6-1-2004

Silence Is a Fence around Wisdom: How Conant v. Walters Broke Down the Fence by Securing Physicians' First Amendment Right to Recommend Medical Marijuana to Their Patients

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"SILENCE IS A FENCE AROUND WISDOM"[1]: HOW *CONANT V. WALTERS* BROKE DOWN THE FENCE BY SECURING PHYSICIANS' FIRST AMENDMENT RIGHT TO RECOMMEND MEDICAL MARIJUANA TO THEIR PATIENTS

I. INTRODUCTION

On October 29, 2002, the Ninth Circuit Court of Appeals decided *Conant v. Walters*,[2] upholding a physician's First Amendment right to recommend medical marijuana to seriously ill patients. The court affirmed the district court's permanent injunction, which enjoined the federal government from "(i) revoking [a] physician['s] . . . DEA registration [to prescribe controlled substances] merely because the doctor makes a recommendation for the use of medical marijuana based on a sincere medical judgment and (ii) from initiating any investigation solely on that ground."[3] In so doing, the Ninth Circuit properly held that the government's federal drug policy was an unconstitutional content-based restriction on speech. The court recognized, however, a limit to the physicians' free speech. It affirmed the district court's holding that the government could take administrative action against a physician if it believed in good faith that it had "substantial evidence" that "[a] physician aided and abetted the purchase, cultivation, or possession of marijuana, or engaged in a conspiracy to cultivate, distribute, or possess marijuana."[4] Thus, the Ninth Circuit's decision finally clarified for physicians that, within a bona fide doctor-patient relationship, they may recommend or discuss—

1. Jewish proverb, *available at* http://www.worldofquotes.com/proverb/Hebrew/1/ (last visited Mar. 29, 2004).
2. 309 F.3d 629 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 387 (2003).
3. *Id.* at 634.
4. *Id.* at 633 (citations omitted).

but not assist their patients in obtaining—medical marijuana, essentially lifting a gag order that had been in place since early 1997.

The Ninth Circuit's decision is a hollow victory in some ways. Although physicians can recommend medical marijuana, there is still very little that seriously ill patients can do to act upon such a recommendation. At the very least, however, patients will be better informed about their medical conditions and can join the debate about medical marijuana if they so desire. Moreover, at a time when medical marijuana is becoming more widely accepted in the United States, the court's decision is a positive step towards helping to eliminate the government's negative policies pertaining to the use of medical marijuana and perhaps one day establishing a legal supply system for patients to procure the drug.

II. BACKGROUND AND PROCEDURAL HISTORY

A. California's Compassionate Use Act

On November 5, 1996, Californian voters passed Proposition 215, the Compassionate Use Act of 1996.[5] It provides, in pertinent part:

> seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been *recommended by a physician* who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.[6]

It also protects physicians who recommend medical marijuana, stating that "no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes."[7]

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5. Conant v. McCaffrey, No. C 97-00139 WHA, 2000 U.S. Dist. LEXIS 13024, at *1 (N.D. Cal. Sept. 7, 2000).

6. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (Deering 2000) (emphasis added).

7. *Id.* § 11362.5(c). In addition, eight other states, Alaska, Arizona, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington, enacted medical

B. The Controlled Substances Act and the Federal Government's Response to the Compassionate Use Act

The Controlled Substances Act (CSA) regulates the manufacture and distribution of dangerous drugs.[8] It gives the government authority, through the office of the Attorney General, to register physicians and other manufacturers, distributors, and dispensers of controlled substances.[9] In certain circumstances, the CSA authorizes the government to deny, revoke, or suspend a physician's registration.[10]

The CSA classifies dangerous drugs in one of five "Schedules" depending on various factors. The government applies the strictest regulation to Schedule I drugs, including marijuana, because it determined that they have "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision."[11] The CSA forbids physicians from prescribing Schedule I drugs and allows their use in the United States only for "strictly–controlled, federally-approved research programs."[12]

On December 30, 1996, less than two months after Californians enacted the Compassionate Use Act, the Office of National Drug Control Policy released the "Administration Response to Arizona Proposition 200 and California Proposition 215" (Response).[13] The Response stated that it was the position of the Department of Justice (DOJ) "that a practitioner's action of recommending or prescribing Schedule I controlled substances is not consistent with the 'public

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marijuana laws by either voter initiative or legislative enactment. *Conant*, 309 F.3d at 643 (Kozinski, J., concurring).

8. 21 U.S.C. §§ 801–971 (2000).

9. *See id.* §§ 821–830.

10. *See id.* § 824. The Attorney General has delegated the authority to grant, deny, and revoke registrations to the Drug Enforcement Administration (DEA). *See* 28 C.F.R. § 0.100(b) (2003). Accordingly, a physician must initially obtain a registration from the DEA in order to prescribe any controlled substance.

11. 21 U.S.C. § 812(b)(1) (2000); *see* Conant v. McCaffrey, No. C 97-00139 WHA, 2000 U.S. Dist. LEXIS 13024, at *3 (N.D. Cal. Sept. 7, 2000); Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997).

12. *McCaffrey*, 2000 U.S. Dist. LEXIS 13024, at *3.

13. Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997).

interest' (as that phrase is used in the federal Controlled Substances Act) and will lead to administrative action by the Drug Enforcement Administration (DEA) to revoke the practitioner's registration."[14]

The DOJ and the Department of Health and Human Services (DHHS) clarified the Administration's position in a letter to national, state, and local practitioner associations dated February 27, 1997.[15] The letter assured that "nothing in federal law prevents a physician, in the context of a legitimate physician-patient relationship, from merely discussing with a patient the risks and alleged benefits of the use of marijuana to relieve pain or alleviate symptoms."[16] It also cautioned physicians, however, that they "may not intentionally provide their patients with oral or written statements in order to enable them to obtain controlled substances in violation of federal law."[17]

C. The Plaintiffs and Their Lawsuit

The plaintiffs in *Conant* included physicians licensed to practice in California who treated patients with serious illnesses, patients suffering from serious or terminal illnesses, a physicians' organization, and a patients' organization.[18] After the government issued its Response, a number of California physicians, including the plaintiffs, feared that the government would prosecute them, or that they would lose their DEA registration to write prescriptions if they either discussed medical marijuana with their patients or recommended it to them.[19] There was also a great deal of confusion among physicians as to what qualified as a "recommendation."[20] As a result, many physicians began to self-censor their conversations with patients, withholding information, recommendations, or advice

