

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

5 Attorneys for WAMM Plaintiffs

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

11 Attorney for County of Santa Cruz  
and WAMM Plaintiffs

12 Additional Counsel Listed on Signature Page

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

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

21 Plaintiffs,

22 v.

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

27 Defendants.

Case No.: 03-CV-1802 JF

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
RECONSIDERATION OF  
AUGUST 28, 2003 ORDER**

Date: March 31, 2004  
Time: 9:00 a.m.  
Place: Courtroom 3  
Judge: Hon. Jeremy Fogel

1 **I. INTRODUCTION**

2 Since September 5, 2002, Plaintiffs Valerie Corral, Eladio V. Acosta, James  
 3 Daniel Baehr, Michael Cheslosky, Jennifer Lee Hentz, Dorothy Gibbs, Harold F. Margolin  
 4 (collectively, “Patient-Plaintiffs”) and other terminally and chronically ill members of Plaintiff  
 5 Wo/Men’s Alliance for Medical Marijuana (“WAMM”) have been waiting for relief from the  
 6 threat of continued federal government interference with their state-sanctioned cultivation and  
 7 use of medical marijuana – the only medication that provides any modicum of normalcy to their  
 8 lives. The Ninth Circuit’s recent decision in *Raich, et al. v. Ashcroft, et al.*, 352 F.3d 1222 (9th  
 9 Cir. 2003)<sup>1</sup> gives Plaintiffs their long-awaited relief. In *Raich*, the Ninth Circuit affirmed  
 10 Plaintiffs’ position that California law and local Santa Cruz ordinances protect Patient-Plaintiffs’  
 11 intrastate cultivation, possession and use of medical marijuana, and that the United States  
 12 Constitution prohibits the federal government from regulating or otherwise interfering with those  
 13 activities. In light of the Ninth Circuit’s decision in *Raich*, this Court should reconsider and  
 14 reverse its August 28, 2003 Order and enjoin Defendants from raiding, seizing or otherwise  
 15 interfering with Plaintiffs’ lawful activities.

16 **II. PROCEDURAL HISTORY**

17 This Court is no doubt familiar with the procedural history of this case, but  
 18 Plaintiffs provide a brief summary. On September 5, 2002, the Drug Enforcement Agency  
 19 (“DEA”) raided the home of Plaintiff Valerie Corral and WAMM’s garden in Davenport,  
 20 California, and seized 167 marijuana plants and the WAMM members’ allotments of medicinal  
 21 marijuana. The members of WAMM had used the garden, collectively, to grow marijuana  
 22 pursuant to California’s Compassionate Use Act of 1996.<sup>2</sup> On September 24, 2002, WAMM  
 23 filed a motion for return of property seeking the return of the 167 marijuana plants the DEA  
 24 seized along with other documents and property. This Court denied that motion.<sup>3</sup>

25 \_\_\_\_\_  
 26 <sup>1</sup> See Declaration of Neha Shah Nissen in Support of Plaintiffs’ Motion for  
 Reconsideration of August 28, 2003 Order (“Nissen Decl.”), Exhibit (“Ex.”) A.

27 <sup>2</sup> See Cal. H&S Code § 11362.5.

28 <sup>3</sup> This Court’s Rule 41(e) Order is currently on appeal before the Ninth Circuit. The Ninth

1 On April 23, 2003, in response to the September 5, 2002 raid, Plaintiffs filed a  
 2 Complaint seeking, *inter alia*, injunctive relief and damages against Defendants John Ashcroft,  
 3 Attorney General of the United States, Karen P. Tandy, Administrator of the Drug Enforcement  
 4 Administration, and John P. Walters, Director of the Office of National Drug Control Policy,<sup>4</sup> as  
 5 well as the DEA agents who raided WAMM's garden and the Corral home. Plaintiffs  
 6 concurrently filed a Motion for Preliminary Injunction to enjoin Defendants from interfering  
 7 with their lawful cultivation, possession and use of marijuana pursuant to physician  
 8 recommendation, under California law. The Defendants opposed that motion and further  
 9 responded by filing a Motion to Dismiss Plaintiffs' Complaint.

