

1 BINGHAM McCUTCHEM LLP  
FRANK KENNAMER (SBN 157844)  
2 NEHA NISSEN (SBN 190848)  
LAURI SCHUMACHER (SBN 217506)  
3 TROY SAURO (SBN 224097)  
Three Embarcadero Center  
4 San Francisco, California 94111-4067  
Telephone: 415.393.2000  
5 Facsimile: 415.393.2286

6 Attorneys for WAMM Plaintiffs

7 GERALD UELMEN (SBN 39909)  
Santa Clara University School of Law  
8 500 El Camino Real  
Santa Clara, California 95053  
9 Telephone: 408.554.5729  
Facsimile: 408.554.4426  
10 Attorney for County of Santa Cruz  
and WAMM Plaintiffs

11 Attorney for County of Santa Cruz  
12 and WAMM Plaintiffs

13 Additional Counsel Listed on Signature Page

14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**  
16 **SAN JOSE DIVISION**

17 COUNTY OF SANTA CRUZ, CALIFORNIA;  
CITY OF SANTA CRUZ, CALIFORNIA;  
18 VALERIE CORRAL; ELADIO V. ACOSTA;  
JAMES DANIEL BAEHR; MICHAEL  
19 CHESLOSKY; JENNIFER LEE HENTZ;  
DOROTHY GIBBS; HAROLD F. MARGOLIN;  
20 and WO/MEN'S ALLIANCE FOR MEDICAL  
MARIJUANA

21 Plaintiffs,

22 v.

23 JOHN ASHCROFT, Attorney General of the  
United States; WILLIAM B. SIMPKINS, Acting  
24 Administrator of the Drug Enforcement  
Administration; JOHN P. WALTERS, Director of  
25 the Office of National Drug Control Policy; and  
30 UNKNOWN DRUG ENFORCEMENT  
26 ADMINISTRATION AGENTS,

27 Defendants.

Case No.: 03-CV-1802 JF

**PLAINTIFFS' REPLY TO OFFICIAL  
CAPACITY DEFENDANTS'  
OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION**

Date: July 7, 2003  
Time: 9:00 a.m.  
Place: Courtroom 3, Fifth Floor  
Judge: Honorable Jeremy Fogel

28  
**PLAINTIFFS' REPLY TO OFFICIAL CAPACITY DEFENDANTS' OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION (Case No. 03-CV-1802 JF)**

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1 Defendants mischaracterize Plaintiffs' positions, cite to outdated and inapplicable  
2 case law, and avoid the unique, undisputed facts presented by this case: (1) Patient-Plaintiffs are  
3 seriously and terminally ill patients who use medical marijuana to alleviate pain and suffering  
4 and to control the circumstances of their deaths; (2) Patient-Plaintiffs' cultivation and personal  
5 use of medical marijuana is a non-economic, local activity permitted and regulated by the State  
6 of California and by Plaintiffs City and County of Santa Cruz; and (3) federal raids on WAMM  
7 like the one that occurred on September 5, 2002, and particularly those that conscript local law  
8 enforcement officers, conflict with the State's, City's and County's lawful exercise of their  
9 powers to regulate for the health and safety of their citizens.

10 These facts make all the difference and cannot be ignored. A preliminary  
11 injunction must issue to ensure that Patient-Plaintiffs and the other members of WAMM can  
12 exercise their fundamental rights to alleviate their pain and suffering, and that Plaintiffs City and  
13 County of Santa Cruz can implement their medical marijuana ordinances, in the interest of public  
14 health, free from federal intrusion.

15 **I. DEFENDANTS' POLICY AND PRACTICE OF SEIZING PLAINTIFFS'**  
16 **MEDICAL MARIJUANA VIOLATE THEIR FUNDAMENTAL RIGHTS**

17 **A. The Fundamental Rights Plaintiffs Assert Are Deeply Rooted In this**  
18 **Nation's History and Legal Precedent**

19 Plaintiffs seek to protect their fundamental rights to ameliorate pain, maintain  
20 bodily integrity and control the circumstances of their own deaths. Plaintiffs also seek to  
21 vindicate the historical right of the State and its political subdivisions and charter cities,  
22 including Plaintiffs City and County of Santa Cruz, to enact and implement legislation designed  
23 to protect the health of their citizens. Defendants, however, ignore the essential nature of  
24 Plaintiffs' lawsuit. *See, e.g.,* Official-Capacity Defendants' Memorandum of Law in Opposition  
25 to Plaintiffs' Motion for a Preliminary Injunction ("Defendants' PI Opp.") at 3-4 (characterizing  
26 the issue in this case as the right "to distribute, cultivate, or possess marijuana.").

