IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SACRAMENTO NONPROFIT COLLECTIVE, DBA EL CAMINO WELLNESS CENTER, a mutual benefit nonprofit collective; RYAN LANDERS, an individual; ALTERNATIVE COMMUNITY HEALTH CARE COOPERATIVE, INC. et al; MARIN ALLIANCE FOR MEDICAL MARIJUANA et al, *Plaintiffs – Appellants*, v. ERIC HOLDER, Attorney General et al, *Defendants –Appellees*. _____/	**No. 12-15991** **No. 12-55775** **No. 12-16710** D.C. No. 2:11-cv-02939-GEB-EFB Eastern District of California, Sacramento D.C. No. 3:11-cv-02585-DMS-BGS Southern District of California, San Diego D.C. No. 4:11-cv-05349-SBA Northern District of California, Oakland

APPELLANTS' PETITION FOR REHEARING *EN BANC*

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I. INTRODUCTION AND RULE 35 STATEMENT

Appellants, California medical marijuana patients and providers, seek to enjoin Appellee United States from enforcing marijuana prohibition against them, in light of their compliance with California law.

This proceeding thus involves a question of exceptional importance and of obvious national implication: do seriously ill Californians - pursuant to the Ninth Amendment, the substantive due process component of the Fifth Amendment, and *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) - have a fundamental right to possess, distribute, and use marijuana as medicine?

With this panel's Memorandum, two panels of this Court now indicate that this question (as a result of *Raich v. Gonzales*, 500 F.3d 850, 864-866 (9th Cir. 2007) (*Raich II*)) may only be decided by en banc consideration.[1] Appellants now accordingly petition for that en banc consideration.

Lawrence's applicability here is clear and undeniable. There, the Supreme Court held that, since "two persons of the same sex [ ] engag[ing] in certain intimate sexual conduct" (539 U.S. at 562) had longstanding historical acceptance

[1] *See Montana Caregivers Association v. United States*, No. 12-35110 at p. 4 ¶ 4 (9th Cir. May 15, 2013) (Appellants' argument, that per the Fifth and Ninth Amendment, they have a fundamental right "to cultivate marijuana for medical purposes .... is squarely foreclosed by *Raich II*", which can "be overturned only by calling for en banc consideration"); Memorandum, attached hereto, pp. 4-5 (same: "[a]lthough we noted in *Raich II* that the passage of time coupled with changing social views may alter the fundamental rights analysis [ ], a prior holding of this court [i.e. *Raich II*] may only be overturned through en banc consideration").

in this country, the fact that 26 States in about 25 years had re-legalized such conduct (after a brief period of nationwide prohibition) (*Id*. at 572) required that citizens' right to engage in such conduct be recognized as a fundamental Constitutional one (*Id*. at 579).

Here, since medical use of marijuana (just like the consensual adult sex in *Lawrence)* is deeply rooted in our history (*see* 500 F.3d at 865), then the fact that 22 States and the District of Columbia in less than 18 years have re-legalized such conduct (after only a brief period of nationwide prohibition)[2] requires that citizens' right to engage in such conduct be recognized as a fundamental Constitutional one.

Yet, the panel here, for reasons unstated,[3] was "unwilling" [or unable] to find that the emerging legal recognition of medical marijuana, which continues to rapidly increase (especially after *Raich II)* from 11 states to 23 in about 6 years, has reached the point that *Raich II* rightly predicted "may be upon us sooner than expected." *Id.* at 866.

The States re-legalization of medical marijuana is expanding at a rate well over one-state-per-year since 1996, a far more rapid rate than the roughly one-per-year rate of re-legalization that was enough for the *Lawrence* court. Given that most national polls show overwhelming supermajority support for medical marijuana, and about a dozen more states are poised to re-legalize medical

[2] *See* 500 F.3d at 865.
[3] *See* Memorandum, attached hereto, at p. 5, fn1.

marijuana, perhaps the real question here is: if not now, when?

