UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

NO. 98-177044

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.

EXCERPTS OF RECORD
VOLUME V

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN CASE NO. C 98-0088 CRB FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
[FED. R. CIV. P. 12(B)(6)]

Date: August 31, 1998
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Courtroom: 8
Hon. Charles R. Breyer

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PRELIMINARY STATEMENT

The government's responsive papers fail to offer any compelling reason why this case should not be dismissed. Instead, the government persists in mischaracterizing the nature of these proceedings, defendants' conduct and this Court's Order. In its zeal to minimize the legal force of the action taken by the City of Oakland, the government persists in its unfounded argument that the Court summarily may find defendants in contempt without benefit of witnesses, cross-examination or a jury. The government's position is plainly wrong.

First, the Ordinance passed by the City of Oakland provides complete immunity to Jeffrey Jones and to the Oakland Cannabis Buyers' Cooperative ("OCBC"). It is a valid exercise of the City of Oakland's police power and it is entirely consistent with the provisions of the Controlled Substances Act.

Second, the government's mischaracterization of the defendants' Ninth Amendment argument, leads it to dismiss, without analysis, defendants' claim. The defendants' patient-members unquestionably have well-established constitutional rights to life and liberty secured by the Ninth and Fifth Amendments that would be violated if the government's interpretation of the Controlled Substances Act were held to apply here.

Finally, the government seriously misapprehends the nature of the proceedings before this Court, the established sequential order of contempt proceedings, as well as the plaintiff's burden at each stage. First, the plaintiff must request an order to show cause why defendants are not in contempt. Only if the Court is satisfied by clear and convincing evidence that the plaintiff has made out a prima facie case, will the order issue and the matter be set for hearing. *See generally* Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* §§ 13:246-13:251.1.

A contempt hearing is a trial with live testimony, not a matter determined on the basis of affidavits. It is clearly not the summary procedure that the government seeks. *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 495 (9th Cir. 1983). As the Court in *Pennwalt* stated: "In [the Ninth] circuit a civil contempt proceeding 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)[;] . . . the issues may not be

tried on the basis of affidavits.'" *Id.* at 495 (citing *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1277 (9th Cir. 1976)). *See also* Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* § 13:250 ("a civil contempt proceeding is usually deemed a *trial* and not a motion hearing [such that] . . . live testimony must be taken or an opportunity afforded to cross-examine the declarants").[1]

For the reasons set forth in defendants' motion to dismiss and in this reply memorandum, the government's case should be dismissed. In no event, however, may the government deprive defendants of their right to a jury trial, should an Order to Show Cause issue.

ARGUMENT

The recent passage of Oakland Ordinance No. 12076 Pertaining to Medical Cannabis (the "Ordinance") absolutely precludes summary judgment in Case Number C 98-0088 CRB. In fact, this Ordinance requires dismissal as to the Oakland defendants.

I. THE CONTROLLED SUBSTANCES ACT DOES NOT SUPERCEDE THE OAKLAND ORDINANCE RELATING TO CONTROLLED SUBSTANCES.

The Oakland Ordinance is entirely consistent with federal law.[2] It does not "destroy" anything. This Court previously has stated in this case that the "Supremacy Clause of Article VI of

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[1] The government's only argument that summary judgment may be considered in the context of contempt proceedings relies on the clause concluding 21 U.S.C. Section 882(b), the section affording a jury trial to anyone accused of violating an injunction issued pursuant to the Controlled Substances Act. This section provides: "[i]n case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by jury *in accordance with the Federal Rules of Civil Procedure*." 21 U.S.C. § 882(b) (emphasis added). This is clearly a thin reed upon which to build an argument for summary judgment. Surely the government is aware, as is the Court, that Federal Rules of Civil Procedure 38 through 53 govern the conduct of a civil trial in federal court. Any reasonable interpretation of 21 U.S.C. § 882(b), as opposed to the government's strained reading, would conclude that the clause "in accordance with the Federal Rules of Civil Procedure" refers to these rules governing the conduct of the jury trial. The clear intent of Section 882(b) was to afford a trial by jury to anyone accused of contempt. As the government itself notes elsewhere, it is an "elementary rule of construction that the act cannot be held to destroy itself[.]" Plaintiff's Consolidated Replies In Support Of Motion To Show Cause And Opposition To Defendant's Motion To Dismiss ("Government's Replies And Opposition") at 21 (citing *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995) (quotation omitted)).

[2] The City of Oakland has filed a separate *Amicus Curiae* Brief In Support Of Defendants' Motion To Dismiss Complaint In C98-0088 CRB.

the United States Constitution mandates that federal law supercede state law *where there is an outright conflict between such laws.*" Memorandum and Order dated May 13, 1998 ("Mem. Op. & Order") at 6 (emphasis added). Here, however, there is no outright conflict between federal and state and local laws. The City of Oakland has designated the OCBC and its agents, employees, and directors as officers of the City of Oakland enforcing the Ordinance and the California Compassionate Use Act. The federal Controlled Substances Act itself provides that "no civil or criminal liability shall be imposed" on public officers such as the Oakland defendants who are engaged in such enforcement activities. 21 U.S.C. § 885(d). Thus, there is no outright conflict between federal and local law, and the Supremacy Clause does not invalidate the Oakland Ordinance. Moreover, the Controlled Substances Act itself mandates that state law not be preempted by federal law where, and to the extent that, federal and state law may be construed as consistent and not in conflict. 21 U.S.C. § 903.

II. THIS CASE MUST BE DISMISSED BECAUSE THE CITY OF OAKLAND PROPERLY HAS ENACTED AN ORDINANCE PURSUANT TO ITS POLICE POWERS TO REGULATE A LOCAL MATTER OF PUBLIC HEALTH AND SAFETY.

The government readily concedes that an officer lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances is "protected by [21 U.S.C.] section 885(d)." Government's Replies and Opposition at 20. The government nevertheless contends that its claims against the Oakland defendants still have merit. Its argument consists of three main points: (1) the Oakland defendants, though "officers" of the City of Oakland, are not "lawfully engaged" in the enforcement of a law relating to controlled substances; (2) the Oakland defendants' literal interpretation of the plain meaning of the immunity provision is "absurd" and "odd" and therefore would somehow "destroy" the intention of the Controlled Substances Act; and (3) a clause in Section 885(d) itself and an unrelated "sister provision" of the Controlled Substances Act, passed long after Section 885(d), require the term "officer" in section 885(d) to be defined as "limited to a law enforcement officer acting in a police or adjudicative function in the enforcement of the controlled substances laws." Government's Replies and Opposition at 24. None of these arguments has merit.

A. The Oakland Defendants, As Duly Authorized Officers Of The City Of Oakland, Are Lawfully Engaged In The Enforcement Of Laws Relating To Controlled Substances.

The government's first argument is a textbook example of the simplest of logical fallacies. The government's argument is as follows: Section 841(a)(1) of the Controlled Substances Act prohibits *anyone* from engaging in the distribution of marijuana; the Oakland Ordinance permits the distribution of marijuana by City officers to seriously ill patients under certain conditions; therefore, these City officers "cannot be said to be 'lawfully engaged' in the enforcement of a law relating to controlled substances." Government's Replies and Opposition at 21.

The government's premise—that the Controlled Substances Act prohibits anyone from distributing controlled substances—reads Section 885(d) right out of the Act. Because the Controlled Substances Act must be considered in its entirety, Section 841(a)(1) must be read in conjunction with Section 885(d). The government violates the very cardinal rule of construction cited on the same page of its brief: "a court is obligated 'to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section . . . ." Government's Replies and Opposition at 21 (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). A plain reading of Section 885(d) makes clear that the Controlled Substances Act does not prohibit everyone from engaging in the distribution of controlled substances when such distribution is by an officer enforcing a law relating to controlled substances. This plain meaning of Section 885(d) must be followed. *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (strong presumption that plain language of statute expresses congressional intent); *United States v. Behnezhad*, 907 F.2d 896, 898 (9th Cir. 1990) (courts should rely on plain meaning when language clear).

B. There Is Nothing "Absurd" About The Defendants' Plain Reading Of The Text Of Section 885(d), Nor Will Applying Section 885(d) To The Oakland Defendants "Destroy" The Controlled Substances Act.

As discussed above, and as the City of Oakland makes clear in its amicus brief, the Oakland Ordinance is entirely consistent with the federal Controlled Substances Act. Nothing in the Act itself invalidates the Oakland Ordinance. To the contrary, Section 885(d) harmonizes federal and state and local laws relating to controlled substances. The Oakland defendants do no more than read and apply the plain words of Section 885(d), a clear and unambiguous statute. *See Connecticut Nat'l Bank v.*

Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992) (when words of statute unambiguous judicial inquiry is complete); *Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd.*, 904 F. Supp. 1072, 1075 (N.D. Cal. 1995), *aff'd*, 99 F.3d 299 (1996) (plain language of statute must be regarded as conclusive).

The government asserts no less than four times, however, that an "absurd" or "odd" result would occur were the Oakland defendants' plain reading of Section 885(d) followed. The government then declares in apparent horror: "According to the OCBC Defendants, any state, city, or local subdivision could determine that it would become engaged in the distribution of controlled substances, designate an agency or private party to engage in the distribution of the controlled substance, and thereby immunize that agency or private party from criminal or civil liability under the Controlled Substances Act." Government's Replies and Opposition at 21.

This is precisely what Section 885(d) permits so long as the state or local official is *lawfully* engaged in the enforcement of a law relating to controlled substances. Section 885(d) plainly recognizes, as it must, the broad authority of state and local governments to exercise its police powers to protect the health, safety and welfare of their citizens. Our nation's government consists of a multi-layered democratic federalism, enabling state and local governments to exercise police powers in this manner.

Unable to read the plain language of section 885(d) out of the Controlled Substances Act, the government's argument next posits a parade of horribles that is unrelated to the Ordinance now before this Court. In the government's scenario, responsible government agencies would legalize, apparently without justification, heroin, crack, LSD, or PCP. Aside from the fact that the government's speculative fears are baseless, a city cannot lawfully distribute crack-cocaine, for example, under Section 885(d) because to do so would violate state law. California Health & Safety Code § 11352. Thus, city agents in that scenario would not be "lawfully engaged" in the enforcement of a law relating to controlled substances. Here, by contrast, the City of Oakland has acted consistently with federal *and* state law, and with clear justification, to protect its citizens' very lives.

Moreover, the government's claim that "the OCBC Defendants' construction of Section 885(d) would have the effect of destroying section 841(a)(1)'s prohibition on the distribution

and manufacture of controlled substances" is simply unsupportable. Government's Replies and Opposition at 21-22. If the plain meaning of Section 885(d) were followed, even within Oakland the Controlled Substances Act would remain in force. Sections 841(a) and 856(a)(1) would still be enforceable against all illicit sales of controlled substances and against all crack houses operating in violation of federal, state, or local law. Congressional intent would still be implemented. The defendants' plain reading of Section 885(d) would in no way "run contrary to Congress's finding that the distribution of controlled substances . . . 'ha[s] a substantial and direct effect upon interstate commerce.'" Government's Replies and Opposition at 22 (citing 21 U.S.C. § 801(3)). Nor would it "run contrary to" any of the other Congressional findings in Section 801.

The government appears to take the position that a state or local government may not legislate *at all* concerning a matter of local concern if such legislation may affect interstate commerce. But this has never been the law. As the Supreme Court has stated: " . . . the Constitution when conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might directly affect the commerce of the country." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-44 (1960) (citations and quotations omitted). Surely, harmony between federal and local laws does not require Congress and state and local governments to agree on every particular aspect of the proper application of controlled substances laws to specific situations. The federal Department of Justice may disagree with what Oakland is doing, but that does not mean that the Controlled Substances Act and the Oakland Ordinance are in conflict.

In sum, the Oakland Ordinance (in conjunction with California Health and Safety Code Section 11362.5) is entirely consistent with the federal Controlled Substances Act. Accordingly, the government's assertion that the Oakland defendants' construction of Section 885(d) "would run contrary to the very purpose of the Controlled Substances Act[,]" Government's Replies and Opposition at 22, is simply inaccurate.

C. Neither the Statute Itself Nor Its Legislative History Limits The Definition Of "Officer" in Section 885(d).

The government asserts that "Congress intended section 885(d)'s grant of immunity to be limited to federal, state, or local law enforcement officers engaged in police or adjudicative functions in connection with the enforcement of the controlled substances laws." Government's Replies and Opposition at 22. The government does not point to legislative history or case law to support such an inference. Instead the government masquerades two questionable arguments as authority.

First, the government cites the qualifying clause of Section 885(d) itself as evidence of Congress's definition of "officer." This clause merely exempts from the section's grant of immunity those who either exceed their authority executing a search warrant or maliciously and without probable cause procure a search warrant. The claim that "[t]hese provisions thus strongly support the reading of 'officer' in section 885(d) as referring to a law enforcement officer engaged in police functions in the enforcement of the controlled substances laws" seriously strains the import of the qualifying clause. Government's Replies and Opposition at 23. Just because Congress excluded those specific misdeeds from immunity, that does not limit the scope of immunity granted to other persons.

Second, the government resorts to the argument that "a sister provision of the Act," Section 848(e)(2), somehow sheds light on the true meaning of the terms "officer" and "enforcement." This argument too is fatally flawed, however.

The separate provisions do not use the same language. While Section 848(e)(2) employs the terms "law enforcement officer," Section 885(d) uses the broader term "officer." Accordingly, contrary to the government's contention, the presumption actually works the other way — rules of statutory construction dictate that these terms have *different* meanings. "It is a fundamental rule of statutory construction that when Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded." *Cramer v. C.I.R. Service*, 64 F.3d 1406, 1412 (9th Cir.), *cert. denied*, 517 U.S. 1244 (1995) (citation and quotation omitted). *See also Miller v. Carlson*, 768 F. Supp. 1331, 1335-36 (N.D. Cal. 1991) ("[w]here Congress employs particular language in one section of a statute while omitting it in

another section of the same Act, it is presumed that Congress acted intentionally and purposefully in the disparate inclusion or exclusion") (citation and quotation omitted). Moreover, while in Section 848(e)(2) Congress defined "law enforcement officer," in Section 885(d) it did not define "officer." This indicates, contrary to the government's position, that Congress intended a broader interpretation of "officer" in Section 885(d).

Moreover, because Congress enacted Section 848(e)(2) in 1988, long after it enacted Section 885(d), any definition contained therein does not apply retroactively to the previously-enacted provision. *See, e.g., American Psychometric Consultants v. Workers' Compensation Appeals Bd.*, 36 Cal. App. 4th 1626, 1643 (1995) (statute not to be applied retroactively unless expressly provided for).

Finally, by its terms, Section 848(e)(2) defines "law enforcement officer" in the specific context of attaching penalties to a person charged with causing the death of a "law enforcement officer." This context is entirely unrelated to those surrounding the reference to the generic "officer" in Section 885(d). Thus, it cannot accurately be said that this "sister provision . . . further attests" to any particular definition of the term "officer" in Section 885(d). Government's Replies and Opposition at 23-24. Even an identical term may be construed differently in two separate sections of the same statute which have different purposes. *See, e.g., Vanscoter v. Sullivan*, 920 F.2d 1441, 1448 (9th Cir. 1990). As previously stated, however, here the terms are different.

In any event, as discussed above and in the amicus brief filed by the City of Oakland, the Oakland defendants are in fact "law enforcement officer[s] acting in a police . . . function in the enforcement of the controlled substance laws." Government's Replies and Opposition at 24. This is because the Oakland defendants are enforcing provisions of an Ordinance relating to controlled substances enacted by the City of Oakland pursuant to its police power. *See, e.g., Berman v. Parker*, 348 U.S. 26, 32 (1954) (municipal police power properly exercised over matters of public safety,

public health, morality, peace and quiet, and law and order). Thus, by its own definition, the government concedes that the Oakland defendants are immune from liability.[3]

III. THE NINTH AMENDMENT AND THE FIFTH AMENDMENT REQUIRE DISMISSAL IN LIGHT OF THE OAKLAND ORDINANCE RELATING TO MEDICAL CANNABIS.

The government both mischaracterizes and cavalierly dismisses the Oakland defendants' constitutional argument in support of their Motion to Dismiss.[4] The Oakland Ordinance presents very serious constitutional issues of federalism, substantive due process, and the state and local governments' specification of a fundamental right of citizens within their sovereign spheres. These issues cannot be dismissed wholesale and without analysis.

The government's first response, that the Ninth Amendment does not alone secure any constitutional rights, the Oakland defendants forthrightly acknowledged in their Motion to Dismiss. *See* Motion to Dismiss at 5 (the Ninth *and Fifth* Amendments protect fundamental rights of seriously ill patients).

Contrary to the government's contentions, the fundamental rights asserted here are not simply the result of "the political vagaries of an individual state legislature or local municipality[.]" Government's Replies and Opposition at 24. As explained in the Oakland defendants' opening brief, these life and liberty interests are deeply rooted in the constitution. The actions of both the State of California and the City of Oakland to safeguard these rights confirm their importance.

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[3] The government cites to 21 C.F.R. § 1301.24 for "further bolster[ing]" of its contention that Congress intended "officer" in Section 885(d) to exclude the City of Oakland's selection of a provider association in furtherance of its Program. Government's Replies and Opposition at 24 n. 16. The full citation from that code section belies this contention. There it states: "Any officer or employee of any State, or any political subdivision or agency thereof, who is engaged in the enforcement of any State or local law relating to controlled substances and is duly authorized to possess controlled substances in the course of his/her official duties [shall be exempt from registration requirements specified elsewhere]." 21 C.F.R. § 1301.24(a)(2). This provision does no more than restate the very broad terms of Section 885(d), and confirms the correctness of the Oakland defendants' position.

[4] The Oakland defendants join and incorporate herein by reference the Tenth Amendment argument posited by the City of Oakland in its *Amicus Curiae* Brief In Support Of Defendants' Motion To Dismiss Complaint In C98-0088 CRB.

CONCLUSION

For all of the foregoing reasons and those set forth in Oakland defendants' motion to dismiss, this Court should dismiss the government's complaint against the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones.

Dated: August 26, 1998

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(typed)

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(signature)

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Alma J. Gilligan
(typed)

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. CANNABIS CULTIVATOR'S CLUB, et al., Defendants.	Nos.	C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00089 CRB C 98-00245 CRB
AND RELATED ACTIONS		

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MEMBERS' MOTION FOR LEAVE TO INTERVENE

Date: August 31, 1998
Time: 2:30 PM
Room: 8
The Hon. Charles R. Breyer

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I. PRELIMINARY STATEMENT.

The Members have established that they meet all of the requirements for intervention as of right and, in the alternative, for permissive intervention. In its opposition, the Government advances *pro forma* arguments to defeat the motion to intervene that are devoid of evidentiary or legal support. The Government's principal argument, for example, is that the motion to intervene is untimely as a matter of law. None of the authorities on which the Government relies, however, supports this conclusion. Likewise, the Government makes exaggerated claims of "possible prejudice" related to the Members' intervention, but these too are make-weight. The Government's opposition offers no evidence of actual prejudice, and its claims of prejudice therefore are without substance.

Moreover, although the Government declined to serve the Members with its "Consolidated Replies" in support of the other pending motions set for hearing on August 31, it is transparent from a review of the entire record of this proceeding that in opposing the Members' motion for intervention, the Government is talking out of both sides of its mouth. On the one hand, the Government asserts in opposing their motion that the Members' interests are adequately represented by the existing parties. See Plaintiff's Opposition to Motion for Leave to Intervene, filed on or about August 24, 1998 ("Opp."), at 7-8. On the other hand, in its "Consolidated Replies," the Government begs the Court to refrain from presenting the contempt charge to a jury on the basis, among other things, that the "non-compliant defendants" assertedly have no standing to rely on the due process defense invoked by the Members in their motion to intervene. See Plaintiff's Consolidated Replies in Support of Motion to Show Cause, etc., filed on or about August 24, 1998 ("Consolidated Replies"), at 17-18. The Court therefore should reject the Government's cynical attempt to prevent the Members from participating in this case and thereby avoid judicial scrutiny of its attempted interdiction of their personal, self-funded medical choice, in consultation

with their personal physician, to alleviate their suffering through the only effective treatment available for them.

II. ARGUMENT.

A. The Government Has Failed to Rebut the Members' Showing that They Should be Permitted to Intervene as "of Right".

The Government agrees with the Members that under applicable Ninth Circuit authorities, intervention as of right is determined on the basis of a four-pronged test. See Fed. R. Civ. P. 24(a); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 572 (9th Cir. 1983) (setting forth requirements for intervention as a matter of right). The Government likewise concedes that the Members have satisfied the third element of the test: namely, that they are so situated that the disposition of this action may impair or impede the Members' ability to protect their interests. Finally, as just described, the Government makes no credible argument that the Members fail to satisfy the fourth prong of the test. It pays lip service to the notion that the Members' interests are adequately represented by the existing parties (see Opp. at 7-8), but this cannot be considered a serious position in light of the other arguments the Government is simultaneously advancing to support its summary judgment motion. See Consolidated Replies at 17-18.

Accordingly, the motion to intervene as of right turns on the first two prongs of the test. On these key points, the Government fails to rebut the Members' showing that they have made a timely application and claim a protectable interest relating to the transactions that are the subject of this litigation. The Government makes much of the asserted untimeliness of the motion but offers no palpable evidence whatever to support its claim of prejudice. Likewise, the Government refuses to address the substantive due process claim advanced by the Members, suggesting in its opposition only that the Members have no protectable interest under the Controlled Substances Act. Thus, the Court's granting the motion to intervene is the only way to permit

plenary consideration of the merits of the Members' constitutional claims and defenses.

1. The Members' motion is timely: there has been no delay and no prejudice.

As stated in the Members' opening memorandum (Mem. at 7), whether a motion to intervene is timely is determined by analyzing three factors: (1) the stage of the proceeding at which an applicant seeks to intervene, (2) the prejudice to other parties and (3) the reason for and length of the delay. See Officers for Justice v. Civil Service Com'n, 934 F.2d 1092, 1095 (9th Cir. 1991). The Government asserts that the Members' motion is untimely. However, as we show below, the Government's contentions in this regard are without merit. The motion for intervention satisfies all of the applicable factors for measuring timeliness.

a. None of the Government's authorities establish that the Members' motion is untimely as a matter of law.

According to the Government, too much time has passed since these actions were filed to permit intervention as of right. In support of its argument, the Government relies on League of United Latin American Citizens v. Wilson, 131 F.3d 1297 (9th Cir. 1997). That decision, however, in fact supports the Members' position that the motion is timely. In League of Latin American Citizens, the court denied the applicant's motion for leave to intervene as untimely because, among other things, the applicant "waited twenty-seven months after the plaintiffs filed their original complaints, and at least eighteen months after four other groups had successfully intervened in the case, to move the district court for intervention." Id. at 1304 (emphasis added).

The decision in League of United Latin American Citizens invalidates the Government's objections to the timeliness of the motion to intervene in several respects. First, in that case, the district court permitted four sets of applicants to intervene nine months after the litigation was filed. Id. at 1301. The Members are

seeking leave to intervene here only seven months after the litigation was filed. Thus, even by the Government's measure, the Members' motion is timely.

Second, League of United Latin American Citizens establishes that the measure of the timeliness of a motion to intervene is contrary to what the Government proposes. In its opposition, the Government proffers a mechanical test for assessing timeliness solely with reference to the lapse of time after the action is filed. This is erroneous. League of United Latin American Citizens holds that the proper focus should be on the date the person attempting to intervene "should have been aware his 'interest[s] would no longer be protected adequately by the parties,' rather than the date the person learned of the litigation." Id. at 1304 (quoting Officers for Justice, 934 F.2d at 1095).

Here, the Government's contempt proceedings made the Members aware that their interests might not be adequately protected by the parties. On July 6, 1998, the Government filed a motion for an order to show cause why certain of the defendant cooperatives should not be held in contempt. See Plaintiff's Motion for An Order to Show Cause, etc., filed on or about July 6, 1998 (hereinafter, "Contempt Mot."). In that motion, the Government sought to have the United States Marshal close certain of the defendant cooperatives, which will cause the Members' irreparable harm (see Brundridge Decl., ¶ 11; Carter Decl., ¶ 10; Nikkel Decl., ¶ 8; Vier Decl., ¶ 5). In its motion, the Government claimed, among other things, that only members of the defendant cooperatives might have standing to assert a medical necessity defense. Contempt Mot. at 20.

The Government's initiation of contempt proceedings created the risk of inadequate representation that resulted in the motion to intervene. The timeliness of the Members' motion is thus measured from July 1998 (when the Government initiated contempt proceedings), not January 1998 (when the action was filed). Because the Members filed their motion for leave to intervene approximately one

month after the Government initiated the contempt proceedings, the Government's claim of protracted delay is specious as a matter of law.

Finally, the League of United Latin American Citizens court found that the applicant's failure to explain the reason for its delay was even more damaging than the delay itself. Id. at 1304. Here, the Members have satisfactorily explained their reason for taking several weeks to file their motion, namely, to talk to potential intervenors whose involvement was complicated by secrecy concerns, fears of criminal prosecution and their physical conditions and disabilities. See Schroeder Decl., ¶ 6.

The Government's other authorities do not support the view that the motion is untimely. For example, in U.S. v. State of Wash., 86 F.3d 1499 (9th Cir. 1996), the court affirmed the district court's findings that two applicants' motions to intervene were untimely because (1) the applicants sought to intervene three months after the court issued its memorandum opinion (id. at 1503-04, 1506), (2) intervention would upset the delicate balance achieved by the district court after six years of litigation because the applicants sought to relitigate issues that had already been decided (id. at 1504, 1506), and (3) the applicants' reasons for delay were unsatisfactory (id.). In contrast, the Members are seeking leave to intervene in this litigation at an early stage in the proceedings. A trial date has not even been set. See, e.g. S.E.C. v. Navin, 166 F.R.D. 435, 439 (N.D. Cal. 1995) (granting motion to intervene after both preliminary and permanent injunction issued). In addition, the Members explained their reason for taking a month to prepare their intervention motion. Hence, the motion is timely, and none of the Government's authorities dictates a contrary conclusion.[1]

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1 For example, in Preston v. Thompson, 589 F.2d 300 (7th Cir. 1979), the court affirmed the denial of an intervention motion filed by prison guards on the grounds that the guards were previously aware of the litigation and in fact participated as witnesses. Id. at 304. Nevertheless, the guards waited three weeks after the court issued a preliminary injunction to file their motion. The preliminary injunction followed a three-month "lockdown" during which prisoners were not permitted to leave their six by ten feet two-man cells and were not permitted to shower. The preliminary injunction required, among other things, that prison officials provide the

(continued...)

b. The Government presents no evidence of actual prejudice.

The Government asserts that the Members' intervention "would prejudice the United States by possibly causing delay to the Court's consideration" of the contempt proceedings. Opp. at 5 (emphasis added). It is not a proper objection to intervention that it will delay the litigation. See League of United Latin American Citizens, 131 F.3d at 1304 ("additional delay is not alone decisive (otherwise *every* intervention motion would be denied out of hand because it carried with it, almost by definition, the prospect of prolonging the litigation)") (original emphasis). The Government also offers no evidence, in the form of an attorney declaration or otherwise, to support its claim of "possible" prejudice. In any event, the Government can hardly be said to be prejudiced by having to prove up claims it chose to initiate. See, e.g. Security Ins. Co. of Hartford v. Schipporeit, 69 F.3d 1377, 1381 (7th Cir. 1995) (holding intervention would avoid additional litigation and conflicting results and would enable court to address important issues in the case once, with fairness and finality). Moreover, the Members seek to intervene to litigate issues such as the medical necessity defense and their substantive due process claims that have not been decided. Under such circumstances, the Government's claims of prejudice are without evidentiary or legal support and should be rejected.

1(...continued)
inmates two hours of yard recreation and two showers a week. This case is hardly analogous to this litigation. See also Assoc. Gen. Contr. of Cal. v. Sec. of Com., Etc., 77 F.R.D. 31, 36, 39 (C.D. Cal. 1977), *vacated*, 438 U.S. 909 (1978) (intervention motion denied because court lacked jurisdiction since matter appealed to United States Supreme Court and motion filed post-judgment); United States v. Blue Chip Stamp Company, 272 F. Supp. 432, 436 (C.D. Cal. 1967) (applicant's motion for leave to intervene properly denied as untimely where applicants filed *amicus curiae* briefs in opposition to consent decree but filed intervention motion after consent decree entered, following two years of extensive negotiations); U.S. v. State of Or., 913 F.2d 576, 588 (9th Cir. 1990) (motion denied as untimely because filed after consent decree entered, beyond geographical limits of decree and offered no explanation for delay); NAACP v. New York, 413 U.S. 345, 366-69 (1973) (motion to intervene untimely when filed four months after applicants learned their interests might be inadequately protected and litigation was at "critical" stage).

c. The Members seek to intervene in the litigation, not the contempt proceeding.

The Government also claims that the Members should not be permitted to intervene in the contempt proceeding. Opp. at 3-5. But this is a red herring. The Members are not seeking leave to intervene in the contempt proceeding. They are seeking leave to intervene in the litigation.

In any event, contrary to the Government's erroneous arguments, there is no blanket prohibition against intervention in contempt proceedings. For example, in Wilder v. Bernstein, 1994 WL 30480, *2 (S.D. NY. 1994), the court granted the applicants' motion to intervene in a contempt proceeding brought seven years after a stipulation had been entered. The court found that the applicants "had no reason to be aware of their interest in the matter until July 1993, when plaintiffs sought a finding of contempt . . . ."

Likewise, in Sierra Club v. U.S. Army Corps of Engineers, 709 F.2d 175, 176 (2d Cir. 1983), the court denied a motion to intervene because the applicant's claimed interest in the contempt proceeding--that its reputation would be affected--was not cognizable. The contempt proceedings in Sierra Club concerned whether the parties had violated the district court's orders entered to ensure compliance with the National Environmental Policy Act and the Clean Water Act. Id. Moreover, unlike the instant litigation, the applicant was "not alleged itself to have engaged in the misconduct resulting in the contempt motion." Id. at 177. Here, the Members are part of the class of persons alleged to have participated in the asserted misconduct which is the subject of the contempt proceeding. See, e.g. Contempt Mot. at 11 (asserting defendant cooperatives continued "to engage in the distribution of marijuana").

All of the cases cited by the Government in which intervention in contempt proceedings was denied arose in a markedly different procedural context. In each of those cases, the underlying action had been reduced to final judgment, such as by

permanent injunction or consent decree.[2] Hence, intervention was denied to prevent relitigation of issues that have already been adjudicated. Here, the contempt proceedings are ancillary to ongoing litigation and raise issues not finally decided in the main action. Accordingly, intervention is proper.

2. The Government ignores that the Members have an interest in the transaction that is protected by the Constitution.

The Government contends that the Members do not have a protected interest in the transaction because they "have no right to obtain marijuana under the Controlled Substances Act, 21 U.S.C. § 844." Opp. at 7. Whether the Members have a right to obtain cannabis under the Controlled Substances Act, however, is irrelevant. The Members here have claimed a protectable interest under the medical necessity defense, the Fifth Amendment of the United States Constitution and California law (see Cal. Health & Safety Code § 11362.5(b)(1)(B)). The Government nowhere addresses these claims in its opposition, and the Court should refrain from deciding this important constitutional issue on the merits under the erroneous guise of a procedural ruling under Rule 24(a).[3]

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2 See, e.g. United States v. Fitch, 472 F.2d 548, 549-50 (9th Cir. 1973) (holding applicant, already under criminal indictment, had no standing to intervene in civil contempt proceeding); and N.L.R.B. v. Shurtenda Steaks, Inc., 424 F.2d 192, 194 (10th Cir. 1970) (denying motion to intervene in enforcement proceeding as untimely when filed after judgment entered).

3 When parties have previously requested that courts recognize a fundamental constitutional right, the right typically has been asserted in litigation in which the exercise of the claimed right is claimed to conflict with positive law. See, e.g. Roe v. Wade, 410 U.S. 113, 120 (1973) (action seeking declaratory judgment that Texas criminal abortion statutes were unconstitutional); Griswold v. Connecticut, 381 U.S. 479, 480 (1965) (action alleging unconstitutionality of Connecticut statutes prohibiting use of contraceptives). Hence, the fact that no reported decision has as yet declared the right that the Members invoke is not a ground for denial of the motion on the basis that no protectable interest exists.

3. The Government concedes that: (1) the disposition of these actions will impair the Members' rights and (2) the Members' interests may not be adequately represented by the parties.

The Government makes no credible argument that the Members have failed to meet either of the last two requirements for intervention. First, the Government offered no opposition whatever to the Members' showing that the disposition of these actions will impair or impede their ability to protect their interest. The Government therefore concedes this requirement has been met.

Second, contrary to its arguments in opposition to this motion, the Government has elsewhere argued that the Members' rights may be inadequately represented by existing parties. This satisfies the last requirement for intervention of right. (See Federal Sav. & Loan, 983 F.2d 211, 216 (11th Cir. 1993) ("The proposed intervenors' burden to show that their interests *may be* inadequately represented is minimal") (original emphasis); see also Sagebrush Rebellion, 713 F.2d at 528 (same).

For example, the Government argued that the defendant cooperatives do not have standing to raise their members' constitutional claims. In rejecting the defendant cooperatives' substantive due process claim, the Government stated that "it is doubtful that the non-compliant defendants have standing to raise any such defense on behalf of their customers." See Consolidated Replies at 17. See also Contempt Mot. at 20. The Government's inconsistent positions are also undermined by its repeated acknowledgements of the centrality of the Members' claims to the litigation and to the contempt proceeding. See, e.g. id. at 9-11 (arguing defendant cooperatives have not carried their burden of production because they failed to "identify a single person [to whom] they distributed marijuana after May 19, 1998; have failed to establish the medical condition which allegedly would have justified the sale of marijuana to that individual; and have failed to introduce any evidence regarding their alleged defenses").

B. In the Alternative, the Members Should be Granted Permissive Intervention.

The Government has failed to rebut the Members' showing that they should be granted permissive intervention if they are denied intervention as of right. The Government again contends that the Members' motion is not timely. For the reasons discussed above and in the Members' moving papers, the motion is plainly timely.

The Members have satisfied the requirements for permissive intervention, and the Government seeks to oppose the Members' request by inventing new requirements. For example, the Government contends the Members should not be granted permissive intervention because they will supposedly "add no new or unique arguments to the briefing already before the Court . . . ." Opp. at 10. There is no requirement that an applicant seeking permissive intervention add "new or unique arguments." See, e.g. Venegas v. Skaggs, 867 F.2d 527, 529 (9th Cir. 1989) (setting forth requirements for permissive intervention). See also Fed. R. Civ. P. 24(b) (same).

Moreover, the Government ignores that "judicial economy is a relevant consideration in deciding a motion for permissive intervention." Id. at 531. In Venegas, the court reversed an order denying permissive intervention. The court found that the "district court in this case is in the best position to decide these issues" because it was "well acquainted with the underlying litigation" and the parties. Id.

This Court is well acquainted with the parties and the issues. It makes sense to permit the Members to intervene in this action. They satisfy all the requirements for permissive intervention, and granting this motion is within the Court's discretion.

III. CONCLUSION.

For the foregoing reasons, the Court should permit the Members to intervene as of right. In the alternative, the Court should grant the Members' motion for permissive intervention.

Dated: August 27, 1998.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

CITY OF OAKLAND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT IN C 98-0088 CRB

INTRODUCTION

On August 14, 1998, defendants Jeffrey Jones and the Oakland Cannabis Buyers' Cooperative ("Oakland defendants") filed their Motion To Dismiss Plaintiff's Complaint In Case No. C 98-0088 CRB For Failure To State A Claim Upon Which Relief Can Be Granted ("Motion to Dismiss"). The City of Oakland (the "City") supports and joins in the arguments presented in the Oakland defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss Plaintiff's Complaint in Case No. C 98-0088 CRB ("Defendants' Memorandum"). Moreover, this Court should dismiss the complaint for the additional reasons set forth herein, namely—(1) the City of Oakland has lawfully exercised its police power to regulate local issues of public health and safety; (2) state and local law as applied to the Oakland defendants does not directly conflict with the Controlled Substances Act; and (3) Sections 841, 846, and 856 of the Controlled Substances Act relating to marijuana are unconstitutional under the Tenth Amendment as applied to the Oakland defendants.

STATEMENT OF FACTS[1]

The City of Oakland has consistently supported the safe, controlled, and efficient distribution of medical cannabis to seriously ill citizens.[2] There are three principal reasons for the City's support of the controlled use of medical cannabis under a physician's supervision. First, the City believes that providing medical cannabis to patients who need it contributes to the health and welfare of city residents by ameliorating the pain and suffering of those who have serious medical conditions such as AIDS, cancer, multiple sclerosis, and glaucoma. Second, the City believes that the controlled distribution of medical cannabis contributes to the public safety of the City of Oakland by providing a

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[1] The City of Oakland joins in the statement of facts set forth in Defendants' Memorandum at 1-3.

[2] The City began its support well before the passage of the State of California's Proposition 215, the Compassionate Use Act of 1996. Evidence of this support may be found in the unanimous passage of Oakland City Council Resolution No. 72379, dated December 12, 1995 (endorsing Compassionate Use Initiative of 1996) and Resolution No. 72516, dated March 12, 1996 (supporting the activities of the Oakland Cannabis Buyers' Cooperative and declaring that investigation and arrest of individuals involved in medical use of marijuana shall be a low priority for the City of Oakland).

safe, regulated environment in which seriously ill people can obtain their medicine, obviating any need for these patients to resort to dangerous street-level drug dealers. Third, the City believes that it has a responsibility under the Compassionate Use Act of 1996 (the "Compassionate Use Act"), codified at California Health & Safety Code § 11362.5, "to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." California Health & Safety Code § 11362.5(b)(1)(C). The City implemented such a plan when it unanimously passed Ordinance No. 12076 C.M.S.—An Ordinance of the City of Oakland Adding Chapter 8.42 to the Oakland Municipal Code Pertaining to Medical Cannabis (the "Ordinance").

The City Council's express purpose in passing this Ordinance was to ensure that seriously ill persons and their primary caregivers who obtain and use cannabis for medical purposes, on a doctor's recommendation, have safe and affordable access to their medicine. A further purpose of the Ordinance was to ensure that these patients and their primary caregivers are not civilly or criminally liable for possessing or using this prescribed medicine. The Ordinance also expressly adopted the purposes stated in the Compassionate Use Act.

In passing the Ordinance, the City of Oakland lawfully established a city program directly related to the public health and safety of Oakland citizens—the Medical Cannabis Distribution Program (the "Program"). The purpose of this Program is to guarantee access to safe and affordable medical cannabis to patients in the City whose doctors have approved it.

The Ordinance provides that a "medical cannabis provider association" will administer and enforce the city Program. The Ordinance requires the Oakland City Manager to designate "one or more entities as a medical cannabis provider association." The Ordinance further requires the designated entity to enforce the provisions of the Ordinance and the Compassionate Use Act to ensure that seriously ill Californians may obtain and use cannabis. Such duly designated provider association, including its agents, employees, and directors acting within the scope of their duties on behalf of the association, are deemed by the Ordinance to be officers of the City of Oakland.

The City of Oakland believes that deputizing an existing medical cannabis cooperative is the most efficient way to meet its obligations under, and to accomplish, the purposes of the Compassionate Use Act. Accordingly, following a thorough and intensive review of the Oakland

Cannabis Buyers' Cooperative ("OCBC"),[3] on August 12, 1998, the Oakland City Manager designated the OCBC (and its agents, employees, and directors) a medical cannabis provider association pursuant to the Ordinance. As a result of this designation, the OCBC (and its agents, employees, and directors) became duly authorized officers of the City of Oakland authorized to enforce the Ordinance and to fulfill its purposes. Because the OCBC is a now a duly authorized officer lawfully engaged in the enforcement of the Ordinance and the Compassionate Use Act, it is immune from liability under 21 §U.S.C. 885(d).

ARGUMENT

The City of Oakland joins in key arguments raised in the Defendants' Memorandum at 3-8. First, the federal Controlled Substances Act (the "Act") provides immunity to the Oakland defendants because these defendants are duly authorized officers of the City of Oakland lawfully engaged in the enforcement of laws relating to controlled substances. Second, Sections 841, 846, and 856 of the Controlled Substances Act are unconstitutional as applied to the Oakland defendants and their patient-members based on both the Fifth and Ninth Amendments to the United States Constitution.

The Oakland defendants, however, have not addressed aspects of this litigation that are unique to the City of Oakland. First, the City has properly exercised its police power to protect public health and safety. Second, in this context, state and local law are entirely consistent with federal law, and thus do not violate the Supremacy Clause. Finally, the Tenth Amendment preserves the City's power to protect the fundamental rights and liberty interests of its citizens. These issues are addressed in turn below.

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[3] The Oakland Fire Department inspected the premises of the OCBC to ensure compliance with city safety and fire code regulations; the Oakland Police Department inspected the OCBC's premises to ensure that adequate security measures are in place; the City Risk Manager reviewed the OCBC to verify that the Cooperative has adequate insurance coverage; the City Attorney reviewed the OCBC Articles of Incorporation and By-Laws to verify the formality of its business practices; and the City Manager's Office reviewed all of the OCBC's protocols, practices, and procedures.

I. THE CITY OF OAKLAND HAS PROPERLY EXERCISED ITS POLICE POWER TO REGULATE LOCAL ISSUES OF PUBLIC HEALTH AND SAFETY.

The City has a distinct interest in the public health and safety of all of its citizens, and it has the right to use its police powers to protect the public health and safety. Cal. Const. art. XI, § 5 ("It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs . . ."); Cal. Const. art. XI, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws"); Oakland City Charter art. I, § 106 ("The City shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs"); *Domar Electric, Inc. v. City of Los Angeles*, 41 Cal. App. 4th 810, 820 (1995) (a chartered city has exclusive power to legislate its municipal affairs); *Hill v. City of Long Beach*, 33 Cal. App. 4th 1684, 1692 (1995) (same). The City has determined, as a matter of local government and of local law enforcement and for the welfare of its citizens, that it is appropriate to use its police powers to establish the Medical Cannabis Distribution Program. The implementation of this Program was neither capricious nor ill-advised. Indeed, the unanimous passage of the Ordinance that established the Program was based on several very sound reasons, all of which are grounded in local government and law enforcement imperatives. The City considers the controlled use of medical cannabis to be a quintessential and fundamental local governmental concern.

If this Court requires the City's designated medical cannabis provider association to close down, patients who currently receive cannabis there will either have to obtain their medicine elsewhere or they will cease using medicine that their physicians have determined is essential for their continued health, if not their ultimate survival. Neither of these outcomes is acceptable, and both would adversely impact the City of Oakland. If patients decide to continue purchasing cannabis, this will likely exacerbate problems associated with drug-dealing. Seriously ill patients will be forced to turn to the sidewalks, the parks, the playgrounds and other public areas of the City to obtain what they need. What is now a well-controlled, safe distribution system — one that has been thoroughly inspected by the City Manager, the City Attorney, the Oakland Police Department, and the Oakland Fire Department — would instead devolve into an unregulated public nuisance. Street-corner drug

dealers, who may also deal in more dangerous drugs and who may use violence to enforce agreements and resolve disputes, will have a new market of seriously ill patients with nowhere else to turn for medicine prescribed by their doctors. Unregulated vendors also may place these patients at further risk by providing impure and tainted cannabis. The drug dealers' ranks and influence on city streets will likely increase. Oakland police officers will be spread thin dealing with these new street criminals. Currently, the City's designated cannabis provider association has stringent controls in place to separate bona fide patients from others who would buy cannabis. Because the arrest and prosecution of bona fide patients violates the Compassionate Use Act and contravenes the City's policies, the City's police officers would have to expend considerable effort distinguishing between medical and non-medical users.

The other alternative poses even more danger to these patients. If seriously ill Oakland citizens stop using medical cannabis, their suffering will continue, their conditions may worsen, and some patients may go blind or die. *See* Declaration of John Morgan, M.D., filed herewith as Exhibit A. The City has determined not to permit such an inhumane outcome to occur, when a legal and safe alternative—the Medical Cannabis Distribution Program—can be made available.

This City has an unqualified interest in protecting the health and welfare of its citizens and in supporting their efforts to preserve their lives. *Washington v. Glucksberg*, __ U.S. __, 117 S. Ct. 2258, 2272 (1997) (recognizing state's unqualified interest in preserving human life). Moreover, Oakland has a right to protect the public health and safety of its citizens. *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967) (recognizing propriety of city's use of police power to protect public health and safety); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (municipal police power properly exercised over matters of public safety, public health, morality, peace and quiet, and law and order). Accordingly, the City of Oakland has established a Medical Cannabis Distribution Program and has designated a provider association to enforce the Program. Oakland therefore respectfully requests that this Court dismiss the complaint against the Oakland defendants to enable the City of Oakland to manage its Program for the sake of the public health and safety of the citizens of Oakland.

