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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARLA JAMES; KATHERINE ALDRICH; and VICTORIA PAPPAS,

Plaintiffs,

v.

UNITED STATES OF AMERICA; CITY OF COSTA MESA, CALIFORNIA; CITY OF LAKE FOREST, CALIFORNIA; and ERIC HOLDER, in his capacity as Attorney General of the United States,

Defendants.

No.: **SACV 12-00280 AG (MLGx)**

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PRELIMINARY INJUNCTION

Date: March 26, 2012
Time: 10:00 a.m.
Hon. Judge Andrew J. Guilford

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SUMMARY OF REPLY

At first glance, this case appears to present a simple question – why should the citizens of the District of Columbia have the right to legalize medical marijuana while the citizens of various states can only decriminalize it? Is there a rational basis for believing that medical marijuana has a greater therapeutic effect upon citizens of Washington D.C. than citizens of California?

This case, however, is not just about the rights of seriously ill and disabled patients to use and access medical marijuana. Rather, this case is about something so fundamental to the American existence that one cannot utter the words "United States" without having the core issue here come immediately to mind. That issue is voting. In a democracy, the right to vote is arguably the *most* fundamental right that, when touched upon or burdened, invokes strict scrutiny analysis.

Congress's 2009 federal law removing its 10-year proscription of Washington D.C.'s 1998 *Legalization of Marijuana for Medical Treatment* law and that allowed District citizens to vote-on and *legalize* medical marijuana cannot be rectified against the Government's claim that marijuana *possession* and *distribution* are wholly prohibited based on Congress's 1970 determination that "marijuana has 'no currently accepted medical use.'" The Government does not dispute that Congress empowered D.C. Citizens to vote-on medical marijuana legalization in 2009. Nor does it argue that the *Legalization of Marijuana for Medical Treatment Act* was not *twice* passed to Congress before it became law. Consequently, Congress's action making an *exception* for District voters to approve medical marijuana while denying that right to state voters is not a "narrowly tailored measure to achieve" its declared interest in wholly and unconditionally restricting marijuana because it has "no medical benefits worthy of an exception."

Since the interest it has proffered for foreclosing states from legalizing medical marijuana is based on the now 40-year-old *CSA*'s "unequivocal language" providing marijuana has "no *medical* value," then surely Congress's action in P.L. 111-117 allowing marijuana legalization for medical treatment in Washington D.C. is inapposite to that goal. Given that Congress then

participated in the legislative process *approving* medical marijuana legalization in the District, it follows it has determined marijuana *does* have medical value – at least in Washington D.C. In contrast, the Government's recent letters ordering closure of Costa Mesa medical marijuana collectives operating in conformance with state law confirm its anomalous conclusion that marijuana has no medical value in California. Or, perhaps the Government is saying that Californians should be subject to prosecution under the *CSA* for medical marijuana activities while D.C. citizens should not. The Government can show no rational basis or legitimate reason for deeming marijuana medically effective in Washington D.C. but not in California. Nor can it show any legitimate reason for enacting legislation that can only result in disparate treatment under the *CSA* based solely on geographic location. Whether in Washington D.C. or California, medical marijuana patients are similarly situated individuals.

As noted, the letters sent by the United States that are the subject of this application for injunctive relief explicitly recite the *CSA*'s "unequivocal" proclamation that marijuana has no medical value. The letters rely on the faulty logic that Congress, over forty years ago, deemed there can be no exception for marijuana under the *CSA* despite its making just such an exception for itself and the voters of the District of Columbia in 2009. Given that plaintiff Marla James voted to approve California's medical marijuana law in 1996 and as a state citizen her elected representatives approved collective medical marijuana cultivation and distribution in 2003, the letters sent by the Government operate to disenfranchise her. However, Congress gave that franchise back to D.C. voters while it was explicitly aware of state voters and its *CSA*. The Government has not argued that Congress's actions meet even basic *rational basis* requirements nor can it. Accordingly, those actions, which have led to the forced closure of Plaintiff James's collective and that have resulted in denial of access to her medication, in light of cases deeming similar denials of medication access not only irreparable harm but *ultimate* harm, should be enjoined by this Court.

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DISCUSSION

I. CONTRARY TO ITS ASSERTIONS OTHERWISE, THE ACTIONS OF THE FEDERAL SOVEREIGN HAVE IMPERMISSIBLY INTERFERED WITH STATE VOTING RIGHTS

During his first inaugural address on March 4, 1801, President Thomas Jefferson proclaimed:

> "All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression."

Years later, Frenchman Alexis de Tocqueville observed that, "[I]n America, the principle of the sovereignty of the people is not hidden or sterile as in certain nations; it is recognized by mores, proclaimed by the laws; it spreads with freedom and reaches its final consequences without obstacle." In his 1835 book *De la démocratie en Amerique* (*Democracy in America*[1]), Tocqueville wrote:

> "It is impossible to understand how equality will not in the end penetrate the political world as elsewhere. One cannot conceive of men eternally unequal among themselves on one point alone, equal on all others; they will therefore arrive in a given time at being equal on all … Now I know only two manners of making equality reign in the political world: rights must be given to each citizen or to no one."

A. Congress is both the national legislature and the *de facto* state legislature for Washington D.C.

Congress has "sweeping and inclusive" powers over the District, Neild v. District of Columbia, 110 F.2d 246 (1940) at 249, in "all cases where legislation is possible." Palmore v. United States, 411 U.S. 389 (1973) at 407. In the District, Congress exercises "complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other." Neild, 110 F.2d at 250-51.

When the court in Neild refers to the "limited power of a state legislature" it is denoting *limits* imposed by art. 6, cl. 2 of the U.S. Constitution (the *Supremacy Clause*), which provides:

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[1] Tocqueville, Alexis de. *Democracy in America*. (2000), Univ. of Chicago Press.

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every **state** shall be bound thereby, anything in the **constitution or laws of any state to the contrary notwithstanding**." U.S. Constitution, Art. 6, Cl. 2 (*emphasis added*).

The text of the provision itself shows that the *Supremacy Clause* is specifically directed at the **states**. Accordingly, as noted in Neild, the *Supremacy Clause* provisions are **inapplicable** to Congress no matter if it acts as the national legislature or as the *de facto* "state" legislature for Washington D.C.

The court's reference to "the limited sovereignty which Congress exercises within the boundaries of the states" relates to the federal sovereign's role as a government limited to the enumerated powers expressed in art.1, sec. 8 of the Constitution. Neild, 110 F.2d at 250-51. In Washington D.C., Congress is not restrained by the *Supremacy Clause* nor is it subject to the limitations expressed in art. 1, sec. 8[2].

