UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

NO. 98-16950

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Appellants/Defendants,

v.

UNITED STATES OF AMERICA,

Appellee/Plaintiff.

Appeal from Order Denying Motion to Modify Preliminary Injunction
Appeal from Order Modifying Injunction by the United States District Court
for the Northern District of California
Case No. C 98-0088 CRB
entered on October 13, 1998, by Judge Charles R. Breyer.

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Oakland Cannabis Buyers' Cooperative. ("OCBC") submits the following Corporate Disclosure Statement as required by Federal Rule of Appellate Procedure 26.1.

OCBC, a California corporation, has no parent companies, subsidiaries, or affiliates.

STATEMENT OF JURISDICTION

On January 9, 1998, the Government filed a civil complaint pursuant to 21 U.S.C. § 882(a) and 28 U.S.C. §§ 2201 and 2202 seeking a declaratory judgment, and preliminary and permanent injunctive relief against Appellants' operation of a medical cannabis dispensary in Oakland, California. ER 0001-08. The Government sought to enforce by this civil action the criminal provisions of the Controlled Substances Act (21 U.S.C. §§ 841(a), 846, and 856). *Id.* The district court had original jurisdiction 28 U.S.C. §§ 1331, 1345, and 1355(a).

On May 19, 1998, the district court issued a Preliminary Injunction Order which enjoined Appellants from violating 21 U.S.C. §§ 841(a)(1), 846, and 856. ER 0636-0637. On September 3, 1998, the district court issued an Order to Show Cause why Appellants should not be held in contempt for violating the Preliminary Injunction Order. ER 1106-1110.

On October 13, 1998, the district court granted the Government's motions *in limine* to exclude Appellants' defenses, denied Appellants' an evidentiary hearing or jury trial, and found Appellants in contempt for violating the Preliminary Injunction Order. ER 1795-1806. In the same order, the district court also modified the Preliminary Injunction Order to permit the United States Marshal to enter and close down Appellants'

premises. ER 1793-1794. Appellants timely filed their notice of appeal of this Order on October 16, 1998. ER 1821-1828; Fed. R. App. P. 4(a)(1). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1), which provides for appeals from interlocutory orders of the district courts modifying injunctions.

On October 15, 1998, Appellants moved the district court to modify the Preliminary Injunction Order to permit cannabis distribution to a narrow category of patients with a confirmed necessity for the medicine as defined in this Circuit. ER 1807-1820. On October 16, 1998, the district court denied this request. ER 1789-1790. On October 27, 1998, Appellants timely filed a notice of appeal of this order. Fed. R. App. P. 4(a)(1). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1), which provides for appeals from interlocutory orders refusing to modify injunctions.

On October 28, 1998 and November 2, 1998, Appellants filed motions to consolidate these two appeals. A third appeal, addressing the district court's denial of Appellants' motion to dismiss is addressed in a separate brief filed concurrently herewith.

STATEMENT OF ISSUES

1. Did the district court violate Appellants' due process rights when it summarily found Appellants in contempt without affording an evidentiary

hearing with live witnesses, or a jury trial, as required by 21 U.S.C. § 882(b), and precluded Appellants from presenting any of their defenses to the contempt charges, although they had submitted detailed evidence establishing every element of each defense?

2. Did the district court abuse its discretion as a court of equity when it denied Appellants' request to modify the Preliminary Injunction Order to permit distribution of cannabis to patients with a confirmed medical need who the district court recognized would suffer if Appellants were prevented from providing this medicine?

I. INTRODUCTION

This case presents an extraordinary circumstance in which the United States government ("the Government") subjected Appellants to a finding of criminal conduct without affording them any of the procedural safeguards required in such circumstances. Criminal findings in this society normally are limited to those proceedings in which the accused is given a fair trial before a jury of his peers, and allowed to confront and to cross-examine his accusers. Moreover, an individual is innocent of violating criminal laws until proven otherwise beyond a reasonable doubt.

In this case, however, the district court denied Appellants each and every one of these rights. The Government began by filing a civil action to

prosecute Appellants for what it considered to be violations of federal criminal law, despite the fact that both the laws of California and the City of Oakland authorized Appellants' conduct. In an admittedly rare move, the district court issued a preliminary injunction enjoining violation of a criminal statute — the federal Controlled Substances Act.

The district court then found Appellants in contempt of the injunction through a procedure never before seen even under these circumstances, thereby denying Appellants' procedural due process rights. Despite the fact that the injunction and contempt charges raised complex factual issues regarding the medical conditions and circumstances of numerous patients, Appellants were not allowed a jury of their peers. They were not allowed to confront or cross-examine accusers who had submitted declarations so sketchy and lacking in detail that Appellants could not adequately prepare their defense. Appellants were found to have violated a federal criminal law in a summary hearing, after the district court denied them, *in limine*, the opportunity to present *any* defense. The district court relieved the Government of any obligation to present specific evidence of contempt, ignored the evidence Appellants presented that disputed the Government's charges, and proceeded to judgment on essentially criminal charges by a standard less than beyond a reasonable doubt.

The district court's legal errors harmed not only Appellants, but also the many patients for whom medical cannabis is necessary to alleviate the symptoms of chronic, debilitating, and often life- threatening illnesses. These patients have been deprived of the only safe means, authorized by state and local law, of obtaining medicine that their physicians have deemed necessary to their very survival. As a court sitting in equity, the district court's refusal to consider the strong public interest against issuance of the injunction and the eventual closing of the cooperative was an abuse of its discretion.

II. FACTUAL SUMMARY

A. California Proposition 215 and The Oakland Cannabis Buyers' Cooperative.

On November 5, 1996, 56% of California voters passed the "Medical Use of Marijuana" initiative, also known as the Compassionate Use Act of 1996 ("Compassionate Use Act"). *See* Cal. Health & Safety Code § 11362.5; ER 0594. The primary purposes of the Compassionate Use Act are:

- To ensure that 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;

- To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction;
- To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

Cal. Health & Safety Code § 11362.5. To further these objectives, the Compassionate Use Act authorizes under California law the possession and cultivation of cannabis by seriously ill patients and their primary caregivers in cases where the patient's physician has recommended cannabis treatment. ER 0594. At least three other states (Alaska, Oregon, and Washington) also have passed similar laws. *See* Addendum to Opening Brief, Exhibit 1.

Appellant Oakland Cannabis Buyers' Cooperative ("OCBC"), a California cooperative corporation, is one of several dispensaries formed to provide seriously ill patients with a physician's recommendation, safe and legal access to medical cannabis. ER 0594. It also provides support services and educational materials concerning medical cannabis to its members. ER 1340, 1345. Appellant Jeffrey Jones is Executive Director of the OCBC.

B. The Federal Government's Civil Actions To Enforce Federal Criminal Laws And The May 19, 1998 Preliminary Injunction Order.

Claiming that the activities of the medical cannabis dispensaries violated federal criminal law (21 U.S.C. § 841 *et seq.*), on January 9, 1998,

the Government filed civil complaints seeking a declaratory judgment and preliminary and permanent injunctive relief against six northern California cannabis dispensaries, one of which was the OCBC. ER 0001-0008. As noted by the district court, the Government's invocation of a civil injunctive procedure to address alleged violations of federal criminal laws was rare. ER 0615. Finding that the Government had shown it was likely to succeed on the merits, presuming irreparable harm to the Government, but failing to consider the public interest involved, on May 19, 1998, the district court issued a Preliminary Injunction Order which enjoined the OCBC and the other named dispensaries: from engaging in the manufacture or distribution of marijuana, or possessing marijuana with the intent to manufacture and distribute it, from using their premises for these purposes, and from conspiring to do the same — in violation of 21 U.S.C. §§ 841(a)(1), 846, and 856. ER 0636-0637.

This Preliminary Injunction Order specifically incorporated and referenced the district court's Memorandum and Order dated May 13, 1998. The May 13 Order set forth a specific framework that was to guide the parties' future conduct. First, the May 13 Order explicitly contemplated a jury trial to determine the validity of any later contempt allegations. The district court stated therein, "[i]f the Court issues an injunction, *defendants*

have a right to a jury in any proceeding in which it is alleged that they have violated the injunction." ER 0616 (emphasis added). The district court at that time correctly recognized that this jury trial right derives from 21 U.S.C. § 882(b):

> [i]n case of an alleged violation of an injunction or restraining order issued under [the Controlled Substances Act], trial shall, upon demand of the accused, be by jury in accordance with the Federal Rules of Civil Procedure.

ER 0616.

Second, the May 13 Order specifically stated that Appellants would have the opportunity to raise, at a jury trial, several defenses to any possible future allegations of contempt, which would be adjudicated in the context of particular facts and circumstances. As to the medical necessity defense, the district court stated:

> If a preliminary or permanent injunction is granted, and the federal government alleges that defendants have violated the injunction, *there will be specific facts and circumstances before the Court* from which the Court can determine if the jury should be given a necessity instruction as a defense to the alleged violation of the injunction.

Id. at ER 0631 (emphasis added). The district court further recognized that a substantive due process defense could be available "in a contempt proceeding where the trier of fact is presented with *a particular transaction*

All of Appellants' evidence clearly met the legal standard established in this Circuit for the necessity defense. Appellants established that: (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a causal relationship between their conduct and the harm to be avoided; and (4) there were no other legal alternatives to violating the law. *Aguilar*, 883 F.2d at 693.

Neither the Government nor the district court seriously dispute that Appellants are faced with a choice of evils: They could either allow seriously ill patients to go untreated or they could engage in conduct which is authorized by state law and which the Government alleges violates federal law.

Contrary to the district court's conclusion, however, Appellants' evidence clearly established that they acted to prevent imminent harm to patients. Appellants presented detailed evidence concerning OCBC's stringent standards designed to permit membership only to those with specific medical conditions for which a physician has recommended cannabis. ER 1370, 1387-1398. Appellants also presented specific evidence regarding the medical necessity of four patient-members who may have been among those to whom cannabis allegedly was distributed at a press conference on May 21, 1998. For example, patient-member Yvonne

Westbrook suffers from spasticity and chronic pain brought on by multiple sclerosis. ER 1441-1442. Kenneth Estes is a quadriplegic who suffers from intense pain. ER 1176. Dr. Michael Alcalay suffers from AIDS and needs cannabis to avoid nausea and vomiting associated with his medications. ER 1640. Albert Dunham is also HIV-positive. ER 1173.

Because the Government failed to describe in any manner the persons to whom cannabis was allegedly distributed, Appellants also submitted detailed evidence about the other patient-members present at the OCBC on May 21. Appellants' evidence established that these patients suffer from debilitating and often deadly diseases, including HIV and/or AIDS, cancer, glaucoma, multiple sclerosis and arthritis, for which cannabis provides relief. ER 1648-1650. All of these patients clearly face imminent harm from these conditions.

Appellants' evidence also established that there is a direct causal relationship between Appellants' supplying medical cannabis and the harms they sought to avert. Appellants' declarations demonstrated that medical cannabis in fact alleviates the often life-threatening symptoms of OCBC's patient-members. ER 1640-1646, 1339-1343, 1222-1236, 0796-0799, 1451-1555. For example, Appellants presented evidence from patient-member Yvonne Westbrook that, after medicating with cannabis, "the spasticity

[from multiple sclerosis] immediately subsides." ER 1441. For Kenneth Estes, "Cannabis makes it possible for [him] to function in society and to deal with other people because it alleviates the pain [he] experience[s]." ER 1176. Cannabis kept Mike Alcalay alive (ER 1640) and allowed Albert Dunham "to live a normal life . . . ." ER 1173.

Furthermore, Appellants provided declarations from medical experts confirming the effectiveness of cannabis in the treatment of cancer, AIDS, glaucoma and the muscle spasticity associated with the neurological disorders, multiple sclerosis and spinal chord injuries from which the patients present on May 21 suffer. ER 1451-1534, 1229, 1234, 1427. Thus, Appellants' evidence demonstrated that medical cannabis in fact alleviates the harmful and even life-threatening symptoms of its patient-members.

