No. _____

In the
Supreme Court of the United States

Richard Langley,
Petitioner,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether there is a fundamental right to use medical marijuana when it provides life-altering medical benefits that other medications cannot reasonably offer.

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INTRODUCTION

In 2005, this Court left open the question of whether there was a "substantive due process" right to use medical marijuana and remanded for the court of appeals to address that question in the first instance. *Gonzales v. Raich*, 545 U.S. 1, 43 (2005) ("*Raich I*"). On remand, the court of appeals held no such right existed. *Raich v. Gonzales*, 500 F.3d 850, 864–66 (9th Cir. 2007) ("*Raich II*"). In doing so, the court tied the fundamental-rights analysis to state-counting exercise in which a right became fundamental only after a certain threshold number of states chose to legislatively protect the activity in question. *Id*. at 865–66. Over a decade later, the court of appeals below reaffirmed *Raich II*'s analysis and conclusion, holding that Petitioner lacked a fundamental right to use medical marijuana. *United States v. Langley*, 17 F.4th 1273, 1274–75 (9th Cir. 2021).

Petitioner now asks this Court to address the pressing issue of whether there is a fundamental right to use medical marijuana when it provides life-altering medical benefits that other medications cannot reasonably offer. This Court should answer that question in the affirmative. The right to use medical marijuana was broadly protected in this country until 1970. Moreover, this right is foundational. For many individuals, including Petitioner, the ability to function and live without intolerable physical pain rests on their ability to use medical marijuana. As a result, the right to use medical marijuana is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," and this Court should thus recognize it as fundamental. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted).

The lower court's contrary conclusion rested on a claim that a right's status as fundamental turned on a question of current legislative popularity.

"[F]undamental rights," however, "depend on the outcome of no elections." *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)). For this reason, an individual can "invoke a right to constitutional protection," "even if the broader public disagrees and even if the legislature refuses to act." *Id*.

This Court should grant review not only because the lower court erred, but it should do so because whether a right is fundamental is an important, pressing question by its nature. The lower court's decision means countless individuals cannot exercise a fundamental right. That is an unacceptable status quo.

This case is also an excellent vehicle to resolve this issue. The question presented was resolved on the merits by both the district court and court of appeals. For this reason, this petition will allow this Court to resolve the question presented.

OPINIONS BELOW

The district court order is reproduced on pages five through eight of the appendix. The published decision of the U.S. Court of Appeals for the Ninth Circuit is reproduced on pages one through three of the appendix.

JURISDICTION

The court of appeals entered judgment on November 16, 2021. Pet. App. 1a. The court denied a timely petition for rehearing on February 8, 2022. Pet. App. 4a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

In 2017, the district court placed Petitioner on supervised release for one decade. By the terms of his supervised release, he cannot use medical marijuana. While medical marijuana is lawful in California where he lives, *see* Cal. Health & Safety Code § 11362.5, it remains "illegal under federal law," *United States v. Lafley*, 656 F.3d 936, 937 n.3 (9th Cir. 2011) (citing 21 U.S.C. § 812(c)). Thus, if Petitioner uses medical marijuana—even if he does so in compliance with California law—he will violate several mandatory supervised-release conditions, including a condition (required by 18 U.S.C. § 3583(d)) that prohibits him from "commit[ting] a federal . . . crime."

Still, Petitioner—who is now 71—has used and relied on medical marijuana for the past four decades. He uses it to alleviate debilitating physical pain. He had his right leg amputated below the knee in 1978 from a motorcycle accident. The stump on his leg still bleeds, and he requires "extensive pain management." He also suffers from phantom leg pain. Apart from the leg pain, he suffers from a permanently separated shoulder.

Using marijuana as a medicine has worked well for Petitioner. It has helped him cope with the pain without suffering debilitating side effects. He has never abused marijuana (nor any other drug). And while Petitioner has tried other medications, they have significant downsides and do not work as well as marijuana.