10 This Court heard oral argument on both motions on July 7, 2003, expressing the  
 11 need for a legal "hook" upon which to grant Plaintiffs' Motion for Preliminary Injunction.  
 12 Nissen Decl., Ex. B at 16:13. On August 28, 2003, this Court issued an Order Denying  
 13 Plaintiffs' Motion For Preliminary Injunction and Granting Defendants' Motion To Dismiss  
 14 With Leave To Amend ("August 23, 2003 Order"). *See County of Santa Cruz, et al., v. Ashcroft,*  
 15 *et al.*, 279 F. Supp. 2d 1192 (N.D. Cal. 2003). Citing Ninth Circuit precedent at the time of the  
 16 Order, the Court held that it had "no alternative but to conclude that under *existing law*  
 17 [Plaintiffs] cannot succeed on the merits of their claims." *Id.* at 1212 (emphasis added).

18 Existing law has since changed, and this Court now has the legal hook it seeks.  
 19 On December 16, 2003, the Ninth Circuit issued its opinion in *Raich, et al. v. Ashcroft, et al.*,  
 20 352 F.3d 1222 (9th Cir. 2003) ("Opinion"), a case involving the intrastate cultivation, possession  
 21 and use of medical marijuana. In its Opinion, the Ninth Circuit reversed the District Court's  
 22 order denying the plaintiffs' motion for preliminary injunction and remanded the case for entry  
 23 of a preliminary injunction consistent with the Opinion. *See* Nissen Decl., Ex. A. The Ninth  
 24

25 \_\_\_\_\_  
 (Footnote Continued from Previous Page.)

26 Circuit heard oral argument on WAMM's appeal on September 17, 2003, but has not yet issued a  
 ruling.

27 <sup>4</sup> John B. Brown III was originally named as Administrator of the Drug Enforcement  
 28 Administration. Since Plaintiffs filed their Complaint, Karen P. Tandy replaced Mr. Brown as  
 Administrator of the Drug Enforcement Administration.

1 Circuit found that the plaintiffs demonstrated a strong likelihood of success on the merits based  
 2 on the same law and on facts nearly identical to those at issue in this case. Moreover, the Ninth  
 3 Circuit specifically cites with disapproval to this Court's August 28, 2003 Order *in this case*  
 4 granting Defendants' Motion to Dismiss and denying Plaintiffs' Motion for Preliminary  
 5 Injunction.

6 On January 12, 2004, Plaintiffs filed an *ex parte* motion for leave to move for  
 7 reconsideration in light of the Ninth's Circuit Opinion in *Raich*. The Court granted Plaintiffs'  
 8 request on January 20, 2004.<sup>5</sup> Plaintiffs now seek reconsideration and reversal of this Court's  
 9 August 28, 2003 Order and entry of a preliminary injunction to enjoin Defendants from  
 10 interfering with Plaintiffs' cultivation, possession and use of medical marijuana.

### 11 III. DISCUSSION

#### 12 A. Reconsideration Is Warranted Under FRCP 60(b)(5)

13 Federal Rule of Civil Procedure 60(b)(5) provides parties with relief from a  
 14 judgment or order when "a prior judgment upon which it is based has been reversed or otherwise  
 15 vacated, or it is no longer equitable that the judgment should have prospective application." FED.  
 16 R. CIV. P. 60(b)(5). It is well settled that relief under Rule 60(b) is appropriate where there has  
 17 been a subsequent change in the law. *Milgard Tempering, Inc. v. Selas Corp. of America*, 902  
 18 F.2d 703, 715 (9th Cir. 1990) (A court "properly exercises its discretion to reconsider an issue  
 19 previously decided" when "a change in the law has occurred"); *see also Kirkbride v. Continental*  
 20 *Cas. Co.*, 933 F.2d 729, 732 (9th Cir. 1991) ("[t]he district court was entitled to reconsider its  
 21 position" in light of new law); *Kelly et al., v. City of New York, et al.*, 2001 WL 1132017  
 22

---

23 <sup>5</sup> The Court also granted Plaintiffs' request that the stay in this case be lifted in light of the  
 24 Ninth Circuit's decision in *Raich*, which is directly applicable to this case. The parties had  
 25 originally agreed to stay these proceedings pending the outcome of the appeal on WAMM's Rule  
 26 41(e) motion, but after *Raich*, there is no longer any need to await the outcome of that appeal.  
 27 The Ninth Circuit has now spoken on the pertinent issues in a case with nearly identical facts and  
 28 the same procedural posture (motion for preliminary injunction) as this one. This, coupled with  
 the fact that Patient-Plaintiffs and other members of WAMM continue to suffer irreparable injury  
 to their health and well-being due to the lack of their medicine, makes reconsideration  
 extraordinarily pressing. *See Declaration of Valerie Corral in Support of Motion for*  
*Reconsideration of August 28, 2003 Order ("Corral Decl. II") at ¶ 3.*

