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10 **UNITED STATES DISTRICT COURT**  
11 **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/PVT  
OFFICIAL-CAPACITY DEFENDANTS'  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR RECONSIDERATION  
OF AUGUST 28, 2003 ORDER

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

22 **PRELIMINARY STATEMENT**

23 Plaintiffs have asked this Court to reconsider its denial of their motion for a preliminary  
24 injunction, contending that such action is compelled by the Ninth Circuit's recent decision in Raich v.  
25 Ashcroft, 352 F.3d 1222 (9th Cir. 2003). Plaintiffs' motion should be denied. Contrary to plaintiffs'  
26 assertion that their conduct is indistinguishable from the conduct at issue in Raich, this case differs from  
27 Raich in at least two fundamental respects. First, this case is not limited to the "cultivation, possession,  
28 and use of marijuana for medicinal purposes," as in Raich, or a situation in which there is no effort "to

1 acquire marijuana from others in a market.” Id. at 1229, 1231. To the contrary, plaintiffs’ own  
2 declarations reveal that plaintiff Wo/Men’s Alliance for Medical Marijuana (“WAMM”) is engaged in  
3 the provision and delivery of marijuana to the individual plaintiffs (and other WAMM members), and  
4 that the individual plaintiffs are engaged in the acquisition of and receipt of marijuana from WAMM.  
5 Such activity plainly constitutes “distribution” within the meaning of the Controlled Substances Act, see  
6 21 U.S.C. §§ 802(8), (11), and this case, therefore, most certainly *does* involve the “sale, exchange, or  
7 distribution” of marijuana, which the Ninth Circuit found lacking in Raich.

8 Second, in Raich, the Ninth Circuit emphasized that the marijuana at issue was obtained by the  
9 appellants “free of charge.” Id. at 1230 n.3. Here, by contrast, the individual plaintiffs do not obtain  
10 marijuana from WAMM “free of charge.” Rather, plaintiffs’ declarations reveal that WAMM members  
11 are “required” to pay a membership fee to the organization to cover administrative costs, and that  
12 WAMM is supported by voluntary contributions of time and money from its patients and other  
13 individuals. That WAMM both demands and receives monetary payments from its members in  
14 exchange for its services also serves to distinguish this case from Raich.

15 For these reasons, plaintiffs’ motion for reconsideration should be denied. Alternatively,  
16 because the very same issues presented by plaintiffs’ motion for reconsideration is currently pending  
17 before the Ninth Circuit in the related case of Wo/Men’s Alliance for Medical Marijuana v. United  
18 States, No. MC 02-7012 JF, (N.D. Cal. Dec. 3, 2002) (“WAMM”), *on appeal*, No. 03-15063 (9th  
19 Cir.), which was argued and submitted on September 17, 2003, this Court should deny plaintiffs’  
20 motion for reconsideration without prejudice pending the Ninth Circuit’s decision in that case, both as a  
21 matter of prudence and restraint, and in the interests of judicial economy.

## 22 BACKGROUND

23 1. On August 28, 2003, this Court denied plaintiffs’ motion for a preliminary injunction,  
24 concluding that it “ha[d] no alternative but to conclude that under existing law they cannot succeed on  
25 the merits of their claims.” County of Santa Cruz v. Ashcroft, 279 F. Supp.2d 1192, 1212 (N.D. Cal.  
26 2003). The Court also granted defendants’ motion to dismiss, with leave to amend. Id.

27 2. On December 16, 2003, a divided panel of the Ninth Circuit reversed and remanded the  
28 denial of a motion for preliminary injunction in Raich. The panel majority held that, as applied to what it

1 characterized as “the intrastate, noncommercial cultivation, possession and use of marijuana for  
2 personal medical purposes on the advice of a physician,” the Controlled Substances Act likely  
3 exceeded Congress’ authority under the Commerce Clause. Judge Beam, sitting by designation from  
4 the Eighth Circuit, dissented.