27 When determining whether a right is fundamental, courts must examine "our  
28 Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710  
(1997). Plaintiffs have provided this Court with historic precedent establishing an individual's

1 right to autonomy in decisions relating to the treatment of pain and suffering. *See* Memorandum  
2 of Points and Authorities in Support of Plaintiffs’ Motion for Preliminary Injunction (“Plaintiffs’  
3 PI Mem.”) at 9-11. Courts likewise consider actions by individual states, such as the passage of  
4 the Compassionate Use Act, Cal. H&S Code § 11362.5, *et seq.*, in deciding whether an asserted  
5 right is fundamental. *See* Plaintiffs’ Opposition to Official Capacity Defendants’ Motion to  
6 Dismiss (“Plaintiffs’ MTD Opp.”) at 6-7.

7           Judicial and historic precedent, and the actions of individual states, establish the  
8 fundamental rights Plaintiffs assert here.<sup>1</sup> In *Glucksberg*, Justices O’Connor, Stevens, Souter,  
9 Ginsburg and Breyer recognized in concurring opinions a patient’s fundamental right to use  
10 physician-recommended medication to alleviate pain and suffering and to live one’s final days  
11 free of intolerable pain. *See Glucksberg*, 521 U.S. at 736-37, 745, 777, 790; *see also* Plaintiffs’  
12 MTD Opp. at 3-5. In recognizing this right, Justice O’Connor identified a key distinction  
13 between the government’s interests in protecting the rights of those who “might seek to end life  
14 mistakenly or under pressure” from the rights of “terminally ill, mentally competent individuals  
15 who would seek to end their suffering.” *Glucksberg*, 521 U.S. at 737 (O’Connor, J. concurring).  
16 Plaintiffs here are chronically and “terminally ill, mentally competent individuals” who have the  
17 fundamental right to “end their suffering” by using medical marijuana to alleviate their pain and  
18 to control the circumstances of their own deaths. *Id.*

19           Plaintiffs’ declarations demonstrate that medical marijuana is the best and, in  
20 some cases, the only means by which the Patient-Plaintiffs can avoid unnecessary and severe  
21 pain and other incapacitating symptoms of their illnesses and side effects from conventional  
22 treatment of those illnesses. For example Plaintiff Jennifer Hentz came close to discontinuing  
23 her chemotherapy treatments due to their debilitating side effects, but she attributes her “ability

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24  
25 <sup>1</sup> Defendants cite *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1125 (9th Cir.  
26 1996), for the proposition that the Ninth Amendment does not secure the rights Plaintiffs assert.  
27 There, the Ninth Circuit addressed whether the Ninth Amendment, independently of the Second  
28 Amendment, encompassed a right to bear arms. *See id.* at 1125. Here, Plaintiffs do not assert  
that the Ninth Amendment independently secures the fundamental rights they seek to protect.  
Rather, they assert that these fundamental rights are secured by the Due Process clause of Fifth  
Amendment and Ninth Amendment in tandem.

1 to continue with [her] chemotherapy and to survive those treatments to the relief afforded [her]  
2 by the medical marijuana.” Hentz Decl. at ¶¶ 8, 14, 15.

3 Likewise, Plaintiff Harold Margolin suffers from chronic peripheral neuropathy  
4 and “began losing hope of maintaining any sort of normalcy in [his] life” because he “had  
5 difficulty tolerating the side-effects of [pharmaceutical] medications and [his] pain persisted.”  
6 Margolin Decl. at ¶¶ 10, 14. Without marijuana, he is “rendered largely immobile.” *Id.* at ¶ 20.

7 Medical marijuana is the only medication that Plaintiff Valerie Corral takes to  
8 control the epileptic seizures that have plagued her since she suffered a severe head injury in  
9 1973. *See* Corral Decl. at ¶¶ 1-2, 3, 7. Not only did conventional medications fail to control her  
10 seizures, but they also sedated Corral to the point that she lived in a near vegetative state,  
11 rendering her unable to work or care for herself. *See id.* at ¶¶ 4-5.

12 Similarly, “medical marijuana is the only medication that provides quick and  
13 effective relief” from the severe spasms of pain that 93-year-old Plaintiff Dorothy Gibbs suffers  
14 as a result of her post-polio syndrome and other illnesses. Gibbs Decl. at ¶ 18. The long list of  
15 conventional pain treatments that Gibbs has tried over the years, including oral pain medication,  
16 opioid medication patches, and Transcutaneous Electrical Nerve Stimulation, have either  
17 completely failed to treat Gibbs’ pain or caused severe dizziness and nausea. *See id.* at ¶¶ 10,  
18 12-13, 15. In stark contrast, the relief Gibbs experienced from medical marijuana “was almost  
19 immediate.” *Id.* at ¶ 17.

20 For Plaintiff Michael Cheslosky, medical marijuana “has proven to be more  
21 effective than any of the numerous other treatments I have tried” to treat the nausea and chronic  
22 pain he suffers as symptoms of HIV/AIDS and its complications. Cheslosky Decl. at ¶ 18.  
23 Medical marijuana treats the nausea, vomiting, and gastrointestinal symptoms Cheslosky suffers,  
24 allowing him to adhere to his HIV treatment regimens, which involve swallowing a number of  
25 pills. *See id.* at ¶¶ 19-20.