Appellants' evidence proved that there are no alternatives, legal under federal law, to the distribution of medical cannabis to the patient-members which is authorized by state and local law. Specifically, the evidence established that for these patients, other medications do not work, are not nearly as effective, or result in serious adverse side effects. *See, e.g.*, ER 1641, 1693, 1441, 1177, 0867-1868, 1171, 1230, 1232, 1234, 1427, 1641.

Finally, Appellants' evidence established that members have no legal or safe alternative to acquire medical cannabis from other sources. Without access to the OCBC, patients are forced to go to the streets or to forego their medicine altogether. ER 1342, 1183-1184, 1442, 1428.

In the face of this overwhelming showing establishing Appellants' necessity defense, the Government offered no evidence to the contrary. Thus, the district court acted erroneously when it completely precluded this defense, particularly after having acknowledged that the defense had been established as to some patients.

(b) Appellants' Evidence Established A Substantive Due Process Defense

The district court erred in precluding Appellants' defense that denial of access to medical cannabis violates the fundamental constitutional rights of patient-members. The Supreme Court has established that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 2267 (1997) (citations omitted). In applying substantive due process analysis, where a fundamental liberty interest is involved, government action must be "narrowly tailored to serve a compelling [government] interest." *Id.* at 2268.

Due process analysis begins with an examination of our "Nation's history, legal traditions and practices." *Id.* at 2262. Unquestionably, individuals historically have had a liberty interest in being free from pain, and a well-established right to preserve their lives. *Id.* at 2288, 2303 (O'Connor, J., concurring). Historically, cannabis long has been accepted and used in society as a medicine. ER 1225. At least three other states now have laws similar to that of California's Compassionate Use Act. Addendum To Opening Brief, Exhibit 1.

The district court erroneously found that the "defendants have failed to proffer evidence that each and every person to whom they distributed marijuana needed the marijuana to protect such a fundamental right." ER 1804. The district court's conclusion is contrary to the evidence, and impermissibly shifts the burden of proof from the Government to Appellants. As discussed in Section I.A.2.a, *supra*, Appellants presented specific and uncontroverted evidence regarding the compelling medical needs of those persons present at the Cooperative on May 21, some of which even the district court acknowledged established medical necessity. ER 1801, 1441-1442, 1640-1641, 1176, 0867-0868. The prohibition against the medical use of cannabis plainly infringes upon the liberty and life

interests of these patients to be free from pain and to preserve their lives. The Government presented no evidence to the contrary.

In responding to Appellants' argument in the district court, the Government relied upon decisions concerning restrictions on access to a particular provider or treatment. ER 1684-1685. Even where the government has chosen to restrict access to a particular treatment, however, courts have recognized that such restrictions violate constitutional rights if the Government's restrictions are irrational or arbitrary. *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980).[3] The Government offered no evidence, scientific or otherwise, to justify its infringement on the substantive due process rights of these patients, instead suggesting that the court defer to the findings of Congress. ER 1575. Where, as in this case, legislation infringes upon fundamental rights, courts have a duty to look beyond legislative findings to determine independently whether the infringement is justified under the Constitution. "A legislature appropriately

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[3] In a related case argued simultaneously with this case, the district court ruled that it lacked jurisdiction to hear a rational basis challenge to the Congressional ban on the medical use of cannabis. ER 1591-1593. To the extent this reasoning informed the district court's decision, the court plainly erred. *See, e.g., United States v. Alexander*, 673 F.2d 287 (9th Cir. 1982) (reviewing classification of cocaine under rational basis test); *United States v. Fogarty*, 692 F.2d 542 (8th Cir. 1982) (reviewing scheduling of marijuana).

inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether . . . the legislation is consonant with the Constitution." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978), *California Prolife Council Political Action Committee v. Scully,* 989 F. Supp. 1282, 1299 C.E.D. Cal. 1998) (deference to a legislative finding cannot limit judicial inquiry when constitutional rights are at stake). Furthermore, "courts are obligated to assure that, in formulating its judgments, Congress has drawn reasonable inferences, based on substantial evidence." *California Prolife Council Political Action Committee v. Scully,* 989 F. Supp. at 1299 (quotations and citations omitted).

The record is devoid of any evidence supporting any legitimate, much less compelling, reason for the Government's blanket prohibition against the medical use of cannabis in this case. Accordingly, the district court erred in prohibiting Appellants from putting forth this defense.

(c) Appellants' Evidence Established A Joint User Defense

Appellants submitted evidence that, as to the transactions alleged, the patient-members were joint users within the meaning of *United States v. Swiderski*, 548 F.2d 445 (2nd Cir. 1977). There, the Second Circuit held that defendants who jointly purchase drugs and share them among

themselves are not engaged in "distribution" within the meaning of the Controlled Substances Act. *Id.* at 450 (applying the defense to the simultaneous purchase and immediate consumption by a husband and wife); *see also United States v. Wright*, 593 F.2d 105, 107 (9th Cir. 1979).

The *Swiderski* rationale applies with equal force to the use of medical cannabis in compliance with state and local laws. Judicial resistance to expansion of the *Swiderski* doctrine has been based on concerns about its possible use as a "cover" for illicit drugs. Those concerns are not present in the context of the OCBC, however. Just as in *Swiderski*, the evidence established that no one other than the co-purchasers were involved in the use of the medical cannabis. The members were not drawn into drug use through Appellants; rather, they sought the cannabis to alleviate their serious medical conditions, after they received a doctor's approval to do so. ER 1171, 1173, 1176, 1431, 1438, 1442. These individuals were not using cannabis for recreational purposes. *Id.* and ER 1181, 1340, 1441. They merely attempted to alleviate their painful ailments. No "distribution" took place because OCBC and its patient-members jointly acquired cannabis for medical purposes to be shared among themselves and not with anyone else. ER 1645, 1342. Appellants also established that when the use of medical cannabis is shared by members of OCBC, the participants agree to a

Statement of Conditions which specifies they are joint participants "in a cooperative effort to obtain and share medical cannabis. . . ." ER 1342-1343.

Thus, all of the circumstances that led the *Swiderski* court to recognize the joint user defense were established by the evidence submitted below, and all elements of the defense existed. The district court's failure to allow Appellants to present this defense to a jury was reversible error.

B. The District Court Violated Appellants' Due Process Rights By Denying Them A Full And Fair Hearing.

1. Appellants Were Entitled to a Hearing Because the District Court Was Presented with Controverted Evidence on Whether Appellants Had Violated the Injunction.

The summary procedure employed by the district court violated Appellants' procedural due process rights in that the district court improperly denied Appellants a full hearing on the contempt charges in the face of clearly disputed evidence. In this Circuit, a full hearing is required in a civil contempt proceeding where the evidence is in dispute. A summary proceeding is allowed *only* where the defendant presents no admissible evidence to dispute the contempt claim. *Peterson v. Highland Music, Inc.*, 140 F.3d 133, 1324 (9th Cir. 1998). Where, as in this case, defendants present evidence to dispute the allegations of contempt, they are

procedurally entitled to a hearing at which they may present additional evidence and cross-examine witnesses. *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888,* 536 F.2d 1268, 1277 (9th Cir. 1976) ("A civil contempt proceeding, which may lead to the assessment of a fine, is a trial within the meaning of Fed. R. Civ. P. 43(a), rather than a hearing on a motion within the meaning of Fed. R. Civ. P. 43(e) and that *the issues may not be tried on the basis of affidavits.* ") (omitting internal citations and adding emphasis); *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 495 (9th Cir. 1983) (finding that due process required a hearing before civil sanctions could be imposed on the alleged contemnor).

2. Under Section 882, Appellants Are Entitled to a Hearing Where They May Present Evidence and Cross-Examine the Government's Witnesses

The district court's summary finding of contempt without a due process hearing was unprecedented. Even under the civil procedures established for an injunction under 21 U.S.C. § 882, Appellants were not afforded the procedural protections to which they are entitled. As the district court recognized, the Government's use of a civil statute to enjoin criminal activity was a rarely used tactic with few precedents in the federal courts. The district court located only five cases in which the Government had

previously used this statute in this way.[4] *Id.* In each of these cases, the Government was not allowed to obtain a finding of criminal conduct without a due process hearing to determine whether it could prove its allegations.

Two of these cases also involved the use of section 882 to enjoin criminal activity under the Controlled Substances Act. Even in those two cases, the defendants were at least given a hearing where they could challenge the Government's evidence and present their own. *See Barbacoff*, 416 F. Supp. at 607 (before granting the Government's motion for partial summary judgment, "the Court held a hearing . . . at which plaintiff and defendants had an opportunity to present witnesses and cross-examine"); *Williams*, 416 F. Supp. at 612 (before granting the Government's motion for partial summary judgment, "the Court held a hearing on the penalty to be

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[4] *See United States v. Leasehold Interest in 121 Norstrand Avenue,* 760 F. Supp. 1015, 1035 (E.D.N.Y. 1991) (issuing an injunction prohibiting defendants from using the apartment to commit narcotics offenses); *United States v. Two Hundred Eighty Thousand Five Hundred and Five Dollars*, 655 F. Supp. 1487, 1501 (S.D. Fla. 1986) (issuing injunction to forfeit money); *United States v. 1979 Mercury Cougar*, 545 F. Supp. 1087, 1090 (D. Colo. 1982) (denying summary judgment on request to issue injunction); *United States v. Barbacoff,* 416 F. Supp. 606, 610 (D.D.C. 1976) (issuing injunction to prepare records and inventory of controlled substances and to desist from filing illegal prescriptions); *United States v. Williams*, 416 F. Supp. 611, 614 (D.D.C. 1976) (issuing injunction to prepare records and inventory of controlled substances and to desist from filing illegal prescriptions).

assessed at which plaintiff and defendants had an opportunity to present witnesses and cross-examine").

Thus, the district court's decision to hold merely a summary proceeding where Appellants were found to have violated a criminal law creates a new precedent regarding section 882 injunctions. Section 882, by its terms, mandates a jury trial in accordance with the Federal Rules of Civil Procedure: "In case of an alleged violation of an injunction or restraining order under this section, trial shall, *upon demand of the accused, be by a jury* in accordance with the Federal Rules of Civil Procedure." 21 U.S.C. § 882(b) (emphasis added). It does not, by its terms, permit a summary proceeding over the objection of the accused. Accordingly, Appellants should have had, at a minimum, an evidentiary hearing like the defendants in every other case brought under section 882(b).

Moreover, there is a fundamental difference between earlier cases involving section 882 injunctions and this case which compels even greater procedural safeguards. Unlike the defendants in other cases involving section 882 injunctions, Appellants here contend that even if an evidentiary hearing could satisfy the procedural requirements of section 882, due process in this case is not satisfied unless Appellants receive a jury trial on the contempt charge. *See infra* at § II.C. Thus, this Court can decide that

Appellants were denied their constitutional right to a jury trial on the contempt charges. *Codispoti v. Pennsylvania,* 418 U.S. 506, 517 (1974) ("Summary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review.").

C. Appellants Are Entitled to a Jury Trial To Determine Whether They Violated the Preliminary Injunction

The Government's decision to proceed by way of civil injunction rather than criminal charges does not obviate the quasi-criminal nature of these proceedings. In this case, the district court issued an injunction that is *equivalent to* the prohibitions defined by the Controlled Substances Act. In particular, the injunction bars Appellants from violating the Controlled Substances Act by (1) "engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1)"; (2) using the OCBC premises "for the purposes of engaging in the manufacture and distribution of marijuana"; and (3) "conspiring to violate the Controlled Substances Act." ER 0636.

The label the Government puts on its actions does not determine the procedural rights to which Appellants are entitled, "the labels 'criminal' and 'civil' are not of paramount importance. . . . To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense

requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *United States v. Halper*, 490 U.S. 435, 447-48 (1989); *see also United States v. Powers,* 629 F.2d 619, 627 (9th Cir. 1980) ("[N]o distinct line can be drawn between civil and criminal contempt. Each shares the other's attributes. The same conduct may result in both civil and criminal contempt charges."). A particularized assessment of this case shows that Appellants should have had a jury trial to determine if they were, as the Government argued at the summary contempt proceeding, acting in violation of the Controlled Substances Act. *Bagwell*, 512 U.S. at 828, (the nature of a contempt sanction is not to be decided from its label alone but, rather, "from an examination of the character of the relief itself") (omitting internal quotation and citation); *Bingman v. Ward*, 100 F.3d 653, 656 (9th Cir. 1996) (same), *cert. denied*, 520 U.S. 1188 (1997).

