Background and Arguments:

Ashcroft v. Raich

By Fred Gardner

The U.S. Supreme Court ruling in the case called *Ashcroft et al v. Raich et al* is likely to determine if and how the federal Controlled Substances Act applies to more than 100,000 people who use cannabis as medicine under the law in California and other western states.

The case was argued Nov. 29, 2004. The ruling is expected by June 2005.

A win for patient Angel Raich, her John Doe caregivers, and her co-defendant Diane Monson, would confer legitimacy on everyone in their situation. A loss could mean widespread, low-key terror with the DEA picking off growers, distributors and persons of interest at will.

There is a spectrum of possible outcomes in between the unambiguous win and loss (See "Robert Raich on the Judgment," page 21.)

The suit started out as *Raich et al v. Ashcroft et al*. It was filed in October, 2002, in response to intermittent DEA raids, such as the raid that closed the 6th Street club in San Francisco, and the destruction of WAMM's garden north of Santa Cruz.

Angel McClary Raich, 39, was the prime mover. Her life would be at risk, she contended, if the feds raided the two caregivers who were growing her year's supply of cannabis (for no charge). Angel sought a court order enjoining the Justice Department and the Drug Enforcement Administration from carrying out any more raids.

Although painfully thin due to her afflictions, Angel (which is the name she chose for herself) has a strong ego and the will to make history —"for all of us," she says.

She comes from Stockton, from a working-class family. Her parents divorced when she was four. Angel has disturbing memories of being molested by a family member. At 12 she was put in a full-body brace to correct curvature of the spine. She developed asthma and had several cysts removed while still in high school.

She married her high school sweetheart. They worked as apartment managers in the Central Valley and had two kids. They divorced. Angel remarried and worked at a series of blue- and white-collar jobs.

Angel in 1998

At age 30 she had a serious adverse reaction to the birth-control pill, resulting in partial paralysis. An inoperable brain tumor was diagnosed. Confined to a wheelchair, in pain, she was given strong prescription painkillers —synthetic opiates, methadone and Fentanyl— which induced nausea, vomiting and other intolerable effects.

She was hospitalized and made a feeble attempt to cut her wrists. A nurse advised her to try marijuana; Angel wouldn't hear of it because it could cost her custody of her kids. When desperation ultimately led her to try the prohibited herb, her pain receded, and in due course she regained her mobility and found her calling as a martyr/advocate.

By 2000 Angel had moved from the Central Valley to the Bay Area, made friends with other patients and activists trying to implement California's medical marijuana law, and formed a nonprofit of her own called "Angel Wings Outreach."

HISTORY MAKERS? David Michael, Diane Monson, Randy Barnett, Angel McClary Raich, and Robert Raich

In the course of helping patients deal with legal problems, Angel met attorney Robert Raich. "It really became hard to see where he ended and I began," she recalls. "We became one."

Robert Raich, 48, is a rabbi's son who went to Harvard and then to law school at the University of Texas. He is almost as thin as Angel, very soft-spoken and mild-mannered. It was Raich who had the insight, back in 1998, that section 885(d) of the Controlled Substances Act, which allows undercover police officers to buy, handle, and sell narcotics, could apply to a city-authorized cannabis dispensary.

Raich represented the Oakland Cannabis Buyer's Co-op in a federal case initiated by the Clinton Justice Department in 1998. The U.S. Supreme Court eventually ruled that the OCBC couldn't claim "medical necessity" as grounds for violating the Controlled Substances Act. Whether an individual could claim "medical necessity" was not addressed in the OCBC case; it is one of the arguments Angel's lawyers made on her behalf in the present case.

Angel's co-defendants are two anonymous growers ("caregivers" in terms of California law) and Diane Monson, a 47-

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Meanwhile, Back in California...

Cities and Counties Impose Restrictions But Cannabis Clubs Keep Opening

By Dale Gieringer

Communities are passing legislation to deal with the growing number of medical cannabis dispensaries in California.

More than 120 dispensaries, patients' co-ops and delivery services are now listed on the California NORML website (www.canorml.org), up from 90 six months ago. Among them are new groups in previously underserved Southern California cities, including **San Diego,** and **Long Beach. West Hollywood** has become a major center of action in the Los Angeles area with seven dispensaries, all of which opened in the past year.

In the Bay Area, the city of **Oakland** closed four out of eight downtown dispensaries in June 2004, but afterwards six new ones cropped up in an unincorporated area to the south. Neighbors expressed dismay and **Alameda County** supervisors responded with a moratorium on new clubs. The supervisors are considering further legislation to regulate and limit the number of clubs in the county, a la Oakland, **Hayward** and **Berkeley.** Local medical cannabis activists are hopeful that they can ward off draconian restrictions proposed by the Alameda County sheriff, which include prohibiting on-site consumption, banning sales of food (including cannabis edibles), drink, and "paraphernalia," and requiring drug testing for employees.

Santa Rosa is also considering regulating cannabis clubs. City officials are strongly supportive of medical cannabis, but concerned by a recent spurt of dispensary openings.

"They see lots of young men going into these places, and don't know what to do," explains a local patient advocate.

Several cities and counties around the state have moved to pass ordinances in response to applications from would-be dispensary operators. Some towns, including **Davis, Willits, Fremont, Dixon** and **Rancho Cordova** have passed moratoriums prohibiting the opening of dispensaries pending further study by city officials. Others, including **Citrus Heights, Elk Grove, Roseville, Plymouth** and **Auburn** have passed ordinances explicitly regulating them.

