No. 03-15481

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ANGEL MCCLARY RAICH, *et al.*

Plaintiffs-Appellants,

v.

ALBERTO GONZALES, as United States Attorney General, *et al.*

*Defendants-Appellees***.**

On Appeal from the United States District Court for the Northern District of California, Dist. Ct. Docket No. C 02-4872-MJJ, and on Remand from the United States Supreme Court, No. 03-1454

BRIEF FOR *AMICI CURIAE* REASON FOUNDATION AND THE CATO INSTITUTE IN SUPPORT OF APPELLANTS

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RULE 26.1 DISCLOSURE STATEMENT

There are no parent corporations or publicly held corporations that own ten percent or more of the stock of either *amici*.

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INTEREST OF *AMICI* [1]

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by

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[1] This brief is filed with the consent of all parties.

issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves the hardship caused by misguided overregulation by the federal government of medically-necessary activities permitted under state law. The federal government's attempt to prohibit patients in California from using medical cannabis in life-threatening circumstances contravenes fundamental rights and liberties retained by the people under the Ninth Amendment, and conflicts with Reason's commitment to individual liberty.

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers, the exercise of which is further limited by both enumerated and unenumerated rights. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including, notably, publication of the annual *Cato Supreme Court Review*. The

instant case raises squarely the question of the limits of the federal government's power in the context of unenumerated rights expressly recognized by the Constitution and is thus of central interest to the Cato Institute and its Center for Constitutional Studies.

ARGUMENT

In upholding Congress' general power to apply the Controlled Substances Act ("CSA") to the wholly intrastate growth, possession, and use of marijuana for medicinal purposes, the Supreme Court returned to its broad reading of the Necessary and Proper Clause as applied to activities "affecting" interstate commerce. *See Gonzales* v. *Raich*, -- U.S. --, 125 S. Ct. 2195, 2198-99, 2209 (2005) (question presented involves Congress' power under the Necessary and Proper Clause and the Commerce Clause; finding prohibition of local cultivation and use of marijuana within authority to make laws "'necessary and proper' to 'regulate Commerce * * * among the several States.'").

That holding, however, only resolved the initial "power" half of the analysis applicable when it comes to measuring the constitutional propriety of the CSA in this case. *Id.*, 125 S. Ct. 2215 (declining to reach other constitutional and common-law challenges prior to those issues being addressed by court of appeals). But even the exercise of an acknowledged federal power may be improper if it

infringes upon rights retained by the people, as such rights provide an independent check on the powers granted to the federal government. While the Framers of the Constitution indeed sought to remedy the commerce-related deficiencies of the Articles of Confederation by expanding the national government's power over commerce, they also recognized that such expanded power threatened the rights and liberties of the people and thus provided a subsequent check on federal power by adopting the Bill of Rights. And because any enumeration of the rights of the people – and hence of the limits on federal power – would necessarily be incomplete, the Framers included the Ninth Amendment as a catch-all provision reigning in such power and preserving the numerous rights of the people, rights that could never be completely catalogued in a single document. It is that Amendment, and the rights recognized therein, that confirms the impropriety of applying the CSA in this case.

I. THE NINTH AMENDMENT CONFIRMS THE EQUIVALENT STATUS OF BOTH ENUMERATED AND UNENUMERATED INDIVIDUAL RIGHTS.

The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST., Amend. IX. While the content and constitutional significance of such other rights "retained by the people" have received little consideration in constitutional litigation to date, an analysis of the text, structure,

and history of the Constitution demonstrates that those rights provide a meaningful and authoritative check on the exercise of federal power, particularly under the Necessary and Proper Clause.

As always, the starting point in any constitutional analysis is John Marshall's bedrock axiom that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible unless the words require it." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Even the most cursory reading of the Ninth Amendment demonstrates that it indeed has substantive meaning, declaring that unenumerated rights may not be disregarded – denied or disparaged in the language of the Amendment – merely because certain other rights were enumerated elsewhere in the Constitution. It is a necessary corollary of that statement that "other[]" rights, beyond those enumerated, in fact exist.

The challenge, of course, is to determine what rights, other than those specifically enumerated elsewhere, are retained by the people and what limits such rights place on federal powers enumerated or implied in the Constitution. Such a determination requires an inquiry into the history of the Ninth Amendment. That history demonstrates that the Ninth Amendment was intended and understood to recognize and preserve the founding generation's broad understanding of the

natural and inherent liberty of the people as a limit on the application of federal power in the same manner and to the same degree as the specific rights enumerated in the Bill of Rights.

