ROBERT D. McCALLUM, JR.
Assistant Attorney General
DAVID W. SHAPIRO
United States Attorney
ARTHUR R. GOLDBERG (D.C. BN 180661)
MARK T. QUINLIVAN (D.C. BN 442782)
U.S. Department of Justice
Civil Division; Room 1048
901 E Street, N.W.
Washington, D.C. 20530
Telephone: (202) 514-3346

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON, Defendants. AND RELATED ACTIONS	Nos. C 98-0085 CRB RELATED C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0245 CRB REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF Date: April 19, 2002 Time: 10:00 a.m. Courtroom: 8 Hon. Charles R. Breyer

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PRELIMINARY STATEMENT

In their Memorandum in Opposition to the Government's Motion for Summary Judgment and Permanent Injunctive Relief, defendants Oakland Cannabis Cultivators' Cooperative and Jeffrey Jones (Case No. C 98-0088), joined by defendants Cannabis Cultivators Club and Dennis Peron (Case No. C 98-0085), and defendants Ukiah Cannabis Buyer's Club and Marvin and Mildred Lehrman (Case No. C 98-0087) (collectively the "Joint Defendants"),[1] misread the Supreme Court's decision in United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001), which unambiguously holds that a district court, sitting in equity, may ***not*** consider the advantages and disadvantages of nonenforcement of a statute, but only the advantages and disadvantages of employing the extraordinary remedy of injunction over the other available methods of enforcement. Here, entry of permanent injunctive relief is the only current means of enforcement available to this Court. The Joint Defendants also utterly fail to rebut our showing that governing Ninth Circuit authority forecloses their arguments that Congress' enactment of 21 U.S.C. § 841(a)(1) exceeds its authority under the Commerce Clause, infringes upon rights protected by principles of state sovereignty and the Tenth Amendment, and infringes upon fundamental rights protected by the Ninth Amendment. Finally, the Joint Defendants offer no legal or factual arguments that would preclude this Court from entering permanent injunctive relief and summary judgment. This Court, therefore, should enter such relief in favor of the United States.

ARGUMENT

I. THE COURT SHOULD REJECT THE JOINT DEFENDANTS' REQUEST TO DISSOLVE THE PRELIMINARY INJUNCTIONS

We first respond to the Joint Defendants' contention that summary judgment and permanent injunctive relief is inappropriate because the preliminary injunctions should be dissolved. The Joint Defendants contend that "sound reasons exist for this Court to exercise its inherent discretion to

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[1] Defendants Marin Alliance for Medical Marijuana and Lynnette Shaw (Case No. C 98-0086), and defendant Santa Cruz Cannabis Buyer's Club (Case No. C 98-0245), did not file any opposition to the United States' motion for summary judgment and permanent injunctive relief. Accordingly, the government's motion should be treated as conceded with respect to these defendants.

dissolve the injunction," and that "[t]he Government's arguments ignore the plain language of the Supreme Court's opinion which clearly states that this Court is not required to issue an injunction on the Government's demand." Joint Reply at 2. *Amicus* American Civil Liberties Union ("ACLU") likewise contends that "this Court has the equitable discretion to refuse the government's request for permanent injunctive relief against OCBC," and that "[i]n the context of this case, such consideration can yield only one result: if the government wishes to enforce the CSA against OCBC, it must convince a criminal jury beyond a reasonable doubt that OCBC's conduct violates the statute." Brief *Amicus Curiae* of the American Civil Liberties Union ("ACLU Mem.") at 5, 15.

Both the Joint Defendants and *amicus* ACLU have seriously misread the Supreme Court's opinion. In Oakland Cannabis, the Supreme Court recognized that, "when district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise," and that, "[b]ecause the District Court's use of equitable power is not textually required by any 'clear and valid legislative command,' the court did not have to issue an injunction." 532 U.S. at 496. The Court further explained that, "[b]y contrast, with respect to the Controlled Substances Act, criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance with the statute. Congress' resolution of the policy issues can be (and usually is) upheld without an injunction." Id. at 497.

However, the Supreme Court also made clear that "a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation,'" id. (quoting Virginian R. Co. v. Railway Employees, 300 U.S. 515, 551 (1937), and that "[a] district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited," for "'[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is * * * for the courts to enforce them when enforcement is sought." Id. (quoting TVA v. Hill, 437 U.S. 153, 194 (1978). Thus, the Supreme Court explained:

> their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is ***not*** whether enforcement is preferable to no enforcement at all. Consequently, when a court of equity exercises its discretion, it may ***not*** consider the advantages and disadvantages of

nonenforcement of the statute, but only the advantages and disadvantages of 'employing the extraordinary remedy of injunction,' over the other ***available*** methods of enforcement.

Id. at 497-98 (emphasis supplied, internal footnote omitted) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982)).

These statements confirm that a court may ***not*** exercise its equitable discretion -- which is intended to allow a court to decide how best to assure *compliance* with a Congressional act -- so as to countenance ongoing *violations* of a Congressional act. Thus, in Hecht Co. v. Bowles, 321 U.S. 321 (1944), the Supreme Court affirmed the district court's denial of the government's request for an injunction upon crediting the district court's determination that the defendant had acted in "good faith and diligence" in attempting to comply with the statute, that the defendant had taken "vigorous steps" to correct and prevent recurrence of its mistakes, and that issuance of an injunction would have "no effect" on ensuring future compliance with the statute. Id. at 325, 326-28. Similarly here, if it were clear that the Joint Defendants had acted in "good faith and diligence" in attempting to comply with section 841(a)(1), or taken "vigorous steps" to ensure that they would no longer distribute marijuana, even in the absence of an injunction, this Court would have discretion to consider measures other than a prohibitory injunction.[2]

Alternatively, had the government decided to pursue a both civil *and* criminal enforcement actions against the Joint Defendants, see United States v. Leasehold Interest in 121 Nostrand Ave., 760 F. Supp. 1015, 1035 (E.D.N.Y. 1991) (injunction entered in addition to criminal sanctions), this Court would have discretion to consider the advantages and disadvantages of "employing the extraordinary remedy of injunction" over the other available methods of enforcement, insofar as "criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance

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[2] Indeed, this Court dismissed the government's case against the Flower Therapy Medical Marijuana Club after defendants Barbara Sweeney and John Hudson took these very steps. Ms. Sweeney and Mr. Hudson attested that the closure of the Flower Therapy Medical Marijuana Club at its previous location had terminated all activity in relation to making marijuana available for medical purposes, and that neither of them had any plans to reactivate Flower Therapy Medical Marijuana Club or participate in establishing a successor to it. See September 3, 1998 Order re: Motion to Dismiss in Case No. 98-0089, slip op. at 1-2.

with the statute," and "Congress' resolution of the policy issues" could be "upheld without an injunction." Oakland Cannabis, 532 U.S. at 497-98. A similar balancing of available enforcement mechanisms was reflected in the Supreme Court's decision in Romero-Barcelo, which "held that a District Court had discretion not to issue an injunction precluding the United States Navy from releasing ordnance into water, but to rely on other means of ensuring compliance, including ordering the Navy to obtain a permit." Oakland Cannabis, 532 U.S. at 498 n.9 (citing Romero-Barcelo, 456 U.S. at 314-18).

But the Joint Defendants have not acted in "good faith and diligence" in promising that they will no longer distribute marijuana, even in the absence of an injunction, similar to the situations in Hecht Co. and Flower Therapy. Nor does this Court have other "*available* methods of enforcement," Oakland Cannabis, 532 U.S. 498, as was the case in Romero-Barcelo. The government has not brought concurrent criminal charges against the Joint Defendants, and this Court does not possess authority to order the United States to bring such charges. See United States v. Nixon, 418 U.S. 683, 693 (1974) (holding that, under the Take Care Clause, U.S. Const. art. II, § 3, the Executive Branch has "exclusive authority and absolute discretion to decide whether to prosecute a case."). Under these circumstances, the only *available* means of ensuring compliance with section 841(a)(1) is to enter the injunctive relief requested by the United States. Indeed, if this Court were to dissolve the preliminary injunctions, as requested by the Joint Defendants and *amicus* ACLU, the Court would not be achieving compliance but *noncompliance* with the statute, a course of action which the Supreme Court expressly disavowed in Oakland Cannabis. See 532 U.S. at 497-98 (district court's choice "is simply whether a particular means of enforcing the statute should be chosen over another permissible means; it is ***not*** whether enforcement is preferable to no enforcement at all" (emphasis supplied)).

In any event, even if they were to surmount this obstacle, the Joint Defendants have failed to offer any persuasive reason why this Court should dissolve the injunctions in these cases. The Joint Defendants first complain that they were "deprived of the procedural safeguards to which they would be entitled in a criminal prosecution." Joint Reply at 3. But the reason the Joint Defendants are not

afforded the same procedural protections in a civil enforcement action as in a criminal prosecution, quite obviously, is that they are not subject to the sanction of loss of liberty in a civil proceeding. Hence, given this Court's conclusion that the procedural differences between civil enforcement and criminal actions "do not compel the conclusion that the federal government is acting in bad faith," United States v. Cannabis Cultivators Club, 5 F. Supp.2d 1086, 1104 (N.D. Cal. 1998), and given that Joint Defendants have no absolute right to be prosecuted criminally, their contention in this regard is insubstantial. Indeed, had the United States chosen to proceed criminally against the Joint Defendants, which would have put the liberty of the individual defendants in question, it can hardly be doubted that the Joint Defendants would have vigorously protested that action as well.

The Joint Defendants also suggest that "the government may be loathe to criminally prosecute anyone *for fear that the public may not support such action*," Joint Reply at 5 (emphasis supplied), and *amicus* ACLU likewise assert that "[f]ederal prosecutors evidently wished to avoid a jury comprising California voters who recently had approved overwhelmingly Proposition 215." ACLU Mem. at 12. But these unabashed invitations to jury nullification cannot be countenanced; a court has no discretion to refrain from enjoining ongoing violations of the Controlled Substances Act because a jury in a criminal action might find the violations sympathetic and therefore nullify the Act. See, e.g., United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991); United States v. Edwards, 101 F.3d 17, 19-20 (2d Cir. 1996) (collecting cases).