5 The panel majority recognized that the Ninth Circuit had previously upheld the Controlled  
6 Substances Act against Commerce Clause challenges on six prior occasions, and also acknowledged  
7 governing Supreme Court authority to the effect that, ““where a general regulatory statute bears a  
8 substantial relations to commerce, the *de minimis* character of individual instances arising under the  
9 statute is of no consequence.”” 352 F.3d at 1227-28 (quoting United States v. Lopez, 514 U.S. 549,  
10 558 (1995), in turn quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)) (emphasis omitted).  
11 In holding these precedents inapplicable, the panel majority concluded that the relevant class of  
12 activities was not the manufacture and possession of marijuana generally, but rather “the intrastate,  
13 noncommercial cultivation, possession and use of marijuana for personal medical purposes on the  
14 advice of a physician,” a class of activities that the panel reasoned was “different in kind from drug  
15 trafficking.” *Id.* at 1229. The panel majority emphasized that “[t]his class of activities does not involve  
16 sale, exchange, or distribution,” and that, although the Doe appellants were providing marijuana to  
17 appellant Raich, “there is no ‘exchange’ sufficient to make such activity commercial in character. As  
18 Raich states in her declaration: ‘My caregivers grow my medicine specifically for me. They do not  
19 charge me, nor do we trade anything. They grow my medicine and give it to me free of charge.’” *Id.* at  
20 1230 n.3, 1231.

21 The panel majority next reasoned that, “[a]s applied to the limited class of activities presented  
22 by this case, the CSA does not regulate commerce or any sort of economic enterprise. The cultivation,  
23 possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not  
24 properly characterized as commercial or economic activity.” *Id.* at 1229. Because the activity to be  
25 regulated was not itself economic, the panel majority deemed it irrelevant whether individual instances  
26 of the conduct could be aggregated to demonstrate a cumulative impact on interstate commerce. *Id.* at  
27 1230. The panel majority further noted that, following the analysis of United States v. McCoy, 323  
28 F.3d 1114 (9th Cir. 2003), “the marijuana at issue in this case is similarly non-fungible, as its use is

1 personal and the appellants do not seek to exchange it or acquire marijuana from others in a market.”  
2 352 F.3d at 1231.

3 The panel majority also found that the link between the class of activities at issue and any  
4 substantial effect on interstate commerce was attenuated. Id. at 1233-34. While recognizing that,  
5 “[p]resumably, the intrastate cultivation, possession and use of medical marijuana on the  
6 recommendation of a physician could, at the margins, have an effect on interstate commerce by  
7 reducing the demand for marijuana that is trafficked interstate,” the majority found that “[i]t is far from  
8 clear that such an effect would be substantial.” Id. at 1233

9 The panel majority therefore held that, after considering the four factors set forth in United  
10 States v. Morrison, 529 U.S. 598 (2000), “we find that the CSA, as applied to the appellants, is likely  
11 unconstitutional.” 352 F.3d at 1234. The panel remanded to the district court “for entry of a  
12 preliminary injunction consistent with this opinion.” Id.

13 3. On January 12, 2004, plaintiffs requested that the Court lift the stay entered in this case on  
14 October 8, 2003, and permit them to file a motion for reconsideration, in view of the Ninth Circuit’s  
15 decision in Raich. On January 20, 2004, this Court lifted the stay of proceedings and allowed plaintiffs  
16 to move for reconsideration. Plaintiffs filed their motion for reconsideration on February 23, 2004.

### 17 ARGUMENT

18 Plaintiffs assert that, “[j]ust as in Raich, Plaintiffs’ activities here involve the intrastate,  
19 noncommercial cultivation, possession and use of marijuana for personal medical purposes on the  
20 advice of a physician and in accordance with state law,” and that “the Raich decision is directly  
21 applicable to this case.” Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for  
22 Reconsideration of August 28, 2003 Order (“Pl. Mem.”) at 6. Neither assertion is correct. As we  
23 now demonstrate, because Raich does not involve the same class of activities as this case, that decision  
24 does not call into question this Court’s judgment that plaintiffs have failed to demonstrate a likelihood of  
25 success on the merits of their claims. Plaintiffs’ motion for reconsideration, therefore, should be denied.

26 1. In Raich, the Ninth Circuit repeatedly emphasized that the class of activities at issue was  
27 limited to the “cultivation, possession, and use of marijuana for medicinal purposes,” and did not involve  
28 the “sale, exchange, or distribution” of marijuana. 352 F.3d at 1229. In pertinent part, the Ninth

1 Circuit stated that: “The cultivation, possession, and use of marijuana for medicinal purposes *and not*  
2 *for exchange or distribution* is not properly characterized as commercial or economic activity.” *Id.*  
3 (emphasis supplied). The Ninth Circuit also emphasized that the marijuana at issue in Raich was non-  
4 fungible because the appellants there “do not seek to exchange it or acquire marijuana from others in a  
5 market,” and that, although one of the individual appellants was supplied marijuana by two “John Doe”  
6 appellants, “there is no ‘exchange’ sufficient to make such activity commercial in character” because the  
7 individual appellant had attested that “‘My caregivers grow my medicine specifically for me. They do  
8 not charge me, nor do we trade anything. They grow my medicine and give it to me *free of charge.*’”  
9 *Id.* at 1230 n.3, 1231 (emphasis supplied).