26 Likewise, consuming medical marijuana allows Plaintiff James Daniel Baehr to  
27 take less morphine to control the excruciating pain he suffers as a symptom of his prostate  
28 cancer. “The amount of morphine that I need to take to adequately control my pain [in the

1 absence of medical marijuana] leaves me utterly incapacitated, mentally and physically.” Baehr  
2 Decl. at ¶ 14. Using medical marijuana has allowed Baehr to drastically reduce the amount of  
3 narcotic medication he takes to manage his pain, freeing him from his formerly incapacitated  
4 state. *See id.*

5 Physicians experienced in treating severely ill patients note that compared to  
6 opiate-based drugs, “marijuana provides almost immediate relief with significantly fewer  
7 adverse effects.” Brody Decl. at ¶ 19; *see also* Flynn Decl. at ¶¶ 12, 15. As a result, medical  
8 marijuana is “a valuable medication for the alleviation of intense suffering” and is therefore  
9 “medically appropriate as a drug of last resort for a small number of seriously ill patients.”  
10 Flynn Decl. at ¶ 22, 15. “Marijuana, in short, can help sick and dying persons achieve autonomy  
11 over their lives by alleviating the intense suffering caused by their illnesses or the side effects of  
12 their medications.” *Id.* at ¶ 23.

13 Defendants have offered no evidence to contradict that the medicinal use of  
14 marijuana alleviates Patient-Plaintiffs’ pain and suffering. Therefore, the Court should grant a  
15 preliminary injunction to protect the Patient-Plaintiffs’ fundamental rights to ameliorate pain,  
16 maintain bodily integrity, and control the circumstances of their own deaths.

17 **B. Carnohan And Rutherford Do Not Support Defendants’ Position**

18 Defendants rely on *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980), and  
19 *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980) to undermine Plaintiffs’ fundamental  
20 rights arguments. These cases are readily distinguishable.

21 *Carnohan* and *Rutherford* held that patients did not have a right to obtain  
22 commercially marketed laetrile, an alleged cancer cure, without the Food and Drug  
23 Administration’s approval. *See Carnohan*, 616 F.2d at 1122; *Rutherford*, 616 F.2d at 457. Here,  
24 however, Patient-Plaintiffs do not seek to obtain commercially marketed and distributed  
25 marijuana, nor do they wish to reclassify a drug or to challenge the federal pharmaceutical  
26 approval scheme. They seek only to use physician-recommended, personally cultivated medical  
27 marijuana to treat the symptoms and side effects of their serious and terminal illnesses, as  
28 authorized by California law. The Ninth Circuit explicitly declined to address whether patients

1 had a right to produce laetrile in their own homes for their personal use. “We need not decide  
2 whether Carnohan has a constitutional right to treat himself with home *remedies of his own*  
3 *confection.*” *Carnohan*, 616 F.2d at 1122 (emphasis added). Here, Patient-Plaintiffs should be  
4 permitted to exercise their right to treat their serious illnesses with medical marijuana of their  
5 “own confection,” a right that neither *Carnohan* nor *Rutherford* forecloses.

6 Defendants rely upon *Rutherford* to argue that Patient-Plaintiffs have the right to  
7 choose *whether* to have medical treatment, but not what *type* of treatment. *See* Defendants’ PI  
8 Opp. at 3. This ignores the unrebutted evidence that medical marijuana is the Patient-Plaintiffs’  
9 best and, in some cases, only choice for alleviating their pain and suffering. *See* Section I.A.,  
10 *supra*. Under Defendants’ theory, Patient-Plaintiffs must choose between living with constant  
11 pain, frequent nausea, or in a vegetative state, or living normal, productive lives. Defendants’  
12 interpretation renders the right to medical treatment meaningless.

## 13 **II. THE COMMERCE CLAUSE DOES NOT PERMIT FEDERAL** 14 **REGULATION OF PLAINTIFFS’ ACTIVITIES**

15 Controlling Supreme Court precedent does not support Defendants’ attempt to  
16 extend the CSA’s reach to the intrastate activity at issue here, which does not “substantially  
17 affect” interstate commerce. Additionally, the Ninth Circuit’s most recent Commerce Clause  
18 jurisprudence confirms that the connection between interstate commerce and the intrastate, non-  
19 commercial cultivation and possession of medicinal marijuana is far too attenuated to permit  
20 federal regulation.

### 21 **A. This Court Must Engage In A Factual Determination Of Whether** 22 **Plaintiffs’ Conduct Substantially Affects Interstate Commerce**

23 In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court defined the  
24 test courts must apply in determining whether Congress has lawfully exercised its commerce  
25 power:

26 We conclude, consistent with the great weight of our case law, that  
27 the proper test requires an analysis of whether the regulated  
28 activity “substantially affects” interstate commerce.

