Case Nos: 12-2441 and 12-2443

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN CLEMENS MARCINKEWCIZ, II (12-2441), and
SHELLEY RENEE WALDRON (12-2443),

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
No. 1:11-cr-340

APPELLANTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

CONSTITUTIONS AND STATUTES **PAGE(S)**

FEDERAL RULES **PAGE(S)**

REQUEST FOR ORAL ARGUMENT

The Appellants, JOHN CLEMENS MARCINKEWCIZ, II, and SHELLEY RENEE WALDRON, through undersigned counsel and pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a), hereby respectfully request oral argument. In light of the novelty of the issues raised herein, Mr. Marcinkewciz and Ms. Waldron submit that oral argument would assist this Court in determining the outcome of this appeal.

STATEMENT OF JURISDICTION

The United States District Court for the Western District of Michigan had subject matter jurisdiction over this federal criminal prosecution pursuant to 18 U.S.C. § 3231. Pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), this Honorable Court has appellate jurisdiction to review the judgments and sentences in this case, which Mr. Marcinkewciz and Ms. Waldron timely appealed on September 29, 2012. R.E. 92, Page ID#439; R.E. 93, Page ID#441. The judgments and sentences issued in this case are final orders that dispose of all matters pending before the district court.

STATEMENT OF THE ISSUES

Mr. Marcinkewciz and Ms. Waldron cultivated medical marijuana as registered "caregivers" under a Michigan's Medical Marihuana Act. The Government prosecuted them for the "manufacture" of marijuana.

I. Does the cultivation of marijuana by a registered caregiver in conformity with Michigan's Medical Marihuana Act fall within the "practitioner exception" to the definition of "manufacture" under the Controlled Substances Act?

II. Does Congress have the authority under the Commerce Clause to prohibit the intrastate cultivation of marijuana by registered caregivers in compliance with the Michigan Medical Marihuana Act?

STATEMENT OF THE CASE AND FACTS

Mr. Marcinkewciz and Ms. Waldron hereby appeal the judgments and sentences imposed pursuant to their plea agreements. The Government charged Mr. Marcinkewciz and Ms. Waldron with one count of conspiracy to manufacture 100 or more marijuana plants and one count of manufacturing 100 or more marijuana plants in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(B)(vii), and 18 U.S.C. § 2. R.E. 1, Page ID#1-2.

On May 22, 2012, Mr. Marcinkewciz and Ms. Waldron jointly[1] filed a Motion to Dismiss Indictment and, or alternatively, Motion to Allow Assertion at Trial of the Michigan Medical Marihuana Act as an Affirmative Defense. R.E. 46, Page ID#161-63. In the Motion, Mr. Marcinkewciz and Ms. Waldron argued that

[1] Counsel for Ms. Waldron advised the Court at the final pretrial conference that she did not join in the motion, notwithstanding the fact that it was initially filed on her behalf. R.E. 59, Page ID#202.

indictment should be dismissed because (1) both defendants had lawfully registered as "patients" and "caregivers" under the Michigan Medical Marihuana[2] Act ("MMMA"); (2) both defendants were in strict compliance with all provisions of the MMMA; and (3) the Indictment is an "impermissible overreaching of Congress's power to regulate interstate commerce." R.E. 46, Page ID#161-62.

On May 24, 2012, the district denied the motion. The court held that even "if the Defendant was in compliance with the MMMA state medical-marijuana laws do not supercede federal laws that criminalize the possession or manufacture of marijuana." R.E. 59, Page ID#203. The court relied upon a state appellate decision that recognized the state law had no effect on federal prohibitions on the possession or consumption of marijuana. R.E. 59, Page ID#204.

That same day, Ms. Waldron entered into a plea agreement with the Government. R.E. 52; Page ID#175-82. Soon after, Mr. Marcinkewciz also reached a plea agreement with the Government. R.E. 63, Page ID#210-219.

