No. 00-16411
(Related Case Nos. 98-16950, 98-17044, 98-17137, 99-15838, 99-15844, and 99-15879)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Defendants-Appellees.

Appeal from Order Modifying Injunction by the United States District Court
for the Northern District of California
Case No. C 98-00088 CRB
entered on July 17, 2000, by Judge Charles R. Breyer.

APPELLEES' REQUEST FOR JUDICIAL NOTICE OF RECORD IN PRIOR PROCEEDINGS IN THE NINTH CIRCUIT, RELATED PROCEEDINGS IN THE SUPREME COURT, AND CERTAIN FACTS

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Defendants and Appellees Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (collectively "OCBC") request that this Court take judicial notice of the following documents contained in the record of the prior proceedings before this Court in this case and deem those documents part of the record in this appeal. *See* Fed.R.Evid. 201(c) & (d); *Corder v. Gates*, 104 F.3d 247, 248, n. 1 (9th Cir. 1996) (taking judicial notice of briefs and records filed in two prior Ninth Circuit appeals in the same case). As these documents are contained in this Court's files, OCBC has not attached copies:

1. This Court's November 13, 1998 Order consolidating Ninth Circuit Case No. 98-16950 (OCBC's appeal from the district court's October 13, 1998 Order modifying the preliminary injunction), Ninth Circuit Case No. 98-17044 (OCBC's appeal from the district court's September 3, 1998 Order denying OCBC's motion to dismiss the action), and Ninth Circuit Case No. 98-17137 (OCBC's appeal from the district court's October 16, 1998 order denying OCBC's request to modify the preliminary injunction).

2. OCBC's opening brief in Ninth Circuit Case No. 98-17044, filed on November 13, 1998.

3. OCBC's opening brief in Ninth Circuit Case No. 98-16950, filed on November 13, 1998.

4. OCBC's excerpts of record, Volumes 1-8, in Ninth Circuit Case Nos. 98-17044 and 98-16950, filed on November 13, 1998.

5. OCBC's addendum of authorities in Ninth Circuit Case No. 98-17044, filed on November 13, 1998.

6. Brief of Amicus Curiae the City of Oakland, California, in support of OCBC in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137, filed on or about January 8, 1999.

7. Joinder of Amicus Curiae Alameda County, California, in the brief of Amicus Curiae the City of Oakland, California, in support of OCBC in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137, filed on or about January 20, 1999.

8. OCBC's reply brief in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137, filed on January 25, 1999.

9. This Court's March 9, 1999, Order granting the City of Oakland, California leave to file its amicus brief, and granting the Alameda County, California leave to file a joinder in the City of Oakland, California's amicus curiae brief.

10. This Court's December 14, 1999, Order directing OCBC to respond to the Government's petition for rehearing and rehearing en banc in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137.

11. This Court's January 6, 2000, Order granting OCBC's motion for an extension of time to file its response to the Government's petition for rehearing and rehearing en banc in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137.

12. OCBC's response to the Government's petition for rehearing and rehearing en banc in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137, filed on January 6, 2000.

13. Brief of Amicus Curiae the California Medical Association in support of OCBC's response to the Government's petition for rehearing and rehearing en banc in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137, filed on or about January 11, 1999.

14. Joinder of Amici Curiae the City of Oakland, California, Alameda County, California, the City and County of San Francisco, California, and the California Nurses Association, in the brief of Amicus Curiae the California Medical Association in support of OCBC's response to the Government's petition

for rehearing and rehearing en banc in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137, filed on or about January 11, 1999.

15. This Court's February 1, 2000, Order granting (1) the California Medical Association leave to file its amicus brief, and (2) granting the City of Oakland, California, Alameda County, California, the City and County of San Francisco, California, and the California Nurses Association, leave to file a joinder in the California Medical Association's amicus curiae brief in support of OCBC's response to the Government's petition for rehearing and rehearing en banc in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137.

16. This Court's February 29, 2000, Order denying the Government's petition for rehearing and rehearing en banc in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137.

17. This Court's mandate in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137, issued on March 8, 2000.

18. OCBC's opposition to the Government's motion to stay and recall the mandate in Ninth Circuit Case Nos. 98-16950, 98-17044 and 98-17137, filed on March 17, 2000.

19. OCBC's opposition to the Government's emergency motion for a stay in Ninth Circuit Case No. 00-16411, filed on August 1, 2000.

20. The Declaration of Annette Carnegie in support of OCBC's opposition to the Government's emergency motion for a stay in Ninth Circuit Case No. 00-16411, filed on August 1, 2000.

21. This Court's August 11, 2000 order denying the Government's emergency motion for a stay in Ninth Circuit Case No. 00-16411.

OCBC also asks this Court to take judicial notice of OCBC's opposition to the Government's emergency motion for a stay in United States Supreme Court Case No. 00-A151, filed on August 22, 2000. This document was submitted to the

United States Supreme Court in this action. Because this document is not contained in this Court's files, OCBC has attached a copy as Exhibit A.

Finally, OCBC asks the Court to take judicial notice of the facts set out in Exhibit B to this Request. Exhibit B is a true and correct summary of the data stated in the annual California Department of Justice, Criminal Justice Statistics Center, "Adult and Juvenile Arrests Reported" for the years 1930 to 1999. OCBC asks that the Court take judicial notice of the fact that the statistics listed in Exhibit B are the statistics listed in the various annual reports. OCBC has provided this summary in lieu of providing each of the annual reports, which are quite voluminous.

Dated: September 19, 2000

MORRISON & FOERSTER LLP

By: Annette Carnegie
Annette P. Carnegie

Attorneys for Defendants
Oakland Cannabis Buyers'
Cooperative and Jeffrey Jones

No. 00-A151

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES

OPPOSITION TO APPLICATION FOR A STAY OF THE ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Oakland Cannabis Buyers' Cooperative ("OCBC") submits the following Corporate Disclosure Statement as required by Supreme Court Rule 29.6.

OCBC, a California corporation, has no parent companies, subsidiaries, or affiliates and there is no publicly held corporation owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Respondents, the Oakland Cannabis Buyers' Cooperative ("the Cooperative") and Jeffrey Jones (collectively "OCBC"), respectfully submit this Opposition to the government's Application for a Stay of the Orders of the United States District Court for the Northern District of California Pending Appeal to the United States Court of Appeals for the Ninth Circuit. The government's application seeks an extraordinary remedy — a stay of a district court order, review of which is now pending in the Court of Appeals. The district court order is not properly before the Court as part of the government's pending petition for a writ of certiorari, and the government fails to offer any legitimate basis for the extraordinary remedy it seeks.

The government's pending petition for a writ of certiorari seeks review of an interlocutory order of the Court of Appeals entered on September 13, 1999, remanding this case back to the district court, and directing the district court to exercise its equitable discretion to consider modification of a preliminary injunction prohibiting OCBC from providing medical cannabis to seriously ill patients. Since that order was entered nearly one year ago, the district court complied with the remand order, and held further proceedings to consider whether to exercise its equitable discretion. OCBC offered significant new evidence that was not part of the record before the Court of Appeals, including additional affidavits from patients and physicians demonstrating that serious medical conditions could be relieved and imminent harm prevented only if the preliminary injunction were modified, and documenting the declaration of a medical emergency by the City of Oakland. At the conclusion of these proceedings, after the government declined to offer any additional evidence, the district court exercised its equitable jurisdiction to modify the preliminary injunction, exempting from the injunction the distribution of cannabis to a small and narrowly-defined group of seriously ill patients who meet the legal criteria for necessity set forth in the amended injunction. The district court's order is currently on appeal to the Ninth Circuit.