B. Through its Article I plenary power over the District of Columbia, Congress approved the *Barr Amendment* to prevent District voters from legalizing medical marijuana

On October 21, 1998, after learning proposed D.C. *Initiative 59*[3] had qualified for voter consideration, Congress included Sec. 171[4] ("Section 171") in P.L. 105-277 providing, "[N]one of the funds contained in this Act may be used to conduct any ballot initiative which seeks to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the *Controlled Substances Act*[5] (21 U.S.C. 801) or any *tetrahydrocannabinols* derivative." Section 171, commonly referred to as the *Barr Amendment*, was named after its author and primary proponent, Congressman Robert Barr of Georgia. Despite the *Barr Amendment*, by the time it enacted P.L. 105-277, the D.C. Board of Elections had already printed *Initiative 59* on the ballots for the upcoming general election. Accordingly, on November 3, 1998, the voters of Washington D.C. were able to vote on *Legalization of*

[2] U.S. Constitution, Art. 1, Sec. 8.
[3] D.C. Act 13-138, Initiative 59, *Legalization of Marijuana for Medical Treatment Act* (1998).
[4] Public Law 105-277 (112 Stat. 2681) (105th Cong., 1998).
[5] 21 U.S.C. § 801, *et seq.*, federal *Controlled Substances Act.*

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Marijuana for Medical Treatment. After D.C. voters cast their ballots, the District's Board of Elections refused to count or certify the vote on *Initiative 59* citing the *Barr Amendment* prohibition.

On March 27, 2001, Congressman Barr participated in hearings[6] on *Medical Marijuana, Federal Drug Law and the Constitution's Supremacy Clause* held before the House Subcommittee on Criminal Justice, Drug Policy and Human Resources. During the hearing, Barr referred to the annual appropriations amendment named after him (the *Barr Amendment*) noting:

> "**The District of Columbia, as I know you are aware, is different. Congress does have a direct constitutional, very explicit responsibility and authority over the District of Columbia. Therefore we have jurisdiction.**
>
> It's not my goal to tell the voters in California or New Mexico or any other State what to do. I do think it is a very important issue that the citizens of each State have to decide. But that being said, I am still a little bit curious as to how you can almost sort of cavalierly get around the supremacy clause of the Constitution. If you accept the fact, which is one of the basic precepts of our Federal system of government, **that you cannot have <u>two sovereigns</u> with an interest in certain behavior, have different laws, how can you really maintain that you have respect for our Federal system of government *<u>if you say that in any one, and if you say in any one, then you have to open the door to all sorts of other instance</u>*, a particular State cannot trump the supremacy clause?**" (*emphasis added*).

In his comments, Barr refers first to *two sovereigns* in our system of federalism – *first* the state sovereign and then the federal sovereign. Contrasting the difference between the District of Columbia and the states, he notes that Congress has *explicit* constitutional responsibility and authority in D.C. Indeed, there is only one sovereign in Washington D.C. Unlike the states or U.S. territories[7] (*e.g.* Puerto Rico) that have two sovereigns, the single sovereign for the District of Columbia is *Congress*. Hence, for District legislation, the *Supremacy Clause* is inapplicable. (*See, e.g.*, <u>Turner v. D.C. Bd. of Elections and Ethics</u>, 77 F. Supp. 2d 25, 31 (D.D.C. 1999)

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[6] Congressional hearing on "*Medical*" *Marijuana, Federal Drug Law and the Constitution's Supremacy Clause*, House Subcommittee on Criminal Justice, Drug Policy and Human Resources (Mar. 27, 2001).

[7] Congress has broad and exclusive authority under the *Territorial Clause* of the Constitution, art. 4, sec. 3, cl. 2, to make "all Needful rules and Regulations" governing all of the acquired territories of the United States. *See* <u>Polychrome Int'l Corp. v. Krigger</u>, 5 F.3d 1522 (3d Cir. 1993) at 1534 (explaining that "Congress has comprehensive powers to regulate territories under the Territorial Clause").

(Turner) at 33, "Congress maintains broad legislative authority over the District … As all sides admit, Congress is empowered to disapprove *Initiative 59*, if it passes, during a review period after the election or to defeat it by repeal.") Notwithstanding the *difference* in Congress's legislative authority, seriously ill and disabled patients are similarly situated whether in Washington D.C. or, for instance, the state of California.

1. Until 2009, the "Barr Amendment" operated in the District of Columbia the same way the Supremacy Clause still operates in the states to prevent voter modification or repeal of the federal Controlled Substances Act

In 2001, referring to state medical marijuana laws, Congressman Barr expressed that our system of federalism breaks down when two sovereigns with opposing laws govern the same behavior differently. In the same statement, he referred to the *Barr Amendment* noting, "[T]he District of Columbia, as I know you are aware, is different. Congress does have a direct constitutional, very explicit responsibility and authority over the District."

Barr recognized that, unlike the states, the District has only one sovereign. In the District, there is no *Supremacy Clause* operating to preempt laws authorized through less stringent congressional *Home Rule Act*[8] approval. Given Congress acted too slowly to stop *Initiative 59* from being printed on the ballot in 1998, Barr was properly concerned that legalization of medical marijuana in D.C. could "open the door" to medical marijuana in the states. Accordingly, to prevent legalization from getting through the D.C. legislative process, he wrote the *Barr Amendment* to remove medical marijuana from that process using Congress's art. 1, sec. 8, cl. 17 *District Clause*[9] power in conjunction with the federal *CSA*. Much like the *Supremacy Clause* maintains the *CSA* regardless of inapposite state legislative action, the *Barr Amendment* prohibited "any ballot initiative which [sought] to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 801) or any *tetrahydrocannabinols* derivative." As it

[8] Public Law 93-198 (87 Stat. 777), the D.C. *Home Rule Act*, (93rd Cong., 1973, amended 1998.); D.C. Code § 1-201, *et. seq.*

[9] U.S. Constitution, Art. 1, Sec. 8, Cl. 17.

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had with the states through the *Supremacy Clause* when it enacted the *CSA*, Congress took away the District's ability to enact legislation that interfered with the *CSA*.

2. Congress's failure to timely act to prevent Initiative 59 from being printed on the ballot led to the Turner decision requiring the Board of Elections to count and certify the vote

Following the November 3, 1998 election, the District's Board of Elections refused to count and certify the vote relying on the *Barr Amendment*. Thereafter, an action was brought in federal District Court seeking an order requiring the D.C. Board of Elections to count and then report voting results for Initiative 59. *See* Turner, 77 F.Supp.2d at 31. Noting that Congress could have stopped the vote outright had it acted on time, the court in Turner held that, despite its plenary power over the District, Congress is still constrained by constitutional boundaries. Accordingly, since the votes had already been cast, the *Barr Amendment* ran afoul of the First Amendment by impermissibly prohibiting vote count, certification, and reporting. After the count was completed, it ended up that seventy-percent (70%) of the District's voters approved *Initiative 59*.

3. The 1999 post-Turner decision part of the Barr Amendment prohibited implementation of Initiative 59 in D.C.

On November 29, 1999, in response to the Turner decision, Congress used its art. 1, sec. 8, cl. 17 plenary power over the District of Columbia to include Section 167(b) of P.L. 106-113[10], (113 Stat. 1530) ("Section 167(b)") providing:

> "[T]he Legalization of Marijuana for Medical Treatment Initiative of 1998, also known as Initiative 59, approved by the electors of the District of Columbia on November 3, 1998, **shall not take effect**." (*emphasis added*).

