No. 03-1454

In The
Supreme Court of the United States

JOHN D. ASHCROFT,
Attorney General, et al.,

Petitioners,

v.

ANGEL MCCLARY RAICH, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF REASON FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Controlled Substances Act, 21 U.S.C. § 801, *et seq*., exceed Congress' power under the Commerce Clause as applied to the intrastate cultivation and possession of marijuana for purported personal "medicinal" use or to the distribution of marijuana without charge for such use?

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Reason Foundation respectfully submits this brief *amicus curiae* in support of respondents on the merits.[1]

Amicus Curiae Reason Foundation is a national research and educational organization. Reason Foundation advances the ideas of individual liberty, free markets, and the rule of law. Reason Foundation uses journalism and public policy research to influence the frameworks and actions of journalists, policymakers, and opinion leaders.

The world leader in privatization, Reason Foundation is known for practical and innovative public policy ideas that emphasize competition, transparency, and accountability for results. Reason Foundation conducts research on the role of choice, local knowledge, and a dynamic market economy in human progress. Reason Foundation has participated as *Amicus Curiae* in significant cases involving individual rights and the rule of law, including *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Reason Foundation publishes *Reason* magazine, which has a circulation of 55,000. *Reason*, the magazine of Free Minds and Free Markets, covers politics, culture, and ideas.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored any part of this brief and no person or entity made a monetary contribution for the preparation or submission of this brief. Respondents have consented to the filing of this brief. The parties have provided written consent to the filing of this brief.

Reason Foundation is an Internal Revenue Code section 501(c)(3) nonprofit corporation incorporated in 1978 and funded by private, voluntary contributions.

SUMMARY OF ARGUMENT

Petitioners argue that the intrastate cultivation and possession of medical cannabis for personal, medicinal use by respondents, and those similarly situated, has a substantial affect on interstate commerce in marijuana.[2] Minimal empirical evidence is cited by petitioner to support their argument, and it appears unlikely that their conclusion can be substantiated. The Congressional findings referenced by petitioners do not take into account the affect of existing California law which continues to substantially prevent cannabis from being diverted into the commercial market.

Both California and federal law prohibit commerce in marijuana. California state law prohibits personal use and possession of marijuana, unless the person in possession can prove that they have an illness for which cannabis provides relief.

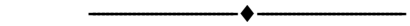
California does not enforce the federal prohibition on medicinal use of cannabis, which is its prerogative under our federal system. However, existing California law prohibits cannabis used for medicinal purposes from entering the commercial market. Cannabis cultivation is

[2] Federal law defines marijuana as "all parts of the plant Cannabis sativa L" with certain exceptions. 21 U.S.C. § 802(16). In this brief, the term "cannabis" refers to any part of the plant cannabis used for medical purposes.

limited to that which is necessary to satisfy the needs of cannabis patients. Patients can use cannabis for medicinal purposes only with the approval or recommendation of a physician. Physicians may only recommend or approve cannabis for illnesses for which cannabis provides relief. Physicians that falsely or fraudulently recommend or approve medical cannabis may have their licenses revoked. Physicians have been investigated and had their licenses suspended for such recommendations. The amount a qualified patient or their caregiver may possess is limited to that which is necessary to satisfy the patient's needs, and any patient or caregiver that puts cannabis into the stream of commerce remains subject to existing California and federal laws prohibiting sale. Therefore personal cultivation and possession of cannabis for medicinal purposes is unlikely to have a substantial affect on the interstate market for marijuana. Should circumstances change, the federal government no doubt would retain the right to prosecute such entry.

In the face of existing California law, there is scant evidence that federal law is necessary to prevent entry of cannabis into the illicit interstate market for recreational marijuana. Congress' findings in the Controlled Substances Act, 21 U.S.C. § 801 (1970) ("CSA") do not address the affect of tightly regulated, noncommercial possession of cannabis for medicinal purposes. Nor do they demonstrate that mere possession of cannabis for medicinal purposes has a substantial affect on interstate commerce – particularly where those in possession have a medical need for cannabis and their health and freedom would be jeopardized by letting their allotment enter the interstate market. Therefore, Congress' findings should be

disregarded as to the respondents and those similarly situated.