II. BRIEF FACTUAL AND PROCEDURAL BACKGROUND

Various plaintiffs (Appellants here) including medical cannabis patients, cooperatives of patients and landlords of those cooperatives, from each of California's four judicial districts, filed nearly simultaneous complaints for declaratory and injunctive relief against Appellee United States and others. Appellants engage in the distribution, possession and use of medical marijuana in full compliance with California law, but their conduct is prohibited by federal law. Indeed, some of the Appellants, amid threats of prosecution, were forced to cease their state authorized but federally prohibited marijuana-related conduct.

Appellants' complaints each made multiple Constitutional challenges to the government's enforcement of marijuana prohibition against suffering ill Californians, including the single Constitutional claim at issue herein, but each district court granted the government's Federal Rule of Civil Procedure 12(b) motion to dismiss.[4] Appellants then appealed to this Court.[5]

On September 21, 2012, this Court granted Appellants' unopposed motion to consolidate the three appeals, and the matter was thereafter fully briefed.

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[4] To that end, Appellants' burden was low, as their complaint needed only allege facts from which reasonable inferences could be taken sufficient for a "plausible" claim for relief. *See, e.g, Cafasso v. Gen. Dynamics C4 Sys*., 637 F.3d 1047, 1054 (9th Cir. 2011) (*citing Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

[5] One set of plaintiffs below, those from the Central District of California, are no longer a party to this appeal for standing reasons unnecessary to state here.

On January 15, 2014, a panel of this Court affirmed. *See* Memorandum, attached hereto, filed and entered 1/15/14.

III. ARGUMENT

Appellants submit that they have a fundamental right protected by the Fifth and Ninth Amendments to the Constitution under a theory of substantive due process to "use *marijuana* to preserve bodily integrity, avoid pain, and preserve [their] life." *Raich II,* 500 F. 3d at 861, 864.

A. Any Fair Reading of *Lawrence* and *Raich II* Reflects That the Use of Marijuana as Medicine is a Fundamental Right Protected By the Constitution

Distinction as a Constitutional fundamental right applies to those rights "deeply rooted in this nation's history and traditions" and "implicit in the concept of ordered liberty." *See, e.g, Washington v. Glucksberg,* 521 U.S. 702, 720-721 (1997).

In *Lawrence v. Texas*, 539 U.S. 558, 578-9 (2003), the Supreme Court found that consensual sex between two adults, regardless of gender, was a Constitutionally mandated fundamental right, "a realm of personal liberty which the government may not enter." The *Lawrence* court so found by first finding that private sex between consenting adults had a long history of acceptance (*Id*. at 568-571), noting that it was "not until the 1970's that any State singled out same-sex relations for criminal prosecution." Id. at 570.

Then the *Lawrence* Court went about reconsidering its prior contrary decision in *Bowers* v. *Hardwick,* 478 U. S. 186 (1986) by finding that the trend of re-legalization of sodomy and homosexual sex in the States warranted reversal of *Bowers* and the Court's formal recognition and protection of the conduct at issue. Critical here is that the *Lawrence* Court was unequivocal in finding that *Bowers* was wrongly decided when it issued:

> *Bowers* was not correct when it was decided [in 1986], and it is not correct today.

Lawrence, supra, 539 U.S. 558, 578 (emphasis added).

Specifically, *Bowers* failed to appreciate the emerging recognition that sodomy had garnered in recent years:

> This emerging recognition should have been apparent when *Bowers* was decided.
> ... In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. [ ]
> ... [T]he deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.

539 U.S. 558, 572-573 (emphasis added).

So, there were basically two trends in the laws of the states that should have been recognized in *Bowers* but were not, which made the *Bowers* court holding "not correct." First, most importantly, and as noted above, there was a trend

between 1961 and 1986, a 25-year period, in which states abolished their sodomy prohibition laws at a rate of about one state per year. The trend continued, but at a slower rate for the next 18 years, so by the time of *Lawrence* in 2004, 11-12 more states followed suit until there was only 13 states that prohibited sodomy.

Second, a trend emerged in "the 1970's", where states began to specifically prohibit homosexual sex, but only 6-7 states followed suit by the time of *Bowers*, ultimately capping at nine States *(see* 539 US 558, 570); but then by the *Lawrence* decision in 2003, four of the nine went back and repealed their same-sex prohibition. (*Id.* at 571).