On October 19, 2012, the district court dismissed the conspiracy count pursuant to the plea agreement and sentenced Ms. Waldron to 18 months imprisonment followed by two years of supervised release on the manufacturing count. R.E. 88; Page ID#409. Five days later, the district court sentenced Mr. Marcinkewciz to two concurrent terms of 60 months of incarceration followed by

[2] While the statute refers to "marihuana," this Brief will use the more conventional spelling "marijuana" unless quoting from the statute.

four years of supervised release for the counts for conspiracy and the manufacturing of 100 or more marijuana plants. R.E. 91; Page ID#433.

Mr. Marcinkewciz and Ms. Waldron timely appealed their respective judgments and sentences.

SUMMARY OF THE ARGUMENT

The district court erred in two respects when it convicted and sentenced Mr. Marcinkewciz and Ms. Waldron. First, Mr. Marcinkewciz and Ms. Waldron were convicted based on allegations that they manufactured the marijuana plants at issue. However, the definition of "manufacture" under 21 U.S.C. § 802 of the Controlled Substances Act ("CSA") specifically excludes actions performed "by a practitioner" who acts "*in conformity with applicable State or local law*." 21 U.S.C. § 802(15) (emphasis added). A "practitioner," as defined under the 21 U.S.C. § 802, includes persons "licensed, registered, or otherwise permitted by the United States *or the jurisdiction in which he practices*" to distribute controlled substances "in the course of professional practice or research." (emphasis added). Because the actions of Mr. Marcinkewciz and Ms. Waldron served a medical purpose and entailed the participation of physicians, their conduct falls within the practitioner exception to the statutory definition of "manufacture." Accordingly, the Government has failed to allege a federal crime, and this Court should vacate the judgments and sentences entered against Mr. Marcinkewciz and Ms. Waldron.

Second, Mr. Marcinkewciz and Ms. Waldron submit that the CSA is unconstitutional exercise of federal authority as applied to registered caregivers under the MMMA. Mr. Marcinkewciz and Ms. Waldron grew the marijuana pursuant to their status as registered caregivers under Michigan law. Michigan law contemplates that caregivers will only sell to individuals who are registered by the state. Thus, a caregiver's compliance with Michigan law requires the caregiver to restrict his activities to intrastate provision of marijuana.

Although the United States Supreme Court held in *Gonzales v. Raich*, 545 U.S. 1 (2005), that Congress had authority under the Commerce Clause to regulate the intrastate cultivation of marijuana, Mr. Marcinkewciz and Ms. Waldron believe that *Raich* should not be extended to the facts of this case for two reasons. First, a significant number of states have enacted statutes that permit the cultivation and use of marijuana in some form or another since the *Raich* decision. These cases undermine the reasoning of the *Raich* decision, which depended in part on the threat of marijuana moving from legal to illegal channels. Second, last year the Supreme Court decided *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2586 (2012), a decision that casts doubt on the continued viability of the *Raich* decision. This Court should decline to extend *Raich* and hold that the CSA is unconstitutional as applied to registered caregivers under the MMMA.

ARGUMENT

I. THE INDICTMENT DOES NOT ALLEGE A FEDERAL CRIME BECAUSE THE APPELLANTS ARE PRACTITIONERS WHOSE CULTIVATION OF MARIJUANA IN CONFORMITY WITH MICHIGAN'S STATUTORY AND REGULATORY SCHEME EXCLUDES THEM FROM FEDERAL PROSECUTION FOR THE MANUFACTURE OF MARIJUANA.

A. Standard of Review.

"Whether the elements of the offense are adequately alleged in the indictment is a legal question subject to *de novo* review." *United States v. Landham*, 251 F.3d 1072, 1080 (6th Cir. 2001).

B. Argument on the Merits.

The indictment in this case is defective as a matter of law because Mr. Marcinkewciz and Ms. Waldron cultivated the marijuana plants while serving as registered "caregivers" under Michigan law. Therefore, they cannot be charged with the "manufacture" of marijuana as that term is defined under the Controlled Substances Act.