Even if the proceedings in this case could initially be viewed as purely civil in nature, under *Bagwell,* Appellants were still entitled to a jury trial. The Supreme Court has held that some civil contempt proceedings constitutionally require the protections afforded to criminal contempt proceedings, in alleged contempts that involve "out-of-court disobedience to complex injunctions" and that "require elaborate and reliable fact-finding."

Bagwell, 512 U.S. at 833-34. The Court has held that in such complex civil contempt cases where crucial facts are in dispute, even holding a lengthy hearing with the right to conduct discovery, introduce evidence, call and cross-examine witnesses, and have contempt proven beyond a reasonable doubt does not satisfy due process requirements. *Id.* at 834. Because such "civil" contempt proceedings are actually more akin to criminal contempt charges, defendants in such complex civil contempt cases *must* be given a jury trial: "Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." *Id.*

The contempt proceeding at issue in *Bagwell* involved a labor dispute and an injunction ordering the defendant labor union to obey certain laws and to refrain from engaging in certain disruptive conduct. After a hearing where defendants were found in contempt, the trial court ordered them to pay $52 million in fines for violations of the injunction. *Id.* at 824-26. In reversing this holding and finding that this civil contempt proceeding should have used criminal procedural protections, the Supreme Court first noted that although the penalty involved was announced in advance of potential future illegal conduct, this in itself did not render the fines "coercive and

civil as a matter of constitutional law." *Id.* at 837. Second, the defendants' "sanctionable conduct did not occur in the court's presence or otherwise implicate the court's ability to maintain order and adjudicate the proceedings before it." *Id.* Thus, the defendants' conduct was an "indirect contempt," the type of contempt in which summary proceedings are prohibited. *Id.* at 833 ("Summary adjudication of indirect contempts is prohibited, and criminal contempt sanctions are entitled to full criminal process.") (omitting internal citation). Third, the sanction was levied "for widespread, ongoing, out-of-court violations of a complex injunction." *Id.* at 837. Based on these three factors, the Supreme Court held: "Under such circumstances, disinterested fact-finding and even-handed adjudication were essential, and [defendants] were entitled to a criminal jury trial." *Id.* at 837-38.

Similarly, in this case, this Court should reject the simple criminal/civil dichotomy sought by the Government and find that Appellants are entitled to a jury trial on the contempt charge. First, although the injunction aims at future conduct, the proscribed conduct is criminal in nature and the punishment — closure of Appellants' premises — severe. Second, the charges involve an alleged indirect contempt that occurred outside of the court's presence in which a summary proceeding is prohibited and careful fact-finding is required. Finally, the contempt charges involve

complex issues which require careful fact-finding concerning the circumstances and medical conditions of the persons to whom cannabis was allegedly distributed as well as the scientific basis for the use of cannabis as a medicine.

Moreover, the Government's chosen avenue for enforcing the criminal laws in this case further justifies the right to a jury trial. The Government is the only body with the authority to bring criminal proceedings against Appellants in this case. Having alleged that Appellants violated a federal criminal statute, the Government should not be able to circumvent criminal due process protections and achieve the same finding of criminal conduct but label the proceedings "civil." *Codispoti,* 418 U.S. at 515-16 ("the jury-trial guarantee reflects a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government") (omitting quotation). This is especially true in a case where the question whether Appellants committed any illegal acts has been hotly debated both in the courts and in the general public. *See, e.g.,* ER 0178-0193 (Brief of the District Attorney of San Francisco as Amicus Curiae); ER 0194-0198 (Brief of City of Oakland as Amicus Curiae); ER 0440-0441 (California Medical Marijuana Initiative); ER 0442-0453

(Resolution of Oakland City Council Endorsing the Medical Marijuana Bill). Because section 882 provides the Government with entry into the civil arena to enjoin what it alleges are criminal acts, criminal procedural protections, including the rights to a jury trial, should apply.

Finally, courts do not have unlimited discretion in contempt proceedings: "due process is a limitation on the court's contempt power." *Falstaff Brewing Corp. v. Miller Brewing Co.,* 702 F.2d 770, 783 (9th Cir. 1983). Indeed, in contempt proceedings, where judges have wider discretion to impose penalties than in other types of proceedings, the right to a jury trial becomes even more important. As the Supreme Court has recognized, "in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament." *Bloom v. Illinois,* 391 U.S. 194, 201-02 (1968) (holding that serious criminal contempts must be tried to a jury if the defendant requests). Under these circumstances, "disinterested fact-finding and even handed adjudication [a]re essential," and demand that Appellants be given a jury trial. *Bagwell,* 512 U.S. at 838.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO MODIFY THE INJUNCTION TO PROVIDE AN EXCEPTION FOR THOSE PATIENTS WITH A CONFIRMED MEDICAL NECESSITY.

In order to avert harm to its patient-members, Appellants requested that the district court modify the Preliminary Injunction Order to permit cannabis distribution only to the specific category of patients with a necessity for cannabis as this Court has defined "necessity" in *Aguilar*, 883 F.2d at 693. This sanction would have been less draconian than complete closure of the OCBC. Additionally this modification would have complied with applicable law, which recognizes a necessity defense.

The district court abused its discretion when it refused to modify its Preliminary Injunction Order as requested by Appellants. Rather than doing what it was empowered to do, as a Court sitting in equity, to alleviate the resulting "human suffering" the district court reasoned that "its equitable powers do not permit it to ignore federal law." ER 1806. Therefore, the district court concluded, it was required to close down the OCBC entirely.

Equity required no such thing, however. As the Supreme Court stated in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982):

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. In exercising their sound

> discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. . . . The 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 of law.

456 U.S. at 312-13 (citations and quotations omitted).

Furthermore, the district court's decision does not indicate that it considered that less drastic alternatives were available which would both recognize the public interest at stake and allow compliance with federal law. *See Caribbean Marine Serv. Co. v. Baldridge*, 844 F.2d 668, 678 (9th Cir. 1988) (reversing injunction when lower court failed to identify and weigh public interest in balancing analysis, and failed to consider less drastic alternatives). As a court sitting in equity, the district court could not refuse, as it did, to consider the public interest as expressed both by the voters of the state of California, and the Oakland City Council. *See Weinberger*, 456 U.S. at 312 ("where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.") (citations omitted); *see also American*

Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966 (9th Cir. 1983) (other circuits agree that a showing of violation of law "should not automatically lead to an injunction where other public interests may be adversely affected.").

The district court could have averted "human suffering" consistent with federal law by modifying the Preliminary Injunction Order as requested by Appellants. Its failure to do so was an abuse of discretion requiring reversal.

CONCLUSION

For all of the foregoing reasons, Appellants respectfully request that this Court (1) vacate the district court's order finding Appellants' in contempt and, (2) vacate the district court's order modifying the preliminary injunction.

Dated: November 13, 1998

JAMES J. BROSNAHAN
ANNETTE P. CARNEGIE
SHERYL C. MEDEIROS
CHRISTINA KIRK-KAZHE
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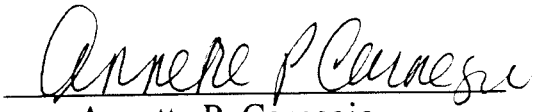
By 
Annette P. Carnegie

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants state that there are currently two pending related cases:

1. Appellants' Appeal from Order Refusing to Modify Injunction by the United States District Court for the Northern District of California Case No. C98-0088 CRB, entered on October 16, 1998, by Judge Charles R. Breyer. This case arises out of the same case in the district court and raises the same or closely related issues.

2. Court of Appeals Docket No. 98-17044: Appellants' Appeal from Order Denying Motion to Dismiss by the United States District Court for the Northern District of California Case No. C98-0088 CRB dated September 3, 1998, by Judge Charles R. Breyer, and entered by the Clerk of Court on September 9, 1998. This case arises out of the same case in the district court and raises the same or closely related issues.

Appellants moved to consolidate these three cases on October 28, 1998 and November 2, 1998. The Government has no objection to consolidation of these three cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32(e)(4), Appellants hereby certify that their Opening Brief is prepared in proportionately spaced Times New Roman typeface in fourteen point.

The brief, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, the Statement of Related Cases, the Corporate Disclosure Statement, and the Proof of Service, contains 10,565 words based on a count by the word processing system at Morrison & Foerster LLP.

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

NO. 98-16950

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Appellants/Defendants,

v.

UNITED STATES OF AMERICA,

Appellee/Plaintiff.

Appeal from Order Denying Motion to Modify Preliminary Injunction
Appeal from Order Modifying Injunction by the United States District Court
for the Northern District of California
Case No. C 98-0088 CRB
entered on October 13, 1998, by Judge Charles R. Breyer.

ADDENDUM IN SUPPORT OF APPELLANTS' OPENING BRIEF

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ADDENDUM
In Support of Appellants' Opening Brief

Exhibit	Description
1	Text and election results regarding passage of medical marijuana initiatives in Alaska (Ballot Measure 8), Oregon (Measure 57), and Washington (Initiative 692)

Ex.

1

ALASKA

Election Summary Report
State of Alaska 1998 General Election
UNOFFICIAL RESULTS

11/10/98
10:49:32

U.S. SENATOR			
Precincts Reporting		453/453	100.00%
Ballots Cast/Reg. Voters		204439/453332	45.10%
Total Votes		199917	
GOTTLIEB, JEFFREY	GRN	6201	3.10%
SONNEMAN, JOSEPH	DEM	39434	19.73%
KOHLHAAS, SCOTT	LIB	4486	2.24%
MURKOWSKI, FRANK	REP	149222	74.64%
Write-in Votes		574	0.29%

U.S. REPRESENTATIVE			
Precincts Reporting		453/453	100.00%
Ballots Cast/Reg. Voters		204439/453332	45.10%
Total Votes		201230	
YOUNG, DON	REP	125811	62.52%
DUNCAN, JIM	DEM	69958	34.77%
GRAMES, JOHN	GRN	5061	2.52%
Write-in Votes		400	0.20%

GOV/LT. GOV			
Precincts Reporting		453/453	100.00%
Ballots Cast/Reg. Voters		204439/453332	45.10%
Total Votes		198188	
LINDAUER/WARD	REP	34573	17.44%
METCALFE/BAXLEY	MOD	12128	6.12%
KNOWLES/ULMER	DEM	102029	51.48%
SULLIVAN	AI	3615	1.82%
JACOBSSON/MILLIGAN	GRN	5794	2.92%
Write-in Votes		40049	20.21%

SENATE DIST. B			
Precincts Reporting		19/19	100.00%
Ballots Cast/Reg. Voters		13429/24370	55.10%
Total Votes		13276	
ABEL, DON	REP	5919	44.58%
ELTON, KIM	DEM	7315	55.10%
Write-in Votes		42	0.32%

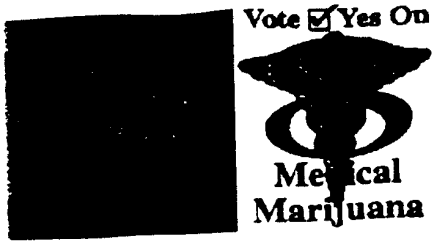
SENATE DIST. D			
Precincts Reporting		23/23	100.00%
Ballots Cast/Reg. Voters		11435/23738	48.17%
Total Votes		9229	
TORGERSON, JOHN	REP	8918	96.63%
Write-in Votes		311	3.37%

BALLOT MEASURE NO. 6		
Precincts Reporting	453/453	100.00%
Ballots Cast/Reg. Voters	204438/453332	45.10%
Total Votes	200977	
YES	137818	68.57%
NO	63159	31.43%

BALLOT MEASURE NO. 7		
Precincts Reporting	453/453	100.00%
Ballots Cast/Reg. Voters	204438/453332	45.10%
Total Votes	196837	
YES	97812	49.69%
NO	99025	50.31%

BALLOT MEASURE NO. 8		
Precincts Reporting	453/453	100.00%
Ballots Cast/Reg. Voters	204438/453332	45.10%
Total Votes	201882	
YES	117003	57.96%
NO	84879	42.04%

BALLOT MEASURE NO. 9		
Precincts Reporting	453/453	100.00%
Ballots Cast/Reg. Voters	204448/453332	45.10%
Total Votes	201037	
YES	73538	36.58%
NO	127499	63.42%



Full Text

An Act Relating to the Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions

Be it Enacted by the People of the State of Alaska

Sec 1. AS 17 is amended by adding a new chapter which reads as follows:

AS 17.35.010. Registry of Patients.