The Joint Defendants next contend that "courts of equity historically have been reluctant to allow the government to circumvent the due process safeguards required in a criminal proceeding by seeking to prohibit allegedly criminal behavior through a civil injunction, which could later be enforced through civil contempt proceedings." Joint Reply at 4. See also ACLU Mem. at 10 (making same argument and citing same authorities). But "[t]he maxim that 'equity will not enjoin a crime,' does not hold where Congress has explicitly authorized injunctive relief." LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 434 (2d Cir. 1995). Accord United States v. Santee Sioux Tribe of Nebraska, 135 F.3d 558, 565 (8th Cir.) (stating that "maxim that equity will not enjoin the commission of a

crime" has "three exceptions under which an injunction will issue," including "cases where a statute grants a court the power to enjoin a crime"), *cert. denied*, 525 U.S. 813 (1998); United States v. Jalas, 409 F.2d 358, 360 (7th Cir. 1969) (same).[3]

Thus, both this Court, see 5 F. Supp.2d at 1098-1106, and others have found no impediment to granting injunctive relief sought by the government against statutory violations of the Controlled Substances Act. See United States v. Chemicals for Research and Industry, Inc., 10 F. Supp.2d 1125, 1126 n.1, 1127-30 (N.D. Cal. 1998) (preliminary injunction and supplemental preliminary injunction entered against chemical supply company for violations of 21 U.S.C. §§ 842(a)(10), 842(a)(11), and 843(a)(7)); Leasehold Interest, 760 F. Supp. at 1035 (injunction entered prohibiting defendants "from using the apartment to commit or facilitate narcotics offenses").

The Joint Defendants further argue that "if the original injunction remains in place, Defendants will have no opportunity to present an immunity defense." Joint Reply at 4. This contention is specious. The Joint Defendants *have* had the opportunity to present an immunity defense under 21 U.S.C. § 885(d), and indeed have done so. While the Joint Defendants may disagree with this Court's rejection of that claim, see September 3, 1998 Order re: Motion to Dismiss in Case No. 09-0088, slip op. at 1-4, that does not entitle them to request that the injunction be dissolved so they can try their luck before a different judge. See Joint Reply at 5 (suggesting that, even though this Court has rejected their immunity claim, "[t]he government cannot predict whether a criminal court would analyze the immunity defense the same way.").

Finally, the Joint Defendants contend that "the government's selection of an injunction as a means of enforcement interferes with the constitutionally protected interests of the State of California and the City of Oakland, as well as the interests of seriously ill patients." Joint Reply at 5. Because

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[3] Indeed, the very *Harvard Law Review* article cited by the Joint Defendants and *amicus* ACLU recognizes that "statutes have assisted in the undercutting of the reluctance to enjoin crime in much the same ways in which they have assisted in the demise of the rule that equity protects only property rights," and that "the vast majority of American courts have held such statutes constitutional and have issued injunctions under them." *Developments in the Law-Injunction: II. The Changing Limits of Injunctive Relief*, 78 Harv. L. Rev. 997, 1015 (1965).

these constitutional arguments have no merit, as discussed below, they provide no basis upon which to dissolve the preliminary injunctions.

II. THE CONSTITUTIONAL CHALLENGES RAISED BY THE JOINT DEFENDANTS ARE MERITLESS

A. Commerce Clause

1. In our opening memorandum, we demonstrated that the Joint Defendants' contention that enactment of section 841(a)(1) exceeds Congress' powers under the Commerce Clause is foreclosed by binding Ninth Circuit precedent, which holds that the Controlled Substances Act's prohibition on the distribution, cultivation, or possession of marijuana and other controlled substances "is constitutional under the Commerce Clause." United States v. Bramble, 103 F.3d 1475, 1479 (9th Cir. 1996). Accord United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997); United States v. Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996); United States v. Visman, 919 F.2d 1390, 1393 (9th Cir. 1990), *cert. denied*, 502 U.S. 969 (1991); United States v. Montes-Zarate, 552 F.2d 1330, 1331-32 (9th Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); United States v. Rodriquez-Camacho, 468 F.2d 1220, 1221-22 (9th Cir. 1972), *cert. denied*, 410 U.S. 985 (1973). The Ninth Circuit is not alone in reaching this conclusion; ***all*** eleven other courts of appeals -- with nary a single dissenting vote -- have likewise upheld the constitutionality of the Controlled Substances Act against Commerce Clause challenges.[4]

Thus, in Tisor, the Ninth Circuit rejected the argument that section 841(a)(1) could not pass constitutional muster under the Commerce Clause following the Supreme Court's decision in United

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[4] See United States v. Edwards, 98 F.3d 1364, 1369 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1170 (1997); United States v. Lerebours, 87 F.3d 582, 584-85 (1st Cir. 1996), *cert. denied*, 519 U.S. 1060 (1997); Proyect v. United States, 101 F.3d 11, 13-14 (2d Cir. 1996) (per curiam); United States v. Orozco, 98 F.3d 105, 107 (3d Cir. 1996); United States v. Leshuk, 65 F.3d 1105, 1111-12 (4th Cir. 1995); United States v. Lopez, 459 F.2d 949, 953 (5th Cir.), *cert. denied*, 409 U.S. 878 (1972); United States v. Brown, 276 F.3d 211, 214-15 (6th Cir. 2002); United States v. Westbrook, 125 F.3d 996, 1009-10 (7th Cir.), *cert. denied*, 522 U.S. 1036 (1997); United States v. Patterson, 140 F.3d 767, 772 (8th Cir.), *cert. denied*, 525 U.S. 907 (1998); United States v. Price, 265 F.3d 1097, 1106-07 (10th Cir. 2001), *petition for cert. filed*, No. 01-8242 (Jan. 30, 2002); United States v. Jackson, 111 F.3d 101, 102 (11th Cir.) (per curiam), *cert. denied*, 522 U.S. 878 (1997).

States v. Lopez, 514 U.S. 549 (1995). In pertinent part, the court of appeals determined that "[t]he activity condemned by the statute interpreted in Lopez did not involve a commercial transaction" and that, in contrast, the "[i]ntrastate distribution and sale of [controlled substances] are commercial activities." 96 F.3d at 375. Likewise, in United States v. Staples, 85 F.3d 461 (9th Cir.), *cert. denied*, 519 U.S. 938 (1996), the Ninth Circuit distinguished Lopez, holding that, "[u]nlike education, drug trafficking is a commercial activity which substantially affects interstate commerce." Id. at 463. This Court, too, has rejected the identical Commerce Clause argument raised by the Joint Defendants, holding that "[t]his case, unlike Lopez, is not about mere possession but rather about distribution, a class of activities that, even if done for the humanitarian purpose of serving the legitimate health care needs of seriously ill patients, can affect interstate commerce." 5 F. Supp.2d at 1098.

The Joint Defendants make little effort to distinguish this governing body of Ninth Circuit authority, or this Court's conclusion that section 841(a)(1) passes muster under the Commerce Clause. Indeed, notwithstanding the well-settled rule that a district court is obliged to follow Ninth Circuit authority when that court has ruled on a controlling legal issue, absent an intervening Supreme Court decision that has called the circuit precedent into doubt, see Hart v. Massanari, 266 F.3d 1155, 1170-72 (9th Cir. 2001), neither the Joint Defendants (nor *amici curiae* State of California, *et al.)* bother discussing or even citing to the Ninth Circuit's decisions in Bramble, Kim, Staples, Visman, Montes-Zarate, or Rodriguez-Camacho, or this Court's earlier ruling on this question. Instead, the Joint Defendants obliquely argue that the Ninth Circuit's decision in one case -- Tisor – is "suspect authority" in light of the Supreme Court's decision in United States v. Morrison, 529 U.S. 598 (2000). See Joint Reply at 7, 9. That argument is entirely without foundation.

The Joint Defendants first note that, in Morrison, the Supreme Court held that "[t]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation," 529 U.S. at 614, and argue that "any pre-Morrison case, such as Tisor, that takes Congressional findings at face value is of suspect authority on this issue today." Joint Reply at 7. But the Ninth Circuit has never simply taken the legislative findings set forth in 21 U.S.C. § 801 "at face

value." In Rodriquez-Camacho, for example, the Ninth Circuit expressly recognized that it was not required to defer to these Congressional findings if "' the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent,"' but determined that "[s]uch is not the case as regards controlled substances. * * * Congress had a rational basis for making its findings." 468 F.2d at 1221-22 (quoting Stafford v. Wallace, 258 U.S. 495, 521 (1922)). Similarly, following the Supreme Court's decision in Lopez, the Ninth Circuit "again acknowledged that drug trafficking affects interstate commerce," Kim, 94 F.3d at 1250, and, in Tisor, the Ninth Circuit upheld the constitutionality of section 841(a)(1) not merely on the basis of the Congressional findings, but also by relying on circuit precedent establishing that "'drug trafficking is a commercial activity which substantially affects interstate commerce.'" 96 F.3d at 375 (quoting Staples, 85 F.3d at 463)).

