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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 WOMEN'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
ADMINISTRATIONS AGENTS,
26

27 Defendants.

Case No.: 03-CV-1802 JF

**REPLY 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 The only issue before the Court on this Motion for Reconsideration is whether
3 new law exists in the Ninth Circuit that increases the likelihood of Plaintiffs' success on the
4 merits of their claims such that the Court should reverse its August 28, 2003 Order. In its
5 Opposition, the Government makes a misguided attempt to distort the facts and evidence before
6 the Court and suggests that Plaintiffs' activities constitute commercial "exchange" or
7 "distribution" in an effort to distinguish this case from the Ninth Circuit's recent findings in
8 *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003). However, the Government ignores this Court's
9 findings that Plaintiffs "do not *purchase*, sell, or otherwise *distribute* marijuana" and that, while
10 "WAMM is supported by *voluntary* contributions, [] its members are *not charged* for their use of
11 marijuana." *County of Santa Cruz, et al. v. Ashcroft, et al.*, 279 F. Supp. 2d 1192, 1196 (N.D.
12 Cal. 2003) (emphasis added). The Ninth Circuit's decision in *Raich* is therefore directly
13 applicable to this case and substantially increases the likelihood of Plaintiffs' success on the
14 merits of their claim that application of the federal Controlled Substances Act to their class of
15 activities is unconstitutional. As a result, this Court should reconsider its August 28, 2003 Order,
16 deny the Government's motion to dismiss and issue a preliminary injunction so that this case,
17 like *Raich*, may proceed with Plaintiffs' constitutional rights being protected.

18 **II. ARGUMENT**

19 Plaintiffs' opening brief in support of its Motion For Reconsideration
20 demonstrates why *Raich* is directly applicable to this case, but in its Opposition, the Government
21 invents two entirely unsupported distinctions in an attempt to distinguish Plaintiffs' activities
22 from the conduct involved in *Raich*. Try as it might, the Government's fact wrangling does
23 nothing to change this Court's findings, nor the applicability of *Raich* to this case.

24 **A. Plaintiffs' Activities Do Not Include Commercial Distribution, A**
25 **Conclusion That *Raich* Supports And This Court Already Reached**

26 The *Raich* court held that "the intrastate, noncommercial cultivation, possession
27 and use of marijuana for personal medical purposes on the advice of a physician . . . is, in fact,
28 different in kind from drug trafficking." *Raich*, 352 F.3d at 1230. Thus, the *key* factual

1 distinction the Ninth Circuit made in assessing whether federal regulation of these activities is
 2 constitutionally permissible was between commercial drug trafficking, on the one hand, and
 3 cultivation, possession and use of marijuana for personal medical purposes on the other. There
 4 can be no dispute that the activities in *Raich* and in this case fall on the same side of that
 5 distinction: they both involve patients' and their caregivers' cultivation and possession of
 6 marijuana for personal, medical use that is wholly unrelated to "drug trafficking." Rather than
 7 accept this true distinction, the Government at the eleventh hour instead invents its own
 8 distinctions involving the alleged "distribution" of marijuana and purported payments for
 9 marijuana — allegations unsupported by the evidence and without meaning in light of *Raich*.

10 **1. The Government's "distribution" argument does nothing to**
 11 **distinguish Plaintiffs' activities from the *Raich* plaintiffs'**
 12 **activities.**

13 The Ninth Circuit held in *Raich* that application of the CSA to "the cultivation,
 14 possession, and use of marijuana for medicinal purposes" violates the Commerce Clause because
 15 "[l]acking sale, exchange or distribution, the activity does not possess the essential elements of
 16 commerce." *Id.* at 1229-30. With an extensive record before it, including numerous declarations
 17 from City and County of Santa Cruz officials, Patient-Plaintiffs and several physicians, this
 18 Court defined the class of activities at issue in this case as the "intrastate cultivation and
 19 possession of marijuana for medicinal purposes . . ." *County of Santa Cruz*, 279 F. Supp. 2d at
 20 1208. This Court also found that Plaintiffs "do not purchase, sell, or otherwise distribute
 21 marijuana" and that WAMM's "members are not charged for their use of marijuana." *Id.* at
 22 1196. This Court made these findings based on an extensive and undisputed factual record.

