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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. EDWARD ROSENTHAL, *et al.*, Defendants.	Case No. CR-02-0053 CRB **NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND ON TENTH AMENDMENT GROUNDS** Date: January 6, 2002 Time: 2:30 p.m. Place: Courtroom of the Hon. Charles R. Breyer

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MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND ON TENTH AMENDMENT GROUNDS

PLEASE TAKE NOTICE that on January 6, 1998, at 2:30 a.m., in the United States Courthouse at 450 Golden Gate Avenue, San Francisco, California, in the courtroom of the Honorable Charles R. Breyer, defendant Edward Rosenthal will hereby move this Court, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, to dismiss this criminal action for lack of subject matter jurisdiction and on Tenth Amendment grounds.

This motion is based on this Notice of Motion, Memorandum of Points and Authorities in Support of Motion to Dismiss on Due Process Grounds, U.S. Const., Art. 1, § 8 & Amend. X, Defendant Rosenthal's Request for Judicial Notice in Support of Motions to Dismiss, the Declaration of Joe DeVries in Support of Defendant Rosenthal's Motions to Dismiss, the Declaration of Jeffrey Jones in Support of Defendant Rosenthal's Motions to Dismiss, the Declaration of Edward Rosenthal in Support of Defendant Rosenthal's Motions to Dismiss, this Court's inherent and supervisory powers, argument presented at the hearing on this motion, and all other statutory and constitutional provisions and case law deemed relevant by this Court.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

It is one thing for the federal government to assert its supremacy through a civil action to enjoin state officials from violating federal law; it is quite another for it to seek to imprison a City of Oakland official for performing his official duties. Unlike *United States v. Cannabis Cultivators' Club*, C 98-0085 CRB, *et al.*, (N.D. Cal. 1998), which is a civil action currently on appeal, this is a criminal prosecution of a City of Oakland official for performing his official duties under state and local law.[1] As a criminal matter, this case implicates a different array of

[1] To the extent that the Ninth Circuit decides issues favorably to the defendants in the civil case, these holdings may benefit defendants here as well.

federalist principles not present in the civil suit, representing as it does a far greater intrusion upon the sovereignty of the state. The dispute centers on the efficacy of marijuana in alleviating the suffering of persons afflicted with diseases ranging from cancer to HIV/AIDS, and whether marijuana should be legal for this limited purpose. The voters of California, as well as those of eight other states, have concluded that it does and should. The federal government disagrees. The issue is decidedly not whether marijuana should be legal for recreational use, nor whether all forms of cultivation and distribution for medical use should be free from criminal penalty. Instead, the narrow question presented is whether the interstate Commerce Clause empowers the federal government to override California's sovereign power to address a local health emergency in a carefully tailored way. Neither the Commerce Clause nor the Tenth Amendment authorizes the federal government to extend its powers so far.

Despite the fact that the class of activity involved is entirely local and does not affect, much less substantially affect, interstate commerce, the federal government is seeking to impose its will over California in the state's regulation of public health, morals and crime -- matters traditionally entrusted exclusively to the states. The Framers designed our federalist system of government with this allocation of power to enhance individual liberty, foster experimentation and increase government responsiveness to local needs. This prosecution strikes at the heart of each of these core values. California has passed legislation to augment the liberty of its citizens; the federal government is seeking its deprivation. The victims are cancer and AIDS patients who reside disproportionately in California. The federal government, which has a different constituency, is insensitive to their needs. The evidence reveals that the government is motivated in this endeavor by a desire to stifle experimentation. It has been embarrassed several times before by empirical testing and it fears yet another group of positive results that state experimentation would undoubtedly yield. Worse still, the government is doing this through the most punitive means available, although it could and should have sought to vindicate any legitimate interests it might have through an action for injunctive relief and/or contempt. The Founders never intended the Supremacy Clause to serve as a license to the federal government to

assert its dominion over the states in this all-encompassing manner. If their vision of federalism is to be restored, this Court must dismiss this prosecution.

I. THE GOVERNMENT'S PROSECUTION OF ROSENTHAL EXCEEDS THE SCOPE OF ITS CONSTITUTIONALLY DELEGATED POWER TO REGULATE COMMERCE AMONG THE STATES

A. Legal Standards

To determine whether the federal government may validly regulate activity under the interstate commerce clause, "[w]e start with first principles." *United States v. Lopez*, 514 U.S. 549, 552 (1995). Of these, the most fundamental is that "[t]he Constitution creates a Federal Government of enumerated powers" with the remaining powers reserved to the states. *Id.* (citing U.S. Const., Art. I, § 8). In particular, the "States possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).[2] "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties'" from encroachment by a "foreign" centralized government. *See id.* (quotation omitted).[3] They conceded that there would be just cause for rejecting the Constitution if it would enable the federal government to "alter, or abrogate . . . [a State's] civil and criminal institutions." 2 Debates in the Several State

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[2] *See also* The Federalist No. 17 at 102-03 (A. Hamilton) ("the ordinary administration of criminal and civil justice" should be governed by local legislation); *Lopez*, 514 U.S. at 584 (Thomas, J., concurring) ("[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power") (emphasis in original).

[3] *See also* The Federalist No. 26, at 172 (A. Hamilton) ("State legislatures . . . will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government"); The Federalist No. 28, at 181 (A. Hamilton) ("It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority"); The Federalist No. 46, at 295 & 298 (J. Madison) (under the Constitution, "the federal and State governments . . . [would possess] the disposition and the faculty . . . to resist and frustrate the measures of each other," which is necessary to curb "ambitious encroachments of the federal government on the authority of State governments"); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

Conventions on the Adoption of the Federal Constitution 267-68 (J. Elliot ed. 1836) (hereinafter "Elliot") (A. Hamilton).

