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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Defendants-Appellees.

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

SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME III

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SUPPLEMENTAL EXCERPTS OF RECORD

VOLUME I

SUPPLEMENTAL EXCERPTS OF RECORD

VOLUME II

SUPPLEMENTAL EXCERPTS OF RECORD

VOLUME III

COPY

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OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE, AND JEFFREY JONES

Defendants.

AND RELATED ACTIONS.

No. C 98-0088 CRB

DECLARATIONS IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION ORDER

VOLUME III

(Fed. R. Civ. P. 60(b), Local Rule 7-11)

Date: July 7, 2000
Time: 10:00 a.m.
Hon. Charles R. Breyer

PREVIOUSLY SUBMITTED IN SUPPORT OF DEFENDANTS' MOTION TO MODIFY PRELIMINARY INJUNCTION ORDER

LIST OF DECLARATIONS

1

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Michael Alcalay. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

it provides me and my fellow coop members with a high-grade, fungal-free product at a reasonable price bought in a very safe environment. ~~knowledgeable~~ ~~that~~

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: Stopping medical cannabis would threaten my health and my life because it would threaten my intake of new, life-saving AIDS medications I am taking and stop their efficacy in keeping me alive. I am presently on several new research medications for treatment of my AIDS diagnosis. These drugs are very powerful and have many interactions that produce in me many side-effects, including nausea, queasiness and an upset stomach — but they are working to keep my HIV level and T-cell count very stable. Although I have tried many anti-nausea medications, including Marinol, only by using medical cannabis have I been able to stay on the strict regimen that these new AIDS drugs require and must be continued indefinitely. Only medical cannabis, taken as 1 to 2 puffs right after taking my AIDS medications, has allowed me to avoid the serious side-effects of my AIDS medications and therefore keep me alive.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Michael Alcalay
Signature

Michael Alcalay
Print Name

Declared and signed in Oakland, California this 16th day of October, 1998.

City of Oakland)
County of Alameda)

10-15-98

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Bruce Armstrong. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

It allows me safe access

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: Because of my condition I suffers from nausea, extreem loss of appetite which would result in quick weight loss. Also I suffer from abdominal cramping, & joint pain & dehidration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

Bruce Anthony
Print Name

Declared and signed in Oakland, California this 15 day of OCT, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is [illegible]. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

I AM A T-7 PARAPLEGIC. I USE MARIJUANA FOR PAIN & MUSCLE SPASMS

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I WOULD SUFFER EXTREME PAIN & SUFFERING WITHOUT MEDICAL MARIJUANA. I WOULD HAVE TO GO BACK TO TAKING VALIUM & PERKESETT TO DO THE SAME THING THE MEDICAL DOCTOR MARIJUANA MAKES ME ABLE TO COPE WITH LIFE IN A MORE ACTIVE & NORMAL LIFESTYLE.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

MARIE J. BRUSTKERI
Print Name

Declared and signed in Oakland, California this 15 day of OCT, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB DECLARATION

TO THIS HONORABLE COURT:

1. My name is Willie C. Beal. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

Its helps me to eat. I need to eat so that I can gain Weight. If I don't eat I die! Food makes me want to throw-up Thats what Cancer does to you. And the Pain You are in, Unbearable pain It really helps! The Club has kept me alive from day to day.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I would die, I would simply die. You lose weight fast with Cancer. You can't eat, everything makes you sick, I'm allergic to everything so I have to have something, everyday. I'm too old and in too much pain to try to go on the street. I live in Oakland and it is hard, very hard. I'm trying to live from day to day, this is helping me to make it. Please don't take this away. It would kill me, my birthday is October 31 I will be 71 years old If I live to make it Please don't murder innocent victims of the Club! Have some compassion! You may be in my shoes one day. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Willie Beal
Signature

Willie C. Beal
Print Name

Declared and signed in Oakland, California this 15th day of October, 1998. This order is signing my death warrant as if I was a person on death row in pris who is innocent.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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; and DENNIS 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 **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is ALICE BIRMINGHAM. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

October 10, 1998
by Alice Birmingham

How do you possibly begin to tell our government all the daily hell one with Eosinophilia Myalgia-Syndrome (EMS) experiences? Most have never seen a case of EMS and some have never even read about it.

When the EMS epidemic broke in late 1988, I was an active, healthy, 38 year old, business owner. I took the, touted as natural, L-tryptophan as a healthy and moral alternative to drugs or alcohol. It was the "in" supplement for stress reduction and sleep...and it did work. Unfortunately, I was one of the unlucky ones to receive a contaminated batch which contained 60 different bio-chemically engineered bacteria. The acute stage of this poisoning was no different than the other 1500+ cases reported to the CDC in 1988-1989.

I guess what really bothers me about EMS is not knowing what each day will bring...not knowing what my turned-on immune system is going to do next. Will it be the colitis that can leave me so weak from blood loss that I need help getting to and from the bathroom, will the shingles be a problem, will the muscle spasms in my throat cause me to choke, or will the already debilitating fatigue be so intense that I can't get out of bed? Will the nerve pain in my feet or legs feel like the nerves are being torn apart? Maybe it will it be the burning and itching on my forearms. The feeling of having a bad case of the flu is constant and my day consists of having most of these other symptoms along with severe neuritis, muscle spasms, and fibromyalgia. Although most of the sensation is gone on my feet, I still have pain. Medical marijuana is the only drug that gives me relief from these symptoms. Before my doctor recommended this treatment, I was on large dosages of pain medication and other powerful, dangerous drugs. I have been able to get off those drugs because of the efficacy of marijuana. I now am able to walk with the assistance of a cane. I am able to dress myself and make love to my husband. The Oakland Cannabis Buyers Club has been a lifesaver for me. I have been given back some quality of life. Please don't take this away from me and from all the others that suffer daily with acute illnesses. It may be hard to understand if you have never suffered as we are suffering. By allowing the OCBC to stay open you are giving me the power to take responsibility for my wellness.

Very Sincerely,

Alice Birmingham

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Alice Birmingham
Signature

ALICE BIRMINGHAM
Print Name

Declared and signed in Oakland, California this 10TH day of OCTOBER, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFERY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	Nos. C 98-00085 CRB
	C 98-00086 CRB
Plaintiff,	C 98-00087 CRB
	C 98-00088 CRB
v.	C 98-00089 CRB
	C 98-00245 CRB
CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON,	
Defendants.	**DECLARATION**
AND RELATED ACTIONS.	

TO THIS HONORABLE COURT:

1. My name is Larry Campos. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative is my sole source of cannabis, one of the drugs that my doctor recommends to me. The location of the Oakland Cannabis Buyers Cooperative, along with the quality and availability of its product and its professional management make my procurement of cannabis a safe, reliable and pleasant experience. Without a source for cannabis such as the Oakland Cannabis Buyers' Cooperative, I would be forced to

seek other methods of procurement, such as illegal street dealers, use of which carries the risk of theft, inferior or fake product, unreliable access, and physical injury.

3. The cannabis supplied to me by the Oakland Cannabis Buyers' Cooperative relieves serious, life-threatening physical side-effects from other drugs that I must take. Without cannabis, my life is in direct danger due to these side effects.

4. The cannabis supplied to me by the Oakland Cannabis Buyers' Cooperative relieves serious, life-threatening mental difficulties that I experience as a result of my medical condition. Without cannabis, my life is in direct danger due to these mental difficulties.

