No. 00-151

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATED QUESTION PRESENTED

Whether a court has equitable discretion to consider a request to modify an injunction where the enjoined party asserts the defense of medical necessity in a civil injunction action under 21 U.S.C. § 882, and establishes through uncontroverted evidence that there is a class of seriously ill patients who would otherwise suffer imminent harm and who have absolutely no other legal alternative.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES AND RULES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITES

TABLE OF AUTHORITIES – Continued

Page

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Defendants and Respondents, Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (hereafter collectively "OCBC"), respectfully request that the Petition for a Writ of Certiorari filed by Plaintiff and Appellant the United States of America be denied.

STATEMENT OF THE CASE

Much has occurred since the Court of Appeals issued the opinion that the government now challenges, *United States v. Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109 (9th Cir. 1999) (per curiam) (*"OCBC I"*), on September 13, 1999.

On July 25, 2000, the government noticed an appeal from the district court's July 17, 2000, Order (App. 12a-14a) and July 17, 2000, Amended Preliminary Injunction Order (App. 15a-17a). That second appeal, *United States v. Oakland Cannabis Buyers' Cooperative*, Ninth Circuit Case No. 00-16411 (*"OCBC II"*), remains pending. Despite the pendency of *OCBC II*, on July 28, 2000, the government filed a Petition for a Writ of Certiorari.

On August 11, 2000, the Court of Appeals denied the government's request for a stay of the district court's July 17, 2000, Orders. *See* App. A1-A2. The Court of Appeals did, however, accelerate the briefing schedule in *OCBC II*. *See* App. A3-A4.

On August 29, 2000, this Court granted the government's request for a stay of the district court's July 17, 2000 orders "pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit and further order of this Court." *United States v. Oakland Cannabis Buyers' Cooperative*, 530 U.S.___, 69 U.S.L.W. 3165 (Aug. 29, 2000). The stay effectively reinstated the broad

preliminary injunction in place before the Court of Appeals issued its opinion in *OCBC I*. Thus, OCBC is not currently permitted to distribute medical cannabis to its seriously ill and dying patients, regardless of whether those patients meet the legal standard for medical necessity set forth in *OCBC I* and the district court's July 17, 2000, Orders. The government now stands in exactly the same position it occupied before the Court of Appeals ruled in *OCBC I*. Justice Stevens dissented from this Court's order issuing the stay, stating:

> Because the [government] has failed in this case to demonstrate that the denial of necessary medicine to seriously ill and dying patients will advance the public interest or that the failure to enjoin the distribution of such medicine will impair the orderly enforcement of federal criminal statutes, whereas [OCBC has] demonstrated that the entry of a stay will cause them irreparable harm, I am persuaded that a fair assessment of that balance favors a denial of the extraordinary relief that the government seeks.

Because of the accelerated briefing schedule set forth in the Court of Appeals' August 11, 2000, Order, briefing was completed in *OCBC II* on October 10, 2000. On October 26, 2000, OCBC requested that the Court of Appeals expedite the disposition of *OCBC II*. *See* App. A5-A14.

REASONS TO DENY THE PETITION

In November 1996, the voters of California passed Proposition 215, the Compassionate Use Act of 1996 ("The Act"). Cal. Health & Safety Code § 11362.5. "The Act makes it legal under California law for seriously ill patients and their primary caregivers to possess and cultivate marijuana for use by the seriously ill patient if the

patient's physician recommends such treatment. In particular, it exempts a seriously ill patient, or the patient's primary caregiver, from prosecution . . . relating to the possession of marijuana and . . . the cultivation of marijuana." *United States v. Cannabis Cultivators' Club*, 5 F. Supp. 2d 1086, 1091 (N.D. Cal. 1998). Pursuant to Proposition 215, OCBC, a not-for-profit organization, was established to meet the needs of seriously ill and dying patients. OCBC's goal is to provide seriously ill patients with safe access to necessary medicine so that these individuals do not have to resort to the streets, thereby exposing themselves to criminal elements and products of dubious quality.

Also pursuant to California law, the City of Oakland established a medical cannabis distribution program and designated OCBC as the City's agent to administer the program. OCBC is a well-run, professional organization that has served the medical needs of seriously ill patients and has worked with law enforcement to ensure that those with legitimate medical needs may obtain medical-quality cannabis safely, and without fear of criminal involvement.