14. *Id.*
15. *McCaffrey*, 2000 U.S. Dist. LEXIS 13024, at *7.
16. *Id.* (internal quotation marks omitted).
17. *Id.* (internal quotation marks omitted).
18. Conant v. Walters, 309 F.3d 629, 633 (9th Cir. 2002).
19. *McCaffrey*, 2000 U.S. Dist. LEXIS 13024, at *15. A number of the plaintiff physicians expressed this fear even after the preliminary injunction took effect in April 1997. *Id.*
20. Conant v. McCaffrey, 172 F.R.D. 681, 690 (N.D. Cal. 1997). The government's policy on medical marijuana was so ambiguous and contradictory that even its own attorneys were unable to clearly articulate its meaning. *Id.* at 691.

regarding the use of medical marijuana.[21] Some physicians omitted medically relevant information from patients' medical charts.[22] Perhaps most significant was the government's acknowledgment that, in reaction to the Response, "a reasonable physician would have a genuine fear of losing his or her DEA registration to dispense controlled substances if that physician were to recommend marijuana to his or her patients."[23]

The plaintiffs filed the original action in early 1997, seeking to enjoin that part of the federal policy that threatened to punish physicians for discussing medical marijuana with their patients.[24] The plaintiffs also sought a declaration that the government's threats to punish physicians for communicating with their patients about the use of medical marijuana violated the First Amendment.[25]

On April 30, 1997, District Judge Fern Smith issued a preliminary injunction.[26] The government never appealed the preliminary injunction, which remained in effect even after Judge Alsup took over the case on August 19, 1999.[27] Judge Alsup dissolved the preliminary injunction and issued a permanent injunction,[28] which enjoined the government from

> (i) revoking any physician class member's DEA registration merely because the doctor makes a recommendation for the use of medical marijuana based on a sincere medical judgment and (ii) from initiating any investigation solely on

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21. *McCaffrey*, 2000 U.S. Dist. LEXIS 13024, at *14.

22. *Id.* Both parties agreed that "accurate charts are necessary to provide sound medical care to the patient in the future, either by the same physician or by a different physician, and the failure to accurately chart a patient's care could jeopardize the patient's life and health." *Id.* at *14 n.2.

23. *Id.* at *15.

24. *Id.* at *16.

25. *Id.*

26. Conant v. Walters, 309 F.3d 629, 633 (9th Cir. 2002). Judge Smith, who was the first judge assigned to the case, presided over it for over two years. *Id.* The preliminary injunction prohibited the government from "'tak[ing] administrative action against physicians for recommending marijuana unless the government in good faith believe[d] that it ha[d] substantial evidence' that the physician aided and abetted the purchase, cultivation, or possession of marijuana, or engaged in a conspiracy to cultivate, distribute, or possess marijuana." *Id.* (citations omitted) (quoting Conant v. McCaffrey, 172 F.R.D. 681, 700 (N.D. Cal. 1997)).

27. *Id.*

28. *Id.*

> that ground. The injunction should apply whether or not the doctor anticipates that the patient will, in turn, use his or her recommendation to obtain marijuana in violation of federal law.[29]

III. THE NINTH CIRCUIT'S DECISION IN *CONANT V. WALTERS*

After the district court issued the permanent injunction, the government appealed the decision to the Ninth Circuit.[30]

A. Aiding and Abetting

The court first addressed whether a physician's recommendation of medical marijuana would lead to illegal use of the drug. The Ninth Circuit rejected this argument and agreed with the district court that there were "many legitimate responses" to a physician's recommendation of medical marijuana to a patient.[31] For example, a physician could try to place a patient in a federally-approved experimental marijuana therapy program, or upon receiving a recommendation of medical marijuana from a physician, a patient could petition the government to change the law regarding the medical use of the drug.[32]

The court then addressed whether a physician's recommendation of medical marijuana was analogous to a prescription of a controlled substance.[33] The court found that the government, which argued that a recommendation was essentially a prescription, was interpreting the injunction too broadly.[34] The court clarified that if a physician who recommended medical marijuana to a patient intended for the patient to use the recommendation—like a prescription—to obtain marijuana, then the physician would be guilty of aiding and abetting.[35]

The court went on to consider whether the permanent injunction protected criminal conduct because it applied even when a physician anticipated that a patient would use the physician's recommendation

29. *Id.* at 634 (quoting *Conant*, 2000 U.S. Dist. LEXIS 13024, at *47–*48).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 635.
34. *Id.*
35. *Id.*

to obtain marijuana in violation of federal law.[36] In addressing this issue, the Ninth Circuit agreed with the district court's statement of the law pertaining to aiding and abetting.[37] The court also relied on *United States v. Gaskins*[38] for its test for aiding and abetting, holding that the government must prove the following four elements to obtain a conviction for aiding and abetting:

> (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense.[39]

Lastly, the Ninth Circuit adopted the district court's test for conspiracy, which required that a defendant make "'an agreement to accomplish an illegal objective and [that he] knows of the illegal objective and intends to help accomplish it.'"[40]

Using these tests, the court held that "[a] doctor's *anticipation* of patient conduct . . . does not translate into aiding and abetting, or conspiracy."[41] The court reasoned that aiding and abetting requires a physician to have the specific intent to provide a patient with a means to obtain marijuana.[42] In addition, the court stated that conspiracy requires that the physician know that a patient intends to obtain marijuana, agree to help the patient obtain it, and intend to help the patient obtain it.[43]

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36. *Id.*

37. *Id.* According to Judge Smith, a conviction for aiding and abetting required proof that the defendant "'associate[d] himself with the venture, that he participate[d] in it as something that he wishe[d] to bring about, that he [sought] by his actions to make it succeed.'" *Id.* (alterations in original) (quoting Conant v. McCaffrey, 172 F.R.D. 681, 700 (N.D. Cal. 1997) (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 190 (1994)).

38. 849 F.2d 454 (9th Cir. 1988).

39. *Conant*, 309 F.3d at 635 (quoting *Gaskins*, 849 F.2d at 459).