1 (S.D.N.Y. 2001) (reconsideration granted where decision from the Second Circuit handed down  
 2 two months after the district court's order "immediately called into question the validity of some  
 3 aspects" of the order). The Supreme Court has repeatedly confirmed this. *See Agostini v.*  
 4 *Felton*, 521 U.S. 203, 239-40 (1997) (holding district court's reconsideration of the permanent  
 5 injunction appropriate); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992)  
 6 (vacating denial of Rule 60(b)(5) motion and remanding to district court for reconsideration of  
 7 whether consent decree should be modified in light of new law); *Pasadena City Bd. of Ed. v.*  
 8 *Spangler*, 427 U.S. 424, 440-41 (1976) (holding that district court's injunction should have been  
 9 vacated in light of new law).

10 Rule 60(b)(5) requires this Court to reconsider and reverse its denial of  
 11 preliminary injunction in light of new Ninth Circuit law. Plaintiffs seek relief under Rule  
 12 60(b)(5) because, as discussed below, the *Raich* Opinion creates new law that did not exist when  
 13 this Court issued its August 28, 2003 Order. This new law strips the federal government of  
 14 jurisdiction under the Controlled Substances Act (CSA) to interfere with Plaintiffs' activities.  
 15 The Opinion makes it highly probable that Plaintiffs will succeed on the merits of their claims,  
 16 just as the Ninth Circuit found in *Raich*.

17 In *Agostini*, the Supreme Court found reconsideration to be particularly  
 18 appropriate in situations where the propriety of prospective relief is at issue. 521 U.S. at 239-40.  
 19 The continued denial of a preliminary injunction here would permit the federal government to  
 20 further act in contravention of the United States Constitution, California law, Santa Cruz City  
 21 and County laws, and now Ninth Circuit law. It is particularly crucial for this Court to revisit the  
 22 propriety of its denial of injunctive relief where, as here, Plaintiffs' activities are a matter of life  
 23 and death.<sup>6</sup> In light of the *Raich* Opinion, it would no longer be equitable to permit Defendants

---

24 <sup>6</sup> Six WAMM members have died since this Court denied Plaintiffs' Motion for  
 25 Preliminary Injunction, bringing WAMM's death toll to twenty since September 5, 2002 when  
 26 the federal government raided and destroyed WAMM's medicinal garden. *See Corral Decl. II* at  
 27 ¶ 2. Additionally, Patient-Plaintiffs continue to suffer injury to their health after the September  
 28 5, 2002 raid. *See Corral Decl. II* at ¶ 3. The seizure has severely impeded and reduced Patient-  
 Plaintiffs' efforts to alleviate their pain, stimulate their appetite and, for some, control the  
 circumstances of their impending deaths. *See Declaration of Jennifer Lee Hentz in Support of*  
*Plaintiffs' Motion for Preliminary Injunction ("Hentz Decl.")* at ¶¶ 20-21; Declaration of

1 to interfere with Plaintiffs' lawful, non-economic intrastate activities.

2 **B. The Ninth Circuit's *Raich* Opinion Is New Law That Warrants**  
 3 **Reconsideration Of This Court's August 28, 2003 Order**

4 At the time this Court ruled on Plaintiffs' Motion for Preliminary Injunction and  
 5 Defendants' Motion to Dismiss, the Ninth Circuit had not directly addressed the issue of whether  
 6 the federal government's interference with cultivation, possession and use of marijuana for  
 7 medicinal purposes, with the recommendation of a physician and pursuant to state law, violates  
 8 the Commerce Clause. At the hearing on those motions, the Court noted that it must approach  
 9 the Commerce Clause issue "as a matter of existing law and existing precedent rather than in any  
 10 way attempting to express its own views about what the proper resolution of this controversy is."  
 11 Nissen Decl., Ex. B at 2:25 - 3:3. Indeed, this Court indicated that while Plaintiffs had shown  
 12 irreparable harm, it needed a legal basis for finding that Plaintiffs were likely to succeed on the  
 13 merits of their Commerce Clause claim, because it felt bound by prior Ninth Circuit precedent  
 14 upholding the CSA in the face of past, unrelated Commerce Clause challenges. *Id.* at 16:12-15;  
 15 18:3; *County of Santa Cruz*, 279 F. Supp. 2d at 1209.

