language of the Controlled Substances Act is waived. We express no opinion as to the merits of that claim.

### CONCLUSION

We conclude that Raich has not demonstrated a likelihood of success on the merits of her action for injunctive relief. First, we hold that Raich's common law necessity defense is not foreclosed by *Oakland*

*Cannabis* or the Controlled Substances Act, but that the necessity defense does not provide a proper basis for injunctive relief. Second, although changes in state law reveal a clear trend towards the protection of medical marijuana use, we hold that the asserted right has not yet gained the traction on a national scale to be deemed fundamental. Third, we hold that the Controlled Substances Act, a valid exercise of Congress's commerce power, does not violate the Tenth Amendment. Finally, we decline to reach Raich's argument that the Controlled Substances Act, by its terms, does not prohibit her possession and use of marijuana because this argument was not raised below.

\*15 Accordingly, the judgment of the district court is **AFFIRMED**.

BEAM, Circuit Judge, concurring and dissenting:

I concur in the result reached by the court in this case, more particularly its holding that "Raich has not demonstrated a likelihood of success on the merits of her action for injunctive relief" and that the district court's denial of an injunction should be affirmed. I dissent from the court's expansive consideration of the doctrine of common law necessity as well as from several of the factual findings and legal conclusions applied to this issue and other claims before the court.

### DISCUSSION

We should decide only the case that is properly before us, not any other, and we should leave for another day any claim or issue not ripe for consideration. When we do otherwise, we simply create obiturn dictum. *See, e.g., Carey v. Musladin*, --- U.S. ----, ----, 127 S.Ct. 649, 655, 166 L.Ed.2d 482 (2006) (Stevens, J., concurring) (citing *Sheet Metal Workers' v. EEOC*, 478 U.S. 421, 490, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986)).

This case returns to us on remand from the Supreme Court. But, the party that earlier supplied jurisdiction to the Supreme Court and to this court, Diane Monson, has withdrawn. *Ante* at ---- n. 1. Thus, the facts concerning Ms. Monson generously recited by the court are in no way relevant or material to the issues now raised by Raich.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.17

--- F.3d ----

Page 18

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

Accordingly, the court likely has no jurisdiction over any claim asserted by the plaintiffs in this appeal but most certainly no jurisdiction to decide whether Raich may assert the doctrine of common law necessity in a future criminal prosecution.

At oral argument, counsel for the parties conceded that there is not now pending nor has there ever been pending a prosecution or even a threatened prosecution of Raich for possession or use of personal amounts of medicinal marijuana. Indeed, counsel for Raich acknowledged at oral argument that, to his knowledge, there has never been a federal criminal prosecution for simple possession or use of medicinal marijuana against anyone anywhere in California. Counsel for the government likewise indicated a lack of knowledge of any such prosecution and stated that it would be “incredibly unlikely” that any such federal prosecution would ensue in the future. So, the court's statement, *ante* at ----, that “[a]lthough Raich has not suffered any past injury, she is faced with the threat that the Government will seize her medical marijuana and prosecute her for violations of federal drug law” is plainly not supported by the record.

Accordingly, I return to the issues of standing, ripeness and justiciability advanced in my earlier dissent in this case. With specific regard to the court's lengthy discussion of and rulings upon the doctrine of common law necessity, it is clear that “[W]here it is impossible to know whether a party will ever be found to have violated a statute, or how, if such a violation is found, those charged with enforcing the statute will respond, any challenge to that statute is premature.” *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 986 (9th Cir.1991). To satisfy Article III's standing requirements, a plaintiff must show that she has suffered a concrete and particularized injury in fact that is actual or imminent (not conjectural or hypothetical). Plaintiff must also show that the injury is fairly traceable to the challenged action of the defendant and that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Citizens for Better Forestry v. United States Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir.2003).

\*16 *Raich v. Ashcroft*, 352 F.3d 1222, 1235-36 (9th Cir.2003) (Beam, J., dissenting).

Here, as to Raich, there is no discrete, challenged action from which an injury can fairly be traced. *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1127 (9th Cir.1996), requires Raich to show a specific threat of prosecution, and she bears the burden of establishing that the statute in question is actually being enforced. A specific warning of prosecution may suffice, but “a general threat of prosecution is not enough to confer standing.” *Id.* Accordingly, the applicability, or not, of the doctrine of common law necessity is not a justiciable issue on this record and Raich currently has no standing to ask the court to consider the matter.

Assuming for purposes of discussion that the bare question of the viability of the doctrine is before us, I nonetheless respectfully disagree with substantial portions of the court's analysis of the matter.

The doctrine of common law (medical) necessity is an affirmative defense assertable only in a criminal prosecution. *E.g., United States v. Arellano-Rivera*, 244 F.3d 1119, 1125-26 (9th Cir.2001) (holding that “before a *defendant* may present evidence of a necessity defense, his offer of proof must establish that a reasonable jury could” ascertain all the elements of the defense) (emphasis added). After reference to several measures of potential injury and harm to Raich almost totally unrelated to a reasonably foreseeable criminal prosecution, the court ultimately recognizes the legal limitations of the defense, but only after issuing what amounts to a lengthy advisory opinion.

Here we are engaged in the review of a civil proceeding seeking declaratory relief and injunction, not a criminal adjudication. It is important to note that, contrary to the inference of the court in its factual dissertation, there has been no “testimony” in this case directly addressing the elements of this defense. The evidentiary record, such as it is, was developed in the district court through a request for a preliminary injunction under Rule 65 of the Federal Rules of *Civil Procedure*. All facts recited by the court, some of which are

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.18

--- F.3d ----

Page 19

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
 (Cite as: --- F.3d ----)

admittedly testimonial in nature, arise from written “declarations” provided by Raich, Monson, Dr. Lucido and Dr. Rose, Monson’s physician, in support of the injunction request. Yet, every case cited by the court concerning the viability of the doctrine and its elements involves a criminal prosecution.<sup>FN1</sup> The burden of proof of such a defense lies with the defendant and involves the following elements:

As a matter of law, a defendant must establish the existence of four elements to be entitled to a necessity defense: (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.

\*17 *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir.1989).

In this civil action, Raich is not presently in a posture to address elements one, two and three and cannot establish element four. She has not been faced with a “choice of evils,” one of which could lead to a criminal prosecution. Nor has she acted to prevent “imminent harm.” She has presented no evidence of a tested, adversarial nature sufficient to establish the causal relationship required by element three. And, she has not established and probably cannot establish that she has no legal alternative to violating the law.

The court states that “Raich’s physician [Dr. Frank Lucido] presented uncontroverted evidence that Raich ‘cannot be without *cannabis* as medicine’ because she would quickly suffer ‘precipitous medical deterioration’ and ‘could very well’ die.” *Ante* at ---- (emphasis added). This opinion evidence is, of course, gleaned from a written declaration seeking declaratory and injunctive relief while positing a very speculative happenstance. The opinion is not the fruit of an adversarial hearing involving the assertion of an affirmative defense by a criminal defendant in a criminal prosecution designed to test the admissibility and credibility of the proposed evidence. But even if Raich “cannot be without cannabis as medicine,” as Dr. Lucido

opines, cannabis (or its synthetic equivalent) as medicine is lawfully available to Raich through the prescription-dispensed drug Marinol.<sup>FN2</sup> And, newly crafted or presently existing drugs as yet untested by Raich may become known or available prior to any prosecution. So Raich may well have a legal alternative to the violation of the drug control laws.

I also cannot fully join the court’s analysis of *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001), as set forth in its footnote 4. *Ante* at ----. Although I do not concede that the Supreme Court’s discussion in *Oakland Cannabis* is dicta, I do agree with the court’s conclusion that the case does not abolish “common law necessity jurisprudence.”