(a) The Department shall create and maintain a confidential registry of patients who have applied for and are entitled to receive a registry identification card according to the criteria set forth in this chapter. Authorized employees of state or local law enforcement agencies shall be granted access to the information contained within the Department s confidential registry only for the purpose of verifying that an individual who has presented a registry identification card to a state or local law enforcement official is lawfully in possession of such card.

(b) No person shall be permitted to gain access to names of patients, physicians, primary care-givers or any information related to such persons maintained in connection with the Department s confidential registry, except for authorized employees of the Department in the course of their official duties and authorized employees of state or local law enforcement agencies who have stopped or arrested a person who claims to be engaged in the medical use of marijuana and in the possession of a registry identification card or its functional equivalent, pursuant to AS 17.35.010(e).

(c) In order to be placed on the state s confidential registry for the medical uses of marijuana, a patient shall provide to the Department:

(1) the original or a copy of written documentation stating that the patient has been diagnosed with a debilitating medical condition and the physician s conclusion that the patient might benefit from the medical use of marijuana;

(2) the name, address, date of birth, and social security number of the patient;

(3) the name, address, and telephone number of the patient s physician; and

(4) the name and address of the patient s primary care-giver, if one is designated at the time of application.

(d) The Department shall verify all information submitted under AS 17.35.010(c) within 30 days of receiving it. The Department shall notify the applicant that his or her application for a registry identification card has been denied if its review of the information which the patient has provided discloses that the information required pursuant to AS 17.35.010(c)has not been provided or has been falsified. Otherwise, not more than five days after verifying such information, the Department shall issue a serially numbered registry identification card to the patient stating:

(1) the patient s name, address, date of birth, and social security number;

(2) that the patient s name has been certified to the state health agency as a person who has a debilitating medical condition which the patient may address with the medical use of marijuana;

(3) the dates of issuance and expiration of the registry identification card; and

(4) the name and address of the patient s primary care- giver, if any is designated at the time of application.

(e) If the Department fails to issue a registry identification card within thirty-five days of receipt of an application, the patient s application for such card will be deemed to have been approved. Receipt of an application shall be deemed to have occurred upon delivery to the Department or deposit in the United States mails. Notwithstanding the foregoing, no application shall be deemed received prior to June 1, 1999. A patient who is questioned by any state or local law enforcement official about his or her medical use of marijuana shall provide a copy of the written documentation submitted to the Department and proof of the date of mailing or other transmission of the written documentation for delivery to the Department, which shall be accorded the same legal effect as a registry identification card, until the patient receives actual notice that the application has been denied. No person shall apply for a registry identification card more than once every six months.

(f) The denial of a registry identification card shall be considered a final agency action subject to judicial review. Only the patient whose application has been denied shall have standing to contest the final agency action.

(g) When there has been a change in the name, address, physician, or primary care-giver of a patient who has qualified for a registry identification card, that patient must notify the state health agency of any such change within ten days. To maintain an effective registry identification card, a patient must annually resubmit updated written documentation to the state health agency, as well as the name and address of the patient s primary care-giver, if any.

(h) A patient who no longer has a debilitating medical condition shall return his or her registry identification card to the Department within twenty-four hours of receiving such diagnosis by his or her physician.

(i) The Department may determine and levy reasonable fees to pay for any administrative costs associated with their roles in this program.

AS 17.35.020. Medical Use of Marijuana.

(a) A patient may not engage in the medical use of marijuana with more marijuana than is medically justified to address a debilitating medical condition. A patient s medical use of marijuana within the following limits is lawful:

(1) no more than one ounce of marijuana in usable form; and

(2) no more than six marijuana plants, with no more that three mature and flowering plants producing usable marijuana at any one time.

(b) For quantities of marijuana in excess of the amounts in AS 17.35.020(a), a patient or his or her primary care-giver must prove by a preponderance of the evidence that any greater amount was medically justified to address the patient s debilitating medical condition.

AS 17.35.030. Privileged medical use of marijuana.

(a) Except as otherwise provided in AS 17.35.040, no patient or primary care- giver may be found guilty of, or penalized in any manner for, a violation of any provision of law related to the medical use of marijuana, where it is proved by a preponderance of the evidence that:

(1) the patient was diagnosed by a physician as having a debilitating medical condition;

(2) the patient was advised by his or her physician, in the context of a bona fide physician-patient relationship, that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition; and

(3) the patient and his or her primary care-giver were collectively in possession of amounts of marijuana only as permitted under this section.

(b) Except as otherwise provided in AS 17.35.040, no patient or primary care-giver in lawful possession of a registry identification card shall be subject to arrest, prosecution, or penalty in any manner for medical use of marijuana or for applying to have his or her name placed on the confidential register maintained by the Department.

(c) No physician shall be subject to any penalty, including arrest, prosecution, disciplinary proceeding, or be denied any right or privilege, for:

(1) Advising a patient whom the physician has diagnosed as having a debilitating medical condition, about the risks and benefits of medical use of marijuana or that he or she might benefit from the medical use of marijuana, provided that such advice is based upon the physician s contemporaneous assessment of the patient s medical history and current medical condition and a bona fide physician-patient relationship; or

(2) Providing a patient with written documentation, based upon the physician s contemporaneous assessment of the patient s medical history and current medical condition and a bona fide physician-patient relationship, stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana.

(d) Notwithstanding the foregoing provisions, no person, including a patient or primary care-giver, shall be entitled to the protection of this section for his or her acquisition, possession, cultivation, use, sale, distribution, and/or transportation of marijuana for non-medical use.

(e) Any property interest that is possessed, owned, or used in connection with the medical use of marijuana, or acts incidental to such use, shall not be harmed, neglected, injured, or destroyed while in the possession of state or local law enforcement officials where such property has been seized in connection with the claimed medical use of marijuana. Any such property interest shall not be forfeited under any provision of state or local law providing for the forfeiture of property other than as a sentence imposed after conviction of a criminal

offense or entry of a plea of guilty to such offense. Marijuana and paraphernalia seized by state or local law enforcement officials from a patient or primary care-giver, in connection with the claimed medical use of marijuana shall be returned immediatly upon the determination that the patient or primary care-giver is entitled to the protection contained in this section as may be evidenced, for example, by a decision not to prosecute,the dismissal of charges, or acquittal.

AS 17.35.040. Restrictions on medical use of marijuana.

(a) No patient in lawful possession of a registry identification card shall:

(1) engage in the medical use of marijuana in a way that endangers the health or well-being of any person;

(2) engage in the medical use of marijuana in plain view of, or in a place open to, the general public; or

(3) sell or distribute marijuana to any person who is known to the patient not to be either in lawful possession of a registry identification card or eligible for such card.

(b) Any patient found by a preponderance of the evidence to have willfully violated the provisions of this chapter shall be precluded from obtaining or using a registry identification card for the medical use of marijuana for a period of one year.

(c) No governmental, private, or any other health insurance provider shall be required to be liable for any claim for reimbursement for the medical use of marijuana.

(d) Nothing in this section shall require any accommodation of any medical use of marijuana:

(1) in any place of employment;

(2) in any correctional facility;

(3) on or within 500 feet of school grounds;

(4) at or within 500 feet of a recreation or youth center; or

(5) on a school bus.

AS 17.35.050. Medical use of marijuana by a minor.

Notwithstanding AS 17.35.030(a), no patient who has not reached the age of majority under AS 25.20 or who has not had the disabilities of a minor removed under AS 09.55.590 shall engage in the medical use of marijuana unless:

(a) his or her physician has diagnosed the patient as having a debilitating medical condition;

(b) the physician has explained the possible risks and benefits of medical use of marijuana to the patient and one of the patient s parents or legal guardians residing in Alaska, if any;

(c) the physician has provided the patient with the written documentation specified in AS 17.35.010(c)(1);

(d) the patient s parent or legal guardian referred to in AS 17.35.050(b), consents to the

Department in writing to serve as the patient s primary care-giver and to permit the patient to engage in the medical use of marijuana;

(e) the patient completes and submits an application for a registry identification card and the written consent referred to in AS 17.35.050(d) to the Department and receives a registry identification card;

(f) the patient and the primary care-giver collectively possess amounts of marijuana no greater than those specified in AS 17.35.020(a)(1) and (2); and

(g) the primary care-giver controls the acquisition of such marijuana and the dosage and frequency of its use by the patient.

AS 17.35.060. Addition of debilitating medical conditions.

Not later than June 1, 1999, the Department shall promulgate regulations under the Administrative Procedure Act governing the manner in which it may consider adding debilitating medical conditions to the list provided in this section. After June 1, 1999, the Department shall also accept for consideration physician or patient initiated petitions to add debilitating medical conditions to the list provided in this section and, after hearing, shall approve or deny such petitions within one hundred eighty days of submission. The denial of such a petition shall be considered a final agency action subject to judicial review.

AS 17.35.070. Definitions. In this chapter, unless the context clearly requires otherwise:

(a) Correctional facility means a state prison institution operated and managed by employees of the Department of Corrections or provided to the Department of Corrections by agreement under AS 33.30.031 for the care, confinement or discipline of prisoners.

(b) Debilitating medical condition means:

(1) cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for any of these conditions;

(2) any chronic or debilitating disease or treatment for such diseases, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient s physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or

(3) any other medical condition, or treatment for such condition, approved by the Department, pursuant to its authority to promulgate regulations or its approval of any petition submitted by a patient or physician under AS 17.35.060.

(c) Department means the Department of Health and Social Services;

(d) Medical use means the acquisition, possession, cultivation, use, and/or transportation of marijuana and/or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a debilitating medical condition only after a physician has authorized such medical use by a diagnosis of the patient s debilitating medical condition.

(e) Patient means a person who has a debilitating medical condition.

(f) Physician means a person licensed to practice medicine in this state or an officer in the regular medical service of the armed forces of the United States or the United States Public Health Service while in the discharge of their official duties, or while volunteering services without pay or other remuneration to a hospital, clinic, medical office, or other medical facility in this state;

(g) Primary care-giver means a person, other than the patient s physician, who is eighteen years of age or older and has significant responsibility for managing the well-being of a patient who has a debilitating medical condition.

(h) Prisoner means a person detained or confined in a correctional facility, whether by arrest, conviction, or court order, or a person held as a witness or otherwise, including municipal prisoners held under contract and juveniles held under the authority of AS 47.10.

(i) Registry Identification card means a document issued by the Department s which identifies a patient authorized to engage in the medical use of marijuana and the patient s primary care-giver, if any.

(j) Usable form and usable marijuana means the seeds, leaves, buds, and flowers of the plant (genus) Cannabis, but does not include the stalks or roots.

(k) Written documentation means a statement signed by a patient s physician or copies of the patient s pertinent medical records.

AS 17.35.080. Short title.

A.S. 17.35.010--17.35.070 may be cited as the Medical Uses of Marijuana for Persons Suffering From Debilitating Medical Conditions Act.

Sec 2. AS 11.71.190(b) is amended to read:

Sec. 11.71.190(b). Schedule VIA. Marijuana is a schedule VIA controlled substance except for marijuana possessed for medical purposes under AS 17.35.