In 2020, after struggling for almost three years on supervised release without medical marijuana, Petitioner moved to modify his supervised-release conditions. In support, he argued that he has a fundamental, constitutional right to use medical marijuana, relying on the Ninth Circuit's decision in *Raich II*. While *Raich*'s bottom-line conclusion was that no fundamental right to use medical marijuana

exists, the court reached that result by pointing out that only 11 states had then legalized medical marijuana. *Raich II*, 500 F.3d at 865–66. This few number of state laws meant "that legal recognition" of the right to use medical marijuana had "not yet reached the point where a conclusion can be drawn that the right . . . is fundamental." *Id.* at 866. By the time Petitioner filed his motion, however, 33 states had laws recognizing the right to use medical marijuana, and he argued this meant the right had reached fundamental status under *Raich II*'s democracy-based framework.

The district court denied the motion to modify supervised-release conditions in a written order. Pet. App. 5a–8a. The court acknowledged that Petitioner "suffers from several serious medical conditions, including debilitating pain due to the amputation of his right leg." Pet. App. 6a. The court also stated that it was "sympathetic to [Petitioner's] suffering and the potential medical benefits he might gain from the use of medical marijuana as an analgesic." Pet. App. 7a. Still, the court thought *Raich* prevented it from holding Petitioner had a fundamental right to use medical marijuana. As a result, the court held that the mandatory supervised-release condition that ordered Petitioner not to commit any federal offense tied its hands. Pet. App. 8a (citing 18 U.S.C. § 3583(d)).

Petitioner appealed the district court's order, and the court of appeals affirmed in a published decision. Pet. App. 1a–3a. While 36 states have now legalized medical marijuana, the panel held that *Raich II* still compelled it to reject Petitioner's argument. *Langley*, 17 F.4th at 1275. According to the panel, it was "bound by [the] holding in *Raich* [*II*] until such time as a higher authority determines there is a fundamental right to medical marijuana[.]" *Id.*

Petitioner then petitioned for rehearing en banc and asked the court to overrule *Raich*.

The court of appeals denied the rehearing petition. Pet. App. 10a.

REASONS FOR GRANTING THE PETITION

The "day has . . . dawned" for this Court to "recognize a fundamental right to use medical marijuana." *Raich II*, 500 F.3d at 866. Under this Court's precedents, individuals have a fundamental right to use medical marijuana when it provides life-altering medical benefits that other medications cannot reasonably offer. The lower court's contrary conclusion conflicted with those precedents. Moreover, given the central importance of fundamental rights, this Court should grant review now. Delay will just further perpetrate the injustice of individuals not been able to exercise a fundamental right. This petition also is an excellent vehicle to resolve the question presented. The issue was resolved on the merits by the district court and the court of appeals.

I. This Court should grant review to recognize the fundamental right to use medical marijuana when it provides life-altering medical benefits that other medications cannot reasonably offer.

The court of appeals, in refusing to recognize a fundamental right to use medical marijuana, held its 2007 decision in *Raich II* required that result. *Langley*, 17 F.4th at 1275–76 (citing *Raich II*, 500 F.3d at 864–66). But *Raich II* mistakenly tied the fundamental-rights analysis to a question about how many states now protect the activity in question. *See* 500 F.3d at 865–66. This Court has never decided fundamental rights in that simplistic way. Under the proper analysis, the right to use medical marijuana when it provides life-altering medical benefits that other medications cannot reasonably offer is fundamental. Thus, this Court should

grant review, recognize the right to use medical marijuana, and remand for lower court to determine whether Petitioner can exercise this fundamental right on supervised release.

A. The lower court analyzed whether the right to use medical marijuana was fundamental in a way that conflicts with this Court's precedents.

The Ninth Circuit decided *Raich II* on remand after this Court held that the federal ban on marijuana did not violate the commerce clause. 500 F.3d at 854 (citing *Raich I*, 545 U.S. at 15–22). On remand, the court of appeals addressed whether the petitioner had a fundamental right to use medical marijuana. *Id.* at 861–66. In answering that question, the court explained that it needed to determine whether "the asserted right is 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'" *Raich II*, 500 F.3d at 864 (quoting *Glucksberg*, 521 U.S. at 720–21). But *Raich II* never tried to answer that question.