Thus, while I do not concur in the court’s statement that “Raich appears to satisfy the threshold requirements for asserting a necessity defense under our case law,” *ante* at ----, I do acknowledge that she certainly *may* be eligible to advance such a defense to criminal liability in the context of an actual prosecution.

Finally, if I fully understand the majority’s approach, the most troubling aspect of its opinion is that it purports to let this court determine, on the evidence presented to the district court at the Rule 65 hearing, that Raich, and anyone similarly situated, is entitled to a medical necessity defense if criminally prosecuted in the future. I respectfully believe that this turns applicable federal criminal procedure on its head. The viability and applicability of this affirmative defense is a mixed question of law and fact. *Arellano-Rivera*, 244 F.3d at 1125. In a criminal prosecution of Raich for possession and use of marijuana for medicinal purposes, if it ever occurs, the issue of the sufficiency of the evidence to submit this particular defense to a jury is a question of law for the federal trial court. *Id.* The establishment of the factual elements of the defense, if submitted, is for the jury (or other trier of fact). *Id.* Imposition of this court’s rulings into a later prosecution would improperly pretermit established criminal procedure. Thus, the court’s medical necessity discussion is a wholly speculative and possibly unconstitutional

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.19

--- F.3d ----

Page 20

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

jurisprudential exercise.

### CONCLUSION

\*18 Accordingly, for the above-stated reasons, I dissent from portions of the court's factual findings and legal conclusions but concur in the denial of Raich's request for injunction and in the court's affirmance of the district court.

FN\* Karen Tandy is substituted for her predecessor, Asa Hutchinson, as Administrator of the Drug Enforcement Administration, pursuant to Fed. R.App. P. 43(c)(2).

FN\*\* The Honorable C. Arlen Beam, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

FN1. Plaintiff-Appellant Monson withdrew from this action on December 12, 2005.

FN2. We also note that the Supreme Court did not question constitutional standing in this case. *See Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1.

FN3. We address Raich's necessity claim before her constitutional substantive due process claim because "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Gilmore v. California*, 220 F.3d 987, 998 (9th Cir.2000) (quoting *NLRB v. Catholic Bishop*, 440 U.S. 490, 500, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979)).

FN4. Dicta in a recent Supreme Court decision questioned the ongoing vitality of common law necessity defense. The majority in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S.

483, 490, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001) ("*Oakland Cannabis*"), stated that "it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute." But the majority ultimately conceded that the "Court ha[d] discussed the possibility of a necessity defense without altogether rejecting it." *Id.* (citing *Bailey*, 444 U.S. at 415, 100 S.Ct. 624). Three Justices filed a separate concurrence in *Oakland Cannabis*, noting that "the Court gratuitously casts doubt on 'whether necessity can ever be a defense' to any federal statute that does not explicitly provide for it, calling such a defense into question by a misleading reference to its existence as an 'open question.'" *Id.* at 501, 121 S.Ct. 1711 (Stevens, J., concurring) (quoting majority opinion) (emphasis in original). "[O]ur precedent has expressed no doubt about the viability of the common-law defense, even in the context of federal criminal statutes that do not provide for it in so many words." *Id.* (citing *Bailey*, 444 U.S. at 415, 100 S.Ct. 624).

We do not believe that the *Oakland Cannabis* dicta abolishes more than a century of common law necessity jurisprudence. *See, e.g., Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884).

FN5. As the Supreme Court did in *Oakland Cannabis*, we first address the underlying principles of the common law necessity defense, and then turn to the defense's relationship to the Controlled Substances Act and the relief sought. *See, e.g., Oakland Cannabis*, 532 U.S. at 490-95, 121 S.Ct. 1711.

FN6. This litany of ailments makes no mention of the fact that Raich was confined to a wheelchair before she found effective pain management in marijuana, which restored her ability to walk. The seriousness of her conditions cannot be overemphasized: in 1997, the extreme physical and psychological pain led Raich

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.20

--- F.3d ----

Page 21

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

to attempt suicide. We are mindful that “extreme pain totally occupies the psychic world” and that “in serious pain the claims of the body utterly nullify the claims of the world.” Seth F. Kreimer, *The Second Time as Tragedy: The Assisted Suicide Cases and the Heritage of Roe v. Wade*, 24 Hastings Const. L.Q. 863, 895 & n. 157 (1997) (citations omitted). Raich has shown remarkable fortitude in pursuing this action to vindicate the rights of the infirm despite her precarious physical condition.

FN7. The causal connection prong limits the danger that a medical necessity exception could open the floodgates to widespread exceptions to the Controlled Substances Act. A marijuana “necessity” claimant absolutely must present, as Raich has, testimony that the allegedly unlawful action was taken at the direction of a doctor.

FN8. The Government suggests that certain federal programs exist which might allow Raich to obtain marijuana lawfully. *See, e.g.*, 21 U.S.C. § 823(f) (authorizing the Secretary of Health and Human Services to permit medical practitioners to design and implement research protocols using Schedule I substances, including marijuana, on a case-by-base basis). Amici curiae American Civil Liberties Union Foundation and Marijuana Policy Project and Rick Doblin, Ph.D make abundantly clear that this is not a tenable “alternative.” The program is highly restricted and has not accepted new medical marijuana patients since 1992.

FN9. We cannot ignore that the unusual circumstances of this case raise the danger of acute preconviction harms. The arrest of Raich or her suppliers, or the confiscation of her medical marijuana would cause Raich severe physical trauma. Under the right circumstances, Raich might obtain relief from the courts for preconviction

harm based on common law necessity. *See generally Jones v. City of Los Angeles*, 444 F.3d 1118, 1129-31 (9th Cir.2006) (noting that constitutionally cognizable harm can occur “at arrest, at citation, or even earlier,” and criticizing the government’s position that “would allow the state to criminalize a protected behavior or condition and cite, arrest, jail, and even prosecute individuals for violations, so long as no conviction resulted”).

FN10. We refer to these claims together as the substantive due process claim.

FN11. Although the Fifth Amendment’s Due Process Clause is applicable here, cases finding substantive rights under the Fourteenth Amendment’s Due Process Clause are equally relevant. *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (“We have long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. The Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests.” (emphasis added) (internal citation and quotation marks omitted)).

FN12. This degree of specificity is required. In *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990), the Court declined to frame the right as an unqualified right to die, and instead specifically construed the right as a “constitutionally protected right to refuse lifesaving hydration and nutrition.” *Id.* at 279, 110 S.Ct. 2841.

FN13. We also find persuasive the suggestion of amicus curiae California Medical Association and California Nurses Association: that the definition incorporate

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.21

--- F.3d ----

Page 22

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

reference to the fact that Raich seeks to establish this right “on a physician's advice.” We also think that resort to a Schedule I substance should be a last resort, and therefore narrow the right by limiting it to circumstances “when all other prescribed medications have failed.”

FN14. The mere enactment of a law, state or federal, that prohibits certain behavior does not necessarily mean that the behavior is not deeply rooted in this country's history and traditions. It is noteworthy, however, that over twenty-five years went by before any state enacted a law to protect the alleged right.

FN15. While these lesser endorsements of medical marijuana are relevant, they cannot carry the same weight as legislative enactments that fully decriminalize the use of medical marijuana. As the *Lawrence* Court considered the number of states that retained laws that prohibited sodomy, so too must we consider the number of states that continue to prohibit medical marijuana.

FN16. Because we find no fundamental right here, we do not address whether any law that limits that right is narrowly drawn to serve a compelling state interest. See *Flores*, 507 U.S. at 301-02, 113 S.Ct. 1439. We note, however, that, a recent Supreme Court case suggests that the Controlled Substances Act is not narrowly drawn when fundamental rights are concerned. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 1221-23, 163 L.Ed.2d 1017 (Feb. 21, 2006) (observing that “mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day,” and that the government had presented no evidence that narrow exceptions to the Schedule I prohibitions would undercut the government's ability to effectively enforce the Controlled Substances Act).