Similarly, in upholding the constitutionality of 21 U.S.C. § 860(a), which provides heightened penalties for drug offenses (including section 841(a)(1)) occurring within 1000 feet of a school, the Ninth Circuit has made clear that it has independently adjudged that the Congressional findings in the Controlled Substances Act are rational. See United States v. Henson, 123 F.3d 1226, 1232-33 (9th Cir. 1997) (prohibition on intrastate distribution or cultivation of controlled substances "is permissible because Congress has found, *and the courts have consistently accepted as rational*, that intrastate drug trafficking substantially affects interstate commerce" (emphasis supplied)); United States v. Thornton, 901 F.2d 738, 741 (9th Cir. 1990) ("Congress has stated *and we have confirmed* that drug trafficking is a national concern which affects interstate commerce." (emphasis supplied).[5]

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[5] As with section 841(a)(1), ***every*** court of appeals to have considered the question has upheld the constitutionality of section 860 against a Commerce Clause challenge, again with nary a single dissenting opinion. See United States v. Hawkins, 104 F.3d 437, 440 (D.C. Cir.), *cert. denied*, 522 U.S. 844 (1997); United States v. Zorrilla, 93 F.3d 7, 8-9 (1st Cir.1996); United States v. Ekinci, 101 F.3d 838, 844 (2d Cir. 1996); Orozco, 98 F.3d at 106-07; United States v. Woodson, 163 F.3d 600, 1998 WL 654449, at ** 4- 5 (4th Cir.) (Mem.), *cert. denied*, 525 U.S. 988 (1998); United States v. Dixon, 132 F.3d 192, 202 (5th Cir.1997), *cert. denied*, 523 U.S. 1096 (1998); United States v. Allen, 106 F.3d 695, 700-01 (6th Cir.), *cert. denied*, 520 U.S. 1281 (1997); United States v. McKinney, 98 F.3d 974, 978 (7th Cir.1996), *cert. denied*, 520 U.S. 1110 (1997); United States v. Pompey, 264 F.3d 1176, 1179-80 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 929 (2002); Jackson, 111 F.3d at 102.

These cases conclusively refute the Joint Defendants' suggestion that the Ninth Circuit has merely taken Congress' findings that the intrastate distribution and cultivation of controlled substances substantially affects interstate commerce "at face value."

The Joint Defendants also acknowledge our argument that, "whereas Lopez (and Morrison) involved activities that were noneconomic, 'drug trafficking' is an 'economic activity,'" and concede that the Ninth Circuit in Tisor distinguished Lopez on this basis. Joint Reply at 9 (citing Tisor, 96 F.3d at 373). The Joint Defendants further concede that "the noneconomic nature of the activities in Lopez and Morrison "contributed importantly to the Supreme Court's conclusion that the activities" in those cases were beyond Congress' Commerce Clause authority. Id. at 10. The Joint Defendants argue, however, that "[l]ike the effort to limit Lopez to the issue of congressional findings, this new effort to limit the reach of Lopez and Morrison is misplaced." Id. at 9. Yet none of the arguments the Joint Defendants advance on this question can withstand scrutiny.

The Joint Defendants first make the lame assertion (unsupported by citation to any authority) that "the government cannot dispute the noneconomic nature of Defendants' activities." Id. On the contrary, the Ninth Circuit has squarely held that the "[i]ntrastate distribution and sale of [controlled substances] are *commercial* activities," Tisor, 96 F.3d at 375 (emphasis supplied), and that, "[u]nlike education, drug trafficking is a *commercial* activity which substantially affects interstate commerce." Staples, 85 F.3d at 463 (emphasis supplied).[6] Other courts of appeals have likewise recognized that "[t]he Controlled Substances Act concerns an obviously economic activity substantially affecting interstate commerce," United States v. Goodwin, 141 F.3d 394, 399 (2d Cir. 1997), *cert. denied*, 523 U.S. 1086, 525 U.S. 881 (1998), and that the distribution and cultivation of controlled substances are

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[6] The uncontradicted evidence in these cases, which the Joint Defendants have steadfastly failed to confront, also establishes, as a factual matter, that the Oakland Cannabis Buyers' Cooperative engaged in the commercial sale of marijuana, as did the Cannabis Cultivators Club and Ukiah Cannabis Buyer's Club. See *infra* notes 15-17 (declarations of DEA Special Agents detailing six undercover cash purchases of marijuana each from the Oakland Cannabis Buyers' Cooperative, Cannabis Cultivators Club, and Ukiah Cannabis Buyer's Club, and declarations of DEA chemist Phyllis E. Queen confirming that the purchases were of marijuana).

"inherently commercial activit[ies]," Orozco, 98 F.3d at 107, which, "by their nature, [are] economic in character." Price, 265 F.3d at 1107. The Joint Defendants' assertion that the United States "cannot dispute the noneconomic nature of Defendants' activities," therefore, is nothing short of frivolous.

The Ninth Circuit's conclusion that traffic in controlled substances constitutes commercial activity, see Tisor, 96 F.3d at 375; Staples, 85 F.3d at 463, serves to distinguish these cases from Lopez and Morrison. In Morrison, the Supreme Court warned against any attempt to "downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis," emphasizing that "a fair reading of Lopez shows that the noneconomic, criminal nature of the conduct at issue was *central* to our decision in that case." 529 U.S. at 610 (emphasis supplied). Turning to the statute before it, the Court held that the federal civil remedy provision of the Violence Against Women Act, 42 U.S.C. § 13981, did not pass muster under the Commerce Clause in part because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity," and that, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." Id. at 613. See also id. at 611 ("Lopez's review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.").

It therefore comes as no surprise that, following the Supreme Court's decision in Morrison, *every* court to have considered the question has rejected the argument that that case calls into question the constitutionality of the Controlled Substances Act. See Price, 265 F.3d at 1107 ("Because Morrison involved the regulation of non-economic activities, while § 841(a)(1) deals with the regulation of economic activities * * * § 841(a)(1) and § 846 are within Congress' power to regulate interstate commerce."); Pompey, 264 F.3d at 1180 (holding that defendant's reliance on Morrison was "unavailing" because "[w]e think any party would be hard-pressed to prove that trafficking in controlled substances is not an economic activity and not an issue of national concern"); Bertoldo v. United States, 145 F. Supp.2d 111, 118-19 (D. Mass. 2001) ("Unlike gender-motivated crimes,

narcotics activity regulated under the CSA is obvious economic activity. * * * Although local distribution and possession may, strictly speaking, be considered intrastate activity, this activity is still directly connected with interstate commerce.").

The Joint Defendants alternatively protest that the Supreme Court in Morrison "did not eliminate the need to show that wholly intrastate economic activities, in the aggregate, have a substantial effect on interstate commerce," and assert that "whatever intrastate conduct *may* be reached by Congress due to the conduct's aggregate effects must be shown to *substantially affect* interstate commerce." Joint Reply at 10 (emphasis in original). See also Brief of *Amicus Curiae* State of California ("Cal. Mem.") at 13 ("To implicate federal authority, a *substantial connection* between what is authorized by the Proposition and interstate commerce must be demonstrated." (emphasis in original)). While these assertions are unobjectionable in the abstract, they once again disregard the fact the Ninth Circuit has already determined that the intrastate distribution and cultivation of controlled substances substantially affects interstate commerce, see Tisor, 96 F.3d at 375; Kim, 94 F.3d at 1250; Staples, 85 F.3d at 463, and has "accepted as rational" Congress' judgment on this matter. See Henson, 123 F.3d at 1232-33; Thornton, 901 F.2d at 741. Here again, nothing in Morrison undermines the precedential force of these authorities.

Finally, the Joint Defendants' Commerce Clause argument fails to come to grips with the fact that, as the Ninth Circuit recognized in Kim, the Supreme Court itself "has recognized Congress' power to regulate illegal drugs." 94 F.3d at 1250 n.4 (citing Minor v. United States, 396 U.S. 87 (1969); and Reina v. United States, 364 U.S. 507 (1960)). Thus, in Minor, the Supreme Court stated that "a flat ban on certain [drug] sales * * * is sustainable under the powers granted Congress in Art. I, § 8," 396 U.S. at 98 n.13 (constitutionality of Harrison Narcotics Act, 26 U.S.C. § 4705(a), *repealed and replaced by* Controlled Substances Act, 21 U.S.C. 801, *et seq.*), and, in Reina, the Court referred to Congress' "undoubted power to enact the narcotics law." 364 U.S. at 511 (constitutionality of Narcotic Control Act of 1956, 18 U.S.C. § 1406, *repealed and replaced by* Controlled Substances Act, 21 U.S.C. 801, *et seq.*). See also United States v. Walsh, 331 U.S. 432, 437-38 (1947) (finding

that Congress' power under the Food, Drug and Cosmetic Act of 1938, 21 U.S.C. § 301(h) extends to the regulation of intrastate drug sales). Neither Lopez nor Morrison disavowed or even discussed these rulings, and the Supreme Court has reminded lower courts that they are not to "conclude our more recent cases have, by implication, overruled an earlier precedent," but instead should "'leav[e] to this Court the prerogative of overruling its own decisions.'" Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriguez de Quijos v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

At bottom, the Joint Defendants have offered no colorable argument that the Supreme Court's decision in Morrison undermines Ninth Circuit precedent which upholding the constitutionality of section 841(a)(1) against Commerce Clause challenges. This Court, therefore, is obliged to follow these governing precedents. See Hart, 266 F.3d at 1175.

2. The Joint Defendants nonetheless contend that, even if Lopez and Morrison are read as being limited to the holding that Congress may not reach noneconomic intrastate activity, such a reading "would still require modification of the injunction in this case to exclude application to any *noneconomic* activities, such as the cultivation and distribution of cannabis for medical purposes without economic gain." Joint Reply at 10 (emphasis in original).

This contention is doubly wrong. First, the Joint Defendants' suggestion that, in fashioning an appropriate injunction, this Court can take into account the alleged medicinal purposes for their actions is foreclosed by the Supreme Court's decision in Oakland Cannabis, in which the Court held that "for purposes of the Controlled Substances Act, marijuana has 'no currently accepted medical use' at all," 532 U.S. at 491 (quoting 21 U.S.C. § 811), and that, "[b]ecause the statutory prohibitions cover even those who have what could be termed a medical necessity, the [Controlled Substances] Act precludes consideration of this evidence." Id. at 499. Hence, because a court sitting in equity cannot "override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited," id. at 497, this Court may not take into account the alleged medicinal purposes for the Joint Defendants' actions.