ARGUMENT

I. The Evolution of California's Medical Cannabis Law

As with federal law, California law generally prohibits the cultivation, possession, sale, and transportation of marijuana. Every person who transports, imports in-state, sells, furnishes, administers, or gives away any marijuana is guilty of a felony. Cal. Health & Safety Code § 11360(a). Possession and cultivation of marijuana are prohibited. *Id*. §§ 11357, 11358. Possession with intent to sell is a felony. *Id*. § 11359. Proof of possession with intent to sell may be circumstantial, and may consist of evidence as to the quantity of the narcotic, the manner of packaging, and the opinion of an expert that the marijuana was being held for sale. *People v. De La Torre*, 268 Cal. App. 2d 122, 126 (1968). It is a crime to maintain any place for the purpose of unlawfully selling, giving away, or using marijuana. *Id*. § 11366.

In 1996, California voters passed Proposition 215, which excepted qualified patients[3] and their designated caregivers from state prosecution for possession or cultivation of cannabis for the personal medicinal purposes of the Qualified Patient, upon recommendation or approval by a physician. *See* Cal. Health & Safety Code § 11362.5(d)-(e).

[3] Patients that are qualified to use cannabis medicinally under California law are referred to throughout this brief as "Qualified Patients."

This Proposition was enacted as the "Compassionate Use Act." *Id*. § 11362.5(a).

In 2004, Senate Bill 420 ("SB 420") (enacted as the "Medical Marijuana Program") was enacted into law. This act clarified the limits of cannabis which Qualified Patients could possess. *See id.* § 11362.77. Under SB 420, transportation, use of buildings and nonprofit sale of cannabis are not prohibited under California law. *Id*. § 11362.765(a).

The Medical Marijuana Program also provides for medical identification cards for Qualified Patients and their caregivers. These cards incorporate security measures similar to driver's licenses. *See id.* §§ 11362.72, 11362.735. The Program implemented a statewide registry of cardholders. *Id*. §§ 11362.715, 11362.72, 11362.74, 11362.745, 11362.76. Cannabis may not be used medically (or otherwise) at work, while operating a car or boat, within the vicinity of a school, or anywhere where anti-smoking laws apply. *Id*. §§ 11362.785, 11362.789.

The Medical Marijuana Program also provides for the creation of a state-sponsored research program to develop medical guidelines for the appropriate administration and use of cannabis. *See id*. § 11362.9(a)(2).

II. Petitioner Has Provided No Evidence that California Law Does Not Effectively Prevent Medical Cannabis Cultivation from Having a Substantial Affect on the Commercial Market for Recreational Marijuana

Proposition 215 exempted medical use of cannabis from state prosecution for cultivation and possession. In the eight years since the passage of Proposition 215,

California statutory and judicial law has clarified the scope of the medical exemption to state laws prohibiting cannabis. California has proscribed the conditions under which cannabis may be possessed. Patients must prove their medical need. Physicians cannot recommend cannabis unless it can be shown to treat illness. State mandated ceilings limit the amounts which patients and their caregivers may possess. Doctors that recommend cannabis have such recommendations scrutinized by the California Medical Board. Sale remains prohibited under California and federal law.

This legal regime effectively precludes cannabis from entering the interstate black market for recreational marijuana. Although individual instances of diversion of cannabis to illicit purposes undoubtedly occur, there is no evidence that cultivation of cannabis has had a "substantial affect" on the black market for recreational marijuana.

The Court need not take *Amicus* at their word. California has recently had record marijuana busts. The federal government's own studies reflect that abuse of the medical cannabis system has not resulted in routine diversion of cannabis for recreational or commercial purposes. *Tellingly, the federal government has not provided evidence that medical cannabis has had any impact on the commercial market for marijuana, let alone a substantial one*. Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question. *United States v. Morrison*, 529 U.S. 598, 614 (2000). The existing California regulatory framework is a key factor in any determination of whether intrastate cultivation and possession

has a substantial affect on the illicit, interstate market for marijuana.