FN17. The commandeering cases involve attempts by Congress to direct states to perform certain functions, command state officers to administer federal regulatory programs, or to compel states to adopt specific legislation. See, e.g., *Printz v. United States*, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *New York v. United States*, 505 U.S. 144, 166, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). The Controlled Substances Act, by contrast, “does not require the[*state legislature*] to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.” *Reno v. Condon*, 528 U.S. 141, 151, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000).

FN18. We assess prejudice to a party by asking whether the party is in a different position than it would have been absent the alleged deficiency. See *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir.2003). The rule “serves to ensure that legal arguments are considered with the benefit of a fully developed factual record, offers appellate courts the benefit of the district court's prior analysis, and prevents parties from sand-bagging their opponents with new arguments on appeal.” *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir.2004). It does not appear that the Government has suffered any prejudice from Raich's failure to raise this claim below: the Government is in the same position that it would have otherwise been.

FN1. See, e.g., *United States v. Bailey*, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980) (discussing the choice of two evils doctrine); *United States v. Schoon*, 971 F.2d 193 (9th Cir.1991) (giving the burning jail example); *United States v. Aguilar*, 883 F.2d 662 (9th Cir.1989) (explaining the standards and elements of the necessity defense).

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.22

--- F.3d ----

Page 23

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07 Cal. Daily Op. Serv. 2698  
(Cite as: --- F.3d ----)

FN2. The active ingredient in Marinol is synthetic delta-9-tetrahydrocannabinol, a naturally occurring component of Cannabis sativa L, the marijuana Raich says she now consumes. Physicians' Desk Reference, 61st ed., 2007 at 3333.

C.A.9 (Cal.),2007.

Raich v. Gonzales

--- F.3d ----, 2007 WL 754759 (C.A.9 (Cal.)), 07  
Cal. Daily Op. Serv. 2698

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.23



125 S.Ct. 2195

Page 1

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)



Gonzales v. Raich  
U.S.,2005.

Supreme Court of the United States  
Alberto R. GONZALES, Attorney General, et al.,  
Petitioners,  
v.  
Angel McClary RAICH et al.  
No. 03-1454.

Argued Nov. 29, 2004.  
Decided June 6, 2005.

**Background:** Users and growers of marijuana for medical purposes under California Compassionate Use Act sought declaration that Controlled Substances Act (CSA) was unconstitutional as applied to them. The United States District Court for the Northern District of California, Martin J. Jenkins, J., 248 F.Supp.2d 918, denied plaintiffs' motion for preliminary injunction. Plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit, Pregerson, Circuit Judge, 352 F.3d 1222, reversed and remanded. Certiorari was granted.

**Holding:** The Supreme Court, Justice Stevens, held that application of CSA provisions criminalizing manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medical purposes did not violate Commerce Clause.

Vacated and remanded.

Justice Scalia concurred in judgment and filed opinion.

Justice O'Connor dissented and filed opinion in which Chief Justice Rehnquist and Justice Thomas joined in part.

Justice Thomas dissented and filed opinion.  
West Headnotes  
[1] Commerce 83 ↪ 82.6

83 Commerce  
83II Application to Particular Subjects and Methods of Regulation  
83II(J) Offenses and Prosecutions  
83k82.5 Federal Offenses and Prosecutions  
83k82.6 k. In General. Most Cited Cases

**Controlled Substances 96H** ↪ 6

96H Controlled Substances  
96HI In General  
96Hk4 Statutes and Other Regulations  
96Hk6 k. Validity. Most Cited Cases  
Application of Controlled Substances Act (CSA) provisions criminalizing manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medical purposes, as otherwise authorized by California Compassionate Use Act, did not exceed Congress' authority under Commerce Clause; prohibition of intrastate growth and use of marijuana was rationally related to regulation of interstate commerce in marijuana. U.S.C.A. Const. Art. 1, § 8, cl. 3; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404(a), 21 U.S.C.A. §§ 841(a)(1), 844(a); West's Ann.Cal.Health & Safety Code § 11362.5.

[2] Commerce 83 ↪ 7(2)

83 Commerce

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ATTACHMENT NO. 1.24

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
**(Cite as: 545 U.S. 1, 125 S.Ct. 2195)**

83I Power to Regulate in General  
 83k2 Constitutional Grant of Power to Congress  
 83k7 Internal Commerce of States  
 83k7(2) k. Activities Affecting Interstate Commerce. Most Cited Cases  
 Commerce Clause grants Congress power to regulate purely local activities that are part of economic class of activities that have substantial effect on interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

### [3] Constitutional Law 92 ↪ 2483

92 Constitutional Law  
 92XX Separation of Powers  
 92XX(C) Judicial Powers and Functions  
 92k2483 k. Determination of Propriety of Classification. Most Cited Cases  
 (Formerly 92k70.1(5))  
 Where class of activities is regulated and that class is within reach of federal power, courts have no power to excise, as trivial, individual instances of class.

### [4] Commerce 83 ↪ 5

83 Commerce  
 83I Power to Regulate in General  
 83k2 Constitutional Grant of Power to Congress  
 83k5 k. Commerce Among the States. Most Cited Cases  
 State action cannot circumscribe Congress' plenary commerce power. U.S.C.A. Const. Art. 1, § 8, cl. 3.  
 West CodenotesNegative Treatment Vacated21  
 U.S.C. § 841(a)(1) \*\*2196 \*1 Syllabus<sup>FN\*</sup>

FN\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

California's Compassionate Use Act authorizes

limited marijuana use for medicinal purposes. Respondents Raich and Monson are California residents who both use doctor-recommended marijuana for serious medical conditions. After federal Drug Enforcement Administration (DEA) agents seized and destroyed all six of Monson's cannabis plants, respondents brought this action seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. Respondents claim that enforcing the CSA against them would violate the Commerce Clause and other constitutional provisions. The District Court denied respondents' motion for a preliminary injunction, but the Ninth Circuit reversed, finding that they had demonstrated a strong likelihood of success on the claim that the CSA is an unconstitutional exercise of Congress' Commerce Clause authority as applied to the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law. The court relied heavily on *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626, and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658, to hold that this separate class of purely local activities was beyond the reach of federal power.

\*2 *Held:* Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law. Pp. 2201-2215.

(a) For the purposes of consolidating various drug laws into a comprehensive statute, providing meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthening law enforcement tools \*\*2197 against international and interstate drug trafficking, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II of which is the CSA. To effectuate the statutory goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute,

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

dispense, or possess any controlled substance except as authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a). All controlled substances are classified into five schedules, § 812, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body, §§ 811, 812. Marijuana is classified as a Schedule I substance, § 812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment, § 812(b)(1). This classification renders the manufacture, distribution, or possession of marijuana a criminal offense. §§ 841(a)(1), 844(a). Pp. 2201-2204.

(b) Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce is firmly established. See, e.g., *Perez v. United States*, 402 U.S. 146, 151, 91 S.Ct. 1357, 28 L.Ed.2d 686. If Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. See, e.g., *id.*, at 154-155, 91 S.Ct. 1357. Of particular relevance here is *Wickard v. Filburn*, 317 U.S. 111, 127-128, 63 S.Ct. 82, 87 L.Ed. 122, where, in rejecting the appellee farmer's contention that Congress' admitted power to regulate the production of wheat for commerce did not authorize federal regulation of wheat production intended wholly for the appellee's own consumption, the Court established that Congress can regulate purely intrastate activity that is not itself "commercial," i.e., not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity. The similarities between this case and *Wickard* are striking. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity. In assessing the scope of Congress' Commerce Clause authority, the Court need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. E.g.,

*Lopez*, 514 U.S., at 557, 115 S.Ct. 1624. Given the enforcement<sup>3</sup> difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, the Court has no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Pp. 2204-2209.

