

1 PETER D. KEISLER  
Assistant Attorney General  
2 KEVIN V. RYAN  
United States Attorney  
3 ARTHUR R. GOLDBERG  
MARK T. QUINLIVAN (D.C. BN 442782)  
4 Assistant U.S. Attorney  
John Joseph Moakley U.S. Courthouse  
5 1 Courthouse Way, Suite 9200  
Boston, MA 02210  
6 Telephone: (617) 748-3606

7 Attorneys for Official-Capacity Defendants

8  
9 **UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN JOSE DIVISION**

11 COUNTY OF SANTA CRUZ, et al., )  
12 Plaintiffs, )  
13 v. )  
14 ALBERTO GONZALES, Attorney General )  
of the United States; KAREN P. TANDY, )  
15 Administrator of the Drug Enforcement )  
Administration; JOHN P. WALTERS, )  
16 Director of the Office of National Drug )  
Control Policy; and 30 UNKNOWN )  
17 DRUG ENFORCEMENT )  
ADMINISTRATION AGENTS, )  
18 Defendants. )  
19 \_\_\_\_\_ )

Nos. C 03-1802 JF **CONSOLIDATED**  
MC 02-7012 JF

**REPLY IN SUPPORT OF**  
**OFFICIAL-CAPACITY DEFENDANTS'**  
**MOTION TO DISMISS**

Date: May 12, 2006  
Time: 9:00 a.m.  
Courtroom 3, 5<sup>th</sup> Floor  
The Hon. Jeremy Fogel

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT ..... 1

ARGUMENT ..... 1

    A.    There Is No Fundamental Right to Obtain or Use Marijuana or  
          Other Unapproved and Unproven Medical Treatments ..... 1

    B.    The CSA Does Not Run Afoul of the Tenth Amendment ..... 7

    C.    Plaintiffs Do Not Have Immunity under the CSA ..... 9

    D.    Oakland Cannabis Forecloses Any Defense of Medical Necessity ..... 10

CONCLUSION ..... 12

**TABLE OF AUTHORITIES**

**CASES**

1

2

3

4 Andrews v. Ballard,  
498 F. Supp. 1038 (S.D. Tex. 1980) ..... 4

5 Carnohan v. United States,  
616 F.2d 1120 (9th Cir. 1980) ..... 1, 2, 3, 4

6 County of Santa Cruz v. Ashcroft,  
7 279 F. Supp.2d 1192 (N.D. Cal. 2003),  
8 reconsidered on other grounds, 314 F. Supp.2d 1000 (N.D. Cal. 2004) ..... 1, 3, 9

9 Cruzan v. Director, Mo. Dept. of Health,  
497 U.S. 261 (1990) ..... 2

10 Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,  
11 126 S. Ct. 1211 (2006)) ..... 4, 5

12 Gonzales v. Raich,  
125 S. Ct. 2195 (2005) ..... *passim*

13 Gregory v. Ashcroft,  
501 U.S. 452 (1991) ..... 8

14 Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.,  
15 452 U.S. 264 (1981) ..... 8

16 Kuromiya v. United States,  
37 F. Supp.2d 717 (E.D. Pa. 1999) ..... 3

17 Lawrence v. Texas,  
18 539 U.S. 558 (2003) ..... 6, 7

19 Lofton v. Secretary of the Dept. of Children and Family Servs.,  
20 358 F.3d 804 (11th Cir. 2004), cert. denied, 543 U.S. 1081 (2005) ..... 7 n.1

21 McConnell v. FEC,  
540 U.S. 93 (2003) ..... 8, 9

22 Muth v. Frank,  
412 F.2d 808, 812 (7th Cir.), cert. denied, 126 S. Ct. 575 (2005) ..... 7 n.1

23 National Ass’n for the Advancement of Psychoanalysis v. California Bd. of Psychology,  
24 228 F.3d 1043 (9th Cir. 2000) ..... 2-3

25 New York v. United States,  
505 U.S. 144 (1992) ..... 8, 9

26 Pearson v. McCaffrey,  
27 139 F. Supp.2d 113 (D.D.C. 2001) ..... 3

28

1 People v. Bianco,  
 2 93 Cal.App.4th 748, 113 Cal.Rptr.2d 392  
 (Cal. Ct. App. 2001), review denied (Jan. 16, 2002) ..... 3

3 People v. Privitera,  
 4 23 Cal.3d 697, 591 P.2d 919,  
 153 Cal.Rptr. 431 (1979) ..... 3

5 People v. Urziceanu,  
 6 132 Cal.App.4th 747, 33 Cal. Rptr.3d 859  
 (Cal. Ct. App. 2005) ..... 7

7 Planned Parenthood of Southeastern Pa. v. Casey,  
 8 505 U.S. 833 (1992) ..... 6

9 Raich v. Ashcroft,  
 248 F. Supp.2d 918 (N.D. Cal. 2003), rev'd, 352 F.3d 1222 (9th Cir. 2003),  
 10 vacated and remanded, 125 S. Ct. 2195 (2005) ..... 11-12