The government has not established that its pending petition for a writ of certiorari will be granted. Nor has the government shown that this Court would grant a petition for a writ of certiorari to review a decision of the Court of Appeals upholding the district court's amended injunction order,

and that this Court would also conclude that any such subsequent Court of Appeals decision would be erroneous. The issues raised by the Court of Appeals' September 1999 decision and the district court's amended injunction order do not warrant the extraordinary intervention by this Court that the government seeks. Nothing in the Court of Appeals' opinion or in the district court's amended injunction order crafted new law or nullified the provisions of the Controlled Substances Act ("the CSA") 21 U.S.C. § 801 *et seq.* To the contrary, the Court of Appeals faithfully applied established legal principles concerning the doctrine of necessity that were reaffirmed years ago in *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). In remanding the case to the district court, the Court of Appeals also applied well-recognized legal doctrine concerning the duty of a court sitting in equity to weigh the public interest and to consider the respective harms to the parties in determining whether an injunction should be modified. The opinion neither creates a conflict among the circuits, nor departs from established precedent. Accordingly, a later decision by the Court of Appeals potentially upholding the district court's amended injunction order would not raise issues requiring review by this Court.

The balance of equities clearly favors Respondents. Respondents plainly have established that the seriously ill patients who must depend upon cannabis for their survival will be imminently and irreparably harmed if the district court's amended injunction order is stayed. These patients, in consultation with their physicians, have tried all other legal medicines and therapies, which have caused intolerable side effects or have provided no relief. (App. Ex A. (Vols. I-III).) During the pendency of these proceedings some patients have died and others have endured severe and debilitating symptoms.

The government fails to describe any injury that remotely approximates the harm that will be visited upon these seriously ill patients. The district court's amended injunction order does not interfere with the government's ability to enforce the CSA. The district court crafted a narrow modification to its injunction, premised on the established legal standards recognized in *Aguilar*. This modification does not prohibit the government from prosecuting criminally any person believed to have violated the CSA, nor does it prohibit the government from initiating contempt proceedings in the event the government believes that the modified injunction has been violated. Instead, the

district court's amended injunction order strikes an appropriate balance between the government's interests, and the very lives of patients who were jeopardized without the modification.

Moreover, the district court's injunction order clearly is in the public interest. The government fails to explain how denying necessary medicine to seriously ill and dying patients during a protracted appellate process possibly could advance the public interest. The government has not shown that the modified injunction would interfere with any law enforcement efforts. Nor has the government shown that the Cooperative, which the City of Oakland has designated as its agent (*see* App. Ex. B), is incapable of adhering to the district court's order.

Finally, there is simply no basis for the urgency that the government now asserts. As the district court recognized in denying the government's motion for a stay pending appeal:

> . . . plaintiff's assertion of urgency and irreparable injury is belied by the government's repeated delays in deciding whether to seek a writ of certiorari from the United States Supreme Court in the wake of the Ninth Circuit's mandate in this matter. Indeed, the record in this case indicates that a stay would impose more significant hardship on defendants and their clients than it would on the government itself.

July 18, 2000 Order (Gov't App. Ex. C).

Given the government's failure to establish irreparable injury, failure to establish harm to the public interest and failure to meet any other prerequisite for a stay, Respondents respectfully request that this Court deny the government's application.

II. FACTUAL AND PROCEDURAL SUMMARY

A. Proposition 215

In November 1996, the voters of California passed Proposition 215, the Compassionate Use Act of 1996. Cal. Health & Safety Code § 11362.5. "The Act makes it legal under California law for seriously ill patients and their primary caregivers to possess and cultivate marijuana for use by the seriously ill patient if the patient's physician recommends such treatment. In particular, it exempts a seriously ill patient, or the patient's primary caregiver, from prosecution . . . relating to the possession of marijuana and . . . the cultivation of marijuana." *United States v. Cannabis Cultivators' Club*, 5 F. Supp. 2d 1086, 1091 (N.D. Cal. 1998). Pursuant to California law, the Cooperative, a not-for-profit organization was established to meet the needs of seriously ill patients. The Cooperative's goal

is to provide seriously ill patients with safe access to necessary medicine so that these individuals do not have to resort to the streets, thereby exposing themselves to criminal elements and products of dubious quality. (App. Ex. A, Alcalay Decl. ¶ 9; Galli Decl. Ex. A.) Pursuant to State law, the City of Oakland also established a medical cannabis distribution program and designated the Cooperative as the City's agent to administer the program. (App. Ex. B (Carnegie Decl. Ex. A).)

B. The Government's Effort to Block Proposition 215 and the Court of Appeals Decision in *OCBC I*

Despite the fact that the voters of California have spoken, the federal government has moved to block Respondents' distribution of medicinal cannabis to those suffering from severe illnesses. However, for reasons known only to itself, the government has never attempted to prosecute Respondents criminally under the federal drug laws. Instead, in January 1998, it filed six civil suits for injunctive relief under 21 U.S.C. § 882(a), a rarely used statute which, according to the district court (Hon. Charles R. Breyer), has been used in only five published decisions since Congress enacted it in 1970. *United States v. Cannabis Cultivators' Club*, 5 F. Supp. 2d at 1104. The district court granted the government's request for a preliminary injunction in May 1998. *Id.* at 1086. The California Medical Association ("CMA"), the California Nurses Association, the City of Oakland, the County of Alameda, and the City and County of San Francisco submitted *amicus curiae* briefs supporting Respondents' position because they concluded that the injunction, if not modified, would adversely affect the public health of California citizens. Since the preliminary injunction was issued, some of OCBC's patient-members died and many others lived with debilitating pain and other serious medical conditions. (App. Ex. A (Vol. I) (Decl. of Dr. Michael Alcalay In Support of Motion to Dissolve or Modify Preliminary Injunction, ¶ 11).)

The district court later denied Respondents' motion to modify the preliminary injunction to allow distribution to patients who meet the legal test of necessity reaffirmed in *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). The Court of Appeals reversed the district court's order denying the requested modification. *United States v. Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109, 1114-15 (9th Cir. 1999) (per curiam) ("*OCBC I*"). In that decision, the Court of Appeals held that in shaping a preliminary injunction, the district court has equitable discretion to

consider whether to exclude from the injunction patients who can satisfy the four-part necessity test drawn from *Aguilar*. The Court of Appeals also held that in considering whether to modify the preliminary injunction on remand, the district court should expressly consider the public interest, as required in proceedings for injunctive relief. *OCBC I*, at 1113-14.