5. By relieving both physical and mental difficulties that I would otherwise regularly experience, the cannabis supplied to me by the Oakland Cannabis Buyers' Cooperative allows me to live a relatively "normal" life, including maintaining a management position in a large corporation and raising my 7 1/2 year old daughter. Without the regular supply of cannabis made available by the Oakland Cannabis Buyers' Cooperative, I most likely would be required to enter long-term disability at work and my daughter would suffer greatly as my involvement with her schooling and extra-curricular activities dwindles due to worsening physical and mental conditions that I would experience.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

Larry Campos

Print Name

Declared and signed in Oakland, California this 28th day of May, 1998.

PILLSBURY MADISON & SUTRO LLP
THOMAS V. LORAN III #95255
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Attorneys for Defendants and Counterclaimants-in-Intervention Edward Neil Brundridge, Ima Carter, Rebecca Nikkel and Lucia L. 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	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB DECLARATION OF IMA CARTER IN SUPPORT OF REQUEST FOR STAY OF MODIFICATION TO PRELIMINARY INJUNCTION

I, IMA CARTER, declare as follows:

1. I am a member of the Oakland Cannabis Buyers' Cooperative in Oakland, California (the "Oakland Coop"). I am submitting this declaration in support of the request of the Oakland Coop to stay modification of the preliminary injunction. 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 56 years old. I suffer from several different conditions and injuries which cause me significant and constant pain. I use cannabis for several of these conditions: congenital scoliosis, fibromyalgia and cervical nerve damage that I suffered as a result of being involved in several car accidents in which I was rear-ended. These conditions, which include cervical nerve damage in C4 through C7 of my spine, cause me enormous pain in my back. This pain is marked by frequent muscle spasms and a recurring shooting pain in my head. Cannabis is the only drug in my experience that has effectively treated this pain.

3. I have tried numerous traditional medicines for these conditions, none of which was effective. For example, I took steroids and anti-inflammatory drugs. These drugs have caused me to bleed internally.

4. I have also tried rhizotomy, which is a laser treatment. During this treatment, a laser beam was burned into the cervical nerves to create scar tissue. The treatment required that I be awake during it and it was excruciatingly painful. It is my understanding that physicians have now discontinued prescribing rhizotomy treatments because they are unbearably painful and useless. The rhizotomy treatments did not relieve my back pain. This pain feels like a hot burning pain going down my left arm into my hand.

5. In addition, I underwent breast reduction surgery to relieve the scoliosis pain in my back. I also tried many different forms of physical therapy, including various exercises, ultrasound, ice packs, jacuzzi treatments and others. None of these even touched the recurring shooting pain I experience in my head.

6. I also have a therapeutic electrical neuro-stimulator (a "TENS") unit that controls some of my pain from the cervical nerve damage and scoliosis. However, the TENS unit does not stop or dull in any way the shooting pain that occurs in my head at frequent intervals. I am presently taking morphine as prescribed by my doctor, but it--like the TENS unit--does not stop or dull in any way the frequent pain in my head.

7. Cannabis is the only drug that I have used that has dulled or stopped the pain. I was once forced to go without cannabis. During this period of time, the pain was completely disabling and prevented me from being able to function. During this time, I could not leave my bedroom due to the pain that recurred every few minutes, and therefore I could not do any of my regular daily activities, such as answering the phone, doing the dishes, running errands, watching television, reading and taking care of my finances.

8. I use cannabis on the written recommendation of my doctor.

9. If the Oakland Coop is closed, I have no other way to obtain cannabis, either legally or illegally. Cannabis is the only effective treatment available to alleviate my pain and frequent muscle spasms associated with congenital scoliosis, fibromyalgia and nerve damage.

10. As described above, I have previously gone without using cannabis. If I am not able to obtain cannabis, I will again experience pain that is so debilitating that I will have to return to my room and be unable to leave. Without cannabis, I experience intense intervals of pain in my head that occur every few minutes. This pain makes it impossible for me to spend any time with anyone, including my husband. I cannot stand the thought of having to endure this pain again. Just knowing that the Oakland Coop may be shut down has caused me incredible fear and anxiety because I do now know how I will endure the pain I know will occur when I have no cannabis to use. If there were anything in the world I could do to relieve this pain other than using cannabis, I would do it. I have tried every other possible way to relieve my pain that I know of, and there is no alternative for me but to use cannabis. There is no drug other than cannabis that alleviates these shooting pains. I have tried many traditional drugs, including morphine, steroids, rhizotomy treatments and breast reduction surgery, none of which has alleviated the shooting pains.

11. If the Oakland Coop is shut down, I will not be able to obtain cannabis and I will suffer immediate and imminent harm. For the reasons described above, using cannabis is a medical necessity for me.

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

Executed this 15th day of October 1998 at Richmond, California.

Ima Carter

Ima Carter

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

PROOF OF SERVICE BY MAIL

I, Elaine M. Simmons, hereby declare:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Madison & Sutro LLP in San Francisco, California.

2. My business address is 235 Montgomery Street, San Francisco, California. My mailing address is P.O. Box 7880, San Francisco, California 94120-7880.

3. On October 16, 1998, I served a true copy of the document titled exactly **DECLARATION OF IMA CARTER IN SUPPORT OF REQUEST FOR STAY OF MODIFICATION TO PRELIMINARY INJUNCTION** by placing the document in a sealed envelope and depositing it in the United States mail, first class postage fully prepaid, addressed to the following:

[See Attached Service List]

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

Executed this 16th day of October, 1998, at San Francisco, California.

Elaine M. Simmons

Service List

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United States of America

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Cipriana Chatman-Bellon. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

I am diagnosed with hiv. I currently take 96 pills daily. I am nauseated from the time I awake. Marijuana helps that nausea. I also have a degenerative disease in my spine. This past

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I Can't eAT And I'd loose WEIGHT that I don't need LIVING With PAIN IS JUST AWFUL. This effects MY QUALITY OF LIFE. I CAN't PEOPLE ROUND. I'M On So MANY MEDS SOMETHING ~~PAIN~~ CANABIS BRINGS ME GREAT RELIEF ~~PAIN~~ FOR MY BODY. I don't Know of Anything that CAN Replace What it does for Me. I Believe this is one of the REASONS I AM a long time SURVIVOR DIAGNSIS WITH AIDS SINCE 1993.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Cynara Chatman Dillon
Signature

Cynara Chatman Dillon
Print Name

Declared and signed in Oakland, California this 6th day of 98, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Pat Crossman. I am over ~~18~~ 68 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

Arthritis of the hands & knees.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I would be in pain.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Pat Crossman
Signature

PAT CROSSMAN
Print Name

Declared and signed in Oakland, California this 15 day of Oct, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Bruce E. Gordon I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

Provides a legal, safe, & economical environment in which to obtain cannabis to increase my appetite, which has decreased severely since the onset of Hepatitis "C" which I contracted approximately 5 yrs. ago.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I would be subject to arrest, if I tried to buy cannabis from "street" dealers, would have to pay exorbitant rates, + would suffer greater weight loss, + loss of health.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Bruce E. Gordon
Signature

Bruce E. Gordon
Print Name

Declared and signed in Oakland, California this 15th day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is GARY GRANATA. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

You name it! It relieves my pain spasticity. In general, it helps me to cope with my multiple sclerosis. It helps be able to eat. This (cannabis) is the only medicine I want to use for my multiple Sclerosis.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I couldn't even cope with life. My eating and sleeping would be adversely affected. My posture would absolutely worsen. I can only walk on crutches.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