II. THE CONTROLLED SUBSTANCES ACT DOES NOT SUPERCEDE STATE AND LOCAL LAW AS APPLIED IN OAKLAND.

The City, of course, remains respectful of federal law. This Court has stated in this case that the "Supremacy Clause of Article VI of the United States Constitution mandates that federal law supercede state law *where there is an outright conflict between such laws*." Memorandum and Order dated May 13, 1998 ("Mem. Op. & Order") at 6 (emphasis added). Here, however, there is no outright conflict between federal and state and local laws. Indeed, the Oakland Ordinance is entirely consistent with federal law. The City of Oakland has designated the OCBC and its agents, employees, and directors as officers of the City of Oakland enforcing the Ordinance and the Compassionate Use Act. The federal Controlled Substances Act itself provides that "no civil or criminal liability shall be imposed" on entities such as the Oakland defendants. 21 U.S.C. § 885(d). Thus, there is no outright conflict between federal and local law, and the Supremacy Clause does not apply here. As discussed below, any other construction would violate the Tenth Amendment.

III. SECTIONS 841, 846, AND 856 OF THE CONTROLLED SUBSTANCES ACT RELATING TO MARIJUANA ARE UNCONSTITUTIONAL UNDER THE TENTH AMENDMENT AS APPLIED TO THE CITY AND THE OAKLAND DEFENDANTS.

Both the State of California and the City of Oakland have identified a particular sphere of sovereign interest — the availability of safe medical cannabis to patients who need it and whose doctors have approved it. Their sovereign authority exists by virtue of the federal structure of our nation's government wherein the federal authority consists only of enumerated powers. *See, e.g., New York v. United States*, 505 U.S. 144, 156 (1992) (under our federal government "[t]he States unquestionably do retai[n] a significant measure of sovereign authority") (citations and quotations omitted). State and local sovereignty is explicitly protected by the Tenth Amendment, which states:

> [t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

U.S. Const., Amend. X. This amendment limits the exercise of federal power when it infringes upon the powers of the several states or of the people. *See New York v. United States*, 505 U.S. at 157. *See also Lane County v. Oregon*, 74 U.S. 71, 76 (1869) ("within their proper spheres, the independent

authority of the States, is distinctly recognized . . . ; to them and to the people all powers not expressly delegated to the national government are reserved"). When the federal government infringes a state or local government acting within its sovereign sphere, the Supreme Court will not hesitate to strike down such federal action as unconstitutional. *See, e.g., Printz v. United States*, 117 S. Ct. 2365, 2377-83 (1997) (holding that the Constitution prohibits the federal government from compelling States to enact or administer a federal regulatory program). Here, the federal government attempts to apply the Controlled Substances Act to a duly authorized agent of the City of Oakland designated by the City to dispense medical cannabis to gravely ill people in furtherance of state and local law. The government's actions plainly violate the Tenth Amendment and the principle of state and local sovereignty enunciated in *Printz*.

The Commerce Clause, in the specific context of the City of Oakland, cannot save the federal government's infringement of state and local sovereignty. The simple fact that some medical cannabis may originate from, or may eventually enter, interstate commerce does not end the constitutional inquiry. To the contrary, the Supreme Court has explicitly recognized that a municipal ordinance addressing matters of local concern, even though it may affect interstate commerce, is nevertheless appropriately left to the sovereign sphere of the local government. As the Court stated in *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1937):

> [T]here are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints.

Id. at 185. The Court held in *Barnwell Brothers* that the state of South Carolina could regulate matters of public safety and conservation on its highways, matters "peculiarly of local concern," notwithstanding the Commerce Clause and the fact that the state's highways necessarily affected interstate commerce. *Id.* at 187. The Court reasoned that ". . . so long as the state action does not discriminate, the burden [on interstate commerce] is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states." *Id.* at 189.

Here, the State of California and the City of Oakland have specifically addressed the particular issue of ensuring the availability of medical cannabis to patients in need; Congress has not. The availability of medical cannabis is a much narrower issue than the generalized federal criminalization of substances listed in Schedule I. This Court itself at least implicitly recognized that Congress may never fully address the specific issue of medical use of cannabis. Mem. Op. & Order at 20 ("The Court doubts whether a rescheduling petition is a reasonable alternative for all seriously ill patients whose physicians have recommended marijuana for therapeutic purposes"). This Court should therefore recognize the City's and California's sovereign rights to address this matter "peculiarly of local concern." *Barnwell Brothers*, 303 U.S. at 187.[4]

The Supreme Court reached a similar result in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). There, the City of Detroit had enacted a smoke abatement ordinance "for the manifest purpose of promoting the health and welfare of the city's inhabitants." *Id.* at 442. The Court recognized that, in the exercise of their police power to legislate concerning the air local residents breathe, "the states and their instrumentalities may act, in many areas of interstate commerce . . . , concurrently with the federal government." *Id.* The Court also recognized the general principle that:

> . . . the Constitution when conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation . . . may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.

---

[4] True, this Court has stated that the Commerce Clause *enables* Congress to regulate the "*intrastate* manufacture, distribution, and possession of controlled substances, as a class of activities," Mem. Op. & Order at 11. The *exercise* of this power should be limited here, however, where the state and local governments have identified and enacted laws specifically addressing a local issue of public health and safety, and where they have enacted laws to protect their citizen's fundamental rights. *See* California Health & Safety Code § 11362.5 (expressing a "right [of their citizens] to obtain and use marijuana for medical purposes. . . ."); Oakland Ordinance No. 12076, Section 1.A (same).

Id. at 443-44 (citations and quotations omitted). *See also General Motors Corp. v. Tracy*, 117 S. Ct. 811, 828 (1997) (recognizing that local health and safety considerations relevant to deciding whether dormant Commerce Clause invalidates local law). Because the "sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community[,]" and because air pollution was "peculiarly a matter of state and local concern[,]" the Court concluded that there was no overlap between the scope of federal law and the municipal ordinance. *Id.* at 445, 446. Therefore, federal air quality legislation was found not to preempt the local ordinance, which the Court upheld as a valid exercise of Detroit's police power to "better the health and welfare of the community." *Id.* at 448.

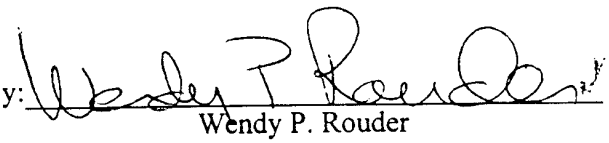
Similarly, here, the sole aims of the Oakland Ordinance are to protect the health of seriously ill patients in Oakland and to ensure the safety and welfare of all its citizens. In furtherance of these purposes, the City of Oakland has adopted an ordinance that is entirely consistent with federal law. Accordingly, this Court should apply the Tenth Amendment and the principles recognizing state and municipal sovereign interest in local matters of health and welfare to declare Section 841, 846, and 856 unconstitutional as applied to the Oakland defendants.

CONCLUSION

For all of the foregoing reasons, the City of Oakland respectfully requests that this Court grant the Oakland defendants' Motion to Dismiss the Complaint in C 98-0088 CRB.

Dated: August 24, 1998

JAYNE W. WILLIAMS, City Attorney
JOYCE M. HICKS, Assistant City Attorney
WENDY P. ROUDER, Deputy City Attorney
BARBARA J. PARKER, Deputy City Attorney

By: 
Wendy P. Rouder

Attorneys for CITY OF OAKLAND

EXHIBIT A

COPY

AUG 14 1998

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

DECLARATION OF JOHN P. MORGAN, M.D.

I, JOHN P. MORGAN, declare:

1. I am a medical doctor and Professor of Pharmacology at the City University of New York Medical School. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would testify competently as to them.

2. I am co-author of the book entitled "Marijuana Myths, Marijuana Facts—A Review of the Scientific Evidence," published in 1997.

3. Marijuana, also known as cannabis, has many proven medical uses. Medical cannabis reduces nausea and vomiting induced by cancer chemotherapy, stimulates appetite and promotes weight gain in AIDS patients, reduces intraocular pressure in people suffering from glaucoma, reduces muscle spasticity in patients with neurological disorders, spinal cord injuries, and multiple sclerosis. Furthermore, patients and physicians have reported that smoked marijuana also provides relief from migraine headaches, depression, seizures, and pain.

4. Recent studies have shown that cannabinoids may also be useful for other neurological disorders, such as stroke.

5. There are no reasonable legal alternatives to medical cannabis for many patients. Delta-9-THC is the main active ingredient in marijuana. While synthetic THC is available in capsule form, it is not nearly as effective as smoked marijuana for many patients. For people suffering from nausea and vomiting, who are unable to swallow and hold down a pill, smoking marijuana is often the only reliable way to deliver THC to the body. Smoking marijuana delivers THC quickly, providing relief in a few minutes, compared to an hour or more when THC is swallowed.

6. Smoking marijuana not only delivers THC to the bloodstream more quickly than swallowing synthetic THC, but smoking delivers most of the THC inhaled. When synthetic THC is swallowed, 90 percent or more of it never reaches sites of activity in the body as a result of the body's extensive metabolism of swallowed THC.

7. Another problem with swallowed THC is that its effects vary considerably, both from one person to another and in the same person from one episode of use to another. Further, because the onset of effect is an hour or more, patients using synthetic THC have difficulty achieving just the effective dose. Moreover, when THC is swallowed, the effects last longer (up to six hours) compared

to one or two hours when marijuana is smoked. Thus, smoking marijuana is a more flexible route of administration than swallowing because smoking allows patients to adjust their dose to coincide with the rise and fall of symptoms. For people suffering from nausea and vomiting from AIDS or cancer chemotherapy, smoked marijuana provides rapid relief with lower overall doses of THC.

8. The psychoactive side effects of swallowed synthetic THC may be more intense than those that occur from smoking, thereby increasing the likelihood of adverse psychological reactions. This occurs because the liver actually produces, in high concentration, an active metabolite.

9. Smoking is a highly unusual way to administer a drug. Many drugs could be smoked, but there is no good reason to do so because oral preparations produce adequate blood concentrations. This is not the case with THC. Inhaling is a better route of administration than swallowing. Inhaling is about equal in efficiency to intravenous injection, and considerably more practical.

10. "Cannabis buyers' cooperatives" are the best and safest way for patients to obtain medical cannabis. Patients who rely on the criminal street markets to obtain marijuana necessarily acquire cannabis of unknown potency and purity. For example, marijuana purchased from a street dealer may contain fungal spores, which may be deadly for AIDS patients who have suppressed immune systems. As a result of the dangers of obtaining marijuana from the criminal market, some patients who need the drug may choose to forego their medication.

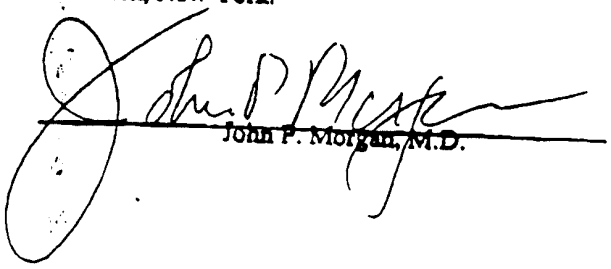
11. The Drug Enforcement Administration's own administrative law judge, Francis L. Young, concluded not only that marijuana's medical utility had been adequately demonstrated by the evidence, but that marijuana had been shown to be "one of the safest therapeutically active substances known to man." The DEA administrator ignored this opinion when he decided to maintain marijuana as a Schedule I drug.

12. For many patients medical cannabis is necessary to avert imminent and often life-threatening harm. For many patients, such as those undergoing intensive chemotherapy or experiencing AIDS-related "wasting syndrome," medical cannabis saves their lives. For patients

suffering from glaucoma, medical cannabis may save their vision. For patients suffering neurological disorders resulting from spinal cord injuries and multiple sclerosis, medical cannabis may enable them to physically cope in society, to go on with their lives and to endure pain.

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

Executed this 13th day of August at New York, New York.



John P. Morgan, M.D.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

CANNABIS CULTIVATOR CLUB, ET AL.,

DEFENDANTS.

CERTIFIED COPY

CIVIL NO. C98-0085 CRB
C98-0086 CRB
C98-0087 CRB
C98-0088 CRB
C98-0089 CRB
C98-0245 CRB

SAN FRANCISCO, CALIFORNIA

MONDAY, AUGUST 31, 1998

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TRANSCRIPT OF PROCEEDINGS

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MONDAY, AUGUST 31, 1998 2:30 P.M.

P R O C E E D I N G S

THE COURTROOM DEPUTY: NOW CALLING CIVIL MATTER 98-0085, UNITED STATES OF AMERICA VS. CANNABIS CULTIVATORS CLUB, ET AL. AND COMPANION CASES.

COUNSEL, PLEASE STATED YOUR APPEARANCE FOR THE RECORD.

MR. MUELLER: MORNING, YOUR HONOR. ROBERT MUELLER WITH MARK QUINLIVAN, DAVID ANDERSON AND DAN DORMONT FOR THE UNITED STATES.

THE COURT: WELCOME TO THIS COURT, MR. MUELLER.

MR. MUELLER: I SHOULD SAY GOOD AFTERNOON, YOUR HONOR.

THE COURT: THANK YOU.

MR. BROSNAHAN: AFTERNOON, YOUR HONOR. JIM BROSNAHAN, FOR THE OAKLAND CANNABIS COOPERATIVE. THANK YOU.

THE COURT: WELCOME TO YOU.

MR. BROSNAHAN: THANK YOU.

MR. LORAN: GOOD AFTERNOON, YOUR HONOR. THOMAS LORAN APPEARING ON BEHALF OF DEFENDANT AND COUNTER-CLAIMANT INTERVENORS.

MR. PANZER: GOOD AFTERNOON. WILLIAM PANZER APPEARING ON BEHALF OF MARIN ALLIANCE FOR MEDICAL MARIJUANA.

MR. NELSON: GOOD AFTERNOON, YOUR HONOR. DAVID NELSON APPEARING FOR UKIAH CANNABIS BUYERS' CLUB.

PROFESSOR UELMEN: GOOD AFTERNOON, YOUR HONOR. GERALD

UELMEN APPEARING FOR THE OAKLAND CANNABIS BUYERS' COOPERATIVE.

MR. RAICH: AFTERNOON, YOUR HONOR, ROBERT RAICH FOR OAKLAND CANNABIS BUYERS' COOPERATIVE.

MR. SHAPIRO: CARL SHAPIRO, AND I REPRESENT THE FLOWER THERAPY AND THE NAMED DEFENDANT.

THE COURT: MR. SHAPIRO, WHY DON'T YOU REMAIN STANDING FOR A MOMENT BECAUSE I'D LIKE TO DEAL WITH YOUR MATTER FIRST. YOU HAVE FILED A MOTION TO DISMISS --

MR. SHAPIRO: RIGHT.

THE COURT: -- THE ACTION INASMUCH AS YOUR CLIENT HAS CEASED OPERATIONS.

MR. SHAPIRO: YES. THE CLUB HAS DISAPPEARED.

THE COURT: DISAPPEARED.

MR. SHAPIRO: AND THAT IS PARTLY A RESULT OF THE ACTION WHICH WAS ORIGINALLY FILED AGAINST FLOWER THERAPY AND A MAN NAMED BURRS WHO WAS A LANDLORD. THE ACTION -- THE COMPLAINT ASKED THAT MR. BURRS BE SANCTIONED FOR ALLOWING MY CLIENTS TO BE IN HIS BUILDING, AND HE TOOK THAT OPPORTUNITY TO EVICT THE CLIENTS. AND THE BUILDING IS NOT BEING USED FOR -- FOR THE SERVICES, AND MY CLIENTS HAVE NO SUBSTITUTE PLACE.

WE FEEL THAT RESOLVES OUR INTEREST IN THE MATTER. I WOULD PERHAPS TRY TO ANSWER MR. QUINLIVAN'S POINTS AFTERWARDS. ESSENTIALLY, THE CASE RESOLVES -- OUR CASE RESOLVES ITSELF AROUND A PRINCIPLE WHICH -- IN SUPREME COURT CASES WHICH WERE -- WHICH WERE CITED, AND THAT IS, IS THERE ANY REASONABLE

PROBABILITY THAT THE FLOWER THERAPY WILL REOPEN AT SOME OTHER LOCATION AT SOME FUTURE TIME. AND THERE'S -- THE FILE IS ABSENT OF ANY EVIDENCE TO THAT EFFECT. THE FILE HAS THE DECLARATIONS OF BOTH MS. SWEENEY AND MR. -- AND -- JUNG TO THE EFFECT THAT THEY ARE OUT OF BUSINESS AND HAVE NO INTENTION OF GOING BACK INTO THE BUSINESS, AND UNDER THOSE CIRCUMSTANCES, I WOULD SAY THAT THERE'S NO REASONABLE POSSIBILITY THAT THEY ARE INTENDING OR PLANNING OR EVEN ABLE TO GO BACK INTO BUSINESS.

I WOULD FURTHER STATE THAT UNDER THOSE CIRCUMSTANCES AND -- A CONTINUATION OF THE INJUNCTION PROCEEDINGS WOULD BE A -- LIKE -- LIKE THE TEN COMMANDMENTS, PROHIBITING FUTURE ACTS WHICH ARE NEITHER PROBABLE NOR LIKELY. AND UNDER THOSE CIRCUMSTANCES, I WOULD ASK THE COURT TO GRANT THE MOTION TO DISMISS.

THE COURT: WELL, I DON'T HAVE TO RULE ON THE TEN COMMANDMENTS.

MR. SHAPIRO: BEG YOUR PARDON?

THE COURT: I DON'T HAVE TO RULE ON THE TEN COMMANDMENTS. THAT'S BEYOND MY JURISDICTION. BUT I AGREE WITH YOUR ARGUMENT. I DON'T THINK THAT THERE'S A REASONABLE PROBABILITY OF YOUR CLIENTS RECOMMENCING THEIR ACTIVITIES. THAT'S NUMBER ONE. NUMBER TWO IS THAT FOR WHATEVER REASON, THE RESULT THAT WAS ACHIEVED IS THE RESULT THAT THE GOVERNMENT REALLY HAD SOUGHT HERE.

MR. SHAPIRO: YES.

THE COURT: WHICH IS STOPPING THE -- THE -- YOU KNOW, THE OPERATIONS. I THINK, THIRD, THAT I WOULD DISMISS IT WITHOUT PREJUDICE, WHICH MEANS THAT IN THE EVENT THERE WAS FURTHER ACTIVITY OF THE TYPE THAT THE GOVERNMENT BELIEVES TO BE PROSCRIBED, THEN THEY WOULD SIMPLY REINITIATE THE PROCESS.

SO I'LL HEAR FROM YOU, MR. QUINLIVAN, IF YOU WANT TO ARGUE IT, BUT MY MIND IS PRETTY WELL MADE UP ON THAT ISSUE.

MR. QUINLIVAN: WITH THAT BEING SAID, YOUR HONOR, WE'D BE HAPPY TO GO ON TO OTHER MATTERS, THEN.

THE COURT: OKAY. SO THE MOTION TO DISMISS IS GRANTED WITHOUT PREJUDICE.

MR. SHAPIRO: I THANK YOU.

THE COURT: ALL RIGHT.

LET ME NOW TURN TO THE MOTION TO INTERVENE.

YOU SHOULD KEEP MOVING, MR. SHAPIRO. THAT'S ONE OF THE LESSONS I LEARNED.

(LAUGHTER.)

THE COURT: THIS IS A MOTION TO INTERVENE BROUGHT ON BEHALF OF VARIOUS INDIVIDUALS ASSOCIATED WITH EACH OF THE THREE CLUBS THAT ARE THE SUBJECT MATTER OF THE -- THE INJUNCTION PROCEEDINGS.

MR. LORAN: YES, YOUR HONOR.

THE COURT: AND AS I AM STANDING, THE ARGUMENT PRINCIPALLY OTHER THAN OTHER ARGUMENTS THAT HAVE BEEN ADVANCED IS THAT THE GOVERNMENT WOULD NOT BE PREJUDICED BY THE GRANTING

OF THE MOTION TO INTERVENE PROVIDED THAT THERE ARE NO DELAYS THAT ARE OCCASIONED BY GRANTING THE MOTION TO INTERVENE.

AND LOOKING AT IT IN THE POSTURE OF THIS CASE, I'M INCLINED TO GO ALONG WITH IT; THAT IS, I WOULD GRANT ON A PERMISSIVE BASIS -- I DON'T THINK YOUR CLIENTS HAVE A RIGHT TO INTERVENE AS A MATTER OF THE RIGHT, THOUGH I UNDERSTAND YOU MADE THAT ARGUMENT. AND I THINK THAT UNDER -- UNDER PERMISSIVE INTERVENTION, I WOULD BE PREPARED TO GRANT THAT BASICALLY BECAUSE I DON'T SEE ON THE THIRD PRONG -- IN TERMS OF PREJUDICE -- ANY PREJUDICE OF THE GOVERNMENT IN TERMS OF ITS TIMETABLE IN TERMS OF HOW WE'RE GOING TO PROCEED.

SO MAYBE I SHOULD HEAR FROM THE GOVERNMENT.

MR. LORAN: THAT'S FINE WITH ME, YOUR HONOR.

THE COURT: MR. QUINLIVAN.

MR. QUINLIVAN: YOUR HONOR, LET ME JUST BRIEFLY ADDRESS THAT. I THINK THAT OUR PRIMARY OBJECTION TO THE MOTION TO INTERVENE IN THIS CONTEXT IS THAT IT WAS NOT -- IT DOESN'T MEET THE TIMELINESS STANDARD UNDER EITHER INTERVENTION AS OF RIGHT OR UNDER PERMISSIVE INTERVENTION.

LET ME JUST NOTE ONE POINT THAT I THINK MAKES THIS ABUNDANTLY CLEAR, AND THAT IS THAT THE -- THE HEART OF THEIR ARGUMENT IS ESSENTIALLY THAT IT WASN'T UNTIL WE MOVED TO HOLD THE NONCOMPLIANT DEFENDANTS IN CONTEMPT THAT THEY BECAME AWARE THAT WE WERE TAKING ISSUE WITH THE STANDING OF THE CLUBS TO RAISE THE DEFENSES OF MEDICAL NECESSITY AND SUBSTANTIVE DUE

PROCESS ON BEHALF OF THEIR MEMBERS.

AND IT'S QUITE CLEAR, YOUR HONOR, THAT WE HAD MADE THIS ARGUMENT IN OUR CONSOLIDATED REPLY BRIEF IN SUPPORT OF OUR MOTION FOR PRELIMINARY INJUNCTION. WE MADE THE POINT ABUNDANTLY CLEAR AT THE MARCH 24TH HEARING, AND WE MADE THAT ARGUMENT IN OUR POST-HEARING MEMORANDUM. AND SO IT CANNOT BE SAID THAT THAT IS WHEN THEY FIRST BECAME AWARE THAT WE WERE MAKING THOSE ARGUMENTS.

AND I POINT OUT FURTHER, YOUR HONOR, THAT IT IS NOT -- IN THE ORDINARY CASE, IT IS THE PROPOSED INTEVENOR THAT YOU LOOK TO AS TO WHY THE DELAY WAS OCCASIONED.

IN THIS CASE IN THEIR PROPOSED MOTION, THEY TALK ABOUT THE -- HOW LONG IT TOOK COUNSEL TO FIND MEMBERS ON WHICH TO INTERVENE. I THINK THAT'S QUITE CLEAR ON PAGE 6 OF THEIR MOTION, WHERE INSTEAD OF REFERRING TO THE MEMBERS, THEY SAY THAT COUNSEL FOR THE MEMBERS HAVE DILIGENTLY ATTEMPTED TO BRING ON THIS MOTION FOR LEAVE TO INTERVENE TO REPRESENT THE UNIQUE POSITION OF THE MEMBERS. AND UNDER THOSE CIRCUMSTANCES, CERTAINLY WE CAN IMPUTE KNOWLEDGE TO COUNSEL AS TO WHEN THEY WERE AWARE THAT THE GOVERNMENT WAS RAISING THOSE ARGUMENTS.

THE COURT: WELL, I -- I MUST SAY I WASN'T OVERWHELMED BY THEIR TIMELINESS ARGUMENT, BUT THEN THE QUESTION OCCURRED TO ME THAT LET'S SAY I DENY INTERVENTION AND THEN THEY FILED AN ACTION AND THEY SOUGHT TO RELATE THAT ACTION TO THIS ACTION. WOULDN'T I RELATE IT? I THOUGHT I WOULD.

AND SO THEN THE QUESTION OCCURRED TO ME, AREN'T I REALLY ELEVATING FORM OVER SUBSTANCE. THE ANSWER IS TO MAKE SURE THIS -- THIS MOVES IN A RELATIVELY DIRECT PROCESS WHERE PEOPLE DON'T SPEND A LOT OF MONEY AND ENERGY AND RESOURCES ON ISSUES THAT AREN'T GOING TO MAKE A DIFFERENCE HERE. AND IT SEEMED TO ME THAT THESE PEOPLE DO HAVE A REAL INTEREST. THEY ARE THE PEOPLE MOST AFFECTED -- OR THEY ARE PEOPLE WHO ARE AFFECTED BY IT. THERE ARE COMMON ISSUES.

CERTAINLY IT SHOULD HAVE BEEN BROUGHT EARLIER, BUT IT WASN'T. SO THAT -- SINCE IT WASN'T, WHAT PREJUDICE IS REALLY SUFFERED BUT TO THE GOVERNMENT, TO THE OPPOSING PARTY? I DON'T SEE IT AS LONG AS WE KEEP A TIMETABLE IN PLACE, WHICH I INTEND TO DO. AND SO I THOUGHT OKAY.

MR. QUINLIVAN: I WILL CERTAINLY CONCEDE, YOUR HONOR, THE HEART OF OUR PREJUDICE ARGUMENT IS THAT THE DETERMINATION OF OUR MOTIONS MIGHT BE IMPACTED. AND IF YOUR HONOR DOES NOT BELIEVE THAT'LL BE THE CASE, THEN --

THE COURT: IT WON'T BE.

MOTION TO INTERVENE IS GRANTED AS TO THE INDIVIDUALS. I DON'T HAVE THEIR NAMES IN FRONT OF ME, BUT IT'S THE INDIVIDUALS WHO ARE REPRESENTED BY THE LAW FIRM OF PILLSBURY, MADISON & SUTRO WHO HAVE FILED A MOTION. SO I THINK IT'S CLEAR.

MR. LORAN: DO YOU NEED ME TO STATE THE NAMES FOR THE RECORD, YOUR HONOR? IT'S ON OUR MOTION. IT'S --

THE COURT: IT MIGHT BE GOOD IDEA.

MR. LORAN: OUR CLIENTS ARE EDWARD NEIL BRUNDRIDGE, IMA CARTER, REBECCA NIKKEL, WHO IS PRESENT AND IS HERE IN THE COURTROOM, AND LUCIA VIER.

THE COURT: NOW, IT SHOULD BE CLEAR -- AND I DON'T WANT TO -- I WANT TO MAKE SURE THAT WE UNDERSTAND WHAT THE MOTION TO INTERVENE IS, WHAT THE INTERVENTION IS.

THE INTERVENTION IS THEY ARE PARTIES TO THE ACTION -- THAT THEY CAN INTERVENE AS INTERVENORS TO THE ACTION, SO I MAY HAVE MISSPOKE WHEN I TALKED ABOUT PARTIES TO THE ACTION. LET ME BE CLEAR ON THAT BECAUSE WE ARE FACING A SITUATION IN WHICH AN ORDER TO SHOW CAUSE REGARDING CONTEMPT IS BEING SOUGHT BY THE GOVERNMENT. IT'S NOT BEING SOUGHT AGAINST YOUR CLIENTS.

AND, THEREFORE, WHATEVER FLOWS FROM THE FACT THAT THEY ARE NOT THE PEOPLE TO WHOM THE GOVERNMENT IS SEEKING TO HOLD IN CONTEMPT -- THAT MAY HAVE SOME BEARING AS TO HOW WE GO AHEAD AND ADJUDICATE IT. THEY STILL HAVE AN INTEREST IN IT. THEY CERTAINLY HAVE AN INTEREST IN THE RELIEF THAT WOULD BE -- THAT WOULD BE SOUGHT, BUT IN TERMS OF WHETHER OR NOT THERE IS A -- WHETHER -- THEY'RE NOT BEING SOUGHT AS -- AND I DON'T EVEN KNOW HOW TO PRONOUNCE IT -- CANNIBAR [PHONETIC] OR WHATEVER THE APPROPRIATE WORD IS. THAT SHOULD BE UNDERSTOOD.

MR. LORAN: AND WE APPRECIATE THAT, YOUR HONOR. WE TRIED TO POINT OUT IN OUR PAPERS, OUR REPLY BRIEF, WE'RE SEEKING TO INTERVENE IN THE ACTION, NOT IN THE CONTEMPT

PROCEEDING. BUT I TAKE IT THAT YOUR HONOR'S COMMENTS DON'T NECESSARILY PRECLUDE TESTIMONY FROM INTERVENORS AS WITNESSES TO THE EXTENT THAT THEY HAVE INVOLVEMENT IN ANY OF THE TRANSACTIONS THAT ARE SUBJECT TO THE CONTEMPT PROCEEDINGS.

THE COURT: I BELIEVE THAT'S RIGHT.

MR. LORAN: ALL RIGHT.

THE COURT: I BELIEVE THAT'S RIGHT.

MR. LORAN: THANK YOU, YOUR HONOR.

THE COURT: NOW LET ME TURN TO SOME OF THE OTHER ISSUES. I HAD TREATED THE MOTION TO DISMISS IN TWO SEPARATE PARTS, AND I'D LIKE TO HEAR ARGUMENT ON ONE OF THE TWO PARTS. ONE IS THE SUBSTANTIVE DUE PROCESS PART, WHICH I DON'T WANT TO HEAR ARGUMENT ON, BECAUSE I THINK I REALLY HAVE HEARD ARGUMENT ON THAT AND I'VE DECIDED THAT. AND I'M DENYING THE MOTION TO DISMISS UNDER SUBSTANTIVE DUE PROCESS FOR THE REASONS THAT I BELIEVE WERE AT LEAST FIRST SET OUT IN MY MEMORANDUM OF MAY. SO I DON'T THINK I WANT TO HEAR ANY FURTHER ARGUMENT ON IT.

ON THE ISSUE OF IMMUNITY, I WOULD LIKE TO HEAR SOME ARGUMENT ON THAT ISSUE. AND I HAVE SOME SPECIFIC QUESTIONS IN MIND. OKAY?

SO, PROFESSOR UELMEN, YOU'RE GOING TO TAKE THE LABORING OAR?

PROFESSOR UELMEN: YES, YOUR HONOR.

THE COURT: OKAY. LOOKING AT THE STATUTE -- (PAUSE) -- 21 U.S.C. 885, PAREN, D, PAREN --

PROFESSOR UELMEN: CORRECT.

THE COURT: -- IS A STATUTE THAT YOU BELIEVE WOULD REQUIRE A DISMISSAL OF THIS ACTION AS IT RELATES TO -- RELATES TO OAKLAND, NOT AS TO ANY OF THE OTHER CLUBS?

PROFESSOR UELMEN: CORRECT.

THE COURT: REALLY I THINK WHAT IS BEFORE ME NOW -- AND MY QUESTION -- I HAVE A COUPLE QUESTIONS, BUT ONE IS THIS: ASSUMING THAT IT DID APPLY TO THESE OFFICERS, IT WOULD EXEMPT THEM, OFFICERS BEING EMPLOYEES OF -- OF THE LOCAL GOVERNMENT, AND I -- BY THE WAY, IN TERMS OF THE REQUEST OF JUDICIAL NOTICE, I'M TAKING REQUEST FOR JUDICIAL NOTICE, AND THAT'S BEING ACCEPTED. I'LL HEAR FROM THE GOVERNMENT IF THEY HAVE ANY OBJECTION, BUT YOU SHOULD -- YOU SHOULD OPERATE FROM THE ASSUMPTION THAT THE RECORD IS COMPLETE IN TERMS OF WHAT'S BEEN OFFERED. OKAY.

PROFESSOR UELMEN: OKAY.

THE COURT: AS WELL AS AMICUS BRIEF WAS FILED BY THE CITY OF OAKLAND, AND I ENTERED AN ORDER ACCEPTING THAT. SO I CONSIDER THAT AS WELL. SO THE QUESTION IS WHETHER SINCE THE STATUTE SAYS THAT PEOPLE WHO ARE OFFICIALS ARE NOT LIABLE, EITHER, I GUESS, CIVILLY OR CRIMINALLY --

PROFESSOR UELMEN: THAT'S CORRECT.

THE COURT: -- IS THAT THE SAME THING AS SAYING THAT THEY CANNOT BE ENJOINED, THAT IS, THEY ARE NOT SUBJECT TO EQUITABLE RELIEF BY THE COURT?

AND THE THOUGHT I HAD IN MIND IS THIS: LET'S ASSUME YOU HAVE A SITUATION WHERE A PEACE OFFICER -- POLICE DEPARTMENT IS ADMINISTERING CHOKE HOLDS TO DEMONSTRATORS, AND THEY'RE BEING SUED. AND A -- A -- A DECLARATORY RELIEF ACTION IS SOUGHT, AND AN ORDER IS SOUGHT FROM THE COURT ENJOINING PEACE OFFICERS FROM ADMINISTERING THIS TYPE OF CHOKE HOLD.

SO THEY COME IN AND THEY SAY, "WELL, ON THE EVIDENCE BEFORE US, WE HAVE QUALIFIED IMMUNITY." THEY MAY HAVE QUALIFIED IMMUNITY. THEY MAY OR MAY NOT. BUT ASSUMING THAT THEY DID AND, THEREFORE, ARE NOT LIABLE FOR DAMAGES, BUT COULDN'T THE COURT IN THAT CONTEXT ISSUE EQUITABLE RELIEF AND ENJOIN THE PEACE OFFICERS FROM ADMINISTERING CHOKE HOLDS? AND IF IT'S TRUE THAT THEY COULD DO THAT, HOW IS THAT DIFFERENT FROM THIS SITUATION IN TERMS OF THE STATUTORY LANGUAGE?

SO THAT'S MY QUESTION.

PROFESSOR UELMEN: ALL RIGHT. I THINK I CAN ADDRESS THAT QUESTION DIRECTLY, YOUR HONOR.

THE AUTHORITY TO ISSUE AN INJUNCTION IN THIS CASE IS BASED ON SECTION 882 OF THE CONTROLLED SUBSTANCES ACT. AND WHAT IT GIVES IS THE COURT AUTHORITY TO ENJOIN VIOLATIONS OF THIS SUBCHAPTER.

THE IMMUNITY CLAUSE, SECTION 885, PROVIDES THAT "NO CIVIL OR CRIMINAL LIABILITY SHALL BE IMPOSED BY VIRTUE OF THIS SUBCHAPTER UPON ANY OFFICER WHO IS ENGAGED IN THE LAWFUL ENFORCEMENT OF A MUNICIPAL ORDINANCE." SO WE WOULD CONTEND

THAT THE INJUNCTION -- INDEED, THE PRELIMINARY INJUNCTION THAT HAS ALREADY BEEN ISSUED DOES IMPOSE CIVIL LIABILITY UPON THESE DEFENDANTS, AND THE IMMUNITY CLAUSE OF SECTION 885 EXCUSES THEM.

THE COURT: WELL, I DIDN'T SAY THEY COULD IMPOSE CIVIL LIABILITY. BUT MY QUESTION IS DIFFERENT, WHICH IS IN TERMS OF EQUITABLE RELIEF IN WHICH THERE'S NO CIVIL LIABILITY OR CRIMINAL LIABILITY, THAT I WANT TO IMPOSE EQUITABLE RELIEF, ARE YOU SAYING THAT I CAN'T IMPOSE -- I THINK THAT'S WHAT YOU HAVE TO SAY, I CAN'T IMPOSE EQUITABLE RELIEF. AND THEN HOW IS THAT DIFFERENT FROM A 1983 ACTION IN WHICH YOU CAN ISSUE AN INJUNCTION? IN A 1983 ACTION, A DEFENSE OF CIVIL LIABILITY MAY BE -- MAY BE A QUALIFIED IMMUNITY.

PROFESSOR UELMEN: WELL, 882 SAYS YOU CAN ENJOIN VIOLATIONS, AND THAT'S THE FORM THAT YOUR INJUNCTION HAS TAKEN, TO ENJOIN THIS DEFENDANT FROM UNLAWFULLY DISTRIBUTING MARIJUANA IN VIOLATION OF THE CONTROLLED SUBSTANCES ACT.

BUT THE EFFECT OF THE IMMUNITY CLAUSE IS TO SAY THAT THIS IS NOT A VIOLATION. THIS IS NOT A CRIMINAL OFFENSE FOR A DEFENDANT TO ENGAGE IN THIS CONDUCT IF HE IS ENFORCING A LAWFUL MUNICIPAL ORDER.

THE COURT: WELL, THE GOVERNMENT IS NOT HERE TODAY BECAUSE IT'S A CRIMINAL OFFENSE. THE GOVERNMENT IS HERE TODAY -- YOU OUGHT TO LAY THIS OUT RIGHT NOW. THIS IS A CIVIL CONTEMPT PROCEEDING -- OR WHAT WILL BE IF IT PROCEEDS A CIVIL

CONTEMPT PROCEEDING, AND IT'S CIVIL CONTEMPT -- FIRST OF ALL, THE GOVERNMENT HAS SOUGHT CIVIL CONTEMPT.

THE REMEDIES WHILE -- IF THEY WERE -- WHILE IT COULD BE BROADER, I PARTICULARLY WOULD NARROW THE REMEDIES TO THOSE REMEDIES THAT WOULD ONLY BE AVAILABLE IN THE CIVIL CONTEMPT PROCEEDING, NOTWITHSTANDING WHATEVER THE RE: POSSIBILITIES MAY BE. I WANT TO BE CLEAR AT THE OUTSET, IS THE RE: POSSIBILITIES IN THIS PROCEEDING WILL BE CIVIL IN NATURE.

PROFESSOR UELMEN: YES.

THE COURT: BUT I'M ASKING A DIFFERENT QUESTION; THAT IS, I UNDERSTAND THAT IF ONE WAS TO GO AFTER OFFICER X OR EMPLOYEE X OF THE OAKLAND CANNABIS CLUB AND SAY, "ALL RIGHT. YOU'RE GOING TO BE FINED $200 A DAY OR $200 TOTAL OR A DOLLAR A DAY" OR WHATEVER IT IS, OR A TOTAL FINE OF $30 -- YOU KNOW, WELL WITHIN THE PARAMETERS OF CIVIL, THEN YOUR ARGUMENT WOULD SAY, ALL RIGHT -- WELL WITHIN CIVIL CONTEMPT, YOUR ARGUMENT WOULD SAY, "LOOK, YOU CAN'T DO THAT BECAUSE WE HAVE NO LIABILITY."

BUT AN INJUNCTION IMPOSING EQUITABLE RELIEF, WHICH IS AN ORDER OF THE COURT, SAYING YOU CAN'T -- YOU CAN'T ENGAGE IN THIS CONDUCT -- YOU'RE SAYING THAT THIS STATUTE EXCUSES THESE PEOPLE FROM DOING THAT? OTHERWISE I WOULD THINK IN A LOT OF -- CAN'T THINK OF A LOT, BUT AT LEAST IN ANY NUMBER OF CIVIL RIGHTS ACTIONS WHERE YOU WANT THE FEDERAL GOVERNMENT TO MAKE SURE THAT INDIVIDUAL -- FOR EXAMPLE, INDIVIDUAL LAW ENFORCEMENT

OFFICER'S CONDUCT COMPORTS WITH FEDERAL LAW, NOT JUST STATE LAW OR A LOCALITY'S IDEA OF WHAT THE PROPER LAW IS, YOU'RE SAYING -- I THINK YOU'RE SAYING, "NO, YOU CAN'T DO THAT." "NO, YOU DON'T HAVE THE POWER TO DO IT."

PROFESSOR UELMEN: EXACTLY, YOUR HONOR. AND WE'RE SAYING THAT BECAUSE THE COURT'S POWER TO ISSUE THE INJUNCTION IS BASED UPON A STATUTE WHICH SAYS THE GOVERNMENT CAN SEEK INJUNCTIVE RELIEF TO PREVENT THE VIOLATION OF PROVISIONS OF THE CONTROLLED SUBSTANCES ACT. AND SECTION 885 SIMPLY SAYS NO CIVIL OR CRIMINAL LIABILITY SHALL BE IMPOSED IF YOU HAVE IMMUNITY. SO IPSO FACTO OUR CONDUCT CANNOT BE A VIOLATION OF THE ACT WHICH CAN BE ENJOINED.

THE COURT: AND YOU THINK -- BY THE WAY, THIS IS CARRYING TO THE SECOND ARGUMENT -- MAYBE THE FIRST ARGUMENT -- THAT A CITY MUNICIPALITY CAN DETERMINE WHAT CONDUCT COMES WITHIN THE ENFORCEMENT OF THE CONTROLLED SUBSTANCE ACTS AND OTHER NARCOTICS ACTS -- OTHER NARCOTICS --

PROFESSOR UELMEN: NOT QUITE, YOUR HONOR. OUR POSITION, OF COURSE, IS THAT THE IMMUNITY ONLY EXTENDS TO AN OFFICER OF THE STATE OR A POLITICAL SUBDIVISION WHO IS LAWFULLY ENGAGED IN THE ENFORCEMENT OF A MUNICIPAL ORDINANCE.

THE COURT: AND WHO MAKES THAT DETERMINATION?

PROFESSOR UELMEN: WELL, OBVIOUSLY THE COURT -- THIS COURT HAS TO MAKE THE DETERMINATION, BUT "LAWFULLY ENGAGED" MEANS IN COMPLIANCE WITH ALL LAW OTHER THAN THE CONTROLLED

SUBSTANCES ACT ITSELF.

THE COURT: OKAY. BUT I'VE ALREADY DECIDED -- MUCH TO YOUR DISPLEASURE, I'VE ALREADY DECIDED THAT THE FEDERAL LAW IN THIS AREA SUPERSEDES -- MAYBE NOT MUCH -- BUT IT -- CONTRARY TO POSITION IN --

PROFESSOR UELMEN: YES.

THE COURT: I'VE ALREADY DECIDED THAT THE FEDERAL LAW SUPERSEDES STATE LAW IN THIS REGARD AND I THINK CERTAINLY LOCAL LAW. AND, THEREFORE, HAVEN'T I ALREADY DECIDED THAT THESE PEOPLE NOTWITHSTANDING WHATEVER THE STATE DOES, MUNICIPALITY DOES, THAT IT'S NOT LAWFUL WITHIN --

PROFESSOR UELMEN: NO.

THE COURT: -- THE MEANING OF THE FEDERAL LAW?

PROFESSOR UELMEN: THAT'S ESSENTIALLY THE FIRST ARGUMENT THAT THE GOVERNMENT IS MAKING. AND IT'S A CIRCULAR ARGUMENT. IT'S A CLASSIC TAUTOLOGY. THEY ARE SAYING BECAUSE THE STATUTE SAYS YOU HAVE TO BE LAWFULLY ENGAGED IN ENFORCING THE ORDINANCE, THE COURT HAS ALREADY DETERMINED THAT YOU'RE NOT LAWFULLY ENGAGED BECAUSE YOU'RE VIOLATING THE CONTROLLED SUBSTANCES ACT.

FIRST OF ALL, YOUR HONOR DID NOT PURPORT TO DECIDE WHETHER DISTRIBUTION OF MARIJUANA BY A LOCAL GOVERNMENT AGENCY WOULD VIOLATE FEDERAL LAW. YOU TOOK CARE TO POINT OUT IN THE FIRST PARAGRAPH OF YOUR MEMORANDUM AND ORDER -- AND IF I MIGHT QUOTE, "THESE LAWSUITS, FOR EXAMPLE, DO NOT CHALLENGE THE

CONSTITUTIONALITY OF PROPOSITION 215, THE MEDICAL MARIJUANA INITIATIVE, AS A WHOLE; NOR DO THEY REFLECT A DECISION ON THE PART OF THE FEDERAL GOVERNMENT TO SEEK TO ENJOIN A LOCAL GOVERNMENT AGENCY FROM CARRYING OUT THE HUMANITARIAN MANDATE ENVISIONED BY THE CITIZENS OF THIS STATE WHEN THEY VOTED TO APPROVE THIS LAW."