During the debates regarding the new Constitution, one of the principal Anti-Federalist arguments against ratification was that the Constitution lacked a bill of rights to check the new powers to be conferred on the national government. "John DeWitt," *Essay II*, American Herald (Oct. 27, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, at 196 (Ralph Ketchum ed., 1986) (hereinafter "THE ANTI-FEDERALIST PAPERS") ("That a Constitution for the United States does not require a Bill of Rights * * * I cannot conceive."; the purpose of a Bill of Rights is to prevent "the intrusion into society of that doctrine of tacit implication [to government of all powers neither granted nor expressly reserved] which has been the favorite theme of every tyrant from the origin of all governments to the present day."); "Centinel," *Number I*, Independent Gazetteer (Oct. 5, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS, at 235 (objecting that there was no provision in the Constitution for liberty of the press and "no declaration of personal rights, premised in most free constitutions").

Federalist supporters of the Constitution initially opposed the inclusion of a Bill of Rights on two grounds. First, they argued that a Bill of Rights was

unnecessary given the limited and enumerated powers of the national government. *See, e.g.*, THE FEDERALIST NO. 84, at 513 (Hamilton) (Clinton Rossiter ed., 1961) ("Why for instance, should it be said that the liberty of press shall not be restrained, when no power is given by which restriction may be imposed?").

Second, they argued that a Bill of Rights was affirmatively dangerous in that it was impossible to list all rights and hence the inclusion of only some would imply the surrender of all others. For example, James Wilson, who represented Pennsylvania at the Constitutional Convention, argued that a complete enumeration of rights was impossible: "All the political writers, from Grotius and Puffendorf down to Vattel, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens. * * * Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 454 (Jonathan Elliot ed., 2d ed. 1836) (hereinafter ELLIOT'S DEBATES) (remarks of James Wilson in the Pennsylvania Ratifying Convention, Dec. 4, 1787). Wilson also explained the dangers of an inevitably incomplete enumeration, noting that "[i]n all societies, there are many powers and rights, which cannot be particularly enumerated. * * * If we attempt an enumeration, every thing that is not enumerated is presumed to be

given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete." 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 388 (Merrill Jensen ed., 1976) (remarks of James Wilson in the Pennsylvania Ratifying Convention, Nov. 28, 1787).[2]

James Iredell, who would later be appointed to the Supreme Court, emphasized the broad scope of the rights retained by the people, and hence the hazard of enumerating just a select few. Addressing the North Carolina Ratifying Convention, he argued that

> it would not only be useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. *Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.*

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[2] Similar concerns were echoed by Federalists elsewhere. *See, e.g.*, 4 ELLIOT'S DEBATES, at 316 (Charles Pinckney addressing South Carolina House of Representatives, Jan. 18, 1788) ("[W]e had no bill of rights inserted in our Constitution: for, as we might perhaps have omitted the enumeration of some of our rights, it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated.").

4 ELLIOT'S DEBATES, at 167 (James Iredell, North Carolina Ratifying Convention, Tuesday, July 29, 1788) (emphasis added).

The Anti-Federalists, for their part, offered two telling replies to such concerns over a Bill of Rights. First, regarding the necessity of a Bill of Rights, they (presciently) noted that the concept of limited enumerated powers offered doubtful security, particularly in light of the Necessary and Proper Clause. Cf. "Brutus," *Number I*, New York Journal (Oct. 18, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS, at 274 (criticizing the breadth of the Necessary and Proper Clause). Second, regarding the claimed danger of a Bill of Rights, the Anti-Federalists noted that Article I, sec. 9, of the proposed Constitution already enumerated certain rights such as the guarantee of the writ of habeas corpus, and hence any danger of a negative implication as to other rights already existed and could only be ameliorated by broader protections in a Bill of Rights. "Brutus," *Anti-Federalist No. 84*, available at http://www.thisnation.com/library/-antifederalist/84.html (arguing that the negative implication reason "was not the true one, why the framers of this Constitution omitted a bill of rights; if it had been, they would not have made certain reservations, while they totally omitted others of more importance"; citing provisions regarding habeas corpus, bills of attainder, and titles of nobility).