San Leandro enacted a preventive moratorium aimed at warding off the flood of clubs from nearby Hayward and Alameda County. The city council voted 4-0 (with three members absent) to extend the ban until November 2006.

Sacramento County has put a freeze on new clubs while it ponders an ordinance to regulate them. At least one dispensary is already operating in the county.

The **Calaveras County** Board of Supervisors voted 3-2 to permit dispensaries to operate in professional office zones. The move came in response to a request by patient Kim Cue to set up a facility in San Andreas. However, Sheriff Dennis Downum, warned that the federal government would likely shut it down just like the Roseville club. Downum reportedly has sicced the feds on local Prop. 215 growers.

In **Riverside County, Temecula** moved to ban dispensaries after receiving an application inquiry from Compassionate Caregivers, which operates dispensaries at a half dozen locations around the state.

Many communities are proceeding cautiously pending the Supreme Court decision in the Raich *case.*

Many communities are proceeding cautiously pending the Supreme Court decision in the *Raich* case. **Placerville** approved a permit for the city's first cannabis dispensary, but only on condition that the federal government permit use of the drug. The **San Luis Obispo** City Council voted to impose a moratorium until the *Raich* ruling is announced.

Other towns in the area, including **Arroyo Grande, Grover Beach** and **Santa Maria** have been considering similar action.

In early February, 2005, **Huntington**

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"EDDY'S MEDICINAL GARDEN" in Lake County was planted to provide cannabis for more than 2,000 medical users. It was uprooted by the DEA in August, 2004. Landowner Eddy Lepp thought a federal court injunction protecting Angel Raich and her caregivers entitled him to cultivate on a large scale. Lepp now faces life in prison —one of many activists whose cases will be influenced by the outcome of the *Raich* case. See story on page 22.

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year old accountant who has her doctor's approval to use cannabis to treat disabling back pain and spasms.

In August, 2002, Monson was growing six outdoor plants in her home garden in the foothills of Oroville. DEA agents arrived to question her about a large quantity of marijuana growing elsewhere in Butte County on property that she and her husband formerly owned and on which they still held the mortgage (i.e., they were getting monthly payments from the new owners).

Diane told the law enforcers she'd been unaware of the large grow. The DEA agents said they were going to confiscate her six plants then and there. (Ordinarily the feds don't concern themselves with small quantities of marijuana.) Diane asked the Butte County Sheriff's deputies who had accompanied the feds to confirm that the plants were legal under Prop 215.

Federal-State Confrontation

A tense, three-hour standoff ensued during which the Butte County District Attorney, Mike Ramsey, asked the U.S. Attorney for the Eastern District of California, John Vincent, to call off the raid. Ramsey's support is a tribute to his integrity ("He's against medical marijuana, personally, but he respects and upholds California law," says Philip A. Denney, MD, who has an office in Redding.) It's also a tribute to the standing in the community of Monson and her recently deceased husband.

The DA of Butte County did not prevail, and as Diane Monson read aloud the text of Prop 215 ("I thought they needed to hear it," she says), DEA agents macheteed and hauled away her almost-ready-to-harvest herbal painkiller.

Angel read about Monson's plight and asked her to become a co-plaintiff so that a favorable decision by the Court could apply to patients whose illnesses were not life-threatening. The two women are represented by San Francisco defense specialist David Michael, and Randy Barnett, a professor of constitutional law at Boston University School of Law, an authority on the 9th amendment, in addition to Robert Raich.

Preliminary Injunction

In requesting an injunction they argued, among other things, that the federal government has no jurisdiction because the process by which the plants were grown for and consumed by Raich and Monson did not affect interstate commerce significantly.

The request for a preliminary injunction was denied in March 2003 by U.S. District Court Judge Martin Jenkins. Raich et al appealed to the 9th Circuit, and in October '03, made their arguments to a three-judge panel (Pregerson, Paez and Beam, on loan from the 8th Circuit). In December '03 the 9th Circuit panel (with Beam dissenting) directed the District Court Judge to issue the preliminary injunction. Jenkins did so in May 2004. It reads:

"Defendants, and their agents and officers, and any person acting in consort with them, are hereby enjoined from arresting or prosecuting Plaintiffs Angel McClary Raich and Diane Monson, seizing their medical cannabis, forfeiting their property, or seeking civil or administrative sanctions against them with respect to the intrastate, noncommercial cultivation, possession, use, and obtaining without charge of cannabis for personal medical purposes on the advice of a physician and in accordance with state law, and which is not used for distribution, sale or exchange."

The above injunction —which the Bush Administration wants the Supreme Court to quash— is what made the summer of 2004 relatively stress-free for many Californians who were growing for or distributing cannabis to patients whose doctors had approved its use.

The Key Arguments

Before appearing in Court, each side makes its arguments in written briefs, which are supplemented by "amici" (friend of the court) briefs from interested parties.

The Justice Department brief, submitted by Acting Solicitor General Paul Clement, argues that Congress had a valid goal in passing the Controlled Substances Act to regulate interstate commerce in licit and illicit drugs. "Medical" users growing their own would undermine that goal. Interstate commerce, although not affected by a few instances of medical users growing their own cannabis in California, is inevitably affected when all such instances are considered in aggregate. All marijuana-related activity is inherently economic because marijuana is a "fungible" substance —it can be bought and sold in commerce. All marijuana is essentially the same, and if the parties in this case didn't have marijuana grown for them, they'd be buying it on the market.