NOW, THE FAILURE OF THE GOVERNMENT TO VOLUNTARILY DISMISS AT THIS POINT NOW REFLECTS A DECISION NOT PREVIOUSLY BEFORE THE COURT. "TO SEEK TO ENJOIN A LOCAL GOVERNMENT AGENCY FROM CARRYING OUT THE HUMANITARIAN MANDATE ENVISIONED BY THE CITIZENS OF THIS STATE."

BUT MORE IMPORTANT, THE GOVERNMENT SEEMS TO MISS THE WHOLE POINT OF SECTION 885(D) AND THAT IS THAT IT'S AN IMMUNITY CLAUSE. IT EXEMPTS A PARTY FROM CIVIL OR CRIMINAL LIABILITY UNDER THE FEDERAL CONTROLLED SUBSTANCES ACT. SO IT ASSUMES THAT THE CONDUCT OF THE OFFICER, OTHERWISE LAWFUL, IS IN VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT.

"LAWFULLY ENGAGED" CAN ONLY REFER TO LAWS OTHER THAN THE FEDERAL CONTROLLED SUBSTANCES ACT ITSELF; OTHERWISE, THE STATUTE WOULD BE MEANINGLESS. IT WOULD SAY IN EFFECT, IF YOU ARE IN FULL COMPLIANCE WITH THE FEDERAL CONTROLLED SUBSTANCES ACT, THEN CIVIL OR CRIMINAL LIABILITY WILL NOT BE IMPOSED UPON YOU FOR VIOLATING THE FEDERAL CONTROLLED SUBSTANCES ACT.

WELL, THANKS FOR NOTHING. IMMUNITY MEANS AN EXEMPTION FROM LIABILITY FOR VIOLATING THE LAW. SO TO LIMIT IMMUNITY TO

THOSE WHO ARE NOT IN VIOLATION OF THE LAW MAKES IMMUNITY ILLUSORY. IT WOULD ONLY BE AVAILABLE TO THOSE WHO HAVE NO NEED FOR IT.

SO, OBVIOUSLY, WHAT THIS STATUTE IS SAYING IS THAT IF YOU ARE OTHERWISE IN COMPLIANCE WITH THE LAW, AND YOU ARE ENFORCING A STATE LAW OR A LOCAL ORDINANCE, YOU HAVE IMMUNITY, AND CIVIL OR CRIMINAL LIABILITY CANNOT BE IMPOSED UPON YOU UNDER THE FEDERAL CONTROLLED SUBSTANCES ACT. THAT'S THE IMMUNITY THAT IS GRANTED BY -- BY 885.

NOW, THE GOVERNMENT'S SECOND ARGUMENT THAT OUR READING OF THE STATUTE PRODUCES ABSURD RESULTS IS KNOWN -- IS WHAT IS KNOWN IN LOGIC AS THE ARGUMENTUM AD HORRENDUM. THEY CONJURE UP VISIONS OF SAN FRANCISCO LEGALIZING HEROIN AND SAN JOSE OPENING CITY CRACK HOUSES AND LOS ANGELES DISTRIBUTING L.S.D. OR P.C.P. PERHAPS AS PART OF THE SCHOOL LUNCH PROGRAM.

(LAUGHTER.)

PROFESSOR UELMEN: NOW, THIS SIMPLY REFLECTS A VERY CALLOUS DISMISSAL OF THE PROFESSED PURPOSE OF PROPOSITION 215 AND THE OAKLAND ORDINANCE. WE'RE NOT DEALING HERE WITH A SUBVERSIVE EFFORT TO UNDERCUT THE GOVERNMENT'S DRUG LAW, NOR ARE WE DEALING WITH GOVERNMENTAL LUNACY. WE ARE CONFRONTED WITH A CAREFUL AND A GOOD-FAITH EFFORT TO IMPLEMENT THE WILL OF THE PEOPLE OF THE [SIC] CALIFORNIA CONSISTENT WITH FEDERAL LAW.

I THINK IT'S IMPORTANT FOR YOUR HONOR TO NOTE THAT IN THE ORDINANCE ITSELF, OAKLAND TAKES NOTE OF THIS IMMUNITY

CLAUSE. AND THEY STATE IN SECTION 1(D) "AN ADDITIONAL PURPOSE OF THIS CHAPTER IS TO PROVIDE IMMUNITY TO MEDICAL CANNABIS PROVIDER ASSOCIATIONS PURSUANT TO SECTION 885(D) OF TITLE 1 OF THE UNITED STATES CODE, WHICH PROVIDES THAT NO LIABILITY SHALL BE IMPOSED UNDER THE FEDERAL CONTROLLED SUBSTANCES ACT UPON ANY DULY AUTHORIZED OFFICER OF POLITICAL SUBDIVISION OF A STATE LAWFULLY ENGAGED IN THE ENFORCEMENT OF ANY MUNICIPAL ORDINANCE RELATING TO CONTROLLED SUBSTANCES."

SO WHAT OAKLAND IS TRYING TO DO HERE IS SAY WE RECOGNIZE THIS PROBLEM WITH THE FEDERAL LAW, AND WE WANT TO HARMONIZE OUR EFFORTS WITH THE FEDERAL LAW BY PRESENTING A MEANS OF ENFORCING THE MANDATE OF THE PEOPLE OF CALIFORNIA CONSISTENT WITH FEDERAL LAW.

THERE'S NO POPULAR MANDATE TO LEGALIZE HEROIN OR CRACK OR L.S.D. OR P.C.P., AND ANY EFFORTS BY INDIVIDUAL CITIES TO DO SO WOULD RUN AFOUL OF BOTH STATE AND FEDERAL LAW.

BUT THERE IS A POPULAR MANDATE IN OUR STATE LAW THAT RECOGNIZES THE RIGHT OF SERIOUSLY ILL CALIFORNIANS TO OBTAIN AND USE MARIJUANA FOR MEDICAL PURPOSES.

THE COURT: DOES THAT MAKE IT LAWFUL IN TERMS OF THE FEDERAL LAW? I MEAN, I UNDERSTAND THAT IT'S LAWFUL IN TERMS OF STATE LAW AND THAT 215 MADE IT VERY CLEAR THAT THAT'S THE LAW AND THAT'S THE WILL OF THE PEOPLE OF THIS STATE.

PROFESSOR UELMEN: YES.

THE COURT: BUT DOES THE "LAWFULLY" THAT'S IN THE

STATUTE THAT YOU'RE REFERRING TO REFER TO LAWFULLY AS A MATTER OF THE STATE LAW OR FEDERAL LAW? WHICH I THINK --

PROFESSOR UELMEN: IT HAS TO, YOUR HONOR, REFER TO LAWFULLY IN -- UNDER THE STATE AND THE LOCAL LAW, BECAUSE IT'S GIVING IMMUNITY UNDER THE FEDERAL LAW.

THE COURT: SO YOU SAY THAT IT'S RESTRICTED TO THAT? THAT'S WHAT --

PROFESSOR UELMEN: IT'S SAYING IF IT'S OTHERWISE LAWFUL, YOU HAVE IMMUNITY UNDER THE FEDERAL LAW EVEN IF IT VIOLATES THE FEDERAL LAW.

THE COURT: ANY AUTHORITY FOR THAT PROPOSITION?

PROFESSOR UELMEN: WELL, YOUR HONOR, THE BASIC MEANING OF IMMUNITY MEANS THAT YOU ARE EXCUSED FROM A VIOLATION OF THE LAW. WHAT VIOLATION ARE WE EXCUSED FROM IF WE'RE SAYING THAT WE HAVE TO BE IN FULL COMPLIANCE WITH THE FEDERAL LAW? WE'RE NOT GETTING ANYTHING.

THE COURT: WELL --

PROFESSOR UELMEN: I THINK IT'S IMPORTANT, AND THE GOVERNMENT OVERLOOKS THIS COMPLETELY IN THEIR ARGUMENT, WITH RESPECT TO THE EFFECT OF 885 TO SEPARATE THE IMMUNITY GRANTED TO FEDERAL OFFICERS AND THE IMMUNITY GRANTED TO STATE OFFICERS.

THEY ARE TWO DIFFERENT GRANTS OF IMMUNITY AND THEY ARE VERY DIFFERENT IN THEIR OPERATION; THAT IS, THE IMMUNITY GRANTED TO THE STATE OFFICERS IS MUCH BROADER THAN THE IMMUNITY GRANTED TO FEDERAL OFFICERS.

THE STATUTE SAYS, "EXCEPT AS PROVIDED IN SECTIONS 2234 AND -35, NO CIVIL OR CRIMINAL LIABILITY SHALL BE IMPOSED BY VIRTUE OF THIS SUBCHAPTER UPON ANY DULY AUTHORIZED FEDERAL OFFICER LAWFULLY ENGAGED IN THE ENFORCEMENT OF THIS SUBCHAPTER." SO WITH RESPECT TO FEDERAL OFFICERS, WE'RE SAYING YOU ONLY GET IMMUNITY FOR YOUR ACTIVITY INVOLVED IN THE ENFORCEMENT OF THE FEDERAL CONTROLLED SUBSTANCES ACT.

BUT AS TO STATE OFFICERS, THE STATUTE SAYS, "NO CIVIL OR CRIMINAL LIABILITY SHALL BE IMPOSED UPON ANY DULY AUTHORIZED OFFICER OF ANY STATE, TERRITORY, POLITICAL SUBDIVISION WHO SHALL BE LAWFULLY ENGAGED IN THE ENFORCEMENT OF ANY LAW OR MUNICIPAL ORDINANCE RELATING TO CONTROLLED SUBSTANCES."

SO THE STATUTE WITH RESPECT TO LOCAL OFFICERS IS SAYING, YOU ARE IMMUNE WHEN YOU ARE ENFORCING A STATE LAW OR A LOCAL ORDINANCE. WHAT ARE YOU IMMUNE FROM? YOU ARE IMMUNE FROM CIVIL OR CRIMINAL LIABILITY IMPOSED BY VIRTUE OF THIS SUBCHAPTER.

WELL, THIS SUBCHAPTER IS THE FEDERAL CONTROLLED SUBSTANCES ACT. SO WHAT WE'RE SAYING IS IF YOU ARE LAWFULLY ENGAGED IN THE ENFORCEMENT OF A STATE LAW OR A LOCAL ORDINANCE, YOU HAVE IMMUNITY FROM CIVIL OR CRIMINAL LIABILITY UNDER THE FEDERAL CONTROLLED SUBSTANCES ACT.

THE COURT: SO IF THE STATE DECIDES TO LEGALIZE SOME SUBSTANCE FOR WHATEVER REASON -- FOR WHATEVER REASON THAT THE FEDERAL GOVERNMENT DOESN'T LEGALIZE, UNDER THIS PROPOSITION, IF

IT DISTRIBUTED THAT DRUG, IT WOULDN'T BE SUBJECT TO ANY CIVIL OR CRIMINAL LIABILITY.

PROFESSOR UELMEN: THAT'S CORRECT IF IT WAS DONE DIRECTLY BY THE STATE OR IF IT WAS DONE BY ANY OFFICER OF A STATE OR A SUBDIVISION THEREOF. AS LONG AS THEIR CONDUCT IS LAWFUL APART FROM THE FEDERAL CONTROLLED SUBSTANCES ACT ITSELF, THIS STATUTE SAYS, "YOU ARE IMMUNE UNDER THE FEDERAL CONTROLLED SUBSTANCES ACT."

NOW, THE GOVERNMENT'S ARGUMENT THAT THIS IS AN ABSURD RESULT SIMPLY REFLECTS THEIR JUDGMENT THAT THIS IS A RESULT THEY DON'T LIKE. OR THIS IS A RESULT THEY DIDN'T ANTICIPATE. OR PERHAPS THIS IS A RESULT THAT CONGRESS DIDN'T ANTICIPATE WHEN THEY ENACTED SECTION 885(D). THAT DOESN'T, HOWEVER, MAKE IT AN ABSURD RESULT.

THE GOVERNMENT APPEARS TO BE IN PRECISELY THE SAME POSITION IN WHICH THE PENNSYLVANIA DEPARTMENT OF CORRECTIONS FOUND ITSELF DURING THE PAST TERM OF THE UNITED STATES SUPREME COURT IN PENNSYLVANIA DEPARTMENT OF CORRECTIONS VS. YESKEY. THERE THE STATE ARGUED CONGRESS COULD NOT HAVE INTENDED TO INCLUDE PRISONS IN THE AMERICAN WITH DISABILITIES ACT TO GIVE RIGHTS TO DISABLED PRISONERS WHO WERE CONFINED IN CORRECTIONAL INSTITUTIONS. THAT WOULD BE ABSURD.

AND JUSTICE SCALIA, SPEAKING FOR A UNANIMOUS COURT RESPONDED, QUOTE, "AS WE HAVE SAID BEFORE, THE FACT THAT A STATUTE CAN BE APPLIED IN SITUATIONS NOT EXPRESSLY ANTICIPATED

BY CONGRESS DOES NOT DEMONSTRATE AMBIGUITY. IT DEMONSTRATES BREADTH."

AND THAT'S PRECISELY OUR POSITION. THIS IS A VERY BROAD GRANT OF IMMUNITY. THE GOVERNMENT'S ARGUMENT THAT THIS STATUTE HAS TO BE CONSTRUED TO ONLY GIVE IMMUNITY TO POLICE OFFICERS WHO ARE ENGAGED IN SOME SORT OF PUNITIVE VENTURE VIOLATES THE CARDINAL RULE OF STATUTORY CONSTRUCTION, AND THAT IS, DON'T REWRITE THE STATUTE. WE MUST PRESUME THAT CONGRESS CHOOSES ITS WORDS CAREFULLY AND THAT IT SAYS PRECISELY WHAT IT MEANS TO SAY.

WHAT THE GOVERNMENT IS INVITING THE COURT TO DO HERE IS REWRITE THIS STATUTE. THEY'RE SAYING, "THE STATUTE REALLY SHOULD READ, 'NO CIVIL OR CRIMINAL LIABILITY SHALL BE IMPOSED BY VIRTUE OF THIS SUBCHAPTER UPON ANY DULY AUTHORIZED POLICE OFFICER OF ANY POLITICAL SUBDIVISION WHO SHALL BE LAWFULLY ENGAGED IN THE ENFORCEMENT OF ANY MUNICIPAL ORDINANCE PROHIBITING THE USE OF CONTROLLED SUBSTANCES.'"

WELL, THE STATUTE DOESN'T SAY, "POLICE OFFICER." IT SAYS, "ANY DULY AUTHORIZED OFFICER." THE STATUTE DOES NOT SAY, "THE ORDINANCE MUST PROHIBIT THE USE OF CONTROLLED SUBSTANCES." IT SAYS, "ANY MUNICIPAL ORDINANCE RELATING TO CONTROLLED SUBSTANCES." THERE IS NO AMBIGUITY ABOUT THESE TERMS.

I'D LIKE TO BRIEFLY FOCUS ON TWO PARTICULAR CLAUSES THAT THE GOVERNMENT HAS SEIZED ON TO BOLSTER THEIR ARGUMENT THAT ONLY POLICE OFFICERS CAN CLAIM THE IMMUNITY CONFERRED BY

SECTION 885(D).

THE FIRST CLAUSE THEY POINT TO IS THE INITIAL EXCEPTION WHERE THE STATUTE SAYS, "EXCEPT AS PROVIDED IN SECTIONS 2234 AND 2235 OF TITLE 18, NO CIVIL OR CRIMINAL LIABILITY SHALL BE IMPOSED." AND THOSE TWO SECTIONS BOTH RELATE TO ABUSE OF THE SEARCH WARRANT PROCESS. AND THEY ARGUE SINCE SEARCH WARRANTS ARE ABUSED BY POLICE OFFICERS, THE IMMUNITY CONFERRED UPON OFFICERS MUST BE LIMITED TO POLICE OFFICERS.

WELL, PART OF THE GOVERNMENT'S PROBLEM ARISES FROM THIS FAILURE TO SEPARATE THE IMMUNITY CONFERRED UPON FEDERAL OFFICERS FROM THE IMMUNITY CONFERRED UPON STATE OFFICERS, BECAUSE THESE EXCEPTIONS DON'T APPLY TO STATE OFFICERS AT ALL. THEY ONLY APPLY TO FEDERAL OFFICERS SINCE ONLY FEDERAL OFFICERS ARE LIABLE AND CAN BE PROSECUTED CRIMINALLY UNDER SECTIONS 2234 AND 2235 OF TITLE 18 OF THE UNITED STATES CODE.

SO FOR FEDERAL OFFICERS, IMMUNITY IS RECOGNIZED FOR THOSE LAWFULLY ENGAGED IN THE ENFORCEMENT OF THIS SUBCHAPTER, THAT IS, THE FEDERAL CONTROLLED SUBSTANCES ACT. BUT FOR STATE OFFICERS, IT EXTENDS TO THOSE ENGAGED IN THE ENFORCEMENT OF ANY LAW OR MUNICIPAL ORDINANCE.

NOW, WHY -- WHY DOES THIS EXCEPTION EXIST? IT EXISTS BECAUSE FEDERAL OFFICERS MIGHT RUN AFOUL OF THE FEDERAL CONTROLLED SUBSTANCES ACT WHILE THEY ARE EXECUTING A SEARCH WARRANT. THE ANSWER, I THINK, LIES IN SECTION 879 OF THE

FEDERAL CONTROLLED SUBSTANCES ACT, WHICH ALLOWS THE ISSUANCE OF SEARCH WARRANTS TO BE EXECUTED AT ANY TIME OF DAY OR NIGHT.

NOW, IN ITS ORIGINAL FORM IN 1970 WHEN THE FEDERAL CONTROLLED SUBSTANCES ACT WAS ENACTED, THIS ALSO INCLUDED AUTHORIZATION FOR FEDERAL AGENTS TO EXECUTE NO-KNOCK SEARCH WARRANTS WHERE THEY DID NOT HAVE TO ANNOUNCE THEIR AUTHORITY AND PURPOSE. AND THAT PORTION WAS REPEALED AFTER FEDERAL AGENTS WERE ACCIDENTALLY KILLED EXECUTING NO-KNOCK WARRANTS IN THE FAMOUS RAIDS IN COLLINSVILLE, ILLINOIS. SO CONGRESS REPEALED THAT PORTION OF SECTION 879.

BUT THE PURPOSE OF THESE TWO EXCEPTIONS AT THE BEGINNING OF THE IMMUNITY CLAUSE WAS TO ENSURE THAT THE IMMUNITY CREATED BY SECTION 885(D) FOR FEDERAL OFFICERS COULD NOT BE ASSERTED ON BEHALF OF FEDERAL OFFICERS WHO MALICIOUSLY PROCURED A NO-KNOCK WARRANT OR WHO WILLFULLY EXCEEDED THEIR AUTHORITY WHILE EXECUTING IT. BUT EVEN THE IMMUNITY FOR FEDERAL OFFICERS, WE WOULD CONTEND, IS NOT LIMITED TO THOSE WHO CARRY BADGES AND GUNS. MANY OTHER FEDERAL ADMINISTRATIVE OFFICERS ARE GIVEN RESPONSIBILITY FOR ENFORCING VARIOUS PROVISIONS OF THE CONTROLLED SUBSTANCES ACT.

ONE MUST WONDER, FOR EXAMPLE, IF THE ATTORNEY GENERAL OR THE SECRETARY OF STATE OR THE SECRETARY OF HEALTH AND WELFARE, ALL OF WHOM ARE CHARGED WITH ENFORCING VARIOUS PROVISIONS OF SECTION 811 OF THE ACT, HAVE AUTHORIZED THE GOVERNMENT ATTORNEYS IN THIS CASE TO GIVE AWAY THEIR IMMUNITY.

OR PERHAPS THE NEXT TIME THAT U.S. POSTAL SERVICE EMPLOYEES WHO ARE GIVEN THE RESPONSIBILITY TO DESTROY SEIZED DRUGS UNDER SECTION 881 ARE SUED FOR WRONGFUL CONVERSION OF SOMEONE'S PROPERTY, IT CAN BE ARGUED THAT THE GOVERNMENT IS ESTOPPED FROM ASSERTING THEIR IMMUNITY BECAUSE IN THIS CASE, THEY INSISTED THEY ARE NOT FEDERAL OFFICERS WITHIN THE MEANING OF SECTION 885(D) BECAUSE THEY ARE NOT POLICE OFFICERS.

IN ANY EVENT, THE EXCEPTION FOR FEDERAL OFFICERS DOES NOT IN ANY WAY LIMIT THE BREADTH OF THE IMMUNITY CONFERRED UPON STATE AND LOCAL OFFICERS.

THE BREADTH OF THE IMMUNITY CONFERRED ON STATE AND LOCAL OFFICERS REALLY FLOWS FROM THE LAST CLAUSE OF THE STATUTE BY SAYING THEY ARE IMMUNE AS LONG AS THEY ARE LAWFULLY ENGAGED IN THE ENFORCEMENT OF ANY LAW OR MUNICIPAL ORDINANCE RELATING TO CONTROLLED SUBSTANCES.

NOW, THE SECOND CLAUSE THAT THE GOVERNMENT SEIZES ON IS THE DEFINITION OF "LAW ENFORCEMENT OFFICER" CONTAINED IN SECTION 848(E)(2), WHICH THEY REFER TO AS A SISTER PROVISION OF SECTION 885(D).

WELL, THE FIRST REQUIREMENT OF A SISTER IS THAT SHE SHARE THE SAME PARENTAGE. SECTION 885 IMMUNITY, HOWEVER, WAS A CHILD OF THE 91ST CONGRESS WHICH ENACTED THE FEDERAL CONTROLLED SUBSTANCES ACT. IT WAS PART OF THE ORIGINAL ACT. SECTION 848(E), HOWEVER, IS PART OF A 1988 AMENDMENT ADDING A DEATH PENALTY TO THE ACT ADOPTED BY THE 100TH CONGRESS 18 YEARS

LATER. SO RATHER THAN A SISTER, SHE APPEARS TO BE A DISTANT COUSIN.

IN ANY EVENT, THE ABILITY OF CONGRESS IN SECTION 848(E) TO CAREFULLY DEFINE "LAW ENFORCEMENT OFFICER" SUGGESTS THAT CONGRESS WELL KNOWS THE DIFFERENCE BETWEEN SAYING "OFFICER" AND SAYING "LAW ENFORCEMENT OFFICER," AND THAT IF CONGRESS HAD MEANT TO LIMIT 885 IMMUNITY TO LAW ENFORCEMENT OFFICERS AS DEFINED IN 848(E), THEY WOULD HAVE SAID IN SECTION 885 "ANY LAW ENFORCEMENT OFFICER" RATHER THAN SIMPLY "ANY OFFICER."

BLACK'S LAW DICTIONARY DEFINES "OFFICER" TO INCLUDE ANY PERSON HOLDING AN OFFICE OF TRUST IN A GOVERNMENT OR OTHER INSTITUTION OR ORGANIZATION.

AND BLACK'S DEFINES "ENFORCEMENT" TO BE THE ACT OF PUTTING SOMETHING SUCH AS A LAW INTO EFFECT, THE CARRYING OUT OF A MANDATE OR COMMAND.

SO TO LIMIT THE CONGRESSIONAL LANGUAGE "OFFICER ENGAGED IN ENFORCEMENT OF ANY LAW OR MUNICIPAL ORDINANCE" TO "POLICE OFFICERS ENFORCING PUNITIVE LAWS" IS A DISTORTION OF THE PLAIN MEANING OF UNAMBIGUOUS TERMS.

BUT EVEN UNDER THE CRABBED LIMITATION OF THE WORD "ENFORCEMENT" URGED BY THE GOVERNMENT, THE DEFENDANTS WOULD FULLY QUALIFY BECAUSE THEY ARE CHARGED UNDER THIS MUNICIPAL ORDINANCE WITH THE RESPONSIBILITY OF ENFORCING THE MANDATE OF THE CITY COUNCIL TO ENFORCE THE RIGHTS OF SERIOUSLY ILL

CALIFORNIANS TO OBTAIN AND USE MEDICAL MARIJUANA.

NOW, ENFORCING THAT RIGHT REQUIRES ENSURING NOT ONLY THAT THOSE WHO QUALIFY FOR MEDICAL MARIJUANA ARE ADMITTED TO MEMBERSHIP, BUT THAT THOSE WHO DON'T QUALIFY ARE EXCLUDED SO THAT THE ILLICIT USE OF DRUGS IS ALSO PREVENTED BY THEIR ENFORCEMENT ACTIVITY.

THE COURT: YOU MEAN "ILLICIT" FROM THE STATE POINT OF VIEW?

PROFESSOR UELMEN: YES.

THE COURT: ALL RIGHT.

PROFESSOR UELMEN: IN TERMS OF THOSE WHO DO NOT QUALIFY UNDER PROPOSITION 215.

NOW, THAT'S -- HOWEVER YOU LOOK AT IT, THAT IS ENFORCEMENT ACTIVITY. THE ENFORCEMENT OF THE LAW IMPLICATES BOTH BENEFICENCE AND PUNISHMENT, A SUBTLETY THAT SEEMS TO HAVE ESCAPED THE GOVERNMENT'S NOTICE. IF THE TERMS OF 885(D) ARE GIVEN THEIR PLAIN ORDINARY MEANING JUST AS THEY MUST, THERE CAN BE LITTLE DOUBT OF THEIR APPLICATION TO THE DEFENDANT OAKLAND CANNABIS BUYERS' CLUB.

THE SISTER CLAUSE THAT WE WOULD URGE THE COURT TO LOOK AT IS A TRUE SISTER OF SECTION 885, AND THAT'S SECTION 903. YOUR HONOR'S QUITE FAMILIAR WITH IT. YOU QUOTED IT IN YOUR ORIGINAL OPINION. OAKLAND SPECIFICALLY REFERS TO SECTION 885(D) IN THE ORDINANCE, AND THAT CONFIRMS THAT WHAT'S GOING ON HERE WAS NOT ENVISIONED AS CREATING ANY CONFLICT OR A

CONTRADICTION WITH FEDERAL LAW.

TO THE CONTRARY, IT IS A CONSCIOUS EFFORT TO HARMONIZE THE OBLIGATIONS OF THE CITY COUNCIL TO EXERCISE THEIR POLICE POWERS TO PROTECT THE CITIZENS OF OAKLAND WITH THE APPLICABLE PROVISIONS OF FEDERAL LAW.

AND SECTION 903, YOUR HONOR WILL RECALL, OBLIGATES THE COURT TO UPHOLD THE OAKLAND ORDINANCE UNLESS IT CANNOT CONSISTENTLY STAND TOGETHER WITH THE FEDERAL CONTROLLED SUBSTANCES.

THE COURT: WELL, THAT'S THE ISSUE. I MEAN, THAT'S AN ISSUE, ISN'T IT? AND HAVEN'T I ALREADY FOUND THAT TO BE THE CASE?

PROFESSOR UELMEN: NO, YOU HAVEN'T. NO, YOU HAVEN'T. WHAT YOU HAVE FOUND IS THAT THE -- THE FEDERAL CONTROLLED SUBSTANCES ACT PROHIBITS THE DISTRIBUTION OF MARIJUANA.

THE COURT: WELL --

PROFESSOR UELMEN: OKAY?

THE COURT: BY ANYONE. AND I THINK WHAT I SAID AND YOU READ IT -- I SAID THAT THE GOVERNMENT HASN'T CHOSEN -- BECAUSE I THINK IT'S A POLITICAL QUESTION AS DISTINCT FROM A LEGAL QUESTION -- HASN'T CHOSEN AT THAT POINT WHETHER OR NOT IF A MUNICIPALITY DECIDED THAT IT WISHED TO UNDER CERTAIN CIRCUMSTANCES COMPORT WITH THE MANDATE OF 215 -- WHETHER THEN THE GOVERNMENT -- THE UNITED STATES GOVERNMENT WOULD DECIDE TO PROSECUTE OR TO ATTEMPT TO ENJOIN THAT.

PROFESSOR UELMEN: PERHAPS, YOUR HONOR --

THE COURT: THAT WASN'T BEFORE ME.

PROFESSOR UELMEN: PERHAPS, YOUR HONOR --

THE COURT: I THINK YOU'RE RIGHT. I THINK MAYBE NOW IT IS IN THE SENSE THAT THE GOVERNMENT -- ACCEPTING WHAT YOU'RE SAYING IS THAT THE GOVERNMENT HAS ELECTED NOTWITHSTANDING THAT, AT LEAST IN THE CONTEXT OF THE OAKLAND CANNABIS CLUB MATTER, TO PROHIBIT -- TO SEEK A PROHIBITION -- OR TO ENFORCE A PROHIBITION MIGHT BE A BETTER WAY OF PUTTING IT -- I THINK ENFORCE A PROHIBITION AGAINST THE DISTRIBUTION OF MARIJUANA FOR THAT PURPOSE.

SO I THINK THAT THAT ISSUE, THE ISSUE OF WHETHER IT'S ILLEGAL, WAS DECIDED, AT LEAST FROM A PRELIMINARY POINT OF VIEW, AND THAT WHAT WASN'T DECIDED WAS WHETHER THE GOVERNMENT, UNITED STATES GOVERNMENT, DECIDED TO GO AGAINST IT.

PROFESSOR UELMEN: WELL, OUR --

THE COURT: -- HAS BEEN DECIDED.

PROFESSOR UELMEN: OUR POSITION, YOUR HONOR, QUITE SIMPLY -- MAYBE THIS IS A POLITICAL QUESTION, BUT IT'S A POLITICAL QUESTION THAT WAS DECIDED BY CONGRESS IN 1970 WHEN THEY ADOPTED THE ACT.

THE COURT: WELL, LET ME TELL YOU, WE'RE NOT THERE YET, AND MAYBE WE OUGHT TO MOVE AHEAD BECAUSE I -- YOU KNOW, WHILE I APPRECIATE YOUR APPROACH HERE AND WHILE I THINK IT'S CREATIVE, IT'S NOT PERSUASIVE, AT LEAST NOT TO ME, IN TERMS OF

WHETHER OR NOT THESE PEOPLE ARE IMMUNIZED UNDER FEDERAL LAW. I DON'T BELIEVE THAT THEY ARE.

AND I DON'T WANT TO PROLONG THAT DISCUSSION FOR THE REASONS THAT I'VE STATED, THAT I DON'T THINK IT'S -- I THINK YOU HAVE TO BE LAWFULLY ENGAGED -- LAWFULLY FROM A FEDERAL POINT OF VIEW, ENGAGED IN THIS PRACTICE OF ENFORCING THE LAW. AND I DON'T THINK THAT FROM A FEDERAL POINT OF VIEW, THE DISTRIBUTION OF MARIJUANA COMPORTING WITH STATE REQUIREMENTS BUT NOT WITH FEDERAL REQUIREMENTS, BECAUSE IT'S A SCHEDULE I DRUG AND NOT A SCHEDULE II DRUG OR A SCHEDULE III DRUG -- COMPORTS WITH THOSE REQUIREMENTS.

AND ALSO I MUST SAY I'M CONCERNED IN THE CONTEXT OF THIS CASE OF WHETHER OR NOT A COURT WOULD HAVE THE POWER TO ISSUE EQUITABLE RELIEF BECAUSE I UNDERSTAND YOUR ARGUMENT -- YOUR ARGUMENT TO BE NO, I WOULDN'T. AND I THINK THAT IN THE CONTEXT, CERTAINLY, OF 1983 ACTIONS -- THERE ARE VERY FEW CASES UNDER THIS. I MEAN, I'VE LOOKED AT ALL FIVE CASES, AND THEY'RE NOT AT ALL HELPFUL. I'VE ALSO LOOKED AT THE LEGISLATIVE HISTORY. I CAN'T FIND ANYTHING THAT'S HELPFUL ONE WAY OR THE OTHER ON THE ISSUE.

SO, YOU KNOW, I'M HAVING A HARD TIME ACCEPTING THE ARGUMENT THAT SIMPLY A FEDERAL COURT HAS NO EQUITABLE POWERS TO ENFORCE THIS INJUNCTION IN THE CONTEXT OF THE CONTROLLED SUBSTANCES ACT, WHICH ABSOLVES -- ARGUE -- ACCEPTING YOUR ARGUMENT THAT THESE PEOPLE ARE ABSOLVED WITH CRIMINAL -- WHICH

WE'RE NOT CONCERNED WITH HERE -- CIVIL, WHICH WE MAY OR MAY NOT BE CONCERNED WITH HERE IN TERMS OF LIABILITY THAT I WAS LOOKING AT IT IN TERMS OF EQUITABLE POWERS OF THE COURT, WHETHER I COULD ENJOIN A -- AN OFFICER, A STATE OFFICER DULY AUTHORIZED, ACTING IN ACCORDANCE WITH THE STATE LAW, ACTING IN ACCORDANCE WITH THE ORDINANCE, WOULD I HAVE ANY POWER TO ENJOIN HIM? I UNDERSTAND YOUR ARGUMENT IS NO, I DON'T BECAUSE OF THIS STATUTE.

I HAVE A HARD TIME ACCEPTING THAT. AND SO I'D SORT OF LIKE TO MOVE ON, BECAUSE I THINK THAT WHEN YOU START TO TALK ABOUT THE REASONABLENESS OF THE RESCHEDULING AND WHERE DO WE GO FROM HERE, THERE'S SOME VERY SERIOUS QUESTIONS THAT I WANT TO GET EVERYBODY'S OPINION ON TO SEE HOW WE SHOULD PROCEED HERE, AND I APPRECIATE YOUR ARGUMENT, PROFESSOR UELMEN, AND IT WAS ONE THAT I HAD CERTAINLY NOT THOUGHT ABOUT AT THE TIME THAT I ISSUED THE PRELIMINARY INJUNCTION.

PROFESSOR UELMEN: WELL, I DON'T BELIEVE YOUR HONOR WOULD HAVE ISSUED AN INJUNCTION IF WE HAD APPEARED BEFORE YOU INITIALLY AS OFFICERS OF THE CITY OF OAKLAND. AND -- AND TO SAY THAT -- THAT THE COURT SHOULD STILL HAVE EQUITABLE POWER EVEN THOUGH THAT EQUITABLE POWER CAN'T BE ENFORCED BECAUSE YOU CAN'T IMPOSE CIVIL OR CRIMINAL LIABILITY ON THE DEFENDANTS, THEN THE EQUITABLE POWER IS MEANINGLESS IN THE FIRST PLACE.

AND I -- I MUST SAY, YOUR HONOR, THAT YOUR INTERPRETATION OF 885(D) MAKES IT MEANINGLESS, THAT THERE IS NO

IMMUNITY CONFERRED UNDER THIS STATUTE IF WE SAY YOU HAVE TO BE IN COMPLIANCE WITH FEDERAL LAW. THEN WHAT ARE WE IMMUNIZING THE DEFENDANTS FROM? THAT'S THE WHOLE PURPOSE OF 885(D), TO GIVE THEM IMMUNITY FROM CIVIL OR CRIMINAL LIABILITY IMPOSED BY VIRTUE OF THIS SUBCHAPTER.

THE COURT: WELL, LET ME HEAR FROM THE GOVERNMENT JUST ON THAT LAST THING.

MR. ANDERSON: GOOD AFTERNOON, YOUR HONOR. DAVID ANDERSON OF THE DEPARTMENT OF JUSTICE FOR THE UNITED STATES. I'M GOING TO BE DISCUSSING THE MOTION TO DISMISS. MR. QUINLIVAN IS GOING TO BE HANDLING THE OTHER ISSUES, BUT LET ME --

THE COURT: I'D LIKE YOU TO ADDRESS JUST THE LAST POINT RAISED BY PROFESSOR UELMEN, THE ISSUE OF WHETHER OR NOT THIS STATUTE -- BY NOT APPLYING THIS STATUTE TO OAKLAND OFFICERS, DULY AUTHORIZED OAKLAND OFFICERS, RENDERS THE STATUTE NULL. AND THAT'S BASICALLY HIS ARGUMENT, AS I UNDERSTAND IT.

MR. ANDERSON: WELL, I THINK THE ANSWER IS OF COURSE NOT, FOR SEVERAL REASONS. ONE, EVEN TAKING PROFESSOR UELMEN'S ARGUMENTS ON ITS OWN TERMS, THAT WHAT THE CLUB IS DOING -- WHATEVER YOU CALL THESE PEOPLE WHO ARE RUNNING IT -- IS NOT LAWFUL UNDER STATE LAW.

WE KNOW FROM THE PEOPLE VS. PERON CASE THAT PROPOSITION 215 DID NOT LEGALIZE DISTRIBUTION OF MARIJUANA. IT SIMPLY LEGALIZED FOR STATE LAW PURPOSES POSSESSION OR

CULTIVATION BY A PATIENT OR A PRIMARY CAREGIVER.

THE COURT: WELL, WAIT A MINUTE. ARE YOU SAYING -- YOU'RE SAYING -- IF THAT'S THE ARGUMENT -- THAT'S THE GOVERNMENT'S ARGUMENT? I BETTER HAVE A HEARING ON WHETHER OR NOT THEY ARE IN COMPLIANCE WITH STATE LAW.

I MEAN, YOU KNOW, THERE'S -- IT'S NOT CLEAR -- IT'S CERTAINLY NOT CLEAR ON THE RECORD BEFORE ME THAT THEY'RE NOT IN COMPLIANCE WITH STATE LAW. THAT'S NUMBER ONE. AND NUMBER TWO IS AN ARGUMENT CAN BE MADE AND ONE WAS MADE IN THE DISSENTING OPINION WHICH WASN'T ACTUALLY -- I MEAN, THE ARGUMENT WAS IN THE STATE COURT PROCEEDING -- THAT IT DOESN'T MAKE ANY SENSE TO SAY, WELL, THE INDIVIDUAL WHO IS USING THE MARIJUANA FOR MEDICINAL PURPOSES, THAT PERSON IS EXEMPTED, BUT THE PERSON WHO WALKS DOWN THE HALL -- BECAUSE MAYBE THE PERSON'S BEDRIDDEN OR MAYBE -- MAYBE HAS MULTIPLE SCLEROSIS OR CAN'T DEAL WITH THE DRUG ITSELF, THAT THAT PERSON WOULDN'T BE, YOU KNOW, EXEMPT.

I MEAN, THE DISSENT RAISED THAT ARGUMENT. I WOULD SAY THAT THAT HAS A CERTAIN -- CERTAINLY HAS A LOGICAL APPEAL, BUT IF YOUR ARGUMENT IS THAT, GEE, THESE PEOPLE AREN'T IN COMPLIANCE WITH STATE LAW, AND THAT'S WHY THE GOVERNMENT THINKS THE -- THE STATUTE DOESN'T APPLY, THEN I -- I'LL HOLD A HEARING ON THAT ISSUE. BUT I DIDN'T THINK THAT WAS THE GOVERNMENT'S MAIN ARGUMENT, IS IT?

MR. ANDERSON: THAT IS NOT OUR MAIN ARGUMENT. I'M JUST --

THE COURT: WELL, WHY DON'T YOU GIVE ME YOUR MAIN ARGUMENT.

MR. ANDERSON: OUR MAIN ARGUMENT IS --

THE COURT: IT'S NOW 3:30 --

MR. ANDERSON: I'LL TRY TO BE VERY BRIEF. BUT OUR MAIN ARGUMENT IS THAT THIS STATUTE DOES NOT AT ALL MEAN WHAT THE DEFENDANTS SAY IT MEANS.

IT'S PRETTY OBVIOUS WHAT CONGRESS WAS GETTING AT IN SECTION 885(D). CONGRESS UNDERSTOOD THAT THE ENFORCEMENT OF DRUG LAWS, BOTH STATE AND FEDERAL, OFTEN HAS TO BE DONE THROUGH UNDERCOVER POLICE WORK; THAT IS, UNDERCOVER OFFICERS PURCHASE AND SELL MARIJUANA AND OTHER DRUGS IN ORDER TO CATCH OFFENDERS.

THAT -- THAT ACTIVITY, IF -- IF YOU READ THE WORDS OF THE CONTROLLED SUBSTANCES ACT LITERALLY MIGHT VIOLATE, SO CONGRESS WANTED TO ENCOURAGE THAT KIND OF ENFORCEMENT SO IT IMMUNIZED THOSE POLICE-TYPE OFFICIALS WHO WERE ENGAGED IN THE ACTIVITY. THAT'S WHAT THE STATUTE'S ABOUT. NO MORE, NO LESS.

AND THAT'S WHY WE SAY THAT THE DEFENDANTS' INTERPRETATION IS ABSURD. THE DESIGN OF THE STATUTE IS THAT CONGRESS SAID MARIJUANA HAS NO MEDICAL VALUE, AND IT SET UP THIS -- THIS EXHAUSTIVE ADMINISTRATIVE PROCESS TO CHANGE ITS SCHEDULING.

AGAINST THAT BACKGROUND, IT WOULD BE PERVERSE TO TREAT 885(D) AS CREATING THIS MASSIVE LOOPHOLE THAT ANY MUNICIPALITY IN THE UNITED STATES COULD WALK THROUGH IF IT WANTED TO

LEGALIZE SOME CONTROLLED SUBSTANCE, WHETHER FOR MEDICINAL PURPOSE OR SOME OTHER PURPOSE. AND IT WOULDN'T BE FOR STATE LAW PURPOSES. THEY WOULD BE LEGALIZING IT FOR FEDERAL LAW PURPOSES, TOO. SO WE JUST SEE THAT --

THE COURT: WELL, ISN'T THAT THE ARGUMENT? I MEAN, THAT'S THE INTERESTING ARGUMENT. THE ARGUMENT IS THAT ACTUALLY WHAT IT IS DOING IN INTENT OR EFFECT, IT ACTUALLY LEGALIZES IT FOR FEDERAL PURPOSES AS TO THE AREA IN WHICH THE JURISDICTION OF THE STATE ENTITY IS COINCIDENTAL WITH FEDERAL JURISDICTION.

SO THAT'S -- AS I SEE IT, THAT'S THE PROBLEM, IS THAT IT TAKES THE CARDS OUT, GRABS A HOLD OF A TERRITORY, AN AREA AND SAYS, "FEDERAL GOVERNMENT CAN'T COME IN HERE. THIS IS THE STATE AREA OR THE LOCAL AREA, AND IN HERE, WE CAN DO 'X' OR 'Y' OR 'Z.'" MAY BE VERY LAUDABLE, BUT NOT FOR -- FOR OUR STATE -- OUR PURPOSES --

MR. ANDERSON: RIGHT.

THE COURT: -- WHATEVER OUR PURPOSES ARE.

BUT THAT'S THE ARGUMENT THAT WAS I ACTUALLY -- IN THE PAPERS THAT CONVINCED ME OF IT. AND ALSO I WAS CONCERNED A LITTLE BIT ABOUT EQUITABLE POWERS OF THE COURT. MAYBE I SHOULDN'T BE SO CONCERNED ABOUT THAT BECAUSE I DON'T NEED TO REACH THAT. I WAS GIVING LITERAL READING TO THE STATUTES.

MR. ANDERSON: IT WOULD SWALLOW ITSELF. IT REALLY WOULD.

LET ME JUST RESPOND. I THINK THAT YOUR HONOR, OF

COURSE, IS OBLIGATED TO CARRY OUT CONGRESS'S PURPOSE, AND I THINK THE PURPOSE OF THIS IMMUNITY SECTION IS CLEAR. IT'S NARROW, AND IT DOESN'T COVER WHAT --

THE COURT: WELL, I THINK I'M OBLIGATED TO CARRY OUT WHAT CONGRESS SAYS THE LAW IS. THE DIVINE CONGRESSIONAL PURPOSE IS SOMETIMES A BIT DIFFICULT.

MR. ANDERSON: IT SOMETIMES CAN BE. HERE, I THINK IT'S PRETTY CLEAR WHAT CONGRESS HAD IN MIND. I JUST --

LET ME SAY ONE OTHER THING ABOUT THE TEXTURAL ARGUMENT BECAUSE I DO WANT TO TAKE ISSUE WITH THE CONCLUSION THAT PROFESSOR UELMEN REACHES WHEN HE TALKS ABOUT THE TWO HALVES OF SECTION 885(D). IT IS CLEAR THAT THERE ARE TWO HALVES TO IT, BUT WE COME TO AN ENTIRELY OPPOSITE CONCLUSION ABOUT WHAT THAT MEANS.

THE FIRST HALF OF 885(D) DEALING WITH FEDERAL OFFICERS WAS IMMUNIZES FEDERAL OFFICERS LAWFULLY ENGAGED IN THE ENFORCEMENT OF, QUOTE, THIS SUBCHAPTER, END QUOTE, OF THE C.S.A.