23 Ignoring this Court's findings and presenting no new evidence to the contrary, the
 24 Government now argues that this case "involves the 'sale, exchange, or distribution' of
 25 marijuana" between WAMM and Patient-Plaintiffs. Official-Capacity Defendants' Opposition
 26 to Plaintiffs' Motion For Reconsideration of August 28, 2003 Order ("Opp."), at 5:11-12. The
 27 Government attempts to support its "distribution" theory by arguing that "WAMM provides and
 28 delivers marijuana to the individual plaintiffs" and "the individual plaintiffs acquire and receive
 marijuana from WAMM." Opp. at 5:14-16. Try as it might, the Government cannot create a

1 meaningful distinction between this case and *Raich*.

2 The plaintiffs in *Raich* included not only two patients who used marijuana for
3 medicinal purposes but also two caregivers, named as Doe plaintiffs, who provided medical
4 marijuana to Angel McClary Raich, one of the patient-plaintiffs. *See Raich*, 352 F.3d at 1224.
5 Like this case, *Raich* involved a patient who was “unable to cultivate her own marijuana.” *Id.* at
6 1225. Therefore, she had someone else – her caregivers – grow the marijuana and provide the
7 marijuana to her. *Id.* Similarly, WAMM, a collective whose membership includes patients and
8 their caregivers, “assists seriously ill and dying patients by providing them with the opportunity
9 to cultivate marijuana plants for their personal medicinal use and to produce marijuana
10 medications collectively used by WAMM members to alleviate their pain and suffering.”
11 *County of Santa Cruz*, 279 F. Supp. 2d at 1195-96. WAMM is a collective of patients and
12 caregivers, not an entity that is necessarily separate from its patient and caregiver members. *Id.*
13 Therefore, here, as in *Raich*, the Government is still left with caregivers assisting patients with
14 the cultivation and possession of medical marijuana for personal use.

15 As the Government points out, the Controlled Substances Act defines the term
16 “distribute” to mean “to deliver (other than by administering or dispensing) a controlled
17 substance or a listed chemical.” 21 U.S.C. § 802(11). Therefore, for purposes of the CSA, the
18 cultivation and delivery of marijuana by Angel McClary Raich’s caregivers is no different than
19 that of the collective of patients and caregivers who comprise WAMM. The delivery of medical
20 marijuana in *Raich* did not prevent the Ninth Circuit from holding that the “class of activities
21 does not involve sale, exchange or distribution,” *Raich*, 352 F.3d at 1229, and that the plaintiffs
22 “made a strong showing of the likelihood of success on the merits of their case.” *Id.* at 1234.
23 Similarly, the mere fact that Patient-Plaintiffs in this case receive their medical marijuana with
24 the assistance of caregivers by virtue of their membership in WAMM does not decrease their
25 likelihood of success on the merits under *Raich*.

26 **2. The Government’s attempt to characterize Plaintiffs’ activities**
27 **as commercial disregards the facts of this case and findings of**
28 **this Court.**

The Government goes to great lengths to twist the facts and evidence in an

1 attempt to portray Plaintiffs' activities as a commercial distribution and trafficking operation.
 2 Not only does this argument ignore the Court's findings that Plaintiffs "do not purchase, sell, or
 3 otherwise distribute marijuana," *County of Santa Cruz*, 279 F. Supp. 2d at 1196, it is predicated
 4 upon a tortured interpretation of what WAMM is and what it does. "WAMM" is a collective,
 5 cooperative organization and therefore is, in effect, merely a name given to the group of patients
 6 and caregivers who work to facilitate the cultivation, possession and use of medical marijuana
 7 for each other. It can hardly be described as a commercial "market" run by entrepreneurs that
 8 Patient-Plaintiffs and their caregivers visit to purchase medical marijuana.¹

9 Nonetheless, the Government contends that this case differs from *Raich* because
 10 the *Raich* Court found that the plaintiffs there received marijuana "free of charge." Opp. at 7:16-
 11 17. Likewise, this Court found based on an extensive factual record that Patient-Plaintiffs are
 12 "not charged for their use of marijuana" and they "do not purchase, sell, or otherwise distribute
 13 marijuana." *County of Santa Cruz*, 279 F. Supp. 2d at 1196. These findings are supported by
 14 numerous declarations submitted in support of Plaintiffs' Motion for Preliminary Injunction. *See*
 15 Declaration of Jennifer Lee Hentz at ¶ 27 ("I use medical marijuana solely within California, do
 16 not exchange money for the marijuana, and never distribute any marijuana to others");
 17 Declaration of Harold F. Margolin at ¶ 19 ("As a member of WAMM . . . I do not have to pay for
 18 my medicine"); Declaration of Eladio V. Acosta at ¶ 13 ("WAMM provides me with a safe,
 19 legal and free supply of medicine"); Declaration of Dorothy Gibbs at ¶ 22 ("I do not have very
 20 much money, so I am grateful that I do not have to pay for my medicine through WAMM");
 21 Declaration of James Daniel Baehr at ¶ 5 (stating that his "medication at WAMM is free").
 22 WAMM complies with strict regulations that prohibit the collective from predicating
 23 "participation upon a patient's ability to pay for services or medical marijuana" and to "strictly
 24 prohibit patients and their primary caregivers from selling or distributing medical marijuana."
 25 Declaration of Mayor Emily Reilly at ¶ 7.

