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10
 11 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 **SAN JOSE DIVISION**

13 COUNTY OF SANTA CRUZ,)
 CALIFORNIA, *et al.*,)
 14 Plaintiffs,)
 15)
 16 JOHN ASHCROFT, Attorney General)
 of the United States; KAREN P. TANDY,)
 17 Administrator of the Drug Enforcement)
 Administration; JOHN P. WALTERS,)
 18 Director of the Office of National Drug)
 Control Policy; and 30 UNKNOWN)
 19 AGENTS OF THE DRUG)
 ENFORCEMENT ADMINISTRATION,)
 20 Defendants.)
 21

Case No. C 03-1802 JF
 OFFICIAL-CAPACITY DEFENDANTS'
EX PARTE MOTION FOR STAY
 PENDING APPEAL
 (Fed. R. Civ. P. 62(c); Local Rule 7-10)
 Date: None set
 Time: None set
 Courtroom 3
 The Hon. Jeremy Fogel

1 **PRELIMINARY STATEMENT**

2 Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure and Local Rule 7-10(a),
3 defendants John Ashcroft, Attorney General of the United States, Karen P. Tandy, Administrator of the
4 Drug Enforcement Administration, and John P. Walters, Director of the Office of National Drug
5 Control Policy, hereby move ex parte for a stay pending appeal of the Court's Order for Preliminary
6 Injunctive Relief, dated June 21, 2004, and this Court's Order Granting Motion for Reconsideration,
7 dated April 21, 2004.

8 **STANDARDS**

9 The standard for granting a stay pending appeal "is similar to that employed by district courts in
10 deciding whether to grant a preliminary injunction." Lopez v. Heckler, 713 F.2d 1432, 1435 (9th
11 Cir.1983), *stay granted pending appeal*, 463 U.S. 1328 (1983) (Rehnquist, J., in chambers). In the
12 Ninth Circuit, a party is entitled to a preliminary injunction when it "demonstrates either (1) a
13 combination of probable success on the merits and the possibility of irreparable injury or (2) the
14 existence of serious questions going to the merits and that the balance of hardships tips sharply in [its]
15 favor." GoTo.com, Inc. v. The Walt Disney Co., 202 F.3d 1199, 1204 (9th Cir. 2000).

16 Under either of these formulations, the United States is entitled to a stay pending appeal.

17 **ARGUMENT**

18 **I. THE GOVERNMENT HAS DEMONSTRATED PROBABLE SUCCESS ON THE**
19 **MERITS OR, IN THE ALTERNATIVE, SERIOUS QUESTIONS GOING TO THE**
20 **MERITS**

21 1. The April 21 and June 21, 2004 Orders preliminarily hold that the Controlled Substances
22 Act ("CSA"), as applied to the manufacture, possession, and distribution of a controlled substance, is
23 unconstitutional under the Commerce Clause. That holding partially invalidates an Act of Congress and
24 specifically conflicts with findings of the CSA that intrastate drug activity substantially affects the overall
25 interstate market of drug trafficking. See 21 U.S.C. § 801. The Orders also are inconsistent with
26 Congress's finding that "[f]ederal control of the intrastate incidents of the traffic in controlled substances
27 is essential to the effective control of the interstate incidents of such traffic," as well as Congress's
28 purpose to establish a national, comprehensive, uniform -- and closed -- statutory scheme to prevent

1 the abuse and diversion of controlled substances that threaten public health and safety. The Orders
2 thus seriously undermine the administration and effectiveness of the CSA.

3 There is a strong likelihood that the government will ultimately succeed on its argument that the
4 CSA, even as applied to the activities of the plaintiffs, is a constitutional exercise of Congress' authority
5 under the Commerce Clause. It is well established that Congress may declare that an entire class of
6 activities affects interstate commerce and, in passing on the validity of such legislation, "the only function
7 of courts is to determine whether the particular activity regulated or prohibited is within the reach of the
8 federal power." United States v. Darby, 312 U.S. 100, 120-21 (1941). Thus, in United States v.
9 Lopez, 514 U.S. 549 (1995), the Supreme Court reaffirmed that, "where a *general regulatory*
10 *statute bears a substantial relation to commerce*, the *de minimis* character of individual instances
11 arising under that statute is of no consequence." 514 U.S. at 558 (emphasis in original) (quoting
12 Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968) (emphasis by Court)). Accord Perez v. United
13 States, 402 U.S. 146, 154 (1971) ("Where the class of activities is regulated and that class is within the
14 reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the
15 class.").