Here, just like at the time of *Bowers*, the medical use of marijuana has both the "deep[ ] root[s] in this nation's history and traditions" and has the re-emergence of protection under state law that warrants its designation as a fundamental Constitutional right.

> It is beyond dispute that marijuana has a long history of use — medically and otherwise —in this country. Marijuana was not regulated under federal law until Congress passed the Marihuana Tax Act of 1937, [ ], and marijuana was not prohibited under federal law until Congress passed the Controlled Substances Act in 1970. [ ]. There is considerable evidence that efforts to regulate marijuana use in the early-twentieth century targeted recreational use, but permitted medical use. *See* Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition,* 56 Va. L.Rev. 971, 1010, 1027, 1167 (1970) (noting that all twenty-two states that had prohibited marijuana by the 1930s created exceptions for medical purposes). By 1965, although possession of marijuana was a crime in all fifty states, almost all states had created exceptions for "persons for

> whom the drug had been prescribed or to whom it had been given by an authorized medical person." [ ]
>
> The history of medical marijuana use in this country took an about-face with the passage of the Controlled Substances Act in 1970.

500 F.3d 850, 865 (emphasis added).

In other words, there is no dispute that the medical use of marijuana is deeply rooted in this country's history and traditions. Of course, in 2007, this Court further found that:

> Though the *Lawrence* framework might certainly apply to the instant case, the use of medical marijuana has not obtained the degree of recognition today that private sexual conduct had obtained by 2004 in *Lawrence*. Since 1996, ten states other than California have passed laws decriminalizing in varying degrees the use, possession, manufacture, and distribution of marijuana for the seriously ill. [ ]
> ... We agree [ ] that medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law [ ]. But that legal recognition has not yet reached the point where a conclusion can be drawn that the right to use medical marijuana is "fundamental" and "implicit in the concept of ordered liberty." [ ] For the time being, this issue remains in "the arena of public debate and legislative action."[ ]
> ... For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected. ...

500 F.3d 850, 865-866 (citations omitted) (emphasis added).

Much has occurred in the 7 years since *Raich II* to show that "that day" is indeed upon us; specifically, the number of States that permit the medical use of marijuana has more than doubled to 23. Though this total state count is a mere two

or three shy of the number of states that had re-legalized sodomy at the time of *Bowers,* medical marijuana has reached that total in much less time – 18 years rather than 25.

Thus, an even stronger trend is present here than was present in *Bowers*: between 1996 and 2014, an 18 year period, 22 States and the District of Columbia permit the medical use of marijuana[6] and Maryland law is favorable to medical marijuana use short of legalization.[7] In any event, the state medical marijuana passage rate is greater than the rate present in *Bowers* of one state per year - which *Lawrence* explicitly held was wrong to ignore.

Additionally, it bears emphasis that this trend is increasing. Between 1996 and 2007, at the time of *Raich II*, the trend was one per year. In the 7 years that have followed *Raich II*, 13 more states began permitting the medical use of marijuana, a rate of close to two per year.

National polls all show an overwhelming supermajority of support for medical marijuana. *See Subsection B, infra*. Public outcry over the criminalization of marijuana is at an all-time high and has also reached a strong majority.

Almost a dozen more States are currently poised to re-legalize medical marijuana. *See Subsection D, infra.*

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[6] For an alphabetical list of these states and cites to their medical marijuana law, see infra pp. 10-11 fn 11. *See also, e.g.,* Dkt. 43; Dkt. 40 (Appellants' FRAP 28j letters).

[7] *See e.g,* Appellants' Supplemental Excerpts of Record, "SER", at 1-14.

Until this Court's en banc panel now decides this important Constitutional issue, the government would have it go down in history as the *Bowers* of medical marijuana, on the wrong side of what is a sad chapter in our nation's history, a fate that this Court should refuse to embrace.

B. National Polls Continue To Reflect Overwhelming Supermajority Support for the Medical Use of Marijuana

National polls in the years since *Raich II* have consistently reflected overwhelming and widespread support of medical marijuana.