NOW, THERE'S NOTHING IN THIS SUBCHAPTER THAT IN ANY WAY UNDERCUTS THE PROHIBITION ON THE DISTRIBUTION OF MARIJUANA. GIVEN HOW THAT PART OF THE SUBSECTION WORKS AND THE FACT THAT THE TWO SUBSECTIONS ARE INTENDED TO OPERATE IN PARALLEL FASHION, IT'S INCONCEIVABLE THAT CONGRESS COULD HAVE BEEN TALKING ABOUT ANYTHING IN THE SECOND HALF OF THE SUBPARAGRAPH BUT STATE AND LOCAL LAWS CRIMINALIZING THE USE AND DISTRIBUTION

OF CONTROLLED SUBSTANCES.

THAT'S WHAT THE LANGUAGE MEANS, AND THE FIRST AND SECOND HALVES OF THE SUBDIVISION WORK IN TANDEM FASHION.

THE COURT: I THINK THAT'S ALL --

MR. ANDERSON: OKAY. THANK YOU, YOUR HONOR.

THE COURT: DO YOU HAVE ANYTHING FURTHER, PROFESSOR?

PROFESSOR UELMEN: YOUR HONOR, WITH RESPECT TO THE ISSUE OF WHETHER THE OPERATIONS OF THE DEFENDANT ARE IN COMPLIANCE WITH STATE LAW, WE WOULD -- WE WOULD WELCOME --

THE COURT: I --

PROFESSOR UELMEN: -- HEARING ON THAT ISSUE. WE'VE BEEN PROCEEDING ON THE ASSUMPTION THAT WE ARE IN COMPLIANCE.

THE COURT: FOR THE PURPOSE OF THIS MOTION, I'VE ASSUMED THEY ARE. FOR THE PURPOSE OF THIS MOTION, I ASSUME THEY ARE.

PROFESSOR UELMEN: WELL --

THE COURT: I DON'T WANT TO HAVE A HEARING ON THAT.

PROFESSOR UELMEN: THE GOVERNMENT'S POSITION IS INTERESTING BECAUSE THEY'RE SAYING THE PURPOSE OF THIS STATUTE IS TO PROTECT POLICE OFFICERS WHO VIOLATE THE FEDERAL LAW WHILE THEY'RE ENGAGED IN UNDERCOVER WORK.

WELL, THEN WE'RE SAYING THAT FEDERAL OFFICERS TO HAVE IMMUNITY DON'T HAVE TO BE IN LAWFUL COMPLIANCE WITH THE FEDERAL CONTROLLED SUBSTANCES ACT, AND THAT'S THE WHOLE POINT OF THE IMMUNITY THAT IS CONFERRED UPON THEM, THAT THEY MAY RUN AFOUL.

THE COURT: WELL, IF -- THEY RUN AFOUL IN A LOT OF DIFFERENT WAYS. ONE WAY IS THEY GO IN AND THEY MAKE AN UNDERCOVER PURCHASE -- AN UNDERCOVER BUY.

WELL, NOW THEY ARE PURCHASING -- READING THE LITERAL LANGUAGE OF THE CONTROLLED SUBSTANCES ACT, THEY VIOLATED THE LAW. THEY WENT TO SOMEBODY AND THEY BOUGHT SOME HEROIN OR THEY DID SOMETHING ELSE. WELL, THEY'RE IN VIOLATION.

THEN YOU COME AROUND TO THIS SECTION, WHATEVER IT IS, 882(D), AND THEY SAY, BUT WAIT A MINUTE. IF WHAT THEY'RE DOING IS ENFORCING THE FEDERAL CONTROLLED SUBSTANCES ACT, IN THIS CASE, THEY'RE FEDERAL OFFICIALS, THEY'RE NOT IN VIOLATION. THEY SHOULD BE IMMUNE.

BY THE WAY, I MEAN, I HATE TO GET BACK TO MY FAVORITE POINT, BECAUSE IT SEEMS TO HAVE EXCITED NOBODY, BUT THEY MAY BE LIABLE -- THEY MAY HAVE SOME RESPONSIBILITIES IN TERMS OF -- IN TERMS OF EQUITABLE RESPONSIBILITIES THAT THE COURT GIVE IT, 'CAUSE I THINK THE COURT CAN DO CERTAIN THINGS WITH THE CONDUCT OF THE EXECUTION OF THE LAWS IN CERTAIN ACTS, BUT WE DON'T HAVE TO GET TO THAT.

JUST LEAVING ME WHERE I AM ON THIS THING, AND IT SEEMS TO ME THAT THE STATUTE DOES MAKE SENSE, ESPECIALLY IN THE CONTEXT OF UNDERCOVER OPERATIONS, THAT THERE MAY BE OTHER OPERATIONS AS WELL. THEY MAY APPREHEND SOMEBODY. THEY MAY TAKE EVIDENCE. WHEN THEY SEARCH A PERSON, THEY TAKE THE HEROIN OR THE CONTROLLED SUBSTANCE, THEY'RE NOW IN POSSESSION OF IT.

THAT'S IN THE DISCHARGE OF THEIR LAWFUL POLICE FUNCTION.

BUT -- SO THEY'RE NOT -- SOMEBODY DOESN'T GET UP AND SAY, "WHY DO WE CHARGE 'X,' AND CHARGE 'Y'? WHY DON'T WE CHARGE OFFICER JONES WITH THAT?" WE DON'T CHARGE OFFICER JONES BECAUSE THE SPECIFIC STATUTE SAYS THAT THEY'RE NOT LIABLE.

PROFESSOR UELMEN: THAT'S ALL WE'RE ASKING, YOUR HONOR, IS EXACTLY THE SAME TREATMENT BECAUSE WE ARE VIOLATING THE FEDERAL LAW. BUT WE CAN'T BE HELD CIVILLY OR CRIMINALLY LIABLE FOR THAT VIOLATION BECAUSE WE ARE --

THE COURT: BUT THE QUESTION IS IF YOU -- IF YOU'RE VIOLATING THE FEDERAL LAW WHETHER YOU CAN THEN CARVE OUT -- VIOLATING THE FEDERAL LAW IN THIS REGARD WHETHER YOU CAN CARVE OUT AN EXCEPTION BY MAKING THE PERSON A PEACE OFFICER WHOSE JOB IT IS IN THIS CONTEXT TO VIOLATE THE FEDERAL LAW.

I MEAN, IT DOES SEEM TO BE CIRCULAR. I DON'T KNOW. MAYBE THAT'S YOUR ARGUMENT ABOUT WHAT I'M DOING. THAT'S THE GOVERNMENT'S ARGUMENT ABOUT WHAT YOU'RE DOING, AND IT JUST SEEMS TO BE -- WELL, CERTAINLY WASN'T THE INTENTION. I MEAN, NOBODY'S COME UP AND SAID, YOU KNOW, THIS IMMUNITY WAS PUT IN JUST SO STATES OR MUNICIPALITIES CAN SET UP EXCEPTIONS TO THE FEDERAL CONTROLLED SUBSTANCES ACT. NOBODY'S SUGGESTING THAT. YOU'RE NOT SUGGESTING THAT.

PROFESSOR UELMEN: ALL WE'RE SUGGESTING IS THIS IS A VERY BROAD STATUTE, AND --

THE COURT: AND IF YOU HAVE --

PROFESSOR UELMEN: -- THE FACT THAT IT'S BROAD DOESN'T MEAN THAT IT CAN'T BE APPLIED TO UNANTICIPATED SETTINGS.

THANK YOU.

THE COURT: OKAY. AS I'VE INDICATED, I WAS GOING TO DENY THE MOTION TO DISMISS ON THE GROUNDS OF IMMUNITY. I'M AFRAID THE STATUTE APPLIES TO THIS SITUATION.

NOW, LET ME TURN TO WHAT I'M THINKING ABOUT IN TERMS OF HOW WE GO FROM HERE. AND WHAT I MIGHT DO IS TELL YOU A LITTLE BIT ABOUT IT AND THEN TAKE A LITTLE RECESS SO YOU HAVE SOME TIME TO CONSULT.

FIRST, I'VE INDICATED THAT THIS IS A CIVIL CONTEMPT PROCEEDING. THE PROCEDURE THAT I THINK OUGHT TO BE APPLIED FROM THE CIVIL CONTEMPT PROCEEDING IS SET FORTH BY THE NINTH CIRCUIT IN THE CASE OF -- MOST RECENT CASE OF PETERSON VS. HIGHLAND MUSIC, 140 F.3D. 1313. AND IT SETS FORTH A PROCESS ON PAGE 1324 OF HOW YOU GO ABOUT PROCEEDING IN A CONTEMPT PROCEEDING. ESSENTIALLY IT'S NOT -- IT'S NOT TERRIBLY COMPLICATED.

WHAT IT SAYS, AS I UNDERSTAND IT -- AND BY THE WAY, THIS IS WHY, AMONG OTHER THINGS, I'M GOING TO DENY THE MOTION FOR SUMMARY JUDGMENT AT THIS POINT, BECAUSE I THINK IT IS A HORSE BEFORE THE CART. I THINK THE QUESTION IS WHETHER OR NOT THE INJUNCTION IS VIOLATED. THAT'S THE QUESTION. IS THERE A VIOLATION OR VIOLATIONS OF THE INJUNCTION? IF I GRANT THE MOTION FOR SUMMARY JUDGMENT, OR IF I MODIFY THE INJUNCTION TO

SEND THE MARSHALS OUT TO CLOSE THE PLACE DOWN, I THINK -- AS TO THE LAST THING, I THINK I'VE DEFINITELY ALREADY RULED, THEN, THAT THE INJUNCTION IS VIOLATED. 'CAUSE THAT'S WHAT THE ISSUE IS, IS THE INJUNCTION VIOLATED.

YOU'VE COME IN AND YOU'VE SAID -- SO I CAN'T GIVE THE RELIEF -- I'M SORT OF GETTING AHEAD OF MYSELF AND TOPSY-TURVY HERE.

I CAN'T MODIFY THE INJUNCTION AT THE OUTSET BECAUSE I THINK THAT THAT'S -- TO MODIFY THE INJUNCTION MEANS THAT I'VE ALREADY FOUND OAKLAND CANNABIS CLUB AS AN EXAMPLE TO BE VIOLATING THE INJUNCTION. BUT THAT'S WHAT I HAVE TO DO. I OR A JURY OR SOME COMBINATION THEREOF HAVE TO MAKE THAT FINDING BEFORE THE INJUNCTION IS MODIFIED. SO THAT IS TO BE LEFT TO ANOTHER DAY.

OKAY. I THINK.

IN TERMS OF THE MOTION FOR SUMMARY JUDGMENT, THE QUESTION REALLY IS, IS THERE A GENUINE ISSUE OF MATERIAL FACT. IF THERE IS -- AND THERE MAY BE. IF THERE IS, THEN THE QUESTION IS SHOULD WE ADJUDICATE THAT FACT. I BELIEVE THE ANSWER IS A JURY ADJUDICATES THAT FACT UNDER THIS STATUTE.

BUT MOVING BACK, YOU HAVE TO SEE, IS THERE A MATERIAL ISSUE, A GENUINE ISSUE OF MATERIAL FACT TO BE ADJUDICATED. NOW, THE GOVERNMENT SAYS NO, THERE ISN'T. THE DEFENSE SAYS THERE ARE A LOT OF THEM. AND THE PROBLEM IS WE'RE TALKING ABOUT SOMEWHAT IN THE ABSTRACT SO THERE -- SO PETERSON PROVIDES

A PRETTY GOOD WAY OF PROCEEDING, WHICH IS THAT THE GOVERNMENT SHOULD COME IN AND SAY EXACTLY WHAT ARE THE VIOLATIONS OF THE INJUNCTION IN THE FORM OF A POTENTIAL ORDER TO SHOW CAUSE, WHICH I WILL ISSUE IF I BELIEVE THAT THERE HAS BEEN EVIDENCE OF THOSE VIOLATIONS.

THE DEFENSE THEN COMES IN AND THEY FILE A RESPONSE. IN THIS CASE, I WANT THEM TO FILE A RESPONSE TO PURPORTED VIOLATIONS WITH DETAILED AFFIDAVITS DEMONSTRATING TO THEIR SATISFACTION AT LEAST TO THE EXTENT IT CAN BE DONE IN GOOD FAITH AND PURSUANT TO FEDERAL RULE 11, THAT, IN FACT, THERE IS A GENUINE ISSUE AS TO FACT ON THE POINTS RAISED BY THE GOVERNMENT IN TERMS OF THE INJUNCTION.

IF THE GOVERNMENT BELIEVES THAT NOTWITHSTANDING THE PROFFER MADE BY THE DEFENSE, THOSE ISSUES ARE NOT ISSUES FOR A JURY OR A JUDGE -- FOR A JURY TO HEAR OR A TRIER OF FACT TO HEAR, IT WILL MAKE A MOTION IN LIMINE. AND I WILL THEN DECIDE WHETHER OR NOT THE MOTION IN LIMINE IS GRANTED.

NOW, THE CASE THAT IS MOST INSTRUCTIVE THAT I FOUND AT LEAST IN THE MOTION IN LIMINE IS THE NINTH CIRCUIT CASE OF U.S. VS. AGUILAR. IN THE CONTEXT OF THE MEDICAL -- WELL, IN THE CONTEXT OF THE NECESSITY DEFENSE. IN THAT CASE WASN'T A MEDICAL NECESSITY. IT WAS A NECESSITY DEFENSE. AND INTERESTINGLY ENOUGH, IT WAS COMING TO THE DEFENSE OF OTHERS, A NECESSITY DEFENSE WHICH WAS THE NECESSITY BY VIRTUE OF THE -- OF THE SITUATION IN WHICH PEOPLE WHO WERE SEEKING ASYLUM WERE

BEING PLACED THERE. AND THE NINTH CIRCUIT ADDRESSED THAT AND ADDRESSED THE PROFFERS TO PROVE THE MOTIONS IN LIMINE.

SO THAT'S SORT OF AS I SEE WHERE WE GO FROM HERE. I SHOULD ALSO TELL YOU -- AND I KNOW I'M LOOKING AT DEFENSE COUNSEL NOW WHO HAVE 2,000 THINGS ON THEIR CALENDAR, THAT I REGRET THE FACT FROM YOUR PERSONAL POINT OF VIEW OR YOUR PROFESSIONAL POINT OF VIEW THAT WE'RE -- THAT WE HAVE TO MOVE QUICKLY, 'CAUSE I THINK THE GOVERNMENT IS ENTITLED TO A -- AN -- A RAPID ADJUDICATION OF THIS ISSUE BECAUSE I ASSUME YOU'RE NOT WILLING TO STIPULATE THAT THE CLUB -- AND I'M NOW TALKING ABOUT IN TERMS OF THE OAKLAND CANNABIS CLUB -- THAT THE OAKLAND CLUB BE CLOSED PENDING THAT.

SO SINCE YOU'RE GOING TO OPERATE IT, SINCE IT'S GOING TO REMAIN OPEN DURING THIS PERIOD OF TIME AND BECAUSE OF THE NATURE OF THE RELIEF THAT'S BEING SOUGHT BY THE GOVERNMENT, WHICH IS AN ORDER BINDING OAKLAND CANNABIS CLUB FROM BEING -- AND THEN SEEKING -- AND THEN HAVING FURTHER, YOU KNOW, WHATEVER RELIEF IS APPROPRIATE, SUCH AS THE MARSHALS CLOSING THE PLACE, WE'RE GOING TO HAVE A VERY RAPID DETERMINATION OF THIS ISSUE.

AND I THINK IN -- YOU KNOW, I THINK THAT THERE'S BEEN RATHER -- AT LEAST THERE ARE SOME AFFIDAVITS OUT THERE. I MEAN, PEOPLE ARE FAIRLY AWARE OF WHAT THE POSITION IS, BUT I DON'T THINK TO -- I DON'T THINK THE DEFENSE HAS ENOUGH NOTICE AS TO EXACTLY WHAT'S GOING ON, AND I -- IN TERMS OF WHAT THE GOVERNMENT BELIEVES TO BE THE -- THE -- THE CONDUCT THAT HAS

RUN AFOUL.

FOR EXAMPLE, IF ALL THE GOVERNMENT IS GOING TO SHOW WAS WELL, THERE ARE WEB SITE PAGES OR THE PLACE IS OPEN FOR BUSINESS -- THAT'S ALL THEY'RE GOING TO SHOW, AND THAT'S WHAT THEY'VE SHOWN IN THE UKIAH SITUATION, A LITTLE BIT -- MARIN'S A LITTLE BIT DIFFERENT, AND OAKLAND'S A LITTLE BIT DIFFERENT. THE UKIAH SITUATION IS THAT THEY'RE OPEN FOR BUSINESS -- I DON'T KNOW IF THAT RUNS AFOUL OF THE INJUNCTION, BECAUSE I DIDN'T ENJOIN -- AND I HAVE TO LOOK AT IT AGAIN, BUT I DIDN'T ENJOIN THEM FROM ADVERTISING THAT THEY'RE OPEN FOR BUSINESS.

IF THEY'RE CONDUCTING BUSINESS, WHATEVER THAT MEANS -- IF THEY'RE CONDUCTING IT, THEN THAT COULD RUN AFOUL DEPENDING ON WHAT THE DEFENSES ARE TO THE PARTICULAR BUSINESS INVOLVED. SO YOU HAVE TO TAKE A LOOK, WHAT DID THEY DO? AND THEN YOU HAVE TO COME IN AND SAY, "WE DID THIS BUT WE DIDN'T DO THAT. AND AS TO THAT WHICH WE DIDN'T DO OR THAT WHICH WE DID DO, HERE IS OUR DEFENSE." MAKE IT DETAILED.

THEN WE LOOK -- AND THEN THE GOVERNMENT COMES IN AND SAYS, "WAIT A MINUTE. THAT'S NOT A LEGAL DEFENSE UNDER THESE CIRCUMSTANCES" OR YOU HAVEN'T SHOWN ENOUGH, THAT IT OUGHT TO GO TO A TRIER OF FACT. THAT WAY IT'S LIKE A CIVIL PROCEEDING, NOT LIKE A CRIMINAL PROCEEDING, 'CAUSE I THINK IN A CRIMINAL PROCEEDING, A JUDGE COULDN'T TAKE AWAY FROM THE JURY THE ELEMENTS OF THE OFFENSE. I THINK THIS, HOWEVER, PRESENTS -- A JURY TRIAL CONDUCTED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

MAKES THAT CLEAR.

SO I THINK THAT -- I THINK THAT YOU COULD HAVE A MOTION IN LIMINE, AND THEY IN DO IN U.S. VS. AGUILAR, EVEN THOUGH THAT'S A CRIMINAL CASE. SO THOSE ARE MY IDEAS AT THIS POINT.

WHY DON'T WE TAKE A 15-MINUTE RECESS. WE'LL RESUME AT 4:00 O'CLOCK, AND I'D LIKE TO HEAR THE PARTIES' VIEWS ON THAT.

(RECESS TAKEN.)

THE COURT: ALL RIGHT. WHY DON'T WE START WITH YOU, MR. QUINLIVAN. DO YOU HAVE ANY QUESTIONS ON SCHEDULING OR HOW WE'RE PROCEEDING?

MR. QUINLIVAN: YOUR HONOR, WHAT I'D LIKE TO DO IS JUST ADDRESS TWO POINTS.

THE COURT: SURE.

MR. QUINLIVAN: AND THE FIRST POINT IS THAT I THINK THAT WITH RESPECT TO ALL THREE OF THE GROUPS OF DEFENDANTS IN THIS CASE, THE EVIDENCE THAT HAS BEEN SUBMITTED TO THE COURT TO DATE IS SUFFICIENT -- IS CLEARLY SUFFICIENT TO WARRANT A SHOW CAUSE ORDER, AND LET ME JUST BRIEFLY GO THROUGH THAT EVIDENCE.

THE COURT: WELL, I'M GOING TO -- I'M PROBABLY GOING TO GRANT A SHOW CAUSE ORDER. WHAT I WAS GOING TO HAVE YOU DO IS GET TO ME A PROPOSED SHOW CAUSE ORDER BY WEDNESDAY AT NOON, OKAY, AND IN THAT, I THINK YOU HAVE TO BE -- NAME THE DEFENDANT. THIS IS WHAT THE INJUNCTION SAYS. THIS IS OUR VIEW AS TO WHAT THE VIOLATIONS OF THE INJUNCTION ARE, YOU KNOW,

TAKING OAKLAND OR WHATEVER IT MAY BE, AND THIS IS WHAT IT IS.

NOW, I THOUGHT I SHOULD TELL YOU THAT IF THE ONLY EVIDENCE YOU HAVE AGAINST THE UKIAH CANNABIS CLUB IS THAT THEY ADVERTISED ON THEIR -- THEY HAD A WEB PAGE OPEN AND A TELEPHONE CALL TO THEM AND SAID, "WELL, WE'RE OPEN FOR BUSINESS," IS THAT ENOUGH? I DON'T KNOW. I'D HAVE TO LOOK AT IT. THAT'S ALL THE EVIDENCE IS, AND YOU DECIDE TO PROCEED AGAINST IT, THEN I'LL MAKE A DETERMINATION AS TO WHETHER I THINK THAT'S ENOUGH TO ISSUE AN ORDER TO SHOW CAUSE.

I JUST -- I JUST DON'T KNOW.

MR. QUINLIVAN: I UNDERSTAND.

THE COURT: MAYBE THAT'S IT. IF THAT'S WHAT THE EVIDENCE IS, THAT'S WHAT THE EVIDENCE IS, AND I'LL MAKE THE DECISION.

MR. QUINLIVAN: I UNDERSTAND, YOUR HONOR. AND LET ME JUST --

THE COURT: SO THERE PROBABLY SHOULD BE THREE SEPARATE ORDER TO SHOW CAUSE -- PROPOSED ORDERS TO SHOW CAUSE, AND YOU SHOULD LIMIT IT.

I'M ALSO GOING TO REQUIRE YOU SHORTLY THEREAFTER TO PROVIDE THE DEFENSE WITH ANY EVIDENCE THAT YOU HAVE THAT YOU WOULD INTEND TO INTRODUCE -- WELL, FIRST ANY EVIDENCE THAT YOU HAVE OF THESE VIOLATIONS, OF THE SPECIFIC VIOLATIONS.

SO IF A -- IF AN UNDERCOVER AGENT, OR NOT, WENT TO THE OAKLAND CANNABIS CLUB AND SAW DISTRIBUTION ON SUCH AND SUCH A

DATE, WROTE A REPORT, I'D WANT YOU TO PROVIDE THAT TO THE DEFENSE BECAUSE IT SEEMS TO ME THAT THEY HAVE TO COME IN AND DEFEND AGAINST IT. SO I WANT THEM TO KNOW WHAT IS THERE OUT THERE, WHAT ARE YOU SAYING THAT THEY DID, AND WHAT IS THE EVIDENCE OF WHAT THEY DID THAT THE GOVERNMENT HAS.

THEN THEY CAN COME IN AND PREPARE THEIR DEFENSE, TO THE EXTENT THEY HAVE IT, AGAINST THAT SPECIFIC CHARGE. SO THAT WILL BE SORT OF THE NEXT STEP IN THE PROCESS AS I UNDERSTAND IT. THEN THEY WILL PREPARE -- FROM THAT THEY WILL PREPARE THEIR RESPONSE.

OKAY. GO AHEAD. I INTERRUPTED YOU.

MR. QUINLIVAN: WELL, NO, YOUR HONOR, I JUST WANTED TO ADD ONE POINT.

THE COURT: SURE.

MR. QUINLIVAN: THAT THIS CASE, OF COURSE, IS NOT SIMPLY -- WE ARE NOT SIMPLY MOVING TO HOLD THE DEFENDANTS IN CONTEMPT FOR VIOLATION OF PART 1 OF YOUR ORDER, WHICH PROHIBITED THEM FROM DISTRIBUTING MARIJUANA, BUT ALSO WITH RESPECT TO I BELIEVE IT WAS PART 3 OF THE ORDER WHICH PROHIBITED THEM FROM MAINTAINING A PLACE OF BUSINESS FOR THE PURPOSE OF DISTRIBUTING MARIJUANA, WHICH IS A CONTINUING OFFENSE. SO I JUST WANTED TO MAKE NOTE OF THAT.

THE COURT: OKAY. WELL, I THINK THE ANSWER IS YOU'RE CERTAINLY NOT FORECLOSED BY WHAT YOU'RE SAYING TODAY TO PUT WHATEVER YOU FEEL IS APPROPRIATE IN YOUR ORDER TO SHOW CAUSE,

BUT I WANT TO MAKE IT -- I WANT IT TO BE ABSOLUTELY CLEAR TO THE DEFENSE WHAT IT IS THAT THEY HAVE DONE, YOU BELIEVE THAT THEY HAVE DONE WHICH VIOLATES THE INJUNCTION.

MR. QUINLIVAN: UNDERSTOOD, YOUR HONOR.

LET ME MOVE TO A SECOND POINT, WHICH IS IRRESPECTIVE OF THIS SCHEDULE WHICH YOU HAVE PROPOSED, WE -- WE DO THINK THAT OUR MOTION FOR SUMMARY JUDGMENT CAN BE DETERMINED BEYOND -- ON THE BASIS OF WHETHER OR NOT -- EVEN ASSUMING THAT THE FACTS ARE IN THE DEFENDANTS' FAVOR, WHETHER OR NOT THEY ARE ENTITLED TO ASSERT THOSE LEGAL DEFENSES AS A MATTER OF LAW, THAT THAT ALSO IS A SUBJECT OF OUR MOTION FOR SUMMARY JUDGMENT.

AND LET ME JUST BRIEFLY TOUCH ON THAT.

THE COURT: GO AHEAD, BECAUSE --

MR. QUINLIVAN: WELL, LET ME START WITH THE ALLEGED DEFENSE OF MEDICAL NECESSITY BECAUSE THE DEFENDANTS HAVE REALLY NOT TAKEN ISSUE WITH OUR SHOWING THAT AS -- THAT CONGRESS CERTAINLY COULD ABROGATE BY STATUTE A DEFENSE BASED ON DURESS OR A NECESSITY, AND IF YOU TAKE A COMPLETE VIEW OF THE CONTROLLED SUBSTANCES ACT IN THIS CASE, THAT IS EXACTLY WHAT CONGRESS HAS DONE.

THE COURT: WELL, LET ME ASK YOU, YOU'RE SAYING THAT LEGALLY, THERE IS NO COMMON LAW DEFENSE OF NECESSITY, MEDICAL NECESSITY, IN A CONTROLLED SUBSTANCE ACT?

MR. QUINLIVAN: NO, I'M NOT. I'M SAYING THERE'S NO COMMON LAW DEFENSE OF MEDICAL NECESSITY IN A CONTROLLED

SUBSTANCES ACT CASE INVOLVING A SUBSTANCE OF SCHEDULE I, AND THAT MAKES ALL THE DIFFERENCE. BECAUSE THIS IS NOT SIMPLY A STATUTE THAT SAYS IT'S UNLAWFUL TO DISTRIBUTE OR MAIN --

THE COURT: WHAT ABOUT BURTON?

MR. QUINLIVAN: I'M --

THE COURT: U.S. V. BURTON? THE SIXTH CIRCUIT CASE. SIXTH CIRCUIT CASE IS ONE CASE THAT I'M AWARE OF.

MR. QUINLIVAN: THAT'S RIGHT.

THE COURT: IT'S U.S. V. BURTON. IT'S A SIXTH CIRCUIT CASE IN WHICH AN INDIVIDUAL HAD MARIJUANA, SUBSTANCE IN SCHEDULE I, AND CLAIMED THAT HE HAD MEDICAL ILLNESS, GLAUCOMA, AND THAT THE MARIJUANA THAT HE GREW, CULTIVATED, WAS NECESSARY FOR HIS ILLNESS.

THE COURT -- DISTRICT COURT -- HE GAVE -- HE GAVE AN INSTRUCTION -- EXCUSE ME. THE DISTRICT COURT, I THINK, GAVE THE INSTRUCTION, BUT ANYWAY HE PRESENTED HIS MEDICAL NECESSITY DEFENSE. SIXTH CIRCUIT SAID THAT HE HAD NOT MET ALL THE PRONGS -- THE FOURTH PRONG IN PARTICULAR -- OF THE MEDICAL NECESSITY DEFENSE BECAUSE HE HADN'T SHOWN THAT IT WASN'T POSSIBLE FOR HIM TO GET THE DRUG BECAUSE HE COULD HAVE JOINED A FEDERAL PROGRAM. AND THEN IN A FOOTNOTE, IT WENT ON TO SAY AS A MATTER OF FACT, HE DID. HE WAS GIVEN MARIJUANA BY THE FEDERAL GOVERNMENT FOR HIS GLAUCOMA.

NOW, READING THAT CASE, THEY CERTAINLY DON'T SAY, "BY THE WAY" -- OR MAYBE I DIDN'T READ IT RIGHT -- "BY THE WAY, THE

DEFENSE OF MEDICAL NECESSITY FOR SCHEDULE I SUBSTANCE ISN'T AVAILABLE."

MR. QUINLIVAN: NO, THEY DIDN'T, YOUR HONOR. BUT THEY DIDN'T HAVE TO. THEY -- I MEAN, THERE WERE A NUMBER OF GROUNDS ON WHICH THEY COULD HAVE REJECTED THE ARGUMENT, AND THEY CHOSE TO REJECT IT ON ONE GROUND. BUT WHAT --

THE COURT: BUT WHY SHOULDN'T THEY REJECT IT -- IF, IN FACT, IT'S SIMPLY A DEFENSE THAT'S NOT EVEN AVAILABLE -- NOT EVEN AVAILABLE, WHY DIDN'T THEY SAY IT? RATHER -- THEY DIDN'T SAY IT WASN'T AVAILABLE. I MEAN, I WILL SAY THAT THEY -- IT WAS ALMOST A TONGUE-IN-CHEEK OPINION. I MEAN, THEY DIDN'T THINK MUCH OF THE DEFENSE.

MR. QUINLIVAN: THAT'S RIGHT, YOUR HONOR.

THE COURT: THEY CERTAINLY DIDN'T THINK MUCH OF IT, BUT THEY DIDN'T SAY, "BY THE WAY, THE DEFENSE ISN'T AVAILABLE."

I MEAN, IF I WERE READING THE CASE, I WOULD SAY THIS PERSON -- IN ONE CASE, IT WENT UP TO THE -- TO A COURT OF APPEALS ON THIS TYPE OF SITUATION, THE COURT HELD THAT THIS INDIVIDUAL HADN'T SATISFIED THE FOUR PRONGS.

MR. QUINLIVAN: THAT'S RIGHT. BUT -- YOU'RE RIGHT, YOUR HONOR, BUT THE COURT DID NOT PURPORT TO STATE THAT ONE -- THAT CONGRESS HAD ALLOWED SUCH A DEFENSE. ALL I'M SAYING IS, IS THAT --

THE COURT: IS THERE A CASE, THOUGH, THAT SAYS THAT?

MR. QUINLIVAN: WELL, THERE ARE FIVE STATE COURTS

WHICH HAVE CONSIDERED THIS ISSUE IN THE CONTEXT OF THE STATE CRIMINAL CODES WHICH PLACE MARIJUANA ON SCHEDULE I. AND FOUR OF THOSE FIVE STATE COURTS HAVE ALL HELD THAT UNDER THOSE STATUTORY SCHEMES, THE VERY PLACEMENT OF MARIJUANA OR ANY OTHER SUBSTANCE ON SCHEDULE I PROHIBITS A DEFENSE OF MEDICAL NECESSITY.

THE COURT: WELL, BUT IN STATE VS. DIANA IN THE WASHINGTON CASE, THEY ALLOWED IT, RIGHT?

MR. QUINLIVAN: THEY DID ALLOW IT, YOUR HONOR. AND LET ME SAY, WHAT I'M TALKING ABOUT IS THE FIVE STATE COURTS WHICH HAVE CONSIDERED THIS ISSUE.

AGAIN, YOUR HONOR -- CERTAINLY THE WASHINGTON COURT OF APPEALS IN STATE V. DIANA, ONE CAN ASSUME THAT THEY ALLOWED IT, BUT I'M FOCUSING ON THOSE FIVE COURTS WHICH HAVE CONSIDERED THIS VERY SPECIFIC ISSUE.

THE COURT: WELL, ISN'T IT A BIT DIFFICULT FOR A DISTRICT COURT TO SAY, "LOOK, THE COMMON LAW" -- YOU'RE SAYING THAT THE COMMON LAW DEFENSE WOULDN'T EVEN BE AVAILABLE IN A CRIMINAL PROCEEDING FOR A SCHEDULE I --

MR. QUINLIVAN: YES, YOUR HONOR. AND THE REASON IS THIS IS -- THIS WOULD BE A DIFFERENT -- MIGHT BE A DIFFERENT CASE, AND IT WOULD BE A DIFFERENT CASE IF ALL THE STATUTE SAID WAS WHAT SECTION 841(A)(1) SAYS, IF THE STATUTE SAID IT'S UNLAWFUL TO DISTRIBUTE OR MANUFACTURE MARIJUANA.

BUT THE STATE SEPARATELY DOES A NUMBER OF INDEPENDENT

THINGS. IN SECTION 812, IT PLACES MARIJUANA IN SCHEDULE I, WHICH BY DEFINITION MEANS IT HAS NO ACCEPTED MEDICAL VALUE IN THE UNITED STATES AND A LACK OF ACCEPTED SAFETY FOR USE UNDER MEDICAL CONDITIONS.

IN SECTION 829, CONGRESS ALLOWED PHYSICIANS TO PRESCRIBE SUBSTANCES IN SCHEDULES II THROUGH V BUT NOT SCHEDULES -- NOT SUBSTANCES IN SCHEDULE I.

IN SECTION 823(F), CONGRESS SAID THAT THE ONLY LEGITIMATE USE FOR A SUBSTANCE IN SCHEDULE I IS PURSUANT TO A RESEARCH PROJECT THAT HAS BEEN AUTHORIZED AND APPROVED.

THE COURT: BUT WHY DIDN'T CONGRESS -- IF CONGRESS WANTS TO TAKE AWAY A DEFENSE, WHY DON'T THEY SIMPLY SAY IT?

MR. QUINLIVAN: WELL, YOUR HONOR, I THINK SECTION 812 DOES THAT. IF CONGRESS HAS SAID THAT A SUBSTANCE HAS NO ACCEPTED MEDICAL VALUE, AND THE DEFENSE -- THE PURPORTED DEFENSE IS THAT OF MEDICAL NECESSITY, IT SEEMS THAT CONGRESS'S JUDGMENT IS BINDING ON THAT QUESTION.

THE COURT: WELL, I THINK THE DEFENSE IS NECESSITY. AND THEY SAY IT'S -- THAT'S THE DEFENSE.

MR. QUINLIVAN: THAT'S RIGHT.

THE COURT: IT'S NECESSITY. IT'S THE COMMON LAW DEFENSE OF NECESSITY THAT THEY'RE RAISING IN THE CONTEXT OF MEDICAL JUSTIFICATION FOR IT.

MR. QUINLIVAN: AND -- THAT'S EXACTLY RIGHT. AND, YOU KNOW --

THE COURT: BUT --

MR. QUINLIVAN: -- I SHOULD FOCUS MY ARGUMENT, YOUR HONOR. IT MAY BE THAT THERE IS A NECESSITY DEFENSE FOR A SUBSTANCE IN SCHEDULE I THAT'S NOT BEFORE THE COURT FOR SOME OTHER BASIS. BUT CERTAINLY AS TO MEDICAL NEED, THAT WHICH THE DEFENDANTS ARE PURPORTING TO RAISE, THAT HAS -- CONGRESS HAS MADE ITS LEGISLATIVE JUDGMENT AS TO THAT ISSUE.

THE COURT: WELL, IF THAT WERE THE CASE, I WOULD ASSUME THE SIXTH CIRCUIT COULD HAVE DEALT WITH THAT -- WITH THAT ISSUE AND DIDN'T.

MR. QUINLIVAN: THAT'S TRUE, YOUR HONOR, BUT --

THE COURT: MATTER OF FACT, BY INFERENCE, IT CERTAINLY WENT THE OTHER WAY. BUT I JUST DON'T KNOW ANY CASE OUT THERE -- CAN YOU POINT ME TO SOME FEDERAL CASE WHICH SAYS THAT THE --

MR. QUINLIVAN: WE'RE ONLY AWARE OF TWO FEDERAL CASES IN WHICH THIS ISSUE HAS BEEN RAISED, THE SIXTH CIRCUIT'S DECISION IN BURTON AND AN UNPUBLISHED DECISION BY THE FOURTH CIRCUIT WHICH WE SIMPLY NOTED IN OUR BRIEF, WHICH, OF COURSE, HAS NO PRECEDENTIAL VALUE. AND I WOULD NOTE THAT, OF COURSE, THE FOURTH CIRCUIT IN THAT CASE THOUGHT THE ARGUMENT WAS SO INSUBSTANTIAL THAT IT DESIGNATED A MEMORANDUM OPINION.

BUT NONETHELESS, IT IS NOT THE CASE -- THERE ARE CERTAINLY TIMES WHEN COURTS DECIDE ONE ISSUE THAT IS AN EASIER -- IT IS AN EASIER BASIS ON WHICH TO RESOLVE IT

WITHOUT -- NOT NECESSARILY RESOLVING THE PREDICATE ISSUE. AND IN CONSTITUTIONAL ISSUES, IT'S A CLASSIC EXAMPLE.

THE COURT: OKAY. I THINK THAT I UNDERSTAND THAT.

MR. QUINLIVAN: LET ME JUST POINT TO TWO OTHER POINTS ON THIS, YOUR HONOR. THERE IS NO CASE THAT HAS EVER ALLOWED THE DEFENSE OF MEDICAL NECESSITY IN THE CONTEXT OF DISTRIBUTION.

WE POINTED OUT -- EVERY ONE OF THE CASES THAT HAVE ALLOWED -- THE STATE COURT CASES WHICH HAVE ALLOWED THE DEFENSE OF MEDICAL NECESSITY HAVE DONE SO IN THE CONTEXT OF POSSESSION CASES. AND TO -- AND THERE'S A GOOD REASON FOR THAT, BECAUSE IF YOU THEN TAKE THE NEXT STEP AND SAY, "WELL, THOSE WHO" -- "IT EXTENDS TO THOSE WHO DISTRIBUTE IT," OF COURSE, WE COULD THEN TAKE THE NEXT STEP AND SAY, "WELL, IT WOULD EXTEND TO THOSE WHO MANUFACTURE THE SUBSTANCE AS WELL."

THE COURT: WELL, AND I'VE THOUGHT ABOUT THAT. I MEAN, BECAUSE -- BECAUSE I UNDERSTAND THAT -- I UNDERSTAND THE ARGUMENT THAT YOU'RE MAKING. I HAVE THE LOGICAL PROBLEM IN MY MIND TRYING TO SEPARATE -- I UNDERSTAND EACH IS A DIFFERENT STEP, BUT I HAD THE -- THE PROBLEM IN MY MIND IS HOW IS SOMEBODY GOING TO COME -- THE PROBLEM OF HOW DOES SOMEBODY COME INTO POSSESSION UNLESS SOMEBODY GIVES TO IT THEM, UNLESS THEY GROW IT THEMSELVES, I UNDERSTAND THAT. BUT THE GOVERNMENT WOULD NOT TAKE -- MAYBE I'M JUMPING, BUT I MEAN, THE GOVERNMENT IS NOT SAYING THAT THESE PEOPLE GROW IT THEMSELVES --

MR. QUINLIVAN: THAT THAT WOULD BE LAWFUL, CERTAINLY NOT.

THE COURT: OKAY. NOR WOULD --

OKAY. I MEAN, I SORT OF LOOKED UPON THIS AS, YOU KNOW, SEVERAL STEPS.

MR. QUINLIVAN: RIGHT.

THE COURT: AND THE BAD NEWS FOR THE GOVERNMENT PUTTING IT THIS WAY IS THAT I THINK THAT AT LEAST AN ARGUMENT COULD BE MADE THAT A PERSON WHO DISTRIBUTES TO A SERIOUSLY ILL PERSON WHO OTHERWISE -- WHO OTHERWISE MEETS THE CRITERION AND SO FORTH, THAT THAT RAISES AN ISSUE -- DON'T KNOW HOW WE COME OUT ON THAT ISSUE.

BUT YOU SEE, THEN I LOOK AT THE U.S. VS. AGUILAR CASE, AND THE U.S. VS. AGUILAR CASE CAME UP IN THE CONTEXT OF INDIVIDUALS WHO WERE BEING PROSECUTED CLAIMING THE DEFENSE OF OTHERS, THE NECESSITY DEFENSE OF OTHERS. AND THE ISSUE MAY BE WHEN YOU LOOK AT THAT IS THEY STILL HAVE TO -- THEY STILL HAVE TO MEET THE -- THE NECESSITY DEFENSE. FOR EXAMPLE, IF THEY'RE GOING TO FURNISH DRUGS, THEY'RE GOING TO FURNISH MARIJUANA TO "X," IT MAY BE THAT THEY HAVE TO SHOW THAT "X" HAD A MEDICAL NECESSITY FOR THE MARIJUANA. IT MAY NOT BE ENOUGH, AND YOU CAN LOOK AT AGUILAR IN THIS REGARD, TO SHOW THAT THEY HAD A GOOD-FAITH BELIEF --

MR. QUINLIVAN: THAT'S --

THE COURT: -- THAT "X" HAD A NECESSITY. MAY NOT BE

ENOUGH TO DO THAT. IT MAY BE PUT IN EXACTLY THE SAME SHOES AS THE PERSON WHO IS CLAIMING THE MEDICAL NECESSITY DEFENSE.

NOW I DON'T WANT TO SAY TOO MUCH ABOUT THIS, 'CAUSE I HAVEN'T THOUGHT ENOUGH ABOUT IT, AND I HAVEN'T HEARD ARGUMENT, ESPECIALLY FROM THE DEFENSE, ON THESE ISSUES, AND I THOUGHT THAT THIS WILL PROPERLY COME UP IN THE MOTION IN LIMINE SHOULD THEY -- AND IT WILL COME UP THE WAY I ACTUALLY ANTICIPATED IT COMING UP, WHICH IS IN A FACTUAL CONTEXT WHERE EVERYBODY KNOWS THIS IS AGREED UPON AND THIS IS NOT AGREED UPON.

SO IT WON'T BE TOO THEORETICAL. IT WILL BE AT LEAST GROUNDED IN SOME ACTUAL FACTS HERE.

MR. QUINLIVAN: AND I CERTAINLY UNDERSTAND, YOUR HONOR.

THE COURT: SO ON YOUR MOTION TO -- ON SUMMARY JUDGMENT, IT MAY BE APPROPRIATE TO GRANT THE SUMMARY JUDGMENT MOTION, THOUGH I DON'T KNOW ABOUT SUMMARY JUDGMENT AND A FINDING OF CONTEMPT. I MEAN, I HAVE TO WORK THOSE TWO THINGS TOGETHER AT A POINT WHERE I SEE THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT SEPARATING THE PARTIES. I DON'T KNOW THAT I'M THERE YET.

MR. QUINLIVAN: UNDERSTOOD.

LET ME -- JUST ONE MOMENT, YOUR HONOR. ON THAT LAST POINT, YOUR HONOR, I DID WANT TO POINT YOU TO ONE OF THE CASES WHICH WE RAISED IN OUR OPENING MEMORANDUM, WHICH IS THE IN RE: GRAND JURY PROCEEDINGS CASE FROM THE SEVENTH CIRCUIT WHICH

APPEARS AT 894 FEDERAL REPORTER SECOND SERIES 881.

AND I JUST WANTED TO QUOTE JUDGE POSNER'S OPINION FROM THE SEVENTH CIRCUIT IN THIS REGARD. QUOTE, "A FEDERAL CIVIL CONTEMPT PROCEEDING IS A CIVIL PROCEEDING GOVERNED BY THE RULES OF CIVIL PROCEDURE. THOSE RULES ENTITLE A PARTY TO AN EVIDENTIARY HEARING ONLY IF THERE ARE GENUINE ISSUES OF MATERIAL FACT." THEN CITING TO FEDERAL RULE OF CIVIL PROCEDURE 56, "THERE IS NO COMPARABLE PRINCIPLE IN CRIMINAL CASES BECAUSE THE PROSECUTOR CANNOT MOVE FOR A DIRECTED VERDICT OR FOR SUMMARY JUDGMENT."

SO I THINK THAT THAT CASE, YOUR HONOR, CERTAINLY BOLSTERS OUR POSITION THAT A MOTION FOR SUMMARY JUDGMENT IS A PROPER PROCEDURAL DEVICE IN THIS CONTEXT.

