No. 02-16534

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee/Appellant,
v.
OAKLAND CANNABIS BUYERS'
COOPERATIVE and JEFFREY JONES,
Defendants-Appellant/Appellee

On Appeal from the United States District Court
for the Northern District of California
Case No. C 98-00088 CRB
On Remand from the United States Supreme Court

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA, COUNTY OF ALAMEDA AND CITY OF OAKLAND IN SUPPORT OF DEFENDANTS' MOTION AFTER REMAND TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes

Other Authorities

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiffs, v. OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES, Defendants. AND RELATED ACTIONS.	NO. 02-16534 **BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA, COUNTY OF ALAMEDA AND CITY OF OAKLAND IN SUPPORT OF DEFENDANTS' MOTION AFTER REMAND TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION**

STATEMENT OF AMICI CURIAE

Amici Curiae State of California, the County of Alameda, and the City of Oakland have a constitutionally protected interest in the health and welfare of their residents and citizens. Each amici has a unique and protected interest in the health and safety of its citizens and each, either through statute, by ordinance, or by lawful declaration of a local public emergency, has sought to further that interest in a manner now threatened by this litigation. As the State's chief law enforcement officer, the Attorney General has a duty to see that the laws of the State are uniformly and adequately enforced. Cal. Const., article V, § 13. The City of Oakland and the County of Alameda have similar responsibilities and, because the Cannabis Buyers' Cooperative is located within their respective jurisdictions, and because the City of Oakland has designated the Oakland Cannabis Buyers' Cooperative as its agent for the distribution of medical cannabis under its Medical Cannabis Distribution program, both are vitally interested in this action. In November 1996, the voters of California adopted Proposition 215, the Compassionate Use Act of 1996, which makes the use of cannabis lawful for specified, limited purposes. No state law represents more forcefully the sovereign will of its citizens than that passed by direct ballot initiative. This proceeding calls into question the legitimacy of Proposition 215, and, thereby, the ability of this or any other State to address creatively the unique health needs of its citizens. This Court should honor the courage and determination of the people of California as these qualities find expression in the exercise of a sovereign State's fundamental right guaranteed by the Ninth and the Tenth Amendments of the United States Constitution and, by denying the injunction sought by the federal government, should return the Controlled Substances Act (CSA) to the established channels of federal authority.

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ARGUMENT

A. INTRODUCTION

The CSA impermissibly interferes with the rights reserved to the States and their political subdivisions by the Ninth Amendment to enact and implement, laws protecting the health, safety and welfare of their citizens. By prohibiting seriously ill persons from using cannabis in States that have approved such use, the CSA also violates traditional notions of State sovereignty protected by the Tenth Amendment. California has a right to decide matters of public health and safety so long as in doing so it does not traverse a recognized power expressly granted to Congress. "[I]n our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power. The power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice. . . ." *Twining v. State of New Jersey*, 211 U.S. 78, 106 (1908), citing *Hurtado v. California,* 110 U.S. 516, 527 (1884), *overruled on other grounds* in *Malloy v. Hogan*, 378 U.S. 1 (1964).

The CSA, classifying marijuana as a "Schedule I" drug was passed in 1970. Much has changed since then. The ravages of AIDS have risen from vague, disturbing rumors to horrifying reality. By 1996, the AIDS epidemic had killed millions of people throughout the world and had become the 8th leading cause of death in the United States. *CDC Media Relations: HHS News,* Oct 7, 1998.

Since then we have also seen the accumulation of solid scientific evidence that marijuana can relieve the suffering of those afflicted by certain types of illness, including glaucoma, multiple sclerosis, spasticity, severe pain, and nausea induced by the drugs used in chemotherapy and in the treatment of AIDS. *See,* generally, *Marijuana and Medicine: Assessing the Science Base*, National

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Academy Press 1999. More specifically, evidence indicates that for some, marijuana is the only drug capable of reducing their anguish.