11 Rutherford v. United States,  
 616 F.2d 455 (10th Cir. 1980) ..... 3, 4

12 Seeley v. State of Washington,  
 13 132 Wash. 2d 776, 794, 940 P.2d 604 (1997) ..... 3

14 Smith v. Shalala,  
 954 F. Supp. 1 (D.D.C. 1996) ..... 8

15 United States v. Cannabis Cultivator’s Club, et al.,  
 16 No. C-98-00085 CRB, etc. (N.D.Cal. Sept. 3, 1998) ..... 3, 4

17 United States v. Dellas,  
 No. CR-03-0226 MHP (N.D. Cal. April 6, 2006) ..... 5

18 United States v. Fogarty,  
 19 692 F.2d 542 (8th Cir. 1982) ..... 5, 6

20 United States v. Greene,  
 892 F.2d 453 (8th Cir. 1989) ..... 5

21 United States v. Jones,  
 22 231 F.3d 508 (9th Cir. 2000) ..... 14

23 United States v. Kiffer,  
 477 F.2d 349 (2d Cir. 1972) ..... 5, 6

24 United States v. Miroyan,  
 25 577 F.2d 489 (9th Cir. 1978) ..... 5

26 United States v. Oakland Cannabis Buyers’ Cooperative,  
 532 U.S. 483 (2001) ..... 9

27 United States v. Rogers,  
 28 549 F.2d 107 (9th Cir. 1976) ..... 5

1 United States v. Rosenthal,  
266 F. Supp.2d 1068 (N.D. Cal. 2003) ..... 10

2 United States v. Rutherford,  
3 442 U.S. 544 (1979) ..... 6

4 Washington v. Glucksberg,  
5 521 U.S. 702 (1997) ..... 2

6 Wiser v. State of Montana,  
331 Mont. 28, 129 P.2d 133 (2006) ..... 4

7  
8 **CONSTITUTIONAL PROVISIONS**

9 U.S. Const. art. I, § 8, cl.3 (Commerce Clause) ..... 8

10 U.S. Const. amend. V (Due Process Clause) ..... *passim*

11 U.S. Const. amend. IX ..... 3

12 U.S. Const. amend. X ..... 7, 8, 9

13 **FEDERAL STATUTES**

14 Controlled Substances Act, 21 U.S.C. § 801 et seq. ..... *passim*

15 21 U.S.C. §841(a)(1) ..... 10

16 21 U.S.C. §844(a) ..... 10

17 21 U.S.C. §885(d) ..... 9

18 21 U.S.C. §903 ..... 10

19 Religious Freedom Restoration Act of 2003, 42 U.S.C. § 2000bb-1(b) ..... 4

20  
21  
22  
23  
24  
25  
26  
27  
28

1 **PRELIMINARY STATEMENT**

2 Defendants Alberto Gonzales, Attorney General of the United States; Karen P. Tandy,  
3 Administrator of the Drug Enforcement Administration; and John P. Walters, Director of the  
4 Office of National Drug Control Policy, hereby file this reply in support of their motion to  
5 dismiss, and in response to Plaintiffs' Opposition to Official-Capacity Defendants' Motion to  
6 Dismiss ("Plaintiffs' Memorandum" or "Pl. Mem."). As we now show, none of the arguments  
7 advanced in Plaintiff's Opposition has merit.

8 **ARGUMENT**

9 **A. There Is No Fundamental Right to Obtain or Use Marijuana or**  
10 **Other Unapproved and Unproven Medical Treatments**

11 Plaintiffs assert (Pl. Mem. at 1) that "[m]uch has changed since Plaintiffs filed this lawsuit  
12 almost three years ago" and that "the allegations of Plaintiffs' First Amended Complaint reflect these  
13 changes, and Plaintiffs' constitutional and other claims are largely based upon these new  
14 allegations." With respect to plaintiffs' First and Second Causes of Action, in which they allege that  
15 defendants' policy and practice of seizing marijuana violates their fundamental rights, that is simply  
16 not so. The rights that plaintiffs assert to be fundamental in their First Amended Complaint are  
17 identical to those that were pled in their initial Complaint and in motion for a preliminary injunction.  
18 Compare Pl. Mem. at 3 (alleging "the fundamental right to preserve life, control the circumstances  
19 of one's own death, ameliorate pain, maintain bodily integrity, consult with physicians regarding  
20 treatment and act on the physicians' recommendations, and to make certain intimate decisions");  
21 Memorandum of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction  
22 at 9-15 (alleging "the fundamental rights to maintain bodily integrity, ameliorate pain, preserve life,  
23 and control the circumstances of their own death," and "the fundamental right to follow the  
24 recommendation of their physicians"). This Court rightly determined that those claims were  
25 foreclosed by binding Ninth Circuit authority, see County of Santa Cruz v. Ashcroft, 279 F. Supp.2d  
26 1192, 1201-05 (N.D. Cal. 2003) (citing Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980)),  
27 reconsidered on other grounds, 314 F. Supp.2d 1000 (N.D. Cal. 2004), and nothing has changed that  
28 would alter the correctness of this ruling.