40. *Id.* (quoting *McCaffrey*, 172 F.R.D. at 700–01).

41. *Id.* at 635–36 (emphasis added).

42. *Id.* at 636.

43. *Id.* The court also dismissed the government's argument that the injunction barred it from investigating suspected criminal misconduct, finding that the government erroneously misconstrued language in the permanent

In sum, the court found that a physician's recommendation of medical marijuana could lead to any number of legitimate responses by a patient. Therefore, by simply recommending the drug, a physician does not automatically aid and abet a crime. Moreover, aiding and abetting only becomes an issue when a physician has the specific intent to provide a patient with a means to acquire medical marijuana. Thus, if a physician merely *anticipates* that a patient may use a recommendation to obtain the drug illegally, the physician is not guilty of aiding and abetting.

B. First Amendment Analysis

The Ninth Circuit next analyzed whether the government's federal drug policy violates a physician's First Amendment rights. The court considered three issues. First, it determined whether the First Amendment protects physician speech. Next, the court considered whether the federal policy is a content-based and viewpoint-based restriction. Finally, the court addressed whether, under the standard of strict scrutiny, the government could justify a restriction of protected speech.

If a regulation is aimed at suppressing the subject matter of speech, it is considered a content-based regulation and will receive strict scrutiny.[44] Accordingly, a court applying strict scrutiny will uphold a content-based restriction only if: (1) it furthers a compelling government interest, and (2) it is narrowly tailored to use the least restrictive means possible to further the interest.[45] The Supreme Court has held that "'[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'"[46] This is due to the concern

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injunction that differed slightly from language in the preliminary injunction. *Id.* The court interpreted the permanent injunction as enjoining essentially the same conduct as the preliminary injunction. *Id.* It found that because a physician's recommendation was not illegal conduct, the part of the injunction that excluded investigations solely on that basis did not get in the way of the federal government's ability to enforce its laws. *Id.*

44. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

45. *Sable Communications*, 492 U.S. at 126.

46. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 126 (1991) (quoting Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984)).

that when the government regulates speech based on its content, it will drive certain topics and viewpoints from the marketplace of ideas.[47] As the Court held in *Texas v. Johnson*,[48] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[49] Thus, even though the government does not approve of medical marijuana, it does not follow that it can necessarily restrict physicians from discussing the drug with their patients.

Furthermore, content-based regulations that attempt to suppress particular viewpoints on a topic may have an even stronger presumption of invalidity. For example, in *Rosenberg v. Rector and Visitors of University of Virginia*,[50] the Court clearly stated its disfavor of such restrictions:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.[51]

Thus, courts presume that content-based speech restrictions, particularly those targeted at specific viewpoints, are invalid.

Although content-based speech restrictions are presumptively invalid, they are not absolutely precluded. The government may impose a content-based restriction, but only if it meets the two requirements of strict scrutiny. Accordingly, for a content-based restriction to be upheld, it must promote a compelling government interest, and the government must narrowly tailor the means it uses to achieve that interest.

After finding that physician speech received First Amendment protection, the *Conant* court concluded that the government's policy prohibiting physicians from recommending medical marijuana to

47. *Id.*
48. 491 U.S. 397 (1989).
49. *Id.* at 414.
50. 515 U.S. 819 (1995).
51. *Id.* at 829 (citations omitted).

their patients was a content-based and viewpoint-based restriction. Then, the Ninth Circuit applied strict scrutiny and found that the policy restricting physician speech was not justified by a compelling government interest, and it was not narrowly tailored.

1. Physician speech and the First Amendment

The Ninth Circuit found that communication between physicians and their patients was an "integral component of the practice of medicine."[52] Citing *Trammel v. United States*,[53] the court stressed the importance of physicians being able to speak openly and honestly with their patients.[54] In *Trammel*, the Supreme Court held that the doctor-patient privilege is "rooted in the imperative need for confidence and trust."[55] The Court further held that "the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment."[56]

Further acknowledging the significance of the doctor-patient relationship, the Ninth Circuit found that the Supreme Court had recognized that the First Amendment protects physician speech.[57] The court relied on *Planned Parenthood of Southeastern Pennsylvania v. Casey*[58] and *Rust v. Sullivan*[59] in reaching its conclusion. According to the Ninth Circuit, the *Casey* Court recognized that physicians have a First Amendment right *not* to speak, while the Court in *Rust* held that some regulations on physician speech may "'impinge upon the doctor-patient relationship.'"[60] In addition, the court found that *Rust* did not uphold restrictions on speech itself, but rather it upheld restrictions on federal funding for specific types of activity, such as abortion counseling, referral, or advocacy.[61] Lastly, the court noted that in *Casey*, although a plurality of the Supreme Court upheld

52. Conant v. Walters, 309 F.3d 629, 636 (9th Cir. 2002).
53. 445 U.S. 40 (1980).
54. *Conant*, 309 F.3d at 636.
55. *Trammel*, 445 U.S. at 51.
56. *Id.*
57. *Conant*, 309 F.3d at 636.
58. 505 U.S. 833 (1992) (plurality opinion).
59. 500 U.S. 173 (1991).
60. *Conant*, 309 F.3d at 636 (quoting *Rust*, 500 U.S. at 200).
61. *Id.* at 638.

Pennsylvania's requirement that a physician advise a patient about the health risks associated with an abortion and provide alternatives to abortion, the Court also recognized that physicians did not have to comply with the law if they had a reasonable belief that the information would have a "'severely adverse effect on the physical or mental health of the patient.'"[62] Whereas the statute in *Casey* "did not 'prevent the physician from exercising his or her medical judgment,'"[63] according to the court, the government's policy in *Conant* did precisely that.[64]

The Ninth Circuit next analyzed whether the fact that physicians are members of a regulated profession means that they must relinquish their First Amendment rights. Relying on *Florida Bar v. Went For It, Inc.*,[65] the court firmly held that "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'"[66] The court also noted that the First Amendment even protects commercial speech by professionals, citing *Bates v. Arizona*[67] to support its conclusion.[68] Lastly, the court pointed to *NAACP v. Button*[69] for an example of how attorneys have the right "to speak freely subject only to the government regulating with 'narrow specificity.'"[70]