THE COURT: WELL, I ASSUME IT IS. I ASSUME THAT A J.N.O.V. IS ALSO APPROPRIATE IN A CIVIL CONTEXT.

MR. QUINLIVAN: YOUR HONOR, I JUST WOULD WANT -- I UNDERSTAND YOUR HONOR'S SCHEDULE. I DO MAINTAIN THAT BECAUSE -- REMEMBER, IN THE DEFENDANTS' OPPOSITION PAPERS, WE HAVE NOT SEEN ONE IOTA OF EVIDENCE REBUTTING THE EVIDENCE THAT WE HAVE PROVIDED TO DATE AS TO THEIR ONGOING VIOLATIONS.

AND I WOULD NOTE EVEN THAT IN THE CONTEXT OF ADMISSIONS OF A PARTY OPPONENT, PROFESSOR UELMEN TODAY HAS ALREADY STATED THAT "WE ARE VIOLATING THE FEDERAL CONTROLLED SUBSTANCES ACT."

SO, YOUR HONOR, TWO-FOLD, I UNDERSTAND YOUR HONOR'S

SCHEDULE. WE CERTAINLY THINK THAT THE ORDERS TO SHOW CAUSE, THEY'RE SUFFICIENT -- THERE'S SUFFICIENT FACTS FOR THEM TO ISSUE TODAY.

AS A SECONDARY MATTER, WE ALSO THINK THAT THE COURT CAN AND SHOULD RULE ON OUR -- ON OUR ISSUES OF WHETHER OR NOT THEY'RE EVEN ENTITLED TO RAISE THESE DEFENSES AS A MATTER OF LAW.

THE COURT: OKAY. THANK YOU.

MR. BROSNAHAN.

MR. BROSNAHAN: AFTERNOON, YOUR HONOR.

I DID NOT HEAR THE GOVERNMENT AT ANY TIME TELL YOUR HONOR OR REPRESENT TO YOU THAT ON WEDNESDAY, THEY WILL FILE AN ADDITIONAL FACT. I LISTENED TO SEE IF THEY WOULD SAY THAT, BUT THEY DIDN'T SAY THAT. NOR IS THERE ANYTHING IN THEIR PAPERS THAT I'M AWARE OF THAT SUGGESTS THEY HAVE MORE THAT THEY HAVEN'T SHOWN US.

THAT'S NOT TO SAY WHAT MIGHT NOT HAPPEN ON WEDNESDAY OR WHATEVER DAY IT FINALLY TURNS OUT TO BE. BUT I'VE COME THIS AFTERNOON TO DISCUSS THE PAUCITY OF WHAT THEY DID PRESENT. AND I WOULD LIKE TO ADDRESS, FIRST OF ALL, THE POINT JUST MADE BY ABLE COUNSEL FOR THE GOVERNMENT BECAUSE IT'S A NON-STARTER.

HE STATES THAT BECAUSE CONGRESS HAS A STATUTE IN A CERTAIN STRUCTURE, THEREFORE THE NECESSITY DEFENSE IS NOT AVAILABLE. IT IS A NON-STARTER. AND THE REASON THAT HE COULD NOT ANSWER YOUR HONOR'S QUESTION ABOUT WHERE IS THERE A CASE

THAT HOLDS THAT IS THAT IN EVERY NECESSITY CASE, THERE IS A STATUTE. SOMETIMES IT'S A STATUTE INVOLVING MURDER ON WHICH CONGRESS IS UNEQUIVOCAL, BUT IN THE PRESENCE OF GREATER EVIL, WHICH IS THEIR TERM NOT MINE DESCRIBING THE ACTIVITY OF MY CLIENT -- BUT IN THE PRESENCE OF GREATER EVIL, THE NECESSITY DEFENSE HAS SURVIVED ALL THESE YEARS.

AND IT WILL BE MY OBJECT THIS AFTERNOON TO ADDRESS THE PROCEDURES THAT YOUR HONOR HAS SUGGESTED AND ALSO, IF I MAY, TO MAKE SIX POINTS WHICH I THINK IN THE END ENTITLE US -- ENTITLE US TO A TRIAL BY JURY.

AND WITH YOUR HONOR'S PERMISSION, I'D LIKE TO DO THAT.

IF THE COURT PLEASE, THE FIRST POINT IS THAT THE GOVERNMENT IN THESE PROCEEDINGS SEEKS TO CHANGE THE BASIS ON WHICH YOUR HONOR ISSUED THE INJUNCTION.

YOUR HONOR SITS ON THE WOOLSACK. THIS IS A COURT OF EQUITY. IT WAS IN MARCH, WHEN YOUR HONOR RULED IN MAY, AND IT IS NOW. AND THEREFORE THE GREATER GOOD, THE VISION OF WHAT IS RIGHT AND WRONG, THE BALANCE OF HARDSHIPS, WHICH HAS NOT BEEN LIMITED BY THE NINTH CIRCUIT, RESTS CERTAINLY AT THIS POINT WITH THE INJUNCTION WITH YOUR HONOR.

AND DESPITE THE FACT THAT YOUR HONOR REPEATEDLY IN THE OPINION REFERRED TO THE -- WHAT WOULD -- EXACTLY WHAT WOULD HAPPEN IF THE GOVERNMENT CAME IN AND MADE ALLEGATIONS OF A VIOLATION OF THE INJUNCTION -- AND YOUR HONOR COULD NOT HAVE BEEN CLEARER. AND I'LL REFER TO A COUPLE OF THOSE QUOTES, BUT

YOUR HONOR SAID, "NOW, IF THEY DO THAT, HERE'S WHAT WILL HAPPEN. AND WE'LL HAVE A TRIAL, AND THIS IS WHAT WILL OCCUR."

AND THAT WAS FAIR TO THE GOVERNMENT. IT GAVE THEM FAIR WARNING AS TO WHAT THEY HAD TO DO, WHAT BURDEN THEY HAD TO MEET. AND IT ALSO WAS TO THE DEFENDANTS A STATEMENT WHICH THEY COULD REASONABLY RELY ON, THE REASONABLE INTENDMENTS AND MEANING OF THAT ORDER THAT YOU ISSUED IN MAY, AND THIS IS NOW AUGUST. BUT IT WAS MUCH MORE THAN THAT, I THINK. AND IT'S ALWAYS HARD TO ARGUE AN ORDER BY THE COURT TO THE COURT. IN FACT, I'VE DONE IT UNSUCCESSFULLY ON MANY OCCASIONS.

BUT IF YOU WILL PERMIT ME, I THINK THAT WHAT YOUR HONOR WAS REFLECTING IS SOME OF THE GOOD, SOLID JURISPRUDENCE ABOUT WHAT IT TAKES IN ORDER TO OVERCOME SOME OF THESE DEFENSES. AND IT TAKES PARTICULARIZED EVIDENCE. AND YOUR HONOR USED THAT PHRASE. IT COMES OUT OF THE GLUCKSBERG SUICIDE CASE, AND I'LL GET TO THAT IN A MOMENT WITH YOUR HONOR'S PERMISSION. BUT THAT'S WHAT YOU WERE REFLECTING IN THAT ORDER.

AND SO THE DEFENDANTS IN THIS CASE WENT OUT WITH THE ORDER IN HAND, LOOKED AT THE SITUATION, AND NOW WE'RE BACK IN COURT. SO THE FIRST POINT IS THAT BY THESE PAPERS, THE GOVERNMENT SEEKS TO CHANGE THE BASIS OF YOUR HONOR'S INJUNCTION. YOU ISSUED IT BUT WITH SPECIFIC PROVISOS AS TO WHAT WOULD HAPPEN. AND THE SECOND POINT IS THAT WITH REGARD TO 882(B), AND I THINK -- I THINK YOUR HONOR HAS ALREADY SAID -- I HOPE THAT I HEARD IT CORRECTLY -- THAT YOU DO BELIEVE WE'RE

ENTITLED TO A JURY TRIAL ON THE QUESTION OF CONTEMPT OR VIOLATION, WHATEVER THE TERM IS.

THE COURT: I BELIEVE YOU'RE ENTITLED TO A JURY TRIAL ON THE ISSUE OF THE -- OF RESOLVING ANY DISPUTED -- ANY MATERIAL DISPUTED FACTS. THAT'S WHAT I THINK A TRIER OF FACT -- I THINK IN THIS CASE, THE TRIER OF FACT IS A JURY. IF YOU COME IN AND YOU SAY, "WELL, ACTUALLY, TO TELL YOU THE TRUTH, WE DID VIOLATE THE INJUNCTION. NOW WE WANT OUR JURY TRIAL." NO. I MEAN, I DON'T KNOW THAT THERE'D BE A JURY TRIAL, SO --

YEAH, I THINK IT'S DIFFERENT, AND I TRIED TO DISTINGUISH BETWEEN THE CRIMINAL CASE WHERE YOU DON'T SAY ANYTHING AND EVEN THOUGH THE FACTS DON'T EVEN SEEM TO BE IN DISPUTE, A JURY HAS TO COME BACK AND FIND ALL THE ELEMENTS OF THE OFFENSE. I DON'T THINK THAT'S TRUE WHEN THE CONGRESS HAS SAID A JURY TRIAL TO BE GOVERNED BY THE FEDERAL RULES OF CIVIL PROCEDURE AS DISTINCT FROM CRIMINAL PROCEDURE.

SO I ASSUME THAT THERE ARE GOING TO BE ISSUES IN DISPUTE. IN YOUR PAPERS, YOU ARGUE LOUD AND CLEAR THAT THERE ARE FACTUAL ISSUES. AND AS TO ANY MATERIAL -- MATERIAL GENUINE ISSUES OF FACT, A JURY, NOT A COURT WILL DECIDE THAT.

MR. BROSNAHAN: UNDERSTANDING YOUR HONOR'S DEEP THOUGHT ON THIS CASE, YOU'VE BEEN IN IT A LONG TIME, MAY I MAKE THREE QUICK POINTS ON THAT POINT?

THE COURT: OF COURSE, YEAH.

MR. BROSNAHAN: THE FIRST POINT IS THE LANGUAGE OF 882(B), WHICH SAYS WE'RE ENTITLED TO A JURY TRIAL. IT HAS A -- AND THAT LANGUAGE IS QUITE CLEAR. THE GOVERNMENT ADMITTED LAST TIME THERE ARE ONLY ABOUT FIVE OF THESE THAT THEY KNOW OF IN THEIR HISTORY AND THE HISTORY OF THIS CODE SECTION.

THIS IS A LITTLE BIT UNUSUAL HERE, AND THE LANGUAGE IS EXPLICIT, YOUR HONOR REFERRED TO IT IN YOUR OPINION, THAT THERE WILL BE A JURY TRIAL. IT WILL BE PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE IN WHICH THE GOVERNMENT WANTS TO ACCRETE THE WORDS "AND INCLUDING ALL OF IT" IN SUMMARY JUDGMENT. THAT'S THEIR POSITION.

BUT IT DOESN'T SAY THAT, AND THE LOGICAL MEANING OF IT WHEN THEY SAY SPECIFICALLY YOU GET A JURY TRIAL ON A CONTEMPT MATTER WHICH HAS A LONG HISTORY THAT I WON'T BORE YOUR HONOR WITH. YOUR HONOR KNOWS IT -- BUT WHEN YOU SAY THAT OUT BEYOND THIS COURT -- NOT A CONTEMPT IN THE PRESENCE OF THE COURT, BUT OUT THERE SOMEWHERE, THERE'S A CONTEMPT, THERE'S A LONG HISTORICAL POWERFUL SET OF DECISIONS THAT MARCHES TO THE CONCLUSION THAT WE'RE ENTITLED TO JURY TRIAL. AND CONGRESS SAID WE ARE.

SECOND POINT, KEEPING TO MY COMMITMENT TO YOUR HONOR, THERE HOVERS OVER THIS CASE THE OMINOUS THREAT OF CRIMINAL CASES. THE GOVERNMENT HAS NEVER SAID THEY WOULDN'T. WE CANNOT RELY, EVEN THOUGH SOME MIGHT BE TEMPTED TO, ON THE FACT THAT THEY JUST WON'T DO SOMETHING LIKE THAT. WE DON'T KNOW THAT.

AND SO THE CLIENTS FACE THE SERIOUS, POWERFUL, DANGEROUS FACT THAT IN ORDER TO PUT INTO THE HANDS OF A PERSON WITH A MEDICAL NECESSITY, THE DETAILS OF WHICH AT THE MOMENT I WILL NOT BURDEN YOUR HONOR WITH -- TO DO THAT, YOU MUST FACE CRIMINAL SANCTION. AND THAT THERE'S A SET OF PROCEDURES THAT THEY WOULD LIKE TO EMPLOY THAT WILL CUT OFF THE PRESENTATION OF A FULL RECORD IN THIS CASE.

WE THINK THAT IS NOT CORRECT. NOT ONLY THAT, BUT THE AUTHORITIES CITED TO YOUR HONOR IS THAT IN THIS AREA, IT IS UNUSUAL FOR APPELLATE JUDGES TO ADMIT THAT IT'S CONFUSING OR DIFFICULT. THEY USUALLY LIKE TO BE VERY DECISIVE, BUT MANY DISTINGUISHED JUDGES HAVE HELD, HAVE WRITTEN THAT YOU CAN'T ALWAYS TELL THE DIFFERENCE BETWEEN CIVIL AND CRIMINAL CONTEMPT.

NOW, IF WE'RE TO HAVE JUST A CIVIL CONTEMPT, AND YOUR HONOR MIGHT INDICATE, AS YOU SAID, THAT YOU WOULD LIMIT IT -- THE SANCTIONS YOU'RE GOING TO IMPOSE -- THERE'S NOTHING TO SAY THAT IN A FEDERAL BUILDING IN WASHINGTON THEY WON'T HAVE A MEETING AND DECIDE TO INDICT, PEOPLE TO SHOW HOW IMPORTANT THIS IS.

THE COURT: WELL, IT SEEMED TO ME THINKING ABOUT IT -- AND I HAVEN'T GIVEN IT VERY MUCH THOUGHT, BUT I HAVE THOUGHT ABOUT THE ARGUMENT YOU'VE RAISED, BECAUSE YOU'RE BEING ASKED TO COME IN WITH AFFIDAVITS, DETAILING WHATEVER DEFENSE IS IT YOU HAVE. THERE ARE CASES OUT THERE THAT I'VE LOOKED AT THAT WOULD SAY, "WELL, THAT'S SORT OF TOO BAD. YOU HAVE TO DO THAT," BUT

I WONDERED -- I WONDERED WHETHER -- WHAT THE GOVERNMENT'S POSITION WOULD BE IF I WERE TO SAY THAT YOU WOULD BE IMMUNIZED -- THAT THOSE STATEMENTS WOULD BE IMMUNIZED FROM ANY USE IN ANY CRIMINAL PROCEEDING. I WAS GOING TO ASK THE GOVERNMENT THAT.

MR. BROSNAHAN: I HOPE YOUR HONOR DOES.

THE COURT: OH, I WILL.

MR. BROSNAHAN: I HOPE YOUR HONOR DOES, BECAUSE IT'S A SERIOUS PROBLEM OBVIOUSLY IN THIS SITUATION AND BEYOND THAT, THOUGH, TO HAVE THE CIVIL PROCEEDING IN WHICH YOU FACE CRIMINAL SANCTIONS, THAT IS THE SECOND REASON FOR A JURY TRIAL.

AND THIRD ONE IS THAT YOUR HONOR SAID REALLY IN YOUR OPINION THAT THERE WOULD BE ONE, AND YOU GRANTED THE INJUNCTION ON THAT BASIS. AND I THINK YOU DID SO AS A JUDGE IN EQUITY. I THINK YOU WERE BALANCING THE COMPLEXITIES OF THIS MATTER.

IT ISN'T THAT THE GOVERNMENT DOESN'T SEE COMPLEXITIES. THEY DO, BUT THEY SEE DIFFERENT ONES THAN WE DO. THIS IS QUITE COMPLEX, AND ONE HAS THE SENSE ABOUT THIS CASE, AND I THINK YOUR HONOR SHARES IT IF I MAY SAY SO, THAT THERE IS SOMETHING ABOUT THIS CASE THAT DESERVES FULL EXPLORATION.

AND THE GOVERNMENT WILL HAVE -- BE FAIR TO THE GOVERNMENT, THEY'D HAVE A FULL OPPORTUNITY TO BRING DOCTORS FROM WHEREVER THEY CAN TO TALK ABOUT THE ISSUES THAT ARE HERE IN ANY EVENT, THAT'S MY SECOND POINT.

THE THIRD POINT IS AMAZINGLY THAT THE GOVERNMENT DID

NOT SUBMIT ANY ADEQUATE EVIDENCE TO SUPPORT THEIR MOTION FOR ORDER TO SHOW CAUSE FOR CONTEMPT. THEY DIDN'T DO THAT. AND I'D LIKE TO ADDRESS DIRECTLY WHAT THEY DID SUBMIT, BECAUSE IT'S INADEQUATE. NOW --

THE COURT: WELL, YOU RAISED OBJECTIONS TO THEIR EVIDENTIARY SHOWING.

MR. BROSNAHAN: WE DID. WE DID. AND -- BUT, YOUR HONOR, I THINK THERE ARE THREE AFFIDAVITS FROM THREE SPECIAL AGENTS.

THE COURT: RIGHT.

MR. BROSNAHAN: ONE OF THEM SAID, "I CALLED THE OAKLAND CANNABIS CLUB AND THEY SAID THEY'RE IN BUSINESS," SOMETHING TO THAT -- I THINK THE WORD WAS "OPEN" ACTUALLY, AND --

THE COURT: RIGHT.

MR. BROSNAHAN: -- AND THEY WERE TAKING NEW MEMBERS. NOW, IN THOSE AFFIDAVITS, THERE ARE DESCRIPTIONS BY THE AGENTS OF HOW TRAINED THEY ARE IN THESE MATTERS.

THE COURT: RIGHT.

MR. BROSNAHAN: ONE OF THEM WAS ABLE TO PENETRATE A PRESS CONFERENCE, AND THERE HE WAS. AND THERE WERE SIX -- I MEAN, SERIOUSLY. THIS IS THE LEVEL -- THIS IS QUALITY -- I'M NOT TRYING TO -- MAYBE A LITTLE BIT.

THERE ARE SIX CAMERAS THERE, IF THE COURT PLEASE, AND HERE COMES AN AGENT NOW -- FEDERAL AGENT WHO COMES UP, AND WHEN

HE GOES AWAY, HE SAYS HE THINKS HE SAW TEN BUYS. INADEQUATE IN ANY COURT, CIVIL OR CRIMINAL. NO COURT I'VE EVER BEEN IN FOR 40 YEARS. PUT THE AGENT ON THE STAND AND SAY, "I WAS AT THE OAKLAND CANNABIS BUYERS' COOPERATIVE, AND I SAW TEN SALES OF MARIJUANA." INADEQUATE. IN LIMINE. OUT.

THE COURT: WHY WOULD IT?

MR. BROSNAHAN: NO ANALYSIS. NO ANALYSIS OF IT. NO NAMES. NO SPECIFICS. NO PEOPLE. NO EVIDENCE. I MEAN, THERE'S NOTHING. THERE'S JUST A AGENT WITH HIS CONCLUSIONS. THAT'S -- AND THAT'S THE STRONGEST ONE AGAINST THE OAKLAND CLUB. THAT'S THE STRONGEST AFFIDAVIT THAT THEY HAVE.

NOW, THAT'S WHY I SAID I DIDN'T HEAR THEM SAY THEY HAVE A LOT MORE. THAT'S WHAT THEY HAVE.

NOW, THAT GOES TO JUST THE QUESTION OF WHETHER THERE'S ANY VIOLATION HERE. AND MAYBE THE ANSWER WILL BE -- AND I HOPE YOUR HONOR WILL AT LEAST CONSIDER THIS. MAYBE THE ANSWER WILL BE HERE THAT AT THE MOMENT, THEY HAVEN'T MADE A SUFFICIENT SHOWING. IF THEY MAKE ONE IN A MONTH WITH NEW PAPERS OR SOMETHING, WE'LL ALL DEAL WITH THAT, BUT THEY HAVEN'T DONE THAT. AND WE SHOULD NOT BE IN A POSITION WHERE WE ARE STARTED ON THIS COURSE UNLESS THEY'VE SHOWN IT.

NOW, THE SECOND PART OF THIS I THINK IS DISPOSITIVE IN THIS WAY: UNDER RULE 56, I ASK YOUR HONOR TO IMAGINE THAT WE'RE NOT HERE JUST ARGUING THIS MATTER WHICH IS SO IMPORTANT BUT SOMEHOW IT'S A COMMERCIAL CASE, AND THERE ARE COMMERCIAL

LAWYERS ARE HERE, AND HERE COMES A PARTY, AND THEY SAY THIS, AND THEY WANT SUMMARY JUDGMENT. YOUR HONOR'S INDICATED YOU'RE GOING TO DENY THAT, BUT THEY WANT ADDITIONAL PROCEEDINGS BASED ON IT. AND THEY DON'T PUT IN A WORD SHOWING THAT THERE IS NO FACTUAL ISSUE ON WHAT HAVE BEEN ESTABLISHED AS DEFENSES, ESTABLISHED NOT ONLY BY THE PLEADINGS, NOT ONLY BY THE ARGUMENTS OF THE DEFENSE COUNSEL BUT ESTABLISHED IN THE SENSE THAT IT WAS TENTATIVE IN YOUR HONOR'S ORDER. "I AM NOT RULING AT THIS TIME THERE'S NO MEDICAL NECESSITY. AT A TRIAL, I WILL BE PRESENTED WITH PARTICULARIZED EVIDENCE," WHICH IS SOMETHING I'D LIKE TO COME BACK TO. YOUR HONOR SAID THAT, AND RIGHTLY YOU SAID IT.

WHY SHOULD ANYONE BE PUT THROUGH THE PROCEDURES -- ESPECIALLY THESE FOLKS -- OF THIS KIND OF PROCEDURE WITHOUT PARTICULARIZED EVIDENCE? THEY HAVE NOTHING ON MEDICAL NECESSITY. THEY HAVE NOTHING ON SUBSTANTIVE DUE PROCESS. THEY HAVE NOTHING ON ANY OF THE OTHER MATTERS THAT ARE HERE. THEY DON'T HAVE A MEDICAL STATEMENT THAT SAYS, YOU KNOW, THERE ARE ALTERNATIVES TO PEOPLE WHO -- WHO -- WHO HAVE ILLNESS, WHO HAVE PAIN, WHO HAVE CONSTANT CONSTIPATION, WHO ARE PRISONERS IN THEIR OWN BODIES.

THE COURT: WELL, TO THAT, THEY'LL SAY THAT'S A DEFENSE. THAT'S BY WAY OF DEFENSE --

MR. BROSNAHAN: AH, BUT FOR SUMMARY JUDGMENT -- FINE. THAT'S PROBABLY RIGHT.

THE COURT: I DON'T WANT TO TAKE YOUR ARGUMENT AWAY.

MR. BROSNAHAN: NO, NO --

THE COURT: WHAT I'M GOING TO DO -- I DON'T KNOW WHETHER IT'S APPROPRIATE. BASED UPON WHAT HAS PRESENTED TO ME, I'M NOT GRANTING SUMMARY JUDGMENT.

MR. BROSNAHAN: I UNDERSTAND.

THE COURT: I'M PROVIDING FOR A DIFFERENT SCENARIO, AND WE'LL JUST HAVE TO SEE WHETHER THE EVIDENCE THAT THEY PRESENT IN TERMS OF ONE, THEIR ORDER -- OR THEY WHAT PROPOSE IN TERMS OF THEIR ORDER TO SHOW CAUSE, AND THEY DON'T HAVE TO MAKE AN -- I THINK THEY HAVE TO MAKE SOME EVIDENTIARY SHOWING, THAT IS, SOME BASIS -- I THINK THERE IS SOME BASIS THAT THEY'VE ALREADY MADE, BUT THEY HAVE TO GO LOOK AT IT AND FORMULATE IT THE WAY THEY WANT TO FORMULATE IT SO, YOU KNOW, IT'S IN SOME FORM OF ORDER.

MR. BROSNAHAN: YES, YOUR HONOR.

THE COURT: AND THEN I HAVE TO MAKE A DETERMINATION. I HAVE TO LOOK AT IT AND SAY IS THAT ENOUGH TO ISSUE AN ORDER TO SHOW CAUSE. NOW, DO YOU THINK THAT TO ISSUE AN ORDER TO SHOW CAUSE, THAT I COULDN'T DO IT ON THE BASIS OF HEARSAY, THAT I COULD -- WHAT DO I -- DO THEY NEED TO LEGALLY --

MR. BROSNAHAN: I DON'T KNOW THAT I'D WANT TO BE A THAT TECHNICAL, BUT I WOULD URGE YOUR HONOR NOT TO ISSUE THE ORDER TO SHOW CAUSE, AND HERE'S WHY. BECAUSE IN JUDGMENT, IN EQUITY, THERE'S JUST NOT SUFFICIENT EVIDENCE HERE. IF THEY

PRESENT MORE AT A LATER TIME, THEN I THINK THAT WE CAN ALL --

THE COURT: WELL --

MR. BROSNAHAN: -- DO THAT.

THE COURT: YOU KNOW THEY DID, MR. BROSNAHAN. THEY DID SAY -- THE INJUNCTION SAID YOU CANNOT DISTRIBUTE MARIJUANA. AND THEN ONE OF THE CLUBS HELD A PRESS CONFERENCE IN WHICH THEY SAID, "WE'RE GOING TO DISTRIBUTE MARIJUANA. COME ON IN. WE'RE INVITING THE U.S. ATTORNEY, MR. YAMAGUCHI, TO COME ON BY" -- I MEAN, WHAT I READ. I DON'T KNOW WHETHER HE SAID IT OR NOT --

MR. BROSNAHAN: IT WAS AT LEAST SOCIABLE.

THE COURT: HE SAID, "COME ON IN. WE'RE GOING TO STAY IN BUSINESS, AND WE ARE GOING TO DISTRIBUTE MARIJUANA." NOW --

MR. BROSNAHAN: YES, YOUR HONOR. BUT YOUR HONOR'S ORDER SAYS -- WHICH, AS YOUR HONOR WELL KNOWS BETTER THAN I, SAYS UNLAWFULLY, AND THAT'S WHAT THE CASE IS ALL ABOUT.

THE COURT: WELL --

MR. BROSNAHAN: THAT'S WHAT THE CASE IS ALL ABOUT.

THE COURT: I UNDERSTAND WHAT THE CASE IS ABOUT, BUT WHETHER IT'S LAWFUL OR UNLAWFUL -- IF IT'S -- AS YOU WELL POINT OUT -- PROFESSOR UELMEN POINTED OUT IN A SENSE OF IRONY AND YOU DID AT THE BEGINNING -- IS THAT YOU WOULDN'T -- YOU WOULDN'T SAY THAT IT'S LAWFUL NECESSARILY FOR THEM TO DISTRIBUTE MARIJUANA BUT THAT THE DEFENSE OF NECESSITY ALWAYS COMES UP IN THE CONTEXT OF ABSOLVING A PERSON FROM LIABILITY FOR A UNLAWFUL ACT.

IT DOESN'T MAKE IT -- I DON'T KNOW WHETHER IT MAKES IT LAWFUL. I HAVEN'T THOUGHT ABOUT THAT -- IT MAKES AN UNLAWFUL ACT LAWFUL -- BUT I KNOW THAT IT'S A DEFENSE. I KNOW ENOUGH ABOUT IT TO FIGURE THAT IF THEY COME IN AND THEY SAY, "THIS CONDUCT IS UNLAWFUL," WHICH I'VE ALREADY SAID, AND THEN THE NEXT THING IS THEY SAY, "WE'RE DOING IT,".

NOW THE CONDUCT'S UNLAWFUL. THEY'RE SAYING THEY'RE DOING IT, AND IT SEEMS TO ME THAT THE NEXT STEP -- THAT -- I THINK THAT'S ENOUGH TO ISSUE AN ORDER TO SHOW CAUSE. THE NEXT STEP IS FOR YOU TO COME IN AND SAY, "NOTWITHSTANDING WHAT THE EVIDENCE IS, THAT EVIDENCE, HERE IS OUR DEFENSE TO THE CASE."

MR. BROSNAHAN: WELL, BUT WHAT ARE WE TO DO WITH THE LANGUAGE WHICH SAID THAT YOU WILL BE PRESENTED WITH PARTICULARIZED EVIDENCE? NOW, YOUR HONOR HAS SAID THAT WEDNESDAY IS SUCH A DATE THEY WILL PRESENT MORE. AND IF THAT'S INADEQUATE, I HOPE WE GET A CHANCE TO POINT THAT OUT, BUT --

THE COURT: I DON'T KNOW WHETHER THEY'LL PRESENT MORE OR THE SAME OR LESS. I DON'T KNOW WHAT THEY'RE GOING TO DO.

MR. BROSNAHAN: MAY I MAKE --

THE COURT: -- GOING TO DO WHATEVER THEY THINK IS APPROPRIATE.

MR. BROSNAHAN: YES, YOUR HONOR.

MAY I MAKE A LARGER POINT, I HOPE?

THE COURT: SURE.

MR. BROSNAHAN: AND THAT IS WITH REGARD TO NECESSITY.

SUPPOSE HYPOTHETICALLY, IF THIS IS ALL RIGHT TO PUT THIS, THAT THE ONLY EVIDENCE THE GOVERNMENT HAD IS ONE PERSON WENT IN, AND THEY HAD THE FOUR ELEMENTS OF NECESSITY THAT YOUR HONOR PUT IN THE ORDER, THAT IS TO SAY, THERE'S A CHOICE OF EVILS.

ALL RIGHT? THE EVIL IS THAT THERE'S A FEDERAL STATUTE ON THE ONE HAND, AND THIS IS WHAT THIS CASE IS ALL ABOUT, AND ON THE OTHER SIDE, THERE IS EXCRUCIATING, INSIDE-THE-BODY, UNENDING PAIN IN A PERSON WHO IS TERMINALLY ILL.

I WANT TO CONVINCE YOUR HONOR, AND I THINK YOUR HONOR KNOWS, AND I THINK -- THE SUBTLETY OF YOUR HONOR'S ORDER SHOWS THAT THAT WHICH ALL AMERICANS TURN AWAY FROM, WHICH MAY BE A GOOD THING, IS WHAT IS DOWN THE ROAD FOR ANY OF US. THERE IS PAIN, AND THAT IS EVIL.

AND FIVE JUSTICES OF THE SUPREME COURT IN DIFFERENT CONCURRING OPINIONS AND WITH -- IN DIFFERENT WAYS AND SOMETIMES GENERAL SUGGESTIONS AND THEN WITH THREE OF THEM MORE ACCURATE HAVE SAID THAT IF THERE'S A FUNDAMENTAL RIGHT IN THIS COUNTRY, IT SURELY MUST BE TO BE FREE OF PAIN.

PEOPLE -- JUDGES WRITE THAT NOTHING STANDS BETWEEN MEDICATION AND A PATIENT. THIS IS POWERFUL STUFF TO ME. THIS IS POWERFUL STUFF THAT THESE CLIENTS ARE FIGHTING FOR.

NOW, SUPPOSE THAT THE GOVERNMENT CAME IN WITH ONE PERSON THAT HAD ALL FOUR ELEMENTS OF THE MEDICAL NECESSITY. WOULD THEY HAVE SHOWN A VIOLATION OF YOUR HONOR'S ORDER? I THINK NOT. I DON'T THINK -- AND I THINK -- I MAY BE QUITE

WRONG ABOUT THIS, BUT I THINK YOUR HONOR'S ORDER HAD THE SCOPE AND MEANING TO IT THAT IF THAT'S ALL YOU CAN DO, IF YOU BRING IN PARTICULARIZED EVIDENCE AND THEY HAVE MEDICAL NECESSITY, THERE'S NOT GOING TO BE A VIOLATION OF THE INJUNCTION.

THE COURT: WELL, BUT AREN'T I MAKING A FINDING OF FACT WHICH A JURY HAS TO MAKE?

MR. BROSNAHAN: YES. WELL, NO.

THE COURT: YOU'RE ASKING WHETHER I WOULD HAVE DONE IT OR WHETHER THE JURY WOULD HAVE DONE IT.

MR. BROSNAHAN: THE FINDER OF FACT. THE FINDER OF FACT. I THINK THERE WOULD BE NOT BE A VIOLATION IN THAT. WE WOULD NOT BE IN CONTEMPT IN THAT CASE.

MAY I MOVE TO THE NEXT POINT, BECAUSE --

THE COURT: SURE.

MR. BROSNAHAN: -- BECAUSE OF THIS, OUR POSITION IS THAT REAL STEPS ARE MADE AT THE OAKLAND CLUB TO ASSURE THAT THERE'S MEDICAL NECESSITY, BUT THE LAW IS COMPLEX. YOUR HONOR'S ALREADY HAD A DETAILED DISCUSSION WITH GOVERNMENT COUNSEL ON THAT SUBJECT.

BUT SUPPOSE HYPOTHETICALLY BY WAY OF ILLUSTRATION THAT WHEN ALL THE EVIDENCE IS IN BEFORE WHOEVER IT IS, THE JURY, WHATEVER, AND YOUR HONOR IS THINKING ABOUT THE INJUNCTION, SUPPOSE THE EVIDENCE WERE THAT 4 PERCENT OF THE PEOPLE OVER THERE AT THAT CLUB DID NOT HAVE MEDICAL NECESSITY BUT 96 PERCENT DID. I THINK IT WOULD BE CLEAR FROM THE EQUITY CASES

THAT YOUR HONOR SHOULD NOT ABOLISH THIS CLUB, YOU SHOULD NOT STRIKE IT DOWN AS THE GOVERNMENT WISHES BUT RATHER YOU SHOULD FASHION SOME REMEDY OR SOMETHING THAT WOULD DEAL WITH THAT.

THE COURT: WELL, YOU KNOW, THAT CAME UP IN THE CONTEXT OF U.S. VS. AGUILAR.

MR. BROSNAHAN: I KNOW.

THE COURT: AND THE COURT IN THAT CONTEXT SAYS YOU HAVE TO SHOW IN EACH AND EVERY CASE THE NECESSITY DEFENSE. AT LEAST --

MR. BROSNAHAN: THAT'S RIGHT.

THE COURT: I DON'T KNOW HOW I WOULD COME OUT, AND I CAN TELL YOU THAT ONE OF THE DANGERS IS TO SIT HERE TODAY WITHOUT ALL THE FACTS BEING LAID OUT, WITHOUT A JURY DETERMINATION AS TO WHAT A JURY CAN DO AND THEN SAYING HOW I WOULD COME OUT. I DON'T KNOW. I DON'T KNOW. I'VE SORT OF -- YOU KNOW --

MR. BROSNAHAN: YES, YOUR HONOR.

THE COURT: I'VE SAID WHATEVER I'VE SAID IN MY OPINION. I'VE URGED WHATEVER I COULD URGE. WE SPEAK THROUGH OUR OPINIONS, BUT WE STILL TO HAVE FOLLOW THE LAW. AND SO I DON'T KNOW HOW I WOULD COME OUT, MR. BROSNAHAN.

MR. BROSNAHAN: IT DOESN'T MATTER, YOUR HONOR. AGUILAR WAS MY CASE. SO I KNOW WHAT YOUR HONOR IS SAYING.

THE COURT: I KNOW THAT.

(SIMULTANEOUS COLLOQUY.)

MR. BROSNAHAN: YES, OF COURSE.

BUT IF THE COURT PLEASE, I'M TRYING TO MAKE THIS POINT: AND IT'S ALWAYS TRICKY TO REPRESENT WHAT THE EVIDENCE WILL BE IN A JURY TRIAL IF THE JURY WAS IN THERE LISTENING TO THIS. AND THEY SHOULD IN THIS CASE.

THERE ARE STEPS TAKEN IN OAKLAND TO ASSURE THAT A DOCTOR HAS SAID -- A MEDICAL TRAINED -- HUNDREDS, I THINK, OF DOCTORS WHO ARE TRAINED HAVE WRITTEN IN WRITING THAT THIS WILL BE A BENEFIT TO THEIR PATIENT WHO SUFFERS FROM VARIOUS ILLNESSES, SOME OF WHICH -- AND THIS IS SO INTERESTING TO ME AND I HOPE IT'S INTERESTING TO YOUR HONOR -- SOME OF THE SAME ILLNESSES THAT WERE TREATED WITH MARIJUANA 1500 YEARS B.C. THAT IS WHAT THE GOVERNMENT CANNOT HAVE IN A TRIAL. THEY CANNOT HAVE AN OPEN PUBLIC DISCUSSION WITH DOCTORS.

JUDGE JONES IN THE BREAST IMPLANT CASES HAD EXTENSIVE HEARINGS WITH DOCTORS. PRODUCTS LIABILITY CASES PRODUCE, AS YOUR HONOR WELL KNOWS -- YOU'VE BEEN PART OF THAT WORLD -- PRODUCED THE EMINENT DOCTORS WHO TALK ABOUT THIS, AND IT'S PUBLIC, AND IT'S GOOD, AND IT OUGHT TO HAPPEN IN THIS CASE.

NOW, IF THE COURT PLEASE, WE SUPPLIED AFFIDAVITS, AND I WANT TO MENTION THOSE BRIEFLY.

THE COURT: I READ THEM.

MR. BROSNAHAN: I KNOW.

THESE ARE MOVING PAPERS. ONE OF THESE FOLKS IS IN THIS COURTROOM TODAY. AND IT'S GOT TO BE THAT THE LAW WILL

FEEL THAT ISSUE. FEEL IT, NOT JUST THINK IT. FEEL IT. IT'S GOT TO BE. THE CASE HAS THAT ASPECT TO IT.

I HAVE NO PRO LEGALIZE MARIJUANA BONE IN MY BODY. I HAVE NEVER INHALED, IF THE COURT PLEASE, EXCEPT, AS YOUR HONOR WILL REMEMBER, WALKING DOWN MONTGOMERY STREET IN THE LATE '60'S WHERE IT WAS IMPOSSIBLE NOT TO INHALE. AND YOU'D GET A LITTLE BUZZ ON BEFORE YOU PERHAPS -- BEFORE YOU CAUGHT YOUR BUS IN THOSE DAYS. THERE WASN'T EVEN ANY BART.

THAT'S NOT WHAT THIS CASE IS ABOUT. THE GOVERNMENT HAS A SNICKERING ASPECT -- I MEAN NO PERSONAL OFFENSE IN THAT -- THEY HAVE A SNICKERING ASPECT IN THE CORNERS OF THEIR ARGUMENT THAT "WE KNOW WHAT YOU'RE DOING," AND NOW THEY COME INTO COURT WITH GREAT HOOPLA BUT WITH NO AFFIDAVITS AGAINST, IN THE MEDICAL NECESSITY TERMS, THE GREATER EVIL, A QUADRIPLEGIC WHO HAS PAIN, APPETITE STIMULATION, CAN'T EAT, PROBLEMS WITH SLEEPING, CONSTANT PAIN, "I WANTED TO KILL MYSELF." THOSE WHO OPPOSE SUICIDE SHOULD BE WITH US. THEY SHOULD BE WITH US.

AND ANOTHER AFFIDAVIT, HAS TRIED -- AND HERE'S YOUR ALTERNATIVES -- HAVE TRIED VALIUM. IT DOESN'T WORK. THIS PERSON HAS SPASTICITY. SPASTICITY. I NEVER REALLY THOUGHT ABOUT IT UNTIL THIS CASE. I MEAN, I'VE SEEN PEOPLE WHO HAVE IT AND WHAT IS IT THAT THEY HAVE. THAT IS THE GREATER EVIL.

JUDGES SIT, LAWYERS ARGUE, COURTS EXIST TO HAVE A MOMENT WHERE SOMEBODY CAN SAY, YOU KNOW WHAT, THE GOVERNMENT CAN ENFORCE EVERYTHING THEY WANT AND ALL THE REST OF IT AS FAR

AS WE'RE CONCERNED, BUT IF IT WILL REDUCE PAIN IN HUMAN BEINGS, THIS IS A JUST CAUSE. THIS IS SOMETHING WORTH DOING.

IF THE COURT PLEASE, I THINK WE'VE COVERED PRETTY MUCH THE MEDICAL NECESSITY HERE. AND THE POINT I WANTED TO MAKE IS I EXPECT -- AND I DIDN'T QUITE MAKE IT -- I EXPECT THAT THE EVIDENCE WILL SHOW THAT VIRTUALLY ALL OR MOST OF THE PEOPLE IN THE OAKLAND CLUB ARE -- GO THROUGH THAT PROCESS WITH SUPPORT FROM DOCTORS AND MEDICAL CONDITIONS. I THINK THAT'S GOING TO BE THE EVIDENCE. NOW, WE HAVE TO DEAL WITH THAT, BUT I THINK -- I WANT TO DEAL DIRECTLY WITH THE IDEA FROM THE GOVERNMENT'S SIDE THAT REALLY THIS ISN'T ABOUT THE MEDICAL CONDITION, IT'S JUST SOMETHING ELSE. AND I THINK THAT IS NOT RIGHT.

THE SUBSTANTIVE DUE PROCESS YOUR HONOR'S HEARD A LOT. IT DIDN'T ELICIT A LOT MORE, BUT I WOULD MAKE TWO LIMITED POINTS IF I MAY. AND I'M ALMOST FINISHED IF THE COURT PLEASE. THE FIRST IS SUBSTANTIVE DUE PROCESS, COMPARED TO SUICIDE ON THE ONE HAND, AND THIS, WHICH IS THE MUCH LESSER -- IF YOU WANT TO CALL IT AN EVIL FOR THIS PURPOSE. THIS IS JUST TAKING MEDICATION.

SO SUBSTANTIVE DUE PROCESS IN THIS CASE -- THERE MIGHT WELL BE FIVE JUSTICES THERE WHO CONFRONTED WITH EITHER AN INTEVENOR OR THE TESTIMONY OR THE WITNESSES AND THE EVIDENCE, "I'M A MEMBER OF THE CLUB. I PURCHASE. I'M IN PAIN. THEY TELL ME I HAVE A YEAR TO LIVE, SIX MONTHS. THIS HELPS ME.

NOTHING ELSE DOES."

WHAT'S GOTTEN ME IN THIS CASE ALL ALONG IS I KNOW OF NO ONE -- WITH ALL RESPECT TO GOVERNMENT COUNSEL -- I KNOW NO ONE WHO HAVING A PERSON YOU CARE ABOUT, A GRANDFATHER, GRANDMOTHER, SOMEBODY YOU CARE ABOUT, WHO WOULD BENEFIT FROM THIS -- I KNOW OF NO ONE THAT WOULDN'T SAY, "LET THEM HAVE IT."

AND THE FINAL POINT IS -- WHICH HAS A SUBPART, SO IT'S REALLY TWO FINAL POINTS, IF THE COURT PLEASE. THE FIRST IS THERE'S SOME SUGGESTION WE DON'T HAVE STANDING. THAT WAS DETERMINED IN N.A.A.C.P. VS. BUTTON. AND IT'S BEEN DECIDED TWICE BY THE SUPREME COURT. AGAIN IN HUNT, AND AGAIN IN THE NINTH CIRCUIT.

WE ARE AN ASSOCIATION, AND WE HAVE THE RIGHT TO ADVANCE THE RIGHTS OF THE MEMBERS OF OUR ASSOCIATION. THAT IS NOT -- THE GOVERNMENT ARGUES TO THE CONTRARY, BUT IT'S NOT AN INTERESTING QUESTION.

BUT FINALLY THE BIG POINT HERE, I THINK, IS ONCE IN A WHILE, A CASE COMES ALONG THAT WE KNOW IS GOING TO BE LOOKED AT BY FOLKS AND IS GOING TO BE REVIEWED BY A COURT OR COURTS. IT SHOULD HAVE A FULL RECORD. IT DESERVES A FULL RECORD. AND THE IN LIMINES ARE CERTAINLY USED, AND THEY'RE USED CREATIVELY RIGHT NOW. THEY'RE AUTHORIZED BY THE U.S. SUPREME COURT. THEY ARE FOR THE USE OF EXCLUDING EVIDENCE WHICH IS PREJUDICIAL. AND I JUST WANT TO SAY I KNOW OF NO PREJUDICIAL EVIDENCE THAT THE DEFENDANT -- THAT THE GOVERNMENT -- IN AGUILAR, THE COURT

THOUGHT THAT THE GOVERNMENT COULD BE PREJUDICED BY EVIDENCE.