Against this backdrop the citizens of California overwhelmingly adopted the Compassionate Use Act intending to relieve the suffering of those beyond the reach of other medications. Since 1996, eight states and the District of Columbia have joined California in authorizing the use of cannabis for seriously ill people. The Act does not legalize the general use of marijuana. It prohibits the use of marijuana for non-medicinal purposes, prescribing that "[n]othing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes." Cal. Health & Safety Code § 11362.5(b)(2)[1].

Amici Curiae have no desire to legalize interstate commerce in controlled substances. However, they have a very strong desire to advance their conviction that under the limited circumstances authorized by California voters, the recommendation, distribution and use of marijuana are not criminal acts.

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1. In fact, California's efforts to prevent the unauthorized use of marijuana continue unabated. The California Department of Justice, Bureau of Narcotics Enforcement (BNE) operates The Campaign Against Marijuana Planting (CAMP), an aggressive marijuana interdiction and eradication effort. CAMP was established in 1983 under the direction of the Attorney General and BNE. This multi-agency law enforcement task force, managed by BNE, provides personnel to remove marijuana growing operations and promote public information and education on marijuana. Member agencies, comprised of local, state and federal law enforcement representatives, carry out the enforcement operations of this program. (*See* generally, California Department of Justice website at http://caag.state.ca.us.)

B. THE CONTROLLED SUBSTANCES ACT IMPROPERLY INTERFERES WITH STATES' SOVEREIGN RIGHTS TO CARE FOR THE HEALTH, SAFETY, AND WELFARE OF THEIR CITIZENS

The States bear primary responsibility for the health, safety, and welfare of their citizens. In our federal system they often serve as democracy's laboratories. *Washington v. Glucksberg* 521 U.S. 702 (1997); *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 292 (1990); *New State Ice Co. v. Liebmann* 285 U.S. 262, 311 (1932), Brandeis, J., dissenting. "The essence of federalism is that the state must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979).

The Framers recognized from the very inception of the Republic that a federal government might find it hard to resist the temptation to overbear the interests of the States. They provided the means for diminishing that risk by imposing limitations on the federal government's power. As the U.S. Supreme Court has noted:

> [T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States — independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Alden v. Maine, 527 U.S. 706, 754 (1999), *quoting Erie R. Co. v. Tompkins*, 304 U.S. 64, (1938).

In keeping with their time-honored role as democracy's laboratories, the States are in by far the best position to determine whether and under what circumstances the use of cannabis by seriously ill patients should be permitted. As

Justice Brandeis, observed,"[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." He cautioned, however:

> This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Boy Scouts of America v. Dale, 530 U.S. 640, 664 (2000) Stevens, J., dissenting, quoting *New State Ice Co.,* 285 U.S. at 311, Brandeis, J., dissenting.

Under the circumstances of this case the *CSA* violates the spirit of this tradition and impermissibly interferes with California's sovereign right to address matters that concern the health, safety and welfare of its citizens.

i. Lawfully Enacted Innovative State Social Policies Should Not be Enjoined Based on Obsolete Legislative Findings

Advancements in science and technology frequently debunk popular myths. The CSA was enacted the year before the first commercial microprocessor was introduced. By 1996, the year California adopted the Compassionate Use Act, us of the Internet and the World Wide Web was skyrocketing. Today, literally billions of people routinely communicate across the globe at the speed of light. Yet, few could have foreseen 30 years ago what their future, today's present, would be like. Congress may be learned, but it is not omniscient. What is believed is not always true, and what is true is not always believed. We must study and we must adapt to what we learn.