"[E]ven if presented for the first time on appeal, claims of jurisdictional defects in the indictment are not waived." *United States v. Schaffer*, 586 F.3d 414, 421 (6th Cir. 2009). To assert a valid jurisdictional challenge, "a defendant who enters a guilty plea must establish that the face of the indictment failed to charge the elements of a federal offense." *United States v. Corp*, 668 F.3d 379, 384 (6th Cir. 2012). Under Rule 12(b)(3) of the Federal Rules of Criminal Procedure, a

court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense at any time until the issuance of the mandate. FED. R. CRIM. P. 12(b)(3)(B); *United States v. Izurieta*, 11-13585, 2013 WL 718325 (11th Cir. Feb. 22, 2013).

The indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." FED. R. CRIM. P. 7(c)(1). One purpose served by an indictment is to "inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had." *Russell v. United States*, 369 U.S. 749, 768 (1962) (quoting *United States v. Cruikshank*, 92 U.S. 542, (1875)). Thus, an indictment that alleges conduct that is not criminal under the relevant statute is subject to dismissal for failure to state a federal offense. *See, e.g.*, *United States v. Superior Growers Supply Co.*, 982 F.2d 173 (6th Cir. 1992); *United States v. McGhee*, 854 F.2d 905, 908-09 (6th Cir. 1988). "Where an indictment sets forth a bare recitation of the statutory language, such indictment may be sustained only if the statute sets forth all the necessary elements fully and clearly, without ambiguity or uncertainty, accompanied by a statement of facts sufficient to inform the accused of the specific conduct which is prohibited." *United States v. Salisbury*, 983 F.2d 1369, 1374 (6th Cir. 1993).

Here, Count I and Count II set forth nothing more than a bare recitation of the statutory language. Count I states that the defendants "did knowingly and intentionally combine, conspire, confederate, and agree with each other and with others known and unknown to the Grand Jury to *manufacture* 100 or more marijuana plants, a Schedule I controlled Substance, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(B)." R.E. 1, Page ID#1 (emphasis supplied). Count II similarly states that the defendants "did knowingly and intentionally *manufacture* 100 or more marijuana plants, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(B)(vii)." R.E. 1, Page ID#2 (emphasis supplied). The indictment makes no mention of the Appellants' status as registered caregivers under the MMMA. Nor does it allege that the Appellants engaged in conduct that exceeded the scope of their practice as registered caregivers under the MMMA or extended beyond the manufacture of marijuana.

It is unclear from the face of the indictment whether the Government knew that Mr. Marcinkewciz and Ms. Waldron were lawfully registered caregivers under the MMMA. However, Mr. Marcinkewciz and Ms. Waldron made the district court aware of their status when they filed the motion to dismiss. Before accepting their plea, the district court had a duty to determine that there is a factual basis for the plea. FED. R. CRIM. P. 11(b)(3). The court made no findings regarding the

status of Mr. Marcinkewciz and Ms. Waldron as registered caregivers under the MMMA; it merely found that "state medical-marijuana laws do not supercede federal laws that criminalize the possession or manufacture of marijuana." R.E. 59, Page ID#203. However, this conclusion assumes that Mr. Marcinkewciz and Ms. Waldron actually manufactured marijuana within the meaning of the Controlled Substances Act. As explained below, this is error.

Under the Controlled Substances Act, the term "manufacture" means:

> the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container; *except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice.* The term "manufacturer" means a person who manufactures a drug or other substance.

21 U.S.C. § 802(15) (emphasis added). According to this definition, the term "manufacture" does not encompass (1) the "preparation, compounding, packaging, or labeling" of a drug; (2) by a "practitioner"; (3) who acts in conformity with applicable state law; and (4) administers or dispenses the drug "in the course of his professional practice." *Id*.

The term "practitioner," as defined in the Controlled Substances Act, means:

> a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, *or other person licensed, registered, or otherwise permitted*, by the United States *or the jurisdiction in which he practices or does research*, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

21 U.S.C. § 802(21) (emphasis supplied). Thus, like the definition of manufacture, the broad definition of practitioner expressly recognizes the role of states in the licensing and registration of practitioners. This statutory language is in keeping with the pre-emption provision of the CSA, which provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903.