Amicus does not argue that a comprehensive regime of state law regulation can divest Congress of its authority to regulate interstate commerce. However, it is now a firmly rooted constitutional principle that unless regulation concerns the channels or instrumentalities of commerce, an activity must have a "substantial affect" on interstate commerce in order to subject it to Congressional regulation under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 558 (1995), *Morrison*, 529 U.S. at 609. Speaking purely as a descriptive matter, the State of California has adopted a system of regulation that meaningfully prevents medical cannabis from entering the commercial market for marijuana.

A. Patient and Caregiver Access Is Limited by Medical Approval

California has established a comprehensive system of controls that effectively keeps cannabis from entering the black market for recreational use. Doctors, Qualifying Patients, and the patients' caregivers are all regulated in an effort to prevent use of cannabis for anything other than medicinal purposes. Further, sick patients remain subject to state and federal criminal prosecution should their cannabis enter the recreational market.

Under California law, a Qualified Patient may use cannabis only for medicinal purposes upon a physician's approval or recommendation. Cal. Health & Safety Code § 11362.5(d). Before a patient is qualified, they must have cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or another illness for which cannabis

provides relief. *Id.* § 11362.5(b)(1)(A). A physician's approval or recommendation must be obtained before use occurs. California courts do not allow a physician's recommendation or approval to be made after use, unless a defendant can show that he used cannabis under "exigent circumstances." *People v. Rigo*, 69 Cal. App. 4th 409, 412-13 (1999) (finding no exigent circumstances).[4]

The requirement that patients have a demonstrated need for treatment acts as a means to monitor physicians as well as patients. The Medical Board of California has issued guidelines which provide that cannabis recommendations should be based on the results of clinical trials, if available, medical literature and reports, or on experience of that physician or other physicians, or on credible patient reports. In all cases, the physician must determine that the risk/benefit ratio of medical cannabis is as good, or better, than other medications that could be used for that individual patient. (Medical Board of California, "California Physicians and Medical Marijuana" (last visited October 12, 2004) <http://www.medbd.ca.gov/Guidelines_Marijuana.htm>). Physicians that recommend cannabis without a valid basis are sanctione by the Medical Board. *People v. Spark*, 121 Cal. App. 4th 259, 263 (2004) (Testifying physician admitted that he was no longer licensed to practice medicine at the time of trial. His license had been suspended for giving medical cannabis recommendations to four

[4] There are no reported cases in which "exigent circumstances" allowed post-use recommendation or approval under the Compassionate Use Act. Further, Lexis and Westlaw searches fail to reveal any nonreported cases in which exigent circumstances allowed post-use recommendation or approval.

undercover police officers). *See also Bearman v. Superior Court*, 117 Cal. App. 4th 463, 468-69 (2004) (medical cannabis patient's records can be subpoenaed in investigation by state medical board where good cause is shown). Therefore, the possibility of losing their medical license operates as a strong disincentive for physicians to fraudulently recommend cannabis for nonmedicinal purposes.

Someone cannot be the primary caregiver without being designated by a Qualified Patient. Cal. Health & Safety Code § 11362.5(d). In order to be a caregiver, a person must consistently assume responsibility for the housing, health, or safety of the Qualified Patient. *Id*. *See People v. Peron*, 59 Cal. App. 4th 1383, 1395 (1997). A person cannot functionally be a "primary caregiver" to a large number of people, they must have an ongoing personal relationship with the Qualified Patient. *See, Peron* at 1395-98.

Under California law, sick people can obtain medical cannabis only pursuant to a physician's recommendation. Caregivers must prove that their patient is qualified and that they have an ongoing relationship of care for that patient. The physician must provide a *bona fide* recommendation or face possible suspension of their license and criminal prosecution. Patients and their caregivers face criminal liability if they misappropriate medical cannabis for illicit purposes. Under these conditions, it is unlikely that the status of a physician, patient or caregiver would readily provide sufficient cover for an opportunistic participant in the commercial market.