The continuing Anti-Federalist concerns over the absence of a Bill of Rights threatened to derail ratification of the Constitution and eventually led to a promise to adopt a Bill of Rights after ratification of the main body of the Constitution. That promise succeeded in mitigating Anti-Federalist concerns and the Constitution was ratified.

In the first Congress following ratification, it fell to Virginia Representative James Madison to begin to make good on the promise to adopt a Bill of Rights. In Madison's speech to Congress introducing the proposed amendments that would eventually become the Bill of Rights, he offered the following precursor to the Ninth Amendment:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

James Madison, *Speech in Congress Proposing Constitutional Amendments* (June 8, 1789), *in* JAMES MADISON, WRITINGS 443 (Jack N. Rakove ed., 1999).

While the Bill of Rights in general was a response to Anti-Federalist concerns regarding the Constitution, the Ninth Amendment was a response to both those Anti-Federalist concerns *and* the Federalist objection that a Bill of Rights

would be incomplete and hence a danger to other retained rights. Thus, in proposing the Bill of Rights to Congress, Madison directly addressed both sides of the debate. He began by recognizing the Anti-Federalist concern over the danger to liberty posed by the Constitution in the absence of a Bill of Rights:

> It is true the powers of the general government are circumscribed; they are directed to particular objects; but even if government keeps within those limits, *it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent*, * * * because in the constitution of the United States there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the government of the United States * * *.

JAMES MADISON, WRITINGS, at 447 (emphasis added).

Madison also expressly addressed the Federalist objection that a Bill of Rights would be dangerous due to the negative implication of the inevitable failure to list all of the rights retained by the people, and directly identified the proto-Ninth Amendment as his solution to that danger:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I

> have attempted it, as gentleman may see by turning to the last clause of the fourth resolution.

JAMES MADISON, WRITINGS, at 448-49 (June 8, 1789 speech in Congress). The "last clause of the fourth resolution" to which Madison refers is the language quoted, *supra* at 10, as the precursor to the Ninth Amendment. Madison's speech also illustrates the clear understanding that the retained rights of the people, whether specifically enumerated or generally recognized by the Ninth Amendment, were "exceptions to the grant of power," not merely such rights as are *left over after* a delegation of power to the national government.

Madison's speech introducing the Bill of Rights also provides considerable evidence that many of the rights enumerated in the Amendments, and the "retained" rights acknowledged by the Ninth Amendment in particular, were "natural" or independently existing rights, not merely positive rights whose force comes solely from the Constitution itself. In describing the proposed Amendments, for example, Madison explains that they cover three distinct classes of rights:

> In some instances they assert [1] those rights which are exercised by the people in forming and establishing a plan of government. In other instances, they specify [2] those *rights which are retained* when particular powers are given up to be exercised by the legislature. In other instances, they specify [3] positive rights, which may seem to result from the nature of the compact.

JAMES MADISON, WRITINGS, at 445 (bracketed numbers added for clarity). Madison also tellingly distinguished the "positive" right to trial by jury, which "cannot be considered as a natural right, but a right resulting from the social compact," from "the pre-existent rights of nature." *Id*. Both types of rights were recognized in his proposed Bill of Rights, however, and both were viewed by Madison "as essential to secure the liberty of the people." *Id*.

Madison's notes for the speech likewise confirm that the concept of "retained" rights, whether such rights were specifically enumerated or not, refers to pre-existing natural rights, not merely positive rights. In outlining the portion of his speech introducing the "Contents" of the Bill of Rights, he listed several elements contained within his proposal, the first four of which were: "1. Assertion of primitive equality &c. [¶] 2. do. of rights exerted in formg Govts. [¶] 3. natural rights retained as speach [illegible]. [¶] 4. positive rights resultg. as trial by jury." *Madison's Notes for Amendments Speech 1789*, *reprinted in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 64 (Randy E. Barnett ed., 1989) (underlining in original).[3]

[3] The last two categories of his outline, not relevant for present purposes, were: "5. Doctrinl. artics vs Depts. distinct electn. [¶] 6. moral precepts for the administration. & natl.character—as justice—economy—&c."

Madison's speech and notes introducing the proposed Bill of Rights to Congress thus provide essential evidence of the meaning of the phrase "rights * * * retained by the people" in the Ninth Amendment. Such rights were natural rights having pre-existing and independent force as a limit on the powers granted the government, not merely positive rights that have force only by virtue of their enumeration. And such retained rights include individual rights having equal stature to the subsequently enumerated, yet equally pre-existing, natural rights such as freedom of speech. By its express terms, the Ninth Amendment recognizes the continuing vitality of such rights and rebuts any implication that they have been surrendered due to the lack of specific enumeration.