The government's real concern in this Court is not the amended injunction order it now asks this Court to stay, but the Court of Appeals' decision in *OCBC I*. Again, for reasons known only to it, the government delayed challenging that decision. The Ninth Circuit issued *OCBC I* on September 13, 1999, and denied the government's petition for rehearing on February 29, 2000. Thus, the government's petition for certiorari was due on May 29, 2000. Sup. Ct. R. 13.3. However, the government delayed seeking certiorari until July 28, 2000. The government evidently felt that neither it nor the public would suffer any "irreparable harm" as a result of *OCBC I*, and there was no need for haste in seeking review in this Court. Instead, the government sought and received two 30-day extensions of time, first to June 28, 2000, and then to July 28, 2000. This was the maximum extension allowed under Supreme Court Rule 13.5. The government took advantage of every single day of these extensions, and filed its petition for a writ of certiorari to review *OCBC I* on July 28, 2000. Respondents' opposition is currently due on August 28, 2000.

C. Proceedings on Remand in District Court

On May 30, 2000, Respondents filed a renewed motion to modify the preliminary injunction in the district court, which included detailed evidence regarding the safety and efficacy of cannabis, and regarding the suffering and medical needs of the seriously ill patients who could receive cannabis treatment if the preliminary injunction were modified. (App. Ex. A.) The government submitted no evidence to the contrary. Faced with the government's failure to contradict any of Respondents' evidence, the district court exercised its equitable discretion, granted Respondents' motion, and modified the preliminary injunction in an order filed on July 17, 2000. In doing so, the district court made the following findings:

> On remand the government still has not offered any evidence to rebut defendants' evidence that cannabis is medically necessary for a group of seriously ill individuals. Instead, the government continues to press arguments which the Ninth Circuit rejected, including the argument that the Court must find that enjoining the distribution of cannabis to

> seriously ill individuals is in the public interest because Congress has prohibited such conduct in favor of the administrative process regulating the approval and distribution of drugs. As a result of the government's failure to offer any new evidence in opposition to defendants' motion, and in light of the Ninth Circuit's opinion, the Court must conclude that modifying the injunction as requested is in the public interest and exercise its equitable discretion to do so.

(Gov't App. Ex. B.)

On July 18, 2000, the government moved for a stay in the district court, but the district court denied the motion, holding:

> In its memorandum in support of this motion, plaintiff has failed to establish either that it is likely to succeed on the merits of its suit in the Court of Appeals or that it will be irreparably injured absent a stay. In urging that it is likely to prevail on the merits, the government appears to rely on the very record which has already been considered and rejected by the Court of Appeals in [*OCBC I*]. In the absence of additional evidence, the Court cannot conclude that the Court of Appeals decision in this anticipated appeal will differ from its previous rejection of the very same argument.
>
> Additionally, the Court notes that plaintiff's assertion of urgency and irreparable injury is belied by the government's repeated delays in deciding whether to seek a writ of certiorari from the United States Supreme Court in the wake of the Ninth Circuit's mandate in this matter. Indeed, the record in this case indicates that a stay would impose more significant hardship on defendants and their clients that it would on the government itself.

(Gov't App. Ex. C.) The government did not petition for certiorari review of *OCBC I* until 10 days after the district court took it to task for failing to decide whether to do so for so many months.

D. Proceedings in the Ninth Circuit Following Remand

The government noticed an appeal from the district court's decision amending the injunction on July 25, 2000, three days before filing its petition for certiorari review of *OCBC I*. Shortly thereafter, the government moved in the Court of Appeals for an emergency stay of the district court's amended injunction order. However, as in the district court, the government submitted no evidence in support of its motion, other than the prior orders entered in the case. Respondents, in contrast, submitted a substantial amount of evidence detailing the hardships that many seriously ill patients would suffer if the district court's order were stayed. (App. Ex. D.) Respondents have submitted with this opposition the brief and evidence supporting their opposition to the government's stay request in the Ninth Circuit (App. Ex. D), as well as copies of the evidence filed in the district

court supporting Respondents' motion to modify the injunction, for this Court's consideration. (App. Ex. A.)

On August 11, 2000, the Court of Appeals issued two orders that struck a compromise between the parties' positions. The Court of Appeals denied the government's motions for a stay pending disposition of its petition for certiorari review of *OCBC I* and for a stay pending appeal of the district court's amended injunction order. However, the court vacated the prior scheduling order and ordered an accelerated briefing schedule under Ninth Circuit Local Rule 3-3, which governs preliminary injunction appeals. Under the revised briefing schedule, the government's opening brief is due on August 22, 2000, Respondents' answering brief is due on September 19, 2000, and the government's optional reply brief is due ten days after service of the answering brief.

ARGUMENT

III. THE GOVERNMENT'S STAY REQUEST MUST BE DENIED

As a preliminary matter, while the government has included in the Appendix to its Petition for Certiorari the district court's decision amending the injunction (Appendix B) and the amended injunction order (Appendix C), these orders are not part of the record they seek to review. Certiorari before judgment is only granted in the rarest cases of imperative public importance, a circumstance not present here.

The government, however, has requested that this Court directly review, and stay the district court's amended injunction order pending appeal of that order to the Court of Appeals. This Court rarely grants such an extraordinary remedy. "When a matter is pending before a court of appeals, it long has been the practice of [the Supreme Court] to grant stay applications only 'upon the weightiest considerations.' *O'Rourke v. Levine*, 4 L. Ed. 2d 615, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers)." *Fargo Women's Health Org., et. al. v Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., in chambers, concurring). To evaluate an application to stay a district court order pending appeal, a Circuit Justice must attempt "to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court Order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.' . . .

This is always a difficult and speculative inquiry . . . ." *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1304 (1993) (O'Connor, J.) (citations omitted).

In seeking to stay a district court order the applicant bears a heavy burden:

> A lower court judgment, entered by a tribunal that was closer to the facts than a single Justice, is entitled to a presumption of validity. Any party seeking a stay of that judgment bears the burden of showing that the decision below was erroneous and that the implementation of the judgment pending appeal will lead to irreparable harm.
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> ***
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> . . . Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim.

Graves v. Barnes, 405 U. S. 1201, 1203-04 (1972)(Powell, J., in chambers).

As set forth below, none of the government's arguments provide a basis for the extraordinary remedy the government seeks. The government fails to establish that this Court would grant certiorari to review either *OCBC I* or a decision upholding the district court's amended injunction order ("*OCBC II*"). The government likewise cannot show that a majority of Justices would conclude that either the decision in *OCBC I*, or a decision in *OCBC II* upholding the order modifying the injunction, is erroneous. Finally, the uncontradicted evidence establishes that: (1) Respondents and their patient-members will suffer irreparable injury without the modification, and the government will not; and (2) the district court's modification of the injunction is in the public interest. For these reasons, this Court should deny the government's application for a stay.

A. The Government Has Failed to Establish a Reasonable Probability That Four Justices Would Vote to Grant a Petition for a Writ of Certiorari to Review *OCBC I* or a Decision in *OCBC II* Upholding the Amended Injunction Order

1. The Court of Appeals Decision in *OCBC I* Rests on Well-Established Legal Precedent and Neither That Decision Nor any Order Affirming the Amended Injunction Order Requires Review by This Court

As set forth in Supreme Court Rule 10, "[a] petition for a writ of certiorari will be granted only for compelling reasons." There are no compelling reasons to grant certiorari in this case. The government both mischaracterizes and overstates the significance of *OCBC I* and the district court's amended injunction order. A careful review of the Court of Appeals decision compels the conclusion that four Justices would not grant the government's petition for a writ of certiorari of *OCBC I*. For

the same reasons, four Justices likely would not vote to grant a petition for certiorari review of a Court of Appeals decision upholding the amended injunction order.