Despite the fact that the voters of California have spoken, the federal government brought a civil injunctive proceeding under 21 U.S.C. § 882 to block OCBC's distribution of medical cannabis to those suffering from severe illnesses. The government's decision to use Section 882 in this case makes this case virtually unique. According to the district court (Hon. Charles R. Breyer), Section 882 has been used in only five published decisions since Congress enacted it as part of the Controlled Substances Act ("CSA") in 1970. *Cannabis Cultivators' Club*, 5 F. Supp. 2d at 1104. The government has never attempted

to prosecute OCBC criminally under the CSA or any other law.

In May 1998, the district court granted the government's request for a preliminary injunction. *Id.* at 1106. On October 15, 1998, OCBC requested that the district court modify the injunction to allow distribution of cannabis to patients who meet the legal test of necessity derived from *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). The district court summarily denied the requested modification on October 16, 1998, because it concluded it lacked discretion to grant OCBC's motion.

Recognizing the danger to public health and safety posed by the closure of OCBC, on October 27, 1998, the Oakland City Council issued Resolution No. 74618 declaring a Local Public Health Emergency with Respect to Safe, Affordable Access to Medical Cannabis in the City of Oakland. The Resolution found that closure of OCBC impairs public safety, and that OCBC's closure would harm seriously ill Oakland residents. The Resolution declares a public health emergency and urges the federal government to cease actions "that pose obstacles to access to cannabis for Oakland residents. . . . " Resolution No. 74618 (Local Public Health Emergency with Respect to Safe, Affordable Access to Medical Cannabis in the City of Oakland). The City of Oakland has since renewed this resolution every two weeks.

On September 13, 1999, the Court of Appeals issued an opinion in this case explicitly recognizing that seriously ill patients who meet the legal definition of medical necessity may lawfully obtain medical cannabis for their illnesses despite these injunctive proceedings. *OCBC I*, 190 F.3d 1109 (9th Cir. 1999). In so doing, the Court of Appeals reversed the district court's order summarily

denying OCBC's request to modify the injunction to permit distribution to patient-members with a medical necessity, and directed that the district court reconsider its decision. *Id.* at 1114-1115.

The Court of Appeals reasoned:

> The district court summarily denied OCBC's motion, saying that it lacked the power to make the requested modification because "its equitable powers do not permit it to ignore federal law." In doing so, the district court misapprehended the issue. The court was not being asked to ignore the law. It was being asked to take into account a legally cognizable defense that likely would pertain in the circumstances.

Id. at 1114.

The Court of Appeals also held that the district court erroneously failed to weigh the public interest when it summarily denied the requested modification:

> The district court erred in another respect as well. In deciding whether to issue an injunction in which the public interest would be affected, or whether to modify such an injunction once issued, a district court *must* expressly consider the public interest on the record. The failure to do so constitutes an abuse of discretion. . . .

Id. at 1114 (*emphasis added*).

The Court of Appeals (*see OCBC I*, 190 F.3d at 1114-1115) and the district court (*see* App. 12a-14a) have found that a balancing of equities favors such an exception in this case. As the Court of Appeals explained in *OCBC I*:

> OCBC has identified a strong public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of a large group of persons with serious or fatal illnesses. Indeed,

> the City of Oakland has declared a public health emergency in response to the district court's refusal to grant the modification under appeal here. Materials submitted in support of OCBC's motion to modify the injunction show that the proposed amendment to the injunction clearly related to a matter affecting the public interest. Because the district court believed that it had no discretion to issue an injunction that was more limited in scope than the Controlled Substances Act itself, it summarily denied the requested modification without weighing or considering the public interest.

OCBC I at 1114-1115.

In view of this background, the government's petition seeks review of a dispute that is not ripe for this Court's intervention. The Court of Appeals has not had an opportunity to rule on the merits of the government's appeal from the district court's order modifying the preliminary injunction. The government offers no justification for bypassing the Court of Appeals and deciding issues on a record that is not fully developed. On this basis alone, the petition should be denied.

Moreover, the petition itself presents no "compelling" reason for review as required by Supreme Court Rule 10 and should be denied for this additional reason. The government both mischaracterizes and overstates the significance of *OCBC I*. *OCBC I* neither legalized the use of cannabis by the general public, nor did it make sweeping pronouncements about the applicability of the necessity defense to facts other than those before the Court of Appeals. Rather, the Court of Appeals held that a district court has equitable jurisdiction to consider a request to modify an injunction where the enjoined party presents facts that raise the applicability of the necessity defense. The criteria for necessity that the Court of Appeals

directed the district court to consider, and that the district subsequently adopted, are narrow and specific, and by no means make the drug laws unenforceable, as the government contends. The government remains free after *OCBC I* to prosecute anyone that it believes to be violating the federal drug laws.