Instead, *Raich II* pivoted to answering a different question: whether an "emerging awareness" of the right to use medical marijuana existed like the "emerging awareness" of the right to private, consensual sexual conduct that carried the day in *Lawrence v. Texas*, 539 U.S. 558 (2003). The court in *Raich II* held that the "the use of medical marijuana [had] not obtained the degree of recognition today that private sexual conduct had obtained by 2004 in *Lawrence*." *Raich II*, 500 F.3d at 865. In 2007, only 11 states no longer criminalized medical marijuana, substantially less than the 37 states that no longer had a sodomy ban by 2004. *Id.* As a result, the "legal recognition" of medical marijuana had "not yet" gained status as a fundamental right. *Id.* at 866. That said, underscoring its state-law focus, *Raich II* noted that the quick evolution of state law on this issue meant that "the

day" when a court recognized the right to use medical marijuana as fundamental "may be upon us sooner than expected." *Id.*

Raich II's state-counting analysis, however, badly misunderstands fundamental rights. "The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right." *Obergefell*, 576 U.S. at 677. Thus, "fundamental rights" by their nature "depend on the outcome of no elections." *Id.* (quoting *Barnette*, 319 U.S. at 638). For this reason, an individual can "invoke a right to constitutional protection," "even if the broader public disagrees and even if the legislature refuses to act." *Id.* Accordingly, whether a minority or majority of states now protect the right to use medical marijuana isn't dispositive.

Raich II purported to rely on *Lawrence* to establish the relevance of state law to the fundamental-rights analysis. *See Raich II*, 500 F.3d at 865–66. But *Lawrence* didn't strike down Texas's sodomy ban because most states no longer had a sodomy ban by 2004, as *Raich II* suggests. *See Raich II*, 500 F.3d at 865. Instead, *Lawrence* focused on longstanding protection of private, consensual sexual conduct. 539 U.S. at 568–69. This Court in *Lawrence* also focused on precedent that reaffirmed the protection afforded "to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id.* at 574. And while this Court did discuss the change in state law since it had decided *Bowers v. Hardwick*, 478 U.S. 186 (1986)—where it had upheld the same Texas statute—that discussion supported the point that the Court should not follow *Bowers* as a matter of stare decisis. *See Lawrence*, 539 U.S. at 573. Indeed, *Lawrence* held that "*Bowers* was not correct when it was decided," not that later changes in state law undid *Bowers*'s holding. *Id.* at 578. That is, the right at issue was *always* fundamental.

In short, when the court below held it was bound by *Raich II*, it reaffirmed a misguided analysis. *See Langley*, 17 F.4th at 1274–75. Whether a right qualifies as fundamental is not strictly tied to whether it can attract democratic support, as this Court has made clear. *See Obergefell*, 576 U.S. at 677. This basic idea is essential to our constitutional system. This Court should thus grant review to make this clear to the lower court.

B. Properly applying this Court's precedents compels the conclusion that there is, and always has been, a fundamental right to use medical marijuana.

While a right's status as fundamental doesn't depend on the ballot box, it does depend on a court "exercis[ing] reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Obergefell*, 576 U.S. at 664; *see also* Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 Wm. & Mary L. Rev. 1599, 1612–23 (2019) (documenting that the original meaning of the "Due Process Clause" included a substantive check on legislation). Once the potential fundamental right has been "careful[ly] descri[bed]," a court must determine whether the right is, "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720–21 (internal citations and quotation marks omitted).

Here, the right at issue is the right to use medical marijuana when it provides life-altering medical benefits that other medications cannot reasonably offer—though Petitioner will use the shorthand the "right to use medical marijuana." As explained momentarily, that carefully described right is deeply

rooted in this nation's history and implicit in the concept of ordered liberty. This Court should thus grant review to recognize this right.

1. The right to use medical marijuana—protected in this country until 1970—is deeply rooted in this nation's history and tradition.

It is "beyond dispute that marijuana has a long history of use—medically and otherwise—in this country." *Raich II*, 500 F.3d at 864–65. In the United States, people used marijuana as medicine shortly after its introduction from England in 1839. *See also* Lewis A. Grossman, *Life, Liberty, [and the Pursuit of Happiness]: Medical Marijuana Regulation in Historical Context*, 74 Food 7 Drug L. J. 280, 287–90 (2019) (discussing historical use of medical marijuana). Marijuana even appeared in the highly respected United States Pharmacopeia from 1854 until 1942. Indeed, as this Court has pointed out, "despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes[.]" *Raich I*, 545 U.S. at 9.