Gary GARY GRANATA
Print Name

Declared and signed in Oakland, California this 15 day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is BETTYE JONES. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

IT helps ME TO EAT. I only have lots of Anxiety due TO AIDS INFECTIONS.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I only weigh 99 pounds DUE TO WASTING SYNDROME. The last closer of Club I MSF I lost 12 pounds. I CANNOT LIVE WITHOUT it.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Bettye Jones
Signature

BETTYE JONES
Print Name

Declared and signed in Oakland, California this 15TH day of OCTober, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Patty Jones. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

~~But~~ By finding another way to help with my pain. The club is in a good location to ~~get~~ get by bus. I don't have to worry about getting robbed trying to ~~get~~ get medicine

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I'm HIV positive, have diabetes and high blood pressure. If this club wasn't here, I would lose weight because I couldn't hold my food down. My eye sight is so bad that I couldn't find my way down the stairs and I could trip and fall down the stair. My life would also be danger trying to buy my stuff off the street. My blood pressure would go too high and I would be subject to a heart attack because of the stress that I would be under not having this to get meds & I would be subject to get a stroke.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Patty Jones
Signature

PATTY JONES
Print Name

Declared and signed in Oakland, California this 15th day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Christopher Pendred Stafford. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

they supply medical Cannabis at a reasonable price. I am a person with Aids and Cannabis helps me take several kinds of medication.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I will have extreams difficulty ingesting my medication. I take 4 pounds of H.I.V medication (per month) and it is next to impossible to digest them without medical cannabis. I do not want to resort to underground street dealers for my medicine. Cannabis makes it possible to ingest my medication & will vomit them up if I dont have safe access to medical Cannabis.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

Christopher Frederick Stafford
Print Name

Declared and signed in Oakland, California this 15th day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Russell Kline. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

Controls severe pain, mostly allows me to become ambulatory and not stay in bed all day. Also helps with my ability to work, resulting in my eventual release off of Social Security Disability.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: My ability to work and move would be limited, resulting in a loss of productivity and work. My pain relief would have to come from resorting to [illegible] which could cause severe [illegible] addiction. I would be forced to buy my medication on the street, resulting in possible dangerous scenarios.

Thank You for your consideration

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

Russell Kline
Print Name

Declared and signed in Oakland, California this 15 day of Oct., 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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; and DENNIS 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 **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is DON KONECNY. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

IT PROVIDES A SAFE AND REUABLE WAY TO GET MY MEDICINE WHICH I HAVE TO HAVE. BEFORE I HAD TO PURCHASE IN THE STREET WHICH WAS ALWAYS SCARY AND I NEVER KNEW WHAT I WAS GETTING. I WAS UNABLE TO HOLD A REGULAR JOB FOR 3 YEARS UNTIL I BEGAN USING CANNABIS FOR MY ILLNESS.

IF THE OCBC closes I WILL BE UNABLE TO KEEP A SOB DUE TO MY ILLNESS BECAUSE THE PAIN AND MUSCLE SPASMS WILL BE TOO SEVERE FOR ME TO WORK.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Don Koneeny
Signature

DON R KONECNY
Print Name

Declared and signed in Oakland, California this 15 day of OCTOBER, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is IZEAH LARRY JR. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

find another way for to help with pain. They also are in a convenient place that easy to get to on Public Transportation.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I have cancer and I'm H.I.V. positive. If this club weren't there I would be control by a mind altering drug that keeps me up and not aware of my surroundings. I would have to put life in danger trying to cope illegal. marijuana?

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

EARL LARRY JR?
Print Name

Declared and signed in Oakland, California this 15 day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is DIANALYNN PENNIS. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

Relaxes my spasicity allowing me to walk without out falling
Providing access to the medicine

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I would not be able to walk easily And I would be very prone to falling and hurting myself.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

DIANA LYNN FRANN
Print Name

Declared and signed in Oakland, California this 15 day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Pamela Powers. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

It helps my insomnia, It helps my Anxiety and Panic attacks that are brought on by my condition. It takes away all my Back pain from a seanous car accident It helps my Asthma, by clearing my lungs.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I would not be able to get any sleep - I will have severe Panic attacks, constant vomiting, Anxiety, Suicidal tendancys depression, not to mention Loss of my Job. I will not be able to pay my rent or bills which would add more stress and add to my depression & other dissorders

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Pamela Powers
Signature

Pamela Powers
Print Name

Declared and signed in Oakland, California this 15 day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Victor PUEBLA. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

Has provided Emotional Support For me by means of A HIV support group - providing Safe Access to Cannabis - And provided a safe place to openly discuss my illness, to others.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: My day starts with Nauscau - Vomiting. I wrench so hard my eyes water and I become short of Breath. My condition is in a wasting state, My appetite will be lost, Cannabis makes me Hungry - I use to be 170 lbs today I am 146 lbs, and gaining weight. My Lowest was 139.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Victor Puebla
Signature

Victor PUEBLA
Print Name

Declared and signed in Oakland, California this 15 day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Steven Rosenmiller. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

Being able to purchase cannabis here is doing me a better good than the drugs that have been prescribed to me by my Doctor. I have pain in my joints, legs and Arms Nausia from the medications I take which the cannabis helps Reduce. If they were not here I would be on other drugs which make me physicaly sicker and more drugged and unable to function.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: pain would return to my body - I would Return to Sleepless nights, Nausia from taking my meds for Aids, Helps my Appitite when I do not eat for several day's.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

Steven E. Rosenmiller
Print Name

Declared and signed in Oakland, California this 15th day of October 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Miles C. Saunders. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

Purchasing pot without hassels for example getting robbed - ripped off - trying to find it. Marijuana is a necessity in my well being, relieving stress, nausea, increase of appetite. I have been living with Aids since 1986 & Living with KS Cancer since 1997 and I believe that with marijuana I will live longer. Please allow me to receive pot personally I feel I need it to be able to eat.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: possible to be robbed or harmed locating it illegally. Ripped off & loss of money when ripped off. I would not eat and go into the "Wasting syndrom" without it. I feel that I would die if not allowed to use Marijuana. Please don't bring the difficulty of obtaining my prescription of Cannabis back into my life. It has been very wonderful to buy Cannabis at the Oakland Cannabis Buyers' Cooperative without hassel or harm I hope you keep it that way for myself & others who feel that Cannabis Relieves many of my health problems & theirs.

Very Sincerely Thank You very much.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Miles C. Saunders

Signature

Miles Clark Saunders

Print Name

Declared and signed in Oakland, California this 15th day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Paul J. Scott. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

I have been diagnosed with Glaucoma for the past 7 years. As a direct result of medical cannabis I have been able to keep the ocular pressure intact and without expensive and toxic eye drops. Should I now be denied the effects would cause a loss of eye sight

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I would lose my eyesight! Increased pressure will cause damage to my ocular nerves The O.C.B.C. is my only source of medical and lawful Cannabis. Please be understanding and compassionate!