Contrary to the government's contention, *OCBC I* did not legalize the use of cannabis by the general public, or make sweeping pronouncements about the applicability of the necessity defense to facts other than those before the court. Rather, the Court of Appeals held that a district court had equitable jurisdiction to consider a request to modify an injunction where the enjoined party presents facts that raise the applicability of legal necessity defense. The criteria for legal necessity that the Court of Appeals directed the district court to consider, and that the district subsequently adopted, are narrow and specific, and by no means make the drug laws unenforceable, as the government contends.[1] The government remains free after *OCBC I*, and after entry of the amended injunction order, to prosecute anyone that it believes to be violating the federal drug laws.

Neither *OCBC I* nor the district court's amended injunction order represent a conflict with any circuit, nor do they represent a departure from established precedent or from established judicial proceedings. (Sup. Ct. R. 10 (a).) To the contrary, in remanding the case to the district court, the Court of Appeals in *OCBC I* expressly relied upon *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). *Aguilar* has been the law of the circuit for over a decade, confirms well-established principles regarding legal necessity, and creates no circuit conflict. The principles articulated in *Aguilar* were reaffirmed in *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1992), a case on which the government relies. *Schoon* reaffirmed the validity of legal necessity and the salutary social policies served by allowing certain acts to be undertaken to prevent a greater harm. *Id.* at 195. *OCBC I* also is consistent with *United States v. Burton*, 894 F.2d 188 (6th Cir. 1990), the only published federal case to consider the defense of medical necessity in connection with the use of cannabis. In that case the Court of Appeals did not question the applicability of the defense. Rather, the court concluded that the defendant had failed to establish one element of the defense. *Id.* at 191.

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[1] There is no basis for the government's contention that as many as 2,200 persons have received a "judicial stamp of approval." (Gov't Appl. at 14 n.8.) The numbers relied upon by the government reflect distribution of cannabis under Proposition 215, and only a small fraction of this group might meet the much more stringent and limited criteria for legal necessity set forth in the district court's amended injunction order.

In remanding the case to the district court, the Court of Appeals in *OCBC I* also relied upon well-established precedent concerning the duties of a court hearing a claim for injunctive relief. In this case, the government elected to enforce criminal drug laws through the unusual means of an equitable injunction. Because the government chose this equitable remedy, the courts below plainly did not abuse their discretion by holding that "since the government chose to deal with potential violations on an anticipatory basis," the injunction must "be narrow enough to exclude conduct that likely would be legally privileged or justified." *OCBC I*, 190 F.3d at 1114. As this 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.*

Id. at 312-13 (citations and quotations omitted) (emphasis added).

The Court of Appeals also held, consistent with established precedent, that a court must expressly consider the public interest on the record in determining whether to grant or to modify an injunction. *OCBC I*, 191 F.2d at 1114. Because the district court failed to do so, the Court of Appeals properly remanded the case for consideration of this issue.

Further, it is unlikely that the government's pending certiorari petition will be granted because the decision rests on grounds other than medical necessity. For example, the Court of Appeals could have remanded the matter back to the district court solely on the ground that the district court failed expressly to consider the public interest. Thus the government's claim that *OCBC I* requires this Court's immediate intervention is without merit.[2]

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[2] Moreover, Respondents also raised other issues that provide alternate grounds for the Court of Appeals' decision including violation of patient-members' substantive due process rights. In the courts below, Respondents also argued that in light of the Compassionate Use Act of 1966, the Ninth and Tenth Amendments protect Respondents' activities. The lower courts did not reach these issues but they provide alternate grounds for the lower courts' decisions.

Consistent with *OCBC I* and established precedent, the district court's order modifying the preliminary injunction contains specific criteria for legal necessity. Consistent with *OCBC I* and established precedent, the amended injunction does not prohibit the government from prosecuting criminally those believed to have violated the CSA or from initiating contempt proceedings should the government believe that the injunction has been violated. The district court amended the injunction based solely on the record before the court at the time, and the amended injunction does not purport to address any other facts or circumstances. In exercising its discretion to modify the preliminary injunction, the district court did not depart from the established legal principles recognized in *Aguilar*, or from the legal requirement that a court in equity expressly consider the public interest in determining whether to modify a preliminary injunction. The government had ample opportunity to submit any evidence it wished to persuade the district court that the proposed modification would cause irreparable injury and was contrary to the public interest. The government elected not to do so. Thus, on the record before it, the district court would have abused its discretion had it *failed* to modify the injunction as requested by Respondents. Accordingly, it is unlikely that the government's petition for a writ of certiorari to review an order affirming the district court's modification of the injunction would be granted.

2. The Case Is Not Ripe for Review and Therefore It Is Unlikely That a Petition for a Writ of Certiorari Will Be Granted

If the government's July 28, 2000 petition were granted, this Court would have *only OCBC I* before it for review, thus making the present petition for certiorari premature. The later proceedings in the district court, the evidence presented in those proceedings, and the district court's amended injunction order would not be before this Court. The government does not and cannot seriously contend that this Court should bypass the Court of Appeals and rule on the government's appeal from the district court's amended injunction order without first allowing the Court of Appeals to render an opinion regarding that order. *See* 28 U.S.C. §§ 1254(1) & 2101(e); Sup. Ct. R. 11 (certiorari before entry of judgment in the court of appeals "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."); *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304

(1976) (Rehnquist, J.) (certiorari before judgment in the court of appeals is "an extremely rare occurrence"). If the case were that critical, the government would not have waited ten months to decide whether to petition this Court for review of *OCBC I*. In fact, the opposite conclusion is more compelling: if the amended preliminary injunction truly presents issues that are so important that this Court should grant certiorari at all, they are important enough that they should be examined on the most complete and developed record possible.

Moreover, because the order under review in *OCBC I* was a *preliminary* injunction, and the case is unresolved in the district court, the case is not yet ripe. Accordingly, it is unlikely that four Justices would vote to grant certiorari to review *OCBC I* or to review a decision in *OCBC II* affirming the district court's amended injunction order. The parties have not litigated the permanent injunction, and the district court has not made findings of fact and conclusions of law regarding a permanent injunction. Most importantly, the Court of Appeals has not had any opportunity to decide an appeal from any such final injunction ruling. Further, in *OCBC I*, 190 F.3d at 1111-12, the Court of Appeals specifically deferred ruling on important, dispositive issues until the case came before it on appeal after further proceedings, and many other issues have been and will be raised in the district court as well. *See, e.g., United States v. Cannabis Cultivators' Club*, 5 F. Supp. 2d 1086 (N.D. Cal 1998).