B. Law Enforcement Retains Meaningful Constraints on Medical Cannabis Users Which Restrict Entry into the Illicit Market

Throughout California's experience with medical cannabis, law enforcement has consistently kept medical cannabis distinct from the illicit market for recreational use of marijuana. Marijuana does remain the same substance no matter whether it is used for medicinal or recreational purposes. However, from an enforcement perspective the purpose for which marijuana is used serves as a useful means of preventing it from entering the illicit market and having a substantial affect on interstate commerce.

Persons in possession of cannabis cannot retain possession unless such person verifies that the purpose of possession is for medicinal use. The Compassionate Use Act does not purport to provide medical cannabis patients with a right to possess cannabis. Rather, when a patient is arrested for possession of medical cannabis, the patient can seek to prove that the use is medicinal as an affirmative defense at trial. *People v. Trippet*, 56 Cal. App. 4th 1532, 1546 (1997), *People v. Mower*, 28 Cal. 4th 457, 469 (2002). Thus, where law enforcement officers or agencies believe that medical cannabis is being diverted for recreational purposes, they may seize the same, thereby preventing its entry into the market.

The California legislature recently authorized the creation of a statewide registry for state medical cannabis identification cards. Where a Qualified Patient or their caregiver in possession of statutorily limited amounts of cannabis presents this card to a state law enforcement officer, the patient or caregiver can avoid arrest, unless there is reasonable cause to believe that the information

contained in the card is false or falsified, that the card has been obtained by means of fraud, or the person is otherwise in violation of the law. Cal. Health & Safety Code § 11362.71(e). The identification cards for Qualified Patients will be readily distinguishable from the identification cards for caregivers. *Id.* § 11362.71(d)(3).

Though not yet implemented, the system will greatly increase law enforcement's ability to isolate and apprehend abusers of the medical cannabis exception. The registry will enable state and local law enforcement to verify identification card validity through a 24-hour database accessible through a 1-800 telephone number. *See id.* § 11362.71(a)(2). The database will be compiled from the counties' health departments, which first obtain the data by verifying individual patients' applications for identification cards. *See id.* § 11362(b).

To obtain an identification card, a patient must provide copies of medical records, created by the patient's attending physician. The application must reflect that the patient has a serious medical condition for which the physician deemed cannabis "appropriate." The attending physician must be identified by name, office address, office telephone number, and California medical license number; proof of residency within the issuing county; and a "government-issued photo identification card." *See id.* §§ 11362.7(i), 11362.715(a). The name and duties of their primary caregiver must also be provided. *Id.* § 11362.715(a)(4). Before it may issue an identification card, a county health department must verify that all information in the application is accurate. Also, it must verify that the attending physician has a license to practice in good standing. The county must contact the physician to verify the legitimacy of the medical records

submitted in the application. *Id.* § 11362.72(a)(1)-(a)(3). If the county issues an identification card, it must within 24 hours electronically transmit the identification card holder's information to the state department of health services. *Id.* § 11362.72(b).

The identification cards have the security provisions typically found in a government-issued identification card. Each card has a unique user identification number, the name and telephone number of the county health department, and the toll-free telephone number that State and local law enforcement officers can call at any time to obtain "immediate access" cardholder information. Each card must carry a photo identification of the patient or caregiver. *Id.* § 11362.735. All cards have an expiration date. Identification cards are valid for one year only, and the county health department must verify all of a patient's new information before it can renew the patient's Identification card. *Id.* § 11362.745(a). The county also may verify any other information that has not changed. *Id.* § 11362.745(b).

The person who possesses an identification card shall notify the county of any change in the Qualified Patient's attending physician or designated primary caregiver. *Id*. § 11362.76(a)(1). They must also annually submit written documentation of the person's serious health condition and the name and duties of the primary caregiver for the forthcoming year. *Id*. § 11362.76(a)(2). Failure to provide this information will result in expiration of the identification card. *Id*. § 11362.76(b).