The government argues, "Excepting drug activity for personal use or free distribution from the sweep of the CSA would discourage the consumption of lawful controlled substances."

Among the feds' arguments is one usually left unspoken: prohibition serves the interests of the pharmaceutical corporations. As expressed in the DOJ brief, "Excepting drug activity for personal use or free distribution from the sweep of the CSA would discourage the consumption of lawful controlled substances." It would also undercut "the incentives for research and development into new legitimate drugs." That's as close as the government has come to acknowledging that wider cannabis use would jeopardize drug-company profits.

The U.S. Supreme Court overturns three out of four cases it chooses to review.

The U.S. Supreme Court overturns three out of four cases it chooses to review. The absence of Chief Justice Rehnquist (undergoing treatments for cancer) would work to Raich's advantage. As a young lawyer in the Nixon Justice Department, Rehnquist helped write the Controlled Substances Act. His questions during the Oakland Cannabis Buyers' Co-op oral argument in 2001 were overtly hostile. And he's considered results-oriented (fight the war on drugs) rather than principled (curtail the overreaching Commerce Clause). Rehnquist could still read the transcript and vote on the Raich case, even though he did not attend the oral argument. He is expected to write an opinion (or have his law clerks do so)... If there's a 4-4 tie, the opinion of the 9th Circuit stands, but doesn't become binding authority on the rest of the country.

States' Rights

Most of the *amici* briefs focus on states' rights. For those of us who remember the battles to end segregation in public schools in the South, there is

ATTORNEY RANDY BARNETT designed arguments that force Supreme Court justices to recognize California's medical-marijuana law or drop their pretense of respect for states' rights.

obvious irony in our side calling for "states' rights." It was in the name of states' rights that governors Orville Faubus and Ross Barnett barred the schoolhouse doors in Arkansas and Mississippi, while up north we were singing "The ink is black, the page is white, together we learn to read and write, to read and write. And now a child can understand this is the law of all the land - all the land!"

Another inversion involves the question of individual rights, to which so-called conservatives always pay lip service. The right to self-medicate is an individual right if ever there was one — but the conservatives are suddenly all about "public health," like a bunch of bleeding-heart liberals!

The Government briefs refer to marijuana as only "purportedly," "assertedly," "allegedly" medical.

The marijuana prohibition takes us through-the-looking glass because it's based on the Mad Hatter's premise that the drug is always harmful, never helpful. The feds and their *amici* refer to marijuana as only "purportedly," "assertedly," "allegedly" medical. But the record established at the district court level —which is supposedly all the Supreme Court goes on— consists of four declarations by the two patients and their physicians showing that cannabis does indeed have medical benefits. The government submitted no evidence to the contrary. They contend it's just a question of law.

Precedent Case

The key precedent is a 1942 case, *Wickard v. Filburn*, which established that impact on interstate commerce is not a function of individual transactions (such as caregivers growing cannabis for Angel Raich) but of all such transactions, in aggregate (all medical users growing their own or having it grown for them within California).

Filburn was an Ohio farmer who grew more wheat than he was allowed to under the Agricultural Adjustment Act, which was intended to keep prices up by limiting production. That Act was clearly trying to regulate economic activity. The Court ruled that Congress could regulate consumption of Filburn's wheat on his own farm because if all farmers acted likewise, Congress's scheme to regulate the price would be undermined.

Raich-Monson argue that *Wickard v. Filburn* is a bad analogy because Filburn sold some of the wheat he raised, and much more of it was being consumed by his cows (from which he derived milk, and which he sold occasionally) than by his family. He also raised and sold chickens and he sold eggs, i.e., he was using his wheat in running a commercial farm. Moreover, the Agricultural Adjustment Act didn't apply to farmers growing small quantities for family use. And the principle of "aggregation" established in *Wickard* did not apply in the two cases —*Lopez* (1995) and *Morrison* (2000)— by which the Rehnquist court has limited Congress's power under the Commerce Clause.

Raich-Monson's arguments are designed to appeal to "conservatives." By ruling against them, the Court would significantly extend federal power under the Commerce Clause —the last thing "conservatives" supposedly want to do. "If the Court upholds Petiitioners' claim of federal power," the Raich-Monson brief points out, "this case will supplant *Wickard* to become the most expansive interpretation of the commerce clause since the Founding, and this Court's landmark decisions in *Lopez* and *Morrison* will become dead letters."

The Historic Hearing

People anxious to watch oral arguments in *Ashcroft v. Raich* started arriving outside the U.S. Supreme Court around 4:00 a.m on Monday, Nov. 29. Frank Lucido, MD, Angel Raich's doctor, and Jeff Jones of the Oakland Cannabis Buyers Co-op were close to the front.

By 9:00 more than 200 concerned citizens had formed an L-shaped line across the wide plaza. What once would have been an unobstructed view of the Capitol (with symbolic meaning, since the Court rules on the legality of what Congress does) now consists of backhoes, trucks, ditch-witches, porta-potties, barricades (huge round tubs of concrete), cyclone fencing, wooden fencing, and non-union construction workers and rent-a-guards milling about. The sun was bright, the temperature around 40; the heavy equipment was kicking fine sand into the air as the line began to move.