29 *Id.* at 559. The Court concluded that possession of a firearm in a school zone does not  
30 substantially affect interstate commerce. *Id.* at 551. In *United States v. Morrison*, 529 U.S. 598

1 (2000), decided five years later, the Supreme Court rejected federal attempts to regulate  
2 intrastate, non-economic, violent criminal conduct based solely on its aggregate effect on  
3 interstate commerce. *See id.* at 617-18. In *Morrison*, the Supreme Court established a four-part  
4 test for determining whether a targeted activity “substantially affects” interstate commerce:

- 5 1) whether the statute in question regulates commerce or any sort  
6 of economic enterprise; 2) whether the statute contains any express  
7 jurisdictional element which might limit its reach to a discrete set  
8 of cases; 3) whether the statute or its legislative history contains  
9 express findings that the regulated activity affects interstate  
10 commerce; and 4) whether the link between the regulated activity  
11 and a substantial effect on interstate commerce is attenuated.

12 *See United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003), citing *Morrison*, 529 U.S. at  
13 610-12.

14 And in *United States v. McCoy*, decided just two and a half months ago, the Ninth  
15 Circuit applied the *Morrison* test to halt the federal government’s regulation of the purely  
16 intrastate possession of an assertedly pornographic visual depiction that had not been mailed,  
17 shipped, or transported interstate and was not intended for interstate distribution or for any  
18 economic or commercial use. *See McCoy*, 323 F.3d at 1115. In so doing, the *McCoy* Court  
19 found the four-factor test “mandated by *Morrison*” to be “determinative” of whether federal  
20 regulation of a particular activity exceeds Commerce Clause power. *Id.* at 1118, 1119.

21 Defendants avoid the *Morrison* test altogether. Instead, they rely upon several  
22 pre-*Morrison* cases, all of which involve commercial “drug trafficking” and the “distribution and  
23 sale” of controlled substances for profit.<sup>2</sup> None of these cases addressed the federal  
24 government’s ability to regulate the cultivation for personal use of medical marijuana by  
25 seriously ill individuals where, as here, such use is non-commercial, recommended by a licensed  
26 physician, and carefully confined within state borders. Defendants ignore the determinative fact  
27 that the Patient-Plaintiffs are not engaged in drug dealing; they are using marijuana for medicinal  
28 purposes to alleviate their pain and suffering. *See, e.g., Corral Decl.* at ¶¶ 14-17; *Acosta Decl.* at

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<sup>2</sup> *See, e.g., United States v. Kim*, 94 F.3d 1247 (9th Cir. 1996); *United States v. Tisor*, 96  
F.3d 370 (9th Cir. 1996); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996).

1 ¶¶ 15-16; Baehr Decl. at ¶¶ 13-14; Hentz Decl. at ¶¶ 13-15; Gibbs Decl. at ¶¶ 17-18; Margolin  
2 Decl. at ¶ 11; Cheslosky Decl. at ¶¶ 17, 23.

3 Defendants also rely upon *United States v. Visman*, 919 F.2d 1390 (9th Cir.  
4 1990). But *Visman* was decided before *Lopez*, *Morrison*, and *McCoy*. As a result, *Visman* did  
5 not apply the four-part test that the Supreme Court and the Ninth Circuit have since held that  
6 courts *must* perform to determine whether a federal statute can reach a particular intrastate  
7 activity. Indeed, Judge Kozinski, quoting Justice Stevens, concluded just last year that  
8 “[m]edical marijuana, when grown locally for personal consumption, *does not have any direct or*  
9 *obvious effect on interstate commerce.*” *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002)  
10 (Kozinski, J., concurring) (emphasis added), citing *United States v. Oakland Cannabis Buyers’*  
11 *Coop.*, 532 U.S. 483, 495, n.7 (2001) (Stevens, J., concurring) (reserving “whether the  
12 Controlled Substances Act exceeds Congress’ power under the Commerce Clause”). *Visman*,  
13 therefore, does not resolve the question of whether Plaintiffs’ local cultivation and personal use  
14 of medical marijuana substantially affects interstate commerce.<sup>3</sup>

15 *Visman* was also decided before California enacted the Compassionate Use Act of  
16 1996, which legalizes the cultivation and medical use of marijuana in the State where it is  
17 recommended by a licensed physician. *See* Cal. H&S Code § 11362.5 *et seq.* The  
18 Compassionate Use Act carves out a discrete exception to other California laws prohibiting the  
19 possession and cultivation of marijuana. Therefore, *Visman*’s statement that Congress may  
20 constitutionally regulate “intrastate criminal cultivation of marijuana plants found rooted in the  
21

22 <sup>3</sup> In denying WAMM’s Section 41(e) motion last year, this Court found *Visman*  
23 determinative. However, the record in this case – including the declarations of the Patient-  
24 Plaintiffs, Plaintiffs City and County of Santa Cruz, and nationally-prominent physicians – is  
25 much more extensive than what could be presented in support of a motion for return of property.  
26 This record shows that Patient-Plaintiffs’ activity (unlike *Visman*’s, which involved the  
27 conspiracy to manufacture, possess with intent to distribute, and distribution of marijuana for  
28 profit) is non-economic and does not substantially affect interstate commerce. *See, e.g.,* Acosta  
Decl. at ¶ 13; Baehr Decl. at ¶¶ 18-19; Gibbs Decl. at ¶ 22; Hentz Decl. at ¶¶ 25-26; Margolin  
Decl. at ¶¶ 18-19; Cheslosky Decl. at ¶ 24. *McCoy*, decided by the Ninth Circuit *after* this  
Court’s Federal Rule of Criminal Procedure 41(e) ruling, makes clear that this Court must review  
this record and apply the *Morrison* test to the facts before determining whether the Commerce  
Clause permits the federal government to regulate Plaintiffs’ intrastate activity.