An Associated Press / CNBC poll from April 2010 showed that **60%** of adults "favor[ed] ... legalizing the possession of small amounts of marijuana for medical purposes[ ]", while 12% were unsure and 28% opposed; and a Gallup poll from October 2010 showed that **70%** of adults "[w]ould [ ] favor [ ] making marijuana legally available for doctors to prescribe in order to reduce pain and suffering[,]" while 27% were unsure and 3% were opposed.[8]

A CBS News poll in October of 2011 showed that **77%** of Americans believe that that doctors should be allowed to prescribe small amounts of marijuana for patients suffering from serious illnesses, while only 17% believed that should not be allowed.[9]

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[8] *See, e.g.,* http://medicalmarijuana.procon.org/view.additional-resource.php?resourceID=000151

[9] *See, e.g., Poll: Public supports medical marijuana, but not full pot legalization*, CBS News, (November 18, 2011), viewed at

Most recently, a CNN/ORC Poll conducted from January 3-5, 2014 (N = 1,010 adults nationwide, margin of error ± 3) showed a whopping **88%** support for people being "allowed to legally use marijuana for medical purposes if their doctor prescribes it[ ]", while only 10% believed it should be illegal.[10]

This has translated into rapidly overwhelming legislative support for the re-legalization of medical marijuana, which will only continue until all 50 states have legalized marijuana for medical purposes in the coming years.

C. Essentially Half of the States Have Re-Legalized the Medical Use of Marijuana

22 States and the District of Columbia currently permit the medical use of marijuana.[11] As noted, this has all occurred in less than 18 years, and more than

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http://www.cbsnews.com/news/poll-public-supports-medical-marijuana-but-not-full-pot-legalization/

[10] *See, e.g.,* http://www.pollingreport.com/drugs.htm

[11] (1) Alaska (Ballot Measure 8) (1998); (2) Arizona, (Proposition 203) (2010); (3) California (Proposition 215) (1996); (4) Colorado (Ballot Amendment 20) (2000); (5) Connecticut (HB 5389) (2012); (6) Delaware (SB 17, HB 17-4) (2011); (7) District of Columbia (Amendment Act B18-622) (2010); (8) Hawaii (SB 862, HB 13-12) (2000); (9) Illinois (HB 1) (2013); (10) Maine (Ballot Question 2) (1999); (11) Maryland (has enacted two laws favorable to medical marijuana: House Bill 180, signed into law by Governor O'Malley on April 9, 2013 provides an affirmative defense to a prosecution for caregivers of medical marijuana patients; and HB 1101, signed into law on May 2, 2013, allows for the investigational use of marijuana for medical purposes by "academic medical centers") (*see* Dkt. 40); (12) Massachusetts (Ballot Question 3) (2012); (13) Michigan (Proposal 1) (2008); (14) Montana (Initiative 148) (2004); (15) Nevada (Ballot Question 9) (2000); (16) New Hampshire, (HB 573) (2013) (17) New Jersey (SB 119, HB 25-13) (2010); (18) New Mexico (SB 523, HB 32-3) (2007); (19) New York (on January 8, 2014, Governor Andrew Cuomo formally announced that he will "Launch a Medical Marijuana Program to Research the Feasibility of Medical Marijuana in NYS[;] will use existing statutory authority (The Antonio G. Olivieri Controlled Substances

half of this legislative recognition has occurred since *Raich II* in 2007.

D. At least 11 States Will Likely Re-Legalize Medical Marijuana in The Coming Months

Almost a dozen States appear to be poised to re-legalize the medical use of marijuana in the coming months.

In Florida, advocates recently gathered enough verified signatures to put a measure to legalize medical marijuana to a vote in 2014,[12] and the Florida Supreme Court just approved of the ballot language,[13] so it will be put to the voters of that state this year. Recent polls indicate overwhelming support for the measure, reflecting that anywhere from 65% - 82% of adults in Florida favor the legalization of medical marijuana.[14]

In Georgia, Republican lawmakers are poised to introduce legislation that

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Therapeutic Research Program; PHL Art. 33-A) to launch a medical marijuana research program that allows up to 20 hospitals to provide medical marijuana to patients being treated for serious illnesses ...") (*see* Dkt. 43); (20) Oregon (Ballot Measure 67) (1998); (21) Rhode Island (SB 0710, HB 33-1) (2006); (22) Vermont (SB 76, HB 645) (2004); (23) Washington (Initiative 692) (1998).