1 First, plaintiffs' description of the "rights" at issue is misplaced. Indeed, they are virtually  
2 identical to those which the Supreme Court rejected in Washington v. Glucksberg, 521 U.S. 702,  
3 721-22 (1997), as being incompatible with the requirement that there be a "careful description" of  
4 the asserted fundamental liberty interest in substantive due process cases, and that the asserted  
5 interest must be viewed with reference to historical tradition. For example, the Court noted that,  
6 although its decision in and Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990), is often  
7 described as a "right to die" case, "we were, in fact, more precise: We assumed that the Constitution  
8 granted competent persons a 'constitutionally protected right to refuse lifesaving hydration and  
9 nutrition.'" 521 U.S. at 722-23 (citing Cruzan, 497 U.S., at 279, 287). The Glucksberg Court  
10 therefore rejected the various descriptions of the interest at stake offered by the respondents in that  
11 case -- including the claimed right to "determin[e] the time and manner of one's death," "right to  
12 die," "liberty to choose how to die," right to "control of one's final days," "the right to choose a  
13 humane, dignified death," and "the liberty to shape death," and instead held that, because the  
14 Washington statute at issue prohibited aiding another person to attempt suicide, "the question  
15 before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to  
16 commit suicide which itself includes a right to assistance in doing so." Id. at 723.

17 Hence, as we demonstrated in our opening memorandum, and following the methodology  
18 outlined by the Supreme Court in Glucksberg, because the CSA prohibits the distribution,  
19 manufacture, and possession of marijuana and other Schedule I controlled substances for any  
20 purpose (unless otherwise authorized by the CSA), the question must be whether the liberty  
21 protected by the Due Process Clause includes a right for the individual plaintiffs to use a particular  
22 unapproved and unproven drug, marijuana, for asserted medicinal purposes, which itself includes  
23 the right to obtain the drug from third parties who cultivate the drug for them, in this case the  
24 WAMM plaintiffs. This is precisely the asserted liberty interest which the Ninth Circuit rejected in  
25 Carnohan, see 616 F.2d at 1122 ("Constitutional rights of privacy and personal liberty do not give  
26 individuals the right to obtain laetrile free of the lawful exercise of the government's police power."),  
27 and which has been rejected by every other court to have considered this question. See, e.g.,  
28 National Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology, 228 F.3d

1 1043, 1050 (9th Cir. 2000) (“We further conclude that substantive due process rights do not extend  
2 to the choice of type of treatment or of a particular health care provider.”); Seeley v. State of  
3 Washington, 132 Wash. 2d 776, 782, 794, 940 P.2d 604, 607, 612 (1997) (holding that plaintiff  
4 suffering from terminal bone cancer had no “fundamental right to have marijuana prescribed as his  
5 preferred treatment” notwithstanding his claim that “smoking marijuana has been more effective in  
6 relieving his symptoms than other antiemetics.”); People v. Privitera, 23 Cal.3d 697, 591 P.2d 919,  
7 153 Cal.Rptr. 431 (1979) (same); Rutherford v. United States, 616 F.2d 455, 457 (1980) (holding  
8 that “the decision by the patient whether to have a treatment or not is a protected right, but his  
9 selection of a particular treatment, or at least a medication, is within the area of governmental interest  
10 in protecting public health.”); People v. Bianco, 93 Cal.App.4th 748, 754, 113 Cal.Rptr.2d 392, 397-  
11 98 (Cal. Ct. App. 2001) (“There is no fundamental state or federal constitutional right to use drugs  
12 of unproven efficacy.”), review denied (Jan. 16, 2002); Pearson v. McCaffrey, 139 F. Supp.2d 113,  
13 123 (D.D.C. 2001) (“[N]o court has recognized a fundamental right to sell, distribute, or use  
14 marijuana. Prescription, recommendation (in states that recognize recommendation as a  
15 quasi-prescription), and use of marijuana is illegal under the CSA. The Court declines to find that  
16 the federal policy, in upholding federal law, violates the Ninth Amendment.”); Kuromiya v. United  
17 States, 37 F. Supp.2d 717, 726 (E.D. Pa. 1999) (citing, e.g., Carnohan and holding that, “there is no  
18 fundamental right of privacy to select one's medical treatment without regard to criminal laws, and  
19 courts have consequently applied only rational review to regulations affecting these matters.”).