This Court has made it clear that, although it has the power to review interlocutory rulings by writ of certiorari, it will do so in only the most extraordinary circumstances. *See American Constr. Co. v. Jacksonville, T & K. W.R. Co.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."); R. Stern, G. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice* § 4:18, pp. 195-98 (7th ed. 1993). Moreover, although this is a civil injunction proceeding, not a criminal case, the Solicitor General's own position in criminal cases supports denial of both the petitions for a writ of certiorari in *OCBC I* and *OCBC II* and the present stay application. In recent years, the Solicitor General has been a strong advocate of the denial of writs of certiorari to review interlocutory orders

when such review was sought by criminal defendants. As noted in *Supreme Court Practice*, § 4.18, p. 196 n.60 (7th Ed. 1993):

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

Justice Scalia's concurring opinion in *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) is also instructive. At that stage of the *Virginia Military Inst.* litigation, the Fourth Circuit had vacated the district court's ruling in favor of VMI and remanded the case to the district court for determination of an appropriate remedy. *United States of America v. Commonwealth of Virginia*, 976 F.2d 890, 900 (4th Cir. 1992), *cert. denied*, 508 U.S. 946 (1993). Justice Scalia agreed with VMI's assertion that the issues presented deserved the Court's consideration. He concurred, however, in the denial of VMI's petition for certiorari because the remedy had not yet been formulated and the case had not proceeded to final judgment in the district court. Justice Scalia explained: "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. I think it prudent to take that course here. Our action does not, of course, preclude VMI from raising the same issues in a later petition, after final judgment has been rendered." *Virginia Military Inst.*, 508 U.S. at 946 (*citations omitted*). After further proceedings in the lower courts, this Court granted certiorari and ruled on the merits. *United States v. Virginia*, 518 U.S. 515 (1996).

Review by writ of certiorari in this case is premature for essentially the same reasons as in *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993). As with the Fourth Circuit decision that VMI asked the Court to review, the Ninth Circuit's decision in *OCBC I* merely remanded the case to the district court to re-examine the remedy. Justice Scalia's observations are even more applicable here, because the remedy at issue in *OCBC I* was a *preliminary injunction*, not a final judgment ending all further litigation in the district court.

Accordingly, regardless of how the Court of Appeals ruled on the preliminary injunction in *OCBC I* and regardless of how it rules on the modification of the preliminary injunction in the appeal

now pending before it, the parties will still be required to litigate, and the district court will still be required to resolve, the government's prayer for a permanent injunction. The litigation will not have run its full course in the lower courts, and it will not be ripe for review by this Court until the Court of Appeals files its opinion in an appeal from an order regarding the permanent injunction.

B. The Government Has Not Established That a Majority of the Justices Will Conclude That *OCBC I* Was Incorrectly Decided or That the District Court Erred in Modifying the Preliminary Injunction

The government's stay application mischaracterizes both *OCBC I* and the relief ordered by the district court. A close reading of *OCBC I* and careful review of the proceedings leading to the district court's order modifying the injunction compels the conclusion that a majority of Justices would not conclude that *OCBC I* was erroneously decided. Similarly, a majority of Justices would not conclude that a decision in *OCBC II* affirming the amended injunction order would be incorrect.

Contrary to the government's contention, neither the Court of Appeals' decision in *OCBC I* nor the district court's amended injunction order purport to nullify any act of Congress. In *OCBC I*, the Court of Appeals established only that in an injunction proceeding, a district court must exercise traditional equitable powers to prevent irreparable harm to innocent persons and to protect the public interest, even where an injunction issues pursuant to 21 U.S.C. § 882. *OCBC I*, 190 F.3d at 1113–15. The district court modified a civil injunction upon a showing that Respondents would be irreparably harmed and that the modification was in the public interest. The modification does not authorize distribution of cannabis to the general public, nor does it purport to reschedule cannabis. The government's current broad interpretation of *OCBC I* is completely at odds with the position that it took on remand before the district court — that *OCBC I* had not decided any issues and simply remanded the matter for further consideration by the district court. (App. Ex. C at pp. 4-13.)

The Court of Appeals' holding that the district court abused its discretion by failing expressly to consider the public interest when originally asked to modify the injunction was clearly correct.

> In *Northern Cheyenne Tribe v. Hodel*, we held that courts retain broad equitable discretion when it comes to injunctions against violations of federal statutes unless Congress has clearly and explicitly demonstrated that it has balanced the equities and mandated an injunction. 851 F.2d 1152, 1156 (9th Cir. 1988). Here, . . . there is no evidence that Congress intended to divest the district court of its broad equitable discretion to formulate appropriate relief when and if injunctions are

> sought. Further, there is no indication that the 'underlying substantive policy' of the Act mandates a limitation on the district court's equitable powers. *Id.* at 1156.

OCBC I, 190 F.3d at 1114.

As Supreme Court and Court of Appeals' decisions demonstrate, when a court decides whether to modify an injunction, the court must independently consider the public interest even when a violation of a federal statute has been shown. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (although the district court found a violation of the Federal Water Pollution Control Act, it was nevertheless appropriate to consider the public interest rather than automatically to issue an injunction). In *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962 (9th Cir. 1983), the court rejected plaintiffs' argument that because they had shown violations of the National Environmental Policy Act (NEPA), the district court was compelled to issue a preliminary injunction. The appellate court acknowledged that when a likely violation of a federal statute is shown, it is possible to infer that irreparable damage will occur as a result of the statutory violation, which is a modification of the general and more stringent standard for granting an injunction. *Id.* at 965-66. The court explicitly recognized, however, that "[t]here are nevertheless cases where public concerns other than failure to comply with NEPA *must* be weighed in determining whether to grant an injunction." *Id.* at 966 (emphasis added). In particular, the court explained that established precedent "authorizes the court not only to weigh the relative hardship and harms to the parties, but to examine how the *greater public interest may be affected*." *Id.* (emphasis added). The court concluded that under these principles, the district court did not abuse its discretion in declining preliminarily to enjoin a likely violation of a federal statute on the ground that the injunction would not have served the public interest.[3]

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[3] Other authorities reaffirm these principles. *See Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1155-58 (9th Cir. 1988) (rejecting the argument that district courts must issue an injunction when a violation of the Federal Coal Leasing Amendments Act is shown, and ordering that on remand, the district court should consider the public interest); *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (stating that "when the public interest is involved, it must be a necessary factor in the district court's consideration of whether to grant preliminary injunctive relief").

In originally denying Respondents' motion to modify the preliminary injunction, the district court concluded that it had no power to grant the requested relief. The Court of Appeals correctly held, however, that "there is no evidence that Congress intended to divest the district court of its broad equitable discretion to formulate appropriate relief . . . . [T]here is no indication that the 'underlying substantive policy' of the [CSA] mandates a limitation on the district court's equitable powers." *OCBC I*, 190 F.3d at 1114.

Neither the CSA itself nor its legislative history evidences any intent by Congress to circumscribe the equitable power of a court in an injunctive proceeding under the CSA.[4] It is well established that common-law defenses may be raised as defenses to a statutory crime. *See, e.g.*, *United States v. Newcomb*, 6 F.3d 1129, 1134 (6th Cir. 1993). As the *Newcomb* court explained:

> [*United States v. Bailey*, 444 U.S. 394 (1980),] teaches that Congress's failure to provide specifically for a common-law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating that statute from relying on such a defense. This conclusion is unassailable; statutes rarely enumerate the defenses to the crimes they describe.

Newcomb, 6 F.3d at 1134.