Three years later, when medical marijuana advocates tried to submit a new proposition, the *Medical Marijuana Initiative of 2002*, the District's Board of Elections refused to place the question on the ballot. Following the Board's denial, the advocates filed suit in U.S. District Court for the District of Columbia arguing that the Barr Amendment violates the First

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Amendment. (Marijuana Policy Project v. U.S., 304 F.3d 82 (D.C. Cir. 2002) [MPP]). In MPP, the D.C. Court of Appeals identified the issue before it as, "[whether] the First Amendment restrict[s] Congress's ability to withdraw the District's authority to reduce marijuana penalties?"

Despite the argument proffered by medical marijuana advocates that the *Barr Amendment* restricts core political speech, the court held:

> "The *Barr Amendment* … restricts no speech; to the contrary, medical marijuana advocates remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties. The *Barr Amendment* merely requires that, **in order to have legal effect, their efforts must be directed to Congress rather than to the D.C. legislative process**." *Ibid.* (*emphasis added*).

To reach its conclusion, the court analogized Congress's plenary authority over the District to its *Supremacy Clause* power over the states observing, "If Congress can preempt state legislation … then, in view of [its] 'exclusive' Article I authority over the District of Columbia, it can certainly limit D.C. legislative authority …" Essentially, similar to how it usurped the power of state voters in respect to medical marijuana legalization, Congress seized that same right from D.C. voters. Although medical marijuana patients are similarly situated whether in Washington D.C. or a state, the effective result of removing their ability to vote through enactment of the *Barr Amendment* put D.C. Voters in the same position as state voters were under the *Supremacy Clause*. The *Barr Amendment* removed the legislative process from District voters the way the *Supremacy Clause* had removed that process for state voters.

C. In December, 2009, D.C. voters no longer had to direct their efforts to legalize medical marijuana to Congress

As the court in MPP noted, after the *Barr Amendment* was enacted in 1998, D.C. voters' efforts to advocate for medical marijuana had to "be directed to Congress rather than to the D.C. legislative process." Congress essentially removed the legislative process from similarly situated seriously ill and disabled patients, as well as District voters, the same way it had removed the legislative process from state voters and patients through the *Supremacy Clause*.

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[10] Public Law 106-113 (113 Stat. 1530) (106th Cong., 1999).

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1. After years of effort "directed to Congress," control over medical marijuana was returned to D.C. voters through P.L. 111-117[11]

Apparently, the efforts "directed to Congress" were effective. Seven years after MPP was decided, Congress reduced its interference in D.C. local affairs providing:

> "The bill [H.R. 3170] also **takes further steps towards reducing undue congressional interference in local affairs** … [and] **allows the District to conduct and implement a referendum** on use of marijuana for medical purposes, as has been done in various states." (H.Rept. 111-202[12] [on H.R. 3170] [111th Congress, 1st Session, July 10, 2009] [enacted as P.L. 111-117, Dec. 2009] at p. 8).

Rather than implement its own medical marijuana law for the District, Congress instead allowed, through P.L. 111-117 (H.R. 3170 amended), the District to **conduct and implement a referendum**. *Ibid*. The District was not required to implement the then ten year old *Initiative 59*. Rather, it could have put the *Medical Marijuana Initiative of 2002* at issue in the MPP case, *supra*, on the ballot. It could have started from scratch and created an entirely new ballot measure. When the President signed P.L. 111-117 on December 17, 2009 following Congress's approval of H.R. 3170 amended, the efforts of D.C. voters that were "directed to Congress rather than to the D.C. legislative process" following the decision in MPP could again be directed at the D.C. legislative process.

2. Congress removed "undue congressional interference" for District voters but not for state voters

In respect to the "removal of undue congressional interference" it exercised when it granted D.C. citizens the right to vote on medical marijuana legalization, Congress had a distinct advantage over state legislatures. As noted in Neild, *supra*, Congress has "complete legislative control as contrasted with the limited power of a state legislature" because, unlike the several state legislatures, the *Supremacy Clause* does not apply to Congress even when it enacts District law.

Had Congress enacted its *own* medical marijuana legislation for the District rather than granting to District citizens the right to conduct and implement a *referendum*, it *may* have been

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[11] Public Law 111-117 (123 Stat. 3034) (111th Cong., 2009).

able to articulate rational reasons for allowing medical marijuana in D.C. while prohibiting it in the states. Indeed, Congress's exceptional legislative power in the District allows it to "exercise its powers as a local sovereign where it has preempted the states from exercising similar local powers." United States v. Cohen, 733 F.2d 128 (1984) at 132 n.10. However, Congress removed its long-standing *Barr Amendment* block and then explicitly allowed the District to **conduct and implement a referendum**. *See* H.Rept. 111-202, *supra*, at p. 8.

In Turner, *supra*, the court noted that simply because Congress could prevent Initiative 59 from becoming law *one way* does not mean that it could do so *in any manner*. Giving a comparative example, the court said:

> "[While] passing a local law to apply in the District that outlaws marijuana possession, use, and distribution is perfectly permissible, [a]n enactment that precluded the Board from releasing and certifying the results of a proper election achieves the same result but infringes on D.C. citizens' First Amendment rights." *Ibid*. (*citations omitted*).

The court's position is consistent with a series of cases holding that Congress's plenary power must be exercised consistent with constitutional limits and requirements. *See*, *e.g.* INS v. Chadha, 462 U.S. 919 (1983) at 940-41, ("The plenary authority of Congress over aliens ... is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977) at 84, (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) ["The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."]); Palmore, *supra*, 411 U.S. at 397 (Congress can exercise its plenary power over the District only "so long as it does not contravene any provision of the Constitution of the United States.").

As Congressman Barr said in 2001, "how can you really maintain that you have respect for our Federal system of government **if you [allow medical marijuana] in any one, and if you say [yes] in any one, then you have to open the door to all [the others]** …" Indeed, Congress can enact medical marijuana laws as D.C.'s *de facto* state legislature without opening the door

[12] H.Rept. 111-202 (H.R. 3170, P.L. 111-117, enacted) (111th Cong., 1st Session, July 10, 2009).

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for the states "so long as [when it does so] it does not contravene any provision of the Constitution of the United States." (Palmore, *supra*, 411 U.S. at 397). In respect to equal protection under the law, at minimum Congress's action must meet rational basis requirements. However, if its actions infringe on a fundamental right, those actions are subject to strict scrutiny analysis. *See* Turner, *supra*.

Here, Congress removed a voting block for certain citizens that it did not remove for others. It granted a right to vote to citizens in the District that it has withheld from state voters.

3. Congress participates in every piece of D.C. legislation

As expressed in Neild, *supra*, Congress is the single sovereign in the District of Columbia. In the District, general rules of statutory construction apply *free* of *Supremacy Clause* restrictions. In every instance, the "D.C. legislative process" necessarily includes Congress (*See, e.g.*, Turner, 77 F.Supp.2d at 33 "Congress maintains broad legislative authority over the District … As all sides admit, Congress is empowered to disapprove Initiative 59, if it passes, during a review period after the election or to defeat it by repeal."; *See also* D.C. Code Ann. §§ 1-201 to 299[13].)