Much needs to be learned about the therapeutic uses of cannabis as a drug. At the time of its introduction, the CSA classified marijuana as a drug

having no accepted medical use. The times have changed. This classification is not a statement of science, but a hollow phrase bereft of factual support, a mantra indentured to the long discredited notion that denying reality prevents its consideration. It should have collapsed upon itself long before the citizens of California adopted Proposition 215. The development and use of Marinol, the trade name for a product containing synthetic tetrahydrocannabinol (THC), a psychoactive ingredient in marijuana, belies the contention that cannabis has no accepted medical use. "Dronabinol, the active ingredient in Marinol, is synthetic delta-9-tetrahydrocannabinol (delta-9-THC). Delta-9-tetrahydrocannabinol is also a naturally occurring component of *Cannabis sativa L.* (Marijuana)." *Physicians Desk Reference* 55th ed. 2001, page 2828. Although the outer parameters of that use may need further clarification, they include ". . . treatment of: 1. anorexia associated with weight loss in patients with AIDS; and 2. nausea and vomiting associated with cancer chemotherapy in patients who have failed to respond adequately to conventional antiemetic treatments." *PDR* 55th ed. 2001, page 2829.

Although the atmosphere surrounding the battle against drug abuse glows with the incandescent exhortations of its champions and detractors, the controversy surrounding Proposition 215 has nothing to do with the war on drugs. This case concerns nothing more than a State's right to enact regulations for the health and welfare of its citizens. The regulation California has chosen on this occasion is certainly controversial, perhaps even outrageous in some eyes. California's bold assertion that cannabis can relieve suffering recognizes that a drug—even one roiled in controversy—having limited medical applications, or having a limited range of effectiveness still may have a legitimate use. State-authorized, medically indicated use should not be proscribed on any but the firmest scientific basis—particularly where, as here, the federal government's action unnecessarily and unreasonably brings the sovereignty of the State of California into conflict with the Congress of the United States.

ii. The Controlled Substances Act, as Applied, Exceeds the Ninth and Tenth Amendment Limits on the Power of Congress and the Federal Government

The Congress and the federal government have limited authority to interfere with Amici's interest in regulating the health, safety and welfare of their citizens. The Ninth Amendment to the Constitution of the United States recites that "[t]he enumeration in the Constitution, of certain rights, *shall not be construed to deny or disparage others retained by the people.*" (Emphasis added). It "preserves against encroachment by the federal government individual rights well embedded in state law until such rights are modified or abolished by state authorities or a judicial determination of unconstitutionality or in some way interfere with the proper scope of federal authority." *United States v. Stowe*, 100 F.3d 494, 500 (7th Cir. 1996), *cert. denied*, 520 U.S. 1171. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from government infringement, which exist alongside those fundamental rights specifically mentioned in the first eight amendments." *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965), (Goldberg J., concurring.) This case requires deference to that history.

The Supreme Court has recognized that controversial areas of social policy are best resolved through the democratic process. Whether to allow seriously ill patients the right to use cannabis upon the advice of a physician is one such controversy. Proposition 215 authorizes the administration, wholly within California's borders, of an admittedly unconventional, but—in the professional judgment of their physicians— effective medication to a very limited class of persons. The wisdom of deferring to the States' inventive genius for solving pressing issues of public health and welfare has no less force because the chosen solution challenges conventional norms.

The States reserved to themselves alone the police power to address the health and welfare of their citizens. "The [Tenth] Amendment expressly

declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity, or their ability to function effectively in a federal system. . . ." *Fry v. United States*, 421 U.S. 542, 547, Fn. 7 (1975).

> In the American constitutional system . . . the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government . . . . It is embraced . . . in that immense mass of legislation which can be most advantageously exercised by the states, and over which the national authorities cannot assume supervision or control." *Patterson v. Kentucky*, 97 U. S. 501, 503, 504 (1878) (internal citations and quotation marks omitted).

Despite the breadth of federal regulatory authority, there are no police powers by which the federal government can compel reluctant States to accept its conception of proper *local* order. Congress has no general power to enact police regulations operative within a State's territorial limits (*Slaughter-House Cases*, 83 U.S. 36 (1872)), and it cannot take this power from the States or attempt any supervision over the regulations of the States established under this power. *Keller v. United States* 213 U.S. 138 (1909).