20 Second, plaintiffs’ attempt (Pl. Mem. at 13-14) to argue that the Ninth Circuit’s decision in  
21 Carnohan and the Tenth Circuit’s decision in Rutherford are not controlling is unavailing. The  
22 principle enunciated in Carnohan -- that there is no fundamental constitutional right to obtain  
23 unapproved and unproven medications free of the lawful exercise of the government’s police power  
24 -- does not change medication by medication, and courts applying Carnohan have found it applicable  
25 not only in cases alleging a fundamental right to use marijuana, see, e.g., County of Santa Cruz, 279  
26 F. Supp.2d at 1204; Seeley, 132 Wash.2d at 793, 940 P.2d at 612, but also in cases alleging a  
27 fundamental right to use other treatments. In Smith v. Shalala, 954 F. Supp.2d 1 (D.D.C. 1996), for  
28 example, the United States District Court for the District of Columbia denied a motion for a

1 preliminary injunction brought by a plaintiff who suffered from an advanced stage of Hodgkin's  
2 lymphoma, and who sought to allow his continued treatment with an experimental anticancer agent  
3 (antineoplastons) that had not been approved for general use by the FDA. Relying in large part on  
4 Carnohan and Rutherford, Judge Robertson reasoned:

5 While there are decisions recognizing that competent adults have a fundamental right  
6 to refuse medical treatment, and to determine the time and manner of their death, free  
7 from governmental interference, nothing in those decisions suggests that the  
8 government has an affirmative obligation to set aside its regulations in order to  
9 provide dying patients access to experimental medical treatments. On the contrary,  
where courts have been presented with claims like Smith's they have refused to find  
a "right" to receive unapproved drugs. The constitutional rights to privacy and  
personal liberty "do not give individuals the right to obtain [unapproved drugs] free  
of the lawful exercise of government police power."

10 954 F. Supp. at 3 (internal citations omitted) (quoting Carnohan, 616 F.2d at 1122).

11 More recently, in Wiser v. State of Montana, 331 Mont. 28, 129 P.2d 133 (2006), the  
12 Montana Supreme Court unanimously held that a rule of the Montana Board of Dentistry that  
13 required that denturists refer all partial denture patients to dentists before providing partial denture  
14 services did not impermissibly infringe upon the state constitutional privacy right of denture patients.  
15 Of particular relevance here, the Montana Supreme Court rejected the analysis in Andrews v.  
16 Ballard, 498 F. Supp.1038 (S.D. Tex. 1980), to the extent that Andrews was advanced for the  
17 proposition that "patients have a fundamental right to obtain medical care from professionals who  
18 have not been determined by the regulating authority to be qualified to provide the desired service."  
19 Wiser, 331 Mont. at 33, 129 P.2d at 137. The Montana Supreme Court stated that, "[w]e are not the  
20 only court to reject Andrews on this point," and specifically cited, *inter alia*, the Ninth Circuit's  
21 decision in Carnohan as standing for the proposition that there is "no right to use medical drugs free  
22 of government police power." Wiser, 331 Mont. at 33 n.1; 129 P.2d at 137 n.1. Plaintiffs'  
23 contention that Carnohan has no application to this case, consequently, lacks merit.

24 Third, the Supreme Court's recent decision in Gonzales v. O Centro Espirita Beneficente  
25 Uniao do Vegetal, 126 S. Ct. 1211 (2006), does not alter this analysis. That decision was based on  
26 the Religious Freedom Restoration Act of 2003, 42 U.S.C. § 2000bb-1(b), *see* 126 S. Ct. at 1216  
27 ("We conclude that the Government has not carried the burden expressly placed on it by Congress  
28

1 in the Religious Freedom Restoration Act, and affirm the grant of the preliminary injunction.”), and  
2 did not establish a fundamental right to use marijuana (or any other drug) for medicinal purposes.