After Madison's speech, his proposals were sent to a Select Committee of Congress, from whence they reemerged as a list of Proposed Amendments, including the precursor to the Ninth Amendment, quoted above, *supra* at 10.[4]

During the debates in Congress on the proposed amendments, the nature of the "rights" retained by the people notwithstanding the adoption of the Constitution was clarified by the continuing debate on whether to enumerate particular rights at

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[4] That text actually was the eleventh proposed amendment which, following alterations and the rejection of two preceding proposed amendments, eventually became the Ninth Amendment.

all. Regarding the proposed inclusion of the right of assembly, for example, Representative Theodore Sedgwick objected on the grounds that "it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutia." 1 ANNALS OF CONG. 759 (Joseph Gales & William Seaton eds., 1834). Sedgwick's understanding, representative of the general view at the time, was that the right to assemble existed independent of the Constitution or any proposed amendment; could not be alienated by the Constitution; and hence would be superior to any power granted in the Constitution. In short, he viewed the right to assemble (and many others) as a *natural* right, not a *positive* right.

That view was likewise shared by the proponents of the Bill of Rights, as reflected in the response to Sedgwick by Representative Egbert Benson: "The committee who framed this report proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all they meant to provide against was their being infringed by the Government." *Id.*

That "inherent" rights was a synonym for natural rights can be seen in Sedgwick's next response to Benson: "[I]f the committee were governed by that general principle, they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he

pleased; that he might get up when he pleased, and go to bed when he thought proper * * * ." *Id.* at 759-60.

Representative John Page's reply to Sedgwick defending the inclusion of the right of assembly in the Bill of Rights reinforced the fact that Sedgwick's examples of personal individual "inherent" liberty rights were on a par with the right of assembly. "[L]et me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights. *Id.* at 760.

That series of exchanges again illustrates that the "self-evident, unalienable," inherent, and unenumerated rights retained by the people are personal *liberty* rights that are unenumerable precisely because the concept of liberty is so broad and its applications so varied. The very point of the Ninth Amendment was to recognize and preserve such broad yet inherent rights, serving as a catch-all substitute for "a very lengthy enumeration of rights" that would nonetheless remain incomplete.[5]

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[5] Further evidence that the phrase "rights * * * retained by the people" refers to individual natural rights can be seen in an alternative draft bill of rights prepared by Connecticut Representative Roger Sherman, who served with Madison on the

Evidence from the subsequent debates over ratifying the Bill of Rights also demonstrates the breadth and force of the rights acknowledged in the Ninth Amendment. For example, Edmund Randolph, a supporter of the Bill of Rights, was reported to have objected in the Virginia Legislature that the enumerated rights "were not all that a free people would require the exercise of," and worried that the Ninth (then still the Eleventh) Amendment might be read too narrowly regarding whether "any other particular right was retained or not." 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 219 (U.S. Dep't of State 1905) (letter from Hardin

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Select Committee considering the proposed amendments. Sherman's draft second amendment read:

> *The people* have certain *natural rights* which are *retained* by them when they enter into Society, Such are the rights of Conscience in matters of religion; of acquiring property, and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.

Roger Sherman's Draft of the Bill of Rights, *in* 1 RIGHTS RETAINED BY THE PEOPLE 351 (emphasis added). What is significant here is the use of language, not the historical force of the draft itself. The reference to "natural rights which are retained by" the people echoes the language ultimately used in the Ninth Amendment and the non-exclusive list of examples of such rights illustrates that retained rights were of the same class and stature as those particular exemplars that were eventually enumerated.

Burnley to James Madison, Nov. 28, 1789) (describing Randolph's objection regarding the eleventh proposed Amendment).