Nor may this Court modify the injunction to allow the Joint Defendants to distribute marijuana "without economic gain." Joint Reply at 10. The Supreme Court has held 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 v. United States, 402 U.S. 146, 154 (1971), and, in Lopez, the Court reaffirmed that "'where *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.'" 514 U.S. at 558 (emphasis in original) (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968) (emphasis by Court)). This unbroken line of authority forecloses any argument that the "distribution of cannabis for medical purposes without economic gain," Joint Reply at 10, is somehow excluded from the scope of the Controlled Substances Act. Rather, given that section 841(a)(1) has been held to be constitutional under the Commerce Clause, see Bramble, 103 F.3d at 1479; Tisor, 96 F.3d at 373-75; Kim, 94 F.3d at 1249-50, it remain unlawful to distribute marijuana *regardless* of whether such distribution is done for monetary gain.[7]

3. Perhaps recognizing that their challenges to section 841(a)(1) premised solely on the Commerce Clause are doomed to failure, the Joint Defendants make a prolonged argument that this Court "must examine the class of activities subject to a claim of Congressional penumbral power under the Necessary and Proper Clause to determine if it is a proper classification." Joint Reply at 11. The Joint Defendants therefore assert that, "by this injunction, the government seeks to prohibit wholly intrastate activity using its penumbral power to enact laws that are necessary and proper for carrying into execution its power over interstate commerce," and contend that section 841(a)(1) fails this test, because "the wholly intrastate commerce in medical marijuana is not an object entrusted to the [federal] government." Id. at 8, 13 (internal quotations omitted).

This argument reflects a fundamental misunderstanding of Supreme Court jurisprudence and, once again, a complete disregard for relevant Ninth Circuit precedent. First, the Joint Defendants'

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[7] In any event, as we have noted above, the uncontradicted record in this establishes that each of the Joint Defendants engaged in the commercial sale of marijuana. See *infra* notes 15-17.

contention this Court "must examine the class of activities * * * under the Necessary and Proper Clause to determine if it is a proper classification," Joint Reply at 11, cannot be squared with the methodology adopted by the Supreme Court in Lopez and confirmed in Morrison. In Lopez, the Supreme Court identified four factors that a court should consider in determining whether a challenged statute falls within Congress' power to regulate those activities that substantially affect interstate commerce: (1) whether the statute relates to an activity that has something to do with "'commerce' or any sort of economic enterprise"; (2) whether the statute contains a "jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce"; (3) whether the statute or its legislative history contains congressional findings that the activity sought to be regulated has a substantial effect on interstate commerce; and (4) whether the link between the activity and interstate commerce is not too attenuated. See 514 U.S. at 561-67. In Morrison, the Supreme Court confirmed that these factors formed "the proper framework" for analyzing the constitutionality of statutes that purport to regulate "those activities that substantially affect interstate commerce." See 529 U.S. at 609. In neither case did the Supreme Court engage in a separate analysis under the Necessary and Proper Clause. See generally McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419-20 (1819) (Marshall, C.J.) (stating that the Necessary and Proper Clause "is placed among the powers of congress, not among the limitations on those powers," and that "[i]ts terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted." (emphasis supplied)).

Nor did the Ninth Circuit, in upholding the constitutionality of section 841(a)(1) in Bramble, Tisor, Kim, Visman, Montes-Zarate, and Rodriguez-Camacho, or in upholding the constitutionality of section 860 in Henson and Thornton, subject those provisions to an independent constitutional analysis under the Necessary and Proper Clause. Indeed, the Joint Defendants can point to *no* case in which a federal court has subjected *any* provision of the Controlled Substances Act to separate scrutiny under the Necessary and Proper Clause. Thus, while the Joint Defendants' co-counsel has argued elsewhere that courts *should* subject Congressional legislation to scrutiny under the Necessary

and Proper Clause,[8] the Joint Defendants' contention here that, "under today's Commerce Clause jurisprudence * * * [a] court *must* examine the class of activities subject to a claim of Congressional penumbral power under the Necessary and Proper Clause to determine if it is a proper classification," Joint Reply at 11 (emphasis supplied), is simply a misstatement of applicable law.

Furthermore, the very premise of the Joint Defendants' argument -- that this Court must consider whether Congress may regulate "the wholly intrastate commerce in medical marijuana," Joint Reply at 13[9] -- is misplaced. First, as shown above, the Joint Defendants are in error in suggesting the Court may take into account the alleged medicinal purposes for defendants' actions because section 841(a)(1) "precludes consideration of this evidence." Oakland Cannabis, 532 U.S. at 499.

And the Joint Defendants are equally in error in suggesting that the relevant inquiry is whether Congress may regulate what they characterize as the "wholly intrastate" distribution of marijuana. Once again,"[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. Hence, because section 841(a)(1)'s prohibition on the distribution of marijuana and other controlled substances has been held to satisfy the Commerce Clause, see Bramble, 103 F.3d at 1479; Tisor, 96 F.3d at 375; Kim, 94 F.3d 1247, 1249-50, the possibility that some of the Joint Defendants' activities may occur wholly intrastate is, in the words of the Second Circuit, "constitutionally irrelevant." United States v. Genao, 79 F.3d 1333, 1336 (2d Cir. 1996).

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[8] See Randy E. Barnett, *Necessary and Proper*, 44 U.C.L.A. L. Rev. 745, 748 (1997) ("While the Necessary and Proper Clause has long been used to greatly expand congressional power, I argue that, to the contrary, it provides a two-part standard against which all national legislation should be judged: Such laws shall be 'necessary and proper.'"); id. at 787 (identifying "my proposal" as the adoption of "a general presumption of liberty which places the burden on the government to establish the necessity and propriety of any infringement on individual or associational freedom").

[9] *Amici* State of California also erroneously attempts to cabin this Court's consideration of the statute, asserting that "[t]o 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 beyond the reach of federal law–the limited use of cannabis by its citizens for specified medicinal purposes." Cal. Mem. at 13.

The Ninth Circuit made this point unambiguously clear in Visman, rejecting the like argument that Congress lacked a reasonable basis to assume that the intrastate "cultivation of marijuana plants found rooted in the soil" affected interstate commerce. In pertinent part, the Visman court held that "no proof of an interstate nexus is required in order to establish jurisdiction of the subject matter'" because "local criminal cultivation of marijuana is within a class of activities that adversely affects interstate commerce." 919 F.2d at 1393 (quoting Montes-Zarate, 552 F.2d at 1331).

Similarly, in granting the government's motions for preliminary injunctions in these cases, this Court held that, even if the defendants could prove "that all marijuana was cultivated locally, distributed locally, and consumed locally by California residents," it did not follow "that the class of activities within which defendants' conduct falls--non-profit distribution of medical marijuana--necessarily does not affect interstate commerce." 5 F. Supp.2d at 1098. Noting that Congress "has the power 'to declare an entire class of activities affects interstate commerce,'" id. at 1097 (quoting Maryland v. Wirtz, 392 U.S. at 192), this Court reasoned that:

> Medical marijuana may be grown locally, or out of state or country, and *there is nothing about medical marijuana that limits it to intrastate cultivation.* Similarly, it may be transported across state lines and consumed across state lines. * * * This case, unlike Lopez, is not about mere possession, but rather about distribution, a class of activities that, even if done for the humanitarian purpose of serving the legitimate health care needs of seriously ill patients, can affect interstate commerce.
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> * * *
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> To hold that the Controlled Substances Act is unconstitutional as applied here would mean that in every action in which a plaintiff seeks to prove a defendant violated federal law, an element of every case-in-chief would be that the defendant's specific conduct at issue, based on the facts proved at an evidentiary hearing or trial, substantially affected interstate commerce. No case so holds and the Court declines to do so for the first time here.

Id. (emphasis supplied).

Neither the Joint Defendants nor *amici* State of California make any attempt to distinguish or otherwise engage Visman or this Court's earlier decision on this subject, let alone even cite to them. Regardless, these authorities foreclose the contention that this Court should limit its inquiry to whether Congress may regulate what the Joint Defendants characterize to be the "wholly intrastate commerce in medical marijuana."

B.. State Sovereignty and the Tenth Amendment

The Joint Defendants also argue that "the exercise of power in this case violates the principle of state sovereignty," asserting that "because Congress has not comparable police power [to that of the States], it may not use its implied penumbral powers as a pretext to countermand a decision by a sovereign state and its people that a particular activity is needed to protect health and safety." Joint Reply at 14. *Amici* State of California likewise argue that "by prohibiting the use of cannabis by seriously ill persons in States that have voter approved ballot initiatives, the CSA also violates traditional notions of state sovereignty protected by the Tenth Amendment." Cal. Mem. at 4.

These contentions must also be rejected. Because it is settled that section 841(a)(1)'s prohibition on the distribution of marijuana and other controlled substances satisfies the Commerce Clause, see Bramble, 103 F.3d at 1479; Tisor, 96 F.3d at 375; Kim, 94 F.3d 1247, 1249-50, it necessarily follows that there can be no violation of the Tenth Amendment or infringement upon principles of state sovereignty. This is because the Supreme 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" or that "curtail[s] or prohibit[s] the States' prerogatives to make legislative choices respecting subjects the States may consider important." Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 290, 291 (1981). See also New York v. United States, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.").

The only exception to this general rule is where "the federal government has intruded on the sovereignty of individual States by "compel[ling] the States to implement, by legislation or executive action, federal regulatory programs." Printz v. United States, 521 U.S. 898, 925 (1997). But this is not a case in which the federal government has "commandeer[ed] the state legislative process by requiring state legislature to enact a particular kind of law." Reno v. Condon, 528 U.S. 141, 149 (2000). Rather, like the federal statute regulating possession of firearms which the Ninth Circuit

upheld as constitutional in United States v. Jones, 231 F.3d 508 (9th Cir. 2000), the Controlled Substances Act is "a federal criminal statute to be implemented by federal authorities; it does not attempt to force the states or state officers to enact or enforce any federal regulation." Id. at 515. Hence, in the words of the Jones court, the Controlled Substances Act "neither violates the Tenth Amendment nor impinges on the sovereignty of the states." Id.