Moreover, contrary to the government's contention, Congress made no finding concerning the medical uses of cannabis and had no basis for doing so. The legislative history of the CSA confirms that Congress intended to place cannabis *only tentatively* in Schedule I "until the completion of certain studies now underway." Act of Oct. 14, 1970, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. 4579. In 1970, Congress instructed the Presidential Commission on Marihuana and Drug Abuse ("Shafer Commission") to conduct a comprehensive study of cannabis and its effects. Public Law 91-513 (Oct. 27, 1970 § 601(e)). Ultimately, the Commission recommended full decriminalization of marijuana. *Marihuana: A Signal of Misunderstanding; First Report of the National Commission on Marihuana and Drug Abuse*, 152 (1972). Congress did not act on this report. The resolutions of the

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[4] Where, as in this case, legislation infringes upon fundamental rights, courts also have a duty to look beyond legislative findings to determine independently whether the infringement is justified under the Constitution. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). *See also, Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 434-38 (1983) (invalidating ordinance requiring all second trimester abortions to be performed in a hospital — the court rejected a legislative determination that such a requirement was a reasonable health regulation).

Senate and the House of Representatives opposing the medical use of cannabis relied upon by the government also were issued without scientific studies. Act of Oct. 21, 1998, Pub. L. No. 105-277, 1998 U.S.C.C.A.N. (112 Stat.) 2681. These resolutions did not address the circumstance presented here — the equitable power of a court faced with a request to modify an injunction where the public interest plainly requires the modification.

Additionally, the continued placement of marijuana in Schedule I does not constitute any finding whatsoever concerning the medical necessity of an individual patient. The DEA definition of "currently accepted medical use" differs significantly from the legal test for "necessity" and serves an entirely different purpose. *See Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1134 (D.C. Cir. 1994).[5]

Under the DEA's guidelines, the test of whether a drug is in currently acceptable medical use for the general public requires that:

1. The drug's chemistry be known and reproducible;
2. There must be adequate safety studies;
3. There must be adequate and well-controlled studies proving efficacy;
4. The drug must be accepted by qualified experts; and
5. The scientific evidence must be widely available.

Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1134 (D.C. Cir. 1994).

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[5] Accordingly, the government's citation to *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131(D.C. Cir. 1994) cannot suffice to establish irreparable injury. *Alliance* concerned the criteria and evidence to be considered in determining whether cannabis should be rescheduled, thereby making it available to the general public. In this case, however, Respondents do not seek rescheduling, or to make cannabis available to the general public, nor did the district court order such relief. Instead, the district court ordered that seriously ill patients facing imminent harm, with no other alternatives to medical cannabis, who are directly affected by the injunctive proceeding initiated by the government, be permitted upon a proper showing, to have access to medical cannabis. Moreover, Respondents presented more recent scientific evidence including unrefuted research establishing that for this limited group of patients, cannabis is safe and effective. (App. Ex. A (Vol. II) Declarations of John Morgan, M.D., Lester Grinspoon, M.D.; App. Ex. D (Ex. C to Affidavit of A. Carnegie (summarizing the results of a recent study by Dr. Donald Abrams finding cannabis safe and effective for AIDS patients).) The government's present insistence on research studies to prove the efficacy of medical cannabis is disingenuous since the government has erected significant barriers to research regarding the medical uses of cannabis.

The legal standard for medical necessity is quite different, however. It requires a showing that:

> the use of cannabis is necessary in order to treat or alleviate [serious medical] conditions or their symptoms; [patients] will suffer serious harm if they are denied cannabis; and . . . there is no legal alternative to cannabis for the effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects.

OCBC I, 190 F.3d at 1115.

The DEA guidelines are intended to scrutinize a drug for use by the general public. In contrast, the medical necessity test is intended to apply to a particular defendant or a class of persons with the same or similar medical conditions, and provides a safety valve for a person who must violate the general law to prevent a greater harm. Because the classification of marijuana as a Schedule I drug serves an entirely different purpose than the medical necessity defense, there is no reason to conclude that the classification has any bearing on the viability of a necessity defense.

Contrary to the government's contention, nothing in *United States v. Rutherford*, 442 U.S. 544 (1979) requires reversal of the Court of Appeals. In *Rutherford*, plaintiffs brought an affirmative case to exempt laetrile, an unproven drug, from the requirements of the Federal Food, Drug and Cosmetic Act. Respondents here do not seek to exempt cannabis from the CSA or any other statutes. Rather, the Cooperative's patient-members are the target of a civil injunction action brought by the *government* to preclude their use of the *only* medicine that has proven effective in relieving their severe or life-threatening symptoms. As the Court of Appeals recognized, if the government had sought to prosecute Respondents criminally, they would have been able to litigate the issue of necessity in due course. *OCBC I*, 190 F.2d at 1114. Respondents should not be penalized because the government sought to proceed by injunction.

C. The Balance of Equities Requires That the Government's Stay Application Be Denied

1. Respondents Have Established Irreparable Harm and the Government Has Not

The lower courts' refusal to grant a stay of the district court's amended injunction order is entitled to great weight. *Graves v. Barnes*, 405 U.S. at 1203-04 (Powell, J., in chambers). The

undisputed evidence Respondents submitted in opposition to the government's motion for an emergency stay in the Court of Appeals, as well as the evidence submitted to the district court, confirms that the seriously and terminally ill individuals to whom Respondents may provide cannabis, will suffer irreparable harm in the form of severe physical pain and possibly death, unless the amended injunction order remains in effect. (*See* App. Ex. A (Vols. I-III); App. Ex. D (*e.g.*, Declarations of Paul Allen, Robert Bonardi, Kerie Campbell, Albert Dunham, Carl Norris, Terry Stogdell, Steven Wilson).) Respondents respectfully request that the Court examine that evidence.

The government has produced no evidence of irreparable harm in support of its motions for stays in the district court, in the Court of Appeals, or in this Court. Indeed, as the government admitted and the district court found, the government delayed for over ten months before even deciding whether to petition for review of *OCBC I*, the government sought the maximum extension of time allowed under Sup. Ct. Rule 13.5, and the government filed on the very last day possible. Certainly, if the matter were so important that it merited issuance of a stay by the Supreme Court, the government would not have delayed filing the petition and would have sought a stay immediately.

2. The Public Interest Mandates That the Stay Be Denied

The evidence also establishes that the modification ordered by the district court is in the public interest. The evidence submitted by Respondents includes declarations establishing the safety of cannabis as a medicine, declarations from sick and dying patients, a determination of a public health emergency by the City of Oakland, and the support of prestigious medical organizations for Respondents' position.

The City of Oakland has determined that the inability of these seriously ill patients to receive medical cannabis constitutes a public health emergency. (App. Ex. B, City of Oakland's Declarations of Public Health Emergency.) Medical groups, such as the prestigious California Medical Association ("CMA"), also have supported the Respondents' arguments regarding the necessity of cannabis to treat seriously ill patients. (*See* App. Ex. D (Ex. G to Affidavit of A. Carnegie (Request for Judicial Notice Ex. 2)).) While the CMA supports the process for approving drugs for medical use, it simultaneously recognizes that the immediate needs of seriously ill patients, in consultation with their physicians, may require pursuit of other treatments while that process is underway. This

position was joined by the California Nurses Association, the City of Oakland, the County of Alameda, and the City and County of San Francisco, all of whom plainly have a stake in identifying and protecting "the public interest." (*See Id.*) Finally, the Attorney General of California repeatedly has requested that the federal government allow the Court of Appeals' September 13, 1999, opinion (*OCBC I*) to take effect. (App. Ex. D (Exs. I and G to Affidavit of A. Carnegie (Ex. 2 at Ex. A) October 6, 1999, and May 24, 1999, letters by California Attorney General Bill Lockyer to United States Attorney General Janet Reno).)