BUT HERE, I KNOW OF NO PREJUDICE THAT WILL SUFFICE [SIC]. IF WE DO THAT PROCEDURE, WE'LL DEAL WITH THAT. WE'LL PRESENT THAT TO YOUR HONOR, AND THAT MIGHT BE FOR ANOTHER DAY. BUT WHAT I WOULD LIKE TO SAY, YOUR HONOR, TODAY, BECAUSE I THINK WE WANT TO GO AWAY PRETTY WELL ASSURED THAT THIS WILL HAPPEN, IS THAT THERE SHOULD BE A FULL RECORD WITH DOCTORS, PATIENTS, OUR CLIENTS TESTIFYING.

WE DO HAVE THE CRIMINAL THREAT PROBLEM, BUT PERHAPS -- PERHAPS THE COURT WILL RAISE THE IMMUNITY ISSUE, AND IN THE OPEN, IN PUBLIC, THERE WILL BE A RATIONAL DISCUSSION BACK AND FORTH, PRO AND CON ABOUT WHETHER MEDICAL MARIJUANA IS SOMETHING THAT DESERVES MEDICAL NECESSITY FOR THESE FOLKS.

THAT'S OUR POSITION IF THE COURT PLEASE.

THE COURT: THANK YOU.

MR. BROSNAHAN: THANK YOU.

THE COURT: WELL, LET ME ASK TWO QUESTIONS OF THE GOVERNMENT. I GUESS THE LAST THING THAT MR. BROSNAHAN SAID, OF COURSE, REMINDED ME OF THE FACT THAT THERE IS A LEGISLATIVE PROCESS THAT IS ONGOING. I DON'T KNOW WHETHER LEGISLATIVE OR EXECUTIVE, BUT THE QUESTION OF RESCHEDULING THE DRUG -- AND I THINK BECAUSE OF WHAT HE SAID IS BASICALLY -- HE WOULDN'T BE SAYING THOSE THINGS IF, IN FACT -- I DON'T KNOW THAT HE WOULD OR WOULDN'T BE SAYING THOSE THINGS --

THOSE THINGS ARE ALSO THINGS -- IN THE FIRST INSTANCE,

IT WOULD BE ADDRESSED TO, YOU KNOW, EITHER THE LEGISLATURE OR THE EXECUTIVE BRANCH IN A RESCHEDULING PROCESS. AT LEAST THAT -- MAY BE MORE, MAY BE LESS, BUT AT LEAST I THINK THAT.

AND I DO RECALL YOUR ADVISING THE COURT THAT THERE WAS A PETITION THAT WAS DIRECTED -- WHAT WAS IT? WAS IT THE D.E.A. THEN SENT IT ON TO THE SECRETARY OF HEALTH?

MR. QUINLIVAN: HEALTH AND HUMAN SERVICES.

THE COURT: HEALTH AND HUMAN SERVICES. WHERE ARE WE ON THAT?

MR. QUINLIVAN: IT IS -- MY UNDERSTANDING IS THAT IT'S CURRENTLY PENDING BEFORE THE SECRETARY OF HEALTH AND HUMAN SERVICES.

THE COURT: IS THERE ANY --

MR. QUINLIVAN: AND THAT HAS BEEN REFERRED -- THEY, OF COURSE, OBTAIN ADVICE FROM THE FOOD AND DRUG ADMINISTRATION ON THESE MATTERS.

THE COURT: WELL, DO WE HAVE ANY DATES?

MR. PANZER: YOUR HONOR --

THE COURT: DO WE HAVE ANY DATES WHERE --

MR. QUINLIVAN: I DON'T, YOUR HONOR, AND THE REASON IS, IS BECAUSE IT IS A SCIENTIFIC PROCESS AND A MEDICAL EVALUATION THAT HAS BEEN ENTRUSTED BY CONGRESS TO THE AGENCY IN THE FIRST INSTANCE. AND THAT -- THAT IS, CONGRESS RECOGNIZED THERE ARE A NUMBER OF DRUGS THAT ARE PENDING THAT COULD HELP PEOPLE IN VARIOUS FORMS OF -- WHO HAVE CANCER, WHO HAVE AIDS.

THAT IS THE PROCESS THAT CONGRESS HAS ESTABLISHED, AND THAT IS THE PROCESS THAT, AS WE'VE NOTED, EVERY COURT OF APPEALS HAS SAID IS THE EXCLUSIVE REMEDY FOR ONE SEEKING TO CHALLENGE THE CLASSIFICATION OF A SCHEDULE I DRUG.

AND I WOULD WANT TO -- I WOULDN'T WANT TO LEAVE COURT TODAY WITHOUT ADDING THAT I WOULD AGREE WITH ABLE COUNSEL THAT -- ON THIS ONE POINT: THERE IS NOT A SINGLE PERSON HERE WHOSE FAMILY MEMBER OR GOOD FRIEND HAS NOT BEEN -- HAS NOT SUFFERED ONE OF THESE GRAVE DISEASES AT ONE TIME OR ANOTHER. NOBODY HERE HAS A MONOPOLY ON COMPASSION.

THE DIFFERENCE -- WHAT THIS CASE IS ABOUT IS THE RULE OF LAW AND WHETHER THE DEMOCRATIC -- OUR DEMOCRATIC SYSTEM WHICH ENTRUSTS THOSE DETERMINATIONS TO CONGRESS AND WHICH CONGRESS HAS ENTRUSTED TO THE ADMINISTRATIVE PROCESS, TO THE DRUG ENFORCEMENT ADMINISTRATION AND TO THE SECRETARY OF HEALTH AND HUMAN SERVICES WILL BE FOLLOWED OR WHETHER THE DEFENDANTS ARE GOING TO BE ABLE TO TAKE THESE MATTERS OUTSIDE OF THAT ARENA AND BEFORE THIS COURT IN THE FIRST INSTANCE. AND THAT REALLY IS WHAT THEY'RE SEEKING HERE.

AND I'D ALSO NOTE, YOUR HONOR, THAT IF THE DEFENDANTS BELIEVE OR ANY OTHER PERSON BELIEVES THAT THE SECRETARY OF HEALTH AND HUMAN SERVICES IS PURPOSELY DELAYING THE RESCHEDULING PROCESS, THEY COULD TAKE A PETITION TO MANDAMUS TO THE D.C. CIRCUIT OR ANOTHER COURT OF APPEALS ON THAT QUESTION. BECAUSE THERE IS PROVIDED IN THE STATUTE REVIEW IN THE COURT OF

APPEALS UNDER SECTION 877.

THE COURT: WELL, I -- I APPRECIATE THAT. I UNDERSTAND THAT. I WAS REALLY INQUIRING WHETHER YOU HAD ANY INFORMATION --

MR. QUINLIVAN: I DON'T, OUTSIDE OF THE FACT THAT IT IS CURRENTLY PENDING, AND I DON'T HAVE ANY FURTHER -- I CAN'T GIVE YOU A DATE, BECAUSE, TO BE QUITE HONEST, I DON'T THINK THAT THE SECRETARY COULD GIVE A DEFINITIVE DATE AT THIS POINT.

THE COURT: I'M NOT SURE I KNOW -- WHEN YOU SAY IT'S CURRENTLY PENDING, I DON'T KNOW EXACTLY WHAT THAT MEANS.

MR. QUINLIVAN: IT MEANS THAT IT'S BEEN REFERRED TO -- THAT THE DRUG ENFORCEMENT ADMINISTRATION DETERMINED THAT THE PETITION HAD RAISED NEW ISSUES SINCE THE PREVIOUS PETITION HAD BEEN DENIED AND SO HAD -- HAS SENT THE PETITION TO THE SECRETARY OF HEALTH AND HUMAN SERVICES FOR ITS SCIENTIFIC AND MEDICAL JUDGMENT ON THE QUESTION.

THE COURT: OKAY.

MR. BROSNAHAN: MAY I ADD ONE SMALL THING, YOUR HONOR?

MR. QUINLIVAN: WELL --

THE COURT: WELL, LET ME FINISH WITH MR. --

MR. BROSNAHAN: OH, I'M SORRY.

MR. QUINLIVAN: LET ME JUST --

MR. BROSNAHAN: GO AHEAD, YOUR HONOR.

MR. QUINLIVAN: -- JUST MAKE TWO FINE POINTS, YOUR HONOR.

THE COURT: GO AHEAD.

MR. QUINLIVAN: I THINK THAT WHAT ABLE COUNSEL HAS SAID HERE TODAY IS REALLY A PREDECESSOR OF IF YOUR HONOR THINKS THAT FURTHER EVIDENCE IS NECESSARY OF WHAT WE'RE GOING TO SEE. AND I WOULD POINT OUT, YOUR HONOR, THAT WE DO BELIEVE THAT YOUR HONOR HAS ALREADY DECIDED ON THE QUESTION -- FOR INSTANCE, OF MEDICAL NECESSITY, YOUR HONOR HAS DECIDED THAT MEDICAL NECESSITY HAS NEVER BEEN HELD TO ALLOW THE DISTRIBUTION OF MARIJUANA ON A BLANKET BASIS, AND THAT TO -- QUOTE, TO PUT IT ANOTHER WAY, FOR THE DEFENSE TO BE AVAILABLE HERE, DEFENDANTS WOULD HAVE TO PROVE THAT EACH AND EVERY PATIENT TO WHOM IT PROVIDES CANNABIS IS IN DANGER OF IMMINENT HARM. THAT'S ON PAGE 20 OF YOUR MEMORANDUM AND ORDER.

THE COURT: I'M LOOKING AT IT.

MR. QUINLIVAN: AND THE SAME STATEMENT WAS MADE WITH RESPECT TO SUBSTANTIVE DUE PROCESS, ALBEIT IN DIFFERENT TERMS, ON PAGE 23. "IT IS NOT AVAILABLE, HOWEVER, TO EXEMPT GENERALLY THE DISTRIBUTION OF MEDICAL MARIJUANA FROM THE FEDERAL DRUG LAWS." SO CERTAINLY WE THINK THAT YOUR HONOR HAS -- HAS CONSIDERED AND REJECTED THE IDEA THAT THE DEFENDANTS COULD ESCAPE A DETERMINATION THAT THEY ARE IN VIOLATION OF YOUR HONOR'S ORDER BY SHOWING THAT SOME PERCENTAGE OF THEIR MEMBERS MEET THE DEFENSE.

THE COURT: I BELIEVE I'VE RESPONDED TO THAT ALREADY TODAY.

LET ME ASK A QUESTION ABOUT IMMUNITY. LET'S SAY THAT YOU COME IN ON YOUR ORDER TO SHOW CAUSE AND YOU SAY THAT ON SUCH AND SUCH A DATE, FIVE PEOPLE, EIGHT PEOPLE WERE -- YOU KNOW, RECEIVED -- OR THERE WAS A DISTRIBUTION OF MARIJUANA. AND THEY WANT TO COME IN AND FILE A DECLARATION AS TO THE CIRCUMSTANCES SURROUNDING THAT. BUT THEY ARE CONCERNED ABOUT DOING SO BECAUSE IT MAY INCRIMINATE THEM CRIMINALLY. THAT IS TO SAY "YES, ON SUCH AND SUCH A DATE, I GOT MARIJUANA," THAT WOULD BE IN THE FIRST INSTANCE A, YOU KNOW, CERTAINLY INCRIMINATORY STATEMENT.

WHAT IS THE GOVERNMENT'S POSITION AS TO WHAT USE, IF ANY, THAT STATEMENT WOULD BE -- WOULD BE MADE OF THAT STATEMENT? WHAT -- I MEAN, IS IT YOUR VIEW THAT YOU WOULD OPPOSE AN ORDER FROM THIS COURT STATING THAT SUCH STATEMENTS CANNOT BE USED IN CONNECTION WITH ANY CRIMINAL PROCEEDING? WOULD YOU OPPOSE IT?

MR. QUINLIVAN: YES.

THE COURT: WOULD YOU NOT OPPOSE IT?

MR. QUINLIVAN: YES, YOUR HONOR, WE WOULD OPPOSE THAT. IT'S NOT FOR A COURT TO DETERMINE THE QUESTION OF WHETHER AND TO WHAT EXTENT IMMUNITY IS GIVEN. IT IS FOR A PROSECUTOR TO DETERMINE THAT. AND WE WOULD OPPOSE THAT. AND I WOULD POINT OUT THAT THIS -- I TAKE A STEP BACK.

CONGRESS MADE THE DETERMINATION THAT WITH RESPECT TO VIOLATIONS OF THE FEDERAL CONTROLLED SUBSTANCES ACT, THE UNITED

STATES CAN PROCEED ONE OF TWO WAYS. IT CAN CRIMINALLY PROSECUTE OR IT CAN SEEK INJUNCTIVE RELIEF UNDER 882(A), AND THE SUPREME COURT AND THE NINTH CIRCUIT ON NUMEROUS OCCASIONS STARTING FROM THE BAXTER VS. PALMIGIANO CASE HAS SAID THAT IN THE CIVIL CONTEXT, ONE WHO IS WORRIED THAT AN ADMISSION MIGHT VIOLATE THEIR FIFTH AMENDMENT RIGHTS HAS THAT CHOICE. THEY CAN --

THE COURT: WELL, I THINK THAT -- THAT SEEMS TO BE THE LAW.

MR. QUINLIVAN: YES.

THE COURT: THAT SEEMS TO BE THE LAW.

MR. QUINLIVAN: AND SO, YOUR HONOR, I THINK THAT IS THE CHOICE THAT IS PUT TO THEM --

THE COURT: OKAY.

MR. QUINLIVAN: -- IN DEFENDING THEMSELVES AGAINST THIS. AND I WOULD NOTE, YOUR HONOR, THAT, AGAIN, THE STATUS QUO HERE, OF COURSE, SHOULD BE NOT THAT THE DEFENDANTS MIGHT HAVE A LEGAL DEFENSE AND THEREFORE THEY REMAIN OPEN.

THE COURT: NO.

MR. QUINLIVAN: IT SHOULD BE THAT YOUR HONOR'S INJUNCTION SHOULD BE ENFORCED. AND TO THE EXTENT -- IF THEY CAN RAISE THE AFFIRMATIVE DEFENSE, THEN WE'LL MEET THAT ISSUE, BUT IT'S CERTAINLY NOT FOR THE GOVERNMENT TO HAVE TO, AT THE FIRST INSTANCE, REBUT THE -- THE DEFENSES OF MEDICAL NECESSITY, SUBSTANTIVE DUE PROCESS OF JOINT USERS. THAT'S A DEFENSE FOR

THE DEFENDANTS TO RAISE AS AN AFFIRMATIVE DEFENSE.

THE COURT: WELL, I THINK THAT'S RIGHT, BUT GETTING BACK -- LET'S TAKE THE UKIAH SITUATION WHERE THE ONLY THING I SAW IN THE DECLARATION WAS SOMEBODY PHONING SOMEBODY -- I MEAN, A TRAINED D.E.A. AGENT AND SO FORTH -- SOMEBODY PHONES, AND THEY SAY -- SEE IF I'M RIGHT ON UKIAH. DID THEY SAY THAT THEY'RE OPEN FOR BUSINESS, OR SOMEBODY WOULD HAVE TO COME IN? I FORGET WHICH ONE SAID WHAT.

MR. BROSNAHAN: ONE OF THEM HAD THE HOURS IN IT THAT THEY'RE OPEN AND --

MR. QUINLIVAN: RIGHT. AND IN ADDITION, YOUR HONOR --

THE COURT: THAT -- I JUST HAD A HARD TIME LOOKING AT THAT AND SAYING, "OKAY. THE INJUNCTION'S BEEN VIOLATED." SOMEBODY -- THEY PHONED A NUMBER AND SOMEBODY SAID, "WELL, WE'RE OPEN FOR BUSINESS" OR "YOU CAN COME ON IN AND WE'LL TAKE A LOOK AT YOUR PAPER." SOMEBODY SAID THAT, "WE'LL COME IN AND TAKE A LOOK AT YOUR PAPERS." NOW, YOU KNOW, TAKE IT OUT OF THE CONTEXT OF MARIJUANA.

MR. QUINLIVAN: RIGHT.

THE COURT: PUT IT IN -- ON THE -- OF A LABOR DISPUTE WHERE INJUNCTIONS ARE ISSUED ALL THE TIME BY COURTS AND SO FORTH. AND LET'S SAY YOU'RE THE GOVERNMENT, NOT -- LET'S SAY YOU'RE NOT THE GOVERNMENT. LET'S SAY YOU'RE ONE PARTY TO A LABOR DISPUTE. YOU GET AN INJUNCTION THAT A LABOR PRACTICE IS IMPERMISSIBLE. YOU KNOW THEY SHOULDN'T DO THAT.

SO THEN THE OTHER SIDE GOES AND THEY PHONE YOU, AND THEY SAY, "ARE YOU GOING TO DO THIS?" AND THEY SAY, "OH, YEAH, WE DO IT ALL TIME. YEAH, FINE. GO IN AND SEEK SANCTIONS AGAINST THEM. I MEAN, YOU KNOW, IT'S ONE THING TO TALK ABOUT WHAT YOU'RE GOING TO DO, AND IT'S ANOTHER THING TO DO WHAT YOU'RE NOT SUPPOSED TO DO. AND I SORT OF DRAW THE LINE IN MY OWN MIND, SO YOU KNOW WHERE I'M COMING FROM BETWEEN TALK -- BECAUSE I LIKE TO TALK. TALK IS -- TALK IS -- THERE'S A REAL BASIC THING ABOUT TALKING. PEOPLE AREN'T ALLOWED TO TALK. THEY SOMETIMES DO THINGS THAT THEY SHOULDN'T DO. AND THE IDEA OF ALLOWING SPEECH, IT'S SO FUNDAMENTAL.

NOW, THAT'S -- YOU KNOW, NOT ALL SPEECH IS PROTECTED, BUT -- BUT A LOT OF SPEECH IS PROTECTED. AND I JUST HAVE A HARD TIME -- I KNOW I DIDN'T ENJOIN PEOPLE AGAINST TALKING, SO IF IT'S GOING TO BE TALK, AND THAT'S IT, I HAVE A HARD TIME ON THE INJUNCTION.

HOWEVER, TALK CAN BE AN ADMISSION, AND TALK CAN BE PART OF A LARGER, YOU KNOW, EVIDENTIARY MOSAIC THAT HAS SOME -- THAT HAS SOME IMPORT. SO I'D SORT OF HAVE TO LOOK AT IT. THAT'S THE WAY -- AND I WANTED TO GIVE YOU SOME GUIDANCE BECAUSE I THINK THAT MR. BROSNAHAN'S RIGHT. I THINK THAT IN THE SENSE THAT -- HE MAY BE RIGHT ON ANY NUMBER OF THINGS, BUT HE'S RIGHT IN THE SENSE -- AND I WOULD ARGUE THIS OR UNDERSTAND THIS, THAT YOU HAVE TO REALLY COME IN WITH SOME VERY SPECIFIC THINGS OF WHAT YOU'RE TALKING ABOUT VIOLATED THE INJUNCTION.

MAYBE I WAS THE ONE WHO SAID IT, BUT AT ANY RATE, DOESN'T MAKE ANY DIFFERENCE. THAT'S WHAT WE'RE LIVING WITH HERE. AND I THINK THAT THAT'S WHAT YOU REALLY HAVE TO DEAL WITH.

MR. QUINLIVAN: I UNDERSTAND, YOUR HONOR. AND LET ME JUST TAKE ISSUE WITH ONE POINT ON THAT.

THE COURT: SURE.

MR. QUINLIVAN: AND THAT IS THIS: YOUR HONOR RAISED THE ISSUE OF TALK MAY NOT DEMONSTRATE AN INDIVIDUAL VIOLATION OF DISTRIBUTION. BUT, AGAIN, YOUR HONOR ALSO ENJOINED THEM FROM MAINTAINING THE PREMISES FOR THE PURPOSE OF DISTRIBUTING MARIJUANA, NOT FOR DISTRIBUTING BUT FOR THE PURPOSE OF DISTRIBUTING, AND AN ADMISSION BY A PARTY THAT THEY ARE MAINTAINING THE PURPOSES AND THAT THEY'RE OPEN FOR BUSINESS TO DISTRIBUTE MARIJUANA CERTAINLY CONSTITUTES CLEAR AND CONVINCING EVIDENCE OF AT LEAST A VIOLATION OF THE SECTION 856 -- OR THE SECTION 856(A)(1) SUBSECTION OF YOUR HONOR'S ORDER.

THE COURT: WELL, I THINK THE ANSWER IS -- IF THAT'S THE ARGUMENT THAT YOU'RE GOING TO MAKE --

MR. QUINLIVAN: THAT'S RIGHT.

THE COURT: -- MAKE THE ARGUMENT, AND THEN I THINK THE OTHER SIDE MAY ADDRESS THAT AT THE APPROPRIATE TIME.

OKAY. WELL, THERE ARE THREE MINUTES LEFT. HOW DO YOU TWO WANT TO DIVIDE IT BETWEEN THE TWO OF YOU?

(DISCUSSION OFF THE RECORD.)

MR. PANZER: WILLIAM PANZER FOR MARIN ALLIANCE FOR MEDICAL MARIJUANA.

YOUR HONOR, IN RESPONSE TO THE COURT'S INQUIRY ABOUT THE PENDING PETITION, I RECENTLY HAD OCCASION TO SPEAK WITH MR. JOHN GETMAN, WHO'S THE INDIVIDUAL WHO SUBMITTED THE PETITION. MR. GETMAN TOLD ME THAT HE HAD INQUIRED AS TO WHAT WAS GOING ON WITH THE PETITION, AND HE WAS TOLD THAT IT'S BEEN DELAYED BECAUSE THE GOVERNMENT'S BEEN TOO BUSY DEALING WITH PROP 215 AND PROP 200.

SO THAT'S THE INFORMATION I CAN PROVIDE TO THE COURT.

THE COURT: OKAY. ANYTHING FURTHER, MR. BROSNAHAN?

MR. BROSNAHAN: JUST VERY BRIEFLY. THREE QUICK POINTS. FIRST, IT IS ARGUED BY THE GOVERNMENT, IT'S A TOUGH CHOICE, YOU GOT TO GET UP AND TESTIFY. LET'S ASSUME THAT'S RIGHT. I DON'T AGREE WITH THAT, BUT LET'S ASSUME THAT WAS RIGHT. YOU'D ONLY DO THAT ON A RECORD THAT WOULD JUSTIFY IT. YOU WOULDN'T PUT PEOPLE THROUGH THAT UNLESS THE SUPPORT OF THEIR AFFIDAVITS WAS SUFFICIENT.

SECONDLY, I'D LIKE TO BRIEF THE IMMUNITY ISSUE BECAUSE OF THE KAASTEGARD [PHONETIC] CASE AND THE POSSIBILITY THAT IT CAN BE STRUCTURED SO THAT THERE IS IMMUNITY.

AND THIRD, I JUST WANT TO SUGGEST TO YOUR HONOR WHEN YOU'RE THINKING ABOUT PROCEDURES HOW IMPRESSED I AM WITH WHAT SHOULD BE PRESENTED TO SHOW THE MEDICAL NECESSITY. AND BY WAY OF EXAMPLE, YALE UNIVERSITY HAS PUBLISHED -- 1997, A HISTORY OF

CANNABIS WHICH I HAVE READ. I'M NOT A SCHOLAR ON THIS ISSUE.

BUT THIS DOES GO BACK TO 1500 YEARS B.C., AND IN THE UNITED STATES AS COMPARED TO SUICIDE -- AND THE MAJORITY OPINION IN GLUCKSBERG BY THE CHIEF, WHO RECITED -- IT'S BEEN ILLEGAL IN ALL THE STATES FOREVER, AND HOW CAN IT BE A FUNDAMENTAL RIGHT? I WANT YOUR HONOR TO REALIZE THAT WE WANT IN WHATEVER VEHICLE YOU GIVE US TO PRESENT THE FACT THAT UNTIL 1906, IT WASN'T ILLEGAL IN THE UNITED STATES. AND EVEN THEN, IT WAS ONLY TAXED AND LICENSED.

THE COURT: WELL, THE VEHICLE I'M GOING TO GIVE YOU, MR. BROSNAHAN, IS THE -- YOU WILL SUBMIT IN TERMS OF YOUR AFFIDAVITS AND SO FORTH WHAT YOU INTEND -- WHAT ISSUES ARE IN DISPUTE, HOWEVER YOU WANT TO DO IT. CERTAINLY NOT GOING TO TELL YOU HOW TO DO IT BECAUSE YOU WOULD DO BETTER THAN I COULD EVEN SUGGEST, AND I'LL LOOK AT IT AND I ASSUME -- MAYBE THE GOVERNMENT WILL CONCEDE SOME POINTS, AND MAYBE THEY WON'T. AND THEN AS TO THAT WHICH THEY WON'T CONCEDE, WE'LL HAVE -- WE'LL HAVE A HEARING ON IT.

MR. BROSNAHAN: YES, YOUR HONOR.

THE COURT: AND YOU'LL BE ALLOWED TO ARGUE IT, BUT THE RECORD WILL BE FULL ONE WAY OR THE OTHER. I WANT YOU TO HAVE -- I WANT BOTH SIDES TO HAVE A COMPLETE RECORD HERE. IT'S ONLY FAIR.

MR. BROSNAHAN: YES, YOUR HONOR.

THE COURT: OKAY. SO --

MR. BROSNAHAN: THANK YOU.

THE COURT: -- YOU'RE GOING TO GIVE ME YOUR PROPOSED ORDER TO SHOW CAUSE, THE GOVERNMENT, BY WEDNESDAY AT NOON. I WOULD ANTICIPATE THAT I WILL ISSUE THE ORDER TO SHOW CAUSE BY THURSDAY. I WILL THEN SET IN THE ORDER TO SHOW CAUSE A SCHEDULE. NOW, I WANT THE PARTIES TO ANTICIPATE THAT WE WILL HAVE -- IF THERE IS A MOTION IN LIMINE, IT WILL BE HEARD THIS MONTH, AND THEREFORE I WANT THE PARTIES TO BE AWARE THAT WE'RE MOVING QUICKLY ON THIS.

MR. BROSNAHAN: WE HAVE NO OBJECTION TO THAT, YOUR HONOR. IF IT COULD BE TOWARDS THE END OF THE MONTH, I HAVE A TRIAL IN SEATTLE UNTIL ABOUT THE 25TH.

THE COURT: IT WOULD BE TOWARDS THE END OF THE MONTH. THE DAY THAT I WOULD LIKE YOU ALL TO RESERVE, AN AFTERNOON, IS SEPTEMBER 24TH, A THURSDAY.

MR. BROSNAHAN: YOUR HONOR, I'M SORRY TO BURDEN EVERYBODY WITH THIS, BUT I THINK I WILL BE IN TRIAL -- JUST FINISHING A TRIAL IN SEATTLE BEFORE JUDGE RAFFITI AT THAT TIME, WHICH I DON'T THINK IS GOING TO SETTLE.

THE COURT: ON THE 24TH?

MR. BROSNAHAN: YES, YOUR HONOR. I THINK THAT'S A THURSDAY, AND IT'S THE END OF --

THE COURT: IT IS A THURSDAY.

MR. BROSNAHAN: -- END THAT WEEK, AND WE START NEXT WEDNESDAY, AND IT'S ABOUT A TWO-AND-A-HALF, THREE-WEEK TRIAL.

THE COURT: LET ME JUST SEE FOR A MINUTE.

WELL, YOU THINK YOU'LL BE FINISHING ON THE 24TH?

MR. BROSNAHAN: OR FRIDAY THE 25TH WOULD BE MY GUESS.

THE COURT: OKAY. THE 28TH.

MR. BROSNAHAN: THANK YOU, YOUR HONOR.

THE COURT: JUST SAVE IT. I'LL PUT IT --

PROFESSOR UELMEN: DOES YOUR HONOR ANTICIPATE ISSUING A WRITTEN ORDER DENYING THE DISMISSAL MOTION?

THE COURT: YES, I WILL. RIGHT.

OKAY. I APPRECIATE EVERYBODY'S COURTESY. I APPRECIATE THE AUDIENCE'S COURTESY AS WELL. THANK YOU VERY MUCH.

MR. BROSNAHAN: THANK YOU.

MR. QUINLIVAN: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED AT 5:04 O'CLOCK P.M.)

--OOO--

CERTIFICATE OF REPORTER

I, RAYNEE H. MERCADO, REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA 94102, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 93, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

Raynee H. Mercado

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON, Defendants. AND RELATED ACTIONS	Nos. C 98-0085 CRB RELATED C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0245 CRB [PROPOSED] ORDER TO SHOW CAUSE IN CASE NO. C 98-0088 CRB

ORDER

This matter comes before the Court on Plaintiff's Motion to Hold Non-Compliant Defendants in Civil Contempt. The United States seeks an order to show cause why the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones, defendants in Case No. C 98-0088 CRB, should not be held in contempt of this Court's May 19, 1998 Preliminary Injunction Order, which provides, in pertinent part:

1. Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby preliminarily enjoined, pending further order of the Court, from 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); and

2. Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby preliminarily enjoined from using the premises of 1755 Broadway, Oakland, California for the purposes of engaging in the manufacture and distribution of marijuana; and

3. Defendant Jeffrey Jones is hereby preliminarily enjoined from conspiring to violate the Controlled Substances Act, 21 U.S.C. § 841(a)(1) with respect to the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana

The United States has submitted the following evidence in support of its motion for an order to show cause:[1]

(1) On May 20, 1998, one day after the Court entered the Preliminary Injunction Orders, defendants OCBC and Jeffrey Jones issued a press release entitled "Oakland Cooperative to Openly Dispense Medical Marijuana for First Time Since Preliminary Injunction - U.S. Attorney to be Notified: HIV, Multiple Sclerosis and Other Seriously Ill Patients to Receive Pot at 11:00 a.m., Thursday May 21, Oakland Buyers Cannabis Cooperative, 1755 Broadway, Oakland." See Exhibit 1 to July 6, 1998 Declaration of Mark T. Quinlivan ("7/6 Quinlivan Dec."), which stated, in pertinent part:

> **Oakland, CA** — Just hours after Federal Judge Charles Breyer signs into law a preliminary injunction against six California medical marijuana clubs, Jeff Jones, Director of the Oakland Cannabis Buyers Cooperative announced that he will openly dispense marijuana to four seriously ill patients at 11:00 a.m. on Thursday May 21. U.S. Attorney Michael Yamaguchi will be notified of the cooperative's actions, Jones said.
>
> "For these four patients, and others like them, medical marijuana is a medical necessity," said Jones. "To deny them access would be unjust and inhumane."
>
> Violation of the preliminary injunction could initiate Contempt of Court proceedings against the Oakland Cooperative. A Contempt case, during which a medical necessity argument would likely be made by attorneys for the cooperative, would be heard by a jury who would have to reach a unanimous verdict.

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[1] The evidence provided by the United States was contained in sworn declarations submitted to the Court and to the defendants.

> "I'd trust a jury of Californians before federal bureaucrats," said Jones. "All the evidence shows that marijuana has medical qualities and should be re-scheduled. Voters in two states have already endorsed medical marijuana, and others look set to follow. Yet the federal government refuses to consider the facts and instead is hell-bent upon enforcing outdated marijuana laws."

Id. Defendant Jeffrey Jones faxed the press release to United States Attorney Michael Yamaguchi. Id.

(2) On May 21, 1998, Special Agent Peter Ott, in an undercover capacity, entered the OCBC and observed approximately fourteen sales or distributions of what appeared to be marijuana by persons associated with the OCBC, including Jeffrey Jones, several of which were made in front of news cameras. Declaration of Special Agent Peter Ott ("Ott Dec.") ¶¶ 3-4.

(3) The World Wide Web site of the OCBC, which indicates that it was updated on June 1 and August 12, 1998, states: "*Currently*, we are providing medical cannabis and other services to over 1,300 members." Exhibit 3 to 7/6 Quinlivan Dec. (emphasis supplied); Exhibit 1 to August 24, 1998 Declaration of Mark T. Quinlivan ("8/24 Quinlivan Dec."). The Web site also includes links to this Court's May 19, 1998, Preliminary Injunction Order and May 13, 1998, Memorandum and Order, demonstrating that defendants OCBC and Jones were and are aware of the Preliminary Injunction Order. See Exhibit 3 to 7/6 Quinlivan Dec.

(4) On May 27, 1998, Special Agent Bill Nyfeler placed a recorded telephone call to the OCBC, at (510) 832-5346, to confirm that the club was continuing to distribute marijuana. Declaration of Special Agent Bill Nyfeler ("Nyfeler Dec.") ¶ 5. The individual who answered the phone informed Special Agent Nyfeler that the OCBC was still open for business, and told Special Agent Nyfeler the club's business hours. Id.

(5) On June 16, 1998, Special Agent Dean Arnold placed a recorded telephone call to the OCBC, at (510) 843-5346, to again confirm that the club was still distributing marijuana. Declaration of Special Agent Dean Arnold ("Arnold Dec.") ¶ 3. An unidentified male answered the telephone and informed Special Agent Arnold that the OCBC was open for business and was accepting new members. The unidentified male further informed Special Agent Arnold about the

requirements of becoming an OCBC member, the hours that the club was open (11 a.m. - 1 p.m., and 5 p.m. - 7 p.m.), and the location of the OCBC, at 1755 Broadway Avenue, in Oakland. Id.

(6) In an article entitled "*Marijuana Clubs Defy Judge's Order* by Karyn Hunt, which appeared on May 22, 1998, in *AP Online*, defendant Jeffrey Jones is quoted as stating, "We are not closing down. We feel what we are doing is legal and a medical necessity and we're going to take it to a jury to prove that." Exhibit 2 to 7/6 Quinlivan Dec.

In reviewing this evidence, the Court notes that admissions of a party-opponent are admissible under Rule 801(d)(2) of the Federal Rules of Evidence "'for whatever inferences the trial judge [can] reasonably draw.'" United States v. Warren, 25 F.3d 890, 895 (9th Cir. 1994) (quoting United States v. Matlock, 415 U.S. 164, 172 (1974)). See also United States v. Singleterry, 29 F.3d 733, 736 (1st Cir. 1994) ("[A] defendant's own statements are never considered to be hearsay when offered by the government; they are treated as admissions, competent as evidence of guilt without any special guarantee of their trustworthiness.").

In addition, while the Court does not yet have a transcript, the Court recalls that, during the August 31, 1998, hearing in these related cases, counsel for defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones, in his argument in support of these defendants' motion to dismiss the government's complaint on the ground that these defendants were immune from suit pursuant to 21 U.S.C. § 885(d), stated that, "[w]e are violating the federal law." Co-counsel for the defendants, in his argument in opposition to the government's motion for an order to show cause, also indicated that ongoing distributions of marijuana were taking place at the Oakland Cannabis Buyers' Cooperative, but that the club's defense was that all or virtually all patients were seriously ill. Admissions of counsel may, of course, be binding upon a party. See Bannister v. Delo, 100 F.3d 610, 622 n.12 (8th Cir. 1996) ("In certain circumstances, a court may rely on a counsel's statement at oral argument as a judicial admission.").

Accordingly, upon consideration of the moving papers, the opposition and reply thereto, argument in open court, and the entire record herein, this Court finds that, based on the totality of

circumstances, the United States has made a prima facie case that defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are continuing to distribute marijuana, and are continuing to use the premises of 1755 Broadway Avenue, Oakland, California, for the purpose of distributing marijuana, both in violation of the Court's May 19, 1998 Preliminary Injunction Order.

Accordingly, defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby

ORDERED to show cause why they should not be held in civil contempt of the Court's May 19, 1998 Preliminary Injunction Order by continuing to distribute marijuana; and by continuing to maintain the premises of 1755 Broadway Avenue, Oakland, California, for the purpose of distributing marijuana, from May 21, 1998, through August 21, 1998; and it is hereby further

ORDERED that defendants shall have until 12:00 p.m. (Pacific Standard Time), September 11, 1998, in which to file their response to this Show Cause Order. Defendants' response shall include sworn declarations outlining the factual basis for any affirmative defenses which they wish to offer in response to this Show Cause Order; and it is hereby further

ORDERED that the United States shall have until 12:00 p.m. (Pacific Standard Time), September 18, 1998, in which to file a motion in limine regarding any defenses which the defendants might raise in their response; and it is hereby further

ORDERED that the defendants shall have until 12:00 p.m. (Pacific Standard Time), September 22, 1998, in which to file an opposition to the United States' motion in limine; and it is hereby further

ORDERED that the United States shall have until 12:00 p.m. (Pacific Standard Time), September 25, 1998, in which to file a reply in support of its motion in limine; and it is hereby further

ORDERED that parties shall appear before the Court on September 28, 1998, at ____ _.m., to appear for a hearing on the government's motion in limine; and it is hereby further

ORDERED that service by all parties shall be accomplished by overnight delivery and facsimile transmission..

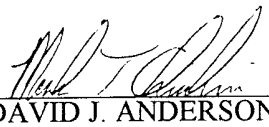
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

Dated: September ___, 1998

Submitted by:

FRANK W. HUNGER
Assistant Attorney General

ROBERT S. MUELLER, III
United States Attorney



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UNITED STATES OF AMERICA

and by the remaining counsel, by overnight delivery:

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Gerald F. Uelman
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School of Law
Santa Clara, CA 95053

Ukiah Cannabis Buyer's Club; Cherrie Lovett; Marvin Lehrman; Mildred Lehrman

Susan B. Jordan
515 South School Street
Ukiah, CA 95482

David Nelson
106 North School Street
Ukiah, CA 95482

Santa Cruz Cannabis Buyers Club

Kate Wells
201 Maple Street
Santa Cruz, CA 95060

MARK T. QUINLIVAN

CERTIFICATE OF SERVICE

I, Mark T. Quinlivan, hereby certify that on this 2nd day of September, 1998, I caused to be served a copy of the foregoing [Proposed] Order to Show Cause, upon lead counsel for defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones, by the facsimile transmission and by hand delivery:

James J. Brosnahan
Annette P. Carnegie
Andrew A. Steckler
Christina A. Kirk-Kazhe
Morrison & Foerster
425 Market Street
San Francisco, CA 94105

by counsel for the following defendants and intervenors, by hand delivery:

Oakland Cannabis Buyers' Cooperative; Jeffrey Jones

Robert A. Raich
1970 Broadway, Suite 1200
Oakland, CA 94612

Marin Alliance for Medical Marijuana

William G. Panzer
370 Grand Avenue, Suite 3
Oakland, CA 94610

Cannabis Cultivators Club; Dennis Peron

J. Tony Serra
Brendan R. Cummings
Serra, Lichter, Daar, Bustamante, Michael & Wilson
Pier 5 North
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San Francisco, CA 94111

Intervenors

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Attorneys for Defendants
OAKLAND CANNABIS BUYERS'
COOPERATIVE AND JEFFREY JONES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

DEFENDANTS' OPPOSITION TO PLAINTIFF'S PROPOSED ORDER TO SHOW CAUSE IN CASE NOS. C 98-0086 CRB, C 98-0087 CRB, C 98-0088 CRB

Hon. Charles R. Breyer

OPPOSITION TO PROPOSED ORDER

At oral argument on August 31, 1998, this Court ordered the government to file a proposed order to show cause why defendants should not be held in contempt of the preliminary injunction order issued on May 19, 1998. Along with the proposed order, the Court specifically directed the government to set forth detailed and specific evidence regarding the factual basis for its contempt allegations.

The government has failed to provide the information required by the Court. Instead, the government has simply re-submitted the conclusory allegations already set forth in affidavits filed along with its previously-filed Motion For An Order To Show Cause Why Defendants Should Not Be Held In Contempt, And For Summary Judgment.[1] This Court, however, directed the government to allege *specific* facts (admissible in court) which may constitute contempt, which the original affidavits failed to do. Therefore, for all of the reasons set forth in Defendants' Memorandum In Opposition To Plaintiff's Motion To Show Cause, And For Summary Judgment at 4-5 and in Defendants' Objections And Motion To Strike The Declarations Of Mark Quinlivan, Bill Nyfeler, Dean Arnold And Peter Ott, this court should deny the government's request for an order to show cause. On this record, the government has not established by clear and convincing evidence a prima facie case of contempt. *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1323 (9th Cir. 1998).; *see also Bauchman v. West High School, et. al.*, 906 F. Supp. 1483, 1493-94 (C.D. Utah 1995) ("In a civil contempt proceeding, plaintiff has the burden of proof to establish a prima facie case by clear and convincing evidence"). Accordingly the Court should deny the government's request to issue an Order to Show Cause.

If this Court should issue an Order to Show Cause, defendants object to the government's proposed briefing schedule concerning any in limine motion regarding defenses which defendants

---

[1] Blatantly overreaching, the government asserts that counsel's in-court arguments constitute an admission of contempt. As set forth in the accompanying declaration of Gerald Uelman, attached hereto as Exhibit A, counsel made no such admission.

will raise. Specifically, defendants object to the government's proposed order allowing only four days for the defendants to file an opposition to any in limine motion which might be filed by the government. If the Court issues an Order To Show Cause, defendants request that more time be allowed defendants for their preparation and filing of their opposition to the government's in limine motion or motions.

Dated: September 3, 1998

JAMES J. BROSNAHAN
ANNETTE P. CARNEGIE
ANDREW A. STECKLER
CHRISTINA KIRK-KAZHE
MORRISON & FOERSTER LLP

By: Annette P. Carnegie
Annette P. Carnegie

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

PROOF OF SERVICE BY OVERNIGHT DELIVERY
(N.D. Civil L.R. 5-3)

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:

DEFENDANTS' OPPOSITION TO PLAINTIFF'S PROPOSED ORDER TO SHOW CAUSE IN CASE NOS. C 98-0086 CRB, C 98-0087 CRB, C-98-0088 CRB

DECLARATION OF GERALD F. UELMEN IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S PROPOSED ORDER TO SHOW CAUSE IN CASE NOS. C 98-0086 CRB, C 98-0087 CRB, C 98-0088 CRB

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:

SEE ATTACHED SERVICE LIST

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 3rd day of September, 1998.

Tonja Jennings
(typed)

Tonja Jennings
(signature)

SERVICE LIST

Opposing Counsel:

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

Intevenor-Patients Thomas V. Loran III, Esq. Pillsbury Madison & Sutro LLP 235 Montgomery Street San Francisco, CA 94104	Cannabis Cultivator's Club, et al. J. Tony Serra/Brendan R. Cummings Serra, Lichter, Daar, Bustamante, Michael & Wilson Pier 5 North, The Embarcadero San Francisco, CA 94111
Marin Alliance for Medical Marijuana, et al. William G. Panzer 370 Grand Avenue, Suite 3 Oakland, CA 94610	Flower Therapy Medical Marijuana Club, et al. Helen Shapiro Carl Shapiro 404 San Anselmo Avenue San Anselmo, CA 94960
Ukiah Cannabis Buyer's Club, et al. Susan B. Jordan 515 South School Street Ukiah, CA 95482 David Nelson 106 North School Street Ukiah, CA 95482	Oakland Cannabis Buyers Cooperative, et al. Gerald F. Uelmen Santa Clara University School of Law Santa Clara, CA 95053 Robert A. Raich A Professional Law Corporation 1970 Broadway, Suite 1200 Oakland, CA 94612

PROOF OF SERVICE BY FACSIMILE TRANSMISSION
(N.D. Civil L.R. 5-3)

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 that the document described below was transmitted by facsimile transmission to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number as last given by that person on any document which he or she has filed in the cause.

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

DEFENDANTS' OPPOSITION TO PLAINTIFF'S PROPOSED ORDER TO SHOW CAUSE IN CASE NOS. C 98-0086 CRB, C 98-0087 CRB, C 98-0088 CRB

DECLARATION OF GERALD F. UELMEN IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S PROPOSED ORDER TO SHOW CAUSE IN CASE NOS. C 98-0086 CRB, C 98-0087 CRB, C 98-0088 CRB

on the following by sending a true copy from Morrison & Foerster's facsimile transmission telephone number (415-268-7520) and that the transmission was reported as complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting facsimile machine.

SEE ATTACHED SERVICE LIST

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 3rd day of September, 1998.