OCBC I does not represent a conflict with any circuit, nor does it represent a departure from established precedent or from established judicial proceedings. Sup. Ct. R. 10(a). In remanding the case to the district court, the Court of Appeals in *OCBC I* relied upon controlling precedent (*Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)) concerning the district courts' traditional equitable discretion to fashion injunctive relief. In this case, the government elected to enforce criminal drug laws through the unusual means of an equitable injunction. Because the government chose this equitable remedy, the Court of Appeals correctly held that "since the government chose to deal with potential violations on an anticipatory basis," the injunction must be "narrow enough to exclude conduct that likely would be legally privileged or justified." *OCBC I*, 190 F.3d at 1114.

In remanding the case to the district court, the Court of Appeals in *OCBC I* also expressly relied upon *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). *Aguilar* has been the law of the circuit for over a decade, it confirms well-established principles regarding necessity, and it creates no conflict with other circuits.

In sum, there is no basis for granting the government's petition. The petition should be denied.

A. The Dispute Is Not Ripe for Review By this Court

The government seeks review of an interlocutory order of the Court of Appeals entered on September 13, 1999, remanding this case to the district court, and directing the district court to exercise its equitable discretion to consider modification of a preliminary injunction prohibiting OCBC from providing medical cannabis to seriously ill patients. Since that order was entered over one year ago, the district court has complied with the remand order. OCBC offered significant new evidence which was not part of the record before the Court of Appeals in *OCBC I*, including additional affidavits from patients and physicians demonstrating that serious medical conditions could be relieved and imminent harm avoided only if the preliminary injunction were modified, and documenting the declaration of a medical emergency by the City of Oakland. Additional briefing was submitted to the district court, including the *Amicus Curiae* Brief of the California Medical Association. At the conclusion of these proceedings, and after the government declined to offer any additional evidence, the district court exercised its equitable jurisdiction to modify the preliminary injunction, exempting from the injunction the distribution of cannabis to a small and narrowly defined group of seriously ill patients who meet the legal criteria for necessity set forth in the amended injunction.

The government has since appealed the district court's order of modification. Rather than intervene with a grant of certiorari while the review of the district court's amended injunction is pending before the Court of Appeals, this Court should await the resolution of the issues currently before the Court of Appeals. If review is then found to be appropriate, this Court will have before

it the entire record, including the proceedings on remand. To limit the Court's review to the original order of remand entered a year ago, while a review of the actual modification after remand is still unresolved, would disrupt the orderly administration of justice, result in piecemeal review, and deprive this Court of a fully developed record.

Although the government has included in the Appendix to its Petition for Certiorari the district court's July 17, 2000, Order [Appendix B] and the Amended Preliminary Injunction Order [Appendix C], these orders are not part of the record they seek to review. The government cannot seriously contend that this Court should bypass the Court of Appeals and rule on the government's appeal from the district court's amended injunction order without first allowing the Court of Appeals to render an opinion regarding that order. *See* 28 U.S.C. §§ 1254(1) & 2101(E); Sup. Ct. R. 11 (certiorari before entry of judgment in the Court of Appeals "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"); *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J.) (certiorari before judgment in the Court of Appeals is an "extremely rare occurrence").

This Court generally awaits final judgment in the lower courts before exercising its certiorari jurisdiction. Ordinarily, "this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T & K. W. R. Co.*, 148 U.S. 372, 384

(1893). Because the government has obtained a stay of the district court's amended injunction, the government plainly suffers no inconvenience if this Court declines to grant the petition.

In recent years, the Solicitor General has been a strong advocate of the denial of certiorari to review interlocutory orders when such review was sought by criminal defendants. As noted in R. Stern, E. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice*, § 4.18, p. 196 n.60 (7th Ed. 1993):

> Since 1980, the Solicitor General consistently has argued in federal criminal cases that the interlocutory status of a case is a sufficient ground for denial of certiorari when review is sought by a defendant. The Solicitor General has maintained that judicial efficiency would be better served by deferring review until rendition of final judgment, so that all claims can be presented in a single petition if, in fact, the defendant is convicted. The Supreme Court has not granted certiorari in such a situation since 1980, which may reflect its general agreement with the Solicitor General's position.