1 soil,” was prior to California’s pronouncement that cultivation of marijuana plants for medical  
2 purposes for or by those in Plaintiffs’ situation does not constitute “intrastate criminal  
3 cultivation.” The cultivation of medical marijuana by Plaintiffs since the passage of the  
4 Compassionate Use Act therefore *is* a matter of first impression, and Plaintiffs’ activity must be  
5 analyzed on its merits under the *Morrison* test.

6 **B. Congressional Findings Regarding the Sale of Controlled Substances**  
7 **and Effects of Drug Trafficking on Interstate Commerce Are Not**  
8 **Determinative**

9 Defendants also rely on congressional findings that “federal control of the  
10 intrastate incidents of the traffic in controlled substances is essential to the effective control of  
11 the interstate incidents of such traffic,” as well as other conclusory findings regarding the  
12 interstate effects of intrastate trafficking of controlled substances. *See* Defendants’ PI Opp. at  
13 13-14. However, *Morrison* holds that the mere existence of legislative findings is not  
14 determinative. “Simply because Congress may conclude that a particular activity substantially  
15 affects interstate commerce does not necessarily make it so.” *Morrison*, 529 U.S. at 614, quoting  
16 *Lopez*, 514 U.S. at 557, n.2 (internal quotation marks omitted). Rather, “whether particular  
17 operations affect interstate commerce sufficiently to come under the constitutional power of  
18 Congress to regulate them is ultimately a judicial rather than a legislative question.” *Id.*, quoting  
19 *Lopez*, 514 U.S. at 557, n.2 (internal quotation marks omitted).

20 Therefore, although the statute at issue in *Morrison* contained specific legislative  
21 findings describing the effect of intrastate violence on interstate commerce, the Supreme Court  
22 rejected those findings in determining that intrastate gender-motivated violence did not  
23 substantially affect interstate commerce. *See Morrison*, 529 U.S. at 615. Similarly here,  
24 intrastate cultivation and use of medical marijuana by the seriously ill Patient-Plaintiffs to  
25 alleviate their pain and suffering do not substantially affect interstate commerce, despite  
26 legislative findings regarding the *general* interstate effects of commercial distribution and  
27 possession of controlled substances. As in *McCoy*, “no legislative findings exist with respect to  
28 the interstate effect of intrastate, non-commercial possession of the . . . materials here,” and the  
Court should “decline to pile inference upon inference, to create a connection between that

1 purely local activity . . . and the interstate commercial activity in question . . .” *McCoy*, 323 F.3d  
2 at 1129 (internal citations and quotation marks omitted) (emphasis in original).

3           Moreover, the regulated activity to be scrutinized is *not* defined by congressional  
4 findings but by the activity actually at issue in the case. The “judicial function is not that of  
5 reviewing a decision made by Congress, but rather that of determining in the first instance  
6 whether the facts permit the exercise of power under the commerce clause.” *Rasmussen v. The*  
7 *American Dairy Association*, 472 F. 2d 517, 524 (9th Cir. 1973). In *Morrison*, the Court  
8 scrutinized the impact of gender-motivated violence against women upon interstate commerce,  
9 *not* the impact of crime and violence *in general*, even though the congressional findings spoke  
10 broadly of impacts upon interstate commerce common to all violent crime. *See Morrison*, 529  
11 U.S. at 615. Similarly, in *Lopez*, the Court considered that Congress had made broad findings in  
12 a 1994 amendment to 18 U.S.C. § 922 (q). *See* 514 U.S. at 563, n.4. These included findings  
13 that “crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem,”  
14 and that a “decline in the quality of education” resulting from the occurrence of violent crime in  
15 school zones “has an adverse impact on interstate commerce and the foreign commerce of the  
16 United States.” *See* 18 U.S.C. § 922 (q)(1)(A), (F) and (G). Despite these findings, the Court  
17 scrutinized the impact of the presence of guns on school campuses upon interstate commerce,  
18 *not* the impact of local crime in general, or educational decline in general. In light of these  
19 precedents, this Court has a duty to scrutinize specifically the impact, if any, that Plaintiffs’  
20 intrastate, non-economic cultivation and personal use of medical marijuana has on interstate  
21 commerce, not the effect that commercial distribution and trafficking of controlled substances  
22 has on interstate commerce generally.