Tonja Jennings
(typed)

Tonja Jennings
(signature)

SERVICE LIST

Opposing Counsel:

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U.S. Department of Justice
901 E Street, N.W., Room 1048
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Intevenor-Patients Thomas V. Loran III, Esq. Pillsbury Madison & Sutro LLP 235 Montgomery Street San Francisco, CA 94104 Fax: (415) 983-1200	Cannabis Cultivator's Club, et al. J. Tony Serra/Brendan R. Cummings Serra, Lichter, Daar, Bustamante, Michael & Wilson Pier 5 North, The Embarcadero San Francisco, CA 94111 Fax: (510) 421-1331 Fax: (510) 848-5499-
Marin Alliance for Medical Marijuana, et al. William G. Panzer 370 Grand Avenue, Suite 3 Oakland, CA 94610 Fax: (510) 834-0418	Flower Therapy Medical Marijuana Club, et al. Helen Shapiro Carl Shapiro 404 San Anselmo Avenue San Anselmo, CA 94960
Ukiah Cannabis Buyer's Club, et al. Susan B. Jordan 515 South School Street Ukiah, CA 95482 Fax: (707) 462-2194 David Nelson 106 North School Street Ukiah, CA 95482 Fax: (707) 468-8096	Oakland Cannabis Buyers Cooperative, et al. Gerald F. Uelmen Santa Clara University School of Law Santa Clara, CA 95053 Fax: (408) 253-0885 Robert A. Raich A Professional Law Corporation 1970 Broadway, Suite 1200 Oakland, CA 94612 Fax: (510) 338-0600

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Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
✓C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

DECLARATION OF GERALD F. UELMEN IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S PROPOSED ORDER TO SHOW CAUSE IN CASE NOS. C 98-0086 CRB, C 98-0087 CRB, C 98-0088 CRB (FAX SIGNATURE)

Hon. Charles R. Breyer

DECLARATION OF GERALD F. UELMEN

I, Gerald F. Uelmen, declare the following:

1. I am an attorney licensed to practice law in the State of California, and a member of the bar in good standing since 1966. I am currently co-counsel representing the Oakland Cannabis Buyers' Cooperative.

2. On August 31, 1998, I appeared before the Hon. Charles Breyer in U.S. District Court to argue a Motion to Dismiss on behalf of my client.

3. In the course of argument, the question arose whether one who was in violation of the Controlled Substances Act would qualify for the immunity conferred upon officers of local government engaged in the enforcement of a municipal ordinance. I argued that the statute necessarily assumed a violation, in order to confer immunity on the violator. If, in the course of that argument, I stated that the Oakland Cannabis Buyer's Club was violating the Federal Controlled Substances Act, it was not intended as an admission on behalf of my client. I believe the context of the argument made it very clear that I was not proffering an admission, but simply making an argument about the applicability of the statute.

4. At no time has my client authorized me to make an admission on its behalf, and no admission was intended. The prosecution's proffer of an argument made to the court by counsel as "evidence" to support the issuance of an order to show cause is proffering me as a witness against my own client, and may be intended as a tactical ploy to disqualify me from the further representation of my client. It is completely unwarranted by the circumstances presented here.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of September, 1998, at Sartatoga, California.

Gerald F. Uelmen

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

CANNABIS CULTIVATORS CLUB, et al.,

Defendants.
_____/

and Related Cases.
_____/

No. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00245 CRB

ORDER TO SHOW CAUSE IN CASE NO. 98-00086

This matter comes before the Court on Plaintiff's Motion to Hold Non-Compliant Defendants in Civil Contempt. The United States seeks an order to show cause why the Marin Alliance for Medical Marijuana and Lynnette Shaw, defendants in Case No. C 98-0086 CRB, should not be held in contempt of this Court's May 19, 1998 Preliminary Injunction Order, which provides, in pertinent part:

> 1. Defendants Marin Alliance for Medical Marijuana and Lynnette Shaw are hereby preliminarily enjoined, pending further order of the Court, from 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); and
>
> 2. Defendants Marin Alliance for Medical Marijuana and Lynnette Shaw are hereby preliminarily enjoined from using the premises of Suite 210, School Street Plaza, Fairfax, California for the purposes of engaging in the manufacture and distribution of marijuana; and
>
> 3. Defendant Lynnette Shaw is hereby preliminarily enjoined from conspiring to violate the Controlled Substances Act, 21 U.S.C. § 841(a)(1) with respect to the

manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana.

The United States has submitted the following evidence in support of its motion for an order to show cause:[1]

(1) On May 27, 1998, Special Agent Bill Nyfeler of the Drug Enforcement Administration ("DEA") observed 14 individuals enter the Marin Alliance, located at 6 School Street Plaza, in Fairfax, California, over a two and one-half hour period. Declaration of Special Agent Bill Nyfeler ("Nyfeler Dec.") ¶ 3. Special Agent Nyfeler further observed that several of these individuals, upon exiting the Marin Alliance, would roll what appeared to be marijuana cigarettes and smoke them in the area directly outside the Marin Alliance. Id.

(2) On May 27, 1998, at approximately 3:15 p.m., Special Agent Nyfeler placed a recorded telephone call to the Marin Alliance, at (415) 256-9328, to confirm that the club was continuing to engage in the distribution of marijuana. A pre-recorded message stated that the caller had reached the Marin Alliance, and that the club was still open under the "medical necessity defense." Id. ¶ 6.

(3) On June 16, 1998, Special Agent Dean Arnold of the DEA placed a recorded telephone call to the Marin Alliance at (415) 256-9328, to again confirm that the Marin Alliance was still distributing marijuana. An unidentified female answered the telephone by stating, "Marin Alliance," and further informed the DEA agent about the requirements of becoming a new member of the Marin Alliance, and that the club was open that day until "five." Declaration of Special Agent Dean Arnold Dec. ¶ 4.

(4) As of August 21, 1998, the Marin Alliance maintained an Internet web site which indicated that the club was engaged in activities related to "medical marijuana." Exhibit 2 to August 24, 1998 Declaration of Mark T. Quinlivan.

(5) Defendant Lynnette Shaw has publicly stated that, notwithstanding the May 19, 1998 Preliminary Injunction Order, "[w]e are still open seven days a week," and that "[s]how

[1] The evidence provided by the United States was contained in sworn declarations submitted to the Court and to the defendants.

me a jury who will look at our patients and not understand the idea of medical marijuana being a necessity for these people." Bill Meagher and Peter Seidman, *Federal Shutdown: Pot clinic could close its doors to sick and dying*, June 3-9 *Pacific Sun*.

In reviewing this evidence, the Court notes that admissions of a party-opponent are admissible under Rule 801(d)(2) of the Federal Rules of Evidence "'for whatever inferences the trial judge [can] reasonably draw.'" United States v. Warren, 25 F.3d 890, 895 (9th Cir. 1994) (quoting United States v. Matlock, 415 U.S. 164, 172 (1974)). See also United States v. Singleterry, 29 F.3d 733, 736 (1st Cir. 1994) ("[A] defendant's own statements are never considered to be hearsay when offered by the government; they are treated as admissions, competent as evidence of guilt without any special guarantee of their trustworthiness.").

Accordingly, upon consideration of the moving papers, the opposition and reply thereto, argument in open court, and the entire record herein, this Court concludes that, based on the totality of circumstances, the United States has made a prima facie case that defendants Marin Alliance for Medical Marijuana and Lynnette Shaw have distributed marijuana, and have used the premises of 6 School Street Plaza, Fairfax, California, for the purpose of distributing marijuana, both in violation of the Court's May 19, 1998 Preliminary Injunction Order.

Accordingly, defendants Marin Alliance for Medical Marijuana and Lynnette Shaw are hereby

ORDERED 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 6 School Street Plaza, Fairfax, California, for the purpose of distributing marijuana, on May 27, 1998; and it is hereby further

ORDERED that defendants shall have until 12:00 p.m. (Pacific Daylight Time), September 14, 1998, in which to file their response to this Show Cause Order. Defendants' response shall include sworn declarations outlining the factual basis for any affirmative defenses which they wish to offer in response to this Show Cause Order; and it is hereby further

ORDERED that the United States shall have until 12:00 p.m. (Pacific Daylight Time), September 21, 1998, in which to file a motion in limine regarding any defenses which the defendants might raise in their response; and it is hereby further

ORDERED that the defendants shall have until 12:00 p.m. (Pacific Daylight Time), September 25, 1998, in which to file an opposition to the United States' motion in limine; and it is hereby further

ORDERED that parties shall appear before the Court on September 28, 1998, at 2:30 p.m., for a hearing on the government's motion in limine; and it is hereby further

ORDERED that service by all parties shall be accomplished by overnight delivery and facsimile transmission; and it is further

ORDERED that plaintiff shall produce to defendants by September 9, 1998, copies of all documentary evidence plaintiff intends to introduce into evidence during the contempt proceeding, as well as any reports relating to the alleged violations of the Court's May 19, 1998 injunction. Plaintiff shall produce only those reports prepared by percipient witnesses to the alleged violations.

IT IS SO ORDERED.

Dated: September 5, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

CANNABIS CULTIVATORS CLUB, et al.,

Defendants.
_____/

and Related Cases.
_____/

No. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00245 CRB

ORDER DENYING MOTION FOR ORDER TO SHOW CAUSE IN CASE NO. 98-00087

This matter comes before the Court on plaintiff's Motion to Hold Non-Compliant Defendants in Civil Contempt. The United States seeks an order to show cause why the Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman, defendants in Case No. C 98-0087 CRB, should not be held in contempt of this Court's May 19, 1998 Preliminary Injunction Order, which provides, in pertinent part:

> 1. Defendants Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman are hereby preliminarily enjoined, pending further order of the Court, from 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); and
>
> 2. Defendants Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman are hereby preliminarily enjoined from using the premises of 40A Pallini Lane, Ukiah, California for the purposes of engaging in the manufacture and distribution of marijuana; and
>
> 3. Defendants Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman are hereby preliminarily enjoined from conspiring to violate the

Controlled Substances Act, 21 U.S.C. § 841(a)(1) with respect to the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana

The United States has submitted the following evidence in support of its motion for an order to show cause:[1]

(1) On May 27, 1998, Special Agent Bill Nyfeler placed a recorded telephone call to the UCBC, at (707) 462-0691, to confirm that the club was continuing to distribute marijuana. An individual who identified himself as "Marvin" answered the phone and stated that, although the UCBC was in receipt of an injunction, the club was still open for business. "Marvin" further informed Special Agent Nyfeler of the UCBC's business hours. Declaration of Special Agent Bill Nyfeler Dec. ¶ 4.

(2) On June 16, 1998, Special Agent Dean Arnold placed a recorded telephone call to the UCBC, at (707) 462-0691, to again confirm that the club was still distributing marijuana. An unidentified male answered the telephone and stated, "UCBC." Special Agent Arnold asked whether the UCBC was still open for business, to which the unidentified male asked if Special Agent Arnold was a member. Special Agent Arnold stated that he was not a member, to which the unidentified male responded, "We are officially closed." Special Agent Arnold then asked if the UCBC was accepting new members, to which the unidentified male responded, "Why don't you come in and show me what you have, medical papers?" Declaration of Special Agent Dean Arnold Dec. ¶ 5.

(3) A May 30, 1998, article entitled *Lake County struggles with pot grant use - Ukiah pot club eviction withdrawn*, by Jennifer Poole, which appeared in the *Ukiah Daily Journal*, states that, notwithstanding the Court's May 19, 1998, Preliminary Injunction Orders, the UCBC is still open, and has no plans to close, and quotes defendant Marvin Lehrman as saying, "We're continuing and fulfilling our mission. I don't know what's next." The article further notes that defendants UCBC and Lehrman had been officially served with this Court's Preliminary Injunction Order on Wednesday, May 27, 1998. Exhibit 7 to July 6,

---

[1] The evidence provided by the United States was contained in sworn declarations submitted to the Court and to the defendants.

1998 Declaration of Mark T. Quinlivan ("7/6 Quinlivan Dec.").

(4) A June 17, 1998, article entitled *Board begins Prop 215 process - But backs away from resolution proposed by Supervisor Peterson*, by Jennifer Poole, which appeared in the *Ukiah Daily Journal*, quotes defendant Marvin Lehrman as saying, "And that's why we're here, to supply medical marijuana to those people who need it now and who may not be alive by the time the boards of supervisors and others get it together." Exhibit 8 to 7/6 Quinlivan Dec.

In reviewing this evidence, the Court notes that admissions of a party-opponent are admissible under Rule 801(d)(2) of the Federal Rules of Evidence "'for whatever inferences the trial judge [can] reasonably draw.'" United States v. Warren, 25 F.3d 890, 895 (9th Cir. 1994) (quoting United States v. Matlock, 415 U.S. 164, 172 (1974)). See also United States v. Singleterry, 29 F.3d 733, 736 (1st Cir. 1994) ("[A] defendant's own statements are never considered to be hearsay when offered by the government; they are treated as admissions, competent as evidence of guilt without any special guarantee of their trustworthiness.").

Upon consideration of the moving papers, the opposition and reply thereto, argument in open court, and the entire record herein, this Court finds that, based on the totality of circumstances, the United States has not made a prima facie case that defendants Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman have distributed marijuana, and have used the premises of 40A Pallini Lane, Ukiah, California, for the purpose of distributing marijuana, both in violation of the Court's May 19, 1998 Preliminary Injunction Order. The evidence, at best, establishes that defendants intend to violate the Court's May 19, 1998 Order when the opportunity arises. Plaintiff has not produced evidence sufficient for a reasonable trier of fact to find that defendants have actually distributed marijuana, or used the premises of 40A Pallini Lane for the purpose of //

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//

//

distributing marijuana. Accordingly, plaintiff's motion for an order to show cause in Case No. 98-00087 is DENIED without prejudice.

IT IS SO ORDERED.

Dated: September 8, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATORS CLUB, et al.,

Defendants.
_____/

AND RELATED ACTIONS
_____/

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0245 CRB

ORDER TO SHOW CAUSE IN CASE NO. 98-0088 CRB

This matter comes before the Court on plaintiff's Motion to Hold Non-Compliant Defendants in Civil Contempt. The United States seeks an order to show cause why the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones, defendants in Case No. C 98-0088 CRB, should not be held in contempt of this Court's May 19, 1998 Preliminary Injunction Order, which provides, in pertinent part:

> 1. Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby preliminarily enjoined, pending further order of the Court, from 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); and
>
> 2. Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby preliminarily enjoined from using the premises of 1755 Broadway, Oakland, California for the purposes of engaging in the manufacture and distribution of marijuana; and

3. Defendant Jeffrey Jones is hereby preliminarily enjoined from conspiring to violate the Controlled Substances Act, 21 U.S.C. § 841(a)(1) with respect to the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana

The United States has submitted the following evidence in support of its motion for an order to show cause:[1]

(1) On May 20, 1998, one day after the Court entered the Preliminary Injunction Orders, defendants OCBC and Jeffrey Jones issued a press release entitled "Oakland Cooperative to Openly Dispense Medical Marijuana for First Time Since Preliminary Injunction - U.S. Attorney to be Notified: HIV, Multiple Sclerosis and Other Seriously Ill Patients to Receive Pot at 11:00 a.m., Thursday May 21, Oakland Buyers Cannabis Cooperative, 1755 Broadway, Oakland." See Exhibit 1 to July 6, 1998 Declaration of Mark T. Quinlivan ("7/6 Quinlivan Dec."), which stated, in pertinent part:

> **Oakland, CA** — Just hours after Federal Judge Charles Breyer signs into law a preliminary injunction against six California medical marijuana clubs, Jeff Jones, Director of the Oakland Cannabis Buyers Cooperative announced that he will openly dispense marijuana to four seriously ill patients at 11:00 a.m. on Thursday May 21. U.S. Attorney Michael Yamaguchi will be notified of the cooperative's actions, Jones said.
>
> "For these four patients, and others like them, medical marijuana is a medical necessity," said Jones. "To deny them access would be unjust and inhumane."
>
> Violation of the preliminary injunction could initiate Contempt of Court proceedings against the Oakland Cooperative. A Contempt case, during which a medical necessity argument would likely be made by attorneys for the cooperative, would be heard by a jury who would have to reach a unanimous verdict.
>
> "I'd trust a jury of Californians before federal bureaucrats," said Jones. "All the evidence shows that marijuana has medical qualities and should be re-scheduled. Voters in two states have already endorsed medical marijuana, and others look set to follow. Yet the federal government refuses to consider the facts and instead is hell-bent upon enforcing outdated marijuana laws."

Id. Defendant Jeffrey Jones faxed the press release to United States Attorney Michael Yamaguchi. Id.

(2) On May 21, 1998, Special Agent Peter Ott, in an undercover capacity, entered the OCBC and observed approximately fourteen sales or distributions of what appeared to be

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[1] The evidence provided by the United States was contained in sworn declarations submitted to the Court and to the defendants.

marijuana by persons associated with the OCBC, including Jeffrey Jones, several were made in front of news cameras. Declaration of Special Agent Peter Ott ("Ott Dec. 3-4.

(3) The World Wide Web site of the OCBC, which indicates that it was updated on June 1 and August 12, 1998, states: "*Currently*, we are providing medical cannabis and other services to over 1,300 members." Exhibit 3 to 7/6 Quinlivan Dec. (emphasis supplied); Exhibit 1 to August 24, 1998 Declaration of Mark T. Quinlivan ("8/24 Quinlivan Dec."). The Web site also includes links to this Court's May 19, 1998, Preliminary Injunction Order and May 13, 1998, Memorandum and Order, demonstrating that defendants OCBC and Jones were and are aware of the Preliminary Injunction Order. See Exhibit 3 to 7/6 Quinlivan Dec.

(4) On May 27, 1998, Special Agent Bill Nyfeler placed a recorded telephone call to the OCBC, at (510) 832-5346, to confirm that the club was continuing to distribute marijuana. Declaration of Special Agent Bill Nyfeler ("Nyfeler Dec.") ¶ 5. The individual who answered the phone informed Special Agent Nyfeler that the OCBC was still open for business, and told Special Agent Nyfeler the club's business hours. Id.

(5) On June 16, 1998, Special Agent Dean Arnold placed a recorded telephone call to the OCBC, at (510) 843-5346, to again confirm that the club was still distributing marijuana. Declaration of Special Agent Dean Arnold ("Arnold Dec.") ¶ 3. An unidentified male answered the telephone and informed Special Agent Arnold that the OCBC was open for business and was accepting new members. The unidentified male further informed Special Agent Arnold about the requirements of becoming an OCBC member, the hours that the club was open (11 a.m. - 1 p.m., and 5 p.m. - 7 p.m.), and the location of the OCBC, at 1755 Broadway Avenue, in Oakland. Id.

(6) In an article entitled "*Marijuana Clubs Defy Judge's Order* by Karyn Hunt, which appeared on May 22, 1998, in *AP Online*, defendant Jeffrey Jones is quoted as stating, "We are not closing down. We feel what we are doing is legal and a medical necessity and we're going to take it to a jury to prove that." Exhibit 2 to 7/6 Quinlivan Dec.

In reviewing this evidence, the Court notes that admissions of a party-opponent are admissible under Rule 801(d)(2) of the Federal Rules of Evidence "'for whatever inferences the trial judge [can] reasonably draw.'" United States v. Warren, 25 F.3d 890, 895 (9th Cir. 1994) (quoting United States v. Matlock, 415 U.S. 164, 172 (1974)). See also United States v. Singleterry, 29 F.3d 733, 736 (1st Cir. 1994) ("[A] defendant's own statements are never considered to be hearsay when offered by the government; they are treated as admissions, competent as evidence of guilt without any special guarantee of their trustworthiness.").

Accordingly, upon consideration of the moving papers, the opposition and reply thereto, argument in open court, and the entire record herein, this Court concludes that, based on the totality of circumstances, the United States has made a prima facie case that defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones have distributed marijuana, and have used the premises of 1755 Broadway Avenue, Oakland, California, for the purpose of distributing marijuana, both in violation of the Court's May 19, 1998 Preliminary Injunction Order.

Accordingly, defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby

ORDERED 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; and it is hereby further

ORDERED that defendants shall have until 12:00 p.m. (Pacific Daylight Time), September 14, 1998, in which to file their response to this Show Cause Order. Defendants' response shall include sworn declarations outlining the factual basis for any affirmative defenses which they wish to offer in response to this Show Cause Order; and it is hereby further

ORDERED that the United States shall have until 12:00 p.m. (Pacific Daylight Time), September 21, 1998, in which to file a motion in limine regarding any defenses or evidence which the defendants might raise in their response; and it is hereby further

ORDERED that the defendants shall have until 12:00 p.m. (Pacific Daylight Time), September 25, 1998, in which to file an opposition to the United States' motion in limine; and it is hereby further

ORDERED that the parties shall appear before the Court on September 28, 1998, at 2:30 p.m., for a hearing on the government's motion in limine; and it is hereby further

ORDERED that service by all parties shall be accomplished by overnight delivery and facsimile transmission; and it is hereby further

ORDERED that plaintiff shall produce to defendants by September 9, 1998, copies of all documentary evidence plaintiff intends to introduce into evidence during the contempt proceeding, as well as any reports relating to the alleged violations of the Court's May 19, 1998 injunction. Plaintiff shall produce only those reports prepared by percipient witnesses to the alleged violations.

IT IS SO ORDERED.

Dated: September 3, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the North District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.
_____/

AND RELATED ACTIONS
_____/

Nos. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0245 CRB

ORDER RE: MOTION TO DISMISS IN CASE NO. 98-0088 CRB

By this lawsuit plaintiff the United States of America seeks a permanent injunction enjoining defendants from distributing marijuana for use by seriously ill persons upon a physician's recommendation. By order dated May 19, 1998, the Court issued a preliminary injunction pursuant to 21 U.S.C. § 882(a) enjoining defendants from violating 21 U.S.C. § 841 of the Controlled Substances Act. Now before the Court is the motion to dismiss of defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones in Case No. 98-00088. Defendants contend that the complaint should be dismissed on substantive due process grounds and because they are entitled to immunity under 21 U.S.C. § 885(d). After carefully considering the papers submitted by the parties, including the memorandum of amicus curiae City of Oakland, and having had the benefit of oral argument on August 31, 1998, the motion to dismiss is DENIED.

A. Substantive Due Process.

The Court declines to dismiss the complaint on substantive due process grounds for the reasons stated in the Court's Memorandum and Order of May 14, 1998.

B. 21 U.S.C. § 885(d) Immunity.

The Court takes judicial notice of the fact that on July 28, 1998, the Oakland City Council adopted Ordinance No. 12076 which added Chapter 8.42 to the Oakland Municipal Code. Chapter 8.42 establishes a "Medical Cannabis Distribution Program" and provides that the City Manager shall designate one or more entities as a medical cannabis provider association which shall "enforce the provisions of this Chapter, including enforcing its purpose of insuring that seriously ill Californians have the right to obtain and use marijuana for medical purposes." Chapter 8.42, section 3. The Ordinance deems the agents, employees and directors of a designated medical cannabis provider association to be officers of the City of Oakland. The Court also takes judicial notice of the fact that the City of Oakland designated defendant Oakland Cannabis Buyers' Cooperative as a Chapter 8.42 medical cannabis provider association.

The Oakland Cannabis Buyers' Cooperative and Jones contend that in light of the adoption of Chapter 8.42, and their subsequent status as City of Oakland officials, they are entitled to immunity from this lawsuit under 21 U.S.C. § 885(d). That section provides in relevant part as follows:

> no civil or criminal liability shall be imposed by virtue of this subchapter . . . upon any duly authorized officer of any State, territory, political subdivision thereof, . . ., who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

Defendants contend that they distribute marijuana to enforce Chapter 8.42 -- a law relating to controlled substances -- and therefore, under 21 U.S.C. § 885(d), they are entitled to immunity. Accordingly, they contend that the federal government's complaint against them must be dismissed. In other words, defendants argue that since they are violating the federal Controlled Substances Act while enforcing a municipal ordinance relating to controlled substances, they are entitled to section 885(d) immunity.

The Court is not persuaded that section 885(d) applies to defendants' conduct for two

reasons. First, to be entitled to section 885(d) immunity, defendants must be "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." Defendants correctly observe that "lawfully" does not mean that their conduct cannot violate the federal Controlled Substances Act since section 885(d), by its nature, provides immunity for violations of that Act. For example, a state agent who participates in a drug purchase as part of an undercover operation in order to enforce state controlled substances laws would be immune from civil and criminal liability under the federal Controlled Substances Act even though his conduct -- participation in the drug sale -- literally violates the federal law.

To be entitled to immunity, however, the law "relating to controlled substances" which the official is enforcing must itself be lawful under federal law, including the federal Controlled Substances Act. Ordinance 12076 states that defendants, as a designated medical cannabis provider association and its agents, are enforcing Chapter 8.42 by distributing medical marijuana. Chapter 8.42, however, to the extent it provides for the distribution of marijuana -- for any purpose -- violates the Controlled Substances Act. As the Court stated in its Memorandum and Order of May 14, 1998, "[a] state law which purports to legalize the distribution of marijuana for any purpose, even a laudable one, nonetheless directly conflicts with federal law, 21 U.S.C. § 841(a)." Memorandum and Order at 17. Since Chapter 8.42 provides for the distribution of marijuana, it and the Controlled Substances Act are in "positive conflict." See 21 U.S.C. § 903. The Court, therefore, denies defendants' motion to dismiss, not because defendants' violated the Controlled Substances Act while enforcing Chapter 8.42, but because Chapter 8.42 itself violates the Controlled Substances Act.[1]

Any other interpretation of section 885(d) would mean that a state or municipality could exempt itself from the Controlled Substances Act. For example, a municipality could enact a law which provides for municipal officials to distribute marijuana to persons over the

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[1]At oral argument, defendants' counsel suggested that defendants are enforcing Proposition 215, California Health & Safety Code § 11362.5. Proposition 215, however, does not require any enforcement; it merely exempts certain conduct by certain persons from the California drug laws.

age of 18 who request the drug. According to defendants' interpretation of section 885(d), the municipal officials who distribute the drug would be immune from civil and criminal liability (and even injunctive relief) because by distributing the drug they are enforcing a municipal ordinance relating to controlled substances. The Court concludes that the phrase "lawfully engaged in the enforcement of" cannot reasonably be interpreted to apply to such a situation. It is undisputed that Congress never intended such a result. The fact that defendants here are distributing marijuana for medical purposes is immaterial; if defendants' interpretation of section 882(b) is correct all conduct enforcing any law related to a controlled substance is entitled to immunity, regardless of the lawfulness, or even reasonableness, of the law which the officials are purporting to enforce. The Court declines to read section 882(d) so broadly, and the word "lawfully" so narrowly, as to permit such a loophole in the Controlled Substances Act.

Defendants' motion to dismiss fails for a second, independent reason. Section 882(b), by its plain terms, provides an official with immunity from civil and criminal liability. In other words, it protects an official from paying compensation or being penalized for conduct in the past which violated the federal Controlled Substances Act. It does not purport to immunize officials from equitable relief enjoining their future conduct. For example, prosecutors enjoy absolute immunity from being held civilly liable under 42 U.S.C. § 1983. See Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976). That immunity, however, does not extend to equitable relief. See Roe v. City and County of San Francisco, 109 F.3d 578, 586 (9th Cir. 1997); Fry v. Melaragno, 939 F.2d 832, 839 (9th Cir. 1991).

Section 885(d) similarly does not immunize officials from lawsuits arising from their violation of the Controlled Substances Act, nor does it immunize officials from being subjected to equitable relief enjoining future conduct. It merely immunizes them from civil or criminal liability. As this lawsuit seeks a permanent injunction and does not seek civil or criminal liability, section 885(d) would not require dismissal of this lawsuit even if that section were to apply. Moreover, the immunity provided by section 885(d) does not extend to relief arising from a finding of civil contempt since such relief is not a "liability," but

rather is designed to compel a defendants' compliance with an injunction. If that were not the law, the fact that a prosecutor is not entitled to immunity from equitable actions under 42 U.S.C. § 1983 would be meaningless since a court could never enforce its injunctions.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss in 98-0088 is DENIED.

IT IS SO ORDERED.

Dated: September 3, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB; and DENIS PERON,

Defendants.

_____/

AND RELATED ACTIONS

_____/

Nos. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00089 CRB
C 98-00245 CRB

ORDER RE: MOTION TO DISMISS IN CASE NO. 98-00089

Now before the Court is defendants' motion to dismiss in Case No. 98-00089. For the reasons stated in open court on August 31, 1998, the motion to dismiss is GRANTED. The complaint is hereby DISMISSED without prejudice.

IT IS SO ORDERED.

Dated: September 3, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB; and DENIS PERON,

Defendants.

_____/

AND RELATED ACTIONS

_____/

Nos. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00245 CRB

ORDER RE: MOTION TO INTERVENE

Now before the Court are the motion of Rebecca Nikkel to intervene in Case Nos. 98-00086, the motion of Lucia Y. Vier to intervene in 98-00087, and the motion of Edward Neil Brundridge and Ima Carter to intervene in 98-00088. After carefully considering the papers submitted by the parties, and for the reasons stated in open court on August 31, 1998, the motions to intervene are GRANTED pursuant to Federal Rule of Civil Procedure 24(b).

IT IS SO ORDERED.

Dated: September 3, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.
_____/

AND RELATED ACTIONS
_____/

Nos. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0245 CRB

ORDER RE: MOTION TO DISMISS IN CASE NO. 98-0088 CRB

By this lawsuit plaintiff the United States of America seeks a permanent injunction enjoining defendants from distributing marijuana for use by seriously ill persons upon a physician's recommendation. By order dated May 19, 1998, the Court issued a preliminary injunction pursuant to 21 U.S.C. § 882(a) enjoining defendants from violating 21 U.S.C. § 841 of the Controlled Substances Act. Now before the Court is the motion to dismiss of defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones in Case No. 98-00088. Defendants contend that the complaint should be dismissed on substantive due process grounds and because they are entitled to immunity under 21 U.S.C. § 885(d). After carefully considering the papers submitted by the parties, including the memorandum of amicus curiae City of Oakland, and having had the benefit of oral argument on August 31, 1998, the motion to dismiss is DENIED.

A. Substantive Due Process.

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The Court takes judicial notice of the fact that on July 28, 1998, the Oakland City Council adopted Ordinance No. 12076 which added Chapter 8.42 to the Oakland Municipal Code. Chapter 8.42 establishes a "Medical Cannabis Distribution Program" and provides that the City Manager shall designate one or more entities as a medical cannabis provider association which shall "enforce the provisions of this Chapter, including enforcing its purpose of insuring that seriously ill Californians have the right to obtain and use marijuana for medical purposes." Chapter 8.42, section 3. The Ordinance deems the agents, employees and directors of a designated medical cannabis provider association to be officers of the City of Oakland. The Court also takes judicial notice of the fact that the City of Oakland designated defendant Oakland Cannabis Buyers' Cooperative as a Chapter 8.42 medical cannabis provider association.

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The Court is not persuaded that section 885(d) applies to defendants' conduct for two

reasons. First, to be entitled to section 885(d) immunity, defendants must be "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." Defendants correctly observe that "lawfully" does not mean that their conduct cannot violate the federal Controlled Substances Act since section 885(d), by its nature, provides immunity for violations of that Act. For example, a state agent who participates in a drug purchase as part of an undercover operation in order to enforce state controlled substances laws would be immune from civil and criminal liability under the federal Controlled Substances Act even though his conduct -- participation in the drug sale -- literally violates the federal law.

To be entitled to immunity, however, the law "relating to controlled substances" which the official is enforcing must itself be lawful under federal law, including the federal Controlled Substances Act. Ordinance 12076 states that defendants, as a designated medical cannabis provider association and its agents, are enforcing Chapter 8.42 by distributing medical marijuana. Chapter 8.42, however, to the extent it provides for the distribution of marijuana -- for any purpose -- violates the Controlled Substances Act. As the Court stated in its Memorandum and Order of May 14, 1998, "[a] state law which purports to legalize the distribution of marijuana for any purpose, even a laudable one, nonetheless directly conflicts with federal law, 21 U.S.C. § 841(a)." Memorandum and Order at 17. Since Chapter 8.42 provides for the distribution of marijuana, it and the Controlled Substances Act are in "positive conflict." See 21 U.S.C. § 903. The Court, therefore, denies defendants' motion to dismiss, not because defendants' violated the Controlled Substances Act while enforcing Chapter 8.42, but because Chapter 8.42 itself violates the Controlled Substances Act.[1]

Any other interpretation of section 885(d) would mean that a state or municipality could exempt itself from the Controlled Substances Act. For example, a municipality could enact a law which provides for municipal officials to distribute marijuana to persons over the

[1]At oral argument, defendants' counsel suggested that defendants are enforcing Proposition 215, California Health & Safety Code § 11362.5. Proposition 215, however, does not require any enforcement; it merely exempts certain conduct by certain persons from the California drug laws.

age of 18 who request the drug. According to defendants' interpretation of section 885(d), the municipal officials who distribute the drug would be immune from civil and criminal liability (and even injunctive relief) because by distributing the drug they are enforcing a municipal ordinance relating to controlled substances. The Court concludes that the phrase "lawfully engaged in the enforcement of" cannot reasonably be interpreted to apply to such a situation. It is undisputed that Congress never intended such a result. The fact that defendants here are distributing marijuana for medical purposes is immaterial; if defendants' interpretation of section 882(b) is correct all conduct enforcing any law related to a controlled substance is entitled to immunity, regardless of the lawfulness, or even reasonableness, of the law which the officials are purporting to enforce. The Court declines to read section 882(d) so broadly, and the word "lawfully" so narrowly, as to permit such a loophole in the Controlled Substances Act.

Defendants' motion to dismiss fails for a second, independent reason. Section 882(b), by its plain terms, provides an official with immunity from civil and criminal liability. In other words, it protects an official from paying compensation or being penalized for conduct in the past which violated the federal Controlled Substances Act. It does not purport to immunize officials from equitable relief enjoining their future conduct. For example, prosecutors enjoy absolute immunity from being held civilly liable under 42 U.S.C. § 1983. See Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976). That immunity, however, does not extend to equitable relief. See Roe v. City and County of San Francisco, 109 F.3d 578, 586 (9th Cir. 1997); Fry v. Melaragno, 939 F.2d 832, 839 (9th Cir. 1991).

Section 885(d) similarly does not immunize officials from lawsuits arising from their violation of the Controlled Substances Act, nor does it immunize officials from being subjected to equitable relief enjoining future conduct. It merely immunizes them from civil or criminal liability. As this lawsuit seeks a permanent injunction and does not seek civil or criminal liability, section 885(d) would not require dismissal of this lawsuit even if that section were to apply. Moreover, the immunity provided by section 885(d) does not extend to relief arising from a finding of civil contempt since such relief is not a "liability," but

rather is designed to compel a defendants' compliance with an injunction. If that were not the law, the fact that a prosecutor is not entitled to immunity from equitable actions under 42 U.S.C. § 1983 would be meaningless since a court could never enforce its injunctions.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss in 98-0088 is DENIED.

IT IS SO ORDERED.

Dated: September 3, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

WILLIAM G. PANZER
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Oakland, California 94610
Telephone: (510) 834-1892

Attorney for Defendants
MARIN ALLIANCE FOR MEDICAL
MARIJUANA; LYNNETTE SHAW

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATORS' CLUB; and DENNIS PERON, Defendants. AND RELATED ACTIONS.	Nos. C 98-0085 CRB C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0089 CRB C 98-0245 CRB RESPONSE OF DEFENDANTS MARIN ALLIANCE FOR MEDICAL MARIJUANA AND LYNNETTE SHAW TO ORDER TO SHOW CAUSE IN CASE NO. C 98-0086 CRB

Defendants MARIN ALLIANCE FOR MEDICAL MARIJUANA and LYNNETTE SHAW, (hereinafter "MAMM" and "SHAW"), herein respond to the Order to Show Cause in Case No. C 98-0086 CRB, issued by this Honorable Court September 3, 1998.

DEFENDANTS HAVE NOT VIOLATED THE PRELIMINARY INJUNCTION OF MAY 19, 1998

The Preliminary Injunction issued by this Honorable Court enjoined MAMM and SHAW from engaging in certain activities

in violation of the Controlled Substances Act, specifically 21 U.S.C. §841(a)(1).

Without admitting that the government has established that any distribution of marijuana has taken place, MAMM and SHAW contend that distribution of marijuana to patients suffering from serious conditions whose physicians have recommended or approved the use of medicinal cannabis does not violate the Controlled Substances Act.

A. DISTRIBUTION OF MEDICINAL CANNABIS TO SERIOUSLY ILL PATIENTS IS PROTECTED BY THE DOCTRINE OF NECESSITY AND THUS NOT VIOLATIVE OF THE CONTROLLED SUBSTANCES ACT

MAMM and SHAW incorporate by reference as if fully set forth herein Argument II, A, found at pages 6-13 of *Defendants' Memorandum In Opposition To Plaintiff's Motion To Show Cause, And For Summary Judgment In Cases No. C 98-0086 CRB; No. C 98-0087 CRB; And No. C 98-0088 CRB*, filed August 14, 1998, in the within action.

B. DEFENDANTS MAMM AND SHAW ARE NOT IN CONTEMPT BECAUSE APPLICATION OF THE CONTROLLED SUBSTANCES ACT VIOLATES THE SUBSTANTIVE DUE PROCESS RIGHTS OF THEIR PATIENT MEMBERS

MAMM and SHAW incorporate by reference as if fully set forth herein Argument II, B, found at pages 13-17 of *Defendants' Memorandum In Opposition To Plaintiff's Motion To Show Cause, And For Summary Judgment In Cases No. C 98-0086 CRB; No. C 98-0087 CRB; And No. C 98-0088 CRB*, filed August 14, 1998, in the within action.

MAMM and SHAW contend that each patient/member of the Marin Alliance for Medical Marijuana has a serious medical condition for which the cannabis provides relief. (See *Declaration of Lynnette Shaw in Support of Response to Order to Show Cause*, filed herewith; see also *Declaration of Rebecca Nikkel In Support Of Motion For Leave To Intervene*, previously filed on August 14, 1998). MAMM and SHAW further contend that substantial scientific evidence establishes that cannabis is "one of the safest therapeutically active substances known to man." (See *Declaration of John P. Morgan, M.D.*, previously filed on August 14, 1998, by defendants OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES, Case No. C 98-0088 CRB, in support of their *Motion To Dismiss Plaintiff's Complaint In Case No. C 98-0088 CRB For Failure To State A Claim Upon Which Relief Can Be Granted*, quoting DEA Administrative Law Judge Francis L. Young).

In view of the scientific evidence establishing the efficacy and safety of cannabis, the government has acted arbitrarily and capriciously in placing marijuana in Schedule I. MAMM and SHAW contend that the maintaining of this relatively harmless substance in Schedule I has nothing to do with reason, logic, or science. Rather the government has done so in furtherance of spreading political propaganda in the "war on drugs".

MAMM and SHAW will prevail should they "prove that a challenged government action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare'". *Patel v. Penman*,

103 F.3d 868, 874 (9th Cir. 1996), citing to *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, (1926); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir.1988). It has been stated that a Substantive Due Process claim "interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

In its briefs and at prior hearings before the Court, the government characterized the defendants' position as an argument that the defendants have a constitutional right to marijuana. Then, in challenging this characterization of the defendants' contentions, the government argued that Substantive Due Process could not be viewed as a right to a particular medical treatment.

MAMM and SHAW submit that the converse is also true. The government may not restrict access to any particular treatment without having, at minimum, a rational basis for the restriction. Such was recognized by the Ninth Circuit in the laetrile case, *Carnohan v. United States*, 616 F.2d 1120, (9th Cir. 1980). The decision in *Carnohan*, previously cited by the government for the proposition that Substantive Due Process does not afford a right to a particular medical treatment, also noted that "Carnohan has failed to show that government regulation of laetrile traffic bears no reasonable relation to the legitimate state purpose of protecting public health." *Carnohan*, at 1122.

Other courts have similarly recognized that the government must establish a rational basis for restricting a particular medical treatment. "In the absence of extraordinary circumstances, state restrictions on a patient's choice of a particular treatment also have been found to warrant only rational basis review." *Sammon v. New Jersey Bd. of Medical Examiners*, 66 F.3d 639, 645 n.10 (3rd Cir.1995). "[A] patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider *if the government has reasonably prohibited the type of treatment or provider.*" *Mitchell v. Clayton*, 995 F.2d 772, 775-6 (7th Cir. 1993), (Emphasis added).

In another case previously cited by the government, the California Supreme Court considered whether cancer patients had a constitutional right to laetrile. *People v. Privitera*, 23 C.3d 697, cert. denied, 444 U.S. 949 (1979). The Court reviewed the government's explanation for the ban and found it reasonable. *Privitera*, at 707-708. In then finding the statute barring access to laetrile constitutional, the Court similarly applied a rational basis test.

> [W]e must resolve a narrow question: Does the challenged legislation bear a reasonable relationship to the achievement of the legitimate state interest in the health and safety of its citizens? We conclude section 1707.1 does satisfy this standard and that it therefore does not encroach upon the federal constitutional right of privacy.

Privitera, at 708-709.

For MAMM and SHAW to be held in contempt for engaging in conduct that violated the Controlled Substances Act, the

government must establish a rational basis for the comprehensive ban it has effectively placed on the medical use of cannabis by placing marijuana in Schedule I. A review of the years of extensive research and history of this benign and effective medicine will confirm that the government cannot meet even this minimal standard. (See *Declaration of Christopher P. M. Conrad in Support of Response to Order to Show Cause*, filed herewith).

C. DEFENDANTS MAMM AND SHAW ARE NOT IN CONTEMPT BECAUSE THEIR PATIENT/MEMBERS ARE JOINT USERS OF MEDICAL CANNABIS

MAMM and SHAW incorporate by reference as if fully set forth herein Argument II, C, found at pages 17-19 of *Defendants' Memorandum In Opposition To Plaintiff's Motion To Show Cause, And For Summary Judgment In Cases No. C 98-0086 CRB; No. C 98-0087 CRB; And No. C 98-0088 CRB*, filed August 14, 1998, in the within action.

Dated: September 14, 1998

Respectfully submitted,

WILLIAM G. PANZER
Attorney for Defendants
MARIN ALLIANCE FOR MEDICAL MARIJUANA; LYNNETTE SHAW

PROOF OF SERVICE BY MAIL

The undersigned hereby declares:

I am employed in the City of Oakland, County of Alameda, am over the age of 18 years, and am not a party to the within action; my business address is 370 Grand Avenue, Suite 3, Oakland, California, 94610. On September 14, 1998, I served the attached:

RESPONSE OF DEFENDANTS MARIN ALLIANCE FOR MEDICAL MARIJUANA AND LYNNETTE SHAW TO ORDER TO SHOW CAUSE IN CASE NO. C 98-0086 CRB

DECLARATION OF LYNNETTE SHAW IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

DECLARATION OF CHRISTOPHER P. M. CONRAD IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

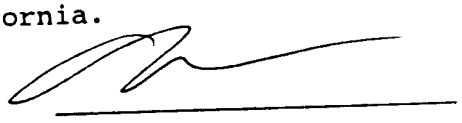
on the parties in said action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as follows:

Robert A. Raich
1970 Broadway, Suite 1200
Oakland, CA 94612

David Nelson
Nelson & Reimenschneider
P.O. Box N
106 N. School Street
Ukiah, CA 95482

Thomas V. Loran III
235 Montgomery Street
P.O. Box 7880
San Francisco, CA 94120-7880

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 14, 1998, at Oakland, California.



PROOF OF SERVICE BY FEDERAL EXPRESS

The undersigned hereby declares:

I am employed in the City of Oakland, County of Alameda, am over the age of 18 years, and am not a party to the within action; my business address is 370 Grand Avenue, Suite 3, Oakland, California, 94610. On September 14, 1998, I served the attached:

RESPONSE OF DEFENDANTS MARIN ALLIANCE FOR MEDICAL MARIJUANA AND LYNNETTE SHAW TO ORDER TO SHOW CAUSE IN CASE NO. C 98-0086 CRB

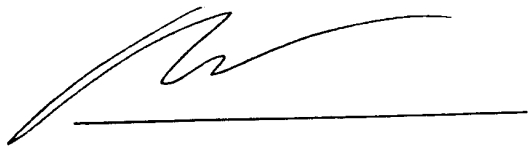
DECLARATION OF LYNNETTE SHAW IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

DECLARATION OF CHRISTOPHER P. M. CONRAD IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

on the parties in said action by placing the documents listed above in a sealed federal express envelope with postage thereon fully prepaid, address set forth below:

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

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 14, 1998, at Oakland, California.