> 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 (1996) (citations and internal quotation marks omitted).

The decision whether to enact a particular law or statutory scheme for the health and welfare of their citizens falls entirely within the powers retained by the States. "[W]hen a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end *as it may deem necessary* in order to make its action effective." *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 201

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(1912) (emphasis added). This includes the power to define a public evil as the denial of medication capable of relieving suffering.

The importance of maintaining the States' preeminent role as caretakers of their citizens lies at the heart of this controversy. It is one thing for the federal government to dictate what items may be transacted in interstate commerce, for example. It is quite another for it to impose its particular notions of medical propriety upon a State whose people have clearly and unequivocally exercised their discretion in a different direction. For then, the federal government arrogates to itself an unsustainable power. The "essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, *no matter how unorthodox or unnecessary anyone else–including the judiciary–deems state involvement to be.*" *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 545–46 (1985) (Emphasis added).

C. THE CONTROLLED SUBSTANCES ACT EXCEEDS CONGRESS' COMMERCE CLAUSE AUTHORITY

The question presented here concerns not whether Congress may enact laws to control the interstate manufacture, transportation and sale of drugs, but rather the degree to which it may regulate purely local activity wholly confined *within* a State. It may not, for example, ban the possession of a weapon within a prescribed distance of a school *(United States v. Lopez,* 514 U.S. 549 (1995), or impose civil remedies for gender-based violence *(United States v. Morrison,* 529 U.S. 598 (2000), nor may it make mere possession of a firearm by an ex-felon a federal crime absent a nexus to interstate commerce (*United States v. Bass,* 404 U.S. 336 (1971). These acts exceed Congress' delegated powers.

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i. The Federal Government is One of Limited, Delegated Powers.

Congress derives its authority to regulate interstate commerce from the Constitution, but though proceeding from that inspired instrument, these powers are not unlimited. Having so recently prevailed against the tyrannical forces of the Crown, the newly independent States were loath to submit once again to an imperious central authority. Indeed, the power granted to the federal government under the Constitution was deliberately restricted because of the jealous reluctance of the sovereign States to part with very much of it. As James Madison observed, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The Federalist No. 45, *The Federalist: A Commentary on the Constitution of the United States,* p. 298 (Modern Library Edition, Random House Inc. 2000).

The Framers did not merely *consider* the notion of limiting the power of the federal government, they believed it imperative to do so. The purpose of the division of powers between the federal and State governments under the Tenth Amendment "is to protect the liberty of individual citizens from excessive concentration of power in a central government" (*Frank v. United States*, 78 F.3d 815, 825 (2d Cir. 1996), *cert. granted, judgment vacated on other grounds* in *Frank v. United States*, 521 U.S. 1114 (1997)). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the State and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991).

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. 'The powers of the legislature are defined

and limited; and that those limits may not be mistaken or forgotten, the constitution is written.'" *Morrison,*529 U.S. at 607, citing *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 69 (1803) (Marshall, C.J.). A connection must exist between those powers and the prohibited act or conduct Congress seeks to regulate. That connection is missing here.

ii. The CSA Cannot be Justified as an Exercise of Congress' Delegated Power Under the Commerce Clause

The federal government may legitimately exercise its powers, even to the extent of imposing its rules upon the States, when employing a power expressly granted by the Constitution such as that granted under the Commerce Clause "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *U.S. Const.,* art. I, § 8. This "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Lopez* at 552, citing *Gibbons v. Ogden,* 9 Wheat. 1, 189, 196, 6 L.Ed. 23 (1824). But the Constitution prescribes limits.

Generally, Congress may regulate three categories of activity under its commerce power: (1) It may regulate the use of the *channels* of interstate commerce, (2) It may regulate and protect the *instrumentalities* of interstate commerce and finally, (3) It may regulate those activities having a *substantial relation* to interstate commerce. *See, Lopez* at 552.