More than 100 media types and others with connections had guaranteed seats. Reporters who cover the court regularly get box seats along one side of the courtroom (stage left); we in the overflow were seated behind them and behind a wall with arched openings. Not all the Justices could be seen through the arches.

Your correspondent had an excellent view of Justice Stephen Breyer (thin, bald, sepulchral) and Clarence Thomas (who looked bored, the only judge who asked no questions). A public informa-

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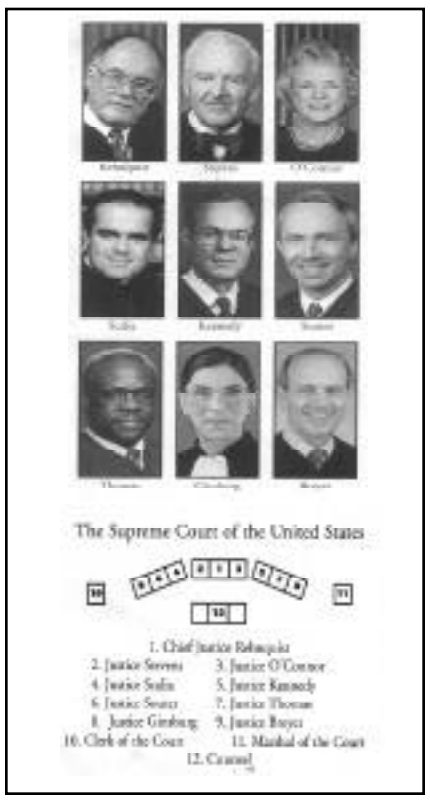
GUILTY CONSCIENCE of corporate-state honchos has led to frenzied construction of "security" barriers .

Historic Hearing *from previous page*



tion officer gave out a scorecard with pictures of the Justices, numbered 1-9, and she held up fingers to indicate who was speaking. Scalia was #4, the clean-up hitter.

Justice Stevens presided because Chief Justice Rehnquist is undergoing treatment for thyroid cancer. Stevens announced that Rehnquist intends to read the transcript and vote on *Ashcroft v. Raich*.

Activists are spinning fantasies about Rehnquist, unable to bear the nausea of chemotherapy, obtaining relief from cannabis and turning into an advocate.

The Government's Case

Each side gets half an hour to restate and defend the arguments made in written briefs that the judges have already read. The petitioner goes first.

The Department of Justice and the Drug Enforcement Administration are petitioning the Court to invalidate an injunction, issued by the 9th Circuit Court of Appeal in October 2003, allowing Angel Raich and Diane Monson to obtain and use cannabis in accordance with California law.

Acting Solicitor General Paul Clement remade the key points: Congress is entitled to enforce the Controlled Substances Act. Californians growing and using cannabis within the state will inevitably have an impact on interstate commerce. The relevant precedent was set by *Wickard v. Filburn*, a 1942 case upholding the federal government's right to limit the amount of wheat a farmer could grow for home consumption.

O'Connor interrupted Clement to ask why the *Lopez* and *Morrison* rulings shouldn't apply. In *Lopez* (1995) the Court struck down a federal law banning possession of a gun within 1,000 feet of a school because it didn't involve economic activity. *Morrison* (2000), similarly, struck down a law entitling rape victims to sue assailants in federal court. The *Lopez* and *Morrison* rulings were said to reflect the Court's "new federalism," a tilt towards states' rights.

Lopez and *Morrison* did not undo but "preserved" *Wickard*, said Clement.

O'Connor noted that the marijuana used by Raich and Monson did not involve interstate commerce. But inevitably some marijuana would be diverted into interstate commerce, said Clement, if all California's medical users and their growers became legal.

O'Connor's tone implied that she was trying to poke holes in the government's position, but she could have been trying to elicit winning arguments to employ on behalf of the government in the Supremes' internal debate.

O'Connor asked whether California law enforcement wouldn't suffice to ban diversion to the non-medical market. Marijuana is "fungible," said Clement, meaning there's no way to distinguish "medical" marijuana from the non-medical kind; one could be sold instead of the other.

Scalia pointed out a difference between *Wickard* and *Raich:* "Congress presumably wanted to *foster* interstate commerce in wheat. Congress doesn't want interstate commerce in marijuana."

Clement repeated that diversion of marijuana was inevitable in an annual national market of $10.5 billion. "Any little island of lawful possession" would undermine regulation by Congress.

Clement falsely stated that any beneficial effects of marijuana could be obtained legally via Marinol.

Clement falsely stated that any beneficial effects of marijuana could be obtained legally via Marinol. "To the extent there is anything beneficial, healthwise, in marijuana, it's THC, which has been isolated and provided in a pill form." Herbal cannabis contains hundreds of other compounds, some of which exert modulating effects. Precise dosage and immediate onset can be achieved by smoking.

Justice Ginsburg noted that one of the plaintiffs had taken "30-odd drugs and none of them worked." Would she have a defense if the federal government were to prosecute her?

The Oakland CBC ruling left open the question of whether individual patients, as opposed to clubs, could invoke medical necessity.

Such a prosecution would be "unlikely," Clement said, but the Oakland CBC ruling would preclude a medical-necessity defense. [Not true —the OCBC ruling left open the question of whether individual patients, as opposed to clubs, could invoke medical necessity.]