Not only did Congress ***allow*** the District to conduct and implement a referendum on *medical* marijuana in 2009, it did "not continue to suspend implementation of the *Legalization of Marijuana for Medical Treatment Initiative of 1998*.[14]" (H.Rept. 111-202, *supra*, at p. 107.) On December 21, 2009, that law was submitted by the District of Columbia local government to both houses of Congress (D.C. Act 13-138; Nov., 1998). Following the statutory 30-day congressional review period, D.C. Act 13-138 became D.C. Law 13-315 on February 25, 2010 and is published at 57 DCR 3360. As it had to, Congress participated in the D.C. legislative process by approving *Initiative 59*.

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[13] *See, e.g.*, Turner, 77 F.Supp.2d at 29, "Congress acts as a local legislative body for D.C. [citations] … Congress retains broad authority to pass local laws on any subject. *See* D.C. Code Ann. § 1-206 (1981). Thus, this Court is mindful of Congress's broad legislative powers over the District, as granted by the D.C. Clause."

[14] Congress left in-place a provision prohibiting the use of federal funds for marijuana legalization (P.L. 111-117, Sec. 813). However, the limit was solely on *federal funds* not on implementation or

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Congress again participated in the legislative process when D.C. Law 18-210 (D.C. Act No. 18-429), the *Legalization of Marijuana for Medical Treatment Amendment Act*, was passed to it by the District for review. As the court in Turner explained, "Congress is empowered to disapprove *Initiative 59*, if it passes, during a review period after the election or to defeat it by repeal." Indeed, during the congressional review period, Representatives Jim Jordan (Ohio) and Jason Chaffetz (Utah) unsuccessfully tried to reject the District law legalizing medical marijuana[15] through proposed H.J. Res. 93 (June 23, 2010). Despite the effort to disapprove *Initiative 59* as amended, the law became effective July 27, 2010. (Feb. 25, 2010, D.C. Law 13-315, § 2, as added July 27, 2010, D.C. Law 18-210, § 2, 57 DCR 4798.)

4. If enacted in California, *Initiative 59* would be preempted by the federal *Controlled Substance Act*

In August, 2008, then California Attorney General Edmund G. Brown provided:

> "Neither Proposition 215, nor the MMP, conflict with the [federal] *CSA* because, in adopting these laws, **California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law** when a physician has recommended its use to treat a serious medical condition. (See City of Garden Grove v. Superior Court, 157 Cal.App.4th 355 (2007) at 371 373, 381-382.)" See Section 1(F), *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, Ca. Atty. Gen. Edmund G. Brown, Jr., August, 2008 (*emphasis added*).

Noticeably lacking from California's medical marijuana laws are provisions *allowing* marijuana cultivation, possession, or use as well as regulations for medical marijuana quality, inspection, transportation, agricultural standards, indoor growing controls, or any other provision that is not specifically related to *decriminalization*.

In Ross v. Raging Wire Telecommunications, 42 Cal.4th 920 (2008), the California Supreme Court held:

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approval of medical marijuana. Moreover, on two occasions after it enacted P.L. 111-117, Congress participated in the legislative approval process that led to the enactment of D.C. Stat. § 111-117, *et. seq.*

[15] In proposed House Joint Resolution 93, Reps. Chaffetz and Jordan included, "Congress disapproves of the action of the District of Columbia Council described as follows: *The Legalization of Marijuana for Medical Treatment Amendment Act of 2010* (D.C. Act 18–0429), approved by the District of Columbia Council on May 21, 2010, and transmitted to Congress pursuant to section 602(c) of the District of Columbia *Home Rule Act* on June 8, 2010." (H. J. Res. 93 [IH] (111th Cong., June 23, 2010).

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> "**Although California's voters had no power to change federal law**, certainly they were free to disagree with Congress's assessment of marijuana, and they also were free to view the possibility of beneficial medical use as a sufficient basis for exempting from criminal liability under state law patients whose physicians recommend the drug." *Id*. at 924 (*emphasis added*).

In referring to preemption and the federal *CSA*, the Ross court made clear that California medical marijuana laws only provide state criminal law exceptions rather than *allow* conduct that would positively conflict with federal law.

Titled the *Legalization of Marijuana for Medical Treatment Act*, the District's *Initiative 59* was codified as D.C. Stat § 7-1671, *et seq.* In its definitions, the law includes:

> "'Cultivation center' means a facility operated by an organization or business registered with the Mayor pursuant to § 7-1671.05 from or **at which medical marijuana is cultivated, possessed, manufactured, and distributed** in the form of medical marijuana, and paraphernalia is possessed and distributed to dispensaries." D.C. Stat § 7-1671.01(5) (2011) (*emphasis added*).

> "'Dispensary' means a facility operated by an organization or business registered with the Mayor pursuant to § 7-1671.05 from or **at which medical marijuana is possessed and dispensed** and paraphernalia is possessed and distributed to a qualifying patient or a caregiver.." D.C. Stat § 7-1671.01(7) (2011) (*emphasis added*).

> "**A dispensary may dispense medical** marijuana and distribute paraphernalia to a qualifying patient or the qualifying patient's caregiver, and a qualifying patient or the qualifying patient's caregiver may obtain medical marijuana and paraphernalia from a dispensary, only if the qualifying patient is registered to receive medical marijuana from that dispensary." D.C. Stat § 7-1671.06(c) (2011) (*emphasis added*).

Contrary to the District's law, the federal *CSA* provides that any[16] manufacture, distribution, or possession of marijuana is a criminal offense. 21 U.S.C. §§ 841(a)(1), 844(a). Unlike California's law that only provides state criminal liability exceptions, D.C. Stat § 7-1671 directly conflicts with the *CSA* by permitting activities prohibited by the federal law.

Under longstanding Supreme Court precedent, "it has been settled that state law that conflicts with federal law is '*without effect*.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) at 516 (quoting Maryland v. Louisiana, 451 U.S. 725

[16] The only exception to the *CSA*'s manufacture, distribution, or possession prohibitions is a federal government authorized research study. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) at 484.

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(1981) at 746). In California, D.C. Stat § 7-1671 would not survive federal *Supremacy Clause* preemption. Instead, the operative provisions of the law would be "without effect" under Ca. Gov't Code § 37100. Accordingly, even if *Initiative 59* were to be approved by Californians, their votes would have no effect.