OREGON

Election Results
November 3, 1998

Alaska

Measure 8: Medical Marijuana
YES: 58%
NO: 42%
(97% of precincts reporting)

Up to the minute results:
http://www.gov.state.ak.us/ltgov/elect98/index.html#gen
(Way at the bottom of the page)

Sponsors: Alaskans for Medical Rights
http://www.alaskalife.net/AKMR/

More information on Alaska's Medical Marijuana Initiative
http://www.levellers.org/akstat.htm

Arizona

Arizona – Prop. 300
YES: 43%
NO: 57%
(100% of precincts reporting - CBS News is reporting that Prop. 300 was officially defeated.)

A 'no' vote will allow doctors to continue to prescribe Schedule I drugs without any further authorization from Congress or the FDA.
Referendum relating to the medical use of Schedule I drugs which was put on the ballot to overturn the gutting by the legislature of Prop. 200 (the Drug Medicalization, Prevention and Control Act), which passed by 65% of the vote in 1996.

Up to the minute results:
http://event.cbs.com/state/state_az.html

More information on Prop. 300
http://www.levellers.org/azstat.htm

Nevada

Ballot Question #9 - Medical Marijuana
YES: 59%

NO: 41%
(99% of precincts reporting - CBS News is reporting that Ballot Question #9 has officially won.)

Up to the minute results:
http://event.cbs.com/state/state_nv.html

More information on Nevada's Medical Marijuana Initiative:
http://www.levellers.org/nvstat.htm

Oregon

Measure 57: Recriminalization
(A 'no' vote prevents recriminalization of marijuana in Oregon)
http://www.koin.com/news/campaign98/elec_results/measure67.html
YES: 33%
NO: 67%
(240/2,196 precincts reporting - KOIN News is reporting that Measure 57 has been officially defeated.)

Measure 67: Medical Marijuana
(A 'yes' vote allows patients to possess one to three ounces of marijuana for medicine and to grow three plants to obtain that medicine. Measure 67 prohibits distribution.)
http://www.koin.com/news/campaign98/elec_results/measure67.html
YES: 55%
NO: 45%
[1,853 of 2,194 precincts reporting (84%)]

Another Site for Oregon Results
http://www.kgw.com/election982.asp

Sponsors of Measure 67: Oregonians for Medical Rights
http://www.teleport.com/~omr/

Oregon Elections Division - Unofficial Election Results
http://www.sos.state.or.us/elections/nov398/nov398.htm

More information on Oregon's Medical Marijuana Initiative and Recriminalization Referendum
http://www.levellers.org/orstat.htm

Washington State

Initiative 692 - Medical Marijuana
YES: 59%
NO: 41%
(99% of precincts reporting - CBS News is reporting that I-692 has officially won.)

Up to the minute results:

The Oregon Medical Marijuana Act

SECTION 1. Sections 1 through 19 of this Act shall be known as the Oregon Medical Marijuana Act.

SECTION 2. The people of the state of Oregon hereby find that:

(1) Patients and doctors have found marijuana to be an effective treatment for suffering caused by debilitating medical conditions, and therefore, marijuana should be treated like other medicines;

(2) Oregonians suffering from debilitating medical conditions should be allowed to use small amounts of marijuana without fear of civil or criminal penalties when their doctors advise that such use may provide a medical benefit to them and when other reasonable restrictions are met regarding that use;

(3) Sections 1 to 19 of this Act are intended to allow Oregonians with debilitating medical conditions who may benefit from the medical use of marijuana to be able to discuss freely with their doctors the possible risks and benefits of medical marijuana use and to have the benefit of their doctor's professional advice; and

(4) Sections 1 to 19 of this Act are intended to make only those changes to existing Oregon laws that are necessary to protect patients and their doctors from criminal and civil penalties, and are not intended to change current civil and criminal laws governing the use of marijuana for nonmedical purposes.

SECTION 3. As used in sections 1 to 19 of this Act:

(1) "Attending physician" means a physician licensed under ORS chapter 677 who has primary responsibility for the care and treatment of a person diagnosed with a debilitating medical condition.

(2) "Debilitating medical condition" means:

(a) Cancer, glaucoma, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, or treatment for these conditions;

(b) A medical condition or treatment for a medical condition that produces, for a specific patient, one or more of the following:

(i) Cachexia;

(ii) Severe pain;

(iii) Severe nausea;

(iv) Seizures, including but not limited to seizures caused by epilepsy; or

(v) Persistent muscle spasms, including but not limited to spasms caused by multiple sclerosis; or

(c) Any other medical condition or treatment for a medical condition adopted by the division by rule or approved by the division pursuant to a petition submitted pursuant to section 14 of this Act.

(3) "Delivery" has the meaning given that term in ORS 475.005.

(4) "Designated primary caregiver" means an individual eighteen years of age or older who has significant responsibility for managing the well-being of a person who has been diagnosed with a debilitating medical condition and who is designated as such on that person's application for a registry identification card or in other written notification to the division. "Designated primary caregiver" does not include the person's attending physician.

(5) "Division" means the Health Division of the Oregon Department of Human Resources.

(6) "Marijuana" has the meaning given that term in ORS 475.005.

(7) "Medical use of marijuana" means the production, possession, delivery, or administration of marijuana, or paraphernalia used to administer marijuana, as necessary for the exclusive benefit of a person to mitigate the symptoms or effects of his or her debilitating medical condition.

(8) "Production" has the same meaning given that term in ORS 475.005.

(9) "Registry identification card" means a document issued by the division that identifies a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver, if any.

(10) "Usable marijuana" means the dried leaves and flowers of the plant Cannabis family Moraceae, and any mixture or preparation thereof, that are appropriate for medical use as allowed in sections 1 to 19 of this Act. "Usable marijuana" does not include the seeds, stalks and roots of the plant.

(11) "Written documentation" means a statement signed by the attending physician of a person diagnosed with a debilitating medical condition or copies of the person's relevant medical records.

SECTION 4. (1) Except as provided in sections 5 and 11 of this Act, a person engaged in or assisting in the medical use of marijuana is excepted from the criminal laws of the state for possession, delivery or production of marijuana, aiding and abetting another in the possession, delivery or production of marijuana or any other criminal offense in which possession, delivery or production of marijuana is an element if the following conditions have been satisfied:

(a) The person holds a registry identification card issued pursuant to this section, has applied for a registry identification card pursuant to subsection (9) of this section, or is the designated primary caregiver of a cardholder or applicant; and

(b) The person who has a debilitating medical condition and his or her primary caregiver are collectively in possession of, delivering or producing marijuana for medical use in the amounts allowed in section 7 of this Act.

(2) The division shall establish and maintain a program for the issuance of registry identification cards to persons who meet the requirements of this section. Except as provided in subsection (3) of this section, the division shall issue a registry identification card to any person who pays a fee in the amount established by the division and provides the following:

(a) Valid, written documentation from the person's attending physician stating that the person has been diagnosed with a debilitating medical condition and that the medical use of marijuana may mitigate the symptoms or effects of the person's debilitating medical condition;

(b) The name, address and date of birth of the person;

(c) The name, address and telephone number of the person's attending physician; and

(d) The name and address of the person's designated primary caregiver, if the person has designated a primary caregiver at the time of application.

(3) The division shall issue a registry identification card to a person who is under eighteen years of age if the person submits the materials required under subsection (2) of this section, and one of the person's parents or legal guardians signs a written statement that:

(a) The person's attending physician has explained to the person and to one of the person's parents or legal guardians the possible risks and benefits of the medical use of marijuana;

(b) The parent or legal guardian consents to the use of marijuana by the person for medical purposes;

(c) The parent or legal guardian agrees to serve as the person's designated primary caregiver; and

(d) The parent or legal guardian agrees to control the acquisition of marijuana and the dosage and frequency of use by the person.

(4) A person applying for a registry identification card pursuant to this section may submit the information required in this section to a county health department for transmittal to the division. A county health department that receives the information pursuant to this subsection shall transmit the information to the division within five days of receipt of the information. Information received by a county health department pursuant to this subsection shall be confidential and not subject to disclosure, except as required to transmit the information to the division.

(5) The division shall verify the information contained in an application submitted pursuant to this section and shall approve or deny an application within thirty days of receipt of the application.

(a) The division may deny an application only for the following reasons:

(i) The applicant did not provide the information required pursuant to this section to establish his or her debilitating medical condition and to document his or her consultation with an attending physician regarding the medical use of marijuana in connection with such condition, as provided in subsections (2) and (3) of this section; or

(ii) The division determines that the information provided was falsified.

(b) Denial of a registry identification card shall be considered a final division action, subject to judicial review. Only the person whose application has been denied, or, in the case of a person under the age of eighteen years of age whose application has been denied, the person's parent or legal guardian, shall have standing to contest the division's action.

(c) Any person whose application has been denied may not reapply for six months from the date of the denial, unless so authorized by the division or a court of competent jurisdiction.

(6) (a) If the division has verified the information submitted pursuant to subsections (2) and (3) of this section and none of the reasons for denial listed in subsection (5)(a) of this section is applicable, the division shall issue a serially numbered registry identification card within five days of verification of the information. The registry identification card shall state:

(i) The cardholder's name, address and date of birth;

(ii) The date of issuance and expiration date of the registry identification card;

(iii) The name and address of the person's designated primary caregiver, if any; and

(iv) Such other information as the division may specify by rule.

(b) When the person to whom the division has issued a registry identification card pursuant to this section has specified a designated primary caregiver, the division shall issue an identification card to the designated primary caregiver. The primary caregiver's registry identification card shall contain the information provided in subsection 4(6)(a)(i)-(iv).

(7) (a) A person who possesses a registry identification card shall:

(i) Notify the division of any change in the person's name, address, attending physician or designated primary caregiver; and

(ii) Annually submit to the division:

(A) updated written documentation of the person's debilitating medical condition; and

(B) the name of the person's designated primary caregiver if a primary caregiver has been designated for the upcoming year.

(b) If a person who possesses a registry identification card fails to comply with this subsection, the card shall be deemed expired. If a registry identification card expires, the identification card of any designated primary caregiver of the cardholder shall also expire.

(8) A person who possesses a registry identification card pursuant to this section and who has been diagnosed by the person's attending physician as no longer having a debilitating medical condition shall return the registry identification card to the division within seven calendar days of notification of the diagnosis. Any designated primary caregiver shall return his or her identification card within the same period of time.

(9) A person who has applied for a registry identification card pursuant to this section but whose application has not yet been approved or denied, and who is contacted by any law enforcement officer in connection with his or her administration, possession, delivery or production of marijuana for medical use may provide to the law enforcement officer a copy of the written documentation submitted to the division pursuant to subsections (2) or (3) of this section and proof of the date of mailing or other transmission of the documentation to the division. This documentation shall have the same legal effect as a registry identification card until such time as the person receives notification that the application has been approved or denied.

SECTION 5. (1) No person authorized to possess, deliver or produce marijuana for medical use pursuant to sections 1 to 19 of this Act shall be excepted from the criminal laws of this state or shall be deemed to have established an affirmative defense to criminal charges of which possession, delivery or production of marijuana is an element if the person, in connection with the facts giving rise to such charges:

(a) Drives under the influence of marijuana as provided in ORS 813.010;

(b) Engages in the medical use of marijuana in a public place as that term is defined in ORS 161.015, or in public view;

(c) Delivers marijuana to any individual who the person knows is not in possession of a registry identification card; or

(d) Delivers marijuana for consideration to any individual, even if the individual is in possession of a registry identification card.

(2) In addition to any other penalty allowed by law, a person who the division finds has willfully violated the provisions of sections 1 to 19 of this Act or rules adopted under sections 1 to 19 of this Act may be precluded from obtaining or using a registry identification card for the medical use of marijuana for a period of up to six months, at the discretion of the division.

SECTION 6. (1) Except as provided in sections 5 and 11 of this Act, it is an affirmative defense to a criminal charge of possession or production of marijuana, or any other criminal offense in which possession or production of marijuana is an element, that the person charged with the offense is a person who:

(a) Has been diagnosed with a debilitating medical condition and been advised by his or her attending physician the medical use of marijuana may mitigate the symptoms or effects of that debilitating medical condition;

(b) Is engaged in the medical use of marijuana; and

(c) Possesses or produces marijuana only in the amounts allowed in section 7 (1) of this Act, or in excess of those amounts if the person proves by a preponderance of the evidence that the greater amount is medically necessary to mitigate the symptoms or effects of the person's debilitating medical condition.