10 These features are wholly absent in the present case. First, in contrast to Raich, this case is not  
11 limited to the “cultivation, possession, and use of marijuana for medicinal purposes,” but rather involves  
12 the “sale, exchange, or distribution” of marijuana from WAMM to the individual plaintiffs, and the  
13 acquisition of marijuana by the individual plaintiffs from WAMM. This conclusion is compelled by the  
14 declarations submitted by plaintiffs in this case, which unambiguously reveal that WAMM provides and  
15 delivers marijuana to the individual plaintiffs, and that the individual plaintiffs acquire and receive  
16 marijuana from WAMM. See Declaration of Valerie Corral (docket entry #10) ¶¶ 11, 13 (stating that  
17 members of WAMM “receive a free, regulated, weekly allotment of medical marijuana,” and that  
18 “WAMM provides a free, organic and reliable source of medical marijuana for patients with a  
19 physician’s recommendation”); Declaration of Eladio V. Acosta (docket entry #6) ¶ 13 (stating that “I  
20 get all of my medical marijuana from WAMM,” and that “WAMM provides me with a safe, legal and  
21 free supply of marijuana”); Declaration of James Daniel Baehr (docket entry #7) ¶ 18 (stating that “I  
22 never give away or sell any of the medicine I receive through WAMM, and I get all of the medical  
23 marijuana I use from WAMM”); Declaration of Michael Cheslosky (docket entry #9) ¶¶ 17, 23  
24 (stating that “I have received my medical marijuana products from WAMM since [1998]” and that  
25 “[t]he WAMM community provides me with marijuana in medically-appropriate forms that are safe and  
26 reliable.”); Declaration of Jennifer Lee Hentz (docket entry #12) ¶¶ 14, 27 (stating that I went to my  
27 first WAMM meeting in April of 2002 and received my first allotment of medicine,” and that “I rely on  
28 WAMM for access to medical marijuana that is medically safe and free from chemical adulterants that

1 could jeopardize my health.”); Declaration of Dorothy Gibbs (docket entry #20) ¶¶ 24-25 (stating that  
2 “[i]f I did not get my medical marijuana from WAMM, I have no idea where I would get my medicine,”  
3 and that, since September 2002, “my dosage of medicine from WAMM has decreased from 7 grams  
4 per week to 5 grams to week.”); Declaration of Harold Margolin (docket entry #14) ¶ 18 (stating that  
5 “[i]n accordance with WAMM’s rules, I obtain my marijuana only from WAMM.”); Declaration of  
6 Emily C. Reilly, Mayor of the City of Santa Cruz, California (docket entry #16) ¶ 11 (“By providing its  
7 members with a safe and reliable source of medical marijuana, WAMM ensures that seriously ill  
8 patients are not forced to obtain their medications through illegal means \* \* \*.”); Declaration of Ellen  
9 Pirie, Chair of the Board of Supervisors of County of Santa Cruz, California (docket entry #15) ¶ 5  
10 (“WAMM provides hospice care and effective medication in the form of medical marijuana to many of  
11 the County’s most seriously ill residents \* \* \*.”).

12 The provision and delivery of marijuana to the individual plaintiffs by WAMM, and the  
13 acquisition and receipt of marijuana by those individuals from WAMM, plainly meets the definition of  
14 “distribution” under the Controlled Substances Act. See 21 U.S.C. § 802(11) (defining the term  
15 “distribute” to mean “to deliver (other than by administering or dispensing) a controlled substance or a  
16 listed chemical.”); 21 U.S.C. § 802(8) (defining the terms “deliver” or “delivery” to mean “the actual,  
17 constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there  
18 exists an agency relationship.”). See generally United States v. Vincent, 20 F.3d 229, 233 (6th Cir.  
19 1994) (“In order to establish the knowing or intentional distribution of a controlled substance, the  
20 government needed only to show that defendant knowingly or intentionally delivered a controlled  
21 substance.”). Accordingly, because WAMM is engaged in the distribution and exchange of marijuana  
22 to WAMM members, and the individual plaintiffs and WAMM members are engaged in the acquisition  
23 of marijuana from that organization, the Ninth Circuit’s decision in Raich does not control the outcome  
24 of this case, and does not support plaintiffs’ motion for reconsideration.