The Joint Defendants' assertion that "[t]he People of the State of California have instructed their government to exercise its police power to declare that the distribution of medical cannabis is vital to the health of some of its citizens," and that "the federal government may not, on the pretext of preventing interstate commerce in drugs, interfere with the exercise of the sovereign police power," Joint Reply at 15, is yet another example of their refusal to engage governing Supreme Court and Ninth Circuit authority. The Supreme Court has held that, "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States [and] Congress may legislate in areas traditionally regulated by the States," Gregory v. Ashcroft, 501 U.S. 452, 460 (1991), and the Ninth Circuit has squarely rejected the argument that section 841(a)(1) "intrudes into an area traditionally regulated by the states," as "lack[ing] merit." Kim, 94 F.3d at 1250 n.4. See also In re Grand Jury Proceedings, 801 F.2d 1164, 1169-70 (9th Cir. 1986); United States v. Rosenberg, 515 F.2d 190, 198 n.14 (9th Cir.), *cert. denied*, 423 U.S. 1031 (1975). Here again, neither the Joint Defendants nor *amici* State of California make any attempt to distinguish, engage, or even cite to these authorities.

Finally, for all the *sturm und drang* raised regarding the issue of state sovereignty, the Joint Defendants and *amici* State of California are remarkably uninformed about what California law actually means. The Compassionate Use Act "on its face exempts only possession and cultivation from criminal sanctions for qualifying patients." People v. Young, 92 Cal.App.4th 229, 237, 111 Cal.Rptr. 726, 731 (Cal. Ct. App. 2001) (citing Cal. Health & Safety Code § 11362.5(d)), *review denied* (Dec. 12, 2001). Consequently, even following passage of the Compassionate Use Act, "[t]he acts of selling, giving away, transporting, and growing large quantities of marijuana *remain criminal*,"

People v. Rigo, 69 Cal.App.4th 409, 415, 81 Cal.Rptr.2d 624, 628 (Cal. Ct. App. 1999) (emphasis supplied), *review denied* (April 21, 1999), and "one who sells, furnishes, or gives away marijuana to a patient or a qualified primary caregiver authorized to acquire it for the patient's physician-approved medicinal use, violates the law. Those sellers have no defense because of section 11362.5 to charges of [distribution]." People v. Peron, 59 Cal.App.4th 1383, 1395, 70 Cal.Rptr.2d 20, 28 (1997), *review denied* (Feb. 25, 1998). In view of these authoritative interpretations of the Compassionate Use Act by the California courts,[10] the Joint Defendants' assertion that "[t]he People of the State of California have instructed their government to exercise its police power to declare that the *distribution* of medical cannabis is vital to the health of some of its citizens," Joint Reply at 15 (emphasis supplied), and *amici* State of California's assertion that "under the limited circumstances authorized by California voters, the prescription, *distribution* and use of cannabis are not criminal acts, Cal. Mem. at 5 (emphasis supplied), are plain misstatements of California law.

C. Fundamental Rights and the Ninth Amendment

The Joint Defendants also continue to assert that the unmodified injunction "impermissibly infringes with patient-members' fundamental rights: (a) to bodily integrity, to ameliorate pain, and to prolong life; and (b) to consult with and act upon their doctors' recommendation," Joint Reply at 16, but they provide no convincing response to our showing that this argument is foreclosed by Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980), and that they lack standing to raise this argument on behalf of their "patient-members." Cf. Oakland Cannabis, 532 U.S. at 500 n.1 (Stevens, J., concurring) ("Of course, respondents also cannot claim necessity based upon the choice of evils facing seriously ill patients, as that is not the same choice respondents face."). Nor do they, or *amici* State of California, make any attempt to distinguish this Court's conclusion that "Carnohan disposes"

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[10] "'Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise * * *.'" Hicks v. Feiock, 485 U.S. 624, 630 n.3 (1990) (quoting West v. American Telephone & Telegraph Co., 311 U.S. 223, 237 (1940)). .

of the claim that the injunctions in these cases infringe on fundamental rights because "[r]egardless of whether the Intervenors have a right to treat themselves with marijuana which they themselves grow (a remedy of their own confection), the Ninth Circuit has held that they do not have a constitutional right to *obtain* marijuana from the medical cannabis cooperatives free of government police power." February 25, 1999 Memorandum and Order, slip op. at 2-3 (emphasis by Court), *vacated and remanded* 221 F.3d 1349 (9th Cir. 2000) (Mem.).

The Joint Defendants first contend that Carnohan is inapplicable because "the Ninth Circuit's brief opinion did not reach the due process issue." Joint Reply at 18-19. This assertion is without merit. The Ninth Circuit squarely held in Carnohan that "[c]onstitutional rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of the lawful exercise of government police power." 616 F.2d at 1122 (citing Rutherford v. United States, 616 F.2d 455 (10th Cir. 1980), and People v. Privitera, 23 Cal.3d 697, 591 P.2d 919, 153 Cal.Rptr. 431 (1979), *cert. denied*, 444 U.S. 949 (1979)).

The Joint Defendants next contend that Carnohan did not "address the situation that arises when state and federal authorities differ." Joint Reply at 19. But that question is irrelevant. As this Court concluded in dismissing the intervenors' identical fundamental right claim, "[t]he fact that California law does not prohibit the distribution of medical marijuana under certain circumstances is not relevant as to whether the Intervenors have a fundamental right. If that were the case, whether one had a fundamental right to treat oneself with marijuana would depend on whether the state in which one lived prohibited such conduct." February 25, 1999 Memorandum and Order, slip op. at 3-4. The Joint Defendants' attempts to distinguish Carnohan, therefore, are unavailing.

The Joint Defendants nonetheless argue that, "when deciding whether a liberty is or is not fundamental, judges should pay great heed to the judgment of the People of a State and their government." Joint Reply at 19. See also Cal. Mem. at 8 (arguing that, under the Ninth Amendment, courts should defer "to the States' inventive genius for solving pressing issues of public health and safety"). Pointing to the passage of Compassionate Use Act in California, the passage of measures

regarding medical marijuana by the County of Alameda and City of Oakland, and the passage of like measures in other states, the Joint Defendants argue that this Court "should reject these judgments only reluctantly," and that, "[i]n this type of case only a federal judge can protect the will and judgment of the people (and their State and city) that a right is fundamental against an overreaching application of a federal statute." Joint Reply at 20.

This suggestion -- that this Court may discover unenumerated rights protected by the Ninth Amendment in state law, even when state law is in conflict with federal law -- cannot be squared with first principles of constitutional law. Under the Supremacy Clause,[11] "'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield,'" Felder v. Casey, 487 U.S. 131, 138 (1988) (quoting Free v. Bland, 369 U.S. 663, 666 (1962)), and "even state regulation designed to protect vital state interests must give way to paramount federal legislation." De Canas v. Bica, 424 U.S. 351, 357 (1976). This is because, as the Supreme Court has explained, "[a] fundamental principle of the Constitution is that Congress has the power to preempt state law," and that, "even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000) (citing, e.g., U.S. Const. art. VI, cl. 2; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)). Thus, as this Court has previously recognized, "[t]he Supremacy Clause of Article VI of the United States Constitution mandates that federal law supersede state law where there is an outright

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[11] The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

conflict between such laws." 5 F. Supp.2d at 1094.[12] The Joint Defendants make no attempt to explain how their theory can be harmonized with these "fundamental principles."

Moreover, by positing that state law could trump conflicting federal law by virtue of the Ninth Amendment, the Joint Defendants' theory would turn the Supremacy Clause on its head. But, as the Seventh Circuit stated in rejecting a like argument, "[t]he Ninth Amendment does not invert the supremacy clause and allow state constitutional provisions to override otherwise lawful federal statutes." United States v. Spencer, 160 F.3d 413, 414 (7th Cir. 1998), *cert. denied*, 526 U.S. 1078 (1999). In that case, a defendant, who had been convicted of possession of crack cocaine with the intent to distribute, in violation of section 841(a)(1), argued that the disproportionate punishment of crimes involving crack cocaine relative to crimes involving powdered cocaine violated a provision of the Illinois Constitution which had been interpreted to require that punishment be proportional to the gravity of the offense, and that the Ninth Amendment prevented Congress from overriding the state constitutional provision. Writing for a unanimous panel, then-Chief Judge Posner found no merit to this argument, holding that " the Ninth Amendment does not empower the states, by creating new state constitutional rights, to truncate the power of Congress under Article I by preempting federal legislation." Id. at 414-15 (internal citations omitted). Judge Posner further commented on the folly of this argument, noting that "Illinois could not by creating a state constitutional right to

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[12] In order to avoid any possible confusion on this point, we wish to emphasize that we are not contending here that the Controlled Substances Act necessarily preempts the Compassionate Use Act. We are instead responding to the Joint Defendants' argument that, by virtue of the Ninth Amendment, the passage of the Compassionate Use Act by California voters preempts section 841(a)(1) of the Controlled Substances Act.

possess child pornography preempt the federal laws that prohibit such possession." Id. at 414.[13] Judge Posner's persuasive analysis is equally applicable to these cases.

The contention that unenumerated rights protected by the Ninth Amendment may be found in state law, regardless of any countervailing federal prohibition, also cannot be squared with the Supreme Court's decision in United Public Workers v. Mitchell, 330 U.S. 75 (1947), *overruled in part on other grounds by* Adler v. Board of Education, 342 U.S. 485 (1952). In that case, the Supreme Court held that:

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. *If granted power is found, the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.*

Id. at 95-96 (emphasis supplied).[14] In other words, where, as here, a challenged statute is a proper exercise of Congress' authority under Article I, see Bramble, 103 F.3d at 1479; Tisor, 96 F.3d at 375; Kim, 94 F.3d 1247, 1249-50, any challenge to that authority on the ground that it infringes on rights founded in state law and reserved by the Ninth Amendment (or Tenth Amendment) necessarily "must fail." United Public Workers, 330 U.S. at 96. See Barton v. Commissioner of Internal Revenue, 737 F.2d 822, 823 (9th Cir. 1984) (relying on United Public Workers to reject Ninth Amendment challenge to federal tax laws because Congress had acted within its Article I authority in enacting such laws).