(c) Respondents' heavy reliance on *Lopez* and *Morrison* overlooks the larger context of modern-era Commerce Clause jurisprudence preserved by those cases, while also reading those cases far too broadly. The statutory challenges at issue there were markedly different from the challenge here. Respondents ask the Court to excise individual applications of a concededly valid comprehensive statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for the Court has often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the **\*\*2198** courts have no power 'to excise, as trivial, individual instances' of the class." *Perez*, 402 U.S., at 154, 91 S.Ct. 1357. Moreover, the Court emphasized that the laws at issue in *Lopez* and *Morrison* had nothing to do with "commerce" or any sort of economic enterprise. See *Lopez*, 514 U.S., at 561, 115 S.Ct. 1624; *Morrison*, 529 U.S., at 610, 120 S.Ct. 1740. In contrast, the CSA regulates quintessentially economic activities: the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational means of regulating commerce in that product. The Ninth Circuit cast doubt on the CSA's constitutionality by isolating a distinct class of activities that it held to be beyond the reach of federal power: the intrastate, noncommercial cultivation, possession, and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law. However, Congress clearly acted rationally in

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

determining that this subdivided class of activities is an essential part of the larger regulatory scheme. The case comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the CSA's findings and the undisputed magnitude of the commercial market for marijuana, *Wickard* and its progeny foreclose that claim. Pp. 2209-2215.

352 F.3d 1222, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined as to all but Part III. THOMAS, J., filed a dissenting opinion.

Robert A. Raich, Oakland, David M. Michael, The DeMartini Historical, Landmark Building, San Francisco, CA, Randy E. Barnett, Boston University, School of Law, Boston, MA, Robert A. Long, Jr., Counsel of Record, Heidi C. Doerhoff, Joshua D. Greenberg, Covington & Burling, Washington, DC, for Respondents.

Paul D. Clement, Acting Solicitor General, Counsel of Record, Peter D. Keisler, Assistant Attorney General, Edwin S. Kneeder, Deputy Solicitor General, Lisa S. Blatt, Assistant to the Solicitor General, Mark B. Stern, Alisa B. Klein, Mark T. Quinlivan, Attorneys, Department of Justice, Washington, D.C., Brief for the Petitioners. For U.S. Supreme Court briefs, see: 2004 WL 1799022 (Pet. Brief) 2004 WL 2308766 (Resp. Brief) 2004 WL 2652615 (Reply. Brief)

Justice STEVENS delivered the opinion of the Court.

\*5 California is one of at least nine States that authorize the use of marijuana for medicinal purposes.<sup>FN1</sup> The question presented\*\*2199 in this case is whether the power vested in Congress by Article I, § 8, of the Constitution “[t]o make all Laws which shall be necessary and proper for carrying into Execution” its authority to “regulate Commerce with foreign Nations, and among the

several States” includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

FN1. See Alaska Stat. §§ 11.71.090, 17.37.010-17.37.080 (Lexis 2004); Colo. Const., Art. XVIII, § 14, Colo.Rev.Stat. § 18-18-406.3 (Lexis 2004); Haw.Rev.Stat. §§ 329-121 to 329-128 (2004 Cum.Supp.); Me.Rev.Stat. Ann., Tit. 22, § 2383-B(5) (West 2004); Nev. Const., Art. 4, § 38, Nev.Rev.Stat. §§ 453A.010-453A.810 (2003); Ore.Rev.Stat. §§ 475.300-475.346 (2003); Vt. Stat. Ann., Tit. 18, §§ 4472-4474d (Supp.2004); Wash. Rev.Code §§ 69.51.010-69.51.080 (2004); see also Ariz.Rev.Stat. Ann. § 13-3412.01 (West Supp.2004) (voter initiative permitting physicians to prescribe Schedule I substances for medical purposes that was purportedly repealed in 1997, but the repeal was rejected by voters in 1998). In November 2004, Montana voters approved Initiative 148, adding to the number of States authorizing the use of marijuana for medical purposes.

## I

California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana,<sup>FN2</sup> and at the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996.<sup>FN3</sup> The proposition was designed\*6 to ensure that “seriously ill” residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need.<sup>FN4</sup> THE ACT CREATES AN eXEmption from criminal prosecution for physicians,<sup>FN5</sup> as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
**(Cite as: 545 U.S. 1, 125 S.Ct. 2195)**

recommendation or approval of a physician.<sup>FN6</sup> A “primary caregiver” is a person who has consistently assumed responsibility for the housing, health, or safety of the patient.<sup>FN7</sup>

FN2. 1913 Cal. Stats. ch. 342, § 8a; see also Gieringer, *The Origins of Cannabis Prohibition in California*, *Contemporary Drug Problems*, 21-23 (rev.2005) Mar. available at <http://www.canorml.org/background/caloriginsmjproh.pdf> (all internet materials as visited June 2, 2005, and available in clerk of court's case file.

FN3. Cal. Health & Safety Code Ann. § 11362.5 . The California Legislature recently enacted additional legislation supplementing the Compassionate Use Act. §§ 11362.7-11362.9 (West Supp.2005).

FN4. “The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

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

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

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

11362.5(b)(1) .

FN5. “Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.” § 11362.5(c) .

FN6. “Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.” § 11362.5(d) .

FN7. § 11362.5(e) .

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to **\*\*2200** the terms of the Compassionate Use **\*7** Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as “John Does,” to provide her with locally grown marijuana at no charge. These caregivers also process the cannabis into hashish or keif, and Raich herself processes

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

some of the marijuana into oils, balms, and foods for consumption.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA), 84 Stat. 1242, 21 U.S.C. § 801 *et seq.*, to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. In their complaint and supporting affidavits, Raich and Monson described the severity of their afflictions, their repeatedly futile attempts \*8 to obtain relief with conventional medications, and the opinions of their doctors concerning their need to use marijuana. Respondents claimed that enforcing the CSA against them would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity.

The District Court denied respondents' motion for a preliminary injunction. *Raich v. Ashcroft*, 248 F.Supp.2d 918 (N.D.Cal.2003). Although the court found that the federal enforcement interests "wane[d]" when compared to the harm that California residents would suffer if denied access to medically necessary marijuana, it concluded that respondents could not demonstrate a likelihood of success on the merits of their legal claims. *Id.*, at 931.

A divided panel of the Court of Appeals for the Ninth Circuit reversed and ordered the District Court to enter a preliminary injunction.<sup>FN8</sup> *Raich v. Ashcroft*, 352 F.3d 1222 (2003). The court found that respondents had "demonstrated a strong

likelihood\*\*2201 of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority." *Id.*, at 1227. The Court of Appeals distinguished prior Circuit cases upholding the CSA in the face of Commerce Clause challenges by focusing on what it deemed to be the "separate and distinct class of activities" at issue in this case: "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law." *Id.*, at 1228. The \*9 court found the latter class of activities "different in kind from drug trafficking" because interposing a physician's recommendation raises different health and safety concerns, and because "this limited use is clearly distinct from the broader illicit drug market-as well as any broader commercial market for medicinal marijuana-insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." *Ibid.*

FN8. On remand, the District Court entered a preliminary injunction enjoining petitioners " 'from arresting or prosecuting Plaintiffs Angel McClary Raich and Diane Monson, seizing their medical cannabis, forfeiting their property, or seeking civil or administrative sanctions against them with respect to the intrastate, non-commercial cultivation, possession, use, and obtaining without charge of cannabis for personal medical purposes on the advice of a physician and in accordance with state law, and which is not used for distribution, sale, or exchange.' " Brief for Petitioners 9.