23           Defendants seek to criticize Plaintiffs’ arguments as hearkening “back to long  
24 discredited notions of state’s rights,” suggesting that they would have permitted states to “carve  
25 out” discrete instances of intrastate racial discrimination and limit the reach of the Civil Rights  
26 Act of 1964. Defendants’ PI Opp. at 12-13. The Civil Rights Act is no analogy. In reviewing  
27 whether the Commerce Clause authorized enactment of the Civil Rights Act, the Supreme Court  
28 held that Congress had demonstrated through evidence that local discrimination had a substantial

1 effect on interstate commerce. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241,  
2 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964). By contrast, an examination of  
3 the legislative history of the CSA yields no evidence to suggest that Congress considered the  
4 impact that local cultivation and use of medicinal marijuana by seriously ill and dying patients  
5 with no pecuniary component had on interstate commerce.<sup>4</sup>

6 **C. Congress Has Not Preempted State Regulation Of Local Drug**  
7 **Cultivation, Possession And Use**

8 Defendants' reliance upon the anti-preemption clause of the Controlled  
9 Substances Act, 21 U.S.C. § 903, distorts Plaintiffs' position. Plaintiffs do not contend that a  
10 conflict between state law and federal law should be resolved by giving precedence to state law.  
11 If the activity that Congress seeks to regulate does not substantially affect interstate commerce,  
12 federal authority to regulate the activity is lacking – not because state law is supreme, but  
13 because the Constitution strictly limits federal authority to regulate intrastate commerce. A  
14 state's police powers are not to be superseded by a federal act unless Congress has clearly  
15 manifested its intent to this end. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947);  
16 *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Here, Congress has expressed a  
17 precisely contrary intention: the CSA is not to be construed as preempting state drug laws unless  
18 there is a positive conflict between state and federal law. *See* 21 U.S.C. § 903. There is no  
19 positive conflict here, however, because Congress lacks the authority to regulate the activity at  
20 issue: wholly intrastate, non-economic cultivation and use of medical marijuana.

21 The assumption of non-preemption advances the policy underlying the Commerce  
22 Clause and the Tenth Amendment: federal power is limited, therefore Congress has no authority  
23 to regulate in areas traditionally reserved to the states. This fundamental premise was the key to

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24  
25 <sup>4</sup> Another key difference between the Civil Rights Act and the CSA is that constitutional  
26 authority for enactment of the Civil Rights Act also derived from Section 5 of the Equal  
27 Protection Clause of the Fourteenth Amendment. *See Heart of Atlanta Motel*, 379 U.S. at 248-  
28 49. Therefore, even if racial discrimination did not affect interstate commerce, the Fourteenth  
Amendment prohibits a state from authorizing such discrimination. Here, Defendants can lay  
claim to no such constitutional authorization in attempting to regulate intrastate cultivation and  
use of medical marijuana.

1 *Lopez and Morrison*. See *Lopez*, 514 U.S. at 583; *Morrison*, 529 U.S. at 615-16; see also  
2 *McCoy*, 323 F.3d at 1127-28. Because California’s legalization of medical marijuana is not  
3 preempted by federal law, and the Patient-Plaintiffs’ conduct does not substantially affect  
4 interstate commerce, federal interference with Patient-Plaintiffs’ intrastate use of medical  
5 marijuana runs afoul of the Commerce Clause.

6 **III. FEDERAL SEIZURE OF THE PATIENT-PLAINTIFFS’ MEDICAL**  
7 **MARIJUANA VIOLATES THE TENTH AMENDMENT**

8 **A. Because It Is Not Authorized by the Commerce Clause, Federal**  
9 **Seizure Of the Plaintiffs’ Medical Marijuana Violates the Tenth**  
10 **Amendment**

11 Defendants’ position that federal seizure of Plaintiffs’ medical marijuana does not  
12 violate the Tenth Amendment is based on the faulty premise that such seizures are proper  
13 exercises of the federal commerce power. See Defendants’ PI Opp. at 18-19. As discussed,  
14 *supra*, such seizures are not proper exercises of that power. See also Plaintiffs’ MTD Opp. at 9-

15 **B. Defendants’ Actions Force California To Keep Medical Marijuana**  
16 **Illegal**

17 This is a case in which the federal government has “commandeered the state  
18 legislative process.” *Reno v. Condon*, 528 U.S. 141, 149 (2000); *Printz v. United States*, 521  
19 U.S. 898, 935 (1997). The federal government’s policy of seizing medical marijuana forces  
20 California and its political subdivisions (including Plaintiff County of Santa Cruz) and its charter  
21 cities (including Plaintiff City of Santa Cruz) to keep medical marijuana illegal, abrogating their  
22 police power over health and safety. See Plaintiffs’ MTD Opp. at 14-15.

23 **C. Defendants Conscripted State Officers To Carry Out The Federal**  
24 **Raid On WAMM**

25 Defendants’ contention that the CSA “does not attempt to force . . . state officers  
26 . . . to enforce any federal regulation,” (Defendants’ PI Opp. at 19-20), ignores what happened in  
27 this case: the federal government conscripted state and local officers to conduct the September  
28 5, 2002 raid on WAMM.