As recognized by the United States Supreme Court in *Gonzales v. Oregon*, 546 U.S. 243 (2006), the CSA "manifests no intent to regulate the practice of medicine generally," which is understandable given the "great latitude" afforded the States under their police powers to "legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. at 270 (internal citation and quotation omitted). Instead, the "structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers." *Id*. Thus, the Government's authority to prohibit

dispensing controlled substances "in the face of a state medical regime permitting such conduct" is highly circumscribed. *Id*. at 275. In sum, the Government is generally required to defer to the regulation of medicine by the individual states.

Against this backdrop, this Court must determine whether Michigan's enactment of the MMMA establishes the sort of medical regime described in *Gonzales v. Oregon*. It does. Section 333.26422 of the Michigan Compiled Laws states: "Modern medical research . . . has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions." MICH. COMP. LAWS § 333.26422(a). The MMMA defines "Medical use" of marijuana as the "acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MICH. COMP. LAWS § 333.26423(e).

The statute defines "debilitating medical condition" as:

> (1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions.
>
> (2) A chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures,

> including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.
>
> (3) Any other medical condition or its treatment approved by the department, as provided for in section 5(a).

MICH. COMP. LAWS § 333.26423(a) (2008). It also defines the "Physician" as "an individual licensed as a physician under Part 170 of the public health code, 1978 PA 368, MCL 333.17001 to 333.17084, or an osteopathic physician under Part 175 of the public health code, 1978 PA 368, MCL 333.17501 to 333.17556." MICH. COMP. LAWS § 333.26423(f) (2008).

A patient may obtain medical marijuana only "after the physician has completed a full assessment of the qualifying patient's medical history" and after the physician has provided a "written certification" that "a patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition." MICH. COMP. LAWS § 333.26423(f)-(l) (2008). Then, the patient may be issued a "registry identification card" that identifies the patient as a person qualified to use medical marijuana. MICH. COMP. LAWS § 333.26423(i) (2008).

To obtain the marijuana, the patient must coordinate with a "primary caregiver," which is defined as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been

convicted of a felony involving illegal drugs." MICH. COMP. LAWS § 333.26423(g) (2008). A primary care giver, like a patient, must register with the Michigan Department of Community Health to receive a registry identification card. MICH. COMP. LAWS § 333.26426. Although a primary care giver may receive compensation for the provision of marijuana, "such compensation shall not constitute the sale of controlled substances." MICH. COMP. LAWS § 333.26424(e) (2008).

In its findings, the Michigan Legislature recognized that "changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana" from prosecution. MICH. COMP. LAWS § 333.26422(b) (2008). To ensure that patients can receive that medication, the statute expressly exempts primary caregivers, physicians and patients from prosecution, provided those parties comply with the requirements of the MMMA. MICH. COMP. LAWS § 333.26424.

With respect to primary caregivers, the statute provides:

> A primary caregiver who has been issued and possesses a registry identification card *shall not be subject to arrest, prosecution, or penalty in any manner,*[3] or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a

[3] It is notable that the statutory exemption makes no distinction between federal or state prosecutions. Thus, a citizen contemplating becoming a registered primary caregiver might read that statutory provision as an exemption from any prosecution, state or federal.

> qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and
>
> (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and
>
> (3) any incidental amount of seeds, stalks, and unusable roots.

MICH. COMP. LAWS § 333.26424(b) (2008) (emphasis added).

In sum, the MMMA provides a comprehensive statutory scheme designed to regulate the use of marijuana for *medical* purposes as a means to address debilitating *medical* conditions. The statutory scheme draws on the expertise of physicians, who determine in their expert opinion whether the patient may benefit from the use of medical marijuana. It also requires the participation of caregivers, who provide the medical marijuana in the same manner as pharmacists who fill prescriptions for pharmaceutical products on behalf of patients.

As such, a primary caregiver who provides medical marijuana to a qualified patient meets the "practitioner" exemption from the definition of "manufacture" set form in 21 U.S.C. § 802(15). The cultivation of medical marijuana entails the "preparation, compounding, packaging, or labeling" of a drug. *Id*. In addition, in

order to comply with the MMMA, a caregiver must act "in conformity with applicable state law." *Id*. A caregiver also meets the definition of a "practitioner" in that a caregiver, whose practice is functionally identical to that of a pharmacist, qualifies as "*any other person licensed, registered, or otherwise permitted . . . [in] the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research*." 21 U.S.C. § 802(21) (emphasis supplied). Finally, it follows from the foregoing that a registered caregiver administers or dispenses the medical marijuana "in the course of his professional practice," either in his capacity as a registered caregiver or, alternatively, as an agent of the physician who authorizes the provision of medical marijuana. 21 U.S.C. § 802(15).