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[13] This absurd outcome which Judge Posner warned against would nonetheless be compelled under the Joint Defendants' theory, as Professor Barnett has elsewhere recognized. See Randy E. Barnett, *Editorial: Case Should Give Ninth Amendment New Life*, Portland Oregonian, April 11, 1999 ("When the people pass an initiative protecting a particular liberty, judges should respect this unenumerated liberty as they would an enumerated right. * * * Does this mean that, if the people of the states voted to protect the liberty to use recreational drugs, or view child pornography, the courts should defer to their judgment? The simple answer is yes * * *.").

[14] Although United Public Workers is nowhere cited in the Joint Reply, Professor Barnett has elsewhere recognized its pertinence to this issue. See Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 Cornell L. Rev. 1, 5-6 & nn.14-15, 19 (1988) (quoting from and criticizing United Public Workers).

Finally, as with their argument regarding state sovereignty and the Tenth Amendment, the Joint Defendants' contention that, by virtue of the Ninth Amendment, this Court should recognize an unenumerated fundamental right to distribute marijuana reveals an astonishing unfamiliarity with what California law actually means. As we have shown above, even following the passage of the Compassionate Use Act, the distribution of marijuana remains unlawful in California, see Rigo, 69 Cal.App.4th at 415, 81 Cal.Rptr.2d at 628; Peron, 59 Cal.App.4th at 1395, 70 Cal.Rptr.2d at 28 (1997), and the California courts have also recently reaffirmed, in a case involving marijuana, that, "[t]here is *no fundamental state* or federal constitutional right to use drugs of unproven efficacy." People v. Bianco, 93 Cal.App.4th 748, 754, 113 Cal.Rptr.2d 392, 397-98 (Cal. Ct. App. 2001) (emphasis supplied) (citing Privitera, 23 Cal.3d at 703-05, 709-10, 591 P.2d at 919, 153 Cal.Rptr. at 431), *review denied* (Jan. 6, 2002). Hence, given that the distribution of marijuana is neither lawful nor a fundamental right under *California* law, the Joint Defendants' contention that this Court should recognize a federal constitutional right to engage in such conduct fails even on its own terms.

III. THE UNITED STATES IS ENTITLED TO PERMANENT INJUNCTIVE RELIEF AND SUMMARY JUDGMENT

In our opening memorandum, we demonstrated that the United States is entitled to summary judgment because all legal questions have been resolved, and because there are no genuine issues of material fact in dispute. See Pl. Mem. at 28-32. We further demonstrated that permanent injunctive relief is warranted because the United States has demonstrated actual success on the merits, and the existence of irreparable injury and inadequacy of legal remedies. Id. at 32-33.

The Joint Defendants raise a multitude of arguments contesting these showings. As we now demonstrate, none has merit.

A. The United States Has Demonstrated Actual Success on the Merits, and the Entitlement to Summary Judgment

In granting the government's motions for preliminary injunctions, this Court found that the uncontradicted evidence established clear violations of the Controlled Substances Act, finding that "[i]t is undisputed that marijuana is a controlled substance within the meaning of section 841(a)" and

"[i]t is equally undisputed that defendants distribute marijuana." 5 F. Supp.2d at 1099. The Court further noted that the "[d]efendants do not challenge the federal government's evidence to the extent it establishes that defendants provide marijuana to seriously ill patients or their primary caregivers for personal use by the patient upon a physician's recommendation." Id.

This Court's conclusion that the Joint Defendants are engaged in the distribution of marijuana is confirmed by a review of the evidence submitted at the preliminary injunction stage, which unequivocally establishes that the Oakland Cannabis Buyers' Cooperative distributed marijuana,[15] as did the Cannabis Cultivators Club[16] and the Ukiah Cannabis Buyer's Club.[17]

Likewise, in granting the government's motion for civil contempt against the OCBC Defendants, this Court noted that those defendants had "offered no facts whatsoever to controvert plaintiff's evidence that defendants distributed marijuana on May 21, 1998. Nor have they identified any evidence that they could present to a jury that they have not already presented that would create a dispute of fact." October 13, 1998 Memorandum and Order re: Motions in Limine and Order to Show Cause in Case No. 98-0088, slip op. at 11 (emphasis supplied). Here again, this Court's

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[15] See Declaration of Special Agent Brian Nehring ¶¶ 4-13 (purchase of marijuana for $40) (Exhibit 1); Declaration of Special Agent Bill Nyfeler ¶¶ 4-32 (three separate purchases of marijuana for $7, $15, and $45) (Exhibit 2); Declaration of Special Agent Carolyn Porras ¶¶ 4-15 (purchase of marijuana for $25) (Exhibit 3); Declaration of Special Agent Deborah Muusers ¶¶ 4-13 (purchase of marijuana for $60) (Exhibit 4); Declaration of Phyllis E. Quinn ¶¶ 4-9 (chemist analysis confirming presence of marijuana from OCBC sales) (Exhibit 5).

[16] See Nehring Dec. ¶¶ 4-17 (purchase of marijuana for $25) (Exhibit 6); Nyfeler Dec. ¶¶ 4-12 (purchase of marijuana for $30) (Exhibit 7); Porras Dec. ¶¶ 4-27 (purchases of marijuana for $25 and $30) (Exhibit 8); Muusers Dec. ¶¶ 4-13 (purchase of marijuana for $60) (Exhibit 9); Declaration of Special Agent Artemis Haywood ¶¶ 4-13 (purchase of marijuana for $40) (Exhibit 10); Quinn Dec. ¶¶ 4-9 (chemist analysis confirming presence of marijuana from Cannabis Cultivators Club sales) (Exhibit 11).

[17] See Nehring Dec. ¶¶ 4-12 (purchase of marijuana for $30) (Exhibit 12); Nyfeler Dec. ¶¶ 4-21 (purchases of marijuana for $25 and $40) (Exhibit 13); Porras Dec. ¶¶ 4-16 (purchase of marijuana for $50) (Exhibit 14); Muusers Dec. ¶¶ 4-23 (purchases of marijuana for $40 and $35) (Exhibit 15); Quinn Dec. ¶¶ 4-9 (chemist analysis confirming presence of marijuana from Ukiah Cannabis Buyer's Club sales) (Exhibit 16).

conclusion is confirmed by a review of the evidence submitted during the civil contempt proceedings, which establishes that the OCBC Defendants distributed marijuana to fourteen individuals on May 21, 1998.[18]

This uncontradicted evidence establishes that the government has demonstrated actual success on the merits, and is entitled to summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986) (summary judgment appropriate where there are no genuine issues of material fact in dispute). To this day, the Joint Defendants have offered not a scintilla of evidence rebutting the government's showing that they engaged in the distribution of marijuana. Instead, they offer a litany of other arguments in the hopes of muddling the issues before the Court. None has merit.

1. The Joint Defendants first contend that, to establish actual success on the merits, the government many not "rely upon materials submitted in connection with the Preliminary Injunction or upon the Preliminary Injunction Order itself to do so." Joint Reply at 24. This contention is patently wrong. The Ninth Circuit has squarely held that a district court "[may] convert a decision on a preliminary injunction into a final disposition on the merits by granting summary judgment on the basis of the factual record available at the preliminary injunction stage." Air Line Pilots Assoc, Inc. v. Alaska Airlines, Inc., 898 F.2d 1393, 1397 n.4 (9th Cir. 1990). This is because "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." Fed. R. Civ. P. 65(a)(2). Thus, as the Fourth Circuit has recognized, "a court need not conduct an evidentiary hearing before issuing a permanent injunction if the affidavits and documentary evidence clearly establish the plaintiff's right to the injunction such that a hearing would not have altered the result." Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 938 (4th Cir. 1995).

Here, as this Court has twice found, the Joint Defendants have neither contested or offered any evidence rebutting the only facts relevant to these lawsuits; that they are engaged in the

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[18] See Declaration of Peter Ott ¶ 4 (Exhibit 17).

distribution of marijuana. See 5 F. Supp.2d at 1099; October 13, 1998 Memorandum and Order, slip op. at 11. Consequently, because there are no genuine issues of material fact in dispute, this Court should convert the preliminary injunctions into permanent injunctions, and grant summary judgment in favor of the United States. See Air Line Pilots, 898 F.2d at 1397 n.4; United States v. McGee, 714 F.2d 607, 613 (6th Cir. 1983) (no hearing necessary before permanent injunction issued because issue in dispute was a purely legal question); Socialist Workers Party v. Illinois State Bd. of Elections, 566 F.2d 586, 587 (7th Cir. 1977) (affirming grant of permanent injunction without evidentiary hearing where no material issues of fact in dispute), *aff'd*, 440 U.S. 173 (1979).

2. The Joint Defendants next contend that the OCBC Defendants have "fully complied with the preliminary injunction." Joint Reply at 25. This contention is frivolous. While defendant Jeffrey Jones has promised that he would "follow the terms of the Injunction * * * with respect to the premises" and that he would "take all reasonable steps * * * to ensure compliance * * * with the injunction," Declaration of Jeffrey Jones ¶ 2, he has *not* promised, as did Ms. Sweeney and Mr. Hudson of the Flower Therapy Medical Marijuana Club, see *supra* note 2, that he has no plans to "reactivate" the OCBC were the injunction to be dissolved. On the contrary, the OCBC's worldwide web site reports that "[t]he OCBC is *currently* unable to dispense medical cannabis due to federal court order," www.rxcbc.org/mission.html, (emphasis supplied), and that "the OCBC is NOT DISPENSING MEDICINE *at this time.*" www.rxcbc.org/news.html. (emphasis supplied). Neither of these statements, which constitute admissions of a party-opponent, see Fed. R. Evid. 801(d)(2), bespeak an unambiguous statement to cease the distribution of marijuana that would entitle the OCBC Defendants to dissolution of the preliminary injunction, or that would disentitle the United States to permanent injunctive relief. See United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953) (mere cessation of illegal conduct does not render a case moot where "[t]he defendant is free to return to his old ways"); Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 564 (9th Cir. 1990) ("Permanent injunctive relief is warranted where, as here, the defendant's past and present misconduct indicates a strong likelihood of future violations.").