The right to use medical marijuana was left unregulated in the United States until the passage of the Marihuana Tax Act of 1937, Pub. L. No. 75-348, 50 Stat. 551 (repealed 1970). *Raich II*, 500 F.3d at 864–65. And pernicious racial stereotypes fueled this interest in regulation. The first commissioner of the Federal Bureau of Narcotics (the predecessor agency to the Drug Enforcement Administration) "vigorously petitioned for the Tax Act" because of his concern about marijuana's "'effect on the degenerate races.'" Sandra M. Praxmarer, *Blazing a New Trail: Using a Federalism Standard of Review in Marijuana Cases*, 85 Geo. Wash. L. Rev. Arguendo 25, 31 (2017). He also contended "that marijuana 'makes darkies think they're as good as white men.'" *Id.*; *see also* Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 Wash. & Lee L. Rev. 779, 793–95 (2018)

(discussing this same history). By contrast, medical organizations lined up against the Marihuana Tax Act of 1937.

Likely because of this raced-based concern about minorities using recreational marijuana, "efforts to regulate marijuana use in the early-twentieth century targeted recreational use[] but permitted medical use." *Raich II*, 500 F.3d at 865. Thus, "all twenty-two states that had prohibited marijuana by the 1930s created exceptions for medical purposes." *Id.* (citing Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L. Rev. 971, 1010, 1027, 1167 (1970)). Moreover, while all states criminalized marijuana possession by 1965, "almost all states had created exceptions for 'persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person.'" *Id.* (quoting *Leary v. United States*, 395 U.S. 6, 16–17 (1969)).

This didn't change until Congress passed the Controlled Substance Act of 1970. It was then that Congress criminalized the possession of all marijuana, including when used for medical reasons. *Raich II*, 500 F.3d at 865.

This history of the right is much like the right to sexual autonomy at issue in *Lawrence*, a right found fundamental. In *Lawrence*, this Court noted that there was no "longstanding history in this country of laws directed at homosexual conduct as a distinct matter." 539 U.S. at 568. Rather, like the right to use medical marijuana, the right to private sexual autonomy was left alone. States did not have laws aimed at homosexuals, and "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." *Id.* at 568–69. It was not until "the last third of the 20th century" that states started to target "same-sex couples," much

like it was not until then that Congress (and then the states) banned medical marijuana. *Id*. at 570.

In sum, the right to use medical marijuana is "deeply rooted in this Nation's history and tradition," and its criminalization is of recent vintage. *Glucksberg*, 521 U.S. at 720–21 (internal citations and quotation marks omitted).

2. The right to use medical marijuana is implicit in the concept of ordered liberty, given its ability to allow an individual to live a productive life by relieving intolerable physical pain.

The right to use medical marijuana is "central to individual dignity and autonomy" too. *Obergefell*, 576 U.S. at 663. That is, it is "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720–21. For many, including Petitioner, exercising the right to use medical marijuana is a foundational choice that permits them to have autonomy to make other choices and exercise other rights. *See id*. Someone who struggles with intolerable physical pain will struggle to do basic things for themselves, let alone exercise other fundamental rights.

For these reasons, the right to use medical marijuana for those suffering from intolerable pain is "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720–21.

3. The right to use medical marijuana is a permutation of other rights that this Court has recognized as fundamental.

The right to use medical marijuana also "comprises" the components of "several fundamental rights that have been recognized at least in part by the Supreme Court." *Raich II*, 500 F.3d at 864. This strongly suggests that the right to use medical marijuana is fundamental too.

As *Raich II* observed, this Court in cases like *Lawrence* has recognized that "the Constitution demands [respect] for the autonomy of the person in making [personal] choices[.]" *Raich II*, 500 F.3d at 864 (quoting *Lawrence*, 539 U.S. at 574). This deep respect for personal autonomy overlaps with the right to use medical marijuana to avoid needless suffering. The decision to use medical marijuana is a personal choice that significantly impacts an individual's autonomy.

This Court has also recognized a fundamental zone of autonomy when making certain significant medical decisions. In the context of the decision whether to have an abortion, for example, this Court has recognized the "importance of protecting 'bodily integrity'" and giving individuals the ability to avoid "suffering [that] is too intimate and personal" to "compel" someone to endure. *Raich II*, 500 F.3d at 864 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 849, 852 (1992) (plurality opinion)). Likewise, this Court has recognized "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs[.]" *Washington v. Harper*, 494 U.S. 210, 221–22 (1990). These fundamental rights also overlap with the right to use medical marijuana to avoid needless suffering.