Appellants recognize that in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), the Supreme Court held that there is no "medical necessity" defense under the CSA because marijuana is a Schedule I controlled substance for which there is "no currently accepted medical use." *Id*. at 492. However, *Oakland Cannabis* dealt only with the issue of whether the common law defense of necessity could be reconciled with the language of the CSA. *Id*. at 490. The Supreme Court held that it could not. However, the argument raised herein was neither aired nor disposed of in *Oakland Cannabis*.

This case more closely resembles *Gonzales v. Oregon*, where the Supreme Court had to determine the extent to which the CSA provided the Government with the authority to regulate "medical practice beyond prohibiting a doctor from acting as a drug 'pusher' instead of a physician." *Gonzales v. Oregon*, 546 U.S. at 269. Here, the State of Michigan, exercising its police power, saw fit to create a broad statutory and regulatory framework to govern the *medical* use of marijuana. The definition of "manufacture" under the CSA expressly permits states to define the scope of medical practice and allows for states to register practitioners, in their varied capacities, for the purpose of distributing medical marijuana *in conformity with state law*.

This case is not about drug pushers. It is about the interplay between Michigan law and the CSA. Appellants believe that there is no "positive conflict" between the two and that the statutes can, in fact, co-exist. 21 U.S.C. § 903. Under the reading of the statute urged here, where a caregiver, acting as a practitioner within Michigan's medical regime, cultivates marijuana in conformity with the law, no criminal liability lies for the manufacture of that drug. This is not to say that there can be no criminal liability for the manufacture of marijuana that exceeds the scope of the state law.

But, based on the plain language of the definition of "manufacture," the actions of Mr. Marcinkewciz and Ms. Waldron, who informed the district court of

their status as registered caregivers, cannot serve as a basis for criminal liability for the manufacture of marijuana. As such, this Court should reverse the district court and order that the indictment be dismissed.

The indictment is also defective because the Appellants lacked adequate notice of its factual basis. Since the indictment does not make clear whether the Government intended to prosecute Mr. Marcinkewciz and Ms. Waldron for the manufacture of marijuana in conformity with Michigan law, they lacked sufficient notice of the factual basis underlying the indictment that would allow them to prepare an adequate defense. *See Hamling v. United States*, 418 U.S. 87, 117-18 (1974) (indictment "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged."). This is because their defense to an affront on their compliance with Michigan law would differ substantially from their defense to a charge that they failed to comply with the CSA, regardless of their compliance with Michigan law. Thus, the lack of notice of the factual basis for the indictment also presents a fatal defect that requires reversal and dismissal of the indictment.

Finally, Mr. Marcinkewciz and Ms. Waldron submit that there is, at the very least, ambiguity in the language of the statute. It is well settled that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."

Skilling v. United States, 130 S. Ct. 2896, 2932 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). This is because "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.).

Here, Mr. Marcinkewciz and Ms. Waldron relied on a statute duly enacted by the citizens of the State of Michigan that expressly stated that they could not be prosecuted for the conduct at issue in this case.[4] In addition, Appellants could have reasonably concluded, after reading the definition of manufacture in the CSA, that

[4] It is also worth noting that on October 19, 2009, Deputy Attorney General David Ogden issued a memorandum with the subject line "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana." The memo was designed to provide guidance for United States Attorneys regarding the prosecution of marijuana-related offenses in jurisdictions where state laws permit the cultivation, sale, and consumption of marijuana for medical purposes. The Ogden Memo states that:

> prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.