B. The Interstate Commerce Clause Does Not Empower The Federal Government To Criminally Prosecute Wholly Intrastate Activity That Does Not Substantially Affect Interstate Commerce

To preserve this proper balance between state and federal authority, the Founders authorized the federal government to regulate only three types of activity under the Commerce Clause. "First, Congress may regulate the use of the channels of interstate commerce." *Lopez*, 514 U.S. at 558 (citations omitted). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce." *Id.* (citations omitted). "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-59 (citations omitted). Because this prosecution is for wholly intrastate activity that does not involve the channels or instrumentalities of interstate commerce, it must be justified as an exercise of the third category, which requires that the regulated activity "'substantially affect' [not merely 'affect'] interstate commerce." *Id.* at 559. The Supreme Court has warned that this category "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 556-57 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

1. *The "Class of Activity" To Be Evaluated For Its Effect On Interstate Commerce Is The Intrastate Distribution of Marijuana For Medical Use In Accordance With The Strict Confines Of State Law, Not The Distribution Of Controlled Substances Generally*

The first step in the "substantial affects" analysis is to define the "class of activity" to be evaluated for its effect on interstate commerce -- in this case, the intrastate cultivation and distribution of medical marijuana in accordance with California law. In *Lopez* and the aggregation cases cited therein, 514 U.S. at 559-60, the Supreme Court defined the class of

activity by the area of the federal/state conflict, rather than the activity generally. *Cf. Katzenbach v. McClung*, 379 U.S. 294, (1964) (class of activity defined as restaurants utilizing substantial interstate supplies, not restaurants generally); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (class of activity includes inns and hotels catering to interstate guests, not inns and hotels generally). The Court warned that a broader definition of the class would effectively obliterate the distinction between what is national and what is local because "depending on the level of generality, any activity can be looked upon as commercial." *See Lopez*, 514 U.S. at 565. Thus, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court defined the class of activity as the production and consumption of *homegrown* wheat, which was the challenged practice of appellee, even though the federal statute at issue regulated wheat production generally. *See id.* at 118-19. In *Lopez*, the Court construed the class of activity as the possession of firearms in a school zone, not firearm possession in any place, and it dismissed Congressional findings regarding the commercial effects of firearm possession generally because they "[do not] speak to the subject matter of" the conflict. *See Lopez*, 514 U.S. at 563. And, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court stated: "[W]e would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." *Id.* at 173. These authorities establish that the class of activity to be evaluated here is the cultivation and distribution of marijuana for medical purposes in accordance with the strict confines of state law, not distribution of controlled substances or marijuana generally. *See also Employment Division v. Smith*, 494 U.S. 872, 909-10 & 913 (1990) (Blackmun, J., dissenting) ("It is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote" "The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs").[4]

[4] This definition of the class of activity is entirely consistent with the Supreme Court's statement in *Perez v. United States*, 402 U.S. 146 (1971) that "[w]here the class of activities is regulated *and that class is within the reach of federal power*, the courts have no power 'to excise,

2. The Intrastate Cultivation And Distribution Of Medical Marijuana In Accordance With The Strict Confines Of State Law Does Not Have A Substantial Effect On Interstate Commerce

Despite several opportunities to do so, the government has failed to sustain its burden of demonstrating how *this* properly defined class of activity substantially affects interstate commerce. Congress has not conducted any empirical studies, nor has it made any findings regarding the effect of medical marijuana on interstate commerce. *Compare Perez*, 402 U.S. at 147-48 n.1 & 153-55 (noting congressional findings regarding substantial affects of extortionate credit transactions on interstate commerce supported by reports and hearings commissioned by Congress showing that millions of dollars are funneled to national criminal organizations through loan sharking each year). Its generalized findings regarding controlled substances as a whole, *see* 21 U.S.C. § 801(3), like the case law regarding drug trafficking generally, *United States v.* Tisor, 96 F.3d 370, 375 (9th Cir. 1996); *United States v. Staples*, 85 F.3d 461, 463 (9th Cir. 1996), do not fill the void, since they "[do not] speak to the subject matter of [the conflict]." *See Lopez*, 514 U.S. at 563. This lack of empirically-supported Congressional findings counsels against the constitutionality of the statute. *See id.* (lack of congressional findings impedes the court's ability "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce").

In any event, *Morrison* teaches that this Court must scrutinize carefully the findings and arguments proffered by the government for its exercise of the commerce power -- "[S]imply because Congress may conclude that a particular activity substantially affects interstate

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as trivial, *individual instances*' of the class." *Id*. at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)) (emphasis added). Rosenthal is not contending that *his* activities have little or no effect on interstate commerce (although obviously they do not), but, rather, that the intrastate cultivation and distribution of medical marijuana *as a class* does not substantially affect interstate commerce. The threshold question remains whether this class of activity, as properly defined under *Wickard* and *Lopez*, substantially affects interstate commerce. *Cf. Wirtz*, 392 U.S. at 192 ("The only question for the courts [] is whether the class is 'within the reach of the federal power'") (quotation omitted); *id.* at 197 n.27 ("[t]he Court has said only that *where a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence") (quoted in *Lopez*, 514 U.S. at 558) (emphasis added).

commerce does not necessarily make it so." *Lopez*, 514 U.S. at 557 n.2; *see also Morrison*, 529 U.S. at 614 ("the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation"). In the face of Congress' silence, this Court has hypothesized two possible effects of the wholly intrastate activity on interstate commerce to justify the federal government's exercise of its commerce power. *See United States v. Cannabis Cultivators Club*, 5 F.Supp.2d 1086, 1098 (N.D. Cal. 1998). First, marijuana cultivated in California for medical purposes may leak to other states. *Id.* Second, marijuana grown in other states may be transported to California to sell to California patients. *Id*. Neither consequence, however, is likely to involve any significant quantity of marijuana crossing state lines. Even if it did, this would not constitute an economic effect on a federally regulated market necessary to sustain federal intrusion into otherwise wholly local activity.