Justice Kennedy asked about the impact on price if Californians were allowed to grow their own marijuana for medical use. "I think the price would go down," Clement said. That would be the opposite of what Congress wants.

"When the government thinks that something is dangerous, it tries to prohiit it," the General solicitously explained. "Part of the effort of prohibiting it is going to lead to a black market, where the prohibition actually would force the price up... Although not primarily designed as a price regulation, the Controlled Substances Act does have the effect of increasing the price for marijuana in a way that stamps down demand." (Theoretically, General; but in reality it also creates price supports for manufacturers and distributors. Not to mention all that work for law enforcement.)

Clement again brought up Marinol. Sales of this "more helpful substance" would be lowered if people could grow and use cannabis —an obvious impact on interstate commerce. "The manufacturing [of Marinol] provides an unambiguous hook for Congress to exercise its Commerce Clause authority." One wonders if that was a factor in the decision to legalize Marinol in the 1980s.

Justice Stevens asked if the Controlled Substances Act "trumps the independent judgment of the physicians who prescribe it?"

Clement: "the federal regulatory regime does not allow individual patients or doctors to exempt themselves out of that regime." (Next time you're sick, call a Congressman.)

Stevens asked if a "judicial tribunal" could find, contrary to Congress, that marijuana is effective medicine.

Clement played the Marinol card again.

Only if the case involved an FDA review of the scheduling decision, according to Clement. He played the Marinol card again. "It's wrong to assume that there's any inherent hostility to the substance at issue here. I mean, the FDA, for example, rescheduled Marinol from Schedule II to Schedule III." (Which shows that the FDA is not inherently hostile to synthetic corporate drugs.)

Ginsburg —who has had surgery for breast-cancer and almost certainly knows people who have used marijuana for nausea and pain— asked if there had been any challenges to marijuana's Schedule I status. Clement said there'd been "a number of those petitions," as if the reviews had been fair and unbiased.

He said the Institute of Medicine study had concluded "whatever benefits there may be for the individual components in marijuana, smoked marijuana itself really doesn't have any future as medicine" because the plant contains too many chemical components to evaluate, and "smoking is harmful." [The Institute of Medicine Report is like the Bible, you can quote it to make any point.]

Clement came close to saying that marijuana is not medicine because it doesn't come from the pharmaceutical industry. "A big part of the process of medicine, generally, is to take raw, crude material that somebody could grow in their garden, and actually have people who do this for a living get involved in a process of synthesizing and isolating the beneficial components, and then manufacturing and making that available."

One more plug for Marinol: "What does have a future for medicine is an effort to synthesize and isolate the beneficial component. That's been done with Marinol... It takes longer to get into the bloodstream; but that's also one of the reasons why the FDA has made a judgment that Marinol is less subject to abuse."

The Citizens' Case

Randy Barnett, a libertarian professor of constitutional law, argued for Raich-Monson that their activity —growing and using cannabis as medicine— had been entirely intrastate and non-economic. The feds need not ban such activity in order to regulate illicit drugs.

In response to questions from Kennedy, Barnett said that the fungibility of marijuana does not mean possession for personal medical use is economic activity.

Scalia compared possessing marijuana for medical use to owning a plant or animal protected by the Endangered Species Act. Barnett said that banning ownership of endanged species might be "an essential part of a larger regulatory scheme." Owning marijuana for personal medical use was "isolated by the State of California" and policed by the state.

"I understand that there are some communes that grow marijuana for the medical use of all of the members of the commune." —Antonin Scalia

Scalia was skeptical that California could "isolate" the activity to medical users. He said, "I understand that there are some communes that grow marijuana for the medical use of all of the members of the commune."

Barnett said that California law would not allow "buying and selling." Scalia was not mollified. "No, no, they're not buying and selling. I mean, you can't prove they're buying and selling. There are just a whole lot of people there with alleged medical needs."

Justices Breyer and Souter pursued the point that California couldn't effectively limit the set of medical users. Breyer foresaw large numbers of cannabis consumers resulting in lowered prices, thus undermining the feds' ability to control contraband. Barnett implied that the government's figure of 100,000 overestimated the number of medical users in California. [Barnett attributed the high estimate to NORML. It was first published in the Spring '04 *O'Shaughnessy's,* based on input from Dale Gieringer of Cal NORML, and seems like an underestimate today. It felt odd to hear Barnett argue "it's a very small fraction of persons that would be involved" if the feds allowed medical marijuana use. In fact, millions would be better off using marijuana than using pharmaceutical anti-depressants, analgesics, anti-emetics, etc.]

Ginsburg asked whether a ruling for Raich-Monson would authorize cultivation of marijuana by medical users in states that hadn't legalized it. Barnett said it depended on how the Court's ruling was crafted. If the activity is non-economic, Congress can regulate only as needed "to enforce a broader regulatory scheme." Congress doesn't have to ban medical use of cannabis in order to limit interstate commerce in contraband.

Scalia asked how the *Raich* case differed from *Wickard v. Filburn*, in which a family was eating their homegrown wheat. Barnett said *Filburn* was also feeding wheat to livestock that were sold on the market: "The wheat was grown as part of a commercial enterprise." The Wickard aggregation principle only applies to activity that is commercial in nature, Barnett argued; the aggregated effects of non-commercial activity are irrelevant.

