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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,

Case No. C 03-1802 JF

REPLY IN SUPPORT OF  
OFFICIAL-CAPACITY DEFENDANTS'  
EX PARTE MOTION FOR STAY  
PENDING APPEAL

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.

Date: None set  
Time: None set  
Courtroom 3  
The Hon. Jeremy Fogel

22 Defendants John Ashcroft, Attorney General of the United States, Karen P. Tandy,  
23 Administrator of the Drug Enforcement Administration, and John P. Walters, Director of the Office of  
24 National Drug Control Policy, hereby submit this reply in support of their ex parte motion for a stay  
25 pending appeal of the Court's Order for Preliminary Injunctive Relief, dated June 21, 2004, and this  
26 Court's Order Granting Motion for Reconsideration, dated April 21, 2004, and in response to  
27 Plaintiffs' Opposition to Official Capacity Defendants' Ex Parte Motion for Stay Pending Appeal  
28 ("Opp.").

1 1. Plaintiffs first argue that the government may not request a stay pending appeal because, in  
2 the Further Case Management Conference Statement which was adopted by this Court as a Further  
3 Case Management Order, the parties agreed that “unless and until a higher court actually *reverses* this  
4 Court’s April 21, 2004 Order or June 21, 2004 Preliminary Injunction Order, the parties agreed and  
5 this Court ordered that the preliminary injunction shall remain in effect.” Plaintiffs contend that the  
6 government similarly agreed not to seek a stay pending appeal in the June 21, 2004 Order, which  
7 provides that the official-capacity defendants are enjoined from taking certain actions “during the  
8 pendency of this action, and until this Court makes a ruling on the merits.” Neither argument is correct.

9 In agreeing to the Further Case Management Statement, and to the form of preliminary  
10 injunction order, the government did not surrender its right to seek a stay or modification of the  
11 preliminary injunction. Rather, the government understood that, with respect to the Further Case  
12 Management Statement, it was merely agreeing that the preliminary injunction would remain in place  
13 notwithstanding the parties’ agreement to stay further proceedings in this case pending the outcome of  
14 the government’s petition for certiorari in Ashcroft v. Raich, No. 03-1454 and the Ninth Circuit’s  
15 decision in the related WAMM case, and notwithstanding the mere filing of a notice of appeal.<sup>1</sup> The  
16 government had no intention of waiving its right to seek further relief from this Court, including a stay  
17 pending appeal, nor did the government waive its right to seek such relief in express or unambiguous  
18 terms.

19 Similarly, the proposed form of order merely includes boilerplate, precatory language that  
20 defendants are enjoined from taking action against the plaintiffs “during the pendency of this action, and  
21 until this Court makes a ruling on the merits.” It says nothing about whether the government might seek  
22 further relief from the Court, including by way of a request for a stay pending appeal, and evinces no  
23 intent on the part of the government to waive its right to request such relief.

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25 <sup>1</sup> The sentence preceding the language relied upon by the plaintiffs reveals that the parties’  
26 agreement was focused the interplay between the operation of the preliminary injunction and the stay of  
27 proceedings, not on whether the government could seek further relief from this Court. That sentence  
28 reads: “Plaintiffs and Official-Capacity Defendants agree that the selection of a trial date and pre-trial  
dates should be stayed pending the outcome of the Government’s Petition for Writ of Certiorari to the  
United States Supreme Court in Raich v. Ashcroft, the Ninth Circuit’s decision in the Related WAMM  
case and any subsequent appeals in those cases.”

1 Indeed, both the Further Case Management Statement and the proposed form of preliminary  
2 injunction order are entirely silent on the issue of whether the government may seek further relief from  
3 this Court, including a stay pending appeal. In view of the importance of this case and the issues it  
4 raises – whether an Act of Congress has been enjoined on constitutional grounds – this Court should  
5 require an express and unambiguous statement by the government that it is relinquishing its right to seek  
6 a stay pending appeal before finding that, in fact, those rights have been waived. This is particularly  
7 true given that the Further Case Management Statement was drafted by the plaintiffs, and the well-  
8 established maxim that a contract should be construed most against the drafter. See United States v.  
9 Seckinger, 397 U.S. 203, 210 (1970).

10 Plaintiffs’ suggestion that the government is foreclosed from seeking further relief from this  
11 Court, including a stay pending appeal, also flies in the face of the well-settled principle that a district  
12 court has the *inherent* authority to enter such relief. See, e.g., Landis v. North American Co., 299  
13 U.S. 248, 254-55 (1936); A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1098 (9th Cir. 2002)  
14 (“A district court has inherent authority to modify a preliminary injunction in consideration of new  
15 facts.”); Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663 (9th Cir. 1988) (Fed. R. Civ. P. 62(c)  
16 “codifies the inherent power of courts to make whatever order is deemed necessary to preserve the  
17 status quo and to ensure the effectiveness of the eventual judgment”) (quoting C. Wright & A. Miller,  
18 11 *Federal Practice & Procedure* § 2904, at 315 (1973)). That neither party in this litigation had the  
19 authority to waive this Court’s power to stay or modify the preliminary injunction, or to entertain such a  
20 request from either party, further counsels in favor of rejecting plaintiffs’ argument that the government  
21 waived its right to seek a stay pending appeal.