In performing the substantial affects test, the court must consider the legal and economic barriers to an interstate effect. Justice Holmes explained: "If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935). Here, California courts have erected legal barriers to interstate marijuana trafficking by narrowly interpreting the legislation passed by California voters. The Compassionate Use Act now provides a defense to the transportation and sale of marijuana for medical purposes only if (1) the quantity transported is reasonably related to the patient's medical needs and (2) the sale is for bona fide reimbursement of costs. *See People v. Trippet*, 56 Cal.App.4th 1532, 1550-52, 66 Cal.Rptr.2d 559, 567-69 (1997); *People ex rel. Lungren v. Peron*, 59 Cal.App.4th 1383, 1399, 70 Cal.Rptr.2d 20, 31 (1997). "It is unreasonable to believe that use of medical marijuana by this discrete population for this limited purpose will create a significant drug problem." *Conant v. McCaffrey*, 172 F.R.D. 681, 694 n.5 (N.D. Cal. 1997); *see also Conant v McCaffrey*, 309 F3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) ("Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce"); *cf. Olsen v. Drug Enforcement Administration*, 878 F.2d 1458, 1463 n.4 (D.C. Cir. 1989)

("Government may allow use of marijuana in programs to lessen the negative side-effects of chemotherapy and to treat glaucoma, for example, without thereby opening the way to licenses for the use of marijuana by the healthy."); *see also Oakland Cannabis Buyers' Coop.,* 532 U.S. at 495 n.7 (reserving "whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause").

And there are other barriers as well. Most states have laws against marijuana cultivation and distribution, even for medical use, and the interstate transportation of medical marijuana remains illegal under federal law. *See* 21 U.S.C. § 841(b)(1)(B)(vii) (providing for terms of imprisonment ranging from five to forty years for the possession, cultivation or distribution of 100 or more marijuana plants, regardless of weight).[5] Lest one be lured by the promise of economic gain to risk prosecution under these laws, California courts have taken the profit out of the activity by requiring California providers to sell medical marijuana at cost. *See People ex rel. Lungren*, 59 Cal.App.4th at 1399, 70 Cal.Rptr.2d at 31. It, thus, comes as no surprise that there is no empirical evidence showing an increase in interstate marijuana transportation in the more than five years since the passage of Proposition 215. *Cf.* Perez, 402 U.S. at 153-55 (describing hearings and detailed findings supporting interstate nexus); *Conant*, 172 F.R.D. at 694 n.5 (noting "the government's fears in this case are exaggerated and without evidentiary support"). Pure speculation, which flies in the face of established barriers to interstate commerce, cannot justify a finding of a substantial effect. *Cf. United States v. Moghadam*, 175 F.3d 1269, 1275 (11th Cir. 1999) (to pass the substantial affects test, statute "must bear more than a generic relationship several steps removed from interstate commerce, and it must be a relationship that is apparent, not creatively inferred")); *see also United States v. Lynch*, 282 F.3d 1049, 1053 (9th Cir. 2002) (even for statutes containing a jurisdictional element that requires only a *de minimis* impact on interstate commerce, the test "reserves to the States the prosecution of robberies and extortionate acts that have only a speculative, indirect effect on interstate commerce").

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[5] Defendants do not here dispute the federal government's power to regulate the *inter*state transportation of marijuana for medical purposes, nor the power to prohibit the intrastate possession, manufacture or distribution of marijuana for recreational use.

Even assuming a factual basis for the government's otherwise unfounded fears, some leakage of medical marijuana across state lines cannot justify the government's exercise of its commerce power. Some leakage will occur with any form of commerce, whether it be books, stereos, firearms, or wheat, since we have not erected impenetrable barriers between the states. The Commerce Clause, however, does not give the federal government the authority to regulate all commerce, but only "[t]o regulate Commerce . . . among the several States. . . ." *See* U.S. Const., Art. I, §8, cl. 3; *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 194-95 (1824) (commerce power is "restricted to that commerce which concerns more States than one," not "the exclusively internal commerce of a State"); *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453, 466 (1938) ("The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several states"). Because medical marijuana use represents only a tiny fraction of all marijuana use,[6] the leakage of a small proportion of this tiny fraction across state lines would not even amount to a drop in the bucket of the annual interstate marijuana trade. "Congress may [not] use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)); *cf. Rewis v. United States*, 401 U.S. 808, 812 (1971) (holding that defendants who ran illegal gambling operation near state lines could not be convicted of violating Travel Act simply because their operation was frequented by out-of-state bettors); *see also Morrison*, 529 U.S. at 617-18 ("The Constitution requires a distinction between what is truly national and what is truly local").