While conceding that guns are routinely bought and sold in interstate commerce, the Supreme Court found that the Gun-Free School Zones Act "has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." *Lopez,* at 561. Even though the Act regulated the use of a product regularly traded in interstate commerce, the Court held: "The [Gun-Free School Zones] Act . . . neither regulates a commercial activity nor

contains a requirement that the possession be connected in any way to interstate commerce." *Id.* at 551. Applying the same analysis to Proposition 215 requires the same result.

To be validly applied to this case, the Controlled Substances Act must necessarily be restricted to the regulation of activities employing the channels and instrumentalities of—and having a substantial relationship to—interstate commerce. These elements are missing from the activity permitted by California's Compassionate Use Act. Although the cannabis recommended by a physician and distributed under Proposition 215 *may* have hypothetical sources outside of this State, there is no *lawful* intrastate or interstate trade in the drug, and California's statute does not assume reliance on illicit sources. More to the point, were the federal, State, and local governments successful in their efforts to eradicate the illegal traffic in marijuana, the conduct authorized by Proposition 215 would be unaffected.

To implicate federal authority, a *substantial connection* between what is authorized by the Proposition and interstate commerce must be demonstrated. California's law has no ambitions beyond its own borders. Read in its proper context, Proposition 215 does not conflict with or otherwise implicate federal law. This State cannot—nor may it authorize others to—place into interstate commerce products prohibited by the federal government, and it does not presume to do so. To be lawful in California, the conduct must be confined within the narrow class of intrastate activities specifically authorized by Proposition 215. Judged in that light and interpreted to give effect to its provisions, the *Compassionate Use Act* only authorizes what is already beyond the reach of federal law—the limited use of cannabis by its citizens for specified medicinal purposes. And it does so through a lawful exercise of this state's police powers.

Although the CSA does purport to regulate commercial activity, which distinguishes it from the Gun-Free School Zone Act, to be correctly applied

under these circumstances, the Constitution requires the regulated conduct be connected to commerce *among* the states— which it is not. "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons v. Ogden,* 9 Wheat. 1, 189, 194-196; *United States v. Morrison*; *United States v. Lopez.*

The commerce power "does not comprehend the purely internal domestic commerce of a State which is carried on between man and man within a State or between different parts of the same State." *Kidd v. Pearson* 128 U.S. 1, 17 (1888). Nor does it comprehend the purely internal exercise of California's police powers to ease the suffering of those identified by Proposition 215.

Although the CSA recites that "[i]ncidents of the traffic [in controlled substances] 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" (21 U.S.C. § 801(3)), that is not the case here. As has often been observed, simply calling a thing by a name does not make it so. *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 174 (1976). More precisely, even though "Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez* at 557.

For example, the Supreme court rejected Congress' attempt to abrogate state sovereign immunity under the Americans with Disabilities Act, despite what dissenting Justice Breyer described as "a vast legislative record documenting massive, society-wide discrimination against persons with disabilities." *Alabama v. Garrett,* 531 U.S. 356, 377(2000). The majority characterized the evidence as "minimal." *Id.* at 370. But even minimal evidence is

some evidence. Here there is no evidence at all so support Congress' finding and this court should have no qualms about rejecting it.

The federal government cannot acquire plenary powers over the states simply by directing its attention to matters touching upon interstate commerce. Were it otherwise, Congress could easily subordinate the states to its will merely by inserting a token reference to a subject within its legitimate constitutional powers into every piece of legislation, bootstrapping itself into the catbird seat with no further effort. But the Supreme Court has never held "that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez* at 558. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Lopez* at 577. In this case, as in *Lopez*, "neither the actors nor their conduct has a commercial character. . . ." *Lopez* at 580. While the CSA may have "an evident commercial nexus," *(Id.* at 580) its applicability to the conduct authorized under California law is theoretical to the point of invisibility and the Court has consistently required more than hypothetical connections to interstate commerce. "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far." *Id.* at 580.