The majority placed heavy reliance on our decisions in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), as interpreted by recent Circuit precedent, to hold that this separate class of purely local activities was beyond the reach of federal power. In contrast, the dissenting judge concluded that the CSA, as applied to respondents, was clearly valid under *Lopez* and *Morrison*; moreover, he

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

thought it “simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in *Wickard v. Filburn*.” 352 F.3d, at 1235 (opinion of Beam, J., dissenting) (citation omitted).

The obvious importance of the case prompted our grant of certiorari. 542 U.S. 936, 124 S.Ct. 2909, 159 L.Ed.2d 811 (2004). The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. We accordingly vacate the judgment of the Court of Appeals.

#### \*10 II

Shortly after taking office in 1969, President Nixon declared a national “war on drugs.”<sup>FN9</sup> As the first campaign of that war, Congress set out to enact legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs.<sup>FN10</sup> That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236.

FN9. See D. Musto & P. Korsmeyer, *The Quest for Drug Control* 60 (2002) (hereinafter Musto & Korsmeyer).

FN10. H.R.Rep. No. 91-1444, pt. 2, p. 22 (1970) (hereinafter H.R. Rep.); 26

Congressional Quarterly Almanac 531 (1970) (hereinafter Almanac); Musto & Korsmeyer 56-57.

**\*\*2202** This was not, however, Congress' first attempt to regulate the national market in drugs. Rather, as early as 1906 Congress enacted federal legislation imposing labeling regulations on medications and prohibiting the manufacture or shipment of any adulterated or misbranded drug traveling in interstate commerce.<sup>FN11</sup> Aside from these labeling restrictions, most domestic drug regulations prior to 1970 generally came in the guise of revenue laws, with the Department of the Treasury serving as the Federal Government's primary enforcer.<sup>FN12</sup> For example, the primary drug control law, before being repealed by the passage of the CSA, was the Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970). The Harrison Act sought to exert control over the possession and sale of narcotics, specifically cocaine and opiates, by requiring producers, distributors, and purchasers to register with the Federal Government, by assessing taxes against \*11 parties so registered, and by regulating the issuance of prescriptions.<sup>FN13</sup>

FN11. Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768, repealed by Act of June 25, 1938, ch. 675, § 902(a), 52 Stat. 1059.

FN12. See *United States v. Doremus*, 249 U.S. 86, 39 S.Ct. 214, 63 L.Ed. 493 (1919); *Leary v. United States*, 395 U.S. 6, 14-16, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

FN13. See *Doremus*, 249 U.S., at 90-93, 39 S.Ct. 214.

Marijuana itself was not significantly regulated by the Federal Government until 1937 when accounts of marijuana's addictive qualities and physiological effects, paired with dissatisfaction with enforcement efforts at state and local levels, prompted Congress to pass the Marihuana Tax Act, 50 Stat. 551

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

(repealed 1970).<sup>FN14</sup> Like the Harrison Act, the Marihuana Tax Act did not outlaw the possession or sale of marijuana outright. Rather, it imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana, and required the payment of annual taxes in addition to transfer taxes whenever the drug changed hands.<sup>FN15</sup> Moreover, doctors wishing to prescribe marijuana for medical purposes were required to comply with rather burdensome administrative requirements.<sup>FN16</sup> Noncompliance exposed traffickers to severe federal penalties, whereas compliance would often subject them to prosecution under state law.<sup>FN17</sup> Thus, while the Marihuana Tax Act did not declare the drug illegal *per se*, the onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade.

FN14. R. Bonnie & C. Whitebread, *The Marijuana Conviction* 154-174 (1999); L. Grinspoon & J. Bakalar, *Marihuana, the Forbidden Medicine* 7-8 (rev. ed.1997) (hereinafter Grinspoon & Bakalar). Although this was the Federal Government's first attempt to regulate the marijuana trade, by this time all States had in place some form of legislation regulating the sale, use, or possession of marijuana. R. Isralowitz, *Drug Use, Policy, and Management* 134 (2d ed.2002).

FN15. *Leary*, 395 U.S., at 14-16, 89 S.Ct. 1532.

FN16. Grinspoon & Bakalar 8.

FN17. *Leary*, 395 U.S., at 16-18, 89 S.Ct. 1532.

Then in 1970, after declaration of the national "war on drugs," federal drug policy underwent a significant transformation. A number of noteworthy events precipitated \*12 this policy shift. First, in *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), this Court held

certain provisions of the Marihuana Tax Act and other narcotics legislation unconstitutional. Second, at the end of his term, President Johnson fundamentally reorganized the federal drug control agencies. The Bureau\*\*2203 of Narcotics, then housed in the Department of Treasury, merged with the Bureau of Drug Abuse Control, then housed in the Department of Health, Education, and Welfare (HEW), to create the Bureau of Narcotics and Dangerous Drugs, currently housed in the Department of Justice.<sup>FN18</sup> Finally, prompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act.<sup>FN19</sup>

FN18. Musto & Korsmeyer 32-35; 26 Almanac 533. In 1973, the Bureau of Narcotics and Dangerous Drugs became the DEA. See Reorg. Plan No. 2 of 1973, § 1, 28 CFR § 0.100 (1973).

FN19. The Comprehensive Drug Abuse Prevention and Control Act of 1970 consists of three titles. Title I relates to the prevention and treatment of narcotic addicts through HEW (now the Department of Health and Human Services). 84 Stat. 1238. Title II, as discussed in more detail above, addresses drug control and enforcement as administered by the Attorney General and the DEA. *Id.*, at 1242. Title III concerns the import and export of controlled substances. *Id.*, at 1285.

Title II of that Act, the CSA, repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.<sup>FN20</sup> Congress was particularly concerned with the \*13 need to prevent the diversion of drugs from legitimate to illicit channels.<sup>FN21</sup>

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

FN20. In particular, Congress made the following findings:

“(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

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

“(3) A major portion of the traffic in controlled substances flows through interstate and foreign 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 and direct effect upon interstate commerce because-

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

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

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

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

“(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

“(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.” 21 U.S.C. §§ 801(1)-(6).

FN21. See *United States v. Moore*, 423 U.S. 122, 135, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975); see also H.R. Rep., at 22, U.S.Code Cong. & Admin.News 1970, pp. 4566, 4596.

To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a). The CSA categorizes all controlled substances into five schedules. § 812. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and \*\*2204 their psychological and physical effects on the body. \*14 §§ 811, 812. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. §§ 821-830. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping. *Ibid.* 21 CFR § 1301 *et seq.* (2004).

In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW “that marihuana be retained within schedule I at least until the completion of certain studies now underway.” FN22 Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. § 812(b)(1). These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. § 812(b)(2). By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule,

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study. §§ 823(f), 841(a)(1), 844(a); see also *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 490, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001).

FN22. Id. at 61, U.S.Code Cong. & Admin.News 1970, pp. 4566, 4629 (quoting letter from Roger Egeberg, M.D.O. to Hon. Harley O. Staggers (Aug. 14, 1970)).

The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between \*15 schedules. § 811. Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug.  
FN23

FN23. Starting in 1972, the National Organization for the Reform of Marijuana Laws (NORML) began its campaign to reclassify marijuana. Grinspoon & Bakalar 13-17. After some fleeting success in 1988 when an Administrative Law Judge (ALJ) declared that the DEA would be acting in an "unreasonable, arbitrary, and capricious" manner if it continued to deny marijuana access to seriously ill patients, and concluded that it should be reclassified as a Schedule III substance, *Grinspoon v. DEA*, 828 F.2d 881, 883-884 (C.A.1 1987), the campaign has proved unsuccessful. The DEA Administrator did not endorse the ALJ's findings, 54 Fed.Reg. 53767 (1989), and since that time has routinely denied petitions to reschedule the drug, most recently in 2001. 66 Fed.Reg. 20038 (2001). The Court of Appeals for the District of Columbia Circuit has reviewed

the petition to reschedule marijuana on five separate occasions over the course of 30 years, ultimately upholding the Administrator's final order. See *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1133 (1994).