To constitute a substantial effect on interstate commerce justifying federal intrusion into otherwise local activity, the government must demonstrate a significant *economic* effect on either

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[6] Whereas there were 11,000,000 marijuana users in the United States in 1998, there were only 30,000 medical marijuana users in California. Office of National Drug Control Policy, What America's Users Spend on Illegal Drugs 1988-1998, Table 9 (Dec. 2000) (reprinted at http://www.whitehousedrugpolicy.gov/publications/drugfact/american_users_spend/exec_summ.html); Dale Gieringer, *The Acceptance of Medical Marijuana in the United States*, J. of Cannabis Therapeutics, Vol. 3, No. 1. Medical marijuana users, therefore, constitute less than one percent of the marijuana using population.

a federally regulated, price-controlled market, *cf. Wickard v. Filburn*, 317 U.S. at 127-29 (upholding regulation of production and consumption of homegrown wheat because regulation necessary to maintain price controls by limiting supply), or on a national corporation or syndicate, *Perez*, 402 U.S. at 156-57 (upholding regulation of statute reducing measured flow of money to national crime syndicates). *See also Morrison*, 529 U.S at 613 (raising possibility of "categorical rule against aggregating the effects of any noneconomic activity," while noting that "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"); *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy"); *Wickard*, 317 U.S. at 125 (intrastate activity "may be reached by Congress if it exerts a substantial *economic* effect on interstate commerce") (emphasis added). Rather than even attempt to make this necessary showing, the government argues that it is entitled to *prohibit* all forms of a particular type of commerce to address what it perceives as a "national problem." *See* 21 U.S.C. § 801(2) (purpose of ban on controlled substances is to protect "health and general welfare of the American people"); House Joint Resolution 117 (Sept. 15, 1998) (justifying ban on medical marijuana because "the ambiguous cultural messages about marijuana use are contributing to a growing acceptance of marijuana use among children and teenagers"). This is *precisely* the type of argument rejected in Morrison and Lopez as an invalid justification for Congress' exercise its commerce power. *Cf. Lopez*, 514 U.S. at 564 (rejecting "costs of crime" and "national productivity" arguments because they would permit Congress to intrude into areas of traditional state regulation); *Morrison*, 529 U.S. at 612-13 ("Under the[se] theories . . ., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states have historically been sovereign") (quoting *Lopez*, 514 U.S. at 564). Although Congress has a limited power to prohibit certain forms of commerce, the Supreme Court has insisted that this power "does not assume to interfere with traffic or commerce . . . carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States." *Champion v. Ames*,

188 U.S. 321, 357 (1903). "To uphold the Government's contentions here, [the court] would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567 (Kennedy, J., concurring); *cf. United States v. Five Gambling Devices*, 346 U.S. 441, 451 (1953) (affirming dismissal of indictments against gaming device operators engaged in wholly local activity as beyond scope of commerce power).[7]

C. The Government Has Violated The Federalist Principles of The U.S. Constitution By Usurping The Traditional Police Powers of The States, Stifling Experimentation And Preventing California From Addressing A Local Need

The weakness of the government's economic justifications, coupled with the extremely punitive means employed here -- a federal prosecution with penalties ranging from ten years to forty years in prison -- betrays the government's true intent to usurp California's traditional police powers and prevent the states from experimenting with a competing approach. *Cf. Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (noting disturbing trend of "Congress appropriating state police powers under the guise of regulating commerce"); *United States v. Constantine*, 296 U.S. 287, 296 (1935) ("under the guise of a taxing act the purpose is to usurp the police powers of the state"). Lest there be any doubt on this score, the statute on its face expressly states that it is designed to protect the "health and general welfare of the American people," 21 U.S.C. § 801(2), and Congress recently affirmed that it is maintaining the ban on medical marijuana because "the ambiguous cultural messages about marijuana use are contributing to a growing acceptance of marijuana use among children and teenagers," House Joint Res. 117 (Sept. 15, 1998). The Supreme Court warned that "Congress cannot, under the

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[7] The Supreme Court's admonition in *Five Gambling Devices* bears emphasis here:

> [The FBI] entered a country club and seized slot machines not shown ever to have had any connection with interstate commerce in any manner whatever. If this is not substituting federal for state enforcement, it is difficult to know how it could be accomplished. A more local and detailed act of enforcement is hardly conceivable. These cases, if sustained, would substantially take unto the Federal Government the entire pursuit of the gambling device.

346 U.S. at 451.

pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government." *Linder v. United States*, 268 U.S. 5, 17 (1925); *see also M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) ("should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government," Court would be bound to hold law invalid); *National Federation of Republican Assemblies v. United States*, 218 F.Supp.2d 1300, 1352 (S.D. Ala. 2002) (invalidating portion of tax statute regulating state and local elections; "even when the taxing power authorizes Congress to legislate in an area otherwise reserved to the states, a statute still violates the Tenth Amendment if it was not enacted pursuant to that power"). Congress has brazenly disregarded this binding authority by using the commerce power as a pretext for making fundamental moral and health decisions for the citizens of California -- decisions traditionally entrusted exclusively to the states. *See Morrison*, 529 U.S. at 618 & n.8 ("the Founders denied the National Government [the police power] and reposed [it] in the States" "the Constitution reserves the general police power to the States"); *Lopez*, 514 U.S. at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power"); *Metropolitan*, 471 U.S. at 756 ("The States traditionally have had great latitude under their police powers to legislate as to 'the protection of the lives, limbs, health, comfort, and quiet of all persons'") (quotation omitted); *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) (recognizing states' broad police power to regulate the administration of drugs by health professionals); *Linder*, 268 U.S. at 18 ("Obviously, direct control of medical practice in the states is beyond the power of the federal government"); *Jacobson v. Massachusetts*, 197 U.S. 1, 24-25 (1905) ("The authority of the State to enact [public health legislation] is . . . commonly called the police power -- a power which the State did not surrender when becoming a member of the Union under the Constitution"). Federal courts have "a particular duty to ensure that the federal-state balance is not destroyed" when Congress "seeks to intrude upon an area of traditional state concern." *Lopez*, 514 U.S. at 580 & 581 (Kennedy, J., concurring); *see National Federation of Republican Assemblies v. United States*, 218 F.Supp.2d 1300, 1352 (S.D. Ala. 2002) ("the federalism concerns that the Tenth Amendment embodies

counsel hesitation before construing Congress's enumerated powers to intrude upon the core aspects of state sovereignty"); *United States v. Wilson*, 880 F.Supp. 621, 633 (E.D. Wis. 1995) ("The Court's role in deciding the proper use of the Commerce power . . . necessarily includes analyzing how a particular exercise of that enumerated power relates to the Tenth Amendment and the incidents of state sovereignty that the Tenth Amendment protects"); *see also GMC v. Tracy,* 519 U.S. 278, 306 (1997) ("[T]he Commerce Clause . . . was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country.").