[12] *See Medical marijuana advocates meet Florida ballot goal*, Tampa Bay Times, January 24, 2014, viewed at http://www.tampabay.com/news/courts/medical-marijuana-advocates-meet-florida-ballot-goal/2162592

[13] *See, e.g.,* http://miami.cbslocal.com/2014/01/27/florida-supreme-court-clears-way-for-medical-marijuana-on-ballot/ & http://www.floridasupremecourt.org/pub_info/documents/sc13-2006.pdf

[14] *See, e.g,* http://thinkprogress.org/justice/2014/01/22/3191661/medical-marijuana-mainstream-issue/ ; http://www.miamiherald.com/2013/11/21/3769092/poll-82-percent-favor-medical.html

would legalize medical marijuana.[15] A Public Policy Polling poll was conducted on January 6 and 7, 2014 and showed that 57% of adults favored supported the medical use of marijuana, while 33% did not and 10% were unsure.[16]

In Kentucky, Senate Bill 43, with three legislative sponsors, is an act "... to establish a comprehensive system for medical cannabis ... including provisions for medical verification of need, persons allowed to cultivate, use, and possess the drug, organizations allowed to assist in providing the drug, regulation by the state Department for Public Health..." that was introduced in the senate and then sent to committee on January 13, 2014.[17] Polls from 2013 show that Kentucky adults support the idea by a whopping 78-80% margin.[18]

In Minnesota, a bipartisan group of Minnesota state lawmakers introduced legislation in 2013 to create a medical marijuana program, HF 1818/SF 1641. The legislature resumes in mid-February and its official website reflects that the bill is in committee. According to a 2013 St. Cloud State University survey, 76% of

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[15] *See, e.g.*, http://www.washingtontimes.com/news/2014/jan/23/gop-lawmakers-want-legalize-medical-marijuana-geor/

[16] 783 Georgia voters were asked "If you or a loved one suffered from a serious illness and your physician suggested that the medical use of marijuana could alleviate suffering, would you want it to be legally available for you or your loved one's use, or not." Interestingly, in the same poll, 62 percent supported ending criminal penalties for possession and use of marijuana. *See, e.g.,* http://www.atlantaprogressivenews.com/interspire/news/2014/01/22/poll-57-of-georgians-support-medical-marijuana.html

[17] *See, e.g.,* http://legiscan.com/KY/bill/SB43/2014

[18] *See, e.g.*, http://www.huffingtonpost.com/the-/kentucky-new-survey-shows_b_3726594.html

Minnesotans support legalizing medical marijuana.[19]

In Missouri, House Bill 1324 was introduced by Rep. Rory Ellinger (D) and read for first time on Jan. 13, 2014, and again on January 14, 2014, and would create the "Compassionate Use of Medical Cannabis Pilot Program Act." Defines adequate supply as "two and one-half ounces of usable cannabis during a period of fourteen days and that is derived solely from an intrastate source". The only poll results Appellants' could find through short order research was a 2013 poll which indicated a majority of Missouri voters support the legalization of medical marijuana,[20] and a 2014 poll that reflected that a majority of voters supported the legalization of marijuana for all purposes.

In North Carolina last year, Rep. Kelly Alexander, along with many co-sponsors, introduced legislation (House Bill 941) to create a compassionate medical marijuana program in his state, as he has done for the last three years.[21] Given that a recent poll by Public Policy Polling found that 63 % of North Carolinians believe doctors should be allowed to prescribe marijuana for medical

[19] http://www.sctimes.com/article/20140109/NEWS01/301090052/SCSU-Survey-Most-Minnesotans-want-legalize-medical-marijuana?nclick_check=1

[20] http://www.theweedblog.com/majority-of-missourians-support-legalizing-marijuana/

[21] *See* http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=H941&submitButton=Go

use (reportedly up from 58 percent last year),[22] this leaves is little doubt that North Carolina will re-legalize medical marijuana shortly.