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SEP 14 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM G. PANZER
State Bar No. 128684
370 Grand Avenue, Suite 3
Oakland, California 94610
Telephone: (510) 834-1892

Attorney for Defendants
MARIN ALLIANCE FOR MEDICAL
MARIJUANA; LYNNETTE SHAW

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATORS' CLUB; and DENNIS PERON, Defendants. AND RELATED ACTIONS.	Nos. C 98-0085 CRB C 98-0086 CRB C 98-0087 CRB ✓C 98-0088 CRB C 98-0089 CRB C 98-0245 CRB DECLARATION OF LYNNETTE SHAW IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

I, Lynnette Shaw, declare as follows:

1. I am the director of the Marin Alliance for Medical Marijuana;

2. The members of the Marin Alliance for Medical Marijuana are patients with serious medical conditions who qualify to use medicinal cannabis, under a physician's care, pursuant to California Health & Safety Code §11362.5, ("Proposition 215");

3. I have read the DEA-6 Report of Investigation prepared by S.A. Bill Nyfeler and dated May 27, 1998. In his

report Agent Nyfeler claims on that date to have observed fourteen individuals between the ages of "late teens/early twenties to elderly" enter the premises of the Marin Alliance for Medical Marijuana between the hours of 9:54 a.m. and 12:01 p.m. Agent Nyfeler further claims to have observed "several people exit the club, roll their own cigarettes, and smoke them in the area dirctly [sic] outside the club";

5. In his report, Agent Nyfeler claims to have observed these individuals at 6 Old School Street Plaza, Suite 210, in Fairfax, California;

6. The Marin Alliance for Medical Marijuana is located at 6 School Street Plaza, Suite 215, in Fairfax, California. I am unaware of any street in Fairfax known as "Old School Street Plaza";

7. Based on Agent Nyfeler's minimal description, I am unable to identify the above-referenced fourteen individuals, nor am I able to identify the unknown number of persons Agent Nyfeler claims to have seen rolling and smoking cigarettes;

8. The building at 6 School Street Plaza is a two-story building housing approximately eight different tenants, including an acupuncture pain relief clinic, an attorney, a computer software development company, and others, in addition to the Marin Alliance for Medical Marijuana. The Marin Alliance for Medical Marijuana is located on the second floor, along with four other businesses. The building's policy is to ban smoking indoors as all offices share a central air-conditioning system. Persons on the second floor who desire to smoke cigarettes usually do so at an outdoor mezzanine located approximately 12

feet north of the Marin Alliance's front door;

9. No medical cannabis smoking is permitted either in the Alliance's office, on the mezzanine, in the parking lot, or anywhere within the vicinity of the building. This policy is specifically provided for in the use permit issued by the Town of Fairfax. It is strictly enforced by both the Marin Alliance for Medical Marijuana and the Town of Fairfax Police Department as part of the agreement with the Town of Fairfax;

10. The Marin Alliance for Medical Marijuana has approximately 300 active members. Each of these members has presented documentation establishing that they suffer from one or more serious medical conditions for which their physician has recommended or approved the use of medicinal cannabis;

11. The Marin Alliance for Medical Marijuana verifies the physician recommendation and/or approval of each individual who applies for membership;

12. The Marin Alliance for Medical Marijuana verifies with the State of California that each member's physician is currently licensed by the State of California;

13. Each member of the Marin Alliance for Medical Marijuana is required to update their physician recommendation and/or approval every six months;

14. I have discussed the federal government's efforts to close the Marin Alliance for Medical Marijuana with the majority of the active members of the Alliance. The members are fearful that the government may seek to prosecute them should their identities become known to the government. For this reason members have requested that I, as director, maintain the

confidentiality of their identities and medical records.

I declare under penalty of perjury as provided for by the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 13th day of September, 1998, at Oakland, California.

Lynnette Shaw

LYNNETTE SHAW

COPY

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SEP 14 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM G. PANZER
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Oakland, California 94610
Telephone: (510) 834-1892

Attorney for Defendants
MARIN ALLIANCE FOR MEDICAL
MARIJUANA; LYNNETTE SHAW

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATORS' CLUB; and DENNIS PERON, Defendants. AND RELATED ACTIONS.	Nos. C 98-0085 CRB C 98-0086 CRB C 98-0087 CRB ✓C 98-0088 CRB C 98-0089 CRB C 98-0245 CRB DECLARATION OF CHRISTOPHER P. M. CONRAD IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

I, CHRISTOPHER P. M. CONRAD, declare as follows:

1. I am a professional consultant on numerous aspects regarding the history, cultivation, use and prohibition of cannabis;

2. I have studied various aspects of cannabis for ten years, including, but not limited to, medical use, non-medical use, industrial use, cultivation techniques and yields;

3. I have authored a book entitled *Hemp for Health* which analyzes scientific data regarding medical, physiological and psychological effects of cannabis;

4. I have also authored a book entitled *Hemp, Lifeline to the Future*, a comprehensive treatment of the industrial, medicinal and social/spiritual applications of the cannabis plant;

5. I have qualified as an expert witness and/or submitted expert declarations regarding cannabis cultivation, crop yields, sex differentiation, preparation, quality and usability, medical and personal consumption patterns, and other aspects of use in California courts in the Counties of Sonoma, Humboldt, San Mateo, San Diego, Marin, Lake, Nevada, Tuolomne, Santa Cruz, Merced, and Butte;

6. I have testified at the National Academy of Science Institute on Medicine hearings on medical marijuana;

7. I participated in the citizen's legislative advisory panel for Sen. John Vasconcellos' Medical Marijuana Research Bill, SB 535;

8. I have researched medical literature, medical marijuana buyers' clubs, and individual patients, having observed and interviewed patients, doctors, caregivers, and/or social consumers throughout the United States as well as in Canada, Holland, Spain, Germany, and Switzerland;

9. I consulted with Hemp Agrotech in conjunction with the United States Department of Agriculture research station in Imperial Valley, California;

10. I am familiar with the requirements for placing a substance in Schedule I as set forth in 21 USC §812. Specifically, before a substance may be placed in Schedule I, the following findings are required:

(A) The drug or other substance has a high potential for abuse.

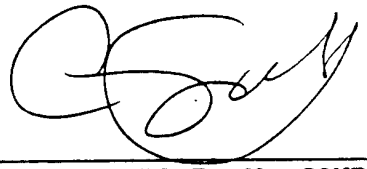
(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision;

11. Based upon my research and review of scientific studies and relevant evidence, it is my opinion that there is virtually no scientific basis for the placement of cannabis in Schedule I.

I declare under penalty of perjury as provided for by the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 13th day of September, 1998, at El Cerrito, California.



CHRISTOPHER P. M. CONRAD

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Attorneys for Defendants and Counterclaimants-in-Intervention Edward Neil Brundridge, Ima Carter, Rebecca Nikkel and Lucia Y. Vier

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. CANNABIS CULTIVATOR'S CLUB, et al., Defendants. AND RELATED ACTIONS	No. C 98-0085 CRB C 98-0086 CRB C 98-0087 CRB √C 98-0088 CRB C 98-0245 CRB DECLARATION OF HELEN COLLINS, M.D. Date: Time: Courtroom of the Hon. Charles R. Breyer

I, HELEN COLLINS, M.D., declare as follows:

1. I am a medical doctor specializing in oncology. I practice medicine in Santa Rosa, California. Except where stated on information and belief, I have personal knowledge of the matters set forth in this declaration and could and would testify competently to them if called on by the Court to do so.

2. I am presently treating Lucia Y. Vier for incurable metastatic squamous cell cancer. I am Ms. Vier's primary physician, and I have been treating her since March 1998 when she was initially diagnosed. Her treatment has consisted of radiation and chemotherapy.

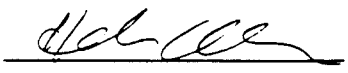
3. In my experience, the chemotherapy drugs paclitaxel and carboplatin, that Ms. Vier is now receiving, cause patients to suffer with nausea and anorexia. This occurred in Ms. Vier's case and is documented by a 4 kilogram (8.8 lb) weight loss. Ms. Vier's initial weight was 42 kg (92 lb.),and she dropped to 83 lb when she began treatment. Many "standard" antiemetics were tried including ondansetron (Zofran), prochlorperazine (Compazine) and lorezepam (Ativan). It was not until she started using cannabis, however, that she regained her appetite and also her weight while continuing the chemotherapy treatments. Her present weight is back to 41 kg (90.2 lb.)

4. It is my medical opinion that for Ms. Vier her use of cannabis has been and is a medical necessity. In combination with ondansetron and lorezepam, it has been the only treatment that effectively relieves her nausea and stimulates her appetite.

5. The average life expectancy of a patient with Ms. Vier's type of cancer is 10 months without chemotherapy and 1.5 years with treatment. Cannabis is the only drug that has allowed us to give her the treatment she requires. It will be frustrating to not be able to guarantee that she will be able to obtain a safe, steady and affordable supply of cannabis.

56. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13 day of September 1998 at Santa Rosa, California.



Helen Collins, MD

PROOF OF SERVICE BY FACSIMILE TRANSMISSION

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 that the document described below was transmitted by facsimile transmission to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number as last given by that person on any document which he or she has filed in the cause.

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

DECLARATION OF HELEN COLLINS, M.D.

on the following by sending a true copy from Morrison & Foerster's facsimile transmission telephone number (415) 268-7522 and that the transmission was reported as complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting facsimile machine.

SEE 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 14th day of September, 1998.

Alma J. Gilligan
(typed)

_____
(signature)

SERVICE LIST FOR

SEPTEMBER 14, 1998 COURT FILING

Opposing Counsel:

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

SERVICE LIST FOR

SEPTEMBER 14, 1998 COURT FILING

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COOPERATIVE and JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

DEFENDANTS' RESPONSE TO SHOW CAUSE ORDER IN CASE NO. C 98-0088 CRB

Date: September 28, 1998
Time: 2:30 p.m.
Courtroom: 8
Hon. Charles R. Breyer

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ER1144

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INTRODUCTION

At oral argument on August 31, 1998, this Court ordered that the government provide specific details concerning the evidentiary basis for its allegation that defendants have violated the Court's Preliminary Injunction Order. The information submitted by the government has failed to establish by clear and convincing evidence that defendants are in contempt of this Court's Preliminary Injunction Order. Accordingly, defendants should not be found in contempt on the basis of the government's conclusory submission.

Nevertheless, in response to the government's allegations, and to the Court's September 3, 1998 Order to Show Cause, defendants have submitted herewith declarations which set forth in detail facts which prove that defendants are not in contempt. Defendants' evidence establishes that they have taken all reasonable steps to comply with this Court's Preliminary Injunction Order and that the alleged distribution of medical cannabis to patient-members is justified as a medical necessity. Additionally, prohibiting such distribution under the circumstances alleged here constitutes a violation of these patient-members' substantive due process rights. At a minimum, these declarations establish triable issues of fact that can only be resolved by a jury.

STATEMENT OF FACTS AND PROCEEDINGS

A. The Court's Order

On May 19, 1998, this Court issued a Preliminary Injunction Order ("Order"). The Order enjoined defendants from engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, from using the premises for these purposes, and from conspiring to do the same — in violation of 21 U.S.C. §§ 841(a)(1), 846, and 856. Order at ¶¶ 1-3.

This Court's Memorandum and Order explicitly contemplated a jury trial to determine the validity of any subsequent allegations that the injunction had been violated. The Court stated: "[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.*" Memorandum and Order dated May 13, 1998 ("Mem. Op. & Order") at 24 (emphasis added).

This Court specifically stated that the defendants may raise, at a jury trial, several defenses to any possible future allegations of contempt — including the medical necessity defense, a substantive due process defense, and the joint users defense. As to medical necessity, this Court stated:

> The Court is not ruling, however, that the defense of necessity is wholly inapplicable to these lawsuits. 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. As such facts are not presently before the Court, it is premature for the Court to decide whether such a defense is available.

Id. at 21 (emphasis added). This Court further recognized that a substantive due process defense might be available "in a contempt proceeding where the trier of fact is presented with *a particular transaction to a particular patient under a particular set of facts*." *Id.* at 23 (emphasis added). Finally, the Court cautioned "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, or that defendants could not as a matter of law defeat a motion for summary judgment with evidence of mere possession." *Id.* at 18-19.

B. Summary Of Defendants' Response To The Government's Contempt Allegations

At the August 31, 1998 hearing this Court directed that the government provide notice to defendants of the specific facts and circumstances underlying the contempt charges. In response, the government simply resubmitted the conclusory allegations already set forth in its previously filed affidavits.[1] More specifically, these affidavits do not identify the individuals to whom defendants are

[1] Defendants incorporate by reference herein the objections set forth in their previously filed Motion to Strike the government's declarations.

alleged to have provided medical cannabis.[2] Defendants believe that the government's submission thus does not provide specific notice or evidence of the charges, thereby impairing defendants' ability to respond to the specific charges and to present evidence concerning their defenses.

The government also has refused to provide immunity for witnesses in these proceedings. Defendants believe that immunity is appropriate, however, and hereby request that the Court provide immunity to those offering, and to those who would offer, evidence in this case.[3] The defenses invoked by defendants necessarily require seriously ill patients to admit to actions which the government contends violate federal law. The Court should grant immunity to witnesses willing to come forward with such evidence.[4]

Notwithstanding the government's failure to identify the participants in the alleged distribution of medical cannabis, and its refusal to provide immunity, defendants have responded with declarations that establish their defenses to the government's charges. The government relies for its contempt charges upon the declaration of Agent Ott, who claims to have seen a distribution of medical cannabis to four unidentified patients at a May 21, 1998 press conference.[5] Declaration of Special Agent Peter Ott ("Ott Decl.") at ¶ 4. Assuming that Agent Ott is referring to Yvonne Westbrook, Kenneth Estes, Ima Carter and David Sanders, who were listed in the press release

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[2] Given the vagueness of these allegations and the government's failure to identify the individuals to whom it is alleged cannabis was distributed, defendants lack sufficient information to admit or deny these specific allegations.

[3] *See Simmons v. United States,* 390 U.S. 377, 393-94 (1968) and *United States v. Perry*, 788 F. 2d 100, 115-16 (3d Cir.), *cert. denied*, 479 U.S. 864 (1986).

[4] The government's announced refusal to provide immunity in this proceeding already has prevented patients and physicians with relevant evidence from coming forward. Declaration of Michael M. Alcalay, M.D., M.P.H. ("Alcalay Decl.") ¶ 26.

[5] The May 20, 1998 press release, and the other "evidence" (news articles and web site pages) relied upon by the government do not establish a violation of this Court's order. A statement of intention does not constitute a criminal act. *See United States v. Pheaster*, 544 F. 2d 353, 377 n.14 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977). Such statements, at best, present triable issues of fact to be determined by a jury. *Id.* ("the possible unreliability of the inference to be drawn by the present intention is a matter going to the weight of the evidence which might be argued to the trier of fact.")

concerning the press conference, (Declaration of Mark T. Quinlivan ("Quinlivan Decl") ¶ 2, Exh. 1) defendants have submitted their declarations. Additionally, defendants have submitted the declaration of Michael Alcalay, a patient-member and the Oakland Cannabis Buyers' Cooperative's ("OCBC's") Medical Director who was also present at the press conference. These declarations establish the defense of medical necessity as well as the fundamental right of these patients to receive medical cannabis. These declarations also refute Agent Ott's claimed observation of four people receiving cannabis at the press conference.

A review of both Agent Ott's declaration and his report further underscores the unreliability of his statements and the vagueness of the government's allegations. The report itself makes no mention of a distribution of cannabis to four individuals at a press conference, nor does it implicate Mr. Jones in any distribution whatsoever. (The report is attached to the Declaration of Andrew A. Steckler ("Steckler Decl.") as Exhibit A.) Neither the declaration nor the report identifies the persons involved in the alleged distributions.

The government also appears to rely upon Agent Ott's assertion that at some unspecified time on May 21, 1998 he observed approximately 10 sales or distributions of what appeared to be marijuana by unspecified persons to 10 unidentified persons. Ott Decl. ¶ 4. Because many patients visited the Cooperative on that day, defendants cannot identify the specific persons to whom Agent Ott alleges cannabis was distributed. These persons are not identified in Agent Ott's report. (Steckler Decl. Exh. A.) Defendants have submitted declarations, however, establishing the medical needs of those patients who visited the Cooperative on May 21, 1998. *See* Declaration of Michael M. Alcalay, M.D., M.P.H. ("Alcalay Decl.") ¶¶ 4-9, 19-26; Declaration of Yvonne Westbrook ("Westbrook Decl.") ¶¶ 2-9; Declaration of Kenneth Estes ("K. Estes Decl.") ¶¶ 2-10; Declaration of Ima Carter ("Carter Decl.") ¶¶ 1-7 (Defendants' Request For Judicial Notice, Exh. O); Declaration of David Sanders ("Sanders Decl.") ¶¶ 2-3; Declaration of Albert Dunham ("Dunham Decl.") ¶¶ 2-8. These persons suffered from HIV and/or AIDS, cancer, glaucoma, multiple sclerosis, and quadraplegia. Alcalay Decl. ¶¶ 23, 25, Exh. A. All of their doctors had recommended that they use medical cannabis. *Id.* ¶ 24. At least one of those persons is now dead from cancer. *Id.* ¶ 27.

Defendants also have submitted the declarations of physicians who recommend cannabis to their patients, including patients who were present at the Cooperative on May 21, 1998. (*See* Declarations of Marcus A. Conant, M.D. ("Conant Decl.") ¶¶ 6, 7, 9, 10, 15; Neil M. Flynn, M.D. ("Flynn Decl.") ¶¶ 7-12, 20; Milton N. Estes, M.D. ("M. Estes Decl.") ¶¶ 13-15; Arnold S. Leff, M.D. ("Leff Decl.") ¶¶ 6-8; Howard D. Maccabee, M.D. ("Maccabee Decl.") ¶¶ 6-9; Debasish Tripathy, M.D. ("Tripathy Decl.") ¶¶ 5-9, 11-14; Stephen Eliot Follansbee, M.D. ("Follansbee Decl.") ¶ 6; Stephen O'Brien, M.D. ("O'Brien Decl.") ¶¶ 4-8, 13; Donald W. Northfelt, M.D. ("Northfelt Decl.") ¶¶ 6-8, 14; Virginia I. Cafaro, M.D ("Cafaro Decl.") ¶¶ 5, 7; Robert C. Scott, M.D. ("Scott Decl.") ¶¶ 5, 6; Alcalay Decl. ¶ 28).[6] This evidence confirms that cannabis is a necessary medicine which alleviates pain and can save patients' lives.

Finally, defendants have submitted evidence from recognized medical experts concerning the history and medical use of cannabis. *See* Declaration of Lester Grinspoon, M.D., Declaration of John P. Morgan, M.D. ("Grinspoon Decl."; "Morgan Decl."). Dr. Grinspoon is an Associate Professor of Psychiatry at Harvard Medical School who specializes in the study of psychoactive drugs. Grinspoon Decl. ¶ 1. 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. *Id.* ¶ 6. 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*. Morgan Decl. ¶¶ 1-2. Both of these experts confirm the effectiveness of cannabis as a medicine and the fact that for many of the illnesses from which OCBC's patient-members suffer, there are no reasonable legal alternatives to medical cannabis. Grinspoon Decl. ¶¶ 8, 16-28; Morgan Decl. ¶¶ 3-12.

In response to the government's charge that defendants violated this Court's order on May 21, 1998, defendants' evidence clearly establishes that:

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[6] These physician declarations were submitted in the Northern District case of *Conant v. McCaffrey*, No. C 97-0139 FMS. Defendants have requested that the Court take judicial notice of these declarations.

1. The OCBC takes extraordinary measures to ensure that only patients with a confirmed medical diagnosis and physician approval are allowed to become members and to use the facility.

2. On May 21, 1998, any cannabis alleged to have been distributed was a medical necessity to the patients who received it.

3. The present state of medical knowledge concerning the use of cannabis fully confirms that cannabis is a medical necessity to patients such as those who were present at the Cooperative on May 21, 1998.

4. Any cannabis allegedly distributed on May 21, 1998 is subject to the joint users' defense.

5. The substantive due process rights of OCBC's patient-members generally, and those alleged to have received cannabis on May 21, 1998, require that they have safe access to medical cannabis.

For these reasons, the government cannot prevail on its contempt charges. Accordingly, the court should dismiss the Order to Show Cause. If the Court determines that it should proceed, the defendants are entitled to a jury trial.

ARGUMENT

I. DEFENDANTS' EVIDENCE DEMONSTRATES THAT THEY ARE IN GOOD FAITH AND SUBSTANTIAL COMPLIANCE WITH THE COURT'S ORDER.

In this Circuit, a party should not be held in contempt if its action "appears to be based on a good faith belief and reasonable interpretation of the [court's order]." *Go-Video, Inc. v. Motion Picture Ass'n of Am.*, 10 F.3d 693, 695 (9th Cir. 1993) (citations and quotations omitted). Moreover, "[s]ubstantial compliance with a court order is [also] a defense to an action for civil contempt." *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986); *Go-Video*, 10 F.3d at 695.

Now that this Court has issued an Order to Show Cause, defendants must be allowed to present detailed evidence to a jury that they are in good faith and substantial compliance with the Order. At least three defenses, *specifically left open by this Court*, exempt defendants from liability for any acts alleged to violate 21 U.S.C. §§ 841, 846, and 856 and the Order. These defenses include

medical necessity, substantive due process, and the joint users defenses. They are established in the declarations submitted with this Response.

A. Defendants Are Not In Contempt Because Any Cannabis They Distribute Is A Medical Necessity To Their Members.

The medical necessity defense consists of the following elements: "(1) that [defendants were] faced with a choice of evils and chose the lesser evil; (2) that [defendants] acted to prevent imminent harm; (3) that [defendants] reasonably anticipated a causal relation between [their] conduct and the harm to be avoided; and (4) that [defendants had] no legal alternatives to violating the law." *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991). The medical necessity defense is a specialized application of the common law defense of necessity available in federal prosecutions. 1 LaFave & Scott, *Substantive Criminal Law*, § 5.4(c)(7), pp. 631-33 (1986). With the affidavits filed herewith, defendants have established each element of the medical necessity defense with respect to the specific transactions alleged by the government.

First, defendants' evidence establishes that they are faced with a choice of evils. They must either allow seriously ill patients to go untreated or engage in conduct which the government alleges violates federal law. Defendants' evidence establishes that OCBC is a professional and well-managed organization which provides a safe place for seriously ill persons to receive physician-approved medical cannabis. OCBC is a cooperative organized under the laws of California. Declaration of James D. McClelland ("McClelland Decl.") ¶ 4, Exh. 2. Its mission is to provide seriously ill patients with a safe and reliable source of medical cannabis products and plants. *Id.* ¶ 3, Exh. 1.

The evidence demonstrates that in order to fulfill its mission, OCBC and its staff take extensive measures to ensure that only those patients with a medical need for cannabis are admitted to the Cooperative. McClelland Decl. ¶¶ 5-11. Applicants for membership are extensively screened to determine whether a physician has made a diagnosis for which cannabis is an indicated treatment and has recommended or approved cannabis for the patient. *Id.* ¶¶ 6-8, Exh. 3. A Cooperative staff nurse confirms with the doctor's office that the doctor has approved the use of cannabis for the patient's medical condition. *Id.* ¶ 8; Declaration of Laura A. Galli, R.N. ("Galli Decl.") ¶¶ 6-7.

Additionally, the staff nurses confirm that the doctor is licensed to practice medicine in California. Galli Decl. ¶ 8. If OCBC's staff cannot confirm either the doctor's approval or the doctor's credentials, then the patient will not be admitted as a member of OCBC. Galli Decl. ¶¶ 7-8.

Once a patient is admitted to membership, OCBC takes additional steps to ensure that only patient-members who have gone through this screening process are admitted to the premises. Patient-members receive an identification card. McClelland Decl. ¶ 10, Exh. 3. They must present the membership card along with a secondary valid photo identification each time they come to the Cooperative. *Id.* ¶ 11. They must show this identification at three separate security checkpoints. *Id.*

As to the conduct alleged to have occurred on May 21, 1998, defendants have provided the declarations of Yvonne Westbrook, Kenneth Estes, Ima Carter and David Sanders, who apparently are alleged to have received cannabis from Jeffrey Jones on that day. *See* Ott Decl. ¶ 4; Quinlivan Decl., Exh. 1. Each patient has a verifiable painful and debilitating medical condition for which cannabis has provided the only form of relief. For example, Yvonne Westbrook suffers from spasticity and chronic pain brought on by multiple sclerosis. Westbrook Decl. ¶¶ 3-8. Kenneth Estes is a quadriplegic who suffers from intense pain. Estes. Decl. ¶¶ 3-5.

Defendants also have submitted the declaration of Michael Alcalay, OCBC's Medical Director who is also a patient-member of the Cooperative. Dr. Alcalay also was present at the press conference. Alcalay Decl. ¶ 4. He suffers from AIDS and needs cannabis to avoid the nausea and vomiting associated with his medications. *Id.* ¶¶ 5-8.

With respect to the 10 unidentified persons who are alleged to have received medical cannabis on May 21, 1998 (*see* Ott Decl. ¶ 4), defendants' evidence confirms that all of the patient-members present on that day have a verifiable medical condition for which cannabis provides relief. Alcalay Decl. ¶¶ 23-25, Exh. A. On May 21, 1998, approximately 191 patients came to the Cooperative. Defendants have provided documentary evidence of their conditions. *Id.* ¶ 25, Exh. A. Sixty-six percent of the patients who came to the Cooperative suffered from HIV and/or AIDS, 4% of patients who came to the Cooperative suffered from cancer, 2% of patients who came to the Cooperative suffered from glaucoma, 1% of patients who came to the Cooperative suffered from multiple sclerosis, and almost 20% of patients who came to the Cooperative suffered from disorders involving

chronic pain, such as quadriplegia. *Id.* ¶ 23, Exh. A. For each patient who came to the Cooperative on May 21, 1998, there exists in the OCBC files written confirmation that a treating California physician acknowledged and assented to cannabis therapy to treat the patient's medical condition or conditions. *Id.* ¶ 24.

One of the patient-members who came to the Cooperative on May 21, 1998, who had cancer, is now dead. Alcalay Decl. ¶ 27. Moreover, patients present on May 21, 1998 are reluctant to come forward or provide evidence of their medical conditions because of the government's refusal to provide immunity. *Id.* ¶ 26. Without additional information about the 10 persons Agent Ott allegedly saw receiving cannabis at OCBC on May 21, 1998, defendants are unable to supply further details about these patients' conditions.

Defendants also have submitted the declarations of Dr. Lester Grinspoon and Dr. John Morgan. These declarations confirm that cannabis is demonstrably effective as a medicine in treating conditions such as those from which OCBC's patient-members suffer, generally, and those from which the patient-members present on May 21, 1998 suffer. These affidavits establish that cannabis is effective for treating those with HIV or AIDS, cancer, multiple sclerosis, glaucoma, and chronic pain. Grinspoon Decl. ¶¶ 16, 18-27; Morgan Decl. ¶¶ 3,4. *See also* Conant Decl. ¶¶ 6, 7, 9, 10, 15; Flynn Decl. ¶¶ 7-12, 20; M. Estes Decl. ¶¶ 13-15; Leff Decl. ¶¶ 6-8; Maccabee Decl. ¶¶ 6-9; Tripathy Decl. ¶¶ 5-9, 11-14; Follansbee Decl. ¶ 6; O'Brien Decl. ¶¶ 4-8, 13; Northfelt Decl. ¶¶ 6-8, 14; Cafaro Decl. ¶¶ 5, 7; Scott Decl. ¶¶ 5, 6.

Second, the affidavits submitted on defendants' behalf confirm that defendants have acted to prevent imminent harm to these patients. The evidence establishes that OCBC's patient-members suffer from debilitating and often deadly diseases, including HIV and/or AIDS, cancer, glaucoma, multiple sclerosis and arthritis for which cannabis provides relief. Alcalay Decl. ¶¶ 21-23; McClelland Decl. ¶¶ 13-16; Galli Decl. ¶¶ 10-13. For the specific patient-members alleged to have received cannabis on May 21, 1998, the inability to use medical cannabis threatens their very lives. For example, Kenneth Estes has stated that "[c]annabis saved my life." K. Estes Decl. ¶ 10. Without cannabis, Yvonne Westbrook would be forced to endure severe pain and debilitating spasticity. Westbrook Decl. ¶¶ 3-5. Michael Alcalay would be unable to tolerate the AIDS wasting syndrome,

nausea and vomiting associated with his disease. Alcalay Decl. ¶¶ 4-5. These patients' conditions are chronic, severe and long lasting.

Third, there is a direct causal relationship between defendants' supplying medical cannabis and these harms they seek to avert. Defendants' declarations submitted herewith show that medical cannabis in fact alleviates the often life-threatening symptoms of OCBC's patient-members. *See, e.g.*, K. Estes Decl. ¶¶ 5, 8; Alcalay Decl. ¶ 6; Westbrook Decl. ¶¶ 3-8; Declaration of Robert T. Bonardi ("Bonardi Decl.") ¶¶ 6-13; *see also* Grinspoon Decl. ¶¶ 16, 18-27; Morgan Decl. ¶¶ 3, 4.

Fourth, Defendants' evidence proves that there are no legal alternatives to the distribution of medical cannabis. Specifically, defendants' evidence establishes that their members have no legal or safe alternative to acquire medical cannabis from other sources. If they did not go to the Cooperative, these patients would be forced to go to the streets in search of illegal drugs or to forego their medicine. *See* McClelland Decl. ¶ 17; Galli Decl. ¶¶ 18-20; Westbrook Decl. ¶ 11; Morgan Decl. ¶ 10. Moreover, the evidence establishes that for these patients, other medications do not work, they are not nearly as effective, or they result in serious adverse side effects. Westbrook Decl. ¶¶ 4-7; K. Estes Decl. ¶¶ 11-16; Alcalay Decl. ¶¶ 7, 8, 20-22; Carter Decl. ¶¶ 2-7 (Defendants' Request For Judicial Notice, Exh. O); Bonardi Decl. ¶¶ 8, 13; Declaration of Harold Sweet ¶ 8. For example, many physicians and patients find that smoked cannabis is more effective than Marinol. Grinspoon Decl. ¶¶ 20, 25, 28, Morgan Decl. ¶¶ 5-9.

Defendants have submitted numerous articles, some from peer-reviewed journals, concerning the medical effectiveness of cannabis for the illnesses from which OCBC's patient-members suffer. For instance, many researchers conclude that inhaling marijuana is very useful in "controlling nausea and vomiting resulting from chemotherapy." Vincieguerra, Vincent, "Inhalation Marijuana as an Antiemetic for Cancer Chemotherapy," *New York State Journal of Medicine*, pp. 525-527 (1988) (Grinspoon Decl., Exh. B). In fact, *forty-four* percent of oncologists taking part in one survey stated they had recommended marijuana to at least one patient. Doblin, Richard E. and Kleiman, Mark A.R., "Marijuana as Antiemetic Medicine: A Survey of Oncologists' Experiences and Attitudes," *Journal of Clinical Oncology*, Vol. 9(7), pp. 1314-1319 (1991) (Grinspoon Decl., Exh. D). Scientific studies also lend support to OCBC patients' and their doctors' claims that

medical cannabis helps them regain their appetite and to recover lost weight. *See, e.g.*, Greenberg, Isaac, *et al.*, "Effects of Marijuana Use on Body Weight and Caloric Intake in Humans," *Psychopharmacology*, vol. 49, pp. 79-84 (1976) (Grinspoon Decl., Exh. J). A summary of the key conclusions reached in these articles is set forth as Exhibit A hereto.

Finally, the pending rescheduling petition does not answer the immediate and compelling needs of these patients. Although a rescheduling petition already has been submitted to the relevant administrative agency, the Court has recognized the futility of awaiting a decision on that petition. Mem. Op. & Order at 20.

B. Defendants Are Not In Contempt Because Application Of The Controlled Substances Act Would Violate Their Patient-Members' Substantive Due Process Rights.

Defendants' evidence also establishes that the prohibition against distribution to OCBC's patient-members violates the substantive due process rights of these individuals. The United States Supreme Court has established that individuals are protected under the Due Process clauses of the Fourteenth and Fifth Amendments from state or federal infringement upon their "fundamental liberty interests." As Justice Rehnquist recently described in *Washington v. Glucksberg*, ___ U.S. ___, 117 S. Ct. 2258 (1997):

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint . . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.

Glucksberg at 2267 (citations omitted). In applying substantive due process analysis, the Chief Justice in *Glucksberg* explained that where a fundamental liberty interest is involved, government action must be "narrowly tailored to serve a compelling [government] interest." *Id.* at 2268.

A due process analysis begins with an examination of our "Nation's history, legal traditions and practices." *Id.* at 2262. Unquestionably, individuals have a liberty interest in being free from pain, and a well-established right to preserve their lives. *Id.* at 2288, 2303. Unlike the issue of suicide in *Glucksberg* it cannot be said that the use of cannabis as a medicine is anomalous or that, historically, its use has been forbidden in society. Cannabis was accepted as a medicine in ancient times. Grinspoon Decl. ¶ 9. Between 1840 and 1900, more than one hundred papers on the

therapeutic uses of cannabis were published in American and European medical journals. *Id.* ¶ 10. It was recommended as an appetite stimulant, muscle relaxant, analgesic, sedative and anticonvulsant (*Id.* ¶ 10) some of the same uses it has today. *Id.* ¶¶ 18, 22, 23. In 1930, only sixteen states had laws prohibiting the use of cannabis. *Id.* ¶ 12. It was not until the enactment of the Marijuana Tax Act in 1937 that cannabis truly fell into disuse as a medicine. The federal criminalization of cannabis in 1970 further limited scientific investigation of the medicinal properties of cannabis. *Id.* ¶ 14.

Moreover, unlike other substances, cannabis has proven to be safe and effective in treating these patients' conditions. *See* Grinspoon Decl.¶¶ 8, 16, 18-28. Thus the government has no compelling interest in seeking to prevent these patients from receiving medical cannabis pursuant to their doctors' recommendation.

The government's application of the Controlled Substances Act to the distribution of medical cannabis violates the substantive due process rights of the specific patient-members alleged to have received medical cannabis on May 21, 1998. All of the patients have medical conditions which require the use of cannabis. *See* Westbrook Decl. ¶¶ 3-8; Alcalay Decl. ¶¶ 5-8; K. Estes Decl. ¶¶ 3-5; Carter Decl. ¶¶ 2-7 (Defendants' Request For Judicial Notice, Exh. O). Their physicians have recommended that they use cannabis. Alcalay Decl. ¶ 24. The only barrier to this safe and effective treatment is the broad federal proscription against the distribution of it even for proven medical need. The government has not offered, nor can it offer, any legitimate justification for withholding life-preserving medicine from those who truly need it.

C. Defendants Are Not In Contempt Because Their Patient-Members Are Joint Users Of Medical Cannabis.

Defendants also have submitted evidence, that as to the transactions alleged, the patient-members are joint users within the meaning of *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977). There the Court 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. The *Swiderski* court applied the defense to the simultaneous purchase and immediate consumption by a husband and wife.

Swiderski's 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 clearly has been based on concerns about its possible use as a "cover" for illicit drugs. Those concerns are not present in this context, however. Just as in *Swiderski*, no one other than the copurchasers is involved in the use of the medical cannabis. The members are not drawn into drug use through the defendants; rather, they seek the cannabis to alleviate their serious medical conditions, and receive a doctor's approval to do so. *See, e.g.*, Bonardi Decl. ¶ 9. These individuals are not using cannabis for recreational purposes. *See, e.g.*, Westbrook Decl. ¶ 10; Bonardi Decl. ¶ 9. They are merely attempting to alleviate their painful ailments. No "distribution" takes place because the Cooperative and its patient-members jointly acquire the cannabis for medical purposes to be shared among themselves and not with anyone else. Alcalay Decl. ¶ 30; McClelland Decl. ¶ 18.

The Oakland defendants have established that when the use of medical cannabis is shared by members of the Oakland Cannabis Buyers' Cooperative, the participants agree to the following statement of conditions:

> The Oakland Cannabis Buyers' Cooperative would like to assure all Members that the Cooperative will continue to operate in the good faith belief that it is not engaging in the distribution of cannabis in violation of law. Federal law excludes from the definition of "distribution" the joint purchase and sharing of controlled substances by users. As a Member of the Oakland Cannabis Buyers' Cooperative, you are a joint participant in a cooperative effort to obtain and share medical cannabis. Each transaction in which you participate is not a "sale" or "distribution," but a sharing of jointly obtained medical cannabis. If you make a payment to the Cooperative, such payment is a reimbursement for administrative expenses and operations, which all Members who utilize the services of the Cooperative agree to share.

Oakland Cannabis Buyers' Cooperative Statement of Conditions. *See* McClelland Decl. ¶¶ 18-19, Exh. 4.

The Oakland defendants have established that the sharing of jointly purchased medical cannabis is conducted in complete conformity with state law requiring medical approval, and with local regulations that govern the use of medical cannabis. Alcalay Decl. ¶¶ 23-25, 32, Exh. 5. Immediate consumption in each other's presence at times is precluded by a prohibition against smoking on the premises of the cannabis dispensary. *Id.* ¶ 31.

The Oakland defendants have demonstrated that no third persons are involved other than "primary caregivers," and that no one else is brought into a "web" of drug use. Alcalay Decl. ¶ 30. The evidence establishes that the joint users are bound together by a shared commitment to the alleviation of each other's pain and compassion for each other's suffering. McClelland Decl. ¶ 18, 30, Exh. 4.

Thus, all of the circumstances that led the *Swiderski* court to recognize the joint user defense can be established by the evidence, and all elements of the defense can be proven to a jury's satisfaction. The jury should be instructed that the Order does *not* preclude mere possession of medical cannabis, even if unlawful, and that the joint use of medical cannabis under the heavily regulated and controlled circumstances of this case is simple possession of the substance, not distribution.

II. DEFENDANTS ARE ENTITLED TO A JURY TRIAL

Defendants' evidence establishes triable issues of fact concerning whether they are in violation of this Court's Order. There are factual issues that can be properly resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). As the Ninth Circuit declared in *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984), "[f]actfinding is usually a function of the jury, and the trial court rarely rules on a defense as a matter of law." Only if the evidence is insufficient as a matter of law to support a defense should a court exclude that evidence. *Id.*

Unlike the defendants in *United States v. Aguilar*, 883 F. 2d 662 (9th Cir. 1989), defendants in this case have presented credible evidence which supports each element of their defenses. Accordingly, defendants are entitled to present their evidence to a jury. *See United States v. Contento-Pachon*, 723 F.2d at 695 (where defendant presented credible evidence to support duress defense, "trier of fact should have been allowed to consider the credibility of the proffered evidence..."). Because a reasonable jury could rule in defendants' favor on the basis of the proffered evidence, it would be inappropriate to preclude any of defendants' defenses prior to a plenary trial.

CONCLUSION

Defendants are in good faith and substantial compliance with the Court's Order. Moreover, based on the detailed evidence submitted by defendants, defendants are entitled to a jury's determination of the specific facts and circumstances concerning their alleged contempt, and of the applicability of their defenses to those charges.

Dated: September 14, 1998

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA V. CANNABIS CULTIVATOR'S CLUB, ET AL.
NO. C 98-0088 CRB

ATTACHMENT A TO DEFENDANTS' RESPONSE TO SHOW CAUSE ORDER

MEDICAL STUDIES FINDING EFFECTIVENESS OF CANNABIS

PUBLICATION AUTHOR AND TITLE	KEY CONCLUSION(S)
Vinciguerra, Vincent, MD, et al., "Inhalation Marijuana as an Antiemetic for Cancer Chemotherapy," *New York State Journal of Medicine*, October 1988	"...inhalation marijuana is active in controlling nausea and vomiting resulting from chemotherapy."
Sallan, Stephen E., Zinberg, Norman E., and Frei, Emil, "Antiemetic Effect of Delta-9-Tetrahydrocannabinol in Patients Receiving Cancer Chemotherapy," *The New England Journal of Medicine*, 1975	"...THC [an active ingredient in cannabis] is an effective antiemetic for patients receiving cancer chemotherapy."
Doblin, Richard E. and Kleiman, Mark A. R., "Marijuana as Antiemetic Medicine: A Survey of Oncologists' Experiences and Attitudes," *Journal of Clinical Oncology*, 1991	"...44% [of oncologists surveyed] said they had recommended marijuana to at least one patient." "...54%...of the respondents reported that available antiemetics caused significant problems with side effects in more than a 'few' of their patients."

Consroe, Paul, PhD, Wood, George C., PhD, and Buchsbaum, Harvey, MD, "Anticonvulsant Nature of Marihuana Smoking," *Journal of the American Medical Association*, 1975	"Marihuana smoking, in conjunction with therapeutic doses of pheno-barbital and diphenylhydantoin, was apparently *necessary* for controlling seizures in one 24-year-old epileptic patient."
Cunha, Jomar M., et al., "Chronic Administration of Cannabidiol to Healthy Volunteers and Epileptic Patients," *Pharmacology*, 1980	"In conclusion, we have found that [cannabidiol, an active ingredient in cannabis] had a beneficial effect in patients suffering from secondary generalized epilepsy with temporal foci, who did not benefit from know[n] anti-epileptic drugs."
Petro, Denis J., MD, and Ellenberger, Jr., Carl, MD, "Treatment of Human Spasticity With Delta-9-Tetrahydrocannabinol," *The Journal of Clinical Pharmacology*, 1981	"Several patients with multiple sclerosis reported to us that their spasticity improved after smoking marihuana. Preliminary uncontrolled observations of these patients before and after inhalation of the drug suggested to us that the improvement in spasticity was a specific effect of the marihuana..."
Perneger, Thomas V., "Risk of Kidney Failure Associated With the Use of Acetaminophen, Aspirin, and Nonsteroidal Antiinflammatory Drugs," *The New England Journal of* Medicine, 1994	"People who take analgesic drugs [an alternative to cannabis for pain relief] frequently may be at increased risk of end-stage renal disease..."
Noyes, Jr., Russell, "Analgesic Effect of Delta-9-Tetrahydrocannabinol," *The Journal of Clinical Pharmacology*, 1975	"A preliminary trial of oral delta-9-tetrahydrocannabinol (THC) [an active ingredient in cannabis] demonstrated an analgesic effect of the drug in patients experiencing cancer pain."
Greenberg, Issac, et al., "Effects of Marihuana Use on Body Weight and Caloric Intake in Humans," *Psychopharmacology*, 1976	"Heavy marihuana users showed a significant increase in caloric intake and body weight following initiation of drug use." "The casual user group also demonstrated increases in both body weight and caloric intake." "Control subjects sustained monotonic increases in both body weight and caloric intake during the 30-day study."

PROOF OF SERVICE BY OVERNIGHT DELIVERY
(N.D. Local Rule 5-3)

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:

DEFENDANTS' RESPONSE TO SHOW CAUSE ORDER IN CASE NO. C 98-0088 CRB

DECLARATIONS IN SUPPORT OF DEFENDANTS' RESPONSE TO SHOW CAUSE ORDER

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

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:

Opposing Counsel:

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

Intevenor-Patients Thomas V. Loran III, Esq. Pillsbury Madison & Sutro LLP 235 Montgomery Street San Francisco, CA 94104	Cannabis Cultivator's Club, et al. J. Tony Serra/Brendan R. Cummings Serra, Lichter, Daar, Bustamante, Michael & Wilson Pier 5 North, The Embarcadero San Francisco, CA 94111
Marin Alliance for Medical Marijuana, et al. William G. Panzer 370 Grand Avenue, Suite 3 Oakland, CA 94610	Flower Therapy Medical Marijuana Club, et al. Helen Shapiro Carl Shapiro 404 San Anselmo Avenue San Anselmo, CA 94960

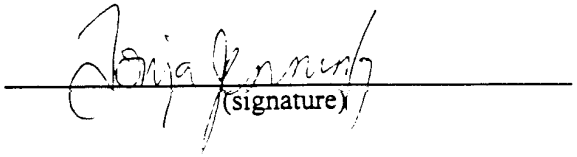
ER1165

Ukiah Cannabis Buyer's Club, et al.	Oakland Cannabis Buyers Cooperative, et al.
Susan B. Jordan 515 South School Street Ukiah, CA 95482 David Nelson 106 North School Street Ukiah, CA 95482	Gerald F. Uelmen Santa Clara University School of Law Santa Clara, CA 95053 Robert A. Raich A Professional Law Corporation 1970 Broadway, Suite 1200 Oakland, CA 94612

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 14th day of September, 1998.

Tonja Jennings
(typed)


(signature)

PROOF OF SERVICE BY FACSIMILE TRANSMISSION
(N.D. Local Rule 5-3)

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 that the document described below was transmitted by facsimile transmission to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number as last given by that person on any document which he or she has filed in the cause.

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

DEFENDANTS' RESPONSE TO SHOW CAUSE ORDER IN CASE NO. C 98-0088 CRB

DECLARATIONS IN SUPPORT OF DEFENDANTS' RESPONSE TO SHOW CAUSE ORDER

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

on the following by sending a true copy from Morrison & Foerster's facsimile transmission telephone number (415) 268-7520 and that the transmission was reported as complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting facsimile machine.

Opposing Counsel:

Mark T. Quinlivan
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901 E Street, N.W., Room 1048
Washington, D.C. 20530
(202) 616-8470

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 14th day of September, 1998.

Tonja Jennings
(typed)

(signature)

ER1167