California law provides strict prohibitions on attempts to fraudulently obtain or manipulate identification cards. Under the California Health and Safety Code, fine and

imprisonment can result for anyone who fraudulently represents a medical condition or fraudulently provides any material misinformation to a physician, county health department or the county's designee, or state or local law enforcement, for the purpose of falsely obtaining an identification card. *Id*. § 11362.81(a), (b)(1). The same punishment will be imposed on anyone who steals or fraudulently uses an identification card (*id.* § 11362.81(b)(2)) or who counterfeits, tampers with, or fraudulently produces an identification card (*id.* § 11362.81(b)(3)). Should a person engage in any of these activities, they may be precluded from attempting to obtain an identification card for six months. *Id.* § 11362.81(c). In addition, the Attorney General is charged with developing appropriate guidelines to ensure the security and nondiversion of cannabis grown for medicinal use by Qualified Patients. *Id*. § 11362.81.

Some California counties have already met with success in using identification cards to efficiently ascertain whether a person in possession of marijuana is a Qualified Patient. One county found that law enforcement resources are effectively conserved by readily drawing the distinction between Qualified Patients and those in possession for recreational purposes. (Mendocino County Sheriff's Office, *Medical Marijuana: Implementing Proposition 215*, <http://www.co.mendocino.ca.us/sheriff/Prop215.htm.>) Once the statewide registry is in place, California can expect even greater efficiency from law enforcement in separating Qualified Patients from fraudulent abusers of the system.

A study performed by the federal government suggests that federal law enforcement officers have not had their enforcement efforts impeded by diversion of medical marijuana, either. During review of federal law enforcement officers in a 2002 United States General Accounting

Office ("GAO") study, none of the federal officials the GAO interviewed provided information to support a statement that abuse of medical marijuana laws was routinely occurring in California. General Accounting Office, *Marijuana: Early Experiences with California's Laws that Allow Use for Medical Purposes* 37 (Nov. 2002). Were federal law enforcement efforts impeded by diversion, one might expect that the federal approach to enforcement would have changed in the eight years since Proposition 215 passed. However, federal law enforcement efforts have not substantially changed since California law enforcement ceased to prohibit medical marijuana. *Id.* at 32 (finding that introduction of medical cannabis laws had little impact on law enforcement officers operations and that the federal process of using case-by-case review of potential marijuana prosecutions has not changed as a consequence of state marijuana laws).

C. Patient and Caregiver Possession Restrictions Limit the Amount of Medical Cannabis Which Might Otherwise "Substantially Affect" the Interstate Market

Since California authorities ceased to prohibit cannabis for medical purposes, the state has limited the amount of cannabis Qualified Patients can possess to what is necessary for their treatment. Soon after Proposition 215 passed, a California Court of Appeal held that the quantity possessed by the patient or the primary caregiver, and the form and manner in which it was possessed, was limited to what was reasonably related to the patient's current medical needs. *Trippet* at 56 Cal. App. 4th 1549. This determination would be made by a judge or jury, as appropriate, but a significant piece of evidence in making this

determination would regularly be the recommending or approving physician's opinion regarding the frequency and amount of the dosage the patient needs. *Id.* at 1549.

The California legislature subsequently added greater clarity to the issue of amount. Upon passage of SB 420, a Qualified Patient or primary caregiver is entitled to possess no more than eight ounces of dried cannabis per Qualified Patient, and (to assure future supply), the patient or his or her caregiver may maintain no more than six mature or 12 immature plants per Qualified Patient. Cal. Health & Safety Code § 11362.77(a). By comparison, the federal government's "Compassionate Use Program," which provides cannabis to a handful of patients pursuant to an out-phased research program, has provided its patients with up to eleven cured ounces of cannabis every three weeks.[5]

A patient may possess no more than the statutory limits at any time, unless an exception applies. The Qualified Patient or caregiver can possess more than this amount only upon recommendation by a physician or upon countywide approval for greater limits. Further, the California Attorney General may, after public comment, recommend greater limits based on currently available scientific research.[6]

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[5] *See*, *e.g.*, Letter from Irvin Rosenfeld, federal medical cannabis patient, to whom it may concern (July 1, 1996) (on file with Reason Foundation) (11 ounces every three weeks); Letter from Barbara Douglas, federal medical cannabis patient, to whom it may concern (July 1, 1996) (on file with Reason Foundation) (nine ounces per month).

