

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANGEL McCLARY RAICH;)	
DIANE MONSON; JOHN DOE)	
NUMBER ONE; and JOHN DOE)	
NUMBER TWO,)	No. 04-16296
)	
Plaintiffs-Appellees)	
v.)	
)	
ALBERTO GONZALES,)	
Attorney General of the United States;)	
and KAREN P. TANDY, Administrator)	
of the Drug Enforcement Administration,)	
)	
Defendants-Appellants.)	
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**MOTION FOR SUMMARY REVERSAL AND VACATUR,
AND FOR MODIFICATION OF BRIEFING SCHEDULE**

Pursuant to Rule 27(a)(1) of the Federal Rules of Appellate Procedure and Rule 27-1 of this Court, Defendants Alberto Gonzales, Attorney General of the United States, and Karen P. Tandy, Administrator of the Drug Enforcement Administration, respectfully move for summary reversal and vacatur of the Preliminary Injunction Order entered by the district court on May 14, 2004, a copy of which is attached hereto. The district court entered the Preliminary Injunction Order following this Court's decision in Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003). That decision has now been vacated and remanded by the Supreme Court of the United States. See Gonzales v. Raich, 125 S. Ct. 2195 (2005). Consequently, the basis for the entry of

the Preliminary Injunction Order is no longer valid, and summary reversal and vacatur is warranted. Defendants also request that this Court modify the briefing schedule to defer briefing pending resolution of this motion for summary reversal and vacatur.

BACKGROUND

1. On October 9, 2002, plaintiffs Angel McClary Raich, Diane Monson, John Doe Number One, and John Doe Number Two filed suit against the Attorney General of the United States and the Administrator of the Drug Enforcement Administration, and subsequently moved for a preliminary injunction that sought to enjoin defendants from enforcing the provisions of the Controlled Substances Act against them.

2. On March 5, 2003, the district court (Jenkins, J.) denied plaintiff's motion for a preliminary injunction, holding that "the weight of precedent precludes a finding of likelihood of success on the merits * * *." Raich v. Ashcroft, 248 F. Supp.2d 918, 920 (N.D. Cal. 2003). Of particular relevance here, the district court concluded that plaintiffs had failed to establish a likelihood of success on the merits of their claim that the Controlled Substances Act's prohibitions on the cultivation and possession of marijuana exceeded Congressional authority under the Commerce Clause, holding that "[t]he Ninth Circuit has repeatedly upheld the constitutionality of the CSA as applied to marijuana," and, therefore, that it was "constrained from such a determination by the weight of precedent." Id. at 925.

3. On December 16, 2003, this Court reversed in a 2-1 decision, determining that the plaintiffs had demonstrated a strong likelihood of success on their claim that, “as applied to them, the [Controlled Substances Act] is an unconstitutional exercise of Congress’ Commerce Clause authority.” Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003). This Court therefore “remand[ed] to the district court for entry of a preliminary injunction consistent with this opinion.” Id. at 1235.

4. On May 14, 2004, the district court entered a Preliminary Injunction Order consistent with this Court’s decision. The injunction provides, in relevant part, that “during the pendency of this action, Defendants, and their agents and officers, and any person acting in concert 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 * * *.” Preliminary Injunction Order, Raich v. Ashcroft, No. 02-4872 MJJ, at 1-2 (N.D. Cal. May 14, 2004).

5. On June 23, 2004, defendants filed a notice of interlocutory appeal, and also requested that the Court stay the appeal pending action of the Supreme Court of the United States. On August 6, 2004, this Court entered a stay pending action of the

Supreme Court, and directed that, within seven days of the disposition by the Supreme Court, the parties shall file a status report or a motion for appropriate relief.

6. On June 6, 2005, the Supreme Court vacated and remanded this Court's decision. In relevant part, the Supreme Court held that "[t]he [Controlled Substances Act] is a valid exercise of federal power, even as applied to the troubling facts of this case. We accordingly vacate the judgment of the Court of Appeals." 125 S. Ct. at 2201. On July 8, 2005, the Supreme Court issued Judgment in Gonzales v. Raich. See (<http://www.supremecourtus.gov/docket/03-1454.htm>).

7. On July 6, 2005, this Court entered an order stating that the parties had not filed a status report or motion for appropriate relief within seven days of June 6, 2005, the date of the Supreme Court's decision in Gonzales v. Raich, and set a briefing schedule.