The government has provided no evidence that states with a recognized medical necessity exception, or that have passed medical cannabis laws, have any difficulty prosecuting violations of their drug statutes. Instead, in an attempt to contradict Respondents' evidence, in its stay application the government for the first time during the course of this litigation suggests that cannabis may not be safe for use by the limited group of patients who may benefit from the modified injunction. The government never made these arguments below, never submitted these claims to either the Court of Appeals or to the district court, and this Court should not entertain these belated arguments now.

In any event, the government's arguments are meritless. The recent comprehensive scientific study conducted by the National Academy of Sciences Institute of Medicine ("IOM")[6] in 1999 concluded that cannabis can be a safe and effective medicine for seriously ill patients with no other legal alternatives.

- "The accumulated data indicate a potential therapeutic value for cannabinoid drugs, particularly for symptoms such as pain relief, control of nausea and vomiting, and appetite stimulation . . . ." (Institute of Medicine, *Marijuana and Medicine, Assessing the Science Base*, at p. 3.)
- ". . . [T]here will likely always be a subpopulation of patients who do not respond well to other medications. The combination of cannabinoid drug effects (anxiety reduction, appetite stimulation, nausea reduction, and pain relief) suggests that cannabinoids would be moderately well-suited for certain conditions such as chemotherapy-induced nausea and vomiting and AIDS wasting." (*Id.* at pp. 3-4.)
- ". . . [T]he adverse effects of marijuana use are within the range of effects tolerated for other medications." (*Id.* at p. 5.)

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[6] In conducting this study the IOM visited the Cooperative and specifically acknowledged Respondents' contributions. (App. Ex. F (June 22, 1999, letter from IOM to Jeffrey Jones).)

- "Until the development of rapid onset antiemetic drug delivery systems, there will likely remain a sub-population of patients for whom standard antiemetic therapy is ineffective and who suffer from debilitating emesis. It is possible that the harmful effects of smoking marijuana for a limited period of time might be outweighed by the antiemetic benefits of marijuana, at least for patients for whom standard antiemetic therapy is ineffective and who suffer from debilitating emesis. . . ." (*Id.* at p. 154.)

- "Terminal cancer patients raise different issues. For those patients, the medical harms of smoking are of little consequence. For terminal patients suffering debilitating pain or nausea and for whom all indicated medications have failed to provide relief, the medical benefits of smoked marijuana might outweigh the harms." (*Id.* at p. 159.)

- ". . . [T]he short-term immunosuppressive effects [of cannabis] are not well established but if they exist, are not likely great enough to preclude a legitimate medical use." (*Id.* at p. 5.)

- "There is no conclusive evidence that marijuana causes cancer in humans, including cancer usually related to tobacco use . . . ." (*Id.* at 119.)

Also, many of the alleged health risks posited by the government can be avoided if a patient ingests cannabis by means other than smoking. Moreover, a recent study has confirmed that cannabis is safe for use by AIDS patients — a population with a significantly compromised and therefore vulnerable immune system. (App. Ex. D (Affidavit of A. Carnegie in Support of Appellees' Opposition to Motion for Emergency Stay, Ex. C).)

Moreover, the government also conveniently omits reference to the Opinion & Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge that was the basis of the proceedings in the *Alliance for Cannabis Therapeutics* case concerning the rescheduling of cannabis. Administrative Law Judge Francis Young concluded in 1989 that cannabis should be rescheduled because "[b]ased upon the facts established in this record . . . one must reasonably conclude that there is accepted safety for use of marijuana under medical supervision. To conclude otherwise, on this record, would be unreasonable, arbitrary and capricious." (App. Ex. E at 444.) The DEA subsequently rejected Judge Young's decision.

Furthermore, in 1997, after over two years of reviewing a petition for rescheduling cannabis and the extensive current medical research supporting the petition, the DEA certified that the petition provided sufficient grounds for removing cannabis and all cannabinoids from Schedules I and II. (App. Ex. D (Declaration of John Gettman attached to Affidavit of A. Carnegie in Support of Appellees' Opposition to Motion for Emergency Stay, Ex. E).) This further confirms that even the

government acknowledges there is merit to the claim that cannabis has medical efficacy and safety and the correctness of the lower courts' conclusion that the modified injunction is in the public interest.

As discussed in section III.B, *supra*, neither *OCBC I* nor the district court's order authorizes the removal of cannabis from Schedule I, or nullifies any act of Congress. Rather, the district court simply ordered that a narrow group of individuals with demonstrable medical need, who face imminent harm, and have tried all other legal alternatives, be permitted to receive medical cannabis through an exception to the injunction issued by that court. The government apparently contends, however, that the district court could not exercise its equitable discretion to consider for itself whether the proposed modification actually serves the public interest, but instead was required to defer to the purported judgment of Congress regarding this matter.

The Court of Appeals rejected the claim the government makes here, instead finding, with good reason, that the district court must determine for itself where the public interest lies given the specific evidence in the record before the court. *OCBC I*, 190 F.3d at 1114. The government nevertheless continues to argue that the district court lacked the authority to weigh the public interest. As discussed in section III.B, *supra*, however, Congress has not concluded that persons with an established legal necessity are absolutely prohibited from obtaining cannabis for medical use, particularly when they are the target of injunctive proceedings. The CSA was originally enacted as an omnibus measure to prevent widespread drug abuse, and to treat and rehabilitate drug abusers. Act of Oct. 14, 1970, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. 4566-67. As discussed *supra*, Congress did not address the criteria for medical necessity nor did it abrogate the common law necessity defense. Despite numerous opportunities to do so, Congress has *never* amended the CSA to preclude medical necessity. Moreover, through its own Compassionate Investigative New Drug Program, through which the government distributes medical cannabis (*see* App. Ex. A (Vol. II, Grinspoon Decl. ¶ 15)), the government has itself acknowledged the legitimacy of medical uses for cannabis. Finally, as discussed in section III.B, *supra*, the fact that marijuana is in Schedule I has no bearing on whether a necessity defense applies. Accordingly, there is no judgment of Congress that foreclosed the district court's modification of the injunction to encompass medical necessity.

The government's reliance on Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 760-61 (1998) is equally unavailing. While this pronouncement spoke to the benefits of the process for drug approval, it did not address the traditional criteria for injunctive relief, amend the CSA, or seek in any way to circumscribe a court's equitable power to fashion relief in injunctive proceedings. *See OCBC I*, 190 F.3d at 1114 (concluding that Congress had not circumscribed the district court's traditional equitable discretion).