David W. Ogden, Dep't of Justice, *Memorandum for Selected United States Attorneys*, Oct. 19, 2009, *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf, (last visited May 15, 2013). Though the memo also reaffirmed the illegality of marijuana under federal law, its issuance supports the view that Mr. Marcinkewciz and Ms. Waldron lacked fair warning that they would be prosecuted.

their conduct would not subject them to criminal liability for the manufacture of marijuana. Because the CSA can be read to provide immunity for the Appellants' actions, this Court should reverse their convictions.

II. CONGRESS LACKS THE AUTHORITY TO PROHIBIT THE CULTIVATION OF MEDICAL MARIJUANA FOR INTRASTATE PURPOSES IN COMPLIANCE WITH THE MICHIGAN MEDICAL MARIJUANA ACT.

A. Standard of Review

This Court reviews questions of law and statutory interpretation *de novo*. *United States v. Al-Zubaidy*, 283 F.3d 804, 810 (6th Cir. 2002).

B. Argument on the Merits

This Court should reverse the convictions of Mr. Marcinkewciz and Ms. Waldron because the CSA is unconstitutional as applied to caregivers operating in compliance with the MMMA. The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. ART. I, § 8, cl. 3. Congress exceeds its authority under the Commerce Clause when it enacts legislation that neither regulates commercial activity nor contains a requirement that the possession of the item regulated be connected in any way to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 551 (1995); *United States v. Morrison*, 529 U.S. 598, 610 (2000) *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to

be regulated.") (emphasis in original). *But see Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (Held: Commerce Clause grants Congress power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce).

In *Raich*, the Supreme Court considered the constitutionality of California's Compassionate Use Act, which authorizes limited marijuana use for medicinal purposes. The respondents argued, *inter alia*, that the enforcement of the CSA was an unconstitutional exercise of Congress' Commerce Clause authority because their cultivation and possession of marijuana for medical use had no impact on interstate commerce. *Gonzales v. Raich*, 545 U.S. at 7-8. The Supreme Court disagreed.

Citing *Wickard v. Filburn*, 317 U.S. 111 (1942), the court noted that Congress had the authority to regulate purely local activities that form part of an economic "class of activities" that have a substantial effect on interstate commerce. *Id*. at 17. The court reasoned that, because the CSA served to control the "supply and demand of controlled substances," and because the cultivation of marijuana, which could be diverted into illicit channels, had a "substantial effect on supply and demand in the national market for that commodity," Congress acted within its authority in regulating marijuana under the CSA. *Id*. at 19.

This Court should decline to extend *Raich* to the facts of this case for two reasons. First, in the time since the *Raich* decision, the national landscape regarding the regulation of marijuana has changed dramatically. When *Raich* was decided, California was an outlier. Now nearly one-third of the states[5] in the union, as well as the District of Columbia, have adopted their own regimes that permit marijuana use in one form or another. Moreover, on November 6, 2012, two states, Washington and Colorado, approved ballot initiatives that legalized limited cultivation, distribution, possession and usage of marijuana for *recreational* purposes. *See* Washington Initiative 502, Code Reviser's Office, Initiative Measure 502, *available at* http://sos.wa.gov/_assets/elections/initiatives/i502.pdf; Colorado Amendment 64: Use and Regulation of Marijuana, *available at* http://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bdd d6b9678de787257799006bd391/cfa3bae60c8b4949872579c7006fa7ee/$FILE/Am endment%2064%20-%20Use%20&%20Regulation%20of%20Marijuana.pdf.

[5] The states are Alaska, Arizona, Colorado, Delaware, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *See* ALASKA STAT. § 17.37.30 (2007); Ariz. Medical Marijuana Act (Proposition 203) (codified 2011); COLO. CONST. Art. XVIII, § 14; DEL. CODE ANN. tit. 16, § 4903A (2011); HAW. REV. STAT. § 329-122 (2008); ME. REV. STAT. ANN. tit. 22, § 2383 (2009); MD. CODE ANN., CRIM. LAW 5-601(c)(3)(ii) (2012); MICH. COMP. LAWS § 333.26421 (2008); MONT. CODE ANN. § 50-46-1 (2007); NEV. REV. STAT. § 453A.010 (2008); N.J. STAT. ANN. § 24-6I-1 (2010); N.M. STAT. § 30-31C-1 (2007); OR. REV. STAT. § 475.300 (2007); R.I. GEN. LAWS § 1-21-28.6 (2006);VT. STAT. ANN. tit. 18, § 4471 (2003); WASH. REV. CODE § 69.51A.005 (2007).