The initial majority report in the Virginia Senate found similar "ground to be apprehensive, when Congress are already seen denying certain rights of the people, heretofore deemed clear and unquestionable." JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 63-64 (Richmond 1828) (entry of Dec. 12, 1789). The majority was concerned that the Ninth Amendment, "as it respects personal rights, [it] might be dangerous, because, should the rights of the people be invaded or called into question, they might be required to shew by the constitution what rights they have *retained*; and such as could not from that instrument be proved to be retained by them, they might be denied to possess." *Id.* The minority report in the Virginia Senate, however, viewed the Amendment "as tending to quiet the minds of many." *Id.* at 66-67. Notably, Randolph, the majority, and the minority in the Virginia Senate all understood the Ninth Amendment to address the protection of unenumerated individual rights and differed only on whether the language would be effective at providing certain protection in the future. In the end, of course, Randolph eventually was persuaded to put aside his concerns, the majority did likewise, and Virginia ratified the Ninth Amendment.

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The text, structure, and history of the Ninth Amendment make it abundantly clear, therefore, that its purpose was to acknowledge and protect pre-existing natural rights of the people that were viewed by the Framers as superior to the powers granted the national government. The danger to which the Ninth Amendment responded was the potential implication that the enumeration of specific rights in a Bill of Rights would become a ceiling, rather than a floor, for the rights of the people. The text of the Ninth Amendment expressly forbids such an implication and acknowledges the continuing force of other rights retained by the people – understood by all who read it to refer to natural rights and the general liberty of free men. In the face of the text and the historical evidence, the occasional suggestion that the Ninth Amendment has no effect whatsoever and describes merely the residual "rights" not ceded by the enumerated powers, *e.g.*, *United Public Workers of America (C.I.O)* v. *Mitchell*, 330 U.S. 75, 95-96 (1947), is grossly mistaken. More faithful to the Constitution are those cases that seem to recognize the Ninth Amendment as the proper textual reference point for rights beyond those enumerated. *See, e.g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 848 (1992) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth

Amendment protects. See U.S. Const., Amdt. 9."); *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 579 & n. 15 (1980) (discussing the history of the Ninth Amendment to reject a claim that the lack of enumeration of a right of the public to attend trials precluded such a right).[6]

A shift back to the proper textual and historical sources for unenumerated rights is valuable in that it adds legitimacy to an exercise that has occasionally been seen as "activism" and often been derided as judicial whim. And such a

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[6] Notwithstanding this Court's conclusion in *San Diego County Gun Rights Comm.* v. *Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996), that the Ninth Amendment does not protect the right to bear arms – a right specifically addressed elsewhere and thus perhaps better analyzed in the context of the specific enumeration – this Court's further *dicta* that the Ninth Amendment "'is not a source of rights as such,'" *id*. (citation omitted) is both beside the point and wrong in its implication. The Ninth Amendment indeed is not the *source* of the natural rights to which it refers, it is merely an acknowledgment of those rights. That acknowledgement, however, confirms that such rights indeed retain force limiting any constitutionally granted power that might deny or disparage them. To the extent this Court's *dicta* implies otherwise, it should reconsider its position in light of the historical evidence presented in this brief. And, as for Judge Posner's suggestion that the Ninth Amendment does not authorize the States to create "*new* state constitutional rights" superseding federal authority, *United States* v. *Spencer*, 160 F.3d 413, 414-15 (7th Cir. 1998) (emphasis in original), *cert. denied*, 526 U.S. 1078 (1999), that is not at all the claim of this brief. The rights protected by the Ninth Amendment are neither "new" nor the creation of the States, but rather pre-existing natural rights retained by the people. While State recognition of various rights might provide some *evidence* of whether they are among those encompassed by the broad concepts of liberty, such recognition is merely persuasive on the question of existing rights, not formative of those rights.

return to textual and historical support for the rights retained by the people might well allow for a greater protection of unenumerated rights once the proper bases for such rights are recognized and the fear of "just making things up" is reduced. There is nothing "made up" about the Framers' broad notions of liberty and the rights of the people, and there is nothing "activist" about enforcing the hard-won restraints on expanding government power that were included in the Bill of Rights and the Ninth Amendment in general. Rather, it is the mark of fidelity to the Constitution and those who adopted it to hold encroachments on individual liberty to a heightened standard rather than to merely abet the modern tendency to ignore the limits on the exercise of power. It is the latter that is activism and invention in the name of expediency, not the broad protection of liberty contemplated by the Framers.

II. IDENTIFYING, VALUING, AND PROTECTING UNENUMERATED RIGHTS.

Having established that the Ninth Amendment indeed was intended to preserve the meaningful status of unenumerated individual rights as a check on federal power, particularly the potentially expansive power implied through the Necessary and Proper Clause, it remains to identify which individual rights preserved by the Ninth Amendment have relevance to this case.