ARGUMENT

I. The Preliminary Injunction Order Should Be Summarily Reversed and Vacated in View of the Supreme Court's Dispositive Ruling in Gonzales v. Raich

The Supreme Court's decision in Gonzales v. Raich is dispositive of the sole issue on appeal in this case. The Supreme Court held that, even as applied to the plaintiffs, the Controlled Substances Act was a valid exercise of Congress' Commerce Clause authority, and vacated and remanded this Court's decision in Raich

v. Ashcroft, upon which the Preliminary Injunction Order entered by the district court was premised. Under these circumstances, the Preliminary Injunction Order should be summarily reversed and vacated, and the case should be remanded for further proceedings. See, e.g., United States v. Hooton, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (“Where the outcome of a case is beyond dispute, a motion for summary disposition is of obvious benefit to all involved.”); Fuentes-Torres v. INS, 344 F.2d 911, 912 (9th Cir. 1965) (summary disposition warranted in view of authoritative decisions of the Supreme Court); see also Joshua v. United States, 17 F.3d 378, 380 (Fed. Cir. 1994) (summary disposition “is appropriate, inter alia, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.”).

This Court also should summarily reverse and vacate the Preliminary Injunction Order forthwith. “[A] temporary injunction against enforcement [of an Act of Congress] is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect. Thus judicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise.” Heart of Atlanta Motel v. United States, 85 S. Ct. 1, 2 (1964) (Black, Circuit Justice). In this case,

following the Supreme Court's decision in Gonzales v. Raich, there is no legal basis upon which the Preliminary Injunction Order can be maintained.

In particular, although the plaintiffs have raised other claims in support of their motion for a preliminary injunction, including claims based on substantive due process and the medical necessity defense, neither the Supreme Court nor this Court has ruled on the merits of those claims. See Gonzales v. Raich, 125 S. Ct. at 2215 (stating that “[t]hese theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases.”); Raich v. Ashcroft, 352 F.3d at 1227 (“We decline to reach the appellants’ other arguments, which are based on the principles of federalism embodied in the Tenth Amendment, the appellants’ alleged fundamental rights under the Fifth and Ninth Amendments, and the doctrine of medical necessity.”). The district court, by contrast, has determined that plaintiffs are unlikely to succeed on the merits of those claims. See Raich v. Ashcroft, 248 F. Supp.2d at 931 (“All of plaintiffs’ arguments in support of their position are unavailing: the weight of precedent precludes this Court from determining that Congress’ findings in support of the CSA are insufficient to survive constitutional challenge; the CSA is not a violation of the Tenth Amendment or the Ninth Amendment; and plaintiffs cannot successfully mount a medical necessity

defense. Since plaintiffs are unable to establish any likelihood of success on the merits, their motion for preliminary injunction is DENIED.”).

Consequently, inasmuch as no court has yet determined that plaintiffs’ other claims warrant the imposition of injunctive relief, the Preliminary Injunction Order should be summarily reversed and vacated . See Turner Broadcasting Sys. v. FCC, 507 U.S. 1301, 1301 (1993) (Rehnquist, Circuit Justice) (an Act of Congress should “remain in effect pending a final decision on the merits by this Court.”) (internal quotation omitted).

II. The Briefing Schedule Should be Modified to Defer Briefing Pending this Court’s Resolution of the Motion for Summary Reversal

Defendants also respectfully request that this Court modify the briefing schedule established on July 7, 2005, to defer briefing pending this Court’s resolution of this motion for summary reversal. See United States v. Hooton, 693 F.2d at 858 (“Where the outcome of a case is beyond dispute, a motion for summary disposition is of obvious benefit to all involved.”). In this regard, we note that, the scheduling order of July 6, 2005, states that neither party had filed a status report or motion for appropriate relief within seven days of June 6, 2005, the date on which the Supreme Court issued its decision in Gonzales v. Raich. While that is true, this Court’s order of August 6, 2004, directed that, within seven days of the disposition by the Supreme

Court, the parties shall file a status report or a motion for appropriate relief. The Supreme Court did not dispose of Gonzales v. Raich until July 8, 2005, the date on which it issued Judgment pursuant to Rule 45.3 of the Rules of the Supreme Court of the United States. The instant motion, therefore, is in compliance with this Court's scheduling order of August 6, 2004, as it is being filed within seven days of the disposition by the Supreme Court in Gonzales v. Raich.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court summarily reverse and vacate the Preliminary Injunction Order entered by the district court on May 14, 2004. Defendants also respectfully request that this Court modify the briefing schedule to defer briefing pending this Court's resolution of the instant motion for summary reversal.