Within the context of its discussion of the physicians' First Amendment rights, the court relied on a recent Supreme Court decision that dealt specifically with regulating speech about controlled substances, *Thompson v. Western States Medical Center*.[71] The Court in *Thompson* found that "provisions in the Food and Drug Modernization Act of 1997 that restricted physicians and pharmacists from advertising compounding drugs violated the First Amendment."[72] Moreover, the Court declined "to make the

62. *Id.* (quoting *Casey*, 505 U.S. at 883–84).
63. *Id.* (quoting *Casey*, 505 U.S. at 884).
64. *Id.*
65. 515 U.S. 618 (1995).
66. *Conant*, 309 F.3d at 637 (quoting *Florida Bar*, 515 U.S. at 634).
67. 433 U.S. 350 (1977).
68. *Conant*, 309 F.3d at 637. In *Bates*, the Supreme Court held that advertising by attorneys could not be subject to blanket suppression. 433 U.S. at 382–83.
69. 371 U.S. 415 (1963).
70. *Conant*, 309 F.3d at 637 (quoting *Button*, 371 U.S. at 433).
71. 535 U.S. 357 (2002).
72. *Conant*, 309 F.3d at 637 (citing *Thompson*, 535 U.S. at 360).

'questionable assumption that doctors would prescribe unnecessary medications' and rejected the government's argument that 'people would make bad decisions if given truthful information about compounded drugs.'"[73] The Ninth Circuit recognized that the government's argument in the present case—that a physician-patient discussion about medical marijuana may result in the patient making a bad decision—was the same paternalistic reasoning that was flatly rejected by the Supreme Court in *Thompson*.[74] Thus, the court refused to accept the argument proffered by the government, emphasizing the warning the Supreme Court gave in *Thompson*: "'If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.'"[75]

Accordingly, the Ninth Circuit found that because of the significance of the physician-patient relationship, communication between doctors and their patients is protected by the First Amendment, even though physicians are a part of a regulated profession and the communication pertains to a controlled substance.

2. The government's policy is a content-based and viewpoint-based restriction

The court also addressed whether the government was punishing physicians based on the content of their speech, because it was clear that the only time a doctor-patient conversation triggered the government's policy was when it included a discussion of medical marijuana.[76] The court found support from *R.A.V. v. City of St. Paul*[77] in asserting that content-based restrictions on speech are "'presumptively invalid.'"[78] The court recognized that the government's policy not only prohibited a discussion of medical marijuana, but also denounced the expression of a particular viewpoint, namely, that a specific patient might benefit from the drug.[79] The court held that within the context of the First

73. *Id.* (quoting *Thompson*, 535 U.S. at 374).
74. *Id.*
75. *Id.* (quoting *Thompson*, 535 U.S. at 373).
76. *Id.*
77. 505 U.S. 377 (1992).
78. *Conant*, 309 F.3d at 637 (quoting *R.A.V.*, 505 U.S. at 382).
79. *Id.*

Amendment, such condemnation of particular views was "especially troubling."[80] Relying on *Rosenberg*, the court noted that when the government attempts to suppress a speaker's viewpoint on a particular subject, "'the violation of the First Amendment is all the more blatant.'"[81]

The court analogized the restriction on medical advice in *Conant* to a similar policy that the Supreme Court struck down in *Legal Services Corp. v. Velazquez*.[82] *Velazquez* dealt with a government restriction that prohibited legal assistance organizations that received federal funds from challenging existing welfare laws.[83] The restriction forbade attorneys from "'present[ing] all the reasonable and well-grounded arguments necessary for proper resolution of the case.'"[84] The court held that like the restriction in *Velazquez*, the government's policy in *Conant* "'alter[ed] the traditional role'" of physicians by "'prohibit[ing] speech necessary to the proper functioning of those systems.'"[85]

Accordingly, the Ninth Circuit concluded that the government's policy on recommending medical marijuana was a content-based and viewpoint-based restriction because it took effect only after a physician discussed the drug with a patient and voiced an opinion on it that was contrary to the government's view.

3. The government's restriction on speech is not justified by a compelling interest

The Ninth Circuit then explored whether the federal policy furthered a compelling government interest. The government justified its policy by asserting that a doctor's recommendation of medical marijuana might encourage a patient to engage in illegal conduct.[86] Therefore, the government presumably had a compelling interest in keeping patients from potentially taking part in such conduct. The court compared the government's argument to a similar one previously rejected by the Supreme Court in *Ashcroft v.*

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80. *Id.*

81. *Conant*, 309 F.3d at 637 (quoting Rosenberg v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

82. 531 U.S. 533 (2001).

83. *Conant*, 309 F.3d at 638 (citing *Velazquez*, 531 U.S. at 537–38).

84. *Id.* (quoting *Velazquez*, 531 U.S. at 545).

85. *Id.* (quoting *Velazquez*, 531 U.S. at 544).

86. *Id.*

Free Speech Coalition, Inc..[87] *Free Speech Coalition* dealt with virtual child pornography and the government's defense of the Child Pornography Prosecution Act of 1996.[88] The government argued that pedophiles might use virtual images to encourage children to participate in sexual activity.[89] The Supreme Court, however, rejected the government's assertion and held that "'[w]ithout a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage . . . illegal conduct.'"[90] Accordingly, the Ninth Circuit concluded that the government's argument in defending its marijuana policy "mirror[ed]" the argument rejected in *Free Speech Coalition*.[91]

Thus, the Ninth Circuit found that the government may not restrict physician speech about medical marijuana solely because such speech may encourage people to engage in illegal activity.

4. The government's policy is not narrowly tailored

Finally, the court focused on the "'narrow specificity'" requirement that the government's drug policy needed to meet in order to survive First Amendment scrutiny.[92] The court stressed that, throughout the litigation of *Conant*, the government was unable to describe precisely what speech the policy prohibited.[93] As a result, the government merely described the speech as a communication that the patient believed to be a recommendation of medical marijuana.[94] Therefore, the court concluded that the determination of whether a doctor-patient conversation regarding medical marijuana constituted a "recommendation" depended on the meaning the patient gave to the physician's words.[95] Relying on precedent established by *Thomas v. Collins*,[96] the court held that under the First Amendment, this type of uncertainty is not allowed.[97] According to the court, the

87. 535 U.S. 234 (2002).
88. *Conant*, 309 F.3d at 638.
89. *Id.* (citing *Free Speech Coalition*, 535 U.S at 250).
90. *Id.* (quoting *Free Speech Coalition*, 535 U.S. at 253–54).
91. *Id.*
92. *Id.* at 639 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
93. *Id.*
94. *Id.*
95. *Id.*
96. 323 U.S. 516 (1945).
97. *Conant*, 309 F.3d at 639.