Thank You

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

Paul Scott
Print Name

Declared and signed in Oakland, California this 15 day of October 1998, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is JEFFERY S. SHEPHERD. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

BE ABLE TO EAT, AS MEDICATIONS AFFECT MY APPETITE.
HELPS CONTROL NAUSEA FROM MEDS
HELPS WITH PAIN OF NEUROPATHY

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I WOULD BE NAUSEOS, CONSTANTLY. I WOULD BE IN PAIN, AND IT WOULD AFFECT MY MEDICINE REGIME AS I HAVE TO EAT ALONG WITH MY MEDS.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

JEFFERY S. SHEPHERD
Print Name

Declared and signed in Oakland, California this 15 day of OCTOBER, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Stacie Traylor. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: I would loose alot of weight. I would not be able to eat or hold down my food. I dont absorb nutritin; any food I can eat and hold down helps. I would be in an incredible amount of pain. Doubled over with pain and throwing up explains my life without cannabis. Without Cannabis I would become malnurished and eventually die, and there is proof of that in my medical records.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

Stacie Taylor
Print Name

Declared and signed in Oakland, California this 15 day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB DECLARATION

TO THIS HONORABLE COURT:

1. My name is Luis URENA . I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

helps my Anxiety, and my Appetite. and nausica from aids medications. and it helps me, on my phisological estability.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: Loose of appetite and will have to relate to prescription drugs - that my system dont tolaviate very well.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

Print Name

Declared and signed in Oakland, California this 15 day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **DECLARATION**

TO THIS HONORABLE COURT:

1. My name is Ellen J. WALL. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

To deal with degenerative disk disease and arthritis. No other drug except marijuana relieves these pains - these intolerable pains - for me.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: If I did not have cannabis, I would have immediate, intractable, extreme pain in my legs & arms which keeps me up all night. NO drug — other than cannabis — in over 30 years has had as much medical efficacy vs cannabis. The arthritis in my arms, unlike cannabis, will cause it to beyond endurable measure, causing me to endure even more suffering, pain & lack of sleep.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Allen J Wall
Signature

Allen J. Wall
Print Name

Declared and signed in Oakland, California this 15 day of October, 1998.

City of Oakland)
County of Alameda)

for Defendants OAKLAND CANNABIS BUYERS' 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.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB DECLARATION

TO THIS HONORABLE COURT:

1. My name is STEVEN WILSON. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called upon, I am willing to testify orally to such matters.

2. The Oakland Cannabis Buyers' Cooperative helps me in the following ways:

THE CLUB ENABLES ME TO MANAGE MY CHRONIC PAIN DUE TO HIV/AIDS RELATED DISEASES. I USE MORPHINE ALONG WITH CANNABIS TO HELP DECREASE MY PAIN. I USE THE SMOKABLE & EDIBLE UNITS TO INGEST CANNABIS, IT REALLY WORKS AND ITS NATURAL. I ALSO USE IT TO HELP MAINTAIN MY WEIGHT.

3. If the Oakland Cannabis Buyers' Cooperative were to close, I would suffer imminent serious harm in the following ways: MY WEIGHT ~~LOSS~~ WOULD DECREASE, MY APPETITE WOULD DIMINISH, MY CHRONIC PAIN WOULD INCREASE THE MORPHINE DOES NOT WORK ALL THE TIME. I WOULD HAVE TO BUY MY MEDICINE FROM THE STREETS, GANGS AROUND THE BAY AREA WHILE TRYING NOT TO GET MUGGED OR STABBED.

WHY ARE YOU INCREASING OUR PAIN? YOUR JUDGEMENT IS WRONG.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature

STEVEN WILSON
Print Name

Declared and signed in Oakland, California this 15 day of OCTOBER, 1998.

DAVID W. OGDEN
Acting Assistant Attorney General
ROBERT S. MUELLER, III (Cal. SBN 59775)
United States Attorney
DAVID J. ANDERSON
ARTHUR R. GOLDBERG
MARK T. QUINLIVAN (D.C. BN 442782)
U.S. Department of Justice
Civil Division; Room 1048
901 E Street, N.W.
Washington, D.C. 20530
Telephone: (202) 514-3346

Attorneys for Plaintiff

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

UNITED STATES OF AMERICA, Plaintiff, v. OAKLAND CANNABIS BUYERS' COOPERATIVE, and JEFFREY JONES, Defendants. AND RELATED ACTIONS	No. C 98-0088 CRB PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION Date: July 14, 2000 Time: 10:00 a.m. Hon. Charles R. Breyer

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PRELIMINARY STATEMENT

Defendants, the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (collectively the "OCBC defendants"), move this Court to dissolve the May 19, 1998 Preliminary Injunction, which prohibited them from distributing or manufacturing marijuana in violation of federal law, on the ground that the injunction is no longer warranted. In the alternative, they move to modify the preliminary injunction to allow for a "medical necessity" exception. The OCBC defendants contend that dissolution or modification of the preliminary injunction is required by the Ninth Circuit's decisions of September 13, 1999 and May 10, 2000. See United States v. Oakland Cannabis Buyers' Cooperative, 190 F.3d 1109 (9th Cir. 1999) (per curiam); United States v. Oakland Cannabis Buyers' Cooperative, No. 99-15838, 2000 WL 569509 (9th Cir. May 10, 2000).

The OCBC defendants' motion should be denied. A faithful application of governing Supreme Court and Ninth Circuit authority, which neither the September 13, 1999 nor the May 10, 2000 decisions purported to overrule or undermine, compels the conclusion that the preliminary injunction should not be disturbed. First, the OCBC defendants have failed to offer any persuasive argument why the preliminary injunction should be dissolved. The United States demonstrated a strong likelihood of success on the merits and, because this is a statutory enforcement action, irreparable injury was presumed. The preliminary injunction entered by this Court, therefore, was entirely proper.

Second, there is no basis upon which to modify the preliminary injunction. The Ninth Circuit's decisions in United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991), and Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980), continue to foreclose the OCBC defendants' asserted defenses of medical necessity and substantive due process. Consideration of the public interest also weighs strongly against modification of the preliminary injunction.

For all these reasons, the OCBC defendants' motion should be denied.

BACKGROUND

1. On January 9, 1998, the United States filed related civil actions against six cannabis buyers' clubs and ten individuals associated with those clubs, including the OCBC defendants, arising out of the defendants' ongoing distribution and manufacture of marijuana, and related activities, in violation of the Controlled Substances Act, 21 U.S.C. §§ 841(a)(1); 846; and 856(a)(1). On May 13, 1998, this Court issued a comprehensive opinion which granted the United States' motions for preliminary injunctions. United States v. Cannabis Cultivator's Club, 5 F. Supp.2d 1086 (N.D. Cal. 1998). The Court determined that the uncontradicted evidence established that defendants had violated the Controlled Substances Act, finding that "[i]t is undisputed that marijuana is a controlled substance within the meaning of section 841(a)" and "[i]t is equally undisputed that defendants distribute marijuana." Id. at 1099. The Court therefore found that the United States was entitled to preliminary injunctive relief. Accordingly, on May 19, 1998, the Court issued preliminary injunctions against the OCBC and other defendants, enjoining them, *inter alia*, from engaging in the distribution or manufacture of marijuana.

The OCBC defendants did not appeal the preliminary injunction; instead, they promptly violated it. The United States therefore instituted civil contempt proceedings against the OCBC defendants. On October 13, 1998, the Court granted the government's motions in limine to exclude the OCBC defendants' affirmative defenses of medical necessity, substantive due process, and "joint users," and found them in civil contempt of the preliminary injunction. The Court noted that, although the OCBC defendants' own evidence indicated that 191 persons had received marijuana on May 21, 1998, the OCBC defendants had submitted declarations of only four patients who asserted that they needed marijuana to treat their medical ailments.