3 Nor are plaintiffs correct in asserting (Pl. Mem. at 15) that the Government “must satisfy its  
4 heavy burden to show that infringement of a fundamental right both furthers a compelling interest  
5 and is the least restrictive means of furthering that interest.” As Judge Patel has recently ruled in  
6 denying a motion to dismiss charges of manufacture and possession of marijuana based on what the  
7 defendant alleged were violations of his rights to due process and equal protection under the Fifth  
8 Amendment, inasmuch as “no fundamental right is implicated nor is a suspect class targeted,” the  
9 correct test to be applied to the defendant’s Fifth Amendment claims is the rational basis test, which  
10 the Controlled Substances Act easily satisfies. See United States v. Dellas, No. CR–03-0226 MHP,  
11 slip op. at 1-3 (N.D. Cal. April 6, 2006) (attached). In particular, Judge Patel declined the  
12 defendant’s invitation “to look at the validity of the classification of marijuana in view of new  
13 scientific and medical information,” determining that this claim was foreclosed by Gonzales v.  
14 Raich, 125 S. Ct. 2195 (2005), in which the Supreme Court found that Congress’ findings in the Act  
15 were adequate and that, although the Act provided for periodic updating of the schedules and despite  
16 efforts to reschedule marijuana, it remains a Schedule I drug. See Dellas, No. CR–03-0226 MHP,  
17 slip op. at 2. Judge Patel further noted both the Ninth Circuit and other circuits have repeatedly  
18 upheld the constitutionality of the federal marijuana laws. Id. slip op. at 2 (citing United States v.  
19 Miroyan, 577 F.2d 489 (9th Cir. 1978); United States v. Rogers, 549 F.2d 107 (9th Cir. 1976);  
20 United States v. Kiffer, 477 F.2d 349 (2d Cir. 1972); United States v. Fogarty, 692 F.2d 542 (8th Cir.  
21 1982); and United States v. Greene, 892 F.2d 453 (8th Cir. 1989)).

22 Indeed, the availability of this statutory and regulatory process for reclassifying marijuana,  
23 should scientific or medical evidence warrant such a change, with review in the court of appeals,  
24 sufficiently guards against unlawful or irrational governmental action. As the Second Circuit held  
25 in Kiffer:

26 The provisions of the Act allowing periodic review of the control and classification  
27 of allegedly dangerous substances create a sensible mechanism for dealing with a  
28 field in which factual claims are conflicting and the state of scientific knowledge is  
still growing. \* \* \* [T]he very existence of the statutory scheme indicates that, in  
dealing with this aspect of the “drug” problem, Congress intended flexibility and

1           receptivity to the latest scientific information to be the hallmarks of its approach.  
2           This, while not necessary to the decision here, is the very antithesis of the  
3           irrationality appellants attribute to Congress.

4           477 F.2d at 357 (emphasis supplied); accord. Fogarty, 692 F.2d at 548 (holding that, in establishing  
5           the reclassification scheme, “Congress provided an efficient and flexible means of assuring the  
6           continued rationality of the classification of controlled substances, such as marijuana”).

7           Finally, we note that, although plaintiffs suggest that this case is limited to the context of  
8           “medical” marijuana, a decision in their favor could not be so easily cabined. In United States v.  
9           Rutherford, 442 U.S. 544 (1979), the Supreme Court rejected the contention that the Food, Drug and  
10          Cosmetic Act had no application to a plaintiff class consisting of terminally ill cancer patients. Of  
11          particular relevance here, Justice Marshall’s opinion for a unanimous Court cautioned that:

12                   It bears emphasis that although the Court of Appeals’ ruling was limited to Laetrile,  
13                   its reasoning cannot be so readily contained. To accept the proposition that the safety  
14                   and efficacy standards of the Act have no relevance for terminal patients is to deny  
15                   the Commissioner’s authority over all drugs, however, toxic or ineffectual, for such  
16                   individuals. If history is any guide, this new market would not long be overlooked.

17          Id. at 557-58. Justice Marshall’s admonition applies with equal force in this case. If plaintiffs’  
18          arguments were to be accepted, and the federal courts were to supplant the role of the FDA and  
19          determine for themselves whether marijuana has medicinal value, there is no limiting principle that  
20          would prevent individuals seeking to use other Schedule I controlled substances or unapproved drugs  
21          -- such as heroin or laetrile -- from likewise claiming a fundamental right to use the treatment of their  
22          choice, thereby bypassing the carefully crafted FDA drug approval process fashioned by Congress  
23          to protect the public health and safety, a result patently at odds with the public interest as expressed  
24          by Congress and recognized by the Supreme Court in Rutherford.

25          Finally, plaintiffs do not gain any traction by placing reliance (Pl. Mem. at 4) on the Supreme  
26          Court’s decision in Lawrence v. Texas, 539 U.S. 558 (2003). In that case, the Court noted that, in  
27          Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), the Court had “reaffirmed  
28          the substantive force of the liberty protected by the Due Process Clause” by “confirm[ing] that our  
29          laws and tradition afford constitutional protection to personal decisions relating to marriage,  
30          procreation, contraception, family relationships, child rearing, and education.” 539 U.S. at 573-74  
31          (citing Casey, 505 U.S. at 851). None of the liberty interests identified in Lawrence or Casey are

1 akin to the rights which plaintiffs seek to declare as fundamental in this case. Nor has the Court  
 2 every declared as fundamental conduct which remains unlawful in a substantial majority of the  
 3 States. Compare Lawrence, 539 U.S. at 573 (noting that only 13 States prohibit the conduct at issue  
 4 in that case, of which only four enforced their laws only against homosexual conduct, all of which  
 5 had a pattern of non-enforcement).<sup>1</sup> And, as we have noted previously, this Court should be  
 6 particularly reluctant to do so in this case, given the California courts have themselves stated that  
 7 “the Compassionate Use Act created a limited defense to crimes, not a constitutional right to obtain  
 8 marijuana.” People v. Urziceanu, 132 Cal.App.4th 747, 774, 33 Cal. Rptr.3d 859, 874 (Cal. Ct. App.  
 9 2005) (emphasis added).