In Ohio, House Bill 153 would authorize a "registered qualifying patient or visiting qualifying patient [to] engag[e] in the medical use of cannabis[.]" It was introduced and assigned to committee in 2013; bills carry over to even years in Ohio and HB 153 is still listed on the official legislature website. Recent polls show medical marijuana support at 63%- 73% of Ohioans.

In Pennsylvania, Senate Bill 1182, introduced by Sen. Daylin Leach (D) and Sen. Mike Folmer (R), is an "[a]ct providing for the medical use of cannabis in the Commonwealth of Pennsylvania." The bill was referred to Committee on January 15, 2014. A 2013 Franklin and Marshall College poll found that 82 % of respondents support the use of marijuana for medical reasons if prescribed by a doctor.[23]

In Tennessee, House Bill 1385, a bill that "decriminalizes the use of medical cannabis by a qualifying patient who is enrolled in the safe access program" was introduced on January 2, 2014 and referred to committee on January 15, 2014.

In West Virginia, House Bill 4264 creates the "Compassionate Use Act for

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[22] *See Public Policy Polling shows growing support for medical marijuana*, Stephanie Lamm, The Pendulum, January 20, 2014, viewed at http://www.elonpendulum.com/2014/01/public-policy-polling-shows-growing-support-medical-marijuana/

[23] http://www.fandm.edu/news/article/f-m-poll-shows-weak-support-for-corbett-privatized-lottery

Medical Cannabis; providing for protections for the medical use of cannabis...", for instance, setting possession limits as six ounces of usable marijuana, and allows for nonprofit registered compassion centers. The bill was Introduced by Rep. Manypenny (D) on January 23, 2014; and referred committee on January 23, 2014. A December 2013 poll by Public Policy Polling found that 56 % of West Virginians support legalizing medical marijuana for seriously ill patients, while only 34 % oppose.[24]

In Alabama (House Bill 104) and Indiana (House Bill 1184), there is legislation pending that would allow for a medical necessity defense in prosecutions for violations of state marijuana prohibition laws.

In Kansas, though it was stalled last year and never received any floor vote, State Senator David Haley, of District 4, has been recently quoted as saying he again plans to bring Senate Bill 9, a medical marijuana bill, to this year's legislative session.[25] Similarly, Mississippi has had representatives introduce medical marijuana bills during the most recent legislative session, but not receive floor

[24] *See, e.g., New poll shows growing support for medical marijuana in W.Va.*, Paul J. Nyden, WV Gazette, January 6, 2014, viewed at http://www.wvgazette.com/News/201401060075

[25] *See Kansas senator pushes for legalization of medical marijuana*, Annette Lawless, KAKE (Jan. 02, 2014), viewed at http://www.kake.com/home/headlines/Medical-marijuana-proposal--238528211.html

votes.[26] Also, in Wisconsin, SB363/AB480, a medical marijuana bill with the support of a broad coalition of legislators and likely widespread public support has been introduced,[27] but articles suggest that a handful of legislators will stall or kill the bill.[28]

Finally, it is noted that Arkansas came short by a mere 30,000 votes (2.88%) of joining the states that have legalized medical marijuana last year.

This Court is thus in a strikingly identical posture as the Supreme Court was in facing the facts before it in *Bowers*. It is likely that a dozen more states will soon join 23 other states and, being propelled by overwhelming public support, re-legalize medical marijuana. Appellants urge this Court to determine en banc that it is now time to recognize the fundamental right that seven years ago this very Court in *Raich II* predicted "may be on us sooner than expected".

CONCLUSION

For all the reasons set forth herein and further expressed in Appellants' briefs before the panel and Appellants' Rule 28(j) letters, Appellants' petition for rehearing en banc should be granted.

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[26] It should be noted, however, that Mississippi has decriminalized personal use marijuana possession. First offense possession of 30 grams (a little more than an ounce) is punishable by a $250 fine instead of jail time and a civil summons as opposed to arrest, as long as the offender provides proof of identity and a written promise to appear.