Prior to the issuance of the civil contempt citation, the OCBC defendants moved to modify the preliminary injunction to include a broad "medical necessity" exemption,

which would allow anyone obtaining a doctor's certificate to "obtain cannabis from the Cooperative to alleviate and/or treat a serious medical condition." On October 16, 1998, this Court denied this motion in a brief order.

The OCBC defendants timely noticed appeals from the denial of their motion to modify the preliminary injunction, as well as from two other interlocutory orders.

2. On February 25, 1999, this Court granted the United States' motion to dismiss the counterclaims-in-intervention of four intervenors, who had alleged that the government's prosecution of civil enforcement actions against the OCBC and other cannabis clubs violated their substantive due process rights. The Court ruled that resolution of this issue was controlled by Carnohan, in which the Ninth Circuit held that there is no substantive due process right to obtain a particular medication free from the government's legitimate police power. The intervenors timely noticed an appeal.

3. On September 13, 1999, a panel of the Ninth Circuit, in a per curiam opinion, remanded this Court's denial of the OCBC defendants' motion to modify the preliminary injunction. Although the panel did not vacate the injunction, it determined that, because the United States had sought an injunction against the OCBC defendants, this Court should have considered whether to modify the injunction to allow the distribution of marijuana to persons with a "medical necessity." 190 F.3d at 1113-15. Specifically, the panel stated that the OCBC defendants' request for a modification of the injunction "gives rise to a drafting issue--crafting an injunction that is broad enough to prohibit illegal conduct, but narrow enough to exclude conduct that likely would be legally privileged or justified." Id. at 1114.

The panel further concluded that this Court must consider the public interest, and indicated, in dicta, that the OCBC defendants had demonstrated a strong public interest in allowing the distribution of marijuana to persons with a medical necessity. Id. at 1114-15. In contrast, the panel suggested that the United States "has yet to identify any interest it

may have in blocking the distribution of cannabis to those with medical needs, relying exclusively on its general interest in enforcing its statutes," and instead "rests on the erroneous assumption that the district judge was compelled as a matter of law to issue an injunction that is coextensive with the facial scope of the statute." Id. at 1115.

The panel therefore instructed this Court "to reconsider the [OCBC defendants'] request for a modification that would exempt seriously ill individuals who need cannabis for medical purposes." Id. In particular, the panel stated that, on remand, "the district court is instructed to consider, in light of our decision in United States v. Aguilar, 883 F.2d 662, 692 (9th Cir. 1989), the criteria for a medical necessity exemption and, should it modify the injunction, to set forth those criteria in the modification order." Id.

4. On May 10, 2000, the same panel, in an unpublished memoranda, vacated and remanded this Court's February 25, 1999 order dismissing the counterclaims-in-intervention. The panel stated that, while "the substantive claim of violation of Fifth Amendment rights that underlies plaintiffs' claim in this appeal differs from the defense of medical necessity upon which we ruled in the earlier appeal, the injunctive remedy involved in both appeals is similar." No. 99-15838, 2000 WL 569509, slip op. at 4. The panel therefore vacated and remanded the February 25, 1999 order for reconsideration in light of the panel's September 13, 1999 opinion. Id.

5. The OCBC defendants filed the instant motion on May 30, 2000, asking that the Court dissolve or, in the alternative, modify the preliminary injunction.

ARGUMENT

The OCBC defendants contend that the Ninth Circuit's decisions of September 13, 1999 and May 10, 2000 requires this Court to dissolve or, at a bare minimum, modify the preliminary injunction. Neither of those rulings purported to overrule or undermine existing Supreme Court and Ninth Circuit authority, however, and as we now demonstrate, that authority forecloses the medical necessity and substantive due process defenses raised

by the OCBC defendants, and dictates that their motion to dissolve or modify the preliminary injunction be denied.

I. THE PRELIMINARY INJUNCTION SHOULD NOT BE DISSOLVED

The OCBC defendants contend that the May 19, 1998 preliminary injunction should be dissolved because it was improperly entered. In particular, they assert that, "[b]ecause Defendants did not concede a violation of the CSA, and because the government did not show a probability of success on the merits, the presumption of irreparable injury does not apply." Memorandum in Support of Motion to Dissolve or Modify Preliminary Injunction ("OCBC Mem.") at 8.

This argument finds no support as a matter of fact or law. In determining that preliminary injunctive relief was warranted, this Court expressly found that "the federal government has established that it is likely to prevail on the merits of its claim that defendants are in violation of federal law." 5 F. Supp.2d at 1103. In particular, the Court found that "[i]t is undisputed that marijuana is a controlled substance within the meaning of § 841(a)" and "[i]t is equally undisputed that defendants distribute marijuana. Defendants do not challenge the federal government's evidence to the extent it establishes that defendants provide marijuana to seriously ill patients or their primary caregivers for personal use by the patient upon a physician's recommendation." Id. at 1099. The OCBC defendants' assertion that "the government did not show a probability of success on the merits," OCBC Mem. at 8, therefore, is simply wrong.

The OCBC defendants assert, however, that the Ninth Circuit's September 13, 1999 and May 10, 2000 decisions somehow undermine this Court's conclusion that the United States had established a likelihood of success on the merits. Specifically, they argue that "[t]his Court based its conclusion that the government was likely to succeed on the merits on a determination that Defendants could not establish any of their defenses, including medical necessity and the substantive due process defense," and that "[t]he Ninth Circuit

has now ruled, however, that Defendants are entitled to both of these defenses." Id. at 9. The OCBC defendants thus contend that "[t]he Ninth Circuit's opinions in this case clearly establish that the government cannot now show either a probability of success on the merits of its claims that OCBC's conduct violates the CSA * * * *." Id. at 10.

This argument fares no better. As we demonstrate below, see *infra* Part II, a principled application of governing Supreme Court and Ninth Circuit precedent compels the conclusion that the OCBC defendants' invocation of the medical necessity and substantive due process defenses must be rejected. But, even if the OCBC defendants were able to maintain these defenses as to *some* of their customers, this would still provide no basis for dissolution of the preliminary injunction *in toto*. As this Court correctly noted in entering the preliminary injunction, neither necessity nor substantive due process has ever held to "exempt a defendant from the criminal laws on a blanket basis" or "as a whole," 5 F. Supp.2d at 1102, 1103, and the OCBC defendants do not even try to show that each and every one of the individuals to whom it distributed marijuana could establish one or both of these affirmative defenses. Nor did the panel's decisions of September 13, 1999 or May 10, 2000 make any suggestion that the preliminary injunction should be dissolved. Under these circumstances, the OCBC defendants' assertion that the United States "cannot now show * * * a probability of success on the merits," OCBC Mem. at 10, cannot withstand scrutiny.

The OCBC defendants are equally wrong in their assertion that, because they did not concede a violation of the Controlled Substances Act, the presumption of irreparable injury that arises in statutory enforcement actions "does not apply." Id. at 8. As this Court correctly observed in determining that preliminary injunctive relief was warranted, in Miller v. California Pacific Medical Center, 19 F.3d 449, 459 (9th Cir. 1994) (en banc), the Ninth Circuit "specifically held that the presumption applies if the defendant concedes the statutory violation *or* the government demonstrates 'that it is likely to prevail on the

merits.'" 5 F. Supp.2d at 1099 (emphasis in original) (quoting Miller, 19 F.3d at 460). Hence, because this is a statutory enforcement action, and because the United States demonstrated a strong likelihood of success on the merits, this Court was quite correct in determining that "irreparable injury is presumed and the injunction must be granted." Id. at 1105. See, e.g., Miller, 19 F.3d at 459 ("In statutory enforcement cases where the government has met the 'probability of success' prong of the preliminary injunction test, we presume it has met the 'possibility of irreparable injury' prong * * * *."); United States v. Nutri-Cology, Inc., 982 F.2d 394, 398 (9th Cir. 1992) (once the government has met the "probability of success" prong of the preliminary injunction test in a statutory enforcement action, "further inquiry into irreparable injury is unnecessary"); United States v. Alameda Gateway, Inc., 953 F. Supp. 1106, 1109 (N.D. Cal. 1996) ("In statutory enforcement actions * * * [t]he court only inquires as to the possibility of irreparable harm when the government fails to establish a likelihood of success on the merits.").