22 Accordingly, because the government did not expressly or unambiguously waive its right to  
23 seek a stay pending appeal, and because the parties had no power to waive this Court’s inherent  
24 authority to stay or modify the preliminary injunction in any event, this Court should reject the plaintiffs’  
25 contention that the government may not seek a stay pending appeal. In the alternative, given that the  
26 government did not expressly or unambiguously waive its right to seek a stay pending appeal, and had  
27 no intention of doing so, in entering the Further Case Management Statement and the form of  
28

1 preliminary injunction order, the government requests that this Court grant it leave to file a motion for  
2 stay pending appeal.

3 2. Plaintiffs next contend (Opp. at 2) that the ex parte motion for stay pending appeal is  
4 procedurally improper because Local Rule 7-10(a) only allows the filing of an ex parte motion where a  
5 specific statute, Federal Rule, or local rule or Standing Order” authorizes its filing. But we have always  
6 understood this requirement to be limited to circumstances in which a party files an ex parte motion  
7 “without notice to the opposing party,” not in circumstances, as here, in which the motion is timely  
8 served on the opposing party. Indeed, it bears emphasis that the plaintiffs have themselves filed a  
9 motion for ex parte relief in this case – to lift the stay and to file a motion for reconsideration – in  
10 circumstances in which only the latter form of relief was expressly provided for by this Court’s Local  
11 Rules. Plaintiffs should not be heard to protest a procedure which they themselves have utilized.<sup>2</sup>

12 Plaintiffs also argue (Opp. at 2-3) that the government’s motion for stay pending appeal is “an  
13 improper request for reconsideration of this Court’s April 21, 2004 Order on which the preliminary  
14 injunction is based.” That is plainly wrong, and reflects a basic misunderstanding of the nature of  
15 request for a stay pending appeal. In order to prevail upon such a request, in the Ninth Circuit, a party  
16 is entitled to a preliminary injunction when it “demonstrates either (1) a combination of probable  
17 success on the merits and the possibility of irreparable injury or (2) the existence of serious questions  
18 going to the merits and that the balance of hardships tips sharply in [its] favor.” GoTo.com, Inc. v. The  
19 Walt Disney Co., 202 F.3d 1199, 1204 (9th Cir. 2000). In attempting to make this showing, the  
20 moving party will, by necessity, be taking a position that is at odds with that of the Court in granting the  
21 underlying injunction, at the very least to show there are serious questions that go to the merits. But that  
22 does not mean that the moving party is making an improper motion for reconsideration. Indeed, if  
23 plaintiffs’ argument were to be adopted, *every* motion for a stay pending appeal would be deemed an  
24 improper motion for reconsideration, as *every* such motion would include an argument by the moving  
25  
26

27 <sup>2</sup> Even were this Court to agree with the plaintiffs that the ex parte motion for relief is  
28 procedurally improper, the remedy is to notice the government’s motion for hearing consistent with  
Local Rule 7-2(a), not to deny the motion outright.

1 party as to why it had shown probable success on the merits or, in the alternative, the existence of  
2 serious questions going to the merits. To state that proposition is to reject it.

3 3. On the merits, the government demonstrated in its opening brief that it had demonstrated  
4 probable success on the merits or, in the alternative, serious questions going to the merits. That  
5 conclusion is only underscored by the fact that, on this date, the United States Supreme Court granted  
6 the government's petition for a writ of certiorari in Raich. See generally Supreme Court Rule 10 ("A  
7 petition for a writ of certiorari will be granted only for compelling reasons.").

8 Plaintiffs argue (Opp. at 3-4) that, because this Court has already ruled in favor of granting their  
9 motion for a preliminary injunction, the government has failed to satisfy either standard governing the  
10 issuance of a stay pending appeal. Not only does this argument predate the Supreme Court's grant of  
11 certiorari in Raich, but it also ignores the fact that the government may establish its entitlement to a stay  
12 either by showing probable success on the merits and the existence of irreparable injury *or* by showing  
13 the existence of serious questions going to the merits and that the balance of hardships tips sharply in its  
14 favor. See GoTo.com, Inc., 202 F.3d at 1204. That this Court ruled in plaintiffs' favor in granting their  
15 motion for a preliminary injunction does not prevent this Court from nonetheless finding that the  
16 government has shown the existence of serious questions going to the merits. Plaintiffs cannot seriously  
17 contend that the government has not shown the existence, at a bare minimum, of serious questions going  
18 to the merits. And, as we have shown previously, allowing the preliminary injunction to remain in place  
19 will cause irreparable harm to the government's ability to enforce the Controlled Substances Act, see  
20 New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist,  
21 Circuit Justice) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by  
22 representatives of its people, it suffers a form of irreparable injury"), and is "an equity to be considered  
23 in favor of [the government] in balancing hardships." Walters v. National Ass'n of Radiation Survivors,  
24 468 U.S. 1323, 1324 (1984) (Rehnquist, Circuit Justice). An Act of Congress therefore should  
25 "remain in effect pending a final decision on the merits by this Court." Turner Broadcasting Sys. v.  
26 FCC, 113 S. Ct. 1806, 1807 (1993) (Rehnquist, Circuit Justice).

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1 **CONCLUSION**

2 For the foregoing reasons, and for the reasons set forth in our opening brief, this Court should  
3 stay the April 21 and June 21, 2004 Orders granting plaintiffs' motion for a preliminary injunction.

4 Respectfully submitted,

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17 Dated: June 28, 2004