### III

[1] Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Brief for Respondents 22, 38. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession \*\*2205 of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation. As charted in considerable detail in *United States v. Lopez*, our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has \*16 evolved over time.<sup>FN24</sup> The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.<sup>FN25</sup> For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible.<sup>FN26</sup> Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress "ushered in a new era of federal regulation under the commerce power," beginning with the enactment of the Interstate Commerce Act in 1887, 24 Stat. 379, and the Sherman Antitrust Act in 1890, 26 Stat. 209, as amended, 15 U.S.C. § 2 *et seq.*<sup>FN27</sup>

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
**(Cite as: 545 U.S. 1, 125 S.Ct. 2195)**

FN24. *United States v. Lopez*, 514 U.S. 549, 552-558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); *id.*, at 568-574, 115 S.Ct. 1624 (KENNEDY, J., concurring); *id.*, at 604-607, 115 S.Ct. 1624 (SOUTER, J., dissenting).

FN25. See *Gibbons v. Ogden*, 9 Wheat. 1, 224, 6 L.Ed. 23 (1824) (opinion of Johnson, J.); Stern, That Commerce Which Concerns More States Than One, 47 Harv. L.Rev. 1335, 1337, 1340-1341 (1934); G. Gunther, *Constitutional Law* 127 (9th ed.1975).

FN26. See *Lopez*, 514 U.S., at 553-554, 115 S.Ct. 1624; *id.*, at 568-569, 115 S.Ct. 1624 (KENNEDY, J., concurring); see also *Granholm v. Heald*, 544 U.S. 460, 472 - 473, 125 S.Ct. 1885, 1895-1896, 161L.Ed.2d 796 (2005).

FN27. *Lopez*, 514 U.S., at 554, 115 S.Ct. 1624; see also *Wickard v. Filburn*, 317 U.S. 111, 121, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (“It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder” (footnotes omitted)).

Cases decided during that “new era,” which now spans more than a century, have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. *Perez v. United States*, 402 U.S. 146, 150, 91 S.Ct. 1357, 28 L.Ed.2d 686

(1971). Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate \*17 commerce. *Ibid.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Ibid.*; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937). Only the third category is implicated in the case at hand.

[2] Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic “class of activities” that have a substantial effect on interstate commerce. See, e.g., *Perez*, 402 U.S., at 151, 91 S.Ct. 1357; *Wickard v. Filburn*, 317 U.S. 111, 128-129, 63 S.Ct. 82, 87 L.Ed. 122 (1942). As we stated in *Wickard*, “even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if \*\*2206 it exerts a substantial economic effect on interstate commerce.” *Id.*, at 125, 63 S.Ct. 82. We have never required Congress to legislate with scientific exactitude. When Congress decides that the “ ‘total incidence’ ” of a practice poses a threat to a national market, it may regulate the entire class. See *Perez*, 402 U.S., at 154-155, 91 S.Ct. 1357 (quoting *Westfall v. United States*, 274 U.S. 256, 259, 47 S.Ct. 629, 71 L.Ed. 1036 (1927) (“[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so”)). In this vein, we have reiterated that when “ ‘a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.’ ” E.g., *Lopez*, 514 U.S., at 558, 115 S.Ct. 1624 (emphasis deleted) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196, n. 27, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968)).

Our decision in *Wickard*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122, is of particular relevance. In *Wickard*, we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, 52 Stat. 31, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. The

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

regulations established an allotment of 11.1 acres for Filburn's 1941 wheat crop, but he sowed 23 acres, intending to use the excess by consuming it on his own farm. Filburn \*18 argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize "federal regulation [of] production not intended in any part for commerce but wholly for consumption on the farm." *Wickard*, 317 U.S., at 118, 63 S.Ct. 82. Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote:

"The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.*, at 127-128, 63 S.Ct. 82.

*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.<sup>FN28</sup> Just as the Agricultural Adjustment Act was designed "to \*19 control the volume [of wheat] moving in interstate and foreign commerce in order\*\*2207 to avoid surpluses ..." and consequently control the market price, *id.*, at 115, 63 S.Ct. 82, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. See nn. 20-21, *supra*. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here

too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

FN28. Even respondents acknowledge the existence of an illicit market in marijuana; indeed, Raich has personally participated in that market, and Monson expresses a willingness to do so in the future. App. 59, 74, 87. See also *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 770, 774, n. 12, and 780, n. 17, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (discussing the "market value" of marijuana); *id.*, at 790, 114 S.Ct. 1937 (REHNQUIST, C. J., dissenting); *id.*, at 792, 114 S.Ct. 1937 (O'CONNOR, J., dissenting); *Whalen v. Roe*, 429 U.S. 589, 591, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (addressing prescription drugs "for which there is both a lawful and an unlawful market"); *Turner v. United States*, 396 U.S. 398, 417, n. 33, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970) (referring to the purchase of drugs on the "retail market").

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. *Wickard*, 317 U.S., at 128, 63 S.Ct. 82. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

substantial effect on supply and demand in the national market for that commodity.<sup>FN29</sup>

FN29. To be sure, the wheat market is a lawful market that Congress sought to protect and stabilize, whereas the marijuana market is an unlawful market that Congress sought to eradicate. This difference, however, is of no constitutional import. It has long been settled that Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity. *Lopez*, 514 U.S., at 571, 115 S.Ct. 1624 (KENNEDY, J., concurring) (“In the *Lottery Case*, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903), the Court rejected the argument that Congress lacked [the] power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit”); see also *Wickard*, 317 U.S., at 128, 63 S.Ct. 82 (“The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon”).

\*20 Nonetheless, respondents suggest that *Wickard* differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a “quintessential economic activity”—a commercial farm—whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court's reasoning.

The fact that Filburn's own impact on the market was “trivial by itself” was not a sufficient reason for removing him from the scope of federal regulation. 317 U.S., at 127, 63 S.Ct. 82. That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the

Court's analysis. Moreover, even though Filburn was indeed a commercial farmer, the activity he was engaged in—the cultivation of wheat for home consumption—was not treated by the Court as part of his commercial farming operation.<sup>FN30</sup> And while it \*\*2208 is true that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect.

FN30. See *Id.*, 317 U.S., at 125, 63 S.Ct. 82 (recognizing that Filburn's activity “may not be regarded as commerce”).

Findings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA. See n. 20, *supra*. The \*21 submissions of the parties and the numerous *amici* all seem to agree that the national, and international, market for marijuana has dimensions that are fully comparable to those defining the class of activities regulated by the Secretary pursuant to the 1938 statute.<sup>FN31</sup> RESPONDENTS NONETHEless insist that the csa cannot be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market. Be that as it may, we have never required Congress to make particularized findings in order to legislate, see *Lopez*, 514 U.S., at 562, 115 S.Ct. 1624; *Perez*, 402 U.S., at 156, 91 S.Ct. 1357, absent a special concern such as the protection of free speech, see, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664-668, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion). While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.<sup>FN32</sup>

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

FN31. The Executive Office of the President has estimated that in 2000 American users spent \$10.5 billion on the purchase of marijuana. Office of Nat. Drug Control Policy, Marijuana Fact Sheet 5 (Feb.2004), available at <http://www.whitehousedrugpolicy.gov/publications/factsht/marijuana/index.html>.

FN32. Moreover, as discussed in more detail above, Congress did make findings regarding the effects of intrastate drug activity on interstate commerce. See n. 20, *supra*. Indeed, even the Court of Appeals found that those findings “weigh[ed] in favor” of upholding the constitutionality of the CSA. 352 F.3d 1222, 1232 (C.A.9 2003) (case below). The dissenters, however, would impose a new and heightened burden on Congress (unless the litigants can garner evidence sufficient to cure Congress' perceived “inadequa[cies]”)—that legislation must contain detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme.