Accordingly, because there is no merit whatsoever to the arguments raised by the OCBC defendants, their motion to dissolve the preliminary injunction should be denied.

II. THE PRELIMINARY INJUNCTION SHOULD NOT BE MODIFIED

The OCBC defendants argue, in the alternative, that "the Ninth Circuit's opinions clearly represent compelling circumstances justifying modification of the injunction." OCBC Mem. at 10. Specifically, the OCBC defendants contend that "the September 1999 opinion explicitly recognizes the availability of the necessity defense in these proceedings," that "the Ninth Circuit has expressly authorized the availability of the medical necessity defense on a prospective basis through an exception in the already existing injunction," and that "the Ninth Circuit has ruled that Defendants' evidence entitles them to the requested modification." Id. at 10-11. They further urge that "this same evidence also establishes that the injunction infringes upon the substantive due process rights of OCBC's patient-members." Id. at 11.

These arguments also must be rejected. The Ninth Circuit manifestly *did not* rule, either in its decisions of September 13, 1999 or May 10, 2000, that the OCBC defendants had established their entitlement to the defenses of medical necessity or substantive due process. Rather, the Ninth Circuit remanded these issues to this Court for *reconsideration* in light of existing circuit authority. See 190 F.3d at 1115 ("On remand, * * * the district court is instructed to consider, in light of our decision in United States v. Aguilar, 883 F.2d 662, 692 (9th Cir. 1989), the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order."); No. 99-15838, 2000 WL 569509, slip op. at 4 ("[W]e vacate the district court's order and remand for consideration in light of our prior opinion.").

Moreover, the Ninth Circuit manifestly *did not* overrule its prior decisions in Aguilar and Carnohan, which this Court found controlling in its earlier analyses of the necessity and substantive due process defenses raised by the OCBC and other defendants. This comes as no surprise, of course, for it is well settled that "'one three-judge panel of [the Ninth Circuit] cannot reconsider or overrule the decision of a prior panel.'" Branch v. Tunnell, 14 F.3d 449, 456 (9th Cir.) (quoting United States v. Gay, 956 F.2d 322, 327 (9th Cir.), cert. denied, 506 U.S. 929 (1992)), cert. denied, 512 U.S. 1219 (1994).

Hence, in assessing whether the OCBC defendants have established their entitlement to the defenses of medical necessity or substantive due process, this Court is bound by the standards enunciated in Aguilar and Carnohan. As we now show, a faithful application of these controlling precedents mandates rejection of the OCBC defendants' requested modification.

A. The Defense of Medical Necessity is Not Available to the OCBC Defendants

The OCBC defendants contend that the preliminary injunction should be modified to allow a "medical necessity" exemption because "[t]he September 1999 opinion expressly recognizes the availability of the medical necessity defense in this case" and

"expressly recognized that this defense is available prospectively." OCBC Mem. at 9. They further assert that "the Ninth Circuit also has concluded that on the record now before this Court, Defendants have established each element of the medical necessity defense." Id. The OCBC defendants thus argue that they are entitled to a modification of the injunction that would allow them to distribute marijuana to:

> patients whose doctors certify that (1) the patient suffers from a serious medical condition; (2) if the patient does not have access to cannabis the patient will suffer imminent harm; (3) cannabis is necessary for the treatment of the patient's medical condition or cannabis will alleviate the medical condition or symptoms associated with it; (4) there is no legal alternative to cannabis for the effective treatment of the patient's medical condition because the patient has tried other legal alternatives to cannabis and has found them ineffective in treating his or her condition, or has found that such alternatives result in intolerable side effects.

190 F.3d 1113-14.

1. As a preliminary matter, we continue to maintain that Congress has precluded any possibility of a medical necessity defense for marijuana and other Schedule I controlled substances. See generally United States v. Schoon, 971 F.2d 193, 196-97 (9th Cir. 1991) (defense of necessity available only "when a real legislature would formally do the same under those circumstances"), cert. denied, 504 U.S. 990 (1992); 1 Walter LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.4, at 631 (1986) ("The defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs."). Here, by placing marijuana in Schedule I, which, by definition, means that it has a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a "lack of accepted safety for use under medical supervision," 21 U.S.C. § 812(b)(1), Congress mandated that *no* physician or pharmacy may dispense a Schedule I controlled substance to any patient outside of a strictly controlled research project registered with the

Drug Enforcement Administration ("DEA"), and approved by the Food and Drug Administration ("FDA"). See 21 U.S.C. § 823(f).[1]

In addition, Congress established an exclusive framework wherein controlled substances that have been placed in Schedule I (or any other schedule) may be transferred between, or removed from the five schedules to reflect changes in scientific knowledge. See 21 U.S.C. § 811. Pursuant to this process, "any interested party" who believes that medical, scientific, or other relevant data warrants transferring marijuana to a less restrictive schedule may petition the Administrator of the DEA to initiate a rulemaking proceeding to reschedule marijuana. Id. In such a proceeding, DEA must refer the rescheduling petition to the FDA for a medical and scientific evaluation, which is binding on the DEA. Id. § 811(b). Any party aggrieved by a final decision of the DEA may seek review in the court of appeals. See 21 U.S.C. § 877.[2] The courts of appeals have uniformly held that this rescheduling process is the exclusive means by which to challenge marijuana's placement in Schedule I.[3]

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[1] In contrast, physicians and pharmacies may lawfully distribute controlled substances in Schedules II through V consistent with their DEA registration. 21 U.S.C. § 829.

[2] As recently as 1994, the D.C. Circuit upheld the decision by the DEA Administrator declining to reschedule marijuana, holding that the DEA Administrator's findings were "consistent with the view that only rigorous scientific proof can satisfy the [Controlled Substances Act's] 'currently accepted medical use requirement.'" Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1137 (D.C. Cir. 1994).

[3] See United States v. Burton, 894 F.2d 188, 192 (6th Cir. 1990); cert. denied, 498 U.S. 857 (1990; United States v. Greene, 892 F.2d 453, 455-45 (6th Cir. 1989), cert. denied, 495 U.S. 935 (1990); United States v. Fry, 787 F.2d 903, 905 (4th Cir.), cert. denied, 479 U.S. 861 (1986); United States v. Wables, 731 F.2d 440, 450 (7th Cir. 1984); United States v. Fogarty, 692 F.2d 542, 548 n. (8th Cir. 1982), cert. denied, 460 U.S. 1040 (1983); United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); United States v. Kiffer, 477 F.2d 349 (2d Cir.), cert. denied, 414 U.S. 831 (1973).