3. The Joint Defendants next contend that the government's "unclean hands" preclude entry of a permanent injunction because "[t]he government's record regarding marijuana in general and medical cannabis in particular demonstrates a pattern of bad faith that precludes it from obtaining equitable relief." Joint Reply at 25. This contention has already been rejected by this Court. In granting the government's motions for preliminary injunctions, this Court found no merit to an identical "unclean hands" argument, determining that "the fact that medical marijuana advocates have been unsuccessful in convincing the federal government decision makers that marijuana should be rescheduled as a Schedule II controlled substance and thus made available to seriously ill patients upon a physician's recommendation * * * does not mean that the federal government has acted with unclean hands." 5 F. Supp.2d at 1105. In particular, the Court noted that, as recently as 1994, the D.C. Circuit had upheld the DEA Administrator's decision not to reschedule marijuana. Id. (citing Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131 (D.C. Cir. 1994)).[19]

4. The Joint Defendants next assert that the declarations of the DEA Special Agents who, collectively, made six purchases of marijuana from each club should not be credited because they are "replete with hearsay, unsupported conclusions, unauthenticated exhibits, and the declarants' speculation as to factual matters." Joint Reply at 28. As we establish in our response to the Joint Defendants' separately filed Statement of Objections in Support of Motion to Dissolve and in Opposition to the Government's Motion for Summary Judgment and Permanent Injunctive Relief, none of these assertions has merit.

5. The Joint Defendants further contend that "significant legal and factual disputes remain concerning defendants' defenses," Joint Reply at 29, but, here again, none have any foundation. The Joint Defendants maintain that the evidence submitted by the government "supports two affirmative

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[19] This Court also noted that a petition to reschedule marijuana was then pending before the DEA, and had been referred to the Secretary of Health and Human Services ("HHS"). Id. On March 20, 2001, that petition was denied by the DEA based, in part, on HHS's recommendation that marijuana remain in schedule I of the Controlled Substances Act. See 66 Fed. Reg. 20038 (April 18, 2001).

defenses in favor of Defendants: entrapment and mistake of law." Joint Reply at 29 n.10. Neither is applicable here. "A defense of entrapment is established if the defendant was (1) induced to commit the crime by a government agent and (2) not otherwise predisposed to commit the crime." United States v. Kessee, 992 F.2d 1001, 1003 (9th Cir. 1993). The Joint Defendants have not made (and cannot make) either showing. They argue that "[d]efendants were not predisposed to providing cannabis to persons without the proper authorization," Joint Reply at 29 n.10, but, that, of course, is irrelevant: the Controlled Substances Act makes it unlawful to distribute marijuana whether or not a customer has a proper authorization. See 5 F. Supp.2d at 1100 ("Section 841 prohibits the distribution of marijuana except for use in an approved research project.").

Nor may the Joint Defendants avail themselves of the mistake of law defense. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system," Cheek v. United States, 498 U.S. 192, 199 (1991), and the Ninth Circuit has precluded invocation of this defense where it is premised on the assertion that the defendant did not know that his or her conduct violated federal law. See United States v. de Cruz, 82 F.3d 856, 867 (9th Cir. 1996) (citing United States v. Aguilar, 883 F.2d 662, 671, 673-74 (9th Cir.1989), *cert. denied*, 498 U.S. 1046 (1991)).

6. The Joint Defendants also contend that they are entitled to immunity under 21 U.S.C. § 885(d). This is yet another contention that has been rejected by this Court. On September 3, 1998, this Court denied the OCBC Defendants' motion to dismiss this action under section 885(d), determining that "[t]o be entitled to immunity * * * the law 'relating to controlled substances' which the official is enforcing must itself be lawful under federal law, including the federal Controlled Substances Act," and that, "[s]ince Chapter 8.42 [of Oakland City Ordinance No. 12076] provides for the distribution of marijuana, it and the Controlled Substances Act are in 'positive conflict.'" September 3, 1998 Order re: Motion to Dismiss in Case No. 98-0088, slip op. at 3 (quoting 21 U.S.C. § 903)). The Joint Defendants make no attempt to distinguish this Court's judgment; indeed, they do not bother to even cite to it.

7. The Joint Defendants next trot out the tired arguments that they are "joint users" within the meaning of United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977), and are "ultimate users" within the meaning of 21 U.S.C. § 802(27). See Joint Reply at 32-34. This Court has already rejected both arguments. This Court declined to extend the "joint user" exception to distribution within a cooperative where "the controlled substance is not literally purchased simultaneously for immediate consumption," 5 F. Supp.2d at 1101, and further held that, "[i]n light of the fact that Swiderski has never been so extended, and in light of the fact that it has not been adopted by the Ninth Circuit, the Court concludes that such a defense is not available on the facts proffered by the defendants *as a matter of law*." October 13, 1998 Memorandum and Order, slip op. at 7 (emphasis supplied). This Court's conclusion that the Joint Defendants do not come within the Swiderski exception is consistent with the Ninth Circuit's decision in United States v. Wright, 593 F.2d 105 (9th Cir.1979), in which the court of appeals refused to extend the scope of Swiderski to cases which "do not involve joint and simultaneous acquisition," id. at 108, and with Swiderski itself, in which the Second Circuit cautioned that "[o]ur holding here is limited to the passing of a drug between joint possessors who *simultaneously acquired possession* at the outset for their own use." Swiderski, 548 F.2d at 450-51 (emphasis supplied).[20]

The Joint Defendants' contention that they are "ultimate users" within the meaning of the Controlled Substances Act also is frivolous. As this Court has ruled, "[d]efendants are not ultimate users because they have not lawfully obtained the marijuana at issue," and "the fact that it may be lawful under state law for defendants to cultivate and possess marijuana for medical purposes, does not make it lawful under federal law–the only law at issue here." 5 F. Supp.2d at 1101.

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[20] Courts also have refused to extend Swiderski to situations where, as here, large numbers of individuals are involved. See, e.g., United States v. Rush, 738 F.2d 497, 514 (1st Cir. 1984) (declining to extend Swiderski "to situations where more than a couple of defendants and a small quantity of drugs are involved."), *cert. denied*, 470 U.S. 1004 (1985); United States v. Taylor, 683 F.2d 18, 21 (1st Cir.) (finding Swiderski inapplicable to complex marijuana distribution organization), *cert. denied*, 459 U.S. 945 (1982).

8. Finally, the Joint Defendants argue that "[e]ven if the government is correct in its position that it need only show a rational basis for its proscription against all medical use of cannabis, a review of the years of extensive research and history of this benign and effective medicine will confirm that the government cannot meet even this minimal standard." Joint Reply at 35-36. This contention also is foreclosed by binding Ninth Circuit authority. As this Court recognized in denying the Marin Alliance defendants' rational basis challenge to section 841(a)(1), "the Ninth Circuit has previously determined that the Controlled Substances Act's restrictions on the manufacture and distribution of marijuana are rational." December 3, 1998 Order in Case No. 98-0086, slip op. at 1 (citing United States v. Miroyan, 577 F.2d 489, 495 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978)). Thus, in Miroyan, the Ninth Circuit stated that "we need not again engage in the task of passing judgment on Congress' legislative assessment of marijuana. As we recently declared, '[t]he constitutionality of the marijuana laws has been settled adversely to [the defendant] in this circuit.'" Id. at 495 (quoting United States v. Rogers, 549 F.2d 107, 108 (9th Cir. 1976)).[21]

* * *

In sum, all the issues of law of fact raised by the Joint Defendants have already been resolved in favor of the United States by this Court, or are foreclosed by binding Ninth Circuit precedent. The United States therefore has established actual success on the merits, and is entitled to summary judgment.

B. Irreparable Injury and Inadequacy of Legal Remedies Have Been Established

The Joint Defendants next challenge the government's request for permanent injunctive relief by contending that "a separate showing of the inadequacy of legal remedies is a prerequisite to a

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[21] This Court further held that, no matter how framed, the Marin Alliance defendants' rational basis challenge to the Controlled Substances Act "is in essence an argument that this Court should reclassify marijuana because there is no substantial evidence to support its current classification," and that "[r]eview of the Attorney's General decision as to the classification of a controlled substance is limited to the District of Columbia Court of Appeals or the circuit in which petitioner's place of business is located." December 3, 1998 Order in Case No. 98-0086, slip op. at 2 (internal citation omitted).

permanent injunction." Joint Reply at 21 (citing Continental Airlines v. Intra Brokers, Inc., 24 F.3d 1099, 1104 (9th Cir. 1994). The Joint Defendant further contend that "an adequate remedy at law exists, and a showing of irreparable injury is completely absent." Id. at 22.

But the Joint Defendants' argument is contradicted by the very case upon which rely. In Continental Airlines, the Ninth Circuit stated that, for purposes of permanent injunctive relief, "once actual success on the merits has been established, 'a party is entitled to relief as a matter of law irrespective of the amount of irreparable injury which may be shown.'" 24 F.3d at 1104 (quoting Western Sys., Inc. v. Ulloa, 958 F.2d 864, 872 (9th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993)). The Ninth Circuit further explained, however, that, while "'irreparable injury is not an independent requirement for obtaining a permanent injunction,'" it nonetheless is "'one basis for showing the inadequacy of the legal remedy.'" Id. at 1104 (quoting 11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2904, at 401 (1973)).[22]

This standard was followed by the three-judge panel in ApolloMedia Corp. v. Reno, 19 F. Supp.2d 1081 (N.D. Cal. 1998), *aff'd*, 526 U.S. 1061 (1999). In that case, writing for himself and Judge Chesney,[23] Judge Hawkins confirmed that "[a] showing of irreparable injury nevertheless is one way to establish the absence of an adequate legal remedy." Id. at 1088 (citing Continental Airlines, 24 F.3d at 1104). Judge Hawkins further noted that "there exists a strong presumption of irreparable injury is cases involving the infringement of First Amendment rights," and held that "ApolloMedia would be entitled to a permanent injunction upon a showing that enforcement of the

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[22] Other courts have likewise followed *Wright & Miller* for the proposition that a showing of irreparable injury is one way to establish the absence of an adequate legal remedy. See, e.g., Crane v. Indiana High School Athletic Ass'n, 975 F.2d 1315, 1326 (7th Cir. 1992); Lewis v. S.S. Baune, 534 F.2d 1115, 1124 (5th Cir. 1976); Clark Constr. Co. v. Pena, 930 F. Supp. 1470, 1477 n.6 (M.D. Ala. 1996); New York State Nat'l Organization for Women v. Terry, 704 F. Supp. 1247, 1262 n.20 (S.D.N.Y. 1989), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); Northeast Women's Center v. McMonagle, 665 F. Supp. 1147, 1153 n.3 (E.D. Pa. 1987), *aff'd in part*, 868 F.2d 1342 (3d Cir. 1989); Pine Township Citizens' Ass'n v. Arnold, 453 F. Supp. 594, 598 (W.D. Pa. 1978).