Stevens asked about the likely effect on the price of marijuana on the interstate market (if Raich prevailed). Barnett, not sounding totally sure, predicted "a slight trivial reduction." Stevens disagreed.

Souter sounded skeptical about Barnett's "argument for triviality." He said, "I take it you accept the assump-

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tion that the more people who are involved —if there are millions and millions, it is unlikely that this licensed activity is going to be without an effect on the market. So the whole argument boils down to how many people are going to be involved..."

Souter then asked the population of California and Barnett couldn't provide the answer. (Kennedy did: 34 million.) Souter tried to estimate how many might be in chemotherapy —100,000? His point was, "isn't it economic activity if it has a large effect on the market?"

Barnett differentiated economic activity from personal activity by using prostitution as an example of the former. "We could be talking about virtually the same act," but that does not make sex within marriage economic activity. The nature of the activity determines if it is economic, Barnett argued.

"Medicine by regulation is better than medicine by referendum." —Justice Stephen Breyer (echoing Dr. Harold Varmus)

At this point Breyer suggested that Raich-Monson should petition the FDA! He sounded like a civics teacher explaining how (and that) the system works "They would say to the FDA, 'FDA, take this off the list. You must take it off the list if it has an accepted medical use and it isn't lacking in safety... And while the FDA can make mistakes, I guess medicine by regulation is better than medicine by referendum." This last phrase was quoted by every reporter who filed a story. It echoes the enlightened-sounding but very elitist comment of Breyer's friend, Dr. Harold Varmus, who was director of the National Institutes of Health when Prop 215 passed: "Nobody wants to settle medical issues by plebiscite."

[Varmus convened a panel of "experts" to settle the issue. That was back in February, 1997.]

Barnett urged Breyer to read the amicus brief written by Rick Doblin, PhD, describing the endless runaround that would-be researchers have gotten over the years from DEA, NIDA, and HHS [see story on page 7].

Barnett also pointed out that the Institute of Medicine Report acknowledges that some people benefit even from smoked marijuana. Barnett's tone was slightly apologetic (smoking, the sin of all time!) and he missed an opportunity to inform the Justices that for nausea there is no better drug and delivery system than herbal cannabis and inhalation.

Kennedy asked if prescriptions were limited to cases where marijuana saved lives. "It is limited to a list of illnesses," said Barnett, instead of acknowledging the open-ended wording of California law and the doctors' gatekeeping role.

Ginsburg asked a final procedural question: can you enjoin criminal prosecutions? Barnett said Raich and Monson were seeking to enjoin the seizure of marijuana, which had already occurred.

Clement, in the few minutes he had reserved for rebuttal, emphasized that the case wasn't about two individuals. He repeated estimates of 100,000 to 170,000 medical users in California. He quoted the broad definition of illness that can be treated by cannabis under California law. He cited a California case in which the defendant, caught with 19 separately packed ounces of marijuana and a scale, was allowed to present a "medical-user" defense. Clement also cited the WAMM case, in which 250 cannabis users —a vast hoard!— claimed protection under the law.

Carrying the Message

Diane Monson and Angel Raich addressed the media after the U.S. Supreme Court heard their case. Publicity around the case has reenforced public understanding that marijuana is safe and effective medicine. A CNN poll the day after the hearing favored Raich-Monson by a 93-7 margin.

Commentary

Many learned observers think the Justices' questions implied a looming victory for the federal government. Linda Greenhouse of the *New York Times*, in the press room after the hearing, predicted a 9-0 vote. However, Pebbles Trippet of the Medical Marijuana Patients Union expects support for Raich from Ginsburg, Thomas ("the commerce clause scholar on this court"), Stevens, and O'Connor (who is often a swing vote). "Anything can happen," says Trippet. Breyer's references to the FDA indicate that the Court might punt —avoid deciding the Constitutional question and extend the stall in the name of Science.

Whatever happens, coverage of the Supreme Court hearing has made the American people even more aware that marijuana is safe and effective medicine. Angel Raich and Diane Monson, although opposites in many ways, are both convincing advocates. There is a desperate edge to Angel, who looks emaciated and says urgently that she would die without cannabis (from which she derives no pleasure except pain relief). Monson is calm and businesslike —an accountant, she is living proof that cannabis use doesn't undermine one's ability to do work that requires sustained attention to detail. Her claim isn't that cannabis is keeping her alive, only that it enables her to function.

Note on Raich (The *Linder* Precedent)

By Pebbles Trippet

Raich v Ashcroft is the most significant case dealing with medical freedom to face the court since the *Roe v Wade* decision affirmed women's reproductive rights and doctors' role as gatekeepers of medical decisions.

There has never been a U.S. Supreme Court ruling on the constitutional rights of cannabis patients under state law —until now.

Raich set federal precedent for an *individual's* right to grow marijuana for medical purposes. It led to *Santa Cruz v Ashcroft*, which went further, setting precedent for medical cannabis collectives, i.e., patients engaged in *collective* cultivation of marijuana for their personal medical use under state law.

Santa Cruz v Ashcroft still stands as 9th Circuit precedent for collectives but undoubtedly will be challenged if *Raich* is reversed.

Linder v US (1925) (268 US 5) reviewed the same jurisdictional question under the Commerce Clause from the physician's perspective 80 years ago. "Obviously, direct control of medical practice in the states is beyond the power of the Federal Government."