16 *Raich* provides the necessary legal basis to support Plaintiffs' likelihood of  
 17 success on the merits. The *Raich* Court held that, unlike "the commercial nature of drug  
 18 trafficking activities that has formed the basis of prior Ninth Circuit decisions upholding the  
 19 CSA on Commerce Clause grounds[,] . . . "the intrastate, noncommercial cultivation, possession  
 20 and use of marijuana for personal medical purposes on the advice of a physician . . . is, in fact,  
 21 different in kind from drug trafficking." *Raich*, 352 F.3d at 1228, 1230. The Ninth Circuit went  
 22 on to find that with respect to this activity, "the CSA does not regulate commerce or any sort of  
 23 economic enterprise." *Id.* at 1229. This is new law that did not exist when this Court issued its  
 24 August 28, 2003 Order – law that strips Defendants of any authority under the CSA to interfere  
 25 with Plaintiffs' cultivation, possession and use of medical marijuana, which is precisely the relief

26 \_\_\_\_\_  
 (Footnote Continued from Previous Page.)

27 Harold F. Margolin in Support of Plaintiffs' Motion for Preliminary Injunction ("Margolin  
 28 Decl.") at ¶¶ 21-22; Declaration of Valerie Corral in Support of Plaintiffs' Motion for  
 Preliminary Injunction at ¶¶ 29, 34.

1 Plaintiffs seek.

2 **1. The *Raich* Opinion Applies Directly to This Case**

3 Just as in *Raich*, Plaintiffs' activities here involve the intrastate, noncommercial  
4 cultivation, possession and use of marijuana for personal medical purposes on the advice of a  
5 physician and in accordance with state law. Plaintiffs provided ample evidentiary support with  
6 their Motion for Preliminary Injunction demonstrating that their activities are wholly intrastate  
7 and non-economic in nature. Consequently, the *Raich* decision is directly applicable to this case.  
8 But the Court need not take Plaintiffs' word for it – *Raich* speaks for itself.

9 The *Raich* Opinion expressly and repeatedly refers to this Court's August 28,  
10 2003 Order. For example, this Court's application of the Supreme Court's test in *United States*  
11 *v. Morrison*, 529 U.S. 598 (2000) to the present case led it to conclude in its August 28, 2003  
12 Order that "Congress has not exceeded its power under the Commerce Clause." *County of Santa*  
13 *Cruz*, 279 F. Supp. 2d at 1208. On that basis, this Court denied Plaintiffs' Motion for  
14 Preliminary Injunction. In the *Raich* Opinion, however, the Ninth Circuit went out of its way to  
15 declare that this Court's application of the *Morrison* factors was "flawed" and "erroneous[]." *Raich*,  
16 352 F.3d at 1231, n.5. Indeed, the *Raich* Court addresses in great detail this Court's  
17 application of the first *Morrison* factor – whether the regulated activity is commercial or  
18 economic in nature:

19 In a recent decision, a district court reached the opposite  
20 conclusion as to this factor. The court defined the class of  
21 activities as "intrastate cultivation and possession of marijuana for  
22 medicinal purposes . . ." *County of Santa Cruz v. Ashcroft*, 279 F.  
23 Supp. 2d 1192, 1208 (N.D. Cal. 2003). The court concluded that  
24 "the declarations and findings of Congress in adopting the CSA  
25 make clear that Congress considers such activity to have a  
26 substantial effect on interstate commerce because controlled  
27 substances are fungible items that influence and contribute to a  
28 national black market for controlled substances regardless of the  
purposes for which they are used." *Id.* at 1209. This analysis is  
flawed because the congressional findings relied upon do not  
address the specific class of activities set forth by the Court in  
*County of Santa Cruz*. See *id.* (citing 21 U.S.C. § 801(3)-(6)).  
Instead they are concerned primarily with the trafficking and  
distribution of controlled substances. More importantly, the  
district court's analysis fails to ask the question set forth in the first  
*Morrison* factor: whether the statute, as applied to the particular  
class of activities, regulates commerce or an economic enterprise.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR  
RECONSIDERATION OF AUGUST 28, 2003 ORDER

1           The congressional findings do not address this question; at best,  
 2           they address whether the activity—commercial or not—has some  
 3           effect on interstate commerce. Finally, the district court in *County  
 of Santa Cruz*, by looking solely to congressional findings,  
 erroneously conflated the first and third factors.