5. Contrary to the Government's assertion, the federal CSA yields to the provisions of D.C. Stat 7-1671, et seq. in D.C.

The *CSA* continues to operate through the *Supremacy Clause* to prevent states from legalizing medical marijuana. However, since it is both the federal sovereign and the single sovereign for the District, Congress is not subject to the *Supremacy Clause*. Consequently, although the Government correctly argues that the federal *CSA* still applies in Washington D.C., its assertion that the *CSA* is *equally* applicable in the District and the states is flawed[17].

a. The relationship between state medical marijuana laws and the federal CSA is analyzed considering Supremacy Clause preemption

"The doctrine of preemption is derived from the *Supremacy Clause* … and therefore applies only to conflicts between federal provisions, on one hand, and state" provisions on the other. State of Rhode Island v.Narragansett Indian Tribe, 19 F.3d 685 (1994) [Narragansett] at ¶ 101 (citing Cipollone, *supra*).

b. In the District, the relationship between the CSA and D.C. Stat § 7-1671 is analyzed using rules of statutory construction

As provided in Cipollone and Narragansett, the *Supremacy Clause* applies only to conflicts between state and federal law on the same subject. Narragansett, 19 F.3d at 704. Accordingly, given that, in the District[18], Congress exercises "complete legislative control as

[17] The Government relies on a waiver form provided to prospective District dispensary and cultivation center operators that acknowledges the *CSA* is still in-force in Washington D.C. Op. Br. In fact, the Plaintiffs have not argued the *CSA* has been repealed. However, following passage of P.L. 111-117 and subsequent participation by Congress in the legislative process that legalized medical marijuana in the District, the *CSA* applies differently in D.C. than it does in the several states.

[18] *See, e.g.,* Turner, 77 F.Supp.2d at 29, "Congress acts as a local legislative body for D.C. [citations]."

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contrasted with the limited power of a state legislature," the proper mode of statutory analysis for conflicting laws is that of implied repeal. *See* Neild, 110 F.2d at 250-51; *See then* Narragansett, 19 F.3d at 704; *See also* United States v. Cook, 922 F.2d 1026 (2d Cir., 1991) at 1033, cert. denied, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

It is a firmly established rule of statutory construction that repeal by implication is disfavored. United States v. Borden Company, 308 U.S. 188 (1939) (Borden) at 199. When there are two laws on the same subject, the general rule is to give effect to both if possible. Morton v. Mancari, 417 U.S. 535 (1974) (Morton) at 551; United States v. Tynen, 78 U.S. 88, 11 Wall. 88 (1870) (Tynen) at 92; General Motors Acceptance Corp. v. United States, 286 U.S. 49 (1932) at 61-62. The intention of the legislature to repeal "must be clear and manifest." Red Rock v. Henry, 106 U.S. 596, 1 S. Ct. 434, 27 L. Ed. 251 (1883) at 601, 602. However, "if the two [acts] are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." Tynen, 78 U.S. (11 Wall.) at 92; *See also* Posados v. National City Bank, 296 U.S. 497, 56 S. Ct. 349, 80 L. Ed. 351 (1936) at 504.

In its opposition brief, the Government argues:

> "Supreme Court and Ninth Circuit precedent forecloses almost any conceivable argument that could justify restraining the government's ability to enforce federal law in this context. The Supreme Court has held that, **given the *CSA*'s unequivocal language, "marijuana has 'no currently accepted medical use.'"** United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 491 (2001). The Court has also held that Congress's authority under the *Commerce Clause* empowers it **to prohibit marijuana distribution and possession**, even if the prohibited activities are not also illegal under state law. Gonzales v. Raich ("Raich I"), 545 U.S. 1 (2005)." Op. Br. at p. 2, lines 1-9.

On October 27, 1970, Congress enacted the federal *Controlled Substances Act* (*CSA*) as Title 2 of the *Comprehensive Drug Abuse Prevention and Control Act of 1970*[19] ("CDAPC"), P.L. No. 91-513, 84 Stat. 1236 (Oct. 27, 1970). The *CSA* is codified at 21 U.S.C. §§ 801, *et. seq*. Based on the Government's own argument, the *CSA* includes **unequivocal language that**

[19] Public Law 91-513 (84 Stat. 1236) *Comprehensive Drug Abuse Prevention and Control Act of 1970*, (91st Cong.,1970).

"marijuana has 'no currently accepted medical use.'" Op. Br. at p. 2, lines 3-5. Moreover, it **prohibits marijuana distribution and possession.** Op. Br. at p. 2, lines 6-8.

Thirty-nine years after it enacted the *CSA*, on December 17, 2009, Congress approved and the President signed P.L. 111-117. Although P.L. 111-117 does not directly repeal provisions of the *CSA*, the House Report on the law includes:

> "[P.L. 111-117] also takes further steps towards reducing undue congressional interference in local affairs and **eliminating restrictions on the District that do not apply to other parts of the Nation**. [The law] allows the District to conduct and implement a referendum on use of marijuana for **medical** purposes…" H.Rept. 111-202, *supra*, at p. 8 (*emphasis added*).

Thereafter, on page 107 the report provides:

> "[P.L. 111-117] does **not** continue to suspend implementation of the ***Legalization** of Marijuana for **Medical Treatment** Initiative of 1998*." (*emphasis added*).

There is no doubt Congress knew it was removing the *Barr Amendment*. Likewise, the report explicitly records that the issue of **medical marijuana** was debated since it includes the opposing *Minority Views of the Honorable Jerry Lewis and the Honorable Jo Ann Emerson* expressing disagreement with Congress's decision to allow medical marijuana in the District. *See* H.Rept. 111-202, *supra*, at p. 175.

Allowing a **medical** marijuana law in the District of Columbia in light of what the Government, in its opposition brief, deems **unequivocal language** in the *CSA* that **"marijuana has 'no currently accepted medical use'"** is irreconcilable. If marijuana has no currently acceptable medical use, then **not** continuing to suspend implementation of **legalization** of **medical marijuana** (H.Rept. 111-202 at p. 107) certainly conflicts with the provisions of the then 39-year-old *CSA*. Likewise, allowing the District to implement the results of a referendum (H.Rept. 111-202 at p. 7) on *medical* marijuana is likewise inapposite to the same "unequivocal language" in the *CSA*. It seems obvious that the congressionally approved provisions of D.C. Stat § 7-1671.06(c) that provide "[a] **dispensary may dispense medical marijuana**" to patients and caregivers as well as **allows** and **regulates** the cultivation, transportation, and possession of

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medical marijuana are both repugnant in light of the *CSA*'s absolute prohibition of those activities.

Moreover, there can be **no** doubt Congress knew of the *CSA* as well as of the provisions included in the District's medical marijuana initiative when it enacted P.L. 111-117 because over the ten (10) year period it left the *Barr Amendment* in-tact, the issue of medicinal marijuana was a topic regularly discussed and debated. Furthermore, it specifically referenced the *legalization* act when it removed the *Barr Amendment*. H.Rept. 111-202, *supra*, at p. 107. After passing P.L. 111-117, Congress **twice approved** the actual *legalization* statute (D.C. Stat § 7-1671), first on February 25, 2010 and then again on July 27, 2010. *See* D.C. Law 13-315 (orig. D.C. Act No. 13-138) 57 DCR 3360 (approved Feb. 25, 2010); *See also* D.C. Act 18-429 (orig. D.C. Law 13-315) 57 DCR 4798 (approved Jul. 27, 2010).