16 Here, Congress has made express findings that the intrastate distribution, cultivation, and
17 possession of controlled substances affects interstate commerce, including findings that the "[local
18 distribution and possession of controlled substances contribute to swelling the interstate traffic in such
19 substances," that "[c]ontrolled substances manufactured and distributed intrastate cannot be
20 differentiated from controlled substances manufactured and distributed interstate," and that "[f]ederal
21 control of the intrastate incidents of the traffic in controlled substances is essential to the effective
22 control of the interstate incidents of such traffic." 21 U.S.C. §§ 801(4)-(6). Thus, as the Ninth Circuit
23 has held, in cases arising under section 841(a)(1), "no proof of interstate nexus is required in order to
24 establish jurisdiction." United States v. Montes-Zarate, 552 F.2d 1330, 1331-32 (9th Cir. 1977),
25 *cert. denied*, 435 U.S. 947 (1978). As the Fourth Circuit has explained:

26 Like the production of home-grown wheat, the manufacture of
27 marijuana for personal use is an economic activity in a general sense.
28 Further, such manufacture is prohibited pursuant to a comprehensive
statutory scheme bearing on all aspects of the illegal-drug trade, which
is assuredly both commercial and interstate. Thus, like the regulation of
home-grown wheat, the prohibition of home-grown marijuana is 'an

1 essential part of a larger regulation of economic activity, in which the
2 regulatory scheme could be undercut unless the intrastate activity were
regulated.’

3 Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820, 836 n.7 (1999) (internal citation
4 omitted) (quoting Lopez, 514 U.S. at 561), *affirmed sub nom. United States v. Morrison*, 529 U.S.
5 598 (2000). Accord United States v. Lopez, 2 F.3d 1342, 1367 n.51 (5th Cir. 1993) (“The [CSA’s]
6 possession proscription [is] a necessary means to regulate the interstate commercial trafficking in
7 narcotics.”), *aff’d*, 514 U.S. 549 (1995).

8 2. The Ninth Circuit’s decision in Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), *petition*
9 *for certiorari filed*, No. 03-1454 (April 20, 2004), is not to the contrary.¹ In Raich, the Ninth Circuit
10 held that, “[a]s applied to the limited class of activities presented by this case, the CSA does not
11 regulate commerce or any sort of economic enterprise. The cultivation, possession, and use of
12 marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as
13 commercial or economic activity.” Id. at 1229. In doing so, the Ninth Circuit repeatedly emphasized
14 that the class of activities at issue was limited to the “intrastate, noncommercial cultivation, possession
15 and use of marijuana for personal medical purposes on the advice of a physician,” and did not involve
16 “sale, exchange, or distribution.” Id. at 1228, 1229. As the court explained, “this limited use is clearly
17 distinct from the broader illicit drug market—as well as any broader commercial market for medicinal
18 marijuana—insofar as the medicinal marijuana in this case is not intended for, not does it enter, the
19 stream of commerce.” Id. In other words, “[l]acking sale, exchange, or distribution, the activity does
20 not possess the essential elements of commerce.” Id. at 1229-30.

21 The Ninth Circuit also emphasized that the “aggregation principle” of Wickard v. Filburn, 317
22 U.S. 111 (1942), was not applicable because “the marijuana at issue in this case is * * * non-fungible,
23 as its use is personal and the appellants do not seek to exchange it or acquire marijuana from others in a
24 market.” Id. at 1231. The court further noted that, although one of the individual appellants was
25 supplied marijuana by two “John Doe” appellants, “there is no ‘exchange’ sufficient to make such
26 activity commercial in character” because Ms. Raich had attested that her caregivers grew marijuana

27 _____
28 ¹ We believe that Raich was wrongly decided. On April 20, 2004, the Solicitor General
petitioned the Supreme Court for a writ of certiorari to review that decision.

1 specifically for her and that they did not charge her for the marijuana or demand anything in trade. Id.
2 at 1230 n.3 (emphasis supplied). Indeed, as the court noted, Ms. Raich had attested that her
3 caregivers “grow my medicine and give it to me *free of charge*.” Id. (emphasis supplied).