Respectfully submitted,



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Counsel for Defendants-Appellants

Dated: July 15, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2005, I served the foregoing Motion for Summary Reversal and Vacatur, and for Modification of Briefing Schedule by causing a copy to be served on the following counsel by Federal Express overnight:

Robert A. Raich
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and by causing a copy to be served on the following counsel by first-class mail, postage prepaid

Randy Barnett
Boston University School of Law
765 Commonwealth Ave.
Boston, MA 02138



MARK T. QUINLIVAN

ATTACHMENT

E-filing

FILED

MAY 14 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ANGEL McCLARY RAICH, DIANE
MONSON, JOHN DOE
NUMBER ONE, and JOHN DOE
NUMBER TWO,

Case No. C 02 4872 MJJ

Plaintiffs,

**PRELIMINARY INJUNCTION
ORDER**

v.

JOHN ASHCROFT, as United States
Attorney General, and KAREN
TANDY, as Administrator of the
Drug Enforcement Administration,

Defendants.

The Court having considered all the pleadings filed in this matter, the argument made by counsel, and for good cause having been shown, Plaintiffs' Motion for Preliminary Injunction is GRANTED.

In *Raich v. Ashcroft*, 352 Fed. 3d 1222 (9th Cir. 2003), the United States Court of Appeals for the Ninth Circuit held that the Plaintiffs have demonstrated a strong likelihood that "as applied to them, the [Controlled Substances Act] is an unconstitutional exercise of Congress' Commerce Clause authority." *Id.* at 1227. Accordingly,

IT IS HEREBY ORDERED THAT, during the pendency of this action Defendants, and their agents and officers, and any person acting in consort with them, are hereby enjoined from

1 arresting or prosecuting Plaintiffs Angel McClary Raich and Diane Monson, seizing their
2 medical cannabis, forfeiting their property, or seeking civil or administrative sanctions against
3 them with respect to the intrastate, noncommercial cultivation, possession, use, and obtaining
4 without charge of cannabis for personal medical purposes on the advice of a physician and in
5 accordance with state law, and which is not used for distribution, sale, or exchange; and

6 IT IS FURTHER ORDERED THAT, the terms of this injunction do not extend to
7 Plaintiffs John Doe Number One and John Doe Number Two unless and until such time as this
8 Court modifies the Preliminary Injunction to provide protection to Plaintiffs John Doe Number
9 One or John Doe Number Two, or both, in the manner set forth below; and

10 IT IS FURTHER ORDERED THAT, during the pendency of this action, Plaintiffs John
11 Doe Number One or John Doe Number Two, or both, may apply to this Court on an emergency
12 basis, pursuant to Civil Local Rule 7-10(a), to modify the Preliminary Injunction to include
13 injunctive relief that would prohibit Defendants, and their agents and officers, and any person
14 acting in consort with them, from arresting or prosecuting Plaintiffs John Doe Number One or
15 John Doe Number Two, or both, seizing their medical cannabis, forfeiting their property, or
16 seeking civil or administrative sanctions against them with respect to their intrastate,
17 noncommercial cultivation, possession, and providing without charge of cannabis for personal
18 medical purposes on the advice of a physician and in accordance with state law, *provided that*,
19 this Court will entertain such a request to modify the Preliminary Injunction only if (1) Plaintiff
20 John Doe Number One or Plaintiff John Doe Number Two, or both, reveals their identity to the
21 Court and to defendants as a John Doe Plaintiff in this action in such request, *and* (2) the Court
22 confirms that such person is a John Doe Plaintiff in this action, on the basis of the information
23 provided to the Court under seal pursuant to Exhibit A hereto; and

24 IT IS FURTHER ORDERED, that, following entry of this Order, Plaintiffs shall file with
25 the Court a completed Declaration in the form attached hereto as Exhibit A, identifying the true
26 names of the John Doe Plaintiffs and the addresses of the medical cannabis gardens they cultivate
27 for Plaintiff Angel McClary Raich. Such Declaration shall be filed under seal, and shall be kept
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1 in the Judge's chambers, not in the clerk's file for this case; and


2 IT IS FURTHER ORDERED THAT the requirement for posting security for payment of
3 any costs or damages incurred by Defendants as a result of the preliminary injunction is hereby
4 waived.

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6 **IT IS SO ORDERED.**

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8 Dated: May 14, 2004


MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Raich et al,

Plaintiff,

v.

Ashcroft et al,

Defendant.

Case Number: CV02-4872 MJJ

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 14, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: May 14, 2004

Richard W. Wieking, Clerk

By:  Deputy Clerk