Not only is the federal government intruding into traditional areas of state concern, but it is doing this by depriving Californians of a right and liberty deemed worthy of protection by the state. The federal structure of our Constitution is not just a political philosophy, but one which promotes functional values. The Founders recognized that the fundamental purpose of federalism is to promote individual liberty by enabling both the state and federal governments to safeguard rights and liberties from incursion by the other. Alexander Hamilton explained:

> [I]n a confederacy of the people, without exaggeration, may be said to be entirely masters of their own fate. Power being almost always the rival of power, the general government will at times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

The Federalist No. 28, at 180-81 (emphasis added) (quoted in *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991)); see also The Federalist No. 51, at 321-22 (J. Madison) ("[T]he constant aim [of the constitutional structure] is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights"). "The States in our federal system . . . remain the primary guardian of the liberty of the people." *Massachusetts v. Upton*, 466 U.S. 727, 739 (1984) (Stevens, J., concurring); *see also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 91 (1980) (applauding "very healthy trend of affording state constitutional provisions a more expansive interpretation

than this Court has given to the Federal Constitution"). The federal government has violated this core value of the Constitution by preventing California from exercising its gatekeeper-of-liberty function.

Worse still, the government is employing highly antidemocratic means to achieve its unconstitutional ends. One principal benefit of our federalist system is that it empowers states to experiment with innovative solutions to public policy issues -- "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Kennedy explained in *Lopez*:

> [Where] considerable disagreement exists about how to best accomplish [a] goal . . . the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear. ." See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973). New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
> . . . .
> The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise. . . .

Lopez, 514 U.S. at 581 & 583 (Kennedy, J., concurring); *see also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("[federalist structure of government] allows for more innovation and experimentation in government"); *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515, 530 (1945) ("the 'insulated chambers of the states' are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment."); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973) ("Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence."); *Boyle v. Anderson*, 68 F.3d 1093, 1109 (8th Cir. 1995) (noting important role of "state's effort to serve as

a 'laboratory of democracy' in the realm of health care).[8] This case, as Justice Stevens recognized in *Oakland Cannabis Buyers' Cooperative*, involves this very principle. See 532 U.S. at 502 (Stevens, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

An obvious explanation for the government's unseemly haste to stifle experimentation by the states is that it has been repeatedly embarrassed by scientific studies showing that marijuana *has* medical use. For years, the government has remained steadfast in its view that marijuana has no medical value, despite voluminous medical and scientific evidence to the contrary. To insulate this dubious position from empirical testing, the DEA has: repeatedly denied marijuana rescheduling petitions without a hearing after lengthy delays, *see Marijuana Rescheduling Petition*, No. 86-22 (DEA Sept. 6, 1988) (available at http://www.druglibrary.org/olsen/MEDICAL/YOUNG/young.html), at 3;[9] failed to monitor the results of its own (now discontinued) medical marijuana program, *see Kuromiya v. United States*, 78 F.Supp.2d 367, 374 (E.D. Pa. 1999) (noting oddity of government's failure to obtain a single useful clinical result from its dispensation of marijuana to small group of patients for medical purposes); and ignored the conclusions reached by its own judges and scientists. The most glaring example of the last category occurred in 1988 when DEA Administrative Law judge

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[8] Justice O'Connor illustrated the utility of the "states-as-laboratories" principle by providing several powerful examples:

> [T]he 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote. That novel idea did not bear national fruit for another 30 years. Wisconsin pioneered unemployment insurance, while Massachusetts initiated minimum wage laws for women and minors.

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 788-89 (1982) (O'Connor, J., concurring in part and dissenting in part).

[9] The DEA denied the latest petition to reschedule marijuana without a hearing, more than six years after it was filed. *See Gettman v. DEA*, 290 F.3d 430, 432 (D.C. Cir. 2002). Three years earlier, this Court admonished the government that "[o]ne would expect the Secretary to act expeditiously on the petition in light of the expressed concerns of the citizens of California." *Cannabis Cultivators Club*, 5 F.Supp.2d at 1105.

Francis L. Young conducted a year-long hearing, which culminated in the following groundbreaking findings:

> From the foregoing uncontroverted facts it is clear beyond any question that many people find marijuana to have, in the words of [21 U.S.C. § 812(b)(2)(B)], an "accepted medical use in treatment in the United States" in effecting relief for cancer patients. . . .
> . . . .
> To conclude otherwise, on this record, would be unreasonable, arbitrary and capricious.
>
> [M]arijuana "has a currently accepted medical use in treatment in the United States" for spasticity resulting from multiple sclerosis and other causes. It would be unreasonable, arbitrary and capricious to find otherwise.
>
> The evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence in this record.
>
> The administrative law judge recommends that the Administrator conclude that the marijuana plant considered as a whole has a currently accepted medical use in treatment in the United States, that there is no lack of accepted safety for use of it under medical supervision and that it may lawfully be transferred from Schedule I to Schedule II.