Finally, in a 1998 "Sense of the Congress" resolution entitled "NOT LEGALIZING MARIJUANA FOR MEDICINAL USE," Congress declared that:

> (1) certain drugs are listed on Schedule I of the Controlled Substances Act if they have a high potential for abuse, lack any currently accepted medical use in treatment, and are unsafe, even under medical supervision;
>
> * * *
>
> (3) pursuant to section 401 of the Controlled Substances Act, it is illegal to manufacture, distribute, or dispense marijuana, heroin, LSD, and more than 100 other Schedule I drugs;
>
> (4) pursuant to section 505 of the Federal Food, Drug and Cosmetic Act, before any drug can be approved as a medication in the United States, it must meet extensive scientific and medical standards established by the Food and Drug Administration to ensure it is safe and effective;
>
> (5) marijuana and other Schedule I drugs have not been approved by the Food and Drug Administration to treat any disease or condition;
>
> (6) the Federal Food, Drug and Cosmetic Act already prohibits the sale of any unapproved drug, including marijuana, that has not been proven safe and effective for medical purposes and grants the Food and Drug Administration the authority to enforce this prohibition through seizure and other civil action, as well as through criminal penalties;
>
> * * * *
>
> (11) Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration * * * *.

Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 760-61 (1998) (attached as Exhibit 1). This legislation reaffirms Congress' continuing adherence to the existing FDA drug approval process, and its continuing opposition to any effort to allow the medicinal use of marijuana or other Schedule I controlled substances until they are proven safe and effective based on appropriate findings by the FDA. See, e.g., Accardi v. Pennsylvania R.R. Co., 383 U.S. 225, 229 (1966) (continuing purpose of Congress reflected in "sense of Congress" enactment); Harris v. United States, 359 U.S. 19, 22 n.8 (1959) (continuing purpose of Congress reflected in subsequently-enacted legislation).

These congressional actions preclude invocation of the medical necessity defense by the OCBC defendants.[4] Indeed, following the passage of the 1998 legislation, it cannot seriously be maintained that, were it presented with the proposed modification offered by the OCBC defendants, Congress would formally adopt the modification. Yet this is *precisely* what the defense of necessity requires. See Schoon, 971 F.2d at 196-97 (defense of necessity available only "when a real legislature would formally do the same under those circumstances").

This conclusion finds additional support in the Supreme Court's decision in United States v. Rutherford, 442 U.S. 544 (1979). In that case, a class of terminally ill cancer patients and their spouses brought suit to enjoin the government from interfering with the interstate shipment and sale of Laetrile, an unapproved drug. The district court granted the requested relief, and the Tenth Circuit affirmed, holding that the safety and effectiveness protections of the Food, Drug and Cosmetic Act had no reasonable application to terminally ill cancer patients since those patients, by definition, would die of cancer regardless of their treatment.

The Supreme Court unanimously reversed. The Supreme Court held that the Food, Drug and Cosmetic Act "makes no special provision for drugs used to treat terminally ill

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[4] At least four district courts have reached this conclusion. See United States v. McWilliams, No. CR 97-997(A)-GHK, slip op. at 2-3 (C.D. Cal. Nov. 5, 1999) ("Because Congress has already determined that there is no accepted medical use for marijuana, and in the absence of controlling precedent from the Ninth Circuit, we conclude as a matter of law that the medical necessity defense is not available in this case.") (attached as Exhibit 2); United States v. Lederer, Nos. CR-97-558 GEB, slip op. at 5-10 (E.D. Cal. May 21, 1999) ("Since the weighing of values required for the defense of necessity has already been conducted by Congress' proscription of the very acts [the defendant] sought to legitimize through his assertion of the defense, [the defendant's] motion was denied.") (attached as Exhibit 3); United States v. Diana, Nos. CR-98-068-RHW; CR-98-069-RHW; CR-98-070-RHW; and CR-98-072-RHW, slip op. at 5 (E.D. Wash. Sept. 21, 1998) (rejecting medical necessity defense because "Congress was aware of the competing interests in cases such as Defendants' and addressed them") (attached as Exhibit 4); United States v. Allerheilgen, No. 97-40090-01-DES, 1998 WL 918841 (D. Kan. Nov. 19, 1998) (same) (attached as Exhibit 5).

patients," and that "[w]hen construing a statute so explicit in scope," it is the incumbent upon the courts to give it effect. Id. at 552. The Court therefore rejected the Tenth Circuit's determination that an exemption from the Act was justified because the safety and effectiveness standards could have no reasonable application to terminally ill cancer patients, holding that, "[u]nder our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. * * * * Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." Id. at 555, 559.

Similarly here, the question whether an exemption for the medicinal use of marijuana should be created is one "for legislative judgment, not judicial interference." Id. We therefore continue to maintain that Congress has precluded any possibility of a medical necessity defense for marijuana and other Schedule I controlled substances.[5]

2. The OCBC defendants' invocation of the medical necessity defense fares no better on the merits. The Supreme Court has held that, "[u]nder any definition of [the necessity] defense[] one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail." United States v. Bailey, 444 U.S. 394, 410 (1980). Thus, in United States v. Richardson, 588 F.2d 1235 (9th Cir. 1978), cert. denied, 441 U.S. 931 (1979), the Ninth Circuit refused to recognize a defense of necessity in a prosecution for the unlawful smuggling of Laetrile, despite the defendants' insistence that Laetrile was "needed in the United States to treat cancer patients." Id. at 1239. The Ninth Circuit concluded that the defense was unavailing because defendants could have sought "to have the FDA classification of Laetrile set aside or to have it approved as a new

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[5] To the extent the Court believes that the Ninth Circuit's September 13, 1999 decision has foreclosed this argument, however, we wish to preserve this issue.

drug." Id. See also United States v. Dorrell, 758 F.2d 427, 430-31 (9th Cir. 1985) (availability of recourse to the political process precludes necessity defense).

Likewise, in Aguilar, the Ninth Circuit made clear that potential recourse to the administrative or judicial process vitiates a necessity defense. Although the defendants in that case urged that their violations of the immigration laws were "necessary" because the INS "continuously has frustrated the present legal way of obtaining refugee status," 883 F.2d at 693, the Court emphasized that defendants could have (and indeed had) sought to correct these improprieties in civil litigation. The Ninth Circuit thus affirmed the district court's granting of the government's motion to preclude evidence regarding the necessity defense. Id.

These cases, and the settled principles they apply, cannot be reconciled with the proposed modification offered by the OCBC defendants. Like the defendants in Richardson or Aguilar, the OCBC defendants have recourse to the administrative and judicial process to advance their claims. Like the defendants in Richardson, the OCBC defendants can challenge the legislative classification of marijuana by seeking to have it rescheduled. See 21 U.S.C. § 811(a). In short, the OCBC defendants can seek relief through the administrative process and can have marijuana's classification set aside by the courts if it is determined to be unreasonable or unconstitutional. The existence of these reasonable, legal alternatives forecloses the proposed modification offered by the OCBC defendants. See Aguilar, 883 F.2d at 693; Richardson, 588 F.2d at 1239.

3. The proposed modification also fails for lack of specificity. In Aguilar, the defendants, who were charged with various violations of the immigration laws arising from their provision of sanctuary to Central American refugees, argued that they were entitled to present a necessity defense. The Ninth Circuit rejected the defense, in part, on the ground that there was insufficient evidence that the particular refugees assisted by the defendants had been in danger of imminent harm:

> We also doubt the sufficiency of the proffer to establish irreparable harm. *The offer fails to specify that the particular aliens assisted were in danger of imminent harm.* Instead, it refers to general atrocities committed by Salvadoran, Guatemalan, and Mexican authorities. The only indication that appellants intended to show that the aliens involved in this action faced imminent harm was their proffer that they adopted a process to screen aliens in order to assure themselves that those helped actually were in danger. *This allegation fails for lack of specificity.* Moreover, even a specific proffer would establish only appellants deliberative assessment that certain aliens faced imminent harm, and not that these aliens in fact were in danger. * * * * In the immigration area * * * allowing this showing to establish a necessity defense essentially would result in sanctioning the creation of religious boards of review to determine asylum status. The executive branch, not appellants, is assigned this task.