26 _____
 27 ¹ Black's Law Dictionary, 7th Edition, defines a "market" as "a place of commercial
 28 activity in which goods or services are bought and sold (a farmers' market)." Nothing in the
 record suggests that, under any stretch of that definition, WAMM is a "market."

1 The Government conveniently overlooks these facts and findings, instead
2 highlighting a section of WAMM’s “Protocols and Guidelines” that provides for a fee to cover
3 “administrative costs.” Opp. at 7:19-22. The Government omits a provision of the very same
4 section of the “Protocols and Guidelines” stating that, “[n]o person shall be refused participation
5 based on financial capability, and services are *not* dependent on ability to pay for medicine.”
6 Corral Decl. at ¶ 11 & Ex. B (emphasis added). As described in Plaintiffs’ Motion for
7 Preliminary Injunction, WAMM, in addition to facilitating the provision of medicine to the City
8 and County of Santa Cruz’s most seriously ill patients, is also intimately involved in the
9 provision of in-home care, hospice care, support groups, health education, and professional
10 counseling for its members. Corral Decl. at ¶ 12; Acosta Decl. at ¶ 14; Baehr Decl. at ¶ 17;
11 Gibbs Decl. at ¶ 22; Hentz Decl. at ¶ 28; Margolin Decl. at ¶¶ 16-17; Cheslosky Decl. at ¶ 24.
12 Members pay the nominal fee, only if it is within their means, to cover some of the costs
13 associated with these services and the administrative functions necessary to keep WAMM
14 compliant with legal requirements.

15 The Government also attempts to warp Plaintiff Corral’s testimony in the Related
16 Case by isolating statements she made regarding “donations of time and money by patients.”
17 Opp. at 7:23-25. Not only do those isolated statements do *nothing* to support the Government’s
18 theory that Patient-Plaintiffs pay for marijuana, they ignore affirmative, undisputed testimony in
19 her declaration that “[p]atients are not charged for the marijuana.” Declaration of Valerie Corral,
20 submitted in WAMM Related Case, at ¶ 2 (attached as Exhibit 1). The Government’s strained
21 interpretation of the evidence fundamentally disregards this Court’s holding that while “WAMM
22 is supported by *voluntary* contributions, [] *its members are not charged* for their use of
23 marijuana.” *County of Santa Cruz*, 279 F. Supp. 2d at 1196. Therefore, the Government’s
24 attempt to create the impression of a money-for-marijuana operation is completely unsupported
25 and fails to take this case outside the reach of *Raich*.

26 **3. *Raich* explicitly addresses this Court’s legal conclusions.**

27 The Government also attempts to mask the importance of the *Raich* Court’s
28 reference to this Court’s August 28, 2003 Order. It gives short shrift to the Ninth Circuit’s

1 criticism of this Court’s legal findings and suggests that the criticism is irrelevant because this
 2 Court “did not consider whether Plaintiffs’ activities also constituted distribution or exchange.”
 3 Opp. at 8:10-11. As discussed above, this Court *did* consider whether Plaintiffs’ activities
 4 involve “distribution,” and found that Plaintiffs “do not purchase, sell, or otherwise distribute
 5 marijuana.” *County of Santa Cruz*, 279 F. Supp. 2d at 1196. The *Raich* Court made it very clear
 6 that, given this Court’s findings and the class of activities at issue, it erroneously applied the
 7 Commerce Clause analysis set forth in *United States v. Morrison*, 529 U.S. 598 (2000). *See*
 8 *Raich*, 352 F.3d 1222 at 1231, n.5. Thus, not only did the Ninth Circuit in *Raich* come to a result
 9 that makes the application of the CSA to Plaintiffs’ activities unconstitutional under Ninth
 10 Circuit law, it suggested that this Court reconsider its Order, which “reached the opposite
 11 conclusion.” *Id.*

12 Ultimately, *Raich* is directly on point and this Court should reconsider its
 13 August 28, 2003 Order in favor of denying the Government’s motion to dismiss and issuing a
 14 preliminary injunction.