Marijuana Rescheduling Petition at 26, 34, 54 & 68 (emphasis added). The DEA Administrator rejected these findings for their purported lack of support by empirical testing. 54 Fed. Reg. 53,767, 53,768 (Dec. 29, 1989). As flimsy as this explanation may be, it is more than the DEA has provided in rejecting similar such conclusions by numerous medical and scientific organizations, including the latest study conducted by its own National Institute of Medicine. See National Institute of Medicine of the National Academy of Sciences, *Marijuana and Medicine: Assessing the Science Base* (Janet E. Joy et al. eds. 1999) (hereinafter "IOM Report"), at 53, 142, 153-54, 157, 160 & 179 (finding that marijuana is effective in treating a variety of illnesses and endorsing its limited medical use); *Conant*, 309 F.3d at 640-43 & nn.4-6 (Kozinski, J., concurring)(describing numerous studies and surveys supporting medical uses of marijuana); Select Committee on Science and Technology, House of Lords, Sess. 1997-98, Ninth Report,

Cannabis: The Scientific and Medical Evidence: Report § 8.2 (Nov. 4, 1998); *Conclusion of the National Academy of Sciences Institute of Medicine* (1982) (reprinted in *Marijuana and Health*. Washington, DC: National Academy Press). This prosecution is the latest in the government's Orwellian efforts to suppress the scientific data.

Indeed, the government is remarkably candid about it efforts to assert absolute control over the medical and scientific process. Following the passage of Proposition 215, the government issued a formal notice demanding that "all evaluations of the medical usefulness of any controlled substance [] be conducted through the Congressionally established research and approval process managed by the National Institute[] of Health (NIH) and the Food and Drug Administration (FDA)." 62 Fed. Reg. 6164, 6165 (Feb. 11, 1997). This was an extraordinary step, since the government does not typically prevent scientific and medical experimentation by the states unless there is an explicit connection to interstate commerce. *Cf. Shumake v. Travelers Ins. Co*., 383 N.W.2d 259, 265 (Mich. Ct. App. 1985) (noting that FDA did not prevent several states from allowing the intrastate distribution of the hotly disputed cancer drug Laetrile, despite FDA's ban on its interstate distribution); *United States v. Articles of Drug*, 585 F.2d 575, 585 (3d Cir. 1978) ("In order for a court properly to condemn a drug under the [Food and Drugs Act], a nexus must be shown between that drug item and commerce so as to invoke federal jurisdiction") (citing 21 U.S.C. § 355(a)); *Weigle v. Curtice Bros. Co*., 248 U.S. 285, 288 (1919) ("The Food and Drugs Act indicates that its intent is to respect the recognized line of distinction between domestic and interstate commerce . . . as the distinction is constitutional"); *see also Margaret S. v. Treen*, 597 F.Supp. 636, 675 (E.D. La. 1984) (noting that state ban on fetal experimentation is unconstitutional violation of physicians' right to conduct research). The government, then, revealed that its purpose in restricting experimentation was to control the information available to the public, so it could educate Arizonans and Californians about the "real and proven dangers of smoking marijuana" through a "message [that] will remind the public there is no medical use for smoked marijuana." 62 Fed. Reg. 6164, 6165. The glitch in this strategy came when the study the government commissioned to support its view found that marijuana does, in fact, have

a medical use. See IOM Report, at 53, 142, 153-54, 157, 160 & 179. Undeterred by science, the government resorted to criminal prosecutions like this one. This attempt to dictate the outcome of a public policy dispute by monopolizing control over the scientific process, silencing all dissent and teaching the children of dissenting states that their state policy is wrong is a most egregious affront to our federalist structure and the "states as laboratories" principle it protects. *See also Kuromiya*, 78 F.Supp. at 374 ("One hopes that both the advocates and opponents of medical marijuana will allow science to substitute for slogans.").[10]

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[10] An example of what is at stake is provided by the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which was decided in 1905, when there was a raging debate in the medical community over the efficacy of smallpox vaccinations. 197 U.S. at 30. The Supreme Court upheld Massachusetts' compulsory vaccinations laws as a proper exercise of its police powers, reasoning as follows:

> The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government. While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power.
>
> . . . .
>
> The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take; and we do not perceive that this legislation has invaded any right secured by the Federal Constitution.

197 U.S. at 34 & 38 (quotation omitted). Numerous cases since *Jacobson* have confirmed that the "states as laboratories" principle counsels strongly in favor of permitting states to choose between competing approaches when the medical data is uncertain. *See Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (holding that disagreements among medical professionals "do not tie the State's hands in setting the bounds of . . . laws. In fact, it is precisely where such

And this, so far, is to say nothing about the thousands of sick and dying Californians for whom this case may "make the difference between a relatively normal life and a life marred by suffering." *Conant*, 309 F.3d at 643 (Kozinski, J., concurring); *cf. id.* (Kozinski, J., concurring) ("[f]or the great majority of us who do not suffer from debilitation pain, or who have not watched a loved one waste away as a result of AIDS-induced anorexia, [citation], it doesn't much matter who has the better of [the medical marijuana] debate. But for patients suffering from . . . AIDS . . . and their loved ones," proper implementation of this policy is critical); *see also United States v. Randall*, 104 Wash. D. Rep. 2249, 2253 n.29 (D.C. Super. 1976) ("a law which apparently requires a person to submit to deteriorating health without proof of a significant public interest to be protected raises questions of constitutional dimensions"). The Founders recognized that no one-size-fits-all national policy can serve the needs of all communities, so they "assure[d] a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society." *Gregory*, 501 U.S. at 458. This is why they reposed the police power exclusively in the states. *See* The Federalist No. 45 at 303 (J. Madison) ("The powers reserved to the States will extend to all objects which, in the course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State"). This case illustrates the wisdom of their thinking.