The language of Proposition 215 carefully distinguishes what it authorizes from what it prohibits. The activity authorized by the people of California presumes nothing upon federal law, nor supposes to make legal what the federal government has properly banished from interstate commerce. All traffic in marijuana not specifically authorized, which the CSA properly addresses, also violates California law. Unfortunately, in failing to make the same distinction, the CSA exceeds the power of Congress.

One searches in vain for a nexus between the conduct authorized by California and the conduct prohibited by Congress. Permitting application of the CSA to this situation invites the federal government to "take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities." *Lopez* at 611.

"[T]he interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Jones & Laughlin Steel,* 301 U.S. 1, 37 (1937). In Proposition 215 California has done nothing more than determine, consistent with its sovereign police power, that within its narrowly prescribed parameters cannabis lawfully may be recommended by a physician and used by a patient.

CONCLUSION

California's unequivocal determination to authorize the medical use of cannabis deserves the respect due lawful acts of a sovereign State. Its decision to enact Proposition 215 "must be considered in light of our dual system of government." The Commerce Clause does not permit Congress to insert itself into activities having no more than "indirect and remote" effects on interstate commerce, nor does it authorize intrusions upon State acts having no effects whatsoever on interstate commerce. The federal government's attempts to impose its will on California in defiance of the expressed desires of its citizens usurps the sovereign rights of the States under the Ninth Amendment, it intrudes upon the powers reserved to the States under the Tenth Amendment, and exceeds the power delegated to Congress by the Commerce Clause of the United States Constitution.

"All great truths begin as blasphemies." *Hoffman v. Cargill*, 142 F.Supp.2d 1117, 1118 (2001), *quoting* George Bernard Shaw. The question here is

whether deference shall be paid to California's heretical decision to test the medical efficacy of marijuana for the purpose of relieving suffering caused by illness or disease. Amici curiae State of California, City of Oakland, and County of Alameda respectfully submit that Californians have a constitutionally protected right to indulge this blasphemy— so long as its utterance is wholly contained within State boundaries. Although none can say what great medical truths, if any, California's intrepid initiative may ultimately liberate, this experiment by one of the nation's great laboratories of democracy should not be enjoined.

November 15, 2002.

Respectfully Submitted,

BILL LOCKYER, Attorney General
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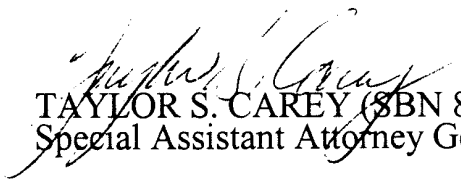

TAYLOR S. CAREY (SBN 88557)
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 (a) 7 (c) and Ninth Circuit Rule 32, I certify that the Brief of Amicus Curiae State of California, County of Alameda and City of Oakland in the case of *United States of America v. Oakland Cannabis Buyers' Cooperative and Jeffrey Jones* is prepared in proportionately space Times New Roman typeface in fourteen point.

The brief, excluding this Certificate of Compliance, the Cover Page, the Table of Contents, The Table of Authorities, and the Proof of Service, contains 5,114 words based on a count by the word processing system at the Attorney General's Office.

Dated: November 15, 2002

Taylor S. Carey

DECLARATION OF SERVICE

Case Name: ***UNITED STATES OF AMERICA, Plaintiff-Appellee/Appellant, v. OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES, Defendants-Appellant/Appellee.***

No.: 02-16534

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

On November 18, 2002, I served the attached

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA, COUNTY OF ALAMEDA AND CITY OF OAKLAND IN SUPPORT OF DEFENDANTS MOTION AFTER REMAND TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION.

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on November 18, 2002, at Sacramento, California.

Catherine J. Cardoza

DECLARANT