10 Plaintiffs’ First and Second Causes of Action, therefore, should be dismissed.

11 **B. The CSA Does Not Run Afoul of the Tenth Amendment**

12 Plaintiffs contend (Pl. Mem. at 15-16) that, in their First Amended Complaint, they have pled  
 13 their Tenth Amendment claims “significantly differently from those previously presented.”  
 14 Specifically, plaintiffs assert that their “new Tenth Amendment allegations plead that Defendants  
 15 have responded [to the passage of the Compassionate Use Act] with a deliberate policy intended to  
 16 incapacitate the mechanisms the State has implemented for separating what is legal from what is  
 17 illegal under State law,” and contend that “[t]his is a backdoor attempt to commandeer the State  
 18  
 19

---

20 <sup>1</sup> Indeed, it bears emphasis that the Supreme Court did not characterize the right at issue in  
 21 Lawrence as being “fundamental,” nor did the Court apply strict scrutiny, the proper standard when  
 22 fundamental rights are implicated. To the contrary, the Court invalidated the Texas statute because  
 23 it “furthers no legitimate state interest which can justify its intrusion into the personal and private  
 24 life of the individual,” 539 U.S. at 578, which is the hallmark of rational basis review. See, e.g.,  
 25 Muth v. Frank, 412 F.2d 808, 812 (7th Cir.) (“Strict scrutiny is the standard applicable to challenges  
 26 where a fundamental liberty interest is at issue. The Court’s refusal to apply that standard confirms  
 27 that the Court was not creating a new fundamental right.”), cert. denied, 126 S. Ct. 575 (2005);  
 28 Lofton v. Secretary of the Dept. of Children and Family Servs., 358 F.3d 804, 816 (11th Cir. 2004)  
 (“Most significant, however, is the fact that the Lawrence Court never applied strict scrutiny, the  
 proper standard when fundamental rights are implicated, but instead invalidated the Texas statute  
 on rational-basis grounds, holding that it ‘furthers no legitimate state interest which can justify its  
 intrusion into the personal and private life of the individual.’”) (quoting Lawrence, 539 U.S. at 578),  
cert. denied, 543 U.S. 1081 (2005).

1 legislative process and to force California to abandon the laws its people have chosen.” This  
2 argument reflects a fundamental misunderstanding of our Constitutional system.

3 We begin with first principles. “If a power is delegated to Congress in the Constitution, the  
4 Tenth Amendment expressly disclaims any reservation of that power to the States \* \* \*.” New York  
5 v. United States, 505 U.S. 144, 156 (1992). This is so, the Supreme Court has explained, because,  
6 “[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose  
7 its will on the States [and] Congress may legislate in areas traditionally regulated by the States.”  
8 Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). This principle applies even in areas in which of  
9 paramount state concern. As the Court explained in Hodel v. Virginia Surface Mining &  
10 Reclamation Ass’n, Inc., 452 U.S. 264 (1981), “[t]his conclusion applies regardless of whether the  
11 federal legislation displaces laws enacted under the States’ “police powers.” The Court long ago  
12 rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment  
13 simply because it exercises its authority under the Commerce Clause in a manner that displaces the  
14 States’ exercise of their police powers.” Id. at 291 (emphasis added).

15 This principle was most recently reaffirmed in McConnell v. FEC, 540 U.S. 93 (2003), in  
16 which the Court upheld the constitutionality of the Bipartisan Campaign Reform Act of 2002  
17 (“BCRA”). The McConnell Court noted that, “[i]n examining congressional enactments for  
18 infirmity under the Tenth Amendment, this Court has focused its attention on laws that commandeer  
19 the States and state officials in carrying out the federal regulatory schemes,” and held that Title I of  
20 BCRA did not run afoul of this standard inasmuch as the statute “imposes no requirements  
21 whatsoever upon States or state officials, and, because it does not expressly pre-empt state  
22 legislation, it leaves the States free to enforce their own restrictions on the financing of state electoral  
23 campaigns.” Id. at 186. The Court acknowledged that the statute prohibited some fundraising  
24 activities that would otherwise be lawful under state law and therefore might have an indirect effect  
25 on the financing of state electoral campaigns, but held that “these indirect effects do not render  
26 BCRA unconstitutional.” Id.