4 In contrast to the “limited class of activities” at issue in Raich, this case is not limited to the
5 “cultivation, possession, and use of marijuana for medicinal purposes” by two individuals, but rather
6 involves the “sale, exchange, or distribution” of marijuana from WAMM to its no less than 250
7 members. The provision and delivery of marijuana to the individual plaintiffs by WAMM, and the
8 acquisition and receipt of marijuana by those individuals from WAMM, plainly meets the definition of
9 “distribution” under the Controlled Substances Act. See 21 U.S.C. § 802(11) (defining the term
10 “distribute” to mean “to deliver (other than by administering or dispensing) a controlled substance or a
11 listed chemical.”); 21 U.S.C. § 802(8) (defining the terms “deliver” or “delivery” to mean “the actual,
12 constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there
13 exists an agency relationship.”).

14 Moreover, in contrast to Raich, WAMM’s manufacturing and distribution activities are clearly
15 commercial, notwithstanding WAMM’s claim that it does not charge its members with respect to a
16 particular allotment of marijuana. WAMM’s mass production and distribution operations are made
17 possible only because WAMM demands and receives financial contributions from its members and
18 other sources. Thus, “[a] sliding scale membership of \$25.00 - \$100.00 is required from each
19 participant to cover administrative costs,” WAMM Protocols and Guidelines § 4 (attached as Exhibit B
20 to the Declaration of Valerie Corral in Support of Plaintiffs’ Motion for a Preliminary Injunction), and
21 the declaration submitted by Ms. Corral in connection with the Related Case provides that “WAMM is
22 supported by voluntary contributions from patients and others,” including “[d]onations of time and
23 money by patients * * *.” Declaration of Valerie Corral, submitted in WAMM Related Case ¶ 2.
24 WAMM also engages in quintessentially commercial activity to sustain its activities. WAMM runs a
25 national website to solicit donations to “help WAMM maintain the first legal medical marijuana garden
26 in the US,” because its members and their caregivers “share the burden of growing this organic
27 medicine” and [s]uch a garden costs much money to maintain.” <http://www.wamm.org/donations.htm>
28 (emphasis added). WAMM further runs an online store to sell apparel, housewares, and other

1 products, <http://www.cafeshops.com/cp/store.aspx?s=wamm.0>, and sells, for \$19.95 (plus shipping
2 and handling), a “Cannabis Cultivation Outdoors” video that purports to be “[a] twelve-step guide” for
3 growing marijuana <http://www.wamm.org/video.htm>. Declaration of Valerie Corral, submitted in
4 WAMM Related Case ¶ 2 (attached as Exhibit 3).

5 It also is of no moment that WAMM allegedly does not operate for a profit. The Supreme
6 Court has held that “[t]he nonprofit character of an enterprise does not place it beyond the purview of
7 federal laws regulating commerce.” Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine,
8 520 U.S. 564, 584 (1997). See also id. (“We see no reason why the nonprofit character of an
9 enterprise should exclude it from the coverage of either the affirmative or the negative aspect of the
10 Commerce Clause.”); id. at 585 (“Nothing intrinsic to the nature of nonprofit entities prevents them
11 from engaging in interstate commerce.”); id. at 586 (“For purposes of Commerce Clause analysis, any
12 categorical distinction between the activities of profit-making enterprises and not-for-profit entities is
13 therefore *wholly illusory*.” (emphasis supplied)). The assertion that the alleged non-for-profit
14 character of WAMM somehow immunizes its activities from the reach of the Commerce Clause,
15 consequently, is without foundation.

16 **II. ALLOWING THE PRELIMINARY INJUNCTION ORDER TO REMAIN IN**
17 **PLACE WILL CAUSE IRREPARABLE INJURY TO THE GOVERNMENT’S**
18 **ABILITY TO ENFORCE THE CSA, AND IS INCONSISTENT WITH THE PUBLIC**
19 **INTEREST**