(2) It is not necessary for a person asserting an affirmative defense pursuant to this section to have received a registry identification card in order to assert the affirmative defense established in this section.

(3) No person who claims that marijuana provides medically necessary benefits and who is charged with a crime pertaining to such use of marijuana shall be precluded from presenting a defense of choice of evils, as set forth in ORS 161.200, or from presenting evidence supporting the necessity of marijuana for treatment of a specific disease or medical condition, provided that the amount of marijuana at issue is no greater than permitted under section 7 of this Act.

SECTION 7. (1) A person who possesses a registry identification card issued pursuant to section 4 of this Act may engage in, and a designated primary caregiver of such a person may assist in, the medical use of marijuana only as justified to mitigate the symptoms or effects of the person's debilitating medical condition. Except as allowed in subsection (2) of this section, a registry identification cardholder and that person's designated primary caregiver may not collectively possess, deliver or produce more than the following:

(a) If the person is present at a location at which marijuana is not produced, including any residence associated with that location, one ounce of usable marijuana; and

(b) If the person is present at a location at which marijuana is produced, including any residence associated with that location, three mature marijuana plants, four immature marijuana plants and one ounce of usable marijuana per each mature plant.

(2) If the individuals described in subsection (1) of this section possess, deliver or produce marijuana in excess of the amounts allowed in subsection (1) of this section, such individuals are not excepted

from the criminal laws of the state but may establish an affirmative defense to such charges, by a preponderance of the evidence, that the greater amount is medically necessary to mitigate the symptoms or effects of the person's debilitating medical condition.

(3) The Health Division shall define by rule when a marijuana plant is mature and when it is immature for purposes of this section.

SECTION 8. (1) Possession of a registry identification card or designated primary caregiver identification card pursuant to section 4 of this Act shall not alone constitute probable cause to search the person or property of the cardholder or otherwise subject the person or property of the cardholder to inspection by any governmental agency.

(2) Any property interest possessed, owned or used in connection with the medical use of marijuana or acts incidental to the medical use of marijuana that has been seized by state or local law enforcement officers shall not be harmed, neglected, injured or destroyed while in the possession of any law enforcement agency. No such property interest may be forfeited under any provision of law providing for the forfeiture of property other than as a sentence imposed after conviction of a criminal offense. Marijuana and paraphernalia used to administer marijuana that was seized by any law enforcement officer shall be returned immediately upon a determination by the district attorney in whose county the property was seized, or his or her designee, that the person from whom the marijuana or paraphernalia used to administer marijuana was seized is entitled to the protections contained in sections 1 to 19 of this Act. Such determination may be evidenced, for example, by a decision not to prosecute, the dismissal of charges, or acquittal.

SECTION 9. No attending physician may be subjected to civil penalty or discipline by the Board of Medical Examiners for:

(1) Advising a person whom the attending physician has diagnosed as having a debilitating medical condition, or a person who the attending physician knows has been so diagnosed by another physician licensed under ORS chapter 677, about the risks and benefits of medical use of marijuana or that the medical use of marijuana may mitigate the symptoms or effects of the person's debilitating medical condition, provided the advice is based on the attending physician's personal assessment of the person's medical history and current medical condition; or

(2) Providing the written documentation necessary for issuance of a registry identification card under section 4 of this Act, if the documentation is based on the attending physician's personal assessment of the applicant's medical history and current medical condition and the physician has discussed the potential medical risks and benefits of the medical use of marijuana with the applicant.

SECTION 10. No professional licensing board may impose a civil penalty or take other disciplinary action against a licensee based on the licensee's medical use of marijuana in accordance with the provisions of sections 1 to 19 of this Act or actions taken by the licensee that are necessary to carry out the licensee's role as a designated primary caregiver to a person who possesses a lawful registry identification card issued pursuant to section 4 of this Act.

SECTION 11. Nothing in sections 1 to 19 of this Act shall protect a person from a criminal cause of action based on possession, production, or delivery of marijuana that is not authorized by sections 1 to 19 of this Act.

SECTION 12. (1) The division shall create and maintain a list of the persons to whom the division has issued registry identification cards pursuant to section 4 of this Act and the names of any designated primary caregivers. Except as provided in subsection (2) of this section, the list shall be confidential and not subject to public disclosure.

(2) Names and other identifying information from the list established pursuant to subsection (1) of

this section may be released to:

(a) Authorized employees of the division as necessary to perform official duties of the division; and

(b) Authorized employees of state or local law enforcement agencies, only as necessary to verify that a person is a lawful possessor of a registry identification card or that a person is the designated primary caregiver of such a person.

SECTION 13. (1) If a person who possesses a registry identification card issued pursuant to section 4 of this Act chooses to have a designated primary caregiver, the person must designate the primary caregiver by including the primary caregiver's name and address:

(a) On the person's application for a registry identification card;

(b) In the annual updated information required under section 4 of this Act; or

(c) In a written, signed statement submitted to the division.

(2) A person described in this section may have only one designated primary caregiver at any given time.

SECTION 14. Any person may submit a petition to the division requesting that a particular disease or condition be included among the diseases and conditions that qualify as debilitating medical conditions under section 3 of this Act. The division shall adopt rules establishing the manner in which the division will evaluate petitions submitted under this section. Any rules adopted pursuant to this section shall require the division to approve or deny a petition within 180 days of receipt of the petition by the division. Denial of a petition shall be considered a final division action subject to judicial review.

SECTION 15. The division shall adopt all rules necessary for the implementation and administration of sections 1 to 19 of this Act.

SECTION 16. Nothing in sections 1 to 19 of this Act shall be construed to require:

(1) A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana; or

(2) An employer to accommodate the medical use of marijuana in any workplace.

SECTION 17. The division may take any actions on or before the effective date of this Act that are necessary for the proper and timely implementation and administration of sections 1 to 19 of this Act.

SECTION 18. Any section of this Act being held invalid as to any person or circumstance shall not affect the application of any other section of this Act that can be given full effect without the invalid section or application.

SECTION 19. All provisions of this Act shall apply to acts or offenses committed on or after December 3, 1998, except that sections 4, 12 and 14 shall become effective on May 1, 1999.

[OMR Home Page]

WASHINGTON

Washington

The results are complete.

Final update: 12 Noon EST, November 5, 1998

U.S. SENATE

98% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
Patty MURRAY*	DEM	807505	58	☆
Linda SMITH	REP	576674	42	

#200: NO AFFIRM ACTN

98% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
YES	YES	810621	59	☆
NO	NO	571875	41	

#692: MED MARIJUANA

98% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
YES	YES	816194	59	☆
NO	NO	576520	41	

#694: NO PT ABORTION

98% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
YES	YES	595138	43	
NO	NO	776701	57	☆

HOUSE - 1

100% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
Jay INSLEE	DEM	80294	51	☆
Rick WHITE*	REP	68187	43	
Bruce CRASWELL	IND	9725	6	

HOUSE - 2

100% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
Grethe CAMMERMEYER	DEM	79700	45	
Jack METCALF*	REP	97368	55	☆

HOUSE - 3

100% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
Brian BAIRD	DEM	100868	55	☆
Don BENTON	REP	83043	45	

STATE OF WASHINGTON

Office of the Secretary of State

1998 Online Voters Guide

FOR THE GENERAL ELECTION - NOVEMBER 3, 1998

Complete Text of Initiative 692

TO THE PEOPLE

FORMATTING NOTE:

In initiatives, legislative bills and other proposed measures, language that is to be deleted from current statutes is represented by a "strikethrough" character and language that is to be added is underlined. Because these special characters cannot be formatted in all Internet browsers, a different set of symbols is used for presenting these proposals on-line. The symbols are as follows:

- Text that is surrounded by (((- text here -))) is text that will be *deleted from* the existing statute if the proposed measure is approved.
- Text that is surrounded by {+ text here +} is text that will be *added to* the existing statute if the proposed measure is approved.
- {+ NEW SECTION+} (found at the beginning of a section or paragraph) indicates that *all* of the text in that section will become law if the proposed measure is approved.

INITIATIVE 692

AN ACT Relating to the medical use of marijuana; adding a new chapter to Title 69 RCW; and prescribing penalties.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION: Sec. 1. TITLE.
This chapter may be known and cited as the Washington state medical use of marijuana act.

NEW SECTION. Sec. 2. PURPOSE AND INTENT.
The People of Washington state find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana. Some of the illnesses for which marijuana appears to be beneficial include chemotherapy-related nausea and vomiting in cancer patients; AIDS wasting syndrome; severe muscle spasms associated with multiple sclerosis and other spasticity disorders; epilepsy; acute or chronic glaucoma; and some forms of intractable pain.

The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physicians' professional medical judgment and discretion.

Therefore, The people of the state of Washington intend that:

Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;

Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana; and

Physicians also be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

NEW SECTION. Sec. 3. NON-MEDICAL PURPOSES PROHIBITED.
Nothing in this chapter shall be construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale, or use of marijuana for non-medical purposes.

NEW SECTION. Sec. 4. PROTECTING PHYSICIANS AUTHORIZING THE USE OF MEDICAL MARIJUANA.
A physician licensed under chapter 18.71 RCW or chapter 18.57 RCW shall be excepted from the state's criminal laws and shall not be penalized in any manner, or denied any right or privilege, for:

1. Advising a qualifying patient about the risks and benefits of medical use of marijuana or that the qualifying patient may benefit from the medical use of marijuana where such use is within a professional standard of care or in the individual physician's medical judgment; or
2. Providing a qualifying patient with valid documentation, based upon the physician's assessment of the qualifying patient's medical history and current medical condition, that the potential benefits of the medical use of marijuana would likely outweigh the health risks for the particular qualifying patient.

NEW SECTION. Sec. 5. PROTECTING QUALIFYING PATIENTS AND PRIMARY CAREGIVERS.

1. If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.
2. The qualifying patient, if eighteen years of age or older, shall:
   (a) Meet all criteria for status as a qualifying patient;
   (b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty day supply; and
   (c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana.
3. The qualifying patient, if under eighteen years of age, shall comply with subsection (2) (a) and (c) of this section. However, any possession under subsection (2) (b) of this act, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility of the parent or legal guardian of the qualifying patient.
4. The designated primary caregiver shall:
   (a) Meet all criteria for status as a primary caregiver to a qualifying patient;
   (b) Possess, in combination with and as an agent for the qualifying patient, no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty day supply;
   (c) Present a copy of the qualifying patient's valid documentation

required by this chapter, as well as evidence of designation to act as primary caregiver by the patient, to any law enforcement official requesting such information;

(d) Be prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as primary caregiver; and

(e) Be the primary caregiver to only one patient at any one time.

NEW SECTION. Sec. 6. DEFINITIONS.
The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

1. "Medical use of marijuana" means the production, possession, or administration of marijuana, as defined in RCW 69.50.101(q), for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or debilitating illness.
2. "Primary caregiver" means a person who:
   (a) Is eighteen years of age or older;
   (b) Is responsible for the housing, health, or care of the patient;
   (c) Has been designated in writing by a patient to perform the duties of primary caregiver under this chapter.
3. "Qualifying Patient" means a person who:
   (a) Is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;
   (b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;
   (c) Is a resident of the state of Washington at the time of such diagnosis;
   (d) Has been advised by that physician about the risks and benefits of the medical use of marijuana; and
   (e) Has been advised by that physician that they may benefit from the medical use of marijuana.
4. "Terminal or Debilitating Medical Condition" means:
   (a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or
   (b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or
   (c) Glaucoma, either acute or chronic, limited for the purpose of this chapter to mean increased intraocular pressure unrelieved by standard treatments and medications; or
   (d) Any other medical condition duly approved by the Washington state medical quality assurance board as directed in this chapter.
5. "Valid Documentation" means:
   (a) A statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient; and
   (b) Proof of Identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035.

NEW SECTION. Sec. 7. ADDITIONAL PROTECTIONS.