27 Plaintiffs’ Tenth Amendment argument cannot be squared with these principles. Plaintiffs  
28 do not allege that the federal government has commandeered the State of California or state officials

1 in any ordinary meaning of that word. Rather, plaintiffs argue (Pl. Mem. at 21) that, “[u]nder the  
2 commandeering doctrine articulated in New York and Printz, the federal government cannot directly  
3 compel California to recriminalize medical marijuana,” and then assert that “[d]efendants cannot  
4 attain that same goal through its punitive actions against California citizens and government  
5 officials.” That is manifestly incorrect. The enforcement of federal law by federal authorities in no  
6 way “compels” California to recriminalize marijuana, nor does it compel state officials to enforce  
7 federal law. See United States v. Jones, 231 F.3d 508, 515 (9th Cir. 2000) (federal statute regulating  
8 possession of firearms did not violate Tenth Amendment because it is “a federal criminal statute to  
9 be implemented by federal authorities; it does not attempt to force the states or state officers to enact  
10 or enforce any federal regulation.”). To be sure, the Controlled Substances Act makes unlawful  
11 conduct that has been decriminalized in California. But that conflict does not implicate the Tenth  
12 Amendment. As the Supreme Court explained in McConnell, “[i]t is not uncommon for federal law  
13 to prohibit private conduct that is legal in some States. Indeed, such conflict is inevitable in areas  
14 of law that involve both state and federal concerns. It is not in and of itself a marker of constitutional  
15 infirmity.” 540 U.S. at 186-87 (citing Oakland Cannabis, 532 U.S. 483). This holding in  
16 McConnell, and the Supreme Court’s express citation to its decision in Oakland Cannabis, forecloses  
17 the plaintiffs’ Tenth Amendment argument in this case.

18 Plaintiffs Third Cause of Action, therefore, should be dismissed.

19 **C. Plaintiffs Do Not Have Immunity under the CSA**

20 Plaintiffs contend (Pl. Mem. at 23-34) that, under 21 U.S.C. § 885(d), they are entitled to  
21 immunity, asserting that “Congress clearly intended that immunity from civil or criminal liability  
22 under the CSA would apply to any state or local officer engaged in the enforcement of any law or  
23 municipal ordinance relating to controlled substances.” Not so. As this Court rightly concluded in  
24 dismissing this very same claim, “any other result ‘would mean that a state or municipality could  
25 exempt itself from the Controlled Substances Act.’” County of Santa Cruz, 279 F. Supp.2d at 1210-  
26 11 (quoting from and deeming “persuasive” analysis in United States v. Cannabis Cultivator’s Club,  
27 et al., No. C-98-00085 CRB, etc., slip op. at 2-5 (N.D.Cal. Sept. 3, 1998)).

1 Indeed, as Judge Breyer has analyzed in rejecting this very same claim, any such  
2 interpretation of § 885(d) “directly contradicts the purpose of the Controlled Substances Act.”  
3 United States v. Rosenthal, 266 F. Supp.2d 1068, 1078 (N.D. Cal. 2003). As the Supreme Court  
4 recognized in Raich, in passing the Controlled Substances Act, “Congress devised a closed  
5 regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled  
6 substance except in a manner authorized by the CSA.” 125 S. Ct. at 2203 (emphasis added) (citing  
7 21 U.S.C. §§ 841(a)(1), 844(a)). Thus, “[b]y classifying marijuana as a Schedule I drug, as opposed  
8 to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became  
9 a criminal offense, with the sole exception being use of the drug as part of a Food and Drug  
10 Administration pre-approved research study.” Id. at 2204 (emphasis added); accord Oakland  
11 Cannabis, 532 U.S. at 491 (“In the case of the Controlled Substances Act, the statute reflects a  
12 determination that marijuana has no medical benefits worthy of an exception (outside the confines  
13 of a Government-approved research project).”). Given these unambiguous statutory commands,  
14 “[t]o hold that Section 885(d) applies to the cultivation of marijuana for a medical cannabis club  
15 would conflict with the stated purpose of the Controlled Substances Act.” Rosenthal, 266 F.  
16 Supp.2d at 1079. That is so, Judge Breyer reasoned, because: “[L]awfully engaged’ in ‘enforcing  
17 a law related to controlled substances’ must mean engaged in enforcing, that is, compelling  
18 compliance with, a law related to controlled substances which is consistent \* \* \* or at least not  
19 inconsistent \* \* \* with the Controlled Substances Act. Section 885(d) cannot reasonably be read to  
20 cover acting pursuant to a law which itself is in conflict with the Act.” Id.; see 21 U.S.C. § 903  
21 (stating that Controlled Substances Act is not intended to occupy the field “unless there is a positive  
22 conflict between that provision of this subchapter and that State law so that the two cannot  
23 consistently stand together.”).