Supreme Court in *Thomas* struck down a state statute because it did not make a clear distinction between union membership, solicitation, "and mere 'discussion, laudation, [or] general advocacy.'"[98] The court then compared the government's policy to the statute in *Thomas*, stating that the policy, like the statute, left physicians and patients "'no security for free discussion.'"[99] The court emphasized that because of the "'fickle iterations of the government's policy,'" physicians were suppressing speech that the First Amendment protected.[100]

In sum, because the government's policy on recommending medical marijuana did not specify exactly what speech is proscribed, the Ninth Circuit found that the policy chilled constitutionally protected speech and, accordingly, the policy was not narrowly tailored.

IV. ANALYSIS OF THE NINTH CIRCUIT'S DECISION

The Ninth Circuit's decision in *Conant v. Walters* properly held that the First Amendment protects a physician's right to recommend medical marijuana to a patient within a bona fide doctor-patient relationship. On the other hand, in *Pearson v. McCaffrey*[101]—a comparable case dealing with physicians and patients who also challenged the federal medical marijuana policy on First Amendment grounds—the District Court of the District of Columbia incorrectly reached the opposite conclusion.[102]

While both cases have similar facts, the *Conant* court, in comparison to the court in *Pearson*, gave physician speech much broader protection under the First Amendment. The Ninth Circuit recognized that a physician's recommendation of medical marijuana

98. *Id.* (quoting *Thomas*, 323 U.S. at 535).

99. *Id.* (quoting *Thomas*, 323 U.S. at 535).

100. *Id.* (quoting Conant v. McCaffrey, 172 F.R.D. 681, 696 (N.D. Cal. 1997)). The Ninth Circuit concluded its analysis with a discussion of federalism, noting that its decision was consistent with notions of federalism that have traditionally designated the states as the primary regulators of professional conduct. *Id.*

101. 139 F. Supp. 2d 113 (D.D.C. 2001).

102. *Id.* at 120–22. Although the *Pearson* decision is not from a circuit court, a comparison of that court's reasoning with the Ninth Circuit's in *Conant* is appropriate because the cases have almost identical facts, and there are very few (if any) circuit court cases that deal with this particular issue. Moreover, there is no split among the circuit courts on this issue.

is protected up until the point that the physician specifically intends for a patient to use the recommendation to engage in illegal activity.[103] In contrast, the district court in *Pearson* held that there is no constitutional protection for a physician's recommendation of medical marijuana because the speech itself is "'an integral part of conduct in violation of a valid criminal statute.'"[104] In reaching its decision, the *Pearson* court attached a much higher degree of regulation to physician speech.[105] Consequently, unlike the *Conant* court, the *Pearson* court failed to address the issue of whether the federal policy was a content-based restriction on speech. In addition, because of its narrow holding regarding the illegality of a physician's recommendation of medical marijuana, the court in *Pearson* did not have to consider where to draw the line between a legal and an illegal recommendation, as the court did in *Conant*.

A. The Ninth Circuit's Reasoning in Conant v. Walters *Was Proper*

1. Physician speech receives constitutional protection

First, the Ninth Circuit correctly held that communication between a physician and a patient receives First Amendment protection. In so holding, the court properly interpreted both *Rust* and *Casey*. Although neither case explicitly held that the government may not impose viewpoint-based restrictions on physician speech, some courts have held that, implicitly, Supreme Court cases suggest there is First Amendment protection for such speech.[106] While the *Rust* Court did not specifically answer whether

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103. *See Conant*, 309 F.3d at 635–36.

104. *Pearson*, 139 F. Supp. 2d at 121 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). The district court equated a physician's recommendation of medical marijuana with a prescription for the drug, and, as a result, the court found that the recommendation itself was a violation of federal law under the Controlled Substance Act (CSA). *Id.*

105. *See id.* The court found that when speaking with a patient, a physician engages in the practice of medicine which has a long history of regulation. *Id.*

106. *See* Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 218–19, 265 (1994); *see also* Conant v. McCaffrey, 172 F.R.D. 681, 694 (N.D. Cal. 1997) (stating that "[a]lthough the Supreme Court has never held that the physician-patient relationship, as such, receives special First Amendment protection, its case law assumes, without so deciding, that the relationship is a protected one").

viewpoint-based restrictions on physician speech are proper in a private context, there is a part of the majority's opinion that suggests that speech restrictions that would affect both public and private physicians would be unconstitutional.[107]

Casey, moreover, appears at first glance not to protect physician speech. For example, even though the plurality recognized that the challenged statute affected physicians' speech rights, the Court dismissed the issue, finding that physician-patient communication is simply a "part of the practice of medicine, subject to reasonable licensing and regulation by the State."[108] As the *Conant* court correctly noted however, the plurality in *Casey* did recognize that the statute in question provided physicians the opportunity to abstain from disclosing information which, in their medical judgment, would harm a patient's mental or physical health.[109] It follows, then, that physicians should not have to remain silent about medical marijuana if, in their expert judgment, the drug could help a patient's mental or physical health.

The *Conant* court did not rely solely on *Rust* and *Casey* to anchor physician-patient communication within the sphere of constitutionally protected speech, however. Instead, the court appropriately reached out to a broader set of cases such as *Trammel* and *Florida Bar* to illustrate clearly the level of importance the Court assigned to not only open and free communication between physicians and patients, but also to professional speech in general.

Furthermore, the Ninth Circuit's reliance on *Thompson*, even though the case dealt with commercial speech, was proper. While the Ninth Circuit did not fully explore the Supreme Court's rationale in *Thompson* for why commercial speech receives constitutional protection, the Court's analysis in that case is equally applicable to the speech in the present case. According to the *Thompson* Court, "'[i]t is a matter of public interest that [economic] decisions, in the aggregate, be intelligent and well-informed. To this end, the free

107. Berg, *supra* note 106, at 211.

108. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 884 (1992).