Although this is not a criminal case, of course, it does involve the enjoining of alleged violations of a federal criminal statute, and the same considerations of judicial efficiency are presented. There are very likely to be other claims to be addressed by this Court in the context of reviewing a final judgment in this matter. In fact, the Court of Appeals deferred considering several significant issues because of the interlocutory nature of OCBC's appeal of the preliminary injunction, including the question of OCBC's complete immunity under the CSA because its officers are local government officials engaged in the enforcement of a law relating to controlled substances. *See* 21 U.S.C. § 885.

In the courts below, OCBC also argued that in light of the Compassionate Use Act of 1996, the Ninth and Tenth Amendments of the Constitution protect OCBC's activities. The lower courts chose not to address these issues, but they provide alternate grounds for the lower courts' decisions. Moreover, OCBC also raised other issues that provide alternate grounds for the Court of Appeals' decision, including violation of patient-members' substantive due process rights.

The pendency of a Court of Appeals' remand has, on numerous occasions, been viewed as a strong reason to deny a petition for a writ of certiorari by this Court. In *Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328, 560 (1967) (per curiam), this Court denied certiorari to review contempt orders issued against a labor union for violating a temporary restraining order forbidding a strike, because the Court of Appeals had remanded to the district court after resolving the legal issues the petitioner sought to review, to allow the district court to exercise its equitable jurisdiction to review the severity of the sanction. "However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied. *Id.* at 328. *See Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 257-258 (1916)." *See generally* R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice*, § 4.18, pp. 224-26 (6th Ed. 1986).

Even more closely analogous was the recent case of *Virginia Military Institute v. United States*, 508 U.S. 946 (1993). There, the petitioner sought certiorari after the Court of Appeals vacated a judgment in its favor, and remanded the case to the district court for determination of an appropriate remedy. The petitioner contended that no remedy was appropriate, since the Court of Appeals

erred in finding a constitutional violation in its policy of restricting admission to a state military college to male applicants. This Court denied certiorari, and Justice Scalia authored an opinion noting the importance of the issues raised, but concluding it was prudent to await resolution of the remedy in the courts below. Subsequently, after the district court's remedial order had been upheld by the Court of Appeals, 44 F.3d 1229 (4th Cir. 1995), this Court granted certiorari. 516 U.S. 910 (1995). The issues presented were then resolved on a complete record. *United States v. Virginia*, 518 U.S. 515 (1996).

The issue now pending in the Court of Appeals after the remand will actually present the question the government seeks to review with greater clarity and less ambiguity than the year-old remand order. The question allegedly presented in this case, as posed by the government, is "Whether the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, forecloses a medical necessity defense to the Act's prohibition against manufacturing and distributing marijuana, a Schedule I controlled substance." *See* Petition for a Writ of Certiorari, p. I. The remand order, however, addressed this question only indirectly and tangentially. The question *actually* decided by the Court of Appeals a year ago was whether a district court had equitable jurisdiction to consider a request to modify an injunction where the enjoined party asserts the defense of medical necessity. Now that the remand has been adjudicated, and the district court has modified the injunction to recognize the availability of the defense, the question the government propounds is squarely presented, not to this Court, *but to the Court of Appeals for the first time*. While this Court has the power to grant a writ of certiorari before judgment by the Court of Appeals, in

exercising this power, the Court is guided by the statement in Rule 18 that

> [a] petition for a writ of certiorari to review a case pending in a United States Court of Appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.

As noted in R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice*, § 4.20, p. 199 (7th Ed. 1993), "[t]he public interest in a speedy determination must be exceptional, however, to warrant skipping the court of appeals in this fashion." Even where this Court has found great public importance, it has awaited Court of Appeals adjudication where the Court of Appeals recognized "the vital importance of the time element in this litigation" and acted in "ample time." *Aaron v. Cooper*, 357 U.S. 566, 567 (1958) (The Little Rock School Desegregation Case). Here, of course, the Court of Appeals has already expedited consideration of the government's appeal from the district court's order entered after remand.

For all these reasons, this dispute is not ripe for review. Accordingly, the petition should be denied.