The court concluded: without interstate commerce, the federal government has no jurisdiction to reach into the practice of medicine within a state.

The same principle applies to cannabis patients as applied to Dr. Linder. The *Linder* ruling has never been overturned as to supplying small amounts of drugs to patients for medical purposes, similar to physician-authorized self-supply of small amounts of plants.

Raich's legal team raised the *Linder* precedent in their 9th Circuit brief and their U.S. Supreme Court brief (p.41).

Mechanism of action elucidated

Robert Raich on "The Judgment"

By O'Shaughnessy's News Service

Technically, the U.S. Supreme Court will be issuing a "judgment" on the Ninth Circuit Court of Appeal's ruling that prevented the feds from interfering with patient Angel Raich and those who grow her cannabis, and Diane Monson, who grows her own. The key section of the judgment will probably be one word — "affirmed" or "reversed." The judgment could also affirm in part and reverse in part.

The judgment will be accompanied by a written opinion explaining the reasoning behind it. Individual justices may issue concurring and dissenting opinions emphasizing aspects of the case they consider important.

A straightforward affirmation or reversal could be on any number of legal grounds. The Commerce Clause was the only issue the Ninth Circuit addressed, so the opinion almost certainly will address it. But the Court could also base its ruling on grounds raised by Raich that the 9th Circuit did not address: necessity, federalism, fundamental rights and individual liberties, or a statutory interpretation of the Controlled Substances Act. All Raich needs in order to win is a majority agreeing on the result.

For example, O'Connor and Ginzburg, who've had brushes with cancer, might decide to affirm on grounds of medical necessity (warding off a greater harm). They could be joined by three conservatives seeking to limit Congressional power under the Commerce Clause. Or by Stevens, Breyer and Souter agreeing with the federalism argument (states should be "laboratories of reform").

Ever the optimist, Robert Raich says the Court could craft a favorable decision while avoiding the constitutional issues: "They could interpret the Controlled Substances Act as not broad enough." The CSA makes it "unlawful for a person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice." Therefore, Raich argues, the patient who has obtained a controlled substance via a physician's "valid order," has not violated the act.

The Court also has the option of sending the case back to the district court for a factual determination on, say, how medical cannabis use in California actually affects the price of marijuana sold on the illicit interstate market. There would then be a trial, with each side calling experts and presenting the results of surveys.

The Raich *ruling will influence how cities and counties relate to dispensaries.*

The Raich ruling will influence how cities and counties relate to dispensaries. As explained by Dale Gieringer in the story beginning on page 1, many jurisdictions have used the looming Supreme Court case to put a moratorium on cannabis clubs, limit the number allowed, or otherwise restrict their operations (can't be 1,000 feet from a school, church, or playground; no medicating on the premises, etc.). Even Oakland, which had pioneered legal distribution and where a thriving cluster of clubs had brought a moribund neighborhood to life, limited the number of clubs to four in 2004, forcing the others to move, close, or go underground. All these local bans and freezes and restrictions on dispensaries are the work of politicians who should be upholding California law. They opposed Prop 215, resented it all along, have no respect for the will of the voters, and now they can hardly wait for the federal threat to become a cruel reality.

There could be a victory for Angel Raich and/or Diane Monson that does not protect cannabis dispensaries. If the Court rules only on Commerce Clause grounds, a given city could say, "We will allow individual patients to cultivate, like Diane, and individual caregivers to give their medicine away for free, like Angel's John Does, but we still aren't going to let collectives and cooperatives exist (even though they're legal under state law)."

It all depends on how the justices frame the opinion. There is no handy scorecard we can offer to preview the Supreme Court ruling in *Raich;* there are

It all depends on how the justices frame the opinion.

too many combinations and permutations. Robert Raich emphasizes this point: "Even if we lose this case, it will not affect state and local laws currently on the books that protect medical cannabis patients. This is important because the federal government only makes about one percent of all marijuana-related arrests in this country."

Raich acknowledges that a few raids on dispensary proprietors and growers could keep all the others living in fear, "but statistically, individual patients will be 99% safe," he says. "Avoid unnecessary fear."

Raich says he learned a lesson from how the media and law enforcement "spun" the Supreme Court decision in the Oakland CBC to imply incorrectly that Prop 215 had been invalidated. In *OCBC* the Court ruled that a dispensary could not claim "medical necessity" as grounds for possessing and distributing cannabis. The Court did not rule on whether an individual had a medical-necessity defense, and in no way did the decision overturn California's medical cannabis law.

In the event of an unfavorable Raich *ruling, dispensaries will be most at risk.*

In the event of an unfavorable *Raich* ruling, dispensaries will be most at risk. Growers can try to remain anonymous, but retail establishments will have a hard time doing so. Some may fold, some may stop advertising or otherwise seek a lower profile, some may go underground. But many will continue doing business as usual and hope that the feds don't have the resources or the political will to move against them. They may take heart from the fact that when the Supreme Court ruled negatively in the OCBC case in 2001 there were only about 25 cannabis dispensaries; now there are an estimated 150.

2005 NORML Conference

"Get Up! Stand Up! Stand Up For Your Rights!"