The Tenth Amendment prohibits the federal government from compelling the

1 officers of a state or its political subdivisions to enact or enforce a federal regulatory scheme.  
2 *See Printz*, 521 U.S. at 935. The federal Drug Enforcement Agency High Intensity Drug  
3 Trafficking Area Task Force is made up of federal, state and local law enforcement officers. The  
4 members of the Task Force that conducted the WAMM raid included officers from the San Jose  
5 Police Department and the Santa Clara County Sheriff's Department. *See Corral Decl.* at ¶ 27;  
6 Uelmen Decl. at ¶ 11; Plaintiffs' Request for Judicial Notice in Support of Motion for  
7 Preliminary Injunction ("RJN I"), Ex. 6. Membership on the Task Force thus requires local  
8 officers to enforce a federal law that conflicts with California's medical marijuana law. *See*  
9 Uelmen Decl. at ¶ 14; RJN I, Ex. 6.<sup>5</sup> In *Printz*, the Supreme Court struck down a similar federal  
10 scheme that conscripted local law enforcement officers to conduct background checks under a  
11 provision of the Brady Handgun Violence Prevention Act, Pub. L. 103-159. *See Printz*, 521 U.S.  
12 at 903-04, 935. Conscripting local law enforcement officers to enforce the CSA violated the  
13 Tenth Amendment. Defendants offer no evidence that such conscriptions and raids will cease in  
14 the future.

15 **IV. THE REMAINING EQUITABLE FACTORS WEIGH STRONGLY IN**  
16 **PLAINTIFFS' FAVOR.**

17 All of the equitable factors tip sharply in Plaintiffs' favor.

18 Plaintiffs will unquestionably suffer irreparable harm if an injunction does not  
19 issue. Plaintiffs City and County of Santa Cruz, pursuant to their duty to uphold the health and  
20 welfare of their citizens, *see, e.g., Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905); Cal.  
21 Const., Art. XI, §§ 1, 7, have authorized the medical use of marijuana as a critical means of  
22 relieving the suffering of their sick and dying residents. Additionally, each Government-Plaintiff  
23 has identified WAMM as central to achieving this objective. *See Pirie Decl.* at ¶ 4 and Ex. B  
24 (Santa Cruz Municipal Code §§ 6.90.020, *et. seq.*); RJN Ex. 15 (Santa Cruz County Resolution  
25 No. 348-2002); Reilly Decl. at ¶¶ 5, 7, & 8. Without the requested injunctive relief, the City and

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26  
27 <sup>5</sup> Since the raid, San Jose Police Chief William Lansdowne has rejected federal efforts to  
28 compel his officers to enforce a federal law that conflicts with California's medical marijuana  
law. *See Uelmen Decl.* at ¶¶ 14, 15; RJN I, Ex. 6.

1 County will be left without the safe, highly regulated, and publicly endorsed method of providing  
2 medical marijuana to their most vulnerable residents.

3 The Patient-Plaintiffs and other members of WAMM will suffer an even more  
4 personal kind of harm. For example, if denied access to medical marijuana, Plaintiffs Hentz,  
5 Acosta, and Baehr will be left to suffer from the nausea and excruciating pain associated with  
6 their cancer and related treatments, increasing their agony in their final days and possibly  
7 accelerating their deaths. *See* Hentz Decl. at ¶¶ 21-22, 28; Acosta Decl. at ¶¶ 15, 18; Baehr Decl.  
8 at ¶¶ 17, 21; *see also* Rosenbaum Decl. at ¶¶ 7, 9. Plaintiff Cheslosky would suffer from nausea,  
9 vomiting, severe abdominal cramps, and diarrhea, all of which can lead to debilitating “wasting  
10 syndrome” and eventually, death. *See* Cheslosky Decl. at ¶¶ 18-20; *see also* Flynn Decl. at ¶¶ 7-  
11 9, 15. Additionally, Plaintiff Gibbs, who is 93 years old, would likely live out her remaining  
12 days in severe and constant pain. *See* Gibbs Decl. at ¶¶ 7, 17-18; *see also* Leff Decl. at ¶ 27. An  
13 injunction can prevent these consequences.

14 For their part, Defendants cannot establish any meaningful harm that they will  
15 suffer if an injunction is granted. Defendants contend that the presumption of constitutionality of  
16 congressional statutes creates a *per se* determination of harm. Defendants misrepresent the scope  
17 of the relief requested. Plaintiffs do not ask this Court to declare the CSA unconstitutional.  
18 Rather, an injunction that permits WAMM to continue its cooperative horticultural activities on  
19 behalf of the chronically and terminally ill Patient-Plaintiffs, pursuant to the regulatory scheme  
20 enacted by the State of California and Plaintiffs City and County of Santa Cruz, neither strikes  
21 down the CSA nor undermines the fundamental purpose of that statute. Indeed, insofar as  
22 Congress promulgated the CSA to promote public safety by protecting against the unregulated  
23 manufacture, distribution, and use of harmful substances, the relief sought by Plaintiffs is  
24 consistent with the CSA’s underlying purpose. This is so because the proposed injunction fits  
25 within a state-created and state-enforced scheme closely governing the cultivation, distribution  
26 and medical use of marijuana for a tightly circumscribed and geographically confined  
27 population.