Finally, none of the government's cited cases establish that the district court's exercise of its discretion to modify the injunction constitutes irreparable harm to the public interest. In *Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323 (1984), relied upon by the government, a single judge of a district court held unconstitutional a statute that had been in effect for over 122 years, and whose constitutionality previously had been confirmed by the Ninth Circuit and the Supreme Court. In that context the presumption of constitutionality was a factor to be weighed in balancing the parties' hardships. There has been no declaration of unconstitutionality here. Similarly, in *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 507 U.S. 1301 (1993) cable operators sought a stay to enjoin enforcement of portions of the Cable Television Consumer Protection and Competition Act. Respondents here do not seek to stay enforcement of any statute, nor does the district court's modification achieve such a broad result.

The government also relies upon *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers) and *Heart of Atlanta Motel v. United States*, 13 L. Ed. 2d 12, 85 S.Ct. 1 (1964), for its claim of harm to the public interest. *New Motor Vehicle Bd.* actually supports Respondents' position, however. In that case, a three-judge district court enjoined enforcement of a California statute. Justice Rehnquist noted that the case was within the Court's obligatory appellate jurisdiction (28 U.S.C. § 1253) and granted a stay. He noted that "any time a *State* is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.*, 434 U.S. at 1351 (emphasis added). Here, the district court has not enjoined enforcement of a State law. Instead, the amended injunction order eliminates the impediment imposed by the initial injunction and allows Respondents to provide cannabis to seriously ill patients, *pursuant to* State law and the California voters' mandate expressed

in Proposition 215. *New Motor Vehicle Bd.* therefore confirms that, unless the amended injunction order remains in effect, the State of California will suffer irreparable injury because *its* laws will be rendered meaningless. (*See also* App. Ex. D (Exs. I and G to Affidavit of A. Carnegie (Ex. 2 and Ex. A, October 6, 1999, and May 24, 1999, letters by California Attorney General Bill Lockyer to United States Attorney General Janet Reno)).)

Likewise, *Heart of Atlanta Motel* does not support the government's argument. In that case, a Georgia motel and restaurant sought to stay enforcement of a district court order holding that its refusal to provide food and lodging to racial minorities violated Title VII of the Civil Rights Act of 1964. Justice Black found that their conduct "plainly violate[d]" Title VII. However, Justice Black refused to enjoin enforcement of the injunction based on Title VII because "a temporary injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect." *Heart of Atlanta Motel*, 85 S.Ct. at 2. Here, the amended injunction order does not stay enforcement of an act of Congress. It does not purport to enjoin the government from bringing criminal actions under the CSA. Instead, it merely allows Respondents to continue to act as the State of California's voters allow them to act under State law without fear of liability for civil contempt.

Furthermore, in 1988, Congress repealed former 28 U.S.C. § 1252, which allowed an immediate, non-discretionary appeal to this Court when a district court declared an act of Congress unconstitutional. Supreme Court Case Selections Act, Pub.L. 100-352, § 1, 102 Stat. 662. This confirms Congress' intent that even when one of its own acts has been struck down as unconstitutional, it is not necessary that this Court review every case or that the case proceed immediately to this Court. The repeal of § 1252 recognizes that the potential collateral impact of a decision declaring an act of Congress unconstitutional does not necessarily justify any special handling by the federal courts, and, despite potential delays, the appellate process should ordinarily proceed as it does in all other cases. Here, the amended injunction order does not strike down any act of Congress, but merely prevents the government from seeking to impose liability for civil contempt on a small group of individuals for a narrowly and carefully defined type of conduct. Accordingly, if Congress no longer finds it necessary for this Court immediately to review every decision striking

down an act of Congress as unconstitutional, then there is no reason to believe it would find review in this case as critical or imperative as the government suggests.

In sum, the amended injunction clearly does not cause irreparable harm to the government. The district court merely modified a preliminary injunction so that seriously ill individuals who satisfy the four-part test of legal necessity may obtain medical cannabis from Respondents without facing civil contempt liability. That modification was necessitated both by the government's decision to seek prospective relief through an injunction, and by the government's failure to offer any evidence of irreparable harm and harm to the public interest. That decision will have little or no collateral effect beyond the parties to the case and the seriously ill individuals who may qualify for medical cannabis under the modified injunction. Contrary to the government's unsupported assertion (Gov't App. at 13)[7] neither the amended injunction nor *OCBC I* destroyed the government's ability to prosecute individuals for violating federal drug laws. Because this is not a criminal prosecution, neither the Court of Appeals nor the district court had any occasion to decide whether and how that defense would apply in a criminal prosecution. Instead, the holdings of both decisions dealt *only* with whether the district court has equitable discretion to shape a civil preliminary injunction under 21 U.S.C. § 882 so that it excludes those who satisfy a narrowly defined four-part medical necessity test to save lives and reduce suffering. Thus, there is no reason for this Court to intervene in a case that is not ripe for its review, and in a circumstance in which the government's own conduct has dictated the remedies available to the district court.

IV. CONCLUSION

The government's application provides no basis for the extraordinary remedy it seeks from this Court. The application for a stay is based upon a premature petition for a writ of certiorari that is unlikely to be granted. Moreover, the government has not established that it will be harmed irreparably if the stay is denied. In contrast, Respondents have demonstrated that seriously ill

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[7] Indeed, the government cites only one instance in which *OCBC I* has been invoked in criminal proceedings. In that case the defendants' claim was rejected. Thus there is no merit to the contention that *OCBC I* or the district court's order modifying the preliminary injunction will encourage widespread use of claims of medical necessity in other types of proceedings.

patients will suffer severe and irreparable injury, including death, if the stay is granted. Respondents also have established that a stay of the district court's order is not in the public interest, and in fact is contrary to law enforcement interests and public health concerns. For these reasons, Respondents respectfully request that the stay be denied.

Respectfully Submitted,

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California Marijuana Arrests, 1930-1999

Source: Cal. Dept. of Justice, Criminal Justice Statistics Center
"Adult and Juvenile Arrests Reported," various years

Year	Misdemeanors	Felonies	Total
1930		228	228
1931		91	91
1935		140	140
1960		5,155	5,155
1961		3,794	3,794
1962		3,743	3,743
1963		5,518	5,518
1964		7,560	7,560
1965		10,002	10,002
1966		18,243	18,243
1967		37,514	37,514
1968		47,939	47,939
1969		51,414	51,414
1970		64,880	64,880
1971		61,199	61,199
1972	3,500	73,061	76,561
1973	3,500	88,110	91,610
1974	3,500	99,597	103,097
1975	3,500	85,757	89,257
1976	34,110	19,284	53,394
1977	34,110	17,262	51,372
1978	35,424	17,397	52,821
1979	32,796	19,263	52,059
1980	38,270	20,509	58,779
1981	43,791	20,771	64,562
1982	42,904	20,737	63,641
1983	43,803	19,926	63,729
1984	42,219	21,350	63,569
1985	43,181	24,182	67,363
1986	30,105	19,938	50,043
1987	32,424	18,722	51,146
1988	27,373	16,853	44,226
1989	25,825	16,325	42,150
1990	20,834	16,819	37,653
1991	19,383	14,050	33,433
1992	22,493	14,980	37,473
1993	25,914	14,357	40,271
1994	31,294	14,668	45,962
1995	35,854	14,449	50,303
1996	41,595	15,361	56,956
1997	43,169	14,498	57,667
1998	46,600	14,344	60,944
1999	48,673	14,171	62,844