1. The lawful possession or manufacture of medical marijuana as authorized by this chapter shall not result in the forfeiture or seizure of any property.
2. No person shall be prosecuted for constructive possession, conspiracy, or any other criminal offense solely for being in the presence or vicinity of medical marijuana or it's use as authorized by this chapter.
3. The state shall not be held liable for any deleterious outcomes

from the medical use of marijuana by any qualifying patient.

NEW SECTION. Sec. 8. RESTRICTIONS, AND LIMITATIONS REGARDING THE MEDICAL USE OF MARIJUANA.

1. It shall be a misdemeanor to use or display medical marijuana in a manner or place which is open to the view of the general public.
2. Nothing in this chapter requires any health insurance provider to be liable for any claim for reimbursement for the medical use of marijuana.
3. Nothing in this chapter requires any physician to authorize the use of medical marijuana for a patient.
4. Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment, in any school bus or on any school grounds, or in any youth center.
5. It is a class C felony to fraudulently produce any record purporting to be, or tamper with the content of any record for the purpose of having it accepted as, valid documentation under section 6 (5)(a) of this act.
6. No person shall be entitled to claim the affirmative defense provided in Section 5 of this act for engaging in the medical use of marijuana in a way that endangers the health or well-being of any person through the use of a motorized vehicle on a street, road, or highway.

NEW SECTION. Sec. 9. ADDITION OF MEDICAL CONDITIONS.
The Washington state medical quality assurance board, or other appropriate agency as designated by the governor, shall accept for consideration petitions submitted by physicians or patients to add terminal or debilitating conditions to those included in this chapter. In considering such petitions, the Washington state medical quality assurance board shall include public notice of, and an opportunity to comment in a public hearing upon, such petitions. The Washington state medical quality assurance board shall, after hearing, approve or deny such petitions within one hundred eighty days of submission. The approval or denial of such a petition shall be considered a final agency action, subject to judicial review.

NEW SECTION. Sec. 10. SEVERABILITY.
If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 11. CAPTIONS NOT LAW.
Captions used in this chapter are not any part of the law.

NEW SECTION. Sec. 12.
Sections 1 through 11 of this act constitute a new chapter in Title 69 RCW.

--- END ---

Ballot Measures Index

7/30/98

PROOF OF SERVICE BY OVERNIGHT DELIVERY

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited in a box or other facility regularly maintained by United Parcel Service or delivered to an authorized courier or driver authorized by United Parcel Service to receive documents on the same date that it is placed at Morrison & Foerster for collection.

I further declare that on the date hereof I served a copy of:

APPELLANTS' OPENING BRIEF (Case No. 98-16950)

EXCERPTS OF RECORD VOLUMES 1-8

on the following by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows for collection by United Parcel Service at Morrison & Foerster LLP, 425 Market Street, San Francisco, California, 94105, in accordance with Morrison & Foerster's ordinary business practices:

Mark T. Quinlivan
U.S. Department of Justice
901 E Street, N.W., Room 1048
Washington, D.C. 20530

Mark Stern
U.S. Department of Justice
601 D Street, N.W., Room 9108
Washington, D.C. 20530

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 13th day of November, 1998.

D.K. Halladay
(typed)

_____
(signature)

sf-603055

PROOF OF SERVICE BY OVERNIGHT DELIVERY (2nd Day Delivery)

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited in a box or other facility regularly maintained by United Parcel Service or delivered to an authorized courier or driver authorized by United Parcel Service to receive documents on the same date that it is placed at Morrison & Foerster for collection.

I further declare that on the date hereof I served a copy of:

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EXCERPTS OF RECORD VOLUMES 1-8

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SEE SERVICE LIST, ATTACHED.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 13th day of November, 1998.

D.K. Halladay
(typed)

_____
(signature)

sf-603074

SERVICE LIST

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Oakland Cannabis Buyers Cooperative, et al.

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to a particular patient under a particular set of facts." ER 0615 (emphasis added). Finally, the district court stated "that it is not ruling that defendants are not entitled to [a joint users] defense at trial or in a contempt proceeding for violation of a preliminary or permanent injunction. . . ." ER 0610-0611.

C. The Government's Allegations of Contempt And The Order to Show Cause.

On July 6, 1998, the Government moved for an Order to Show Cause why Appellants should not be held in contempt for violating the Preliminary Injunction Order. ER 0645. The Government based its request on an assortment of vague materials, and unsupported and conclusory allegations. These included a Web site describing Appellants' services, a news article regarding Appellant Jones' belief about the legality of his conduct, answering machine messages confirming that OCBC was open and accepting members, and a press release announcing Appellants' intention to distribute cannabis to seriously ill patients at a press conference. ER 0678-0717. None of these items constituted a violation of the Preliminary Injunction Order.

Even the declaration of Special Agent Peter Ott, which purported to allege actual cannabis distribution, failed to do so with any specificity. Special Agent Ott stated only that he saw a distribution of what appeared to be cannabis to four unidentified persons at a press conference (ER 0710),

and that a person identified as Appellant Jones had done the distribution. ER 0710. Additionally, Agent Ott stated that he saw ten "sales" of what appeared to be cannabis to unidentified persons. ER 0710. Although trained in undercover work, contrary to well-established law enforcement procedure, Agent Ott did not identify any persons other than Jones, did not describe the alleged participants by age, height, weight, gender, or clothing, and did not state the time of the alleged acts. ER 0678-0717. Most significantly, he did not acquire any of the substance to verify that in fact it was cannabis. Appellants objected that these vague allegations were legally insufficient to support an Order to Show Cause. ER 0720-0732, 0777-0784.

Apparently agreeing with Appellants' objections, at the August 31, 1998 hearing on the Government's motion for the Order to Show Cause, the district court directed that the Government provide further notice to Appellants of the specific facts and circumstances underlying the contempt charges, as well as any evidence upon which it relied. ER 0987. The district court stated that the Government would "have to really come in with some very specific things of what [the Government was] talking about violated the injunction . . ." before the district court would issue the Order to Show Cause. ER 1074.

In response to the district court's mandate, on September 2, 1998, the Government simply resubmitted the identical conclusory and nonspecific allegations already set forth in its previously filed declarations. ER 1081. Appellants promptly informed the district court on September 3, 1998, that the Government's submission did not provide adequate notice of the charges and impaired Appellants' ability to respond to the charges and to present their defenses. ER 1089-1091.

Nevertheless, on September 3, 1998, the district court issued an Order to Show Cause in Case No. 98-0088 CRB ("Order to Show Cause"), which required Appellants "to show cause why they should not be held in civil contempt of the Court's May 19, 1998 Preliminary Injunction Order by distributing marijuana and by using the premises of 1755 Broadway Avenue, Oakland, California, for the purpose of distributing marijuana, on May 21, 1998." ER 1106, 1110. The district court based its Order to Show Cause solely on the vague and conclusory allegations to which Appellants had objected. ER 1107-1108.

D. Appellants' Response To The District Court's Order To Show Cause.

On September 14, 1998, Appellants filed their response to the district court's Order to Show Cause. ER 1143-1555. This response categorically denied any violation of the Order, and submitted evidence in support of that

denial. ER 1143-1161. Despite the Government's failure to identify any of the participants in, or the circumstances surrounding, the alleged distribution of medical cannabis, Appellants responded with detailed declarations from patients, doctors, experts, and OCBC employees and volunteers. This evidence established every element of Appellants' defenses, and at a minimum, raised triable issues of fact as to the validity of the Government's charges.[1]

Appellants submitted declarations of the patient-members who were listed in the press release announcing the May 21, 1998 press conference (Estes, Sanders, Westbrook, Carter) (ER 0681), and who possibly were among the four individuals whom Agent Ott allegedly saw obtain what appeared to be cannabis at the press conference on that day. ER 0710. Additionally, Appellants submitted the declaration of Dr. Michael Alcalay, a patient-member and the OCBC Medical Director who also was present at the May 21 press conference. ER 1640. The declarations established these patients' defense of medical necessity and their fundamental right not to be denied access to medical cannabis without a compelling governmental interest.

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[1] Significantly, the Preliminary Injunction Order did not prohibit the distribution of cannabis. Instead, it prohibited such distribution "in violation

[Footnote continued on following page.]

As to the approximately ten alleged distributions to unidentified persons of what appeared to be cannabis, ER 0710; ER 1802, Appellants took the extraordinary step of submitting declarations establishing the medical needs of all patients who visited the Cooperative on May 21, 1998. ER 1640-1641, 1643-1645, 0801-0802, 0807, 0785-0793, 1430, 1173-1174. These persons suffered from conditions including HIV and/or AIDS, cancer, glaucoma, multiple sclerosis, and quadriplegia. ER 1642-1644. Their doctors recommended that they use medical cannabis and had confirmed this recommendation to the OCBC. *Id.* ¶ 23-24. At least one of those persons died from cancer by the time of Appellants' submission below. *Id.* ¶ 26.

Appellants also submitted the declarations of physicians who have gone to federal court and preliminarily won the right to recommend cannabis to certain patients. Several of these physicians confirmed that cannabis is a superior alternative to other available treatments for patients. ER 1453, 1458, 1464-1466, 1468-1469, 1477-1479, 1484, 1488-1489, 1494-1498, 1503-1504, 1514-1517, 1521, 1523-1524, 1527-1528, 1532-1533. This

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[Footnote continued from previous page.]

of 21 U.S.C. §§ 841(a)(1), 846, and 856. ER 0009.

evidence further confirmed that cannabis is a necessary medicine which alleviates pain and can save patients' lives where other alternatives fail.

Finally, Appellants submitted evidence from recognized medical experts concerning both the proven medical superiority of cannabis for some patients and the long history of the medical use of cannabis in this and other countries. ER 1222, 0796. Dr. Grinspoon is an Associate Professor of Psychiatry at Harvard Medical School who specializes in the study of psychoactive drugs. ER 1223. He has authored over 154 articles in scholarly and professional journals dealing with clinical comparisons of drug therapies and has written several books which deal with the history and medical use of cannabis. ER 1224-1225. Dr. Morgan is a medical doctor and Professor of Pharmacology at the City University of New York Medical School and recently co-authored a book entitled *Marijuana Myths, Marijuana Facts — A Review of the Scientific Evidence*. ER 0797.

These experts confirmed that cannabis has been recognized as an effective medicine for several thousand years B.C. and has been used as a medicine in this country since at least 1840. ER 1225-1226. These medical experts also confirmed that for many of the illnesses from which the OCBC's patient-members suffer, there are no reasonable legal alternatives to medical cannabis. ER 1225, 1228-1234, 0797-0799.

The Government submitted no evidence to controvert Appellants showing. The Government thus left unrefuted the wealth of evidence establishing the medical necessity of the OCBC patient-members, as well as the overwhelming scientific evidence establishing the medical efficacy of cannabis for those patients.

E. The District Court's October 13, 1998 Order.

On October 5, 1998, the district court heard oral argument on the Government's motions *in limine* to exclude all of Appellants' defenses and evidence at trial. ER 1723-1790. No live testimony was taken, and Appellants had no opportunity to cross-examine the Government's witnesses.

On October 13, 1998, the district court granted the Government's motions *in limine*. ER 1795-1806. Without one witness ever having been sworn, the district court summarily found Appellants in contempt for violating the Order. ER 1806. While the district court recognized that "four OCBC patients . . . have submitted sufficient evidence as to their need for marijuana to permit a trier of fact to determine if they have a legal necessity for marijuana[,]" (ER 1801), it went on to conclude that because Appellants did not offer specific evidence as to ten other unidentified patients to whom cannabis was allegedly distributed on May 21, 1998, their necessity defense

failed as a matter of law. ER 1804. The district court held that the "joint user" defense recognized in *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977) did not apply to the facts of this case as a matter of law. ER 1800-1801. Finally, the district court precluded Appellants' constitutional substantive due process defense because Appellants' evidence did not establish that *each and every* person to whom they allegedly distributed cannabis on May 21 (although not identified by the Government) needed cannabis to protect a fundamental right. ER 1804.