To be sure, this Court has not recognized an unfettered right to make medical decisions. For example, this Court in *Glucksberg* refused to recognize a fundamental right to medically assist a suicide. 521 U.S. at 735. In doing so, this Court pointed to the nearly unbroken tradition of legal prohibitions against assisting suicide. *Id*. at 711–16. That said, Justice O'Connor—who provided the necessary vote for the majority opinion—pointed out that a different result might obtain if a "mentally competent person who is experiencing great suffering" asserted a right to obtain medication to "control[] the circumstances of his or her imminent death." *Id*. at 736

(O'Connor, J., concurring). This suggests support for a fundamental right to use particular medication to avoid needless suffering.

Considered together, these cases show that the right to use medical marijuana is derivative of other fundamental rights and is therefore itself a fundamental right.

4. While not dispositive, the wide-spread current protection of the right to use medical marijuana confirms that the right is fundamental.

This Court has cautioned courts about too aggressively announcing fundamental rights. It has warned that courts should "exercise the utmost care" in deciding whether to consider a right fundamental, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of" judges. *Glucksberg*, 521 U.S. at 720 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)).

If this Court recognizes the right to use medical marijuana as fundamental, it will have exercised the required "reasoned judgment," *Obergefell*, 576 U.S. at 664, not merely enacting a policy preference. This conclusion finds support in the fact that, as already mentioned, 36 states and the District of Columbia now protect the right to use medical marijuana. *Langley*, 17 F.4th at 1273. While *Raich II* was wrong that this sort of evidence is dispositive, it has some relevance: it helps to ground this Court's exercise of judgment in something beyond its own subjective sense.

Additionally, that the right to use medical marijuana is fundamental finds support in recent congressional action. Congress has attached a rider to the annual appropriations bill every year since 2015 that prohibits the Department of Justice from spending federal dollars in a way that "prevent[s]" states "from implementing

their own . . . laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *United States v. Nixon*, 839 F.3d 885, 886–87 (9th Cir. 2016) (quoting Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014)). This too helps to ground this Court's exercise of judgment.

* * *

In sum, this Court should grant review to clarify the proper fundamental rights analysis is not tied to a state-counting exercise. It should also grant review to recognize the fundamental right to use medical marijuana when it provides life-altering medical benefits that other medications cannot reasonably offer

II. The question presented deserves immediate resolution.

This Court should resolve the question presented now rather than wait for this issue to further percolate. The lower court's decision has prevented Petitioner and countless others from exercising a fundamental right. Thus, each day that passes means individuals are being kept from exercising a basic right that everyone who lives in this country is entitled to exercise.

The lower court's refusal to permit Petitioner from exercising his fundamental rights is also especially pernicious. For countless individuals, using medical marijuana allows them to live without debilitating physical pain, to live with dignity and self-determination. For these individuals, this life-altering medicine empowers them to meaningfully exercise their other rights. Your right to free speech, for example, is hard to exercise if you are in too much pain to leave your bed.

Petitioner is one of these countless individuals who rely on medical marijuana. For decades, he has responsibly used marijuana to alleviate intolerable

physical pain caused by a leg amputation and a permanently separated shoulder. Other remedies, like opioids, cause debilitating side effects or are significantly less effective. For Petitioner, marijuana is not a recreational drug. For him, it is medicine that provides an otherwise unattainable basic quality of life. And unless this Court steps in, he will be left to needlessly suffer.

III. This case provides an excellent vehicle to address the question presented.

This petition squarely presents the question presented. The district court refused to permit Petitioner to use medical marijuana on supervised release based on its holding that he lacked a "constitutional right to use medical marijuana[.]" Pet. App. 7a. The court of appeals likewise affirmed the district court's refusal to permit Petitioner to use medical marijuana strictly on a determination that binding court of appeals precedent required it to hold that there is no "substantive due process right to use medical marijuana." *Langley*, 17 F.4th at 1275.

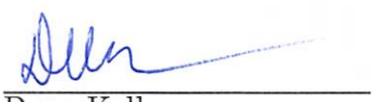
No procedural impediment, then, will prevent this Court from resolving the question presented. As a result, this this petition will allow this Court to resolve the question presented.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

February 15, 2022

Respectfully submitted,



Doug Keller