[6] If the patient needs more than the amount allowed under Cal. Health and Safety Code § 11362.77(a), then they must receive a doctor's

(Continued on following page)

Such restrictions assure that patients only receive the amount of cannabis they need to treat their ailments. Petitioners argue in their Brief that Qualified Patients can be expected to commonly divert cannabis they use as medicine to the illicit market, stating "Local users may ultimately sell or divert the drug to others . . . " (Brief at 25). However, this does not comport with self-interest of Qualified Patients or those persons such patients have chosen as their caregivers. Qualified Patients cannot be expected to routinely divert their medication in expectation of compensation. If they do, they will suffer their illness for lack of proper treatment.

Moreover, irrespective of the outcome of this case, California and federal law will both continue to prohibit sale of marijuana for recreational purposes. The Qualified Patients or caregivers will face the same state and federal criminal penalties should they put medical cannabis in the recreational market. Whether they possess a state-issued identification card or not, the accused will have to prove as an affirmative defense that the medical cannabis defense applies. *People v. Konow*, 32 Cal. 4th 995, 1003 (2004). (For-profit sale of marijuana remains prohibited under state law), *Mower*, 28 Cal. 4th at 469 (Compassionate Use Act does not provide a "complete immunity"

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recommendation for the same. *Id.* § 11362.77(b). Also, in order to allow for geographical variances in production capacity, SB 420 provides that cities and counties may promulgate their own regulations allowing patients or qualified caregivers to exceed the state limits set forth in section 11362.77(c). The California Attorney General may also recommend modifications to the Legislature by December, 2005. Cal. Health & Safety Code § 11362.77(e).

whereby claimed patient can compel further investigation merely by claiming that he is a Qualified Patient.)[7]

Were a cannabis patient tempted to sell "excess" medical cannabis on the recreational market, they would encounter existing legal prohibitions under California and federal law.[8] Qualified Patients face the same criminal prohibitions as any other Californian should they exceed the amounts they may lawfully possess or transfer cannabis to a person other than a patient or caregiver. Cal. Health & Safety Code §§ 11362.77(a), 11357, 11359. Of course, once marijuana entered the stream of interstate commerce, patients or their caregivers would also be subject to prosecution under federal law. The same holds true for caregivers that possess or transfer cannabis to persons other than patients or caregivers. *Id*. These prohibitions make it doubtful that possession or cultivation of cannabis for medicinal purposes will have a substantial affect on interstate commerce for marijuana.

The foregoing legal structure does not provide a mere theoretical prohibition regarding commercial demand for medical marijuana. Rather, the theory behind Proposition 215 has been borne out in practice. California state law

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[7] As noted above, persons who fraudulently attempt to or use, seek or tamper with identification cards may also be precluded from applying for the same. Cal. Health & Safety Code § 11362.81(c).

[8] Although California authorities will not assist federal authorities in preventing Qualified Patients from using marijuana, California law does not purport or threaten to supersede federal authority. For instance, if a small amount of marijuana were seized en route from Mexico or Las Vegas to San Diego, and the person in possession claimed a defense under California's Compassionate Use Law, there would be no question that interstate commerce occurred. California's law would neither purport to nor actually provide a defense to such person.

enforcement has an established track record of policing sales of illicit marijuana. In fact, the California Attorney General recently announced record-breaking seizures of "large-scale illegal marijuana grows." Office of the Attorney General, *Campaign Against Marijuana Planting Achieves Milestone for 2004 Eradication Season* (last visited October 12, 2004), *available at* http://ag.ca.gov/newsalerts/2004/04-103.htm. The Attorney General announced seizures in 2004 of a total of 471,128 plants worth an estimated $1.88 billion. This announcement was made on September 9, 2004 and therefore did not include plant seizures that will occur from September 10, 2004 through December 31, 2004. Yet the state had already surpassed its record of 466,054 plants seized in 2003 – which was also a record-breaking year. *Id.* Given this track record, it is unreasonable to assume that a trickle of diverted medical cannabis will affect the interstate illicit market.