109. *See* Conant v. Walters, 309 F.3d 629, 638 (9th Cir. 2002).

flow of commercial information is indispensable.'"[110] The Court further emphasized that "'[t]he commercial marketplace . . . provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.'"[111] Certainly, it is a matter of public interest to ensure that patients make health decisions that are "intelligent and well-informed." In addition, there can be no doubt that the free exchange of ideas is as "indispensable" in the physician-patient context as it is in the commercial context because it affords the patient the opportunity to know what options are available for treatment and to personally assess, without interference from the government, whether the information is of any value. If a physician is barred by the government from presenting all possible treatment options to a patient, then it is impossible for the patient to fully and properly assess the value of such information.

2. Aiding and abetting, conspiracy, and the *Brandenburg* test

After finding that physician-patient speech is protected by the First Amendment, the court properly held that a physician's recommendation of medical marijuana does not constitute illegal conduct. The plaintiff physicians simply wanted to be free to discuss medical marijuana with their patients without the fear of government retaliation.[112] Clearly, this case was not about "doctors prescribing, growing, or distributing marijuana, nor [was] it about giving free rein to patients to make massive purchases of marijuana for distribution."[113] The court made this point apparent when it held that a physician's recommendation did not meet the elements of either aiding and abetting or conspiracy.

Although the court chose not to do so, it could have analyzed this issue using the *Brandenburg* test to reach a similar result. Under this test, speech which advocates criminal conduct receives constitutional protection unless it is "directed to inciting or

110. Thompson v. W. States Med. Ctr., 535 U.S. 357, 366 (2002) (alteration in original) (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976)).

111. *Id.* at 367 (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)).

112. *See Conant*, 309 F.3d at 640 n.2 (Kozinski, J., concurring).

113. Conant v. McCaffrey, 172 F.R.D. 681, 686 (N.D. Cal. 1997).

producing imminent lawless action and is likely to incite or produce such action."[114] In other words, in order to be punishable, the speech must satisfy both of the following requirements: 1) the speaker must intend to incite an immediate illegal act, *and* 2) it must be likely that the speaker will succeed in inciting such an act.

Given the facts of the present case, it seems certain that at least one, if not both prongs, of this test are not met. When a physician recommends medical marijuana to a patient, the physician is merely informing the patient of possible treatments for the patient's illness. It is not necessarily true that the physician intends for the patient to immediately use the recommendation to obtain marijuana.[115] While it may be possible to prove that a physician intended for a patient to use a recommendation to obtain marijuana, it is uncertain whether the second prong of the *Brandenburg* test could be met. Moreover, even if a physician were to advise a patient to obtain and use medical marijuana, it is not a forgone conclusion that the patient would act upon the physician's recommendation, especially since, under federal law, the drug is still considered illegal, and in the states where medical marijuana is legal, it is not easy to obtain.[116]

3. First Amendment issues

Most importantly, the Ninth Circuit correctly held that because the federal policy forbids physicians from recommending medical marijuana, it violates physicians' First Amendment rights. The court clearly recognized that the federal policy sought to punish physicians based not only on the content of their speech with their patients, but also on the viewpoint they expressed on medical marijuana.[117] Because content-based restrictions, especially those targeted at a particular viewpoint, are presumptively invalid,[118] the court properly applied strict scrutiny.

First, the court correctly held that the federal policy did not further a compelling government interest. The Supreme Court has

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114. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

115. *See supra* notes 31–32 and accompanying text.

116. *See generally* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) (holding that the dispensing of marijuana for medical necessity by "medical cannabis dispensaries" is not exempted from prosecution under the CSA).

117. *Conant*, 309 F.3d at 637.

118. *See supra* notes 44–51 and accompanying text.

made it clear that forbidding a particular message is, by definition, an illegitimate government objective.[119] There is no doubt that the government in this case was seeking to suppress a particular message: Medical marijuana may benefit some patients. Moreover, although the government justified its policy by asserting that it had an interest in keeping physicians from encouraging their patients to engage in illegal conduct, the Ninth Circuit relied on the Court's reasoning in *Free Speech Coalition* and rightly rejected the government's argument. Because the court found that the connection between physician speech and illegal conduct was so attenuated, it properly declined to recognize the government's interest in prohibiting the speech.

Finding that the government's policy was not justified by a compelling interest, the Ninth Circuit then concluded that the federal policy was not narrowly tailored. First, the court correctly recognized the vagueness of the federal policy, focusing on the fact that the government never gave a clear definition of what speech the policy proscribed.[120] This, in turn, made physicians fearful of talking about medical marijuana because they did not want the government to sanction them for merely discussing, but not recommending, the drug to their patients.[121] Ultimately, patients were left to decide what constituted a recommendation of medical marijuana.[122] As a result, physicians were suppressing their speech, even though the majority of it was protected by the Constitution.[123] Clearly, if physicians were refraining from engaging in constitutionally protected speech, then the government did not narrowly tailor its federal policy to burden the least possible speech.

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119. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence . . . . Government action that stifles speech on account of its message . . . contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a *legitimate regulatory goal*, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." (citations omitted) (emphasis added)).

120. *Conant*, 309 F.3d at 639.

121. *See supra* notes 19–21 and accompanying text.

122. *Conant*, 309 F.3d at 639.

123. *Id.*

Button provided proper support for the court's conclusion that the government did not narrowly tailor its policy regarding medical marijuana. In that case, the Supreme Court held:

> [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.[124]

Thus, by making vague threats of sanctions, the government was infringing upon the "breathing space" of physicians' free speech rights because it was deterring physicians from speaking at all.

The Ninth Circuit's reliance on *Thomas* is appropriate as well. The Court in that case recognized the problems that arise when listeners are allowed to define the meaning of a speaker's words, stating that "[g]eneral words create different and often particular impressions on different minds. No speaker, however careful, can convey exactly his meaning, or the same meaning, to the different members of an audience."[125] If a patient were allowed to decide whether a conversation about medical marijuana was either a simple discussion about the drug or an outright recommendation of it, physicians would be hesitant to initiate any discussion whatsoever because they would be fearful of a patient's interpretation of the conversation. Once again, because the policy is not narrowly tailored, it forces physicians to suppress speech that may very well receive First Amendment protection.