1 Public interest factors further weigh in favor of an injunction. In the public  
2 interest analysis, the court must look beyond the interests of the litigants to assess the impact of  
3 an injunction on non-parties. *See Sammartano v. First Judicial Court, in and for the County of*  
4 *Carson City*, 303 F.3d 959, 974 (9th Cir. 2002). The public here has an overwhelming interest in  
5 allowing seriously and terminally ill family members, co-workers, friends, and neighbors safe  
6 and regulated access to a physician-recommended treatment that relieves suffering.<sup>6</sup> This  
7 interest is not speculative. The people of California, through the ballot box, have made clear  
8 their desire to allow use of medical marijuana to maintain and promote health and well being.  
9 *See Cal. H & S Code § 11362.5, et. seq.* Likewise, the citizens of the City and County of Santa  
10 Cruz have repeatedly endorsed the actions of WAMM in furthering the intent of the  
11 Compassionate Use Act. *See Pirie Decl. at ¶ 4; Reilly Decl. at ¶¶ 5, 7, & 8.*

12 Defendants belittle this showing by claiming that the public interest analysis  
13 begins and ends with the issue of whether Plaintiffs' actions are lawful under the CSA. This is  
14 wrong: equitable factors must be addressed separately from the merits of the case in determining  
15 whether an injunction is warranted. *See Sammartano*, 303 F.3d at 965. It also glosses over  
16 Defendants' failure to offer any contrary evidence. And even if Defendants' discussion of the  
17 CSA were relevant to the balancing of equitable interests, Plaintiffs would still prevail.

18 Defendants contend that marijuana's Schedule I classification under the CSA  
19 forecloses this Court from finding that its use could be in the public interest. But California is  
20 vested with a steadfast and unquestioned mandate to safeguard the health and welfare of its  
21 residents, derived from its constitution, Cal. Const. Art. XI, §§ 1, 7, and shaped by the history of  
22 the Republic, *see e.g. Jacobson*, 197 US. at 24-25 (recognizing state's police power, "a power  
23 which the state did not surrender when becoming a member of the Union under the Constitution"  
24 and which authorizes states to enact "health laws of every description") (internal quotations  
25 marks omitted). The State of California and Plaintiffs City and County of Santa Cruz have

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26  
27 <sup>6</sup> The public's strong interest in having access to medical recommendations for marijuana  
28 is judicially recognized. *See Conant*, 309 F.3d at 629, 636-37 (upholding First Amendment right  
of physicians to confer and patients to receive recommendations for medical marijuana).

1 confirmed that the medical use of marijuana is integral to this public interest. This public  
2 interest, moreover, is supported by an authoritative body of scientific evidence underscoring the  
3 medical efficacy of marijuana, as evidenced by the declarations submitted to this Court by  
4 nationally prominent physicians. *See e.g.* Brody Decl. at ¶ 20; Rosenbaum Decl. at ¶¶ 7, 11, 18;  
5 Flynn Decl. at ¶ 15; Leff Decl. at ¶¶ 8-12, 20-21; Rose Decl. at ¶¶ 4-22. *See also* Plaintiffs'  
6 Request for Judicial Notice in Support of Opposition to Official Capacity Defendants' Motion to  
7 Dismiss. Therefore, because the equitable factors tip sharply in Plaintiffs' favor, Plaintiffs are  
8 entitled to the requested preliminary injunction.

9 **V. CONCLUSION**

10 For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be  
11 granted.

12 DATED: June 9, 2003

BINGHAM McCUTCHEN LLP

13  
14 By: Neha S. Nissen  
15 Neha Shah Nissen  
16 Attorneys for WAMM Plaintiffs  
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24  
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26  
27  
28

1 **Additional Counsel:**

2 Daniel Abrahamson (SBN 158668)  
3 Judith Appel (SBN 179121)  
4 DRUG POLICY ALLIANCE  
5 Office Of Legal Affairs  
6 717 Washington Street  
7 Oakland, California 94607  
8 Telephone: 510.208.7711  
9 Facsimile: 510.208.7722

10  
11 Attorneys for WAMM Plaintiffs  
12

13 Benjamin Rice (SBN 98551)  
14 331 Soquel Avenue, Suite 203  
15 Santa Cruz, California 95062  
16 Telephone: 831.425.0555  
17 Facsimile: 831.459.9815

18  
19 Attorney for County of Santa Cruz  
20 and WAMM Plaintiffs  
21

22  
23 John Barisone (SBN 87831)  
24 333 Church Street  
25 Santa Cruz, California 95060  
26 Telephone: 831.423.8383  
27 Facsimile: 831.423.9401

28  
29 Attorney for City of Santa Cruz, California  
30  
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