A principal benefit of medical marijuana is that it provides relief from AIDS-induced anorexia, also known as "wasting syndrome," because it acts as a powerful appetite stimulant. See IOM Report at 154. Not coincidentally, California has the second highest HIV/AIDS-infected population of any state. National Center for HIV, STD and TB Prevention, Centers for Disease Control and Prevention, Department of Health and Human Services, HIV/AIDS

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disagreement exists that legislatures have been afforded the widest latitude."); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 292 (1990) ("no national consensus has yet emerged on the best solution for this difficult and sensitive problem. . . . [The] challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' of the States."); *see also Collins v. Texas*, 223 U.S. 288, 297-298 (1912) (Holmes, J.) (declaring the "right of the state to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute").

Surveillance Report: U.S. HIV and AIDS Cases Reported Through December 2001, Vol. 13, No. 2, Table 2 (2002) (reprinted at http://www.cdc.gov/hiv/stats/hasr1302.htm). The passage of the Compassionate Use Act, thus, represents a textbook example of a state's sensitivity to local needs. The federal government, on the other hand, has been extremely insensitive to persons suffering from AIDS. Undisputed evidence presented in another case reveals that the federal government terminated its own medical marijuana program precisely because of an increase in applications from AIDS sufferers. *See Kuromiya*, 78 F.Supp.2d at 373 ("these documents [] suggest that the increasing number of applications from individuals suffering from AIDS played a role in the decision to terminate the program") (citing March 29, 1991 internal memorandum at HHS expressing concern that new applications had increased in number and extended "into a new indication"). The Founders designed our federalist system of government "for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control." *See Gregory*, 501 U.S. at 458; *Alden v. Maine*, 527 U.S. 706, 759 (1999).

II. THIS PROSECUTION VIOLATES THE TENTH AMENDMENT BECAUSE IT INTRUDES UPON THE SOVEREIGN POWERS OF THE STATE OF CALIFORNIA

A. Legal Standards

This prosecution violates the Tenth Amendment for many of these same reasons. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend X. It works in tandem with the Commerce Clause to ensure that the federal government legislates in areas of truly national concern, while the states retain independent power to regulate areas better suited to local governance. *Conant*, 309 F.3d at 647 (Kozinski, J., concurring). To this end, the Amendment requires both a narrow interpretation of the federal government's commerce powers and it provides an affirmative external limitation on the government's exercise of those powers. *See Reno v. Condon*, 528 U.S. 141, 149 (2000); *New*

York v. United States, 505 U.S. 144, 157 (1991); *Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975); *ACORN v. Edwards*, 81 F.3d 1387, 1393 (5th Cir. 1996).

As with the Commerce Clause, the guiding principle of the Tenth Amendment inquiry is individual liberty. *See United States v. Wilson*, 880 F.Supp. 621, 633 (E.D. Wis. 1995). *In New York v. United States*, 505 U.S. 144 (1991), the Supreme Court explained:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

505 U.S. at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); *see also Printz v. United States*, 521 U.S. 898, 921 (1997) ("This separation of the two spheres is one of the Constitution's structural protections of liberty. . . . 'a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front") (quotation omitted). The Framers enacted the Tenth Amendment to allay lingering concerns about the extent of the national power and to eliminate any doubt that the federal government possesses only limited, enumerated powers, which must yield in some instances to the sovereignty of the states. *Alden v. Maine*, 527 U.S. 706, 713-14 (1999).

B. The Government Is Seeking To Displace A Liberty-Enhancing Policy Of The State Through Compulsion Directed At A State Officer

Precisely as the "dual sovereignty" principle of the Tenth Amendment forbids, the government is seeking to displace a liberty-enhancing state policy through compulsion directed at California officers. In August of 1998, the City of Oakland deputized Rosenthal as a city official for the express purpose of cultivating marijuana for distribution to the seriously ill. Declaration of Jeffrey Jones in Support of Defendant Rosenthal's Motions to Dismiss ("Jones Decl."), filed herewith, at ¶6. A city official is the same as a state official for Tenth Amendment purposes. *Printz*, 521 U.S. at 931 n.17. The federal government is now seeking to imprison Rosenthal simply for performing his official duties. Although Rosenthal will have to serve the time if

convicted, this suit is essentially one against the state. *Cf. id.*, 521 U.S. at 930-31; *Conant*, 309 F.3d at 645-46 (Kozinski, J., concurring); *see* Defendant Rosenthal Motion to Dismiss on Grounds of Official Immunity, filed herewith, at 14-18.

In *Printz*, the Supreme Court found that provisions of the Brady Handgun Violence Prevention Act ("Brady Act") requiring local chief law enforcement officers ("CLEOs") to conduct background checks of prospective gun purchasers violate the Tenth Amendment. The Court explained:

> While the Brady Act is directed to "individuals," it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State. . . . "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.... As such, it is no different from a suit against the State itself."

521 U.S. at 930-31 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989)).

Similarly, in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), Judge Kozinski found that federal threats to revoke the licenses of California physicians who recommend marijuana to their patients violates the Tenth Amendment. *Id.* at 645-47 (Kozinski, J., concurring). He characterized the federal government's action as a "backdoor attempt to 'control or influence the manner in which States regulate private parties,'" *id.* at 646 (quoting *Reno v. Condon*, 528 U.S. 141, 150 (2000)), and concluded with this stern warning:

> Federal efforts to regulate [medical marijuana] considerably blur the distinction between what is national and what is local. But allowing the federal government, already nearing the outer limits of its power, to act through unwilling state officials would "obliterate the distinction" entirely.