In Tynan, *supra*, the Court held, "[w]hen repugnant provisions like these exist between two acts, **the latter act is held**, according to all the authorities **to operate** as a repeal of the first act, **for the latter act expresses the will of the government**." *Id.* at 92, 93 (*emphasis added*). Moreover, where there is no clear intention otherwise, a *specific* statute will not be controlled or nullified by a *general* one. *See, e. g.*, Bulova Watch Co. v. United States, 365 U. S. 753 (1961) at 758; Rodgers v. United States, 185 U. S. 83 (1902) at 87, 89. In respect to *medical marijuana*, D.C. Stat § 7-1671 is far more specific that the general *CSA*. Accordingly, in the District, conflicting provisions of the *Legalization of Marijuana for Medical Treatment Act* override conflicting provisions of the *CSA*.

6. D.C. Stat § 7-1671 does not apply outside the District of Columbia

Contrary to the Government's assumption, Plaintiff James does not assert that D.C. Stat § 7-1671 applies *outside* of the District. Indeed, although Congress must review all District legislation and ultimately allow a District law to become effective, District laws are for the District rather than the entire country. *See, e.g.*,Neild, 110 F.2d at 250-51, ("Congress exercises 'complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the

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boundaries of the states, on the other.'"); *See also e.g.* Turner, 77 F.Supp.2d at 33, ("Congress is empowered to disapprove Initiative 59, if it passes, during a review period after the election or to defeat it by repeal. D.C. Code Ann. §§ 1-206, 1-233.").

D. For purposes of equal protection analysis, voters in Washington D.C. and California are similarly situated

To establish an equal protection violation a plaintiff must demonstrate "treatment different from that received by similarly situated individuals" that either intentionally discriminated against the plaintiff based on a protected classification, arbitrarily treated the plaintiff differently from other similarly situated individuals, or that violated a fundamental right. *See, e.g.*, Klarfeld v. United States, 944 F.2d 583 (9th Cir., 1991) (Klarfeld) at 587 (no equal protection violation if classification scheme is not inherently invidious, does not impinge on fundamental rights, or is rationally related to legitimate governmental objectives); *See also* Taylor v. Johnson, 257 F.3d 470 (5th Cir., 2001) at 473.

Congress acts as the state legislature for the District of Columbia. In 2009 and 2010, it acted for District voters the same way a state legislature would act for its constituents. Although it acted as a state legislature, it did so in its dual role as federal sovereign and affected Marla James as a citizen of the United States adversely as compared to a citizen in the District. Consequently, whether intentionally discriminatory or inherently invidious, the result is the disparate and adverse impact to Marla James as a voter of California subject to Congress's *national* power. When it acted, Congress should have removed the corresponding *Supremacy Clause* restrictions on state legislatures and voters that continue to block them from the legislative process District voters gained access to through P.L. 111-117.

E. When Congress enabled D.C. citizens to vote-on medical marijuana and withheld that same right from state voters, it impermissibly "touched on" and burdened the right to vote

There is no question that "voting is of the most fundamental significance under our constitutional structure." Burdick v. Takushi, 504 U.S. 428 (1992) at 438, 443. Voting is a fundamental right subject to strict scrutiny review. *See, e.g.*, Harper v. Virginia Board of

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Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) at 670, ("[W]here fundamental rights and liberties are asserted under the *Equal Protection Clause*, classifications which might invade or restrain them must be closely scrutinized.... [T]he right to vote is too precious, too fundamental to be so burdened or conditioned.").

> "[H]istory has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote … is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533(1964) at 632.

In Hussey v. City of Portland, 64 F.3d 1260 (1995), the Ninth Circuit held that "a statute which confers power to halt an election, and thus to prevent all qualified voters from casting their vote, must be considered to 'touch upon' and to 'burden' the right to vote, and therefore must be examined under the strict equal protection standards."

The court in MPP, *supra*, held that, as it had done with the states using the *Supremacy Clause*, Congress could prevent District residents from voting on the *Medical Marijuana Initiative of 2002*. Nonetheless, Congress can exercise its plenary power over the District *only* "so long as it does not contravene any provision of the Constitution of the United States." Palmore, 411 U.S. at 397; *See also, e.g.*, Turner, 77 F. Supp. 2d at 29-30, ("The D.C. Clause may not be read in isolation from the rest of the Constitution, however, any more than any other constitutional clause may be read alone. In this area, as in all others, Congress's actions are constrained by the Constitution itself."). In Turner, the court explained,

> "Assuming that prevention of marijuana's legalization is a compelling state interest, blocking the release and certification of the results of votes properly cast in a properly conducted ballot referendum would not appear to be a narrowly tailored measure to achieve that interest." Turner, 77 F. Supp. 2d at 33.

The court then noted,

> "As all sides admit, Congress is empowered to disapprove Initiative 59, if it passes, during a review period after the election or to defeat it by repeal. *See* D.C. Code Ann. §§ 1-206, 1-233 (1981). If Congress's interest here is to assure that drug possession, use, and

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> distribution are not legalized in the District, that interest readily can be met without burdening First Amendment rights." *Ibid*.

When it used its plenary power to *block* the District from voting on medical marijuana legalization, it did so citing the *CSA*. When, ten years later, it *removed* the block and granted the right to vote-on and implement medical marijuana legislation, that same national drug legislation remained in-place. And, although in December, 2009 when it allowed medical marijuana in the District, Congress could have done so by simply approving the District's *Initiative 59* -- it did not. Instead, Congress allowed the District to **conduct and implement a referendum** on medical marijuana. H.Rept. 111-202, *supra*, at p. 8. It considered its own national drug legislation yet decided to allow District residents to conduct a referendum on legalization.

Curiously, when Congress gave the voters of D.C. the right to vote-on and *legalize* medical marijuana, it referred to states with medical marijuana laws and noted it was removing "undue congressional interference" in the District's local affairs. *Ibid*. Yet, while it acted for the voters of the District, it left in-place its corresponding block that has, for many years, disenfranchised state voters. Indeed, while District voters' efforts to *legalize* medical marijuana no longer needed to "be directed to Congress rather than to the D.C. legislative process" (MPP, *supra*), state voters must *still* focus their efforts on Congress because unlike D.C. voters, state citizens do not have the power to vote-on and thereafter legalize medical marijuana. Congress's report on P.L. 111-117 shows it was fully aware of the *legalization* provisions of the D.C. Act. *See* H.Rept. 111-202, *supra*, at p. 107. The fact that Congress explicitly referred to state voters (H.Rept. 111-202, *supra*, at p. 8) shows it granted certain citizens the right to vote to *legalize* while consciously excluding others.

Like the Portland law at issue in Hussey, *supra*, Congress's action in P.L. 111-117 "must be considered to 'touch upon' and to 'burden' the right to vote." Specifically, in its unique role as both the national legislature and state legislature for the District, Congress must act within the boundaries of the Constitution (Turner, 77 F. Supp. 2d at 29-30) and must do so *not* only for District citizens, but *also* for state citizens. *See, e.g.*, Grant v. Meyer, 828 F.2d 1446 (10th Cir., 1987) at 1456, (having granted citizens the right to an initiative procedure, the State was

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obligated to confer the right in a manner consistent with the Constitution), aff'd,486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). Here, it did not. Moreover, when it acted as a *state legislature* or in its role as the *national legislature* in respect to its *purpose* for prohibiting medical marijuana, the voters in the states and the District are similarly situated.

