Nos. 02-16335, 02-16534, 02-16715

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,
Defendants-Appellants.

Appeal from Final Judgment Entered by the United States District Court
for the Northern District of California
Case Nos. C 98-00086, C 98-00087, C 98-00088 CRB
entered on July 29, 2002, by Judge Charles R. Breyer.

APPELLANTS' MOTION FOR LEAVE TO FILE A REPLY BRIEF EXCEEDING THE TYPE-VOLUME LIMITATION OF FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

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Pursuant to Ninth Circuit Local Rule 32-2, Appellants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (collectively "Appellants") request leave to file the attached reply brief, which exceeds the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B). That limitation states that a reply brief may exceed 15 pages, provided that it does not exceed 7,000 words. The brief contains 18,430 words, counted in accordance with Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). (Carnegie Decl., ¶ 2.) The brief is due March 6, 2003, pursuant to an order dated January 30, 2003. (Carnegie Decl., ¶ 2.) Appellants seek an extension of 11,430 words. (Carnegie Decl., ¶ 11.)

Good cause exists for this motion for the following reasons:

- Appellants' opening brief was 24,719 words, and the government's opposition brief was 22,894 words. (Carnegie Decl., ¶ 3.) Appellants require the requested additional space in order to respond adequately to the government's extensive analysis. (Carnegie Decl., ¶ 3.)
- Pursuant to an order dated December 20, 2002, the following three cases have been consolidated: (1) *United States v. Marin Alliance for Medical Marijuana*, No. 02-16335; (2) *United States v. Oakland Cannabis Buyer's Cooperative*, No. 02-16534; and (3) *United States v. Ukiah Cannabis Buyers' Club*, No. 02-16715. Per this Court's order, this reply brief will serve as the main brief with respect to the consolidated appeals. (Carnegie Decl., ¶ 4.)
- This case presents important constitutional issues of first impression concerning the federal government's authority under the Controlled Substances Act to prohibit medical cannabis dispensaries, acting under state law, from distributing cannabis to seriously ill patients for whom physicians have recommended cannabis as an appropriate medical treatment. These issues are of concern to the State of California, to the

United States government, and to States that have passed laws allowing the limited use of cannabis for medical purposes by their citizens. The constitutional issues raised in this case also extend beyond the narrow issue of medical cannabis and implicate the federal government's general authority to regulate in areas traditionally reserved to States. All of these issues require an extensive analysis of the jurisprudence of the United States Supreme Court and of this Court concerning the scope and limits of that authority. (Carnegie Decl., ¶¶ 5-7.)

- This case was appealed to this Court and to the Supreme Court. Both Courts issued opinions and remanded the case for further proceedings in the district court. *See United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001). All of the constitutional issues raised by Appellants in their opening brief and this reply brief were expressly left open by the United States Supreme Court for decision by this Court. (Carnegie Decl., ¶ 6.)
- The case is procedurally complex. This appeal involves five separate dispositive motions raising legal and factual issues: (a) the district court's refusal to modify or dissolve the preliminary injunction; (b) the district court's grant of summary judgment in favor of the government; (c) the issuance of a permanent injunction enjoining Appellants from distributing medical cannabis to their patient-members; (d) the district court's denial of Appellants' motion to dismiss for failure to state a claim; and (e) the district court's denial of Appellants' motion to dismiss the action for lack of jurisdiction. Appellants also appeal the district court's rulings on their objections to the government's evidence on summary judgment, and the denial of Appellants' motion for further

discovery pursuant to Federal Rule of Civil Procedure 56(f). (Carnegie Decl., ¶ 8.)

- It is necessary to address the government's lengthy response concerning the significant constitutional arguments raised by Appellants, including: (a) an "as applied" challenge to the Controlled Substances Act under the Commerce Clause; (b) the constraints that the Necessary and Proper Clause imposes on Congressional power to enact federal legislation pursuant to its powers under the Commerce Clause; (c) state sovereignty and the breadth, scope, and applicability of the Tenth Amendment; and (d) unenumerated fundamental rights under the Fifth and Ninth Amendments. Appellants also must address the government's response to the legal defenses to the injunction raised and rejected below, including statutory immunity under 21 U.S.C. § 885(d). Finally, Appellants must address the government's lengthy response to Appellants' challenge to the procedural and evidentiary errors committed by the district court in granting summary judgment and issuing a permanent injunction. (Carnegie Decl., ¶ 9.) For each of the government's arguments, Appellants are required to set forth why the government's analysis is wrong, and address the new authorities upon which the government relies. (Carnegie Decl., ¶ 9.)
- The government cites over 140 cases, only approximately 23 of which were cited in Appellants' opening brief. Appellants' reply brief devotes substantial analysis to the legal theories presented in those cases and their applicability to this case. Appellee's opposition brief also argues in detail issues that were mentioned in summary form in the opening brief, for example, whether there is a rational basis for the application of the challenged statute and Appellants' evidentiary objections. Accordingly,

Appellants have devoted a portion of their brief to addressing these issues in detail. (Carnegie Decl., ¶ 10.)

In the event that this Court does not grant the requested relief or grants it only in part, Appellants respectfully request an extension of time to file a revised reply brief in compliance with the Court's order per the Circuit Advisory Committee Note to Circuit Rule 32-2.

Dated: March 6, 2003

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