Relying on the Supreme Court's substantive due process cases, Appellants have identified the right to life, the right to control important medical decisions, and the right to avoid pain as fundamental and deeply rooted rights. Raich Br. at 11-32. From a Ninth Amendment perspective, those same rights are surely among the other rights "retained by the people," though they likely would have been thought of in more traditional terms as the "self-evident" and "unalienable Rights" to "Life, Liberty, and the Pursuit of Happiness." THE DECLARATION OF INDEPENDENCE (1776). Indeed, the Declaration and its reference to self-evident and unalienable rights are almost precisely echoed in the exchange between Representatives Sedgwick and Benson when discussing a proposed Bill of Rights in the first Congress, *see supra* at 14-15, and would certainly have been a prime exemplar of rights retained by the people. In fact, various proposed amendments and even some existing state constitutions spoke in the same terms, illustrating the common understanding of the natural and inalienable rights of the people.[7]

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[7] *See, e.g., United States Senate Legislative Journals* (Sept. 8, 1789), *reprinted in* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 40 (William Charles DiGiacomantonio, *et al.* eds., 1995) (proposed list of amendments, leading with: "That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."); THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 636 (Neil H. Cogan ed., 1997) (proposed first amendment from the

While the Framer's understanding of "retained" rights was broad in scope – recall Wilson scoffing at the notion of a complete enumeration, Iredell declaring he could add twenty or thirty rights to any list composed, and Sedgwick's seemingly dry reference to the prospect of "a very lengthy enumeration of rights," *supra* at 7, 8, 15 – such rights were, of course, not absolute and could be regulated to a certain extent. The Framers' recognized the difference between license and liberty and the need to cabin potential abuses, but they certainly would not have allowed the complete elimination of a particular liberty where there was little or no harm to others from its exercise.

Even rights specifically enumerated in the Bill of Rights are subject to a certain degree of regulation, though such regulation is reviewed with varying degrees of scrutiny. The regulation and review applied in the context of the unenumerated rights to life, liberty, and the pursuit of happiness should be treated no differently, with regulations allowed and the degree of scrutiny of such

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Virginia ratifying convention: "1st. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."); *id*. at 638 (New York Constitution: "We hold these Truths to be self-evident, that all Men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the Pursuit of Happiness.").

regulations rising or falling with the character and magnitude of the burden imposed on the right in question. Such an approach both recognizes the importance of retained rights and the practicalities of government, and should alleviate any concern that revitalizing the Ninth Amendment would be unduly disruptive.

III. PLAINTIFFS HAVE ESTABLISHED A SUBSTANTIAL AS-APPLIED CLAIM THAT THE CSA IMPROPERLY ABRIDGES THEIR UNENUMERATED RIGHTS EMBRACED WITHIN THE NINTH AMENDMENT.

Once this Court recognizes that the Ninth Amendment was intended and understood to preserve the status of then-existing natural rights as a check on government having continuing force, whether or not specifically enumerated elsewhere in the Constitution, and that such natural rights encompassed the general liberty of individuals insofar as such liberty was not incompatible with the like liberty of others, exercises of federal power that infringe on such liberty must necessarily be held to a higher standard than mere rational basis scrutiny as it has come to be applied. In this case, there is even greater reason for applying a significant degree of scrutiny to the operation of the CSA against these plaintiffs.

The opening brief for Appellants amply describes the reasons why the rights to life, to control over medical decision-making, and to access to relief from pain are "fundamental" under developed due process jurisprudence. Raich Br. at 11-32.

For much the same reasons, such rights would easily be among those "retained" by the people as recognized in the Ninth Amendment. Indeed, the Ninth Amendment acknowledges a considerably broader class of natural rights encompassing the Founders' fuller notions of human liberty, and hence, even were there some question as to the "fundamental" nature of the rights at stake here for due process purposes, they would still fall well within the scope of rights retained by the people for Ninth Amendment purposes.

Appellants' brief likewise provides ample explanation of how the CSA as applied in this case imposes a severe burden on Appellants, depriving them of any meaningful medical choice, imposing the prospect of continuing, intolerable, and unavoidable pain, and even threatening their very lives. Raich Br. at 5-8. While the rights at issue here would only be slightly burdened by a restriction on one out of a variety of effective treatments, the CSA as applied in this case forbids the *only* effective treatment available, and thus severely burdens Appellants' rights. In the context of enumerated rights such as the freedom of speech, the significance of the rights at issue and the severity of the burden would demand a substantial and well-supported justification for imposing such a burden. The Ninth Amendment demands no less with regard to unenumerated rights.