[27] http://www.immly.org/poll.htm

[28] *See* http://www.wiscnews.com/news/local/article_1f07c7d0-3255-5c25-ba4e-28a70137965e.html

Respectfully submitted,

29 January 2014

s/*David M. Michael*
DAVID M. MICHAEL

s/*Edward M. Burch*
EDWARD M. BURCH

s/*Matthew W. Kumin*
MATTHEW W. KUMIN

s/*Alan Silber*
ALAN SILBER

Attorneys for Appellants

BRIEF FORMAT CERTIFICATION

I certify that pursuant to Circuit Rules 35-4 or 40-1, the attached petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 3,998 words according to Microsoft Word 2008, the program on which it was created.

29 January 2014

s/Edward M. Burch
EDWARD M. BURCH

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that, on 29 January 2014, I caused to be electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Edward M. Burch
EDWARD M. BURCH

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 15 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SACRAMENTO NONPROFIT COLLECTIVE, DBA El Camino Wellness Center, a mutual benefit non-profit collective; RYAN LANDERS, an individual, Plaintiffs - Appellants, v. ERIC H. HOLDER, Jr., Attorney General; MICHELLE LEONHART, Administrator of the Drug Enforcement Administration; BENJAMIN B. WAGNER, U.S. Attorney for the Eastern District, Defendants - Appellees.	No. 12-15991 D.C. No. 2:11-cv-02939-GEB-EFB MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, Jr., Senior District Judge, Presiding

ALTERNATIVE COMMUNITY HEALTH CARE COOPERATIVE, INC., a not-for-profit cooperative corporation, DBA Cloud 9 Cooperative; LIGHT THE WAY, a mutual benefit non-profit	No. 12-55775 D.C. No. 3:11-cv-02585-DMS-BGS

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

collective; MOTHER EARTH'S ALTERNATIVE HEALING COOPERATIVE, INC., a not-for-profit cooperative corporation; AMERICAN TREATMENT ADVANCEMENT COOPERATIVE, INC., a mutual benefit non-profit cooperative corporation; JOY GREENFIELD, an individual,

Plaintiffs - Appellants,

v.

ERIC H. HOLDER, Jr., Attorney General; MICHELLE LEONHARTDEF, Administrator of the Drug Enforcement Administration; LAURA E. DUFFY, U.S. Attorney for the Southern District of California,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of California
Dana M. Sabraw, District Judge, Presiding

MARIN ALLIANCE FOR MEDICAL MARIJUANA, a not-for-profit association; JOHN D'AMATO, an individual; MEDITHRIVE, INC., a not-for-profit cooperative corporation, DBA MediThrive Cooperative; THE JANE PLOTITSA SHELTER TRUST, a revocable living trust; THE FELM TRUST, an irrevocable living trust; THE

No. 12-16710

D.C. No. 4:11-cv-05349-SBA

DIVINITY TREE PATIENT'S WELLNESS COOPERATIVE, INC., a not-for-profit cooperative corporation,

Plaintiffs - Appellants,

v.

ERIC H. HOLDER, Jr., Attorney General; MICHELLE LEONHART, Administrator of the Drug Enforcement Agency; MELINDA HAAG, U.S. Attorney for the Northern District of California,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of California
Saundra Brown Armstrong, Senior District Judge, Presiding

Submitted January 13, 2014**
San Francisco, California

Before: ALARCÓN, TALLMAN, and IKUTA, Circuit Judges.

In this consolidated appeal, Plaintiffs-Appellants Sacramento Nonprofit Collective and other distributors of medical marijuana as well as patients and landlords of the marijuana distributors (collectively "Appellants") appeal the decisions of three different California district courts dismissing their actions for

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The lawsuits alleged violations of Appellants' Fifth and Ninth Amendment rights and raised a judicial estoppel argument. Appellants seek, through injunctive relief against various federal law enforcement authorities, to prevent the federal prosecution of both cooperatives operating marijuana dispensaries pursuant to California state law as well as other entities affiliated with the marijuana dispensaries (such as their landlords). We review *de novo* the dismissal of a complaint by the district court pursuant to Federal Rule of Civil Procedure 12(b)(6). *W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 975 (9th Cir. 2012). And we review "a district court's application of judicial estoppel . . . for abuse of discretion." *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 992 (9th Cir. 2012).