[23] Judge Illston dissented on other grounds.

[Communications Decency Act] provisions at issue here would result in 'a loss of First Amendment freedoms.'" Id. at 1088-89.

Similarly here, the Ninth Circuit has held that, in statutory enforcement actions, irreparable injury is presumed when the government has established a likelihood of success on the merits. See Miller v. California Pacific Medical Center, 19 F.3d 449, 459 (9th Cir. 1994) (en banc); United States v. Nutri-Cology, Inc., 982 F.2d 394, 398 (9th Cir. 1992); United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174-76 (9th Cir. 1987); Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449, 453 (9th Cir. 1983). This Court, too, has recognized that, in statutory enforcement actions, "irreparable injury is presumed if the government establishes that it is likely to prevail on the merits" 5 F. Supp.2d at 1103.[24]

Accordingly, because the United States has established actual success on the merits, irreparable injury is presumed, see Miller, 19 F.3d at 459; Nutri-Cology, Inc., 982 F.2d at 398; Odessa Union Warehouse, 833 F.2d at 174-76, and this showing of irreparable injury also establishes the absence of an adequate legal remedy. See, e.g., Continental Airlines, 24 F.3d at 1104; ApolloMedia, 19 F. Supp.2d at 1088.

The Joint Defendants protest, however, that "[u]nder the government's reasoning, all permanent injunctions would issue automatically where the government seeks to enjoin violations of a federal statute." Joint Reply at 21. This is inaccurate. As we have recognized above, see *supra* Part I, a district court, sitting in equity, may deny the government an injunction in a statutory enforcement action where a defendant has taken "vigorous steps" to correct and prevent recurrence of its mistakes, such that issuance of an injunction would have "no effect" on ensuring future compliance with the

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[24] This Court also noted that "[s]uch a presumption is not unique to government statutory enforcement actions," noting that, in copyright actions, "the party claiming infringement enjoys a similar presumption of irreparable harm upon a showing of likelihood of success on the merits." Id. at 1099. Similarly, a party who claims the violation of First Amendment freedoms and demonstrates likelihood of success on the merits is entitled to a presumption of irreparable injury. See Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); ApolloMedia, 19 F. Supp.2d at 1088-89 (same).

statute, see Hecht Co., 321 U.S. at 325, 326-28; where the court has available "other means of ensuring compliance," Oakland Cannabis, 532 U.S. at 498 n.9, or where the government has failed to establish likelihood of success on the merits. See Nutri-Cology, 982 F.2d at 398 ("where the government can make only a colorable evidentiary showing of a violation, the court must consider the possibility of irreparable injury"). But where, as here, the government has demonstrated actual success on the merits, Ninth Circuit authority is clear that irreparable injury is to be presumed, see, e.g., Miller, 19 F.3d at 459; Nutri-Cology, 982 F.2d at 398; Odessa Union Warehouse, 833 F.2d at 174-76 (9th Cir. 1987), and that irreparable injury is one way in which to establish the absence of an adequate legal remedy. See Continental Airlines, 24 F.3d at 1104; ApolloMedia, 19 F. Supp.2d at 1088.

The Joint Defendants also second their argument that "equity will not enjoin the commission of a crime," Joint Reply at 22, but fail to acknowledge that "[t]he maxim that 'equity will not enjoin a crime,' does not hold where Congress has explicitly authorized injunctive relief," LeBlanc-Sternberg, 67 F.3d at 434, and that, in these cases, Congress has expressly authorized the United States to enforce the Controlled Substances Act by means of a statutory enforcement action. See 21 U.S.C. § 882(a).

The Joint Defendants further contend that "[a]n adequate remedy at law exists where the crime being enjoined could be prosecuted and criminal penalties imposed," Joint Reply at 22, but this argument also cannot withstand scrutiny. Courts have routinely found the absence of an adequate remedy at law in statutory enforcement actions notwithstanding the fact that the United States could have chosen to pursue criminal sanctions. In Santee Sioux Tribe of Nebraska, for example, the Eighth Circuit found that the defendant "Tribe's conduct of illegal gaming has been 'continuing and flagrant' and, although potentially subject to criminal prosecution by the United States under the provisions of the [Indian Gaming Regulatory Act], this activity is likewise subject to injunctive relief pursuant to Nebraska law." 135 F.3d at 565. Insofar as such injunctive relief was made available to the United States under federal law by virtue of 25 U.S.C. § 1166, the Eighth Circuit held that "the District Court

erred in refusing to grant the government's request for an order enjoining the Tribe's gaming activities." Id.

Likewise, in LeBlanc, the Second Circuit held that, to the extent that the district court had refused the United States' request for an injunction on the ground that such relief was "unnecessary since [the court] would be enjoining acts which are already illegal," the district court's views "represented a misapplication of the law." 67 F.3d at 434. Noting that the Fair Housing Act "expressly grants district courts the authority to enter such injunctive relief in a suit by the government against a party who has violated the Act," the Second Circuit reversed the district court's dismissal of the government's enforcement action and remanded the matter "for the entry of a declaratory judgment in favor of the government and for such injunctive and other relief as may be appropriate." Id. at 434-35.

Finally, in United States v. Buttorff, 761 F.2d 1056 (5th Cir. 1985), the Fifth Circuit found no merit to the contention that "injunction is improper because the government has an adequate remedy at law by prosecuting under the criminal sections of the Internal Revenue Code and Title 18." Id. at 1063. Noting that "[h]ere * * * we deal with a statute expressly authorizing injunctive relief at the request of the Secretary of the Treasury, on the finding by the court of stated preconditions, against actions denounced as wrongful by positive, public law," the Fifth Circuit held that "the existence of criminal or other legal sanctions did not require that the district court deny the requested injunctive relief." Id. at 1064.

Similarly here, the availability of criminal sanctions for defendants' conduct does not undermine our showing that irreparable injury and the inadequacy of alternate legal remedies have been established.

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CONCLUSION

For the foregoing reasons, and for the reasons set forth in our opening memorandum, the Court should deny the Joint Defendants' motion to dissolve or modify the preliminary injunction, grant the United States' motion for summary judgment against all defendants, and issue permanent injunctive relief against all defendants.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

DAVID W. SHAPIRO
United States Attorney

ARTHUR R. GOLDBERG
Assistant Branch Director

MARK T. QUINLIVAN
Senior Counsel
U.S. Department of Justice
Civil Division, Room 1048
901 E St., N.W.
Washington, D.C. 20530
Tel: (202) 514-3346

Attorneys for Plaintiff
UNITED STATES OF AMERICA

Dated: April 4, 2002

CERTIFICATE OF SERVICE BY OVERNIGHT DELIVERY

I, Mark T. Quinlivan, Senior Counsel, Civil Division, United States Department of Justice, whose address is 901 E Street, N.W., Room 1048, Washington, D.C. 20530, hereby certify that on the 4th day of April, 2002, I caused to be served a copy of the following documents:

- Reply in Support of Plaintiff's Motion for Summary Judgment and for Permanent Injunctive Relief;
- Exhibits to Reply in Support of Plaintiff's Motion for Summary Judgment and for Permanent Injunctive Relief

by overnight delivery on the following counsel for the defendants, intervenors, and *amicus curiae*:

Oakland Cannabis Buyer's Cooperative, *et al.*

Annette P. Carnegie
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

Robert A. Raich
1970 Broadway, Suite 1200
Oakland, CA 94612

Gerald F. Uelmen
Santa Clara University
School of Law
Santa Clara, CA 95053

Randy Barnett
Harvard Law School
1525 Massachusetts Ave.; Griswold 308
Cambridge, MA 02138

Marin Alliance for Medical Marijuana, *et al.*

William G. Panzer
370 Grand Avenue, Suite 3
Oakland, CA 94610

Cannabis Cultivators Club, *et al.*
J. Tony Serra
Serra, Lichter, Daar, Bustamante,
Michael & Wilson
506 Broadway
San Francisco, CA 94133

Ukiah Cannabis Buyer's Club, *et al.*

Susan B. Jordan
515 South School Street
Ukiah, CA 95482

David Nelson
Nelson & Riemenschneider
106 North School Street
Ukiah, CA 95482

Santa Cruz Cannabis Buyers Club

Kate Wells
2600 Fresno Street
Santa Cruz, CA 95062

Intervenors

Thomas V. Loran, III
Margaret S. Schroeder
Pillsbury Winthrop LLP
50 Fremont Street, 5th Floor
San Francisco, CA 94105

Amicus Curiae State of California

Taylor S. Carey
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814

Richard E. Winnie
Alameda County Counsel
1221 Oak Street, #450
Oakland, CA 94612

John A. Russo
City Attorney
Barbara J. Parker
Chief Assistant City Attorney
City of Oakland
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612

Amicus Curiae American Civil Liberties Union

Graham A. Boyd
American Civil Liberties Union Foundation
85 Willow Street
New Haven, CT 06511

Ann Brick
American Civil Liberties Union
Foundation of Northern California, Inc.
1663 Mission Street
San Francisco, CA 94103

Jordan C. Budd
American Civil Liberties Union
Foundation of San Diego & Imperial Counties, Inc.
110 West C Street, Suite 901
San Diego, CA 92101

Peter Eliasberg
American Civil Liberties Union
Foundation of Southern California, Inc.
1616 Beverly Blvd.
Los Angeles, CA 90026

MARK T. QUINLIVAN