4    *Id.* WAMM members do not purchase or sell medical marijuana. *See* Hentz Decl. at ¶¶ 25-26;  
 5    Margolin Decl. at ¶¶ 18-19; Declaration of Eladio V. Acosta in Support of Plaintiffs’ Motion for  
 6    Preliminary Injunction (“Acosta Decl.”) at ¶ 13; Declaration of James Daniel Baehr in Support  
 7    of Plaintiffs’ Motion for Preliminary Injunction (“Baehr Decl.”) at ¶¶ 18-19; Declaration of  
 8    Dorothy Gibbs in Support of Plaintiffs’ Motion for Preliminary Injunction (“Gibbs Decl.”) at ¶  
 9    22; Declaration of Michael Cheslosky in Support of Plaintiffs’ Motion for Preliminary Injunction  
 10   (“Cheslosky Decl.”) at ¶ 24. As in *Raich*, WAMM members and their caregivers employ a  
 11   closed system of cultivation, and the cultivation, possession and use of medical marijuana occurs  
 12   within the State of California. Baehr Decl. at ¶ 18; Gibbs Decl. at ¶ 22; Hentz Decl. at ¶ 26;  
 13   Margolin Decl. at ¶ 18; Cheslosky Decl. at ¶ 24. Because of the unique non-economic and non-  
 14   commercial nature of the activity at issue both here and in *Raich*, the Ninth Circuit concluded  
 15   “that the first *Morrison* factor favors a finding that the CSA, as applied to the facts of this case, is  
 16   unconstitutional under the Commerce Clause.” *Raich*, 352 F.3d at 1231.

17           As to the second *Morrison* factor – whether the statute contains a “jurisdictional  
 18   hook” to limit its reach – the Ninth Circuit and this Court are already in agreement that the CSA  
 19   clearly contains no such hook. *See County of Santa Cruz*, 279 F. Supp. 2d at 1209; *Raich*, 352  
 20   F.3d at 1233. The third *Morrison* factor asks whether the statute or its legislative history  
 21   contains express congressional findings regarding the effects of the regulated activity upon  
 22   interstate commerce. While this Court and the *Raich* Court found that this factor weighs in favor  
 23   of finding the applicable provisions of the CSA constitutional, the *Raich* Court was careful to  
 24   note that “there is no indication that Congress was considering anything like the class of  
 25   activities at issue here when it made its findings,” and that “[c]ommon sense indicates that the  
 26   findings related to this specific class of activities would be significantly different from the  
 27   findings relating to the effect of drug trafficking, generally, on interstate commerce.” *Raich* 352  
 28   F.3d at 1232. In so noting, the Ninth Circuit echoed *Morrison’s* admonition to “take

1 congressional findings with a grain of salt.” *Id.* Finally, *Morrison* requires an analysis of  
 2 whether the link between the regulated activity and its alleged effect on interstate commerce is  
 3 “attenuated.” Here, the Ninth Circuit stressed that “[t]he connections in this case are, indeed,  
 4 attenuated.” *Id.* at 1233. The Court noted that although the activities at issue *might* have an  
 5 effect on interstate commerce “at the margins. . . [i]t is far from clear that such an effect would  
 6 be substantial.” *Id.* Ultimately, citing this Court’s August 28, 2003 Order, the Ninth Circuit  
 7 found that “this factor favors a finding that the CSA cannot constitutionally be applied to the  
 8 class of activities at issue in this case.” *Id.*

9 Weighing all four factors, the Ninth Circuit found that the plaintiffs were likely to  
 10 succeed on the merits of their claim that application of the CSA to their activities is  
 11 unconstitutional under the Commerce Clause. *Id.* at 1234. Thus, not only does *Raich* represent  
 12 new law involving facts nearly identical to this case, it explicitly references and refutes the  
 13 holdings of this Court in its August 28, 2003 Order and provides a direct basis for  
 14 reconsideration and reversal.<sup>7</sup>