To these points *amici* would simply add two others that support the substantial nature of Appellants' claim.

First, the exercise of federal power in this case, though recently sanctioned by the Supreme Court as valid, is nonetheless at the nadir of legitimacy and strength insofar as it is based upon the Necessary and Proper Clause rather than directly on the enumerated commerce power itself. At the same time, the historical purpose and force of the Ninth Amendment should be at its maximum in a case involving the Necessary and Proper Clause because it is precisely that clause that was viewed by Madison and others as a central source of danger to the retained rights of the people; that most threatened to undermine the careful and limited enumeration of federal powers; and that was thought subject to the greatest abuse. Such fears of a broad expansion of federal powers through the Necessary and Proper Clause have indeed come to pass, thus making it all the more important that the Ninth Amendment safety-net adopted to allay those fears be allowed to operate effectively.

While the Bill of Rights enshrines a rule of equivalence between enumerated and unenumerated *rights*, it adopts the precise *opposite* rule regarding enumerated and unenumerated powers, the later being expressly reserved to the States or the People via the Tenth Amendment. That rule has as its corollary a healthy

skepticism of any expansion of the enumerated powers through the guise of the Necessary and Proper Clause. Given such skepticism, and faced with a clash between expansive claims to power and the retained rights acknowledged and protected by the Ninth Amendment, Courts should, at a minimum, reject the ordinary presumption of constitutionality attached to congressional action and instead place the burden on the government to defend its actions as a proper regulation of retained rights. *Cf. United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments * * *.").

Second, the substantive federal interest in this case is quite attenuated. Notwithstanding the bulk of the Supreme Court's discussion regarding the "effects" on commerce, the essence of the government's objection to medical marijuana is not that it poses some inherent hazard to commerce, but rather that it supposedly lacks medical *effectiveness*. That, after all, is the relevant difference between Schedule I and Schedule II drugs, and if the medical utility of marijuana were acknowledged by the government, it would then be available even *in commerce* (as opposed to the indirect "effect" on commerce here), albeit under a variety of restrictions.

In the end, the only federal interest actually at stake is the government's oddly paternalistic desire to prevent seriously ill patients from taking a drug of last resort simply because the government is not yet *convinced* that it will help them (*i.e.*, that it has a generally accepted medical use), notwithstanding the well-supported contrary experience and views of the patients and their doctors. The notion that the people have to convince the government of the *value* of non-harmful behavior before the government will permit such behavior is a strange and disturbing basis for government regulation and is squarely at odds with any notion of liberty as conceived by the founding generation.[8] And whatever may be the ability of States to adopt such an odd paternalism through their broad police powers, the State of California has made the opposite choice, and federal imposition of such local paternalism contrary to the State's own local desires, is a far stretch from the concerns that led to the Commerce Clause.[9]

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[8] To take Sedgwick's example, *supra* at 15, a federal determination that wearing a hat has no proven benefits to the wearer would not be a sufficient basis for prohibiting all hat-wearing, and the Framers would be aghast at the suggestion.

[9] None of this denies that the federal government has a valid interest in *regulating* any commerce in medical marijuana to ensure that it is used for medical purposes and does not fall into illegal channels. It is the outright prohibition of medical marijuana that imposes a severe burden on rights; a burden that would be substantially reduced under a regulatory scheme limited to the government's legitimate interests. A ruling in Appellants' favor here thus would not lead to a free-for-all of marijuana use, but rather would allow many continued regulations

CONCLUSION

For the above reasons, this Court should reverse the denial of a preliminary injunction and remand for further proceedings.

Respectfully Submitted,

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consistent with the specific rights to medical treatment and pain avoidance implicated in this case. Appellants do not suggest otherwise. Raich Br. at 40.

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of November, 2005, I caused two copies of the foregoing Brief for *Amici Curiae* to be served by Federal Express overnight delivery, postage pre-paid, on each of:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for *Amici Curiae* is proportionally spaced, has a typeface of 14 points or more, and complies with the 7,000 word type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) in that it contains 6671 words, including both text and footnotes and excluding the table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word XP. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

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