20 1. The April 21 and June 21, 2004 orders granting plaintiffs’ motion for a preliminary injunction
21 expressly enjoin the enforcement of the CSA as it applies to WAMM, a large-scale manufacturer and
22 distributor of marijuana. Allowing those orders to remain in effect will cause irreparable harm to the
23 government's ability to enforce the CSA. See New Motor Vehicle Bd. of California v. Orrin W. Fox
24 Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice) (“[A]ny time a State is enjoined by a
25 court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable
26 injury”); see also Heart of Atlanta Motel v. United States, 85 S. Ct. 1, 2 (1964) (Black, Circuit Justice)
27 (“[A] temporary injunction against enforcement is in reality a suspension of an act, delaying the date
28 selected by Congress to put its chosen policies into effect.”). The CSA, like all Congressional
enactments, is “presumptively constitutional,” and this “presumption of constitutionality * * * [is] an
equity to be considered in favor of [the government] in balancing hardships.” Walters v. National Ass'n

1 of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, Circuit Justice). An Act of Congress
2 therefore should “remain in effect pending a final decision on the merits by this Court.” Turner
3 Broadcasting Sys. v. FCC, 113 S. Ct. 1806, 1807 (1993) (Rehnquist, Circuit Justice).

4 The irreparable harm to the public interest posed by the preliminary injunction is plain.
5 Congress has weighed what it deemed to be the relevant considerations (including medical and other
6 scientific evidence and the high potential for abuse) and made the fundamental policy decision that
7 marijuana, a Schedule I controlled substance, may not be distributed for human consumption outside a
8 strictly controlled research project that has been registered with the DEA and approved by the FDA.
9 21 U.S.C. 812(b)(1), 841(a), 823(f). Congress likewise has determined that “the illegal * * *
10 distribution[] and * * * improper use of controlled substances have a substantial and detrimental effect
11 on the health and general welfare of the American people.” 21 U.S.C. 801(2). And Congress has
12 reiterated its continuing adherence to the existing FDA drug approval process, and its continuing
13 opposition to any effort to allow the use of marijuana or other Schedule I controlled substances until
14 they are proven safe and effective based on appropriate findings by the FDA. See Pub. L. No.
15 105-277, Div. F, 112 Stat. 2681, 760-61 (1998) (stating that “Congress continues to support the
16 existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to
17 circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without
18 valid scientific evidence and the approval of the Food and Drug Administration * * *.”).

19 The April 21 and June 21, 2004, orders have nonetheless partially abrogated the statutory
20 prohibitions under the CSA and given judicial approval to the on-going distribution of marijuana by
21 WAMM in violation of those prohibitions. In addition, the orders permit the cultivation and distribution
22 of marijuana without any of the statutory and regulatory controls that Congress deemed necessary to
23 ensure the public health and safety even for those controlled substances that are listed in Schedules II
24 through V.

25 2. Nor is the public interest in the enforcement of the CSA outweighed by plaintiffs’ assertion
26 that marijuana has medical utility and that the members of WAMM will suffer irreparable injury without
27 access to marijuana. Those assertions are directly countered by Congress’s determination in the CSA
28 that marijuana has a “high potential for abuse,” “no currently accepted medical use in treatment in the

1 United States,” and “a lack of accepted safety for use * * * under medical supervision.” 21 U.S.C.
2 812(b)(1). Thus, in United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483 (2001),
3 the Supreme Court held that the CSA makes no allowance for the distribution or cultivation of
4 marijuana for alleged medicinal purposes:

5 In the case of the Controlled Substances Act, the statute reflects a
6 determination that marijuana has no medical benefits worthy of an
7 exception (outside the confines of a Government-approved research
8 project). Whereas some other drugs can be dispensed and prescribed
9 for medical use, see 21 U.S.C. § 829, the same is not true for
10 marijuana. *Indeed, for purposes of the Controlled Substances Act,*
11 *marijuana has “no currently accepted medical use” at all. § 811.*

12 532 U.S. at 491 (emphasis supplied). The Court therefore concluded that, “[b]ecause the statutory
13 prohibitions cover even those who have what could be termed a medical necessity, *the Act precludes*
14 *consideration of this evidence.” Id.* at 499 (emphasis supplied).