III. The Congressional Findings in the Controlled Substances Act Should Not Be Given More than Minimal Weight in Determining Whether Respondents' Conduct Has a "Substantial Affect" on Interstate Commerce

Petitioners claim that the cultivation and possession of cannabis for medicinal purposes by respondents and those similarly situated has a substantial affect on the interstate market for marijuana. In support of this claim, they reference the Congressional findings in the CSA that provide, among other things:

> 1. After manufacture, many controlled substances are transported in interstate commerce (21 U.S.C. § 801(3)),

> 2. Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances (21 U.S.C. § 801(4)), and
>
> 3. Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate, and thus it is not feasible to distinguish between such substances in terms of controls. (21 U.S.C. § 801(5)).

(Pet'rs. Brief at pp. 4-5).

Based on these findings, Petitioners argue that allowing possession and cultivation by Qualified Patients and their caretakers within California necessarily will have a substantial impact on the interstate market for marijuana. They argue that from an enforcement perspective, all marijuana is the same, whether it is used recreationally or medicinally. Medical cannabis is fungible and can therefore meet illicit demand. Therefore, they argue that all use must be deemed commercial to allow for effective regulation. ("Moreover . . . respondents' manufacturing, distribution and possession activities themselves involved economic activity . . . to at least the same extent as Roscoe Filburn's home-grown production of wheat in *Wickard*. In both cases, the regulated individuals are producing a fungible commodity for which there is an established market and are doing so for their own use when they would otherwise be participants in a regulated market.") (Pet'rs. Brief at 37).

This analysis fails to take into account California and federal law which act as a barrier for medical cannabis to enter into the illicit market.

As set forth above, the class of people that can possess cannabis for medical purposes is limited. To obtain Qualified Patient status under California law, a person must have an illness for which cannabis provides relief, and receive the recommendation or approval of a physician. The physicians who evaluate the patient run the risk of losing their license should they provide a fraudulent recommendation. Caregivers must prove that they have been designated as primary caregivers by an identified Qualified Patient, and they must prove that they have consistently assumed responsibility for the housing, health or safety of that person. The "Qualified Patient" and "caregiver" classifications narrow who may possess or cultivate cannabis to an identifiable class of persons. Where the persons who can legally possess cannabis are ascertainable by reference to a medically verifiable standard, the chance of successful false claims of status is minimized. Therefore, possession for medicinal as opposed to recreational purposes is ascertainable from an enforcement perspective.

Just as certain amounts have always been deemed presumptive of an intent to sell, the limits on possession established by California law also act as an indicator of whether cannabis is used for medicinal or recreational purposes. Neither Qualified Patients nor their caretakers can possess an amount of cannabis in excess of that allowed under state law. The limits under California state law operate as a bright line separating a sick person or their caretaker from a drug dealer. The limits on possession therefore act as an additional guarantor that those who can prove Qualified Patient or caretaker status do not abuse such status and begin selling marijuana. Because the state limits indicate if someone is abusing their status,

the limits reinforce the difference between cannabis and recreational marijuana for enforcement purposes.

Petitioners further argue that Qualified Patients and their caregivers can be expected to divert cannabis to the illicit market in such frequency that it would result in a substantial affect on the interstate market. ("The 'home-grown' manufacturing, free distribution, and possession of controlled substances . . . pose an appreciable risk of diversion to others (for instance, should their production yield exceed their purported needs or should additional funds be required to finance their drug production or other activities).") (Pet'rs. Brief, pp. 25-26). But this speculative inference from the Congressional findings about "swelling" of the interstate market for marijuana is wholly unsubstantiated.