F. Congress's action in P.L. 111-117 burdens a right to vote and is subject to *strict scrutiny* analysis

As Tocqueville wrote, "rights must be given to each citizen or to no one." Congress referenced the several states in its report on the 2009 federal law granting voters in Washington D.C. the right to vote-on and then to legalize medical marijuana based on the outcome of a referendum. (H.Rept. 111-202, *supra*, at p. 8; P.L. 111-117). It did so *free* of the *Supremacy Clause* block that renders state votes cast similarly to *legalize* medical marijuana "*without effect*." (Cipollone, 505 U.S. at 516). Unlike California's medical marijuana laws that can only *decriminalize* state marijuana prohibitions for seriously ill and disabled patients, the District's *Legalization of Marijuana for Medical Treatment Act* actually *legalizes* medical marijuana. (*See* Ca. Health and Safety Code §§ 11362.5, 11362.7; See also, *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, Ca. Atty. Gen. Edmund G. Brown, Jr., (2008) at Section F; *See then* D.C. Act §§ 7-1671.01, 7-1671.06, 7-1671.08, 7-1671.08[c]). Congress twice participated in the legislative process that enacted the District's 7-1671 law. (Legislative History, D.C. Official Code, D.C. Stat § 7-1671.01 (2011) at Annotations). If California, like the limited D.C. local government, was required to pass its state legislative acts to Congress before its legislation could become law, perhaps today its voters would not be disenfranchised. (*See*, *e.g.*, Turner, 77 at 33, "Congress maintains broad legislative authority over the District … As all sides admit, Congress is empowered to disapprove *Initiative 59*, if it passes, during a review period after the election or to defeat it by repeal.")

An equal protection claim occurs when the action at issue impinges on a fundamental right. Klarfeld, 944 F.2d at 587 (no equal protection violation if classification scheme is not inherently invidious, does not impinge on fundamental rights, or is rationally related to legitimate governmental objectives). Through its 2009 federal legislation, Congress removed the block

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enacted under its plenary power over the District and returned the issue of medical marijuana legalization to the D.C. legislative process (referendum). (H.Rept. 111-202, *supra*, at pp. 8, 107). Accordingly, Congress's law that removes that block and grants the right to vote to *some* citizens while continuing to deny that same right to others is subject to *strict scrutiny* analysis. (Kramer v. Union Free School Dist., 395 U.S. 621, 89 S.Ct. 1886, 1890, 23 L.Ed.2d 583 (1969) at 628-629). Its actions should have been "narrowly tailored to achieve an important government interest." (Turner, 77 F. Supp. 2d at 33). Yet noticeably absent in the Government's opposition is any announcement of the "important government interest" it sought to achieve by granting a voting right to D.C. citizens to *legalize* medical marijuana while withholding that same right from its subjects in the several states. (*See* Op. Br.).

As the Turner court noted, "[a]ssuming that prevention of marijuana's legalization is a compelling state interest," allowing District residents to *legalize* medical marijuana does not achieve that interest. (*Id.*, 77 F. Supp. 2d at 33). It follows that *allowing* the District's voters to approve such legalization while denying that right to state voters is not a "narrowly tailored measure to achieve that interest."

Congress's 2009 federal law removing its 10-year suspension of implementation of the District's 1998 *Legalization of Marijuana for Medical Treatment* law cannot be rectified against the Government's claim in its opposition that marijuana *possession* and *distribution* is wholly prohibited under the federal sovereign's *Controlled Substances Act* because "marijuana has 'no currently accepted medical use." (*See* H.Rept. 111-202, *supra*, at p. 107; P.L. 111-117, *supra*; *See then* Op. Br. at p. 2, lines 1-9). The Supreme Court emphasized Congress's intent and purpose noting, "[i]t is clear from the text of the [*CSA*] that Congress has made a determination that marijuana has no medical benefits worthy of an exception." U.S. v. Oakland Cannabis Club, 532 U.S. 583 (2001) at 593. The Government does not dispute that D.C. Stat § 7-1671 went through Congressional review *twice* before it became law. (*See, e.g.*, Legislative History, D.C. Official Code, D.C. Stat § 7-1671.01 (2011) at Annotations, ["With the removal of the 'Barr Amendment', the Council transmitted Act 13-138 to Congress on December 21, 2009, for

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a 30-day period of review. Act 13-138 became D.C. Law 13-315 on February 25, 2010, and is published at 57 DCR 3360 ... Law 18-210, the '*Legalization of Marijuana for Medical Treatment Amendment Act of 2010*', … was assigned Act No. 18-429 and transmitted to both Houses of Congress for its review. D.C. Law 18-210 became effective on July 27, 2010."]). Nor does it argue the *Supremacy Clause* applies in the District of Columbia. (Neild, 110 F.2d at 250-51; Narragansett, *supra*). Consequently, Congress's action making an *exception* for District voters to approve medical marijuana while denying that right to state voters cannot be held to be a "narrowly tailored measure to achieve" its declared interest in restricting marijuana because it has "no medical benefits worthy of an exception."

G. Congress has no rational basis for deeming marijuana medically valuable in the District of Columbia but not in California

The Equal Protection Clause of the Fourteenth Amendment[20] commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. Plyler v. Doe, 457 U.S. 202 (1982) at 216. Equal protection is applicable to the federal government through the due process provisions of the Fifth Amendment[21]. Bolling v. Sharpe, 347 U.S. 497 (1954). For purposes of equal protection, the general rule is that legislation is presumed to be valid and will be sustained if classifications drawn by the statute are rationally related to a legitimate state interest. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); Schweiker v. Wilson, 450 U.S. 221 (1981) at 230; United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) at 174-175; Vance v. Bradley, 440 U.S. 93 (1979) at 97.

In its opposition brief, the Government references the *CSA*'s unequivocal language that "marijuana has 'no currently accepted medical use.'" Op. Br. at p. 2, lines 1-9. It also argues the *CSA* prohibits all marijuana possession and distribution. *Ibid*. However, Congress said explicitly in H.Rept. 111-202 that it was "allowing" the District to vote-on and implement "*medical* marijuana" legislation in its P.L. 111-117. H.Rept. 111-202, *supra*, at p. 8. At the

[20] U.S. Constitution, Fourteenth Amendment.
[21] U.S. Constitution, Fifth Amendment.

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same time, it removed the ten year block on implementation of *Initiative 59* legalizing medical marijuana in D.C. H.Rept. 111-202, *supra*, at p. 107.