15 It also is significant that, although the CSA allows that controlled substances that have been
16 placed in Schedule I (or any other Schedule) may be transferred to another Schedule or be entirely
17 removed from the Schedules, see 21 U.S.C. § 811(a), marijuana has not been rescheduled or proven
18 safe or effective by the Food and Drug Administration (“FDA”). In 1992, the Administrator of the
19 Drug Enforcement Administration (“DEA”) declined to reschedule marijuana, finding that the record
20 demonstrated that marijuana “had no currently accepted medical use in treatment in the United States,”
21 and thus had to remain in Schedule I. See 57 Fed. Reg. 10,499 (Mar. 26, 1992). This decision was
22 upheld by a unanimous panel of the D.C. Circuit. See Alliance for Cannabis Therapeutics v. DEA, 15
23 F.3d 1131, 1137 (D.C. Cir. 1994). More recently, on March 20, 2001, the DEA Administrator once
24 again denied a petition to reschedule marijuana, based, in part, on HHS’s scientific and medical analysis
25 recommending that marijuana remain in schedule I. See 66 Fed. Reg. 20038 (April 18, 2001). In
26 particular, General David Satcher, the then-Assistant Secretary for Health and Surgeon General of the
27 United States, concluded that, based on a comprehensive review by the FDA’s Controlled Substance
28 Staff, it remained the case that “marijuana has a high potential for abuse, has no currently accepted
29 medical use in treatment in the United States, and has a lack of accepted safety for use under medical
30 supervision.” Id. at 20039. Assistant Secretary and Surgeon General Satcher therefore
31 recommended, on behalf of HHS, that marijuana “continue to be subject to control under Schedule I of

1 the CSA.” Id. The D.C. Circuit unanimously dismissed a petition challenging the DEA Administrator’s
2 determination for lack of standing. See Gettman v. DEA, 290 F.3d 430, 432-35 (D.C. Cir. 2002).

3 It therefore would be highly anomalous for this Court to place greater reliance on the subjective
4 claim of a patient or his physician that marijuana is medically appropriate in order to authorize the
5 distribution and cultivation of marijuana, a substance not only banned under the CSA but also not
6 approved for use or distribution under the FDCA. See Weinberger v. Hynson, Westcott & Dunning,
7 Inc., 412 U.S. 609, 629-632 (1973) (holding that the FDA’s “strict and demanding standards,” which
8 “bar[] anecdotal evidence indicating that doctors ‘believe’ in the efficacy of a drug, are amply justified
9 by the legislative history” of the FDCA, which reflects “a marked concern that impressions or beliefs of
10 physicians, no matter how fervently held, are treacherous”). Indeed, in Oakland Cannabis, the
11 Supreme Court explained that the fact that a district court has discretion in determining whether to enter
12 a request for injunctive relief “does not suggest that the District Court * * * could consider any and all
13 factors that might relate to the public interest or the conveniences of the parties, including the medical
14 needs of the Cooperative’s patients. On the contrary, a court sitting in equity cannot ‘ignore the
15 judgment of Congress, deliberately expressed in legislation.’” Id. at 497 (quoting Virginian Ry. Co. v.
16 System Federation No. 40, 300 U.S. 515, 551 (1937)). In particular, the Court stated, “[a] district
17 court cannot, for example, override Congress’ policy choice, articulated in a statute, as to what
18 behavior should be prohibited. * * * Their choice (unless there is statutory language to the contrary) is
19 simply whether a particular means of enforcing the statute should be chosen over another permissible
20 means; *their choice is not whether enforcement is preferable to no enforcement at all.*” Id. at
21 497-98 (emphasis supplied).

22 Here, in no uncertain terms, Congress has made unlawful the very conduct which plaintiffs seek
23 to engage in. In such circumstances, “[c]ourts of equity cannot, in their discretion, reject the balance
24 that Congress has struck in a statute.” Id. at 497. Accord Virginian Railway Co., 300 U.S. at 551,
25 552 (“In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of
26 Congress” which is “deliberately expressed in legislation [because] [t]he fact that Congress has
27 indicated its purpose [in a statute] is in itself a declaration of the public interest and policy which should
28 be persuasive in inducing the courts to give relief.”); People v. Tahoe Regional Planning Agency, 766

1 F.2d 1319, 1324 (9th Cir. 1985) (“The district court has greater power to fashion equitable relief in
2 defense of the public interest than it has when only private interests are involved,” and further held that
3 “[i]t may define the public interest by reference to the policies expressed in legislation.”).

4 For all these reasons, the Official-Capacity Defendants are entitled to a stay pending appeal.

5 **CONCLUSION**

6 For the foregoing reasons, this Court should stay the April 21 and June 21, 2004 Orders
7 granting plaintiffs’ motion for a preliminary injunction.

8 Respectfully submitted,

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26 Dated: June 23, 2004