Because "the legal issues on appeal are fairly raised by" at least one Appellant with standing, we "need not consider the standing" of John D'Amato and Ryan Landers. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943–44 (9th Cir. 2011) (en banc) (internal quotation marks omitted).

Appellants contend that the Ninth Amendment and the substantive due process component of the Fifth Amendment together protect a fundamental right to

"distribute, possess and use medical cannabis" in compliance with California state law. But this argument is squarely foreclosed by *Raich v. Gonzales (Raich II)*, 500 F.3d 850, 864–66 (9th Cir. 2007). In *Raich II*, we rejected the notion that "the Due Process Clause embraces a right to make a life-shaping decision on a physician's advice to use medical marijuana . . . when all other prescribed medications and remedies have failed." *Id.* Although we noted in *Raich II* that the passage of time coupled with changing social views may alter the fundamental rights analysis,[1] *id.* at 865–66, a prior holding of this court may only be overturned through en banc consideration, *see United States v. Parker*, 651 F.3d 1180, 1184 (9th Cir. 2011).

Second, Appellants allege that federal enforcement of the CSA violates Equal Protection because the federal ban on medical marijuana, "while permitting prescription drugs[,] has no rational basis." Assuming that Appellants did not waive this claim by failing to specifically raise it in their complaints, *see Raich II*, 500 F.3d at 868, the argument is foreclosed by our prior precedent, *see, e.g.*, *United States v. Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978) (rejecting through citation to supporting case law the argument that "[m]arijuana . . . cannot rationally

[1] Although the use of medical marijuana is more accepted today than it was in 2007, we are unwilling to declare that legal recognition of such a right has reached the point where it should be removed from "the arena of public debate and legislative action" and deemed "implicit in the concept of ordered liberty." *Raich II*, 500 F.3d at 866.

be deemed to meet the criteria required for a Schedule I controlled substance [under the CSA]"), *overruled on other grounds as recognized by United States v. Pineda-Moreno*, 688 F.3d 1087, 1090–91 (9th Cir. 2012); *see also James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir. 2012) (rejecting plaintiffs' equal protection argument that implementation of a D.C. medical marijuana initiative resulted in unequal treatment of D.C. and California residents by broadly noting that "[l]ocal decriminalization notwithstanding, the unambiguous *federal* prohibitions on medical marijuana use set forth in the CSA continue to apply in [all] jurisdictions").

Third, Appellants claim that the Government is judicially estopped from enforcing the CSA because in a prior lawsuit involving different plaintiffs, the parties entered into a joint stipulation to dismiss the sole remaining claim in that case—that the Tenth Amendment barred federal enforcement of the CSA with respect to medical marijuana use under California law—in light of the Ogden Memorandum.[2] But the Appellants over-read the statements made in both the Ogden Memorandum and during the course of the prior litigation; at no point did

[2] Appellants assert that the Medical Marijuana Guidance document referred to by the district court in the prior litigation is somehow different from the Ogden Memorandum. But the joint stipulation in the prior case makes clear that the document referred to is the Ogden Memorandum.

the Government promise not to enforce the CSA. Appellants therefore identify no clear inconsistency between the Government's current and prior positions as is required to invoke the doctrine of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001).

Nor do the Appellants demonstrate that the Government misled the court or would derive an unfair advantage if not estopped. *Id.* (describing these as other requirements for judicial estoppel). Appellants also do not allege that the Government engaged in fraud. *See Milton H. Greene Archives, Inc.*, 692 F.3d at 993–94 (noting that chicanery or fraud on the court is an important factor of judicial estoppel even if it is not a requisite element). Estoppel in this case "would compromise a governmental interest in enforcing the law" and would therefore be inappropriate. *New Hampshire*, 532 U.S. at 755.

The district courts properly dismissed Appellants' request for injunctive relief.

AFFIRMED.