B. The District Court's Reasoning in Pearson *Was Flawed as Compared to* Conant

The plaintiffs in *Pearson* included physicians, patients, and scientists, all of whom sought a preliminary injunction against many of the same governmental agencies that were the defendants in *Conant*.[126] They alleged that the federal policy violated the First Amendment rights of physicians and patients because the speech at issue, prescribing and recommending medical marijuana, was "fully

124. NAACP v. Button, 371 U.S. 415, 433 (1963) (citations omitted).
125. Thomas v. Collins, 323 U.S. 516, 534 (1945).
126. *See* Pearson v. McCaffrey, 139 F. Supp. 2d 113, 115 (D.D.C. 2001).

protected."[127] As a result, the plaintiffs sought to enjoin the defendants from initiating civil, criminal, or administrative proceedings against physicians who wanted to prescribe or recommend medical marijuana to their seriously ill patients.[128]

In holding that the federal policy did not violate physicians' First Amendment rights, the *Pearson* court gave the federal policy deferential review, failing to address a number of issues raised by the plaintiffs. Significantly, the court did not analyze whether the federal policy was a content-based restriction. Instead, the court focused its attention on the government's argument that a recommendation of medical marijuana was essentially a prescription for the drug.[129] Agreeing with the government's assertion, the court concluded that the plaintiffs had no First Amendment concerns because it was clear that they could discuss the risks and benefits of marijuana, so long as the discussion did not turn into a recommendation.[130] Moreover, in reaching this conclusion, the court found that when a physician has a discussion with a patient, the discussion is part of the practice of medicine, and thus, it can be regulated.[131] Lastly, because it held that a recommendation of marijuana was itself a violation of federal law, the court did not need to address just how far a recommendation could go before it crossed the line into illegal conduct.

The district court's reasoning was faulty, however, because it assumed that since some states allow a patient to use a physician's recommendation to obtain marijuana, a recommendation is always analogous to a prescription for the drug.[132] Based on this assumption, the court concluded that even if state law allowed for a prescription or recommendation of medical marijuana, "to do so is still a violation of federal law under the CSA."[133] Accordingly, the court held that physicians could "freely discuss the risks and benefits

127. *Id.* at 117.
128. *Id.* at 115.
129. *See id.* at 120–21.
130. *Id.* at 121.
131. *Id.*
132. *Id.* at 120–21. The court stated that "the term 'recommend' has a special significance under the law because patients [in California] are able to take a recommendation for medicinal marijuana to a buyers' club to receive the drug." *Id.* at 120.
133. *Id.* at 121.

of medicinal marijuana," but it found that "the recommendation . . . of the drug is a different issue."[134] In reaching this conclusion, the district court obviously did not entertain any other use for a physician's recommendation of medical marijuana other than an illegal one. Thus, in the court's mind, a recommendation could lead to only one thing: an illegal prescription for medical marijuana.

This approach, as compared to the one in *Conant*, is clearly far less protective of physician speech. Whereas *Conant* protected physician speech, including recommendations of medical marijuana, up until the point that the recommendation incited unlawful behavior, *Pearson* cut protection off at the moment of recommendation. Before adopting such a rigid interpretation of "recommendation," the *Pearson* court should have applied either the reasoning from *Conant* or the first prong of the *Brandenburg* test to address whether a physician who recommends medical marijuana specifically intends for a patient to commit an illegal act. Indeed, had the court applied either analysis, it most likely would have discovered that not all physicians intend for their recommendations of medical marijuana to be like prescriptions that patients can use to obtain the drug. Regrettably, the court's limited analysis prevented it from exploring the possibility that a physician may recommend medical marijuana to a seriously ill patient for a legal purpose, such as to enroll the patient in a federally-approved government research program, or to encourage the patient to become involved in the political debate over medical marijuana. Thus, had the court expanded its perception of what a "recommendation" is and how a physician intends for a patient to use it, it would have afforded more protection to physician speech.

Moreover, the *Pearson* court limited protection for physician speech by holding that during a physician-patient conversation, the physician engages in the practice of medicine, which can be regulated to protect public safety.[135] In contrast, the *Conant* court did not sweep physician speech in with conduct, but instead treated it separately. Consequently, the court in *Conant* found that such professional speech received perhaps some of the strongest constitutional protection.[136] If the *Pearson* court had followed this

134. *Id.*
135. *Id.*
136. *See* Conant v. Walters, 309 F.3d 629, 637 (9th Cir. 2002).

approach, much more physician speech would have been protected, including a recommendation of medical marijuana.

In sum, the *Pearson* reasoning, as compared to that in *Conant*, is unsound, primarily because the court interpreted "recommendation" so narrowly. Had the court considered that a recommendation could mean something other than a prescription, it is likely that more physician speech would have been protected. In addition, if the *Pearson* court had not placed physician-patient conversations under the umbrella of physician conduct, perhaps such discussions, even those that included a recommendation of medical marijuana, would have received First Amendment protection.

V. IMPLICATIONS

Several months after the Ninth Circuit decided *Conant v. Walters*, the government filed a petition for a writ of certiorari with the United States Supreme Court. On October 14, 2003, the Court denied the petition. This makes the *Conant* decision all the more significant because within the Ninth Circuit, it is the law.

The case is important for a number of reasons. To begin with, it has broad First Amendment ramifications. *Conant* firmly places physician-patient speech within the protection of the Constitution. Specifically, the Ninth Circuit concluded that restrictions on discussions about medical marijuana violated the First Amendment. Prior to this case, the courts only dealt with restrictions on physician speech within the realm of abortion and contraception, and it was not until *Rust* and *Casey* that the Supreme Court addressed whether restrictions on physician-patient speech were unconstitutional.[137] Thus, *Conant* considered physician speech within a new area—medical marijuana—and used a First Amendment analysis to conclude that restrictions on such speech were unconstitutional.

The case also marks a victory for seriously ill patients because their doctors will feel safe to have open and honest discussions with them about medical marijuana.[138] Thus, patients are more likely to receive the information they need to make informed decisions about

137. *See* Berg, *supra* note 106, at 202–03.