25 We acknowledge, of course, that, in the related WAMM case, this Court assumed without  
26 deciding that the movants were *not* engaged in the distribution of marijuana. See Slip op. at 4 n.2  
27 (attached as Exhibit 1). But this Court assumed that WAMM was not engaged in distribution only  
28 upon determining that the parties’ dispute on this question was “immaterial in light of relevant case law.”

1 Id. Because the question whether WAMM is engaged in the distribution of marijuana is now material to  
2 plaintiffs' motion for reconsideration, this Court's prior assumption that WAMM was not engaged in  
3 the distribution of marijuana can no longer stand.

4 2. That WAMM is engaged in the distribution of marijuana also belies plaintiffs' contention that  
5 their activity is in "accordance with state law." Pl. Mem. at 6. The California courts have made clear  
6 that the Compassionate Use Act "on its face exempts *only* possession and cultivation from criminal  
7 sanctions for qualifying patients." People v. Young, 92 Cal.App.4th 229, 237, 111 Cal.Rptr.2d 726,  
8 731 (Cal. Ct. App. 2001) (emphasis supplied), *review denied* (Dec. 12, 2001). Consequently, even  
9 following passage of that initiative, "[t]he acts of selling, giving away, transporting, and growing large  
10 quantities of marijuana *remain criminal*." People v. Rigo, 69 Cal.App.4th 409, 415, 81 Cal.Rptr.2d  
11 624, 628 (Cal. Ct. App. 1999) (emphasis supplied), *review denied* (April 21, 1999). Thus, "one who  
12 sells, furnishes, or gives away marijuana to a patient or a qualified primary caregiver authorized to  
13 acquire it for the patient's physician-approved medicinal use, violates the law. Those sellers have no  
14 defense because of section 11362.5 to charges of [distribution]." People v. Peron, 59 Cal.App.4th  
15 1383, 1395, 70 Cal.Rptr.2d 20, 28 (Cal. Ct. App. 1997), *review denied* (Feb. 25, 1998).

16 3. In Raich, the Ninth Circuit also emphasized that all marijuana was provided to the individual  
17 appellants "free of charge." 352 F.3d at 1230 n.3. In this case, by contrast, the declarations submitted  
18 by plaintiffs reveal that WAMM does not provide marijuana to its members entirely "free of charge."  
19 To the contrary, the Protocols and Guidelines and Member Requirements of WAMM, which is  
20 attached as Exhibit B to the Declaration of Valerie Corral in Support of Plaintiffs' Motion for a  
21 Preliminary Injunction (docket entry #10), at 1, expressly provides that "[a] sliding scale membership  
22 fee of \$25.00 to \$100.00 is required from each participant to cover administrative costs," and the  
23 declaration submitted by Ms. Corral in connection with the Related Case provides that "WAMM is  
24 supported by voluntary contributions from patients and others," including "[d]onations of time and  
25 money by patients \* \* \*." Declaration of Valerie Corral, submitted in WAMM Related Case ¶ 2  
26 (attached as Exhibit 2). These admissions make clear that, while WAMM alleges that it does not  
27 demand a one-for-one payment of money for marijuana from its members, it recoups the costs of  
28 providing marijuana to its members, or a portion thereof, through other means, including both required

1 and voluntary monetary payments from WAMM's members. The fact that WAMM both demands and  
2 receives monetary payments from its members in exchange for its services further distinguishes this case  
3 from the situation presented in Raich, and further compels the conclusion that that case does not  
4 provide support for plaintiffs' motion for reconsideration.

5 4. To be sure, in Raich, the Ninth Circuit criticized certain aspects of this Court's analysis in  
6 rejecting plaintiffs' Commerce Clause challenge. See 352 F.3d at 1231 n.5. Plaintiffs seize upon this  
7 footnote, noting that the Raich court specifically called into question this Court's application of the first  
8 Morrison factor. See Pl. Mem. at 6. But this Court's discussion of the first Morrison factor was  
9 limited to an evaluation of the "intrastate cultivation and possession of marijuana for medicinal  
10 purposes," County of Santa Cruz, 279 F. Supp.2d at 1208, and did not consider whether plaintiffs'  
11 activities also constituted distribution or exchange of marijuana in violation of federal law. Given this  
12 Court's judgment in this case and the related WAMM case that plaintiffs' Commerce Clause challenge  
13 was foreclosed by United States v. Visman, 919 F.2d 1390, 1393 (9th Cir. 1990), *cert. denied*, 502  
14 U.S. 969 (1991); this Court did not need to decide the question whether plaintiffs' actions also  
15 constituted distribution of marijuana in violation of the Controlled Substances Act. Plaintiffs' motion for  
16 reconsideration now compels the Court to decide that question left previously unanswered and, as we  
17 have shown above, plaintiff WAMM's activities plainly constitutes distribution and exchange of  
18 marijuana in violation of federal law. Hence, the Ninth Circuit's criticism of this Court's analysis is  
19 beside the point.