B. The Law Governing this Case Is Well Settled and Does Not Require Clarification on Certiorari

1. *OCBC I* Correctly Directed the District Court to Exercise Its Equitable Jurisdiction

OCBC I does not depart from established legal precedent, and the issue determined in that case – the equitable jurisdiction of the district court – does not warrant review by this Court. As Justice Stevens recognized, the

issues raised in the present petition are governed by controlling Supreme Court precedent: *Romero-Barcelo*, 456 U.S. 329-330. *See United States v. Oakland Cannabis Buyers' Cooperative*, 530 U.S.___, 69 U.S.L.W. 3165 (Aug. 29, 2000) (Stevens, J., dissenting). *Romero-Barcelo* and many other Supreme Court and Court of Appeals' decisions[1] hold that when, as in Section 882, Congress grants the district courts jurisdiction to issue civil injunctions to enjoin future federal statutory violations, "[t]he [mere] grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation." *Romero-Barcelo*, 456 U.S. at 313. Instead, absent an "unequivocal statement of [Congress'] purpose" to "make such a drastic departure from the traditions of equity practice" by making issuance of an injunction mandatory, an injunction is not mandatory even if the conduct to be enjoined indisputably violates

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[1] *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541-542 (1987); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *The Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944); *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836); *United States v. Marine Shale Processors*, 81 F.3d 1329, 1358-1361 (5th Cir. 1996); *Sierra Club v. Federal Deposit Ins. Corp.*, 992 F.2d 545, 551-552 (5th Cir. 1993); *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1156 (9th Cir. 1988) (cited in *OCBC I*, 190 F.3d at 1114); *The Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992); *Natural Resources Defense Council, Inc. v. Texaco Refining & Mktg., Inc.*, 906 F.2d 934, 938-939 (3rd Cir. 1990); *National Labor Relations Bd. v. P*I*E* Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990); *The Town of Huntington v. Marsh*, 884 F.2d 648, 651-652 (2d Cir. 1989); *Kinney v. Pioneer Press*, 881 F.2d 485, 490-491 (7th Cir. 1989); *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 323-324 (D.C. Cir. 1987); *Flynn v. United States By and Through Eggers*, 786 F.2d 586, 591 (3rd Cir. 1986).

federal law. *The Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944). The showing of Congressional intent must be compelling, because such an intent overrides centuries of judicial practice and tradition:

> We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied . . . . [I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain. Hence we resolve the ambiguities of [the Act] in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.

The Hecht Co., 321 U.S. at 329-330.

Romero-Barcelo's discussion of *TVA v. Hill,* 437 U.S. 153 (1978), upon which the government relies confirms just how rare it is – and how compelling the showing of Congressional intent must be – before this Court will hold that Congress intended to deprive the district courts of their traditional equitable discretion to fashion injunctive relief. In *Hill,* the issue was whether, by enacting the Endangered Species Act, Congress intended to deprive

the district court of its traditional equitable discretion to grant or deny an injunction barring completion of a dam that, if it became operational, would inevitably cause the extinction of an endangered species, the snail darter. This Court held in *Hill* that Congress had deprived the district court of its discretion and had mandated that an injunction issue. In *Romero-Barcelo*, this Court explained that the injunction in *Hill* was mandatory because an injunction was the *only* way to fulfill the Congressional objective of the Endangered Species Act. *Romero-Barcelo*, 456 U.S. at 314. "The purpose and language of the statute under consideration in *Hill*, not the bare fact of a statutory violation, compelled that conclusion." *Id.* at 313. In contrast, in *Romero-Barcelo*, "[a]n injunction [was] not the *only means* of insuring compliance" with federal law. *Id.* at 314. (*emphasis added*). This was so because the statute at issue in *Romero-Barcelo*, the FWCPA, like the statute at issue in this case, the CSA, 21 U.S.C. § 801 et seq., provided for *criminal penalties* in addition to a civil injunction. *Romero-Barcelo*, 456 U.S. at 314. Thus, an agency enforcing the FWCPA can ensure that Congress' goals are fulfilled by prosecuting violations under the FWCPA's criminal provisions, regardless of whether it also obtains an injunction, just as the Justice Department can under the CSA.

Accordingly, this case is indistinguishable from *Romero-Barcelo* and the result should be the same in both cases: the district court had discretion to refuse to enjoin some or all of the defendants' conduct, even if that conduct indisputably violated federal law. This Court made itself clear in *Romero-Barcelo*, and the Court of Appeals followed its prior case law interpreting *Romero-Barcelo* (*Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1155-56 (9th Cir. 1988)) when it decided *OCBC I*. *See* 190 F.3d at 1114.