As a result of its *in limine* and contempt rulings, the district court also granted the Government's request to modify the Preliminary Injunction Order to empower the United States Marshall to enforce the Order. The district court also empowered the Marshall to:

> . . . enter the premises of the Oakland Cannabis Buyers' Cooperative at 1755 Broadway, Oakland, California, at any time of the day or night, evict any and all tenants, inventory the premises, and padlock the doors, until such time that defendants can satisfy the Court that they are no longer in violation of the injunctive order and that they would in good faith thereafter comply with the terms of the order.

Id. at ER 1806. This modification thus authorized the complete closure of the OCBC as of October 19, 1998. ER 1793.

F. The District Court's Order Denying Appellants' Request to Modify The Preliminary Injunction.

The district court acknowledged the devastating effect of its finding of contempt, stating that it "understands defendants' argument that in this action the Court is sitting in equity and therefore must consider the human suffering that will be caused by plaintiff's success in closing down the OCBC." ER 1806. Therefore, on October 15, 1998, Appellants moved the district court to modify the Order to permit cannabis distribution to a specific category of patients with a confirmed medical necessity. ER 1807-1812. Appellants' request precisely tracked the language of the necessity defense found in *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989), which had been relied upon by the district court in evaluating Appellants' necessity defense. Appellants requested the following modification:

> Notwithstanding the foregoing, the Oakland Cannabis Buyers' Cooperative patient-members who fit the following description may obtain cannabis from the Cooperative to alleviate and/or treat a serious medical condition: patients whose doctors certify that (1) the patient suffers from a serious medical condition; (2) if the patient does not have access to cannabis the patient will suffer imminent harm; (3) cannabis is necessary for the treatment of the patient's medical condition or cannabis will alleviate the medical condition or symptoms associated with it; (4) there is no legal alternative to cannabis for the effective treatment of the patient's medical condition because the patient has tried other legal alternatives to cannabis

> and has found them ineffective in treating his or her condition, or has found that such alternatives result in intolerable side effects.

ER 1812. The district court summarily denied this requested modification on October 16, 1998, thereby failing to give weight to the significant public interests affected by its decision. ER 1844-1845.

G. The City Of Oakland's Ordinance Immunizing Appellants Under 21 U.S.C. § 885(d)

Before the district court issued the Order to Show Cause, on July 28, 1998, the Oakland City Council unanimously passed Ordinance No. 12076 — An Ordinance of the City of Oakland Adding Chapter 8.42 to the Oakland Municipal Code Pertaining to Medical Cannabis (the "Ordinance"). ER 0788-0791. The Ordinance was designed to further the purposes of the Compassionate Use Act, protect the life and liberty interests of citizens needing medical cannabis ensure that seriously ill persons with a doctor's recommendation for cannabis would be able to obtain and use cannabis for medical purposes. ER 0781-0791.

The Oakland Ordinance establishes a Medical Cannabis Distribution Program. ER 0789. Pursuant to the Ordinance, on August 11, 1998, the Oakland City Manager designated the OCBC as a medical cannabis provider association, under the Medical Cannabis Program. ER 0793. The

Ordinance deems designated providers such as the OCBC, and its agents, employees, and directors, officers of the City of Oakland. ER 0790.

Finally, the Ordinance also provides "immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code . . . ." ER 0789. Section 885(d) immunizes from civil and criminal liability duly authorized state and local government officers who are engaged in the enforcement of laws relating to controlled substances. *Id.*

STANDARD OF REVIEW

Appellants challenge the procedure by which the Government was permitted to obtain a finding that they engaged in criminal conduct in violation of federal law, and were in contempt of the district court's Preliminary Injunction Order. Specifically, Appellants challenge the issuance of the Order to Show Cause, the denial of an evidentiary hearing, the denial of a jury trial, the granting of the Government's motion *in limine* precluding Appellants' defenses, and the finding of contempt. Each of these issues is subject to *de novo* review. *Thomas, Head & Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1458 (9th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) ("[T]he issue of whether a district court provided an alleged contemnor due process . . . is a legal question subject to *de novo* review on appeal.").

Finally, Appellants also challenge the district court's refusal to modify the Order to permit limited distribution to those patients with a confirmed medical need as defined in this Circuit. This issue is reviewed for abuse of discretion. *Whitaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir 1992).

SUMMARY OF ARGUMENT

The essence of this case is the district court's refusal to allow Appellants the protections due them under the Constitution, and the resultant harm to patient-members who will suffer severe, chronic and life-threatening illness without access to medical cannabis.

Specifically, the district court made a finding of criminal conduct based upon allegations so lacking in specificity as to violate Appellants' due process right to be on notice of the charges against them. This sketchy evidence further failed to satisfy the Government's burden of proof by clear and convincing evidence.

The district court then denied Appellants all opportunity to present defenses which would have established a legal justification for their actions. Appellants were precluded from offering substantial evidence which would have established a medical necessity defense, a substantive due process right

to be free from pain and suffering, and that medical cannabis was purchased for joint medicinal use, not for distribution in violation of federal law.

The district court's erroneous failure to require sufficient proof before finding a violation was compounded by its unprecedented refusal to allow Appellant a full and fair hearing before a jury. The very statute used by the Government to bring this action mandates a full hearing with an opportunity to present evidence and cross-examine witnesses. Due process not only requires the same protections when the evidence is controverted, it also requires a trial by jury.

Finally, the district court abused its discretion when it refused to modify the injunction to allow cannabis distribution to a limited category of patients with a confirmed medical need as defined in this Circuit. The district court failed to consider the important public policy, as expressed in both state and city law, justifying Appellants' conduct. As a court sitting in equity, this failure constitutes reversible error.

ARGUMENT

I. THE DISTRICT COURT DENIED APPELLANTS' CONSTITUTIONAL RIGHTS TO PRESENT EVIDENCE, TO CROSS-EXAMINE WITNESSES, AND TO A JURY TRIAL.

A. The District Court Erred In Making A Finding Of Criminal Conduct Without Due Process Protection

The Government originally sought an injunction under 21 U.S.C. § 882(a), based on alleged violations of the Controlled Substance Act, a federal criminal statute that, among other things, regulates the distribution of cannabis.[2] *See* ER 0596. Thus, the Government's stated purpose in this case was to prove that Appellants violated the Controlled Substance Act. ER 0001-0002. Appellants, however, have consistently maintained that their activities fall within the legal parameters of Proposition 215, and in any event do not violate the federal criminal statute at issue. *See* ER 1622-1623.

Appellants had no opportunity to defend themselves at trial, however, because the Government elected to circumvent the stronger procedural

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[2] As set forth in Appellants' separate brief filed herewith, as a matter of law, the district court erred in denying Appellants' motion to dismiss. Accordingly, the district court's issuance of the Order to Show Cause, its finding of contempt, and its refusal to modify the injunction were all based on an erroneous conclusion of law, and should be reversed. *See Kennecott Copper Corp. v. Costle*, 527 F.2d 1349, 1357 n.3 (9th Cir. 1978) (appellate court may "freely overturn the lower court action if it was based on an erroneous conclusion of law").

protections of the Controlled Substance Act by using Section 882 — an ostensibly "civil" remedy — to obtain a finding that Appellants engaged in criminal activity. Through these extraordinary tactics, the Government obtained what is essentially a finding of criminal conduct by labeling the proceedings "civil contempt," and depriving Appellants of the procedural protections normally afforded defendants faced with accusations of criminal conduct. The procedures used by the district court to find Appellants in contempt fell far short of those necessary to provide an alleged contemnor with due process in either a civil or criminal arena.

1. The District Court Erred When It Based The Order To Show Cause And Its Subsequent Finding Of Contempt On The Government's Legally Insufficient Allegations Of A Violation Of The Preliminary Injunction Order.

(a) The Government Failed To Submit Evidence Sufficient To Notify Appellants Of The Charges Against Them.

The district court violated Appellants' procedural due process rights by failing to require that the Government's contempt allegations notify Appellants of the specific charges against them. The Government's evidence was so lacking in specificity that it failed to comply with this requirement. *Taylor v. Hayes*, 418 U.S. 488, 498-99 (1974) (requiring notice of "specific charges" in contempt proceedings).

The district court's failure to require that the Government adhere to this standard was particularly prejudicial in light of its earlier announcement that the Government would be required to set forth *specific* allegations of contempt. ER 0031, 0033.

In refusing initially to grant the Government's request for the Order to Show Cause, the district court again required that the Government provide proper notice of the charges. Yes inexplicably, the district court accepted as sufficient the vague and conclusory allegations it previously had rejected as inadequate. ER 0298.

The Government never made the particularized showing required by the district court. First, most of the Government's "evidence" (the website, press release, news article and phone messages) did not describe conduct which in itself violated the injunction. ER 0678-0708. And, the DEA agents' declarations, among other failings, did not even describe the fourteen individuals who allegedly participated in fourteen transactions, although the agents purportedly witnessed the transactions. ER 0709-0711. The Government presented no admissible evidence that the substance involved was in fact cannabis. Moreover, a comparison of Agent Ott's declaration and his written incident report (ER 1435-1436) casts serious doubts on the reliability of his alleged observations. The incident report does not mention

a distribution to four people, or a press conference, nor does it name Appellant Jones as a participant in any distribution whatsoever. ER 1435-1436. A hearing would have provided Appellants with a fair opportunity to cross-examine the DEA agents about their alleged observations.

The Government's plainly inadequate allegations deprived Appellants of a meaningful opportunity to prepare a defense. Accordingly, the district court erred in issuing the Order to Show Cause on the basis of these insubstantial allegations.

(b) The Government Failed To Establish Clear And Convincing Evidence Of Contempt.

In this Circuit, the moving party must establish contempt by clear and convincing evidence. The Government's evidence was so lacking in specificity that it failed to establish by this burden of proof that any actions had occurred in violation of the Preliminary Injunction Order. (*See, supra*, discussion at § I.A.1.a). Given the severity of the finding sought by the Government and the severity of the punishment imposed (closure of the OCBC), Appellants were entitled to more than a summary disposition based on this legally insufficient evidence.

2. The District Court Improperly Denied Appellants Their Right To Present Legal Defenses To The Contempt Charges.

The district court violated Appellants' due process rights when it precluded Appellants' defenses after receiving evidence sufficient to establish each element of these defenses. A district court may preclude a legal defense only where "the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985); *United States v. Aguilar*, 883 F.2d at 692-93; *United States v. Contento-Pachon*, 723 F.2d 691 (9th Cir. 1984) (reversing district court's decision to exclude evidence of duress defense where defendant had provided evidence sufficient to raise triable issue of fact).

The legal standard for excluding *in limine* a defense is the same as deciding whether to *instruct* a jury on a defense. *United States v. Chesney*, 10 F.3d 641, 644 n.2 (9th Cir. 1993). "In general, '[a] defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence.'" *United States v. Duran*, 59 F.3d 938, 941 (9th Cir. 1995) (quoting *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990)); *see also Guam v. Agualo*, 948 F.2d 1116, 1117 (9th Cir. 1991) (defendant entitled to jury instructions

on any legal defense which has some foundation in the evidence, even though the evidence may be weak, insufficient, or of doubtful credibility).

Appellants' evidence, which was unrefuted by the Government, was sufficient, as a matter of law, to establish each element of their defenses, and dispute the Government's contempt charges. At a minimum the district court was required to hold a hearing to permit Appellants to cross-examine the Government's witnesses, and to offer further evidence in their defense. *See International Union, UMW v. Bagwell*, 512 U.S. 821, 832 (1994).

(a) Specific Facts Established Each Element of Appellants' Necessity Defense

The district court erred in concluding that Appellants had not provided evidence sufficient to support their defense of necessity to the contempt charge. ER 1801-1802. Specifically, the district court erroneously concluded that Appellants failed to identify evidence demonstrating that each person to whom they allegedly distributed marijuana on May 21, 1998 was in danger of imminent harm. ER 1802. The district court itself acknowledged that as to four patients, Appellants' evidence was sufficient to raise a triable issue of fact as to necessity, however. ER 1801. On this basis alone, Appellants were entitled to proceed with their necessity defense. *See Contento-Pachon*, 723 F. 2d at 694-95 n.4 (defendant entitled to hearing on defense where triable issue of fact raised).