The proliferation of state regimes permitting the use of medical marijuana undermines one of the primary rationales for affirming the CSA's regulation of the noncommercial marijuana cultivation in *Raich*: the potential diversion of marijuana from legal into illicit channels. As ever more states adopt their own legal frameworks that allow some manner of marijuana cultivation and usage, the supposition that legally grown marijuana will be diverted into "illegal" channels becomes increasingly attenuated. So, too, does the reasoning of *Raich*.

Second, this Court should decline to extend *Raich* to this case because the recent decision in *National Federation of Independent Businesses v. Sebelius* casts doubt on one rationale underlying the *Raich* decision. The Government argued in *Raich* that the regulation at issue was economic in nature because cultivators of marijuana who would otherwise be participants in the market for marijuana would no longer participate in that market if they were allowed to grow their own cannabis. *See* Brief for the Petitioners at 37, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (No. 03-1454). The *Raich* Court adopted this reasoning. *See Raich*, 545 U.S. at 28.

However, when the Government raised a similar argument in *National Federation of Independent Businesses v. Sebelius*—that an individual's choice not to not participate in the health insurance market impacted the national insurance market—the Supreme Court rejected the assertion:

> Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. at 2587. If choosing *not* to buy insurance is not a factor in the analysis under the Commerce Clause, then choosing *not* to buy illegal marijuana is no longer a viable rationale for the exercise of congressional power. Thus, the continued viability of *Raich*, at least as to this point, is in question.

It is true that the Supreme Court noted in *National Federation* that the regulation in *Raich* "did not involve the exercise of any 'substantive and independent power'" but instead concerned only the "constitutionality of 'individual *applications* of a concededly valid statutory scheme.'" *Id*. at 2593 (quoting *McCulloch v. Maryland*, 4 Wheat. 159, 201 (1819), and *Raich*, 545 U.S. at 23). However, in light of the recent explosion of states permitting some form of marijuana usage, the assertion of power in the CSA appears far more "substantive and independent" than when *Raich* was decided.

Indeed, here the Government, which disregarded a duly enacted statutory and regulatory scheme to prosecute just two of the many Michigan citizens whose cultivation of marijuana fully comported with state law, revealed a propensity for arbitrary overreach of federal authority. This exercise of authority is in direct

violation of the federal scheme of Government on which this Country was founded. There will come a day of constitutional reckoning, when the federal government will no longer be able to hold out against the tide of states that seek to permit their citizens to use marijuana to ease the ailments that afflict them. For the foregoing reasons, Mr. Marcinkewciz and Ms. Waldron ask this Court to hasten that day's arrival.

CONCLUSION

Based upon the foregoing arguments and legal authority, Defendants-Appellants, JOHN CLEMENS MARCINKEWCIZ, II, and SHELLEY RENEE WALDRON, respectfully request that this Honorable Court vacate their judgments and sentences, dismiss the indictment against them, and afford any other relief deemed necessary.

DATED this 15th Day of March, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This Brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief was served via CM/ECF on this date to opposing counsel:

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DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(g), Appellant hereby identifies the record entries that are most relevant to his position on appeal:

Description of Entry	Date Filed	Record Entry No.	Page ID Range
Indictment	12/15/2011	1	1-5
Motion to Dismiss	5/22/2012	46	161-163
Brief in support of Motion to Dismiss	5/22/2012	46-1	164-169
Memorandum Opinion and Order	5/24/2012	59	202-206
Plea Agreement (Waldron)	5/24/2012	52	175-182
Plea Agreement (Marcinkewciz)	5/31/2012	63	210-219
Judgment and Sentence (Marcinkewciz)	10/24/2012	91	433-438
Judgment and Sentence (Waldron)	10/19/2012	88	409-414
Notice of Appeal (Marcinkewciz)	10/29/2012	92	439-440
Notice of Appeal (Waldron)	10/29/2012	93	441-442