Id. at 647 (quoting *Lopez*, 514 U.S. at 557); *see also Hayden v. Keane*, 154 F.Supp.2d 610, 615 (S.D.N.Y. 2001) (noting that federal agency's attempt to nullify bail decisions of state court by issuing parole violation warrant on eve of bail hearing would undermine state autonomy and violate principles of federalism). This case is even worse.

As in *Printz* and *Conant*, the government is seeking to displace state policy through compulsion directed at a state official. *Cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) (noting that federal sentence of 35 years for crime with maximum state

sentence of 10 years "illustrates how a criminal law like this may effectively displace a policy choice made by the State"); *Cannabis Cultivators Club*, 5 F.Supp.2d at 1100 (noting that federal prohibition on all marijuana use law conflicts with California's medical marijuana policy). Unlike these cases, however, the government is acting through the harshest possible means. In *Printz*, the government required state officials to perform minor ministerial tasks. In *Conant*, it threatened to revoke professional licenses. Here, the government is seeking to imprison a state official for decades simply for performing his official duties. The Tenth Amendment "prevent[s] Congress from selecting methods of regulating which are 'drastic' invasions of state sovereignty where less intrusive approaches are available." *District of Columbia v. Train*, 521 F.2d 971, 994 (D.C. Cir. 1995), *vacated as moot*, 431 U.S. 99 (1977); *cf. Alden*, 527 U.S. at 758 ("Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States"); *Fry*, 421 U.S. at 548 (noting that wage control regulation was only mildly intrusive). So, too, does the necessary and proper clause, as the Supreme Court explained in *Printz*:

> When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty . . . it is not a 'Law . . . proper for carrying into Execution the Commerce Clause, and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'

Printz, 521 U.S. at 923-24 (quoting The Federalist No. 33, at 204 (A. Hamilton) (emphasis in original); *see also City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"). The government could have, but elected not to, file an action seeking an order enjoining Rosenthal from violating federal law, or citing him for contempt for violating this Court's prior order. *See Ex parte Young*, 209 U.S. 123, 160 (1908); *Edelman v. Jordan*, 415 U.S. 651 (1974). But, rather than attempt to vindicate its interests through this orderly process,

the government resorted to the most extreme and punitive means available. This was neither necessary, nor proper, nor sanctioned by the Tenth Amendment.[11]

Furthermore, the government's ends are just as unconstitutional as its means. The fundamental purpose of the Tenth Amendment is to empower states to protect the rights and liberties of its citizens from encroachment by a centralized national government. *See Alden*, 527 U.S. at 758 (the Framers' "unique insight [was] that freedom is enhanced by the creation of two governments, not one"); *Massachusetts v. Upton*, 466 U.S. 727, 739 (1984) (Stevens, J., concurring) (noting that the basic premise of our system of government is that states remain the primary guardian of the liberty of the people). In complete disregard of this basic federalist principle, the government has repeatedly attempted to deprive Californians of their state-conferred right to medical marijuana: first, through threats directed at California physicians, *Conant v. McCaffrey*, 172 F.R.D. 681 (N. D. Cal. 1997); then, through a civil suit directed at the cooperatives, *United States v. Cannabis Cultivators* Club, 5 F.Supp.2d 1086 (N.D. Cal. 1998); and, now, through this criminal prosecution. By intruding upon state-defined rights in this manner, the government has become the overreaching entity feared by those who drafted the Constitution. Cf. 2 Elliot 267-68 (A. Hamilton noting that there would be just cause for rejecting the Constitution if it would enable the federal government to "alter, or abrogate . . . [a State's] civil and criminal institutions"). The document they created requires that this Court return the federal government to its proper sphere.

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[11] The extreme methods employed by the government here has touched off a firestorm of controversy and has driven a wedge between state and federal officials who ordinarily cooperate in law enforcement. *See Conant*, 309 F.3d at 647 n.12 (Kozinski, J., concurring) (citing William Booth, *Santa Cruz Defies U.S. on Marijuana: City Officials Vow to Defend Medical Uses*, Wash. Post, Sept. 18, 2002); Claire Cooper, *Medical Pot Dispute Boiling Over*, Sacramento Bee, Sept. 18, 2002 (noting Santa Cruz City Council protests over arrests of directors of Wo/men's Alliance for Medical Marijuana); Mark Simon, *San Jose Cops Off DEA Squad: Chief Doesn't Want Them Raiding Pot Clubs*, S.F. Chron (Oct. 10, 2002). "It is precisely such conflicts between state and federal officials that the [Tenth Amendment] is designed in part to prevent." *Conant*, 309 F.3d at 647 n.12 (Kozinski, J., concurring); *see also Alden*, 527 U.S. at 758 ("Congress must accord States the esteem due to them as joint participants in a federal system. . . . it must respect the sovereignty of the states").

CONCLUSION

The government has instituted these extremely punitive criminal proceedings to send a message to the American public that it will not tolerate any deviation from its prohibitive drug policy. The crux of the issue involves a public health and policy dispute that has been raging for decades and, now, pits nine states against the federal government. Rather than allow the dispute to be resolved through a healthy competition for the hearts and minds of the public, as our Constitution demands, the government is seeking to eradicate the competing approach through the most oppressive means. In *Morrison* and *Lopez*, the Supreme Court invalidated federal statutes as improper exercises of the commerce power under far less egregious circumstances. In *Printz* and *Conant* (Kozinski, J., concurring), the courts did the same on Tenth Amendment grounds. Where, as here, several states have enacted legislation addressing the immediate needs of its sick and dying citizens by affording them greater liberty than the federal government provides, the principles of federalism emphasized in these cases operate with even greater force. "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

DATED: December 13, 2002 Respectfully submitted,

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