15 **B. The Government’s Suggestion That Plaintiffs’ Activities Violate**
 16 **California Law Is Wrong.**

17 This Court held that “[t]here is no dispute that the activities of WAMM and the
 18 Patient-Plaintiffs, each of whose primary caregiver also is a WAMM member, are legal under the
 19 [Compassionate Use Act of 1996],” *County of Santa Cruz*, 279 F. Supp. 2d at 1197. The
 20 Government chooses once again to disregard this Court’s findings and further assumes that its
 21 “distribution” theory somehow undermines the fact that all of Plaintiffs’ activities strictly adhere
 22 to, and are in complete accord with, California law. *See* Opp. at 7:4-5.²

23 The Compassionate Use Act permits the provision of medical marijuana with the

24 ² To support its proposition that Plaintiffs’ activities are not legal under California law, the
 25 Government cites cases that are completely distinguishable from this case. *See People v. Rigo*,
 26 69 Cal. App. 4th 409, 413 (1999) (arrest pre-dated passage of the Compassionate Use Act);
 27 *People v. Young*, 92 Cal. App. 4th 229, 231 (2001) (appeal of trial judge’s failure to instruct the
 28 jury on a “mistake of fact” defense where defendant alleged that he believed he was entitled to
 transport marijuana under the Compassionate Use Act of 1996); *People v. Peron*, 59 Cal. App.
 4th 1383, 1383 (1997) (injunction issued prior to the Compassionate Use Act becoming law
 enjoining group from selling marijuana to public at large).

1 assistance of caregivers. *See* Plaintiffs’ Request For Judicial Notice In Support of Motion for
2 Preliminary Injunction, Ex. 13 (attached as Exhibit 2). In addition, California law allows
3 collectives such as WAMM to assist in the provision of medical marijuana to patients. Last year,
4 the California legislature passed SB420 which enacted California Health and Safety Code
5 § 11362.775 and specifically allows for collective growth of medical marijuana pursuant to the
6 Compassionate Use Act. The new law clarifies that “[q]ualified patients, persons with valid
7 identification cards, and the designated primary caregivers of qualified patients and persons with
8 identification cards, who associate within the State of California in order collectively or
9 cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that
10 fact be subject to state criminal sanctions” Cal. Health & Safety Code § 11362.775. The
11 law protects a caregiver who “transports, processes, administers, delivers, or gives away
12 marijuana for medical purposes,” Cal. Health & Safety Code § 11362.765(b)(2), and specifically
13 exempts from criminal punishment for “possession for sale” caregivers who receive
14 “compensation for actual expenses, including reasonable compensation incurred for services
15 provided to an eligible qualified patient or person with an identification card to enable that
16 person to use marijuana” for personal medical purposes. Cal. Health & Safety Code
17 § 11362.765(c). Therefore, the Government’s argument, in addition to being irrelevant to this
18 motion, is without merit.

19 **C. At This Stage, Ninth Circuit Law Warrants Issuance Of A**
20 **Preliminary Injunction And Denial Of The Government’s Motion To**
21 **Dismiss**

22 The Government goes to great lengths in attempting to portray WAMM as a
23 “distributor,” but does little to address the true issues involved in this motion: (1) whether the
24 holding in *Raich* increases the likelihood of success on the merits of Plaintiffs’ Commerce
25 Clause claim, such that the Court should issue a preliminary injunction; and (2) whether the
26 Court should reconsider dismissal of Plaintiffs’ Complaint in light of *Raich*. The answer on both
27 fronts is “yes.” Reversal of the Order is proper where, as here, Plaintiffs have made a clear
28 showing that there is new law that significantly increases the likelihood of success on the merits
of their claims and that renders prospective application of this Court’s August 28, 2003 Order

1 inequitable. *See* Fed. R. Civ. Proc. 60(b)(5).