138. There are some physicians who, despite the Ninth Circuit's holding, are still fearful of recommending medical marijuana to their patients. *See* David Tuller, *Doctors Tread a Thin Line on Marijuana Advice*, N.Y. TIMES, Oct. 28, 2003, at F5.

their health care. Clearly, physicians may not go so far as to help patients acquire medical marijuana, but at the very least, it is imperative that physicians are able to discuss the drug with their patients in an effort to provide them with proper care.[139] Indeed, physicians' ability to have open conversations about medical marijuana affects their patients' First Amendment rights. As Judge Kozinski pointed out in his concurrence in *Conant*, "[i]t is well established that the right to hear—the right to receive information—is no less protected by the First Amendment than the right to speak."[140] Judge Kozinski even went so far as to say that "[i]n this case . . . it is perfectly clear that the harm to patients from being denied the right to receive candid medical advice is far greater than the harm to doctors from being unable to deliver such advice."[141] Lastly, it is equally vital that seriously ill patients remain informed about their medical options not only so that they can seek proper treatment, but also so that they can become involved in the political debate surrounding medical marijuana. Thus, *Conant* serves a two-fold purpose in that it protects the right of physicians to recommend medical marijuana and the right of patients to hear that information.

In addition to its First Amendment ramifications, the case also has policy implications because it contributes to the debate about medical marijuana. On the one hand, the Ninth Circuit's ruling in *Conant* has not changed the fact that marijuana, even when used for medical purposes, is still an illegal drug in the eyes of the federal government. Thus, even though doctors can now recommend it to their patients, there is not much that patients can do with the recommendation. Some options for patients include growing marijuana themselves or buying it from marijuana buyers' clubs.[142] Another option may be for states to enact a state-run medical

139. *See* Berg, *supra* note 106, at 243–50 (discussing the importance of patients' right to hear physician speech in order to make informed decisions about their health care).

140. *Conant*, 309 F.3d at 643 (Kozinski, J., concurring).

141. *Id.* (Kozinski, J., concurring).

142. J. Wells Dixon, Casenote, Conant v. McCaffrey: *Physicians, Marijuana, and the First Amendment*, 70 U. COLO. L. REV. 975, 979 (1999). Unfortunately, the buyers' clubs are illegal, and the state of California and the federal government are closing them down. *Id.* at 1010 n.208.

marijuana regulatory program.[143] While California has not taken such a drastic step as the latter option, former Governor Gray Davis signed a bill in 2003 that established a state-sponsored identification card for patients who use medical marijuana to protect them from arrests.[144]

On the other hand, even though *Conant* has not changed the federal policy regarding medical marijuana, the *Conant* court looked favorably upon the use of marijuana for medical purposes; hopefully, as perceptions regarding the drug change, so will the federal government's policies and regulations. According to a Time/CNN poll conducted in 2002, 80 percent of Americans are in favor of legalizing medical marijuana.[145] Moreover, nine states have enacted medical marijuana laws,[146] and another thirty-five states have passed laws that either reduce the penalties for using medical marijuana or otherwise recognize its medicinal value.[147] Given that a majority of the population appears to have a more accepting view of medical marijuana than does the federal government, it is significant that the Ninth Circuit made a decision that reflects the nation's affirmative attitude toward the drug.

VI. CONCLUSION

Although the Ninth Circuit's decision in *Conant v. Walters* has not changed the federal government's policy regarding medical marijuana, it is still an important case because it recognized that physicians have a First Amendment right to discuss the drug with their patients. Unlike the court in *Pearson*, the court in *Conant* acknowledged that the federal policy was a content-based restriction because it prohibited both speech and a viewpoint on a particular

143. *See generally* Alex Kreit, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. PA. L. REV. 1787 (2003) (arguing that a state-run medical marijuana program may be the best strategy available to patients who seek a system of legal medical marijuana distribution because it is possible that, under the Commerce Clause, such a system could escape federal regulation).

144. Tuller, *supra* note 138, at F5.

145. Joel Stein, *The New Politics of Pot: Can it Go Legit?*, TIME, Nov. 4, 2002, at 56.

146. *See* discussion *supra* note 7.

147. Clarence Page, *So Long to a Misguided Gag Rule on the Medicinal Use of Marijuana*, CHI. TRIB., Oct. 15, 2003, at C27.

topic. Because the federal policy was both content and viewpoint-based, the *Conant* court properly used a strict scrutiny analysis. The court found that the government did not have a compelling interest in prohibiting physicians from discussing medical marijuana with their patients, and it also found that the government did not narrowly tailor the policy so as to restrict the least amount of speech possible. Finally, the *Conant* court established a limit on what physicians could say to their patients, holding that if a physician who recommended medical marijuana intended to help a patient obtain the drug illegally, then the physician could be found guilty of aiding and abetting a crime.

The implications of the Ninth Circuit's decision in *Conant* are far-reaching. For one thing, the court established for the first time that patient-physician speech regarding medical marijuana receives First Amendment protection. In so holding, the court has not only impacted physicians and their free speech rights, but it has also significantly affected patients by supporting their First Amendment right to receive information from their physicians regarding medical marijuana. Thus, patients will now be better informed about their medical options, which, in turn, will allow them to make better decisions about their treatment. Furthermore, because *Conant* presents a generally positive position on medical marijuana, it will presumably have some influence on the current debate that surrounds the drug. Indeed, as popular support for medical marijuana grows, perhaps the federal government will change its policies, which currently place severe restrictions on the recommendation and use of the drug.

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[*] J.D. Candidate, May 2005, Loyola Law School, Los Angeles. I would like to thank the editors and staff of the *Loyola of Los Angeles Law Review* for their assistance, especially Lisa Walgenbach for her invaluable feedback. I am especially grateful to Professor Marcy Strauss for her insightful comments and guidance. I also thank my family and friends, especially my father, Leo Pomerantz, for his unconditional love and constant support, and for always believing in me. Most importantly, I thank my husband, Sidney Sherman, for his never-ending encouragement, patience and love, and for inspiring me to realize my full potential. Finally, I dedicate this Comment in memory of my mother, Shirley Pomerantz, who continues to be a source of inspiration for me.