*Post*, at 2227-2228 (O'CONNOR, J., opinion of dissenting); *post*, at 2233 (THOMAS, J., opinion of dissenting). Such an exacting requirement is not only unprecedented, it is also impractical. Indeed, the principal dissent's critique of Congress for “not even” including “declarations” specific to marijuana is particularly unpersuasive given that the CSA initially identified 80 other substances subject to regulation as Schedule I drugs, not to mention those categorized in Schedules II-V. *Post*, at 2228 (O'CONNOR, J., opinion of dissenting). Surely, Congress cannot be expected (and certainly should not be required) to include specific findings on each and every substance contained therein in order to satisfy the dissenters' unfounded skepticism.

\*22 In assessing the scope of Congress' authority

under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a “rational basis” exists for so concluding. *Lopez*, 514 U.S., at 557, 115 S.Ct. 1624; see also *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Perez*, 402 U.S., at 155-156, 91 S.Ct. 1357; \*\*2209 *Katzenbach v. McClung*, 379 U.S. 294, 299-301, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964). Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, FN33 we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to “make all Laws which shall be necessary and proper” to “regulate Commerce ... among the several States.” U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

FN33. See n. 21, *supra* (citing sources that evince Congress' particular concern with the diversion of drugs from legitimate to illicit channels).

\*23 IV

[3] To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

broadly. Those two cases, of course, are *Lopez*, 514 U.S. 549, 115 S.Ct. 1624, and *Morrison*, 529 U.S. 598, 120 S.Ct. 1740. As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez*, 402 U.S., at 154, 91 S.Ct. 1357 (emphasis deleted) (quoting *Wirtz*, 392 U.S., at 193, 88 S.Ct. 2017); see also *Hodel*, 452 U.S., at 308, 101 S.Ct. 2352.

At issue in *Lopez*, 514 U.S. 549, 115 S.Ct. 1624, was the validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. 104 Stat. 4844-4845, 18 U.S.C. § 922(q)(1)(A). The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity. Distinguishing our earlier cases holding that comprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce, we held the statute invalid. We explained:

\*24 "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities\*\*2110 that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 514

U.S., at 561, 115 S.Ct. 1624.

The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. As explained above, the CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242-1284, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." Most of those substances—those listed in Schedules II through V—"have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." 21 U.S.C. § 801(1). The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project.

While the statute provided for the periodic updating of the five schedules, Congress itself made the initial classifications. It identified 42 opiates, 22 opium derivatives, and 17 hallucinogenic substances as Schedule I drugs. 84 Stat. 1248. Marijuana was listed as the 10th item in the 3d subcategory. That classification, unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many "essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut \*25 unless the intrastate activity were regulated." *Lopez*, 514 U.S., at 561, 115 S.Ct. 1624. FN34 Our opinion in *Lopez* casts no doubt on the validity of such a program.

FN34. The principal dissent asserts that by "[s]eizing upon our language in *Lopez*," *post*, at 2223 (opinion of O'CONNOR, J.), *i.e.*, giving effect to our well-established case law, Congress will now have an incentive to legislate broadly. Even putting aside the political checks that would generally curb Congress' power to

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
**(Cite as: 545 U.S. 1, 125 S.Ct. 2195)**

enact a broad and comprehensive scheme for the purpose of targeting purely local activity, there is no suggestion that the CSA constitutes the type of "evasive" legislation the dissent fears, nor could such an argument plausibly be made. *Post*, at 2223 (O'CONNOR, J., dissenting).

Nor does this Court's holding in *Morrison*, 529 U.S. 598, 120 S.Ct. 1740. The Violence Against Women Act of 1994, 108 Stat.1902, created a federal civil remedy for the victims of gender-motivated crimes of violence. 42 U.S.C. § 13981. The remedy was enforceable in both state and federal courts, and generally depended on proof of the violation of a state law. Despite congressional findings that such crimes had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*, and that our prior cases had identified a clear pattern of analysis: " 'Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.' " <sup>FN35</sup> *Morrison*, 529 U.S., at 610, 120 S.Ct. 1740.

FN35. *Lopez*, 514 U.S., at 560, 115 S.Ct. 1624; see also *id.*, at 573-574, 115 S.Ct. 1624 (KENNEDY, J., concurring) (stating that *Lopez* did not alter our "practical conception of commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy").

**\*\*2211** Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International **\*26** Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and

consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. <sup>FN36</sup> Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

FN36. See 16 U.S.C. § 668(a) (bald and golden eagles); 18 U.S.C. § 175(a) (biological weapons); § 831(a) (nuclear material); § 842(n)(1) (certain plastic explosives); § 2342(a) (contraband cigarettes).

The Court of Appeals was able to conclude otherwise only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." 352 F.3d, at 1229. The court characterized this class as "different in kind from drug trafficking." *Id.*, at 1228. The differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, *i.e.*, its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court **\*27** of Appeals was an essential part of the larger

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

regulatory scheme.

First, the fact that marijuana is used “for personal medical purposes on the advice of a physician” cannot itself serve as a distinguishing factor. *Id.*, at 1229. The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses. Moreover, the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner. Indeed, most of the substances classified in the CSA “have a useful and legitimate medical purpose.” 21 U.S.C. § 801(1). Thus, even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug,<sup>FN37</sup> \*\*2212 the CSA would still impose controls beyond what is required by California law. The CSA requires manufacturers, physicians, pharmacies, and other handlers of controlled substances to comply with statutory and regulatory provisions mandating registration with the DEA, compliance with specific production quotas, security controls to guard against diversion, recordkeeping and reporting obligations, and prescription requirements. See \*28 21 U.S.C. §§ 821-830; 21 CFR § 1301 *et seq.* (2004). Furthermore, the dispensing of new drugs, even when doctors approve their use, must await federal approval. *United States v. Rutherford*, 442 U.S. 544, 99 S.Ct. 2470, 61 L.Ed.2d 68 (1979). Accordingly, the mere fact that marijuana-like virtually every other controlled substance regulated by the CSA-is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.

FN37. We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I. See, *e.g.*, Institute of Medicine, *Marijuana and Medicine:*

*Assessing the Science Base* 179 (J. Joy, S. Watson, & J. Benson eds.1999) (recognizing that “[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC [Tetrahydrocannabinol] for pain relief, control of nausea and vomiting, and appetite stimulation”); see also *Conant v. Walters*, 309 F.3d 629, 640-643 (C.A.9 2002) (Kozinski, J., concurring) (chronicling medical studies recognizing valid medical uses for marijuana and its derivatives). But the possibility that the drug may be reclassified in the future has no relevance to the question whether Congress now has the power to regulate its production and distribution. Respondents' submission, if accepted, would place all homegrown medical substances beyond the reach of Congress' regulatory jurisdiction.

Nor can it serve as an “objective marke[r]” or “objective facto[r]” to arbitrarily narrow the relevant class as the dissenters suggest, *post*, at 2223 (O'CONNOR, J., opinion of dissenting); *post*, at 2235 (THOMAS, J., opinion of dissenting). More fundamentally, if, as the principal dissent contends, the personal cultivation, possession, and use of marijuana for medicinal purposes is beyond the “ ‘outer limits’ of Congress' Commerce Clause authority,” *post*, at 2220 (O'CONNOR, J., opinion of dissenting), it must also be true that such personal use of marijuana (or any other homegrown drug) for recreational purposes is also beyond those “ ‘outer limits,’ ” whether or not a State elects to authorize or even regulate such use. Justice THOMAS' separate dissent suffers from the same sweeping implications. That is, the dissenters' rationale logically extends to place *any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the “ ‘outer limits’ ” of Congress' Commerce Clause authority. One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but “visible to the \*29 naked eye,” *Lopez*, 514 U.S., at 563, 115 S.Ct. 1624, under any commonsense appraisal of the probable consequences of such an open-ended exemption.