24 Plaintiffs’ Fourth Cause of Action, therefore, should be dismissed.

25 **D. Oakland Cannabis Forecloses a Defense of Medical Necessity**

26 Plaintiffs lastly contend (Pl. Mem. at 24-25) that “the Supreme Court’s decision in [Oakland  
27 Cannabis] does not foreclose the necessity defense here.” Placing reliance on the concurrence in  
28 Oakland Cannabis, in which Justice Stevens noted that the cooperative at issue in that case did not

1 qualify for the necessity defense because it had not itself been confronted with an unavoidable choice  
2 of evils, plaintiffs assert that “[t]his case, in contrast, presents the ‘difficult issue’ of whether the  
3 defense is available to Patient-Plaintiffs who personally face this ‘choice of evils.’” Plaintiffs  
4 therefore argue that, “[t]aking the facts alleged in the amended complaint as true, Patient-Plaintiffs  
5 satisfy the traditional requirement of the necessity doctrine.”

6 This contention, too, is misplaced. As we showed in our opening memorandum, the Supreme  
7 Court’s decision in Oakland Cannabis leaves no room for plaintiffs’ contention that they are entitled  
8 to injunctive relief to protect a “medical necessity” defense to the CSA’s prohibitions on the  
9 manufacture or possession of marijuana. In that case, the Court squarely held that, “a medical  
10 necessity exception for marijuana is at odds with the terms of the Controlled Substances Act.” 532  
11 U.S. at 491. Noting that the Controlled Substances Act “reflects a determination that marijuana has  
12 no medical benefits worthy of an exception (outside the confines of a Government-approved research  
13 project),” the Court concluded that, “[b]ecause the statutory prohibitions cover even those who have  
14 what could be termed a medical necessity, the Act precludes consideration of this evidence.” Id. at  
15 499 (emphasis supplied). Furthermore, the Court expressly rejected any distinction between a  
16 claimed medical necessity to manufacture and distribute marijuana and a claimed medical necessity  
17 to possess marijuana, declaring that:

18 Lest there be any confusion, we clarify that nothing in our analysis, or the statute,  
19 suggests that a distinction should be drawn between the prohibitions on  
20 manufacturing and distributing and the other prohibitions in the Controlled  
21 Substances Act. Furthermore, the very point of our holding is that there is no  
22 medical necessity exception to the prohibitions at issue, even when the patient is  
“seriously ill” and lacks alternative avenues for relief. Indeed, it is the Cooperative’s  
argument that its patients are “seriously ill,” and lacking “alternatives.” We reject  
the argument that these factors warrant a medical necessity exception. If we did not,  
we would be affirming instead of reversing the Court of Appeals.

23 Id. at 494 n.7 (emphasis added). Plaintiffs make no effort in their Memorandum to grapple with this  
24 controlling language.

25 Moreover, the very argument that plaintiffs now advance has been rejected by Judge Jenkins  
26 in Raich. Like plaintiffs here, the plaintiffs in Raich contended that the medical necessity defense  
27 “has been preserved for those people who are not distributors of marijuana,” relying on Justice  
28 Stevens’ concurring opinion in Oakland Cannabis, See Raich v. Ashcroft, 248 F. Supp.2d 918, 928-

1 29 (N.D. Cal. 2003), rev'd and remanded on other grounds, 352 F.3d 1222 (9th Cir. 2003), vacated  
2 and remanded, 125 S. Ct. 2195 (2005). Judge Jenkins rejected this contention, concluding that “the  
3 language of the majority opinion in OCBC, delivered by Justice Thomas, is dispositive on this  
4 question, and that, “[a]s there is no distinction between manufacturing and distribution, for which  
5 there is no medical necessity defense, it follows that there is no medical necessity defense for other  
6 prohibitions in the CSA, such as possession of marijuana.” Id. at 929 (citing Oakland Cannabis, 532  
7 U.S. at 494 n.7).

8 Plaintiffs’ Sixth Cause of Action, therefore, should be dismissed.

9 **CONCLUSION**

10 For the foregoing reasons, and for the reasons set forth in our opening memorandum,  
11 plaintiffs’ First, Second, Third, Fourth, and Sixth Causes of Action should be dismissed.

12 Respectfully submitted,

13 PETER D. KEISLER  
14 Assistant Attorney General

15 KEVIN V. RYAN  
16 United States Attorney

17 ARTHUR R. GOLDBERG  
18 Assistant Branch Director

19 /s/ Mark T. Quinlivan  
20 MARK T. QUINLIVAN  
21 Assistant U.S. Attorney  
22 John Joseph Moakley U.S. Courthouse  
23 1 Courthouse Way, Suite 9200  
24 Boston, MA 02210  
25 Tel: 617-748-3606  
26 Fax: 617-748-3969  
27 e-mail: mark.quinlivan@usdoj.gov  
28

23 Dated: April 12, 2006