California law limits the amount of cannabis Qualified Patients may possess. Qualified Patients would risk their health if they attempted to divert cannabis. With the amount of cannabis patients may possess limited to their needs, patients would choose remuneration over their own health should they divert their cannabis. While this may occur in some instances, it is not likely that it would occur with sufficient frequency to affect the interstate market. Further, even more severe risks to the patient's health can occur should they divert medical cannabis. They may be deprived of treatment while awaiting trial in an attempt to prove the affirmative defense of medicinal use.

Of course, California state law does not purport to change federal law prohibiting sale. Because illicit sales remain unlawful under state law, Qualified Patients and their caregivers also risk their liberty should they attempt to divert medical cannabis into the illicit market.

Moreover, respondents do not contend that they have a right to buy or sell marijuana. They and those similarly situated with them simply wish to cultivate it for personal, medicinal use.

Petitioners' cited Congressional findings simply do not substantiate the inferences they draw. Where only a distinct, identifiable class of persons can possess a limited amount of cannabis, and certain amounts indicate that possession is not for medicinal use, then cannabis is distinguishable from recreational marijuana for enforcement purposes. Where patients risk their health and freedom by diverting cannabis, they cannot in the absence of credible evidence lightly be presumed to frequently engage in that course of conduct.

The existence of Congressional findings is not by itself sufficient to sustain the constitutionality of Commerce Clause legislation. *United States v. Morrison*, 529 U.S. at 614. The judiciary ultimately determines whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them. *Morrison* at 614. Ultimately, it is the government which carries the burden of establishing that a party's conduct has an affect on interstate commerce. *United States v. Farmer*, 924 F.2d 647, 651 (7th Cir. 1991). (RICO case). The government has not met this burden.

Petitioners rely on Congressional findings which claim that cannabis use is indistinguishable from recreational use. California law suggests otherwise. In California, patients are identified using objective medical criterion that is evaluated by the California Medical Board. Possession of a suspicious amount by a nonpatient or caregiver serves as indicia that nonmedical use is occurring.

Similarly, Petitioners have not provided any evidence that respondents, or anyone similarly situated to them, have diverted their cannabis into commerce. They have not presented any evidence that diversion occurs in an amount sufficient to have a substantial affect on the interstate market. Instead, they offer the conclusory argument that such diversion would routinely occur. In light of the fact that patients have their health endangered and their liberty deprived, this argument should be viewed with skepticism.

The question of Congressional power under the Commerce Clause is ultimately one of degree. *Lopez* at 566-67. Much as with the possession of a gun by the defendant in *Lopez*, the respondents' possession of medical cannabis which was cultivated purely interstate does not implicate the Commerce Clause. There is no indication that the respondents here "recently moved in interstate commerce." *Id*. Nor is there "any requirement that [their possession] of [cannabis] have any concrete tie to interstate commerce." *Id*. Further, California's laws act as a powerful disincentive for those similarly situated to respondents to place their cannabis into the stream of interstate commerce. Of course, the federal government's prohibition of sale would remain undisturbed by this Court's Commerce Clause established jurisprudence.

CONCLUSION

Unless petitioners can show that respondents' actions had a substantial affect on interstate commerce, Congress may not constitutionally prohibit respondents' intrastate possession and cultivation of medical cannabis.

California's regulatory regime casts grave doubt on the Congressional findings cited by petitioners. The class of persons who may possess cannabis is limited by a medically ascertainable standard. Even once those persons meet this standard, they remain subject to criminal sanction under California and federal law. Should they put cannabis into interstate commerce, they will be subject to federal prosecution. State prosecution will follow should respondents or those similarly situated possess or cultivate an amount of marijuana not allowed under California law. Should cannabis patients be subjected to legal scrutiny, they will have to prove medicinal use as an affirmative defense.

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Respectfully submitted,

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