2 The Government has not disputed that the irreparable harm and public interest
3 factors weigh in Plaintiffs' favor. On the record currently before the Court, there is no denying
4 that *Raich* substantially increases Plaintiffs' likelihood of success on the merits of their
5 Commerce Clause claim, as well as their commandeering claim. This Court has already
6 determined that Plaintiffs "do not purchase, sell, or otherwise distribute marijuana." *County of*
7 *Santa Cruz*, 279 F. Supp. 2d. at 1196. The Government will have an opportunity to try to create
8 some semblance of a factual basis for its theory that Plaintiffs are engaged in a commercial
9 "exchange" or "distribution" that affects interstate commerce once the discovery process begins.
10 But at this stage of the litigation, *Raich* warrants reconsideration and reversal of the Court's
11 August 28, 2003 Order.

12 The Government argues that this Court should avoid reconsideration because
13 "plaintiffs are seeking a pre-indictment, anticipatory injunction to enjoin future criminal
14 proceedings." *Opp.* at 9:10-11. Any action by this Court at this point would be far from
15 "anticipatory." On September 5, 2002, a federal Drug Enforcement Agency task force raided the
16 home that Plaintiff Valerie Corral shares with her husband in Davenport, California. They seized
17 the medical marijuana on the property and in the WAMM garden, and severely undercut Patient-
18 Plaintiffs' access to their medicine. Plaintiffs have repeatedly provided updates to this Court
19 regarding the continuing harm to WAMM and the terminally and chronically ill Patient-Plaintiffs
20 whose access to medication is now drastically limited.³ To suggest that there has not yet been
21 any true injury and characterize this action as "anticipatory" in any way is disingenuous. It also
22 ignores the fact that the Ninth Circuit in *Raich* ordered the entry of a preliminary injunction in
23 the absence of a large scale raid or indictment.

24

25 ³ Indeed, the evidence of irreparable harm only gets stronger as each day passes. On
26 March 11, 2004, Plaintiff Dorothy Gibbs passed away. This death leaves the City and County of
27 Santa Cruz with one less citizen, WAMM with one less member, and this case with one less
28 Plaintiff. Ms. Gibbs, like so many other WAMM members, was deprived of her right to control
the circumstances of her death without the threat of unconstitutional interference by the federal
government.

1 Finally, the Government’s argument that this Court must wait for a ruling on
 2 WAMM’s motion for return of property is an additional attempt to delay the inevitable. The
 3 Ninth Circuit has clearly established the law on the issues relevant to this motion and binding in
 4 this case. The Government’s petition for rehearing of the *Raich* decision was unsuccessful, and
 5 the Ninth Circuit unanimously denied the Government’s motion for *en banc* review on
 6 February 26, 2004. Therefore, *Raich* is the law of the Ninth Circuit. The Government’s only
 7 recourse is to seek review by the United States Supreme Court of the *Raich* decision. The
 8 Related Case involves a criminal motion for return of property and thus has a different
 9 procedural posture than this case and the *Raich* case.⁴ There is no reason for this Court to wait
 10 any longer; and the irreparable harm that continues to threaten Plaintiffs militates in favor of an
 11 expeditious decision.

12 **III. CONCLUSION**

13 Plaintiffs respectfully request that this Court reconsider and reverse its August 28,
 14 2003 Order and enter a preliminary injunction against Defendants.

15 DATED: March 15, 2004

BINGHAM McCUTCHEN LLP

17 By: _____ /S/
 18 Neha Shah Nissen
 19 Attorneys for WAMM Plaintiffs

21 _____
 22 ⁴ On the other hand, this case and *Raich* both arise from the same procedural posture. In
 23 *Raich*, the plaintiffs sued the federal government “fearing raids in the future, and the prospect of
 24 being deprived of medical marijuana.” *Raich*, 352 F.3d at 1226. As this Court is well aware, the
 25 fear on the part of Plaintiffs in this case is even more real because the federal government *did*
 26 raid the WAMM garden and *did* deprive Patient-Plaintiffs of their medicine. Like Plaintiffs here,
 27 the *Raich* plaintiffs sought “declaratory relief and preliminary and permanent injunctive relief.”
 28 *Id.* And just as in this case, the district court in *Raich* denied the plaintiffs’ motion for a
 preliminary injunction, finding that they did not demonstrate the requisite likelihood of success
 on the merits of their claims that “the CSA is unconstitutional to the extent it purports to prevent
 them from possessing, obtaining, manufacturing, or providing cannabis for medical use.” *Id.*
 The Ninth Circuit, of course, went on to find in *Raich* that the district court erred in so finding,
 and took the extra step of disapproving this Court’s legal findings in this case.

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