20 5. Considerations of prudence and judicial economy also militate strongly against granting  
21 plaintiffs' motion for reconsideration. The adjudication of an Act of Congress is "the gravest and most  
22 delicate duty that [a] Court is called upon to perform," Blodgett v. Holden, 275 U.S. 142, 148 (1927)  
23 (Holmes, J.), and the Supreme Court has repeatedly emphasized that constitutional issues should not be  
24 decided "in advance of the necessity of deciding them." New York Transit Auth. v Beazer, 440 U.S.  
25 568, 582 n.22 (1979). In this case, the very question presented by plaintiffs' motion for  
26 reconsideration -- whether plaintiffs' activities substantially affects interstate commerce, and therefore  
27 constitutes activity that Congress may properly reach under the Commerce Clause -- has been argued  
28 and submitted to the Ninth Circuit in the related WAMM case, where it remains pending. In these

1 circumstances, even if the Court were to believe Raich might provide a basis for reconsideration, the  
2 prudent course would be to deny plaintiffs' motion without prejudice and await the Ninth Circuit's  
3 ruling in the related case.<sup>1</sup> If the Court were to grant plaintiffs' motion, and the Ninth Circuit were to  
4 hold that WAMM's activities do, indeed, have a substantial effect on interstate commerce, this Court  
5 would be compelled to reverse course once again and entertain a motion for reconsideration by the  
6 government. Such piecemeal litigation would be an unnecessary waste of judicial resources, and would  
7 be particularly inappropriate in the context of rendering judgment on the constitutionality of an Act of  
8 Congress.

9 The conclusion that this Court should defer resolving the plaintiffs' motion for reconsideration is  
10 further underscored by the fact that plaintiffs are seeking a pre-indictment, anticipatory injunction to  
11 enjoin future criminal proceedings. It is well-established that "only the most extraordinary  
12 circumstances warrant anticipatory judicial involvement in criminal investigations," North v. Walsh, 656  
13 F. Supp. 414, 420 (D.D.C. 1987), and this principle has been applied even in cases in which significant  
14 constitutional challenges have been raised. See, e.g., Deaver v. Seymour, 822 F.2d 66, 69-71 (D.C.  
15 Cir. 1987) (denying plaintiff Michael Deaver's request to enjoin Independent Counsel Whitney North  
16 Seymour from continued exercise of prosecutorial authority on grounds that the independent counsel  
17 law was unconstitutional, and holding that Fed. R. Crim. P. 12(b)(1) permits any defendant to raise by  
18 motion, after indictment but before trial, a constitutional challenge to his or her prosecution and,  
19 therefore that "[w]e cannot allow Deaver to avoid these rules—and thereby encourage a flood of  
20 disruptive civil litigation—by bringing his constitutional defense in an independent civil suit. Prospective  
21 defendants cannot, by bringing anticipatory equitable proceedings, circumvent federal criminal  
22 procedure."). That plaintiffs here are seeking an pre-indictment, anticipatory injunction to enjoin future  
23 criminal proceedings based on a judicial declaration that an Act of Congress is likely unconstitutional  
24 counsels in favor of restraint, particularly when the very same issues raised by plaintiffs' motion for  
25 reconsideration will soon be decided by the Ninth Circuit.

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27 <sup>1</sup> Indeed, plaintiffs themselves have seen the utility of this approach, having earlier sought a stay  
28 of this case "pending the outcome of the Ninth Circuit appeal in the related case." See Proposed  
Order Staying Proceedings (docket entry #74), with attached Letter to the Hon. Jeremy Fogel.

1 **CONCLUSION**

2 For the foregoing reasons, plaintiffs' motion for reconsideration of this Court's Order of August  
3 28, 2003, should be denied.

4 Respectfully submitted,

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