It not only returned the issue of medical marijuana legalization to the D.C. legislative process (H.Rept. 111-202, *supra*, at p. 8), Congress itself participated in that process resulting in the *legalization* of medical marijuana in the District. (*See* D.C. Law 13-315 (Feb. 25, 2010); *See then* D.C. Law 13-315 § 2, as added July 27,2010, D.C. Law 18-210, § 2, 57 DCR 4798). Despite the Government's arguments to the contrary, as discussed above, the *CSA* does not burden D.C. Stat § 7-1671, *et seq.* through the *Supremacy Clause*. Rather, the rules of statutory construction apply because Congress is the single sovereign in the District of Columbia. Thus, the affirmative defense "to a criminal charge of possession or distribution of marijuana" included in D.C. Stat § 7-1671.08(c) is effective for qualified persons in the District against such charges brought under the *CSA*.

Since the rational interest it has proffered for foreclosing states from legalizing medical marijuana is based on the now 40-year-old *CSA*'s "unequivocal language" providing marijuana has no *medical* value, then surely Congress's action in P.L. 111-117 allowing marijuana legalization for medical treatment in Washington D.C. is inapposite to that goal. Given that Congress then participated in the legislative process *approving* a complete medical marijuana legalization law for the District, it follows it has determined marijuana *does* have medical value in D.C. Given the Government's recent letters ordering closure of California medical marijuana collectives, the executive branch has determined marijuana does not have medical value in California. Or, perhaps the Government is saying that Californians should be subject to prosecution under the *CSA* for medical marijuana activities while D.C. citizens should not. Congress can show no rational basis or legitimate reason for deeming marijuana medically effective in Washington D.C. but not in California. Nor can it show any legitimate reason for enacting legislation that can only result in disparate treatment of citizens under the *CSA* based solely on geographic location.

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II. DESPITE ITS CONTENTION THAT PLAINTIFF JAMES HAS NOT BEEN DISENFRANCHISED, THE LETTERS SENT BY THE UNITED STATES ORDERING CLOSURE OF COLLECTIVES DIRECTLY ANNULLED VOTES JAMES CAST SINCE AS FAR BACK AS 1996

In its opposition brief, the Government contends it has not disenfranchised Marla James. However, the letters sent to the patient collective James is a member of in Costa Mesa warn that state law is not a defense to marijuana use, possession, or distribution. Moreover, the letter claims that all marijuana activities are illegal under federal law, specifically the *CSA*. The husband of the managing patient of James's collective contacted an assistant U.S. Attorney after his wife's collective received the letter ordering shutdown on January 18, 2012. The Assistant U.S. Attorney told him there is "no such thing as 'medical' marijuana." (Decl. of Howard Weitzberg, Ex. Appl. For T.R.O.) He also said that patients will have to go back to the street and illegally obtain marijuana. In addition to the letter and phone call, the U.S. Attorney for the Central District of California explained on his official Website that California law does not allow storefront dispensaries. Yet, in People v. Hochanadel, 176 Cal.App.4th 997 (2010) (Hochanadel), a California appellate court explained that it does[22].

In November, 1996, Marla James voted to approve *Proposition 215*, California's *Compassionate Use Act*. Ca. Health and Safety Code § 11362.5. She has consistently voted to elect state representatives, including some of those who participated in the 2003 enactment of California's *Medical Marijuana Program Act.* Ca. Health and Safety Code § 11362.7, *et seq.* The letter sent by the U.S. Attorney: 1) misstates California law; 2) misstates Federal law; and 3) erroneously provides that state medical marijuana laws are not a defense to the *CSA* despite Congress's enactment of P.L. 111-117 and subsequent congressional participation in the approval of the federal District's law *legalizing* medical marijuana. Despite the D.C. Stat. § 7-1671.08(c) affirmative defenses Congress approved for D.C. citizens, the U.S. Attorney threatens arrest and forfeiture in his letter. By taking action based on statements that are legally

[22] (*See, e.g.* Hochanadel at pp. 998-1000, "[W]e also conclude that storefront dispensaries that qualify as "cooperatives" or "collectives" under the *CUA* and *MMPA*, and otherwise comply with those laws, may operate").

incorrect following Congress's action in P.L. 111-117 and its subsequent participation in the legislative process that approved *Initiative 59*, the U.S. Attorney has effectively disenfranchised Marla James. To wit, the collectives operating in accordance with California law are closed despite the votes she cast in elections as far back as 1996. The right she and a majority of Californians conveyed to "all seriously ill Californians" in medical need of cannabis to "obtain" that medication with a valid doctor's recommendation has been abridged by the actions of the federal Defendants she seeks to enjoin.

III. THERE IS NO DUE PROCESS AFFORDED IN GOVERNMENT CEASE AND DESIST LETTERS THAT MISSTATE THE LAW RESULTING IN DEPRIVATION OF RIGHTS

Given that the issue presented by Plaintiff James is one of first impression, it makes sense that the various authorities relied on by the Government in asserting it has not run afoul of the Constitution, many of which pre-date Congress's action in Washington D.C., are inapplicable here. As discussed, *supra*, the letter sent by the U.S. Attorney misstates federal as well as state law in respect to medical marijuana, the federal *CSA*, and the obligations of the patient collective. Accordingly, the command to cease and desist made in the letter sent by authorized representatives of the executive branch can never be rectified against the procedural due process requirements of the Fifth Amendment.

IV. PLAINTIFF JAMES DOES NOT HAVE UNCLEAN HANDS BECAUSE SHE HAS NOT VIOLATED STATE OR FEDERAL LAW

Plaintiff Marla James has a doctor's recommendation for medical cannabis. She is wheel-chair bound and suffers from serious disabilities. As discussed, *supra*, Congress recognized medical marijuana in P.L. 111-117. It gave District voters the right to vote-on and legalize medical marijuana in Washington D.C. Thereafter, it participated in the legislative process and *approved* medical marijuana legalization in the District. The law it approved provides for seriously ill people like Marla James. Years before Congress finally removed its block prohibiting a referendum on medical marijuana, Marla James and other Californian's

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voted to approve the *Compassionate Use Act*. Marla James does not have to move to Washington D.C. to be protected from the arbitrary and illogical behavior of the federal government. The Article I power has acted and it has no rational basis for denying the medical value of marijuana in California while recognizing medical value in the District of Columbia. Accordingly, the continuing and irreparable harm Plaintiff James is suffering as a result of losing access to her medication can be rectified by this court.

CONCLUSION

For all of the foregoing reasons, Plaintiff James respectfully asks the Court to issue the preliminary injunction.

DATED this 12th day of March, 2012.

Respectfully submitted,

Matthew Pappas
Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I, Matthew Pappas, declare as follows:

I am over the age of 18 and a citizen of the United States. I am not a party to this action. On **March 12, 2012**, I served a copy of the **Plaintiffs' Reply in Support of Preliminary Injunction** in James, *et al.* v. United States, *et al.*, No. SACV 12-00280 electronically using the Court's ECF system to the CM/ECF recipients as well as via e-mail and facsimile to the e-mail addresses and facsimile phone numbers shown on Attachment "A."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED this **12th** day of **February, 2012** at Lake Forest, CA:

Matthew S. Pappas
Attorney for Plaintiffs

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ATTACHMENT "A"

Via ECF:

All parties that receive service through the ECF system in this case.

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