## 15 2. *Raich* Ensures Plaintiffs’ Likelihood of Success on the 16 Merits

17 In its August 28, 2003 Order, this Court found that Plaintiffs could not  
 18 “demonstrate a likelihood of success on their claim that application of the CSA to their conduct  
 19 constitutes an unlawful exercise of Congressional powers under the Commerce Clause.” *County*

---

20  
 21 <sup>7</sup> In addition to *Raich*, the Ninth Circuit recently upheld a criminal defendant’s Commerce  
 22 Clause challenge against enforcement of federal firearm laws in *United States v. Stewart*, 348  
 23 F.3d 1132, 1134 (9th Cir. 2003). There, the defendant was charged and convicted of violating 18  
 24 U.S.C. § 922(o) making it unlawful to “transfer or possess a machinegun.” The Court remarked  
 25 that “notably absent from [the statute] is any jurisdictional requirement that the machinegun has  
 26 traveled in or substantially affected interstate commerce.” *Stewart*, 348 F.3d at 1135. However,  
 27 much like Plaintiffs’ activities, “Stewart did not acquire his machineguns from someone else:  
 28 He fabricated them himself.” *Id.* at 1134. The Court also recognized that “[a]t some level, of  
 course, everything we own is composed of something that once traveled in commerce.” *Id.* at  
 1135. In applying the first and fourth *Morrison* factors, the Court found that “[p]ossession of a  
 machine gun is not, without more, economic in nature” and that “the effect of Stewart’s  
 possession of homemade machineguns on interstate commerce was attenuated.” *Id.* at 1137.  
 Consequently, Congress could not “prohibit the mere possession of homemade machineguns.”  
*Id.* at 1133. The same must be said for marijuana grown for personal, medical purposes within  
 California by members of WAMM.

1 of *Santa Cruz*, 279 F. Supp. 2d at 1209.<sup>8</sup> At the July 7, 2003 hearing, the Court suggested that  
2 “[i]f the Ninth Circuit wants to change its view on these matters . . . it certainly may do that . . .”  
3 Nissen Decl., Ex. B at 3:18-21. The Ninth Circuit has done exactly that.

4 Applying the *Morrison* factors for the first time to the federal government’s  
5 interference with the cultivation, possession and use of medical marijuana in California, the  
6 Ninth Circuit found that “the CSA, as applied to appellants, is likely unconstitutional.” *Raich*,  
7 352 F.3d at 1234. Application of *Raich* requires this Court to change its view about Plaintiffs’  
8 likelihood of success on the merits of their Commerce Clause claim. And this Court already  
9 recognized in its August 28, 2003 Order that Plaintiffs “adequately have demonstrated that they  
10 face a significant threat of irreparable harm because of Defendants’ actions” and that they  
11 provided “substantial evidence of irreparable harm.” *County of Santa Cruz*, 279 F. Supp. 2d at  
12 1200, 1212. As a result, Plaintiffs should not be forced to wait a day longer for a preliminary  
13 injunction to issue so that they may receive the relief – both legal and medical – that the  
14 Constitution, the Compassionate Use Act and *Raich* entitles them to.

15 **IV. CONCLUSION**

16 Plaintiffs respectfully request that this Court reconsider and reverse its August 28,  
17 2003 Order and enter a preliminary injunction against Defendants.

18 DATED: February 23, 2004

BINGHAM McCUTCHEN LLP

19  
20 By: \_\_\_\_\_ /S/  
21 Neha Shah Nissen  
22 Attorneys for WAMM Plaintiffs  
23  
24  
25

26  
27 <sup>8</sup> In addition, the Court tied Plaintiffs’ likelihood of success on their Tenth Amendment  
28 claim that the CSA intrudes upon areas traditionally regulated by the states to Plaintiffs’ success  
on their Commerce Clause claims. *Id.* at 1210.

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 Attorneys for WAMM Plaintiffs

11 Benjamin Rice (SBN 98551)  
12 331 Soquel Avenue, Suite 203  
13 Santa Cruz, California 95062  
14 Telephone: 831.425.0555  
15 Facsimile: 831.459.9815

16 Attorney for County of Santa Cruz  
17 and WAMM Plaintiffs

18 John Barisone (SBN 87831)  
19 333 Church Street  
20 Santa Cruz, California 95060  
21 Telephone: 831.423.8383  
22 Facsimile: 831.423.9401

23 Attorney for City of Santa Cruz, California

24

25

26

27

28