March 31 - April 2 at the Cathedral Hill Hotel in San Francisco

Space is limited, 3 ways to pre-register: www.norml.org, 888-67-NORML, or norml@norml.org

Wednesday, March 30
6-8 pm Early Registration/Happy Hour

Thursday, March 31
9-9:20 am Welcome by Steve Dillon, Chair, NORML board of directors
9:20-9:40Cannabis Convocation, Allen St. Pierre, Executive Director, NORML
9:40-11am **2004 Pro-Cannabis Initiatives** Alaska, Ken Jacobes; Oregon, John Sajo; Montana and Future Initiatives, Rob Kampia, MPP; Massachusetts, Steve Epstein; Columbia, MO, Sterling Neeb and Dan Viets; Detroit and Ann Arbor, MI, Timothy Beck; Oakland, Judy Appel. Moderator: Dominic Holden.

1:15-2 pm **Drug Policy Reform: Taking It Directly To The People** Jack Cole, LEAP; Roger Goodman, Voluntary Lawyer Comm; Nick Eyle, ReconsiDer; Mikki Norris, Cannabis Consumer Campaign; Keith Saunders, Ph.D, MassCANN/NORML. Moderator: Cliff Thornton.
2-2:30 pm **Teens and Drugs: Reports from the Field** Marsha Rosenbaum, Ph.D, Deputy Director, Drug Policy Alliance.
2:30-4 pm **Cannabis Prohibition Victims and Survivors: Recent, Current, Prospective** Diane Munson, Valerie Leveroni Corral, Angel Raich, Brian Epis, Todd McCormick, Marissa Garcia, Moderator: Steph Sherer, ASA
4-6 Breakout Sessions
A) **Student Activism: Stoking the Reefer Revolution** Christopher Mulligan, CHEAR;Scarlett Swerdlow, Abby Bair, SSDP; Josh Manning, Matt Jones - Univ. of FL NORML; Moderator: Kris Krane.
B) **Police Tactics: Don't Become a Statistic!** Attorneys Anthony Feldstein, Omar Figueroa, Peter Vilkelis; Moderator: Norm Kent.
C) **Vaporizers & FDA Research: The Future of 'Smoking' Cannabis** Rick Doblin, Ph.D, MAPS; Dale Gieringer, Ph.D,

6:30-9 pm
NORML/High Times
Annual Art Auction and Activist Awards

Friday, April 1
9 -9:45 am **Challenges and Opportunities in Drug Policy Reform** Ethan Nadelmann, Ph.D, Drug Policy Alliance
9:45-11 am **Physicians in the Forefront** Tod Mikuriya, MD; Frank Lucido, MD; David Bearman, MD; Mollie Fry, MD; Claudia Jensen, MD; David Hadorn, MD; Philip A. Denney, MD.
11:15-1 pm**Marijuana and Good Health: Who Knew?** Robert Malamede, PhD; Phillipe Lucas, VIC; Mitch Earlywine, Ph.D, USC Greg Carter, MD. Moderator: Dale Gieringer, PhD.

1-2:30 pm **Luncheon and Keynote Speech by Rick Steves**, best-selling travel author, TV show host and NORML Advisory Board member.

2:30-3:15 pm **Cannabis Arrest Report and Use Analysis,** Jon Gettman, PhD; Fellow, George Mason University.
3:15-4 pm **High Times' History of The 'Bud' Shot:** A Pictorial & Cultural Anthology. Steve Bloom and Richard Cusick, co-editors.
4-6 pm Breakout Sessions
A) **Cannabis Cultivation: The How, Why and for What**
Participants to be announced.
B) **Medical Marijuana: State of the Law From the Pros**
Lee Berger, David Michaels, Zenia Gilg, David Nick.Moderator: William Panzer.
C) **Hemp: A Fruitful Future For Farmers**
Jack Herer, The Emperor of Hemp; Johanna Schultz and Lenda Hand, HIA; David Frankel; Terri Zeman/hemp car; Moderator: Patrick Goggins.

Saturday, April 2
10-11:15 am **Drugged Driving Tests: The Science and Policies**
Dale Gieringer, PhD; Ed Orlett, Caren Woodson, Drug Policy Alliance. Moderator: Paul Armentano.
11:15-12 pm
The Lessons of the Cape Cod Canal for Drug Legalization Arnold Trebach, PhD, Founder of the Drug Policy Foundation, Trebach Institute
12 -2 pm **Oh, Canada! Separating Myth From Reality:** Richard Cowan, www.marijuananews.com
Participants TBA
Moderator: Phillipe Lucas.

3-4:15 pm **Lessons Learned: Cannabis Prohibition and Censorship**
Michael Gray, Common Sense for Drug Policy; Michael Aldrich, PhD;Marsha Rosenbaum, PhD; Debby Goldsberry, BPG; Mikki Norris. Moderator: Keith Saunders, PhD.
4:15-6 pm
The Future is Now: Growing Grassroots Online Allen St. Pierre;
Dave Borden, DRCNet; Steven Heath, Matt Elrod, Media Awareness Project
Moderator: Richard Cowan.

8 pm 'till...
$50/person benefit for NORML and the NORML Foundation (includes hor d'ouvres, drinks and delight while mixing with fellow NORML supporters, NORML's staff, members of the National Legal Committee and board of directors). Entertainment KINDly provided by Stonetrout, The Danny Brant Band and other guests.

Space for NORML 2005 is limited, pre-register now!