[4] Second, limiting the activity to marijuana possession and cultivation “in accordance with state law” cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is “‘superior to that of the States to provide for the welfare or necessities of their inhabitants,’ ” however legitimate or dire those necessities may be. \*\*2213 *Wirtz*, 392 U.S., at 196, 88 S.Ct. 2017 (quoting *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426, 45 S.Ct. 176, 69 L.Ed. 352 (1925)). See also 392 U.S., at 195-196, 88 S.Ct. 2017; *Wickard*, 317 U.S., at 124, 63 S.Ct. 82 (“‘[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress’ ”). Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, see, e.g., *Morrison*, 529 U.S., at 661-662, 120 S.Ct. 1740 (BREYER, J., dissenting) (noting that 38 States requested federal intervention), so too state action cannot circumscribe Congress' plenary commerce power. See *United States v. Darby*, 312 U.S. 100, 114, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (“That power can neither be enlarged nor diminished by the exercise or non-exercise of state power”).<sup>FN38</sup>

FN38. That is so even if California's current controls (enacted eight years after the Compassionate Use Act was passed) are “[e]ffective,” as the dissenters would

have us blindly presume, *post*, at 2228 (O'CONNOR, J., opinion of dissenting); *Post*, at 2232, 2235 (THOMAS, J., opinion of dissenting). California's decision (made 34 years after the CSA was enacted) to impose “stric[t] controls” on the “cultivation and possession of marijuana for medical purposes,” *post*, at 2232 (THOMAS, J., dissenting), cannot retroactively divest Congress of its authority under the Commerce Clause. Indeed, Justice THOMAS' urgings to the contrary would turn the Supremacy Clause on its head, and would resurrect limits on congressional power that have long since been rejected. See *post*, at 2219 (SCALIA, J., concurring in judgment) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 424, 4 L.Ed. 579 (1819)) (“‘To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution’ ”).

Moreover, in addition to casting aside more than a century of this Court's Commerce Clause jurisprudence, it is noteworthy that Justice THOMAS' suggestion that States possess the power to dictate the extent of Congress' commerce power would have far-reaching implications beyond the facts of this case. For example, under his reasoning, Congress would be equally powerless to regulate, let alone prohibit, the intrastate possession, cultivation, and use of marijuana for *recreational* purposes, an activity which all States “strictly contro[l].”

Indeed, his rationale seemingly would require Congress to cede its constitutional power to regulate commerce whenever a State opts to exercise its “traditional police powers to define the criminal law and to

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
**(Cite as: 545 U.S. 1, 125 S.Ct. 2195)**

protect the health, safety, and welfare of their citizens.” *Post*, at 2234 (dissenting opinion).

\*30 Respondents acknowledge this proposition, but nonetheless contend that their activities were not “an essential part of a larger regulatory scheme” because they had been “isolated by the State of California, and [are] policed by the State of California,” and thus remain “entirely separated from the market.” *Tr. of Oral Arg.* 27. The dissenters fall prey to similar reasoning. See n. 38, *supra* this page. The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.

Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just “plausible” as the principal dissent concedes, *post*, at 2229 (O’CONNOR, J., opinion of dissenting), it is readily apparent. The exemption for physicians provides them with an economic incentive to grant their patients permission to use the drug. In contrast to most prescriptions for legal drugs, which limit the dosage and duration of the usage, under California law the doctor’s permission to \*31 recommend marijuana use is open-ended.\*\*2214 The authority to grant permission whenever the doctor determines that a patient is afflicted with “any other illness for which marijuana provides relief,” Cal. Health & Safety Code Ann. § 11362.5(b)(1)(A) (West Supp.2005), is broad enough to allow even the most scrupulous doctor to conclude that some recreational uses would be therapeutic.<sup>FN39</sup> And our cases have taught us that there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so.<sup>FN40</sup>

FN39. California’s Compassionate Use Act has since been amended, limiting the catchall category to “[a]ny other chronic or persistent medical symptom that either: ...

[s]ubstantially limits the ability of the person to conduct one or more major life activities as defined” in the Americans with Disabilities Act of 1990, or “[i]f not alleviated, may cause serious harm to the patient’s safety or physical or mental health.” Cal. Health & Safety Code Ann. §§ 11362.7(h)(12)(A) (B) (West Supp.2005).

FN40. See, e.g., *United States v. Moore*, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975); *United States v. Doremus*, 249 U.S. 86, 39 S.Ct. 214, 63 L.Ed. 493 (1919).

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market.<sup>FN41</sup> The likelihood that all such production will \*32 promptly terminate when patients recover or will precisely match the patients’ medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious.<sup>FN42</sup> Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so.<sup>FN43</sup> Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, a fact Justice O’CONNOR’s dissent conveniently disregards in arguing that the demonstrated\*\*2215 effect on commerce while admittedly “plausible” is ultimately “unsubstantiated,” *post*, at 2228, 2229, Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

FN41. The state policy allows patients to possess up to eight ounces of dried marijuana, and to cultivate up to 6 mature or 12 immature plants. Cal. Health & Safety Code Ann. § 11362.77(a) (West

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, 73 USLW 4407, 05 Cal. Daily Op. Serv. 4725, 2005 Daily Journal D.A.R. 6530, 18 Fla. L. Weekly Fed. S 327  
(Cite as: 545 U.S. 1, 125 S.Ct. 2195)

Supp.2005). However, the quantity limitations serve only as a floor. Based on a doctor's recommendation, a patient can possess whatever quantity is necessary to satisfy his medical needs, and cities and counties are given *carte blanche* to establish more generous limits. Indeed, several cities and counties have done just that. For example, patients residing in the cities of Oakland and Santa Cruz and in the counties of Sonoma and Tehama are permitted to possess up to 3 pounds of processed marijuana. Reply Brief for Petitioners 18-19 (citing Proposition 215 Enforcement Guidelines). Putting that quantity in perspective, 3 pounds of marijuana yields roughly 3,000 joints or cigarettes. Executive Office of the President, Office of National Drug Control Policy, What America's Users Spend on Illegal Drugs 24 (Dec.2001), [http://www.whitehousedrugpolicy.gov/publications/pdf/american\\_users\\_spend\\_2002.pdf](http://www.whitehousedrugpolicy.gov/publications/pdf/american_users_spend_2002.pdf). And the street price for that amount can range anywhere from \$900 to \$24,000. DEA, Illegal Drug Price and Purity Report (Apr.2003) (DEA-02058).

FN42. For example, respondent Raich attests that she uses 2.5 ounces of cannabis a week. App. 82. Yet as a resident of Oakland, she is entitled to possess up to 3 pounds of processed marijuana at any given time, nearly 20 times more than she uses on a weekly basis.

FN43. See, e.g., *People ex rel. Lungren v. Peron*, 59 Cal.App.4th 1383, 1386-1387, 70 Cal.Rptr.2d 20-23 (1997) (recounting how a Cannabis Buyers' Club engaged in an "indiscriminate and uncontrolled pattern of sale to thousands of persons among the general public, including persons who had not demonstrated any recommendation or approval of a physician and, in fact, some of whom were not under the care of a physician, such as undercover officers," and noting that "

some persons who had purchased marijuana on respondents' premises were reselling it unlawfully on the street").

So, from the "separate and distinct" class of activities identified by the Court of Appeals (and adopted by the dissenters), we are left with "the intrastate, noncommercial cultivation, possession and use of marijuana." 352 F.3d, at 1229. Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically \*33 rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim.

## V

Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases. We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Justice SCALIA, concurring in the judgment.  
I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the