883 F.2d at 693 n.28 (emphasis supplied).

Similarly here, defendants' proposed modification would allow OCBC to distribute marijuana to an undefined, anonymous class of individuals, based on the assessment of yet another anonymous group of doctors, as to whether they are entitled to the necessity defense. Neither a court nor jury would hear the facts that would justify a particular distribution of marijuana; rather, the modification, in effect, would delegate to private doctors the task of identifying appropriate users. Borrowing from Aguilar, not only would such a modification "establish only [the doctors'] deliberative assessment that certain [OCBC customers] faced imminent harm, and not that these [customers] were in danger," it also "essentially would result in sanctioning the creation of [physician] boards of review to determine" whether a particular OCBC customer was entitled to a necessity defense. Id. This result cannot be squared with the Ninth Circuit's analysis in Aguilar.

Indeed, an examination of the declarations submitted by the OCBC defendants in support of their proposed modification underscores this inherent inconsistency with Aguilar. Although the proposed modification would allow the OCBC defendants to distribute marijuana "to patients whose doctors certify" that four specified factors are met, the OCBC defendants have failed to submit a single declaration from a physician treating one of their declarants (the only exception being the declaration of the OCBC's own medical director). Thus, if adopted, the proposed modification would succeed in

effectively removing the Court from any role in determining whether specific individuals are entitled to maintain a necessity defense, reserving that role entirely for the OCBC defendants and an anonymous class of physicians. Again, such a result cannot be reconciled with Aguilar, let alone with the Controlled Substances Act.

4. The OCBC defendants' proposed modification also is inconsistent with Bailey. In that case, the Supreme Court held that the defendants were not entitled to a necessity instruction after having escaped from prison because they had offered no evidence justifying their continued absence from custody. 444 U.S. at 412-15. In particular, the Court held that:

> [I]n order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure, and that an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force.

Id. at 412-13.

Similarly here, the OCBC defendants have offered no comparable evidence of a bona fide effort to comply with federal law as soon as the asserted necessity has lost its coercive force. On the contrary, the OCBC defendants straightforwardly seek to distribute marijuana on a permanent, ongoing basis to its customers under an all-encompassing "necessity" exemption. This is the very antithesis of the "absolute and uncontrollable necessity" that is the hallmark of the necessity defense. See The Diana, 74 U.S. (7 Wall.) 354, 360 (1869).

5. We recognize, of course, that, in its September 13, 1999 decision, the Ninth Circuit panel stated that "[w]e have no doubt that the district court could have modified its injunction, had it determined to do so in the exercise of its equitable discretion. The evidence in the record is sufficient to justify the requested injunction." 190 F.3d at 1115. But the panel did *not* rule on this question; rather, it expressly remanded this issue to this Court for its independent judgment under the test established in Aguilar. Nor, as we have

noted above, did the panel purport to overrule Aguilar, and it had no power to do so in any event. See Branch, 14 F.3d at 456. Under these circumstances, this Court must exercise its considered judgment as to whether, following the standards enunciated in Bailey and Aguilar, the proposed modification is warranted. For the reasons set forth above, we respectfully maintain that the answer to this question is an unequivocal no.

B. Binding Precedent Forecloses the OCBC Defendants' Substantive Due Process Claim

The OCBC defendants also contend that the preliminary injunction must be modified because "[t]he prohibition against the medical use of cannabis plainly infringes upon the liberty and life interests of these patients to be free from pain and to preserve their lives." OCBC Mem. at 14-15. The OCBC defendants further assert that "[t]he government has offered no evidence, scientific or otherwise, to justify its infringement on the substantive due process rights of these patients * * * *." Id. at 15.

This contention, too, must be rejected. As this Court correctly determined in dismissing the counterclaims of the intervenors, the Ninth Circuit's decision in Carnohan mandates the conclusion that there is no substantive due process right to obtain marijuana from a medical cannabis cooperative free of the lawful exercise of government police power. In Carnohan, the Ninth Circuit affirmed the dismissal of a declaratory judgment action in which the plaintiff had sought to secure the right to obtain and use laetrile for the prevention of cancer. The plaintiff had contended that "the state and federal regulatory schemes [requiring administrative approval of new drugs] are so burdensome when applied to private individuals as to infringe upon constitutional rights." Id. at 1122. The Court rejected the plaintiff's constitutional claim, holding that:

> We need not decide whether Carnohan has a constitutional right to treat himself with home remedies of his own confection. Constitutional rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of the lawful exercise of government police power.

Id.

In reaching this conclusion, the Ninth Circuit cited with approval the Tenth Circuit's decision in Rutherford v. United States, 616 F.2d 455 (10th Cir.), cert. denied, 449 US. 937 (1980), which held that terminally ill cancer patients had no fundamental right to obtain laetrile. The Tenth Circuit stated that "the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health." Rutherford, 616 F.2d at 457. The Carnohan court also relied upon the California Supreme Court's decision in People v. Privitera, 23 Cal.3d 697, 591 P.2d 919, 153 Cal. Rptr. 431 (1979), cert. denied, 444 U.S. 949 (1979), which held that "the asserted right to obtain drugs of unproven efficacy is not encompassed by the right of privacy embodied in either the federal or state Constitutions." Id. at 702, 591 P.2d at 921.

Carnohan is consistent with the overwhelming weight of authority. As we have noted previously, all other courts of appeals to consider the question have held that individuals do not have a fundamental right to particular medical treatments. See, e.g., Sammon v. New Jersey Bd. of Medical Examiners, 66 F.3d 639, 645 n.10 (3d Cir. 1995) ("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."); Mitchell v. Clayton, 995 F.2d 772, 775-76 (7th Cir. 1993) ("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 that type of treatment or provider"); United States v. Burzynski Cancer Research Inst., 819 F.2d 1301, 1313-14 (5th Cir. 1987) (rejecting cancer patients' claim of constitutional right to obtain antineoplastin drugs), cert. denied, 484 U.S. 1065 (1988).

More recently, in Kuromiya v. United States, 37 F. Supp. 2d 717 (E.D. Pa. 1999), the district court rejected a substantive due process challenge to the Controlled Substances Act's prohibition on the distribution or manufacture of marijuana identical to that raised by

the OCBC defendants in this case. In pertinent part, the court held that "there is no fundamental right of privacy to select one's own medical treatment without regard to criminal laws, and courts have consequently applied only rational review to regulations affecting these matters." Id. at 726 (citing, *inter alia*, Carnohan, 616 F.2d at 1122). See also Smith v. Shalala, 954 F. Supp. 1, 3 (D.D.C. 1996) (quoting Carnohan, 616 F.2d at 1122, for proposition that there is no substantive due process right "to obtain [unapproved drugs] free of the lawful exercise of government police power" (alteration in original)); United States v. Vital Health Products, Ltd., 786 F. Supp. 761, 777 (E.D. Wisc. 1992) ("a claim that American citizens have the freedom to choose whatever medication or treatment they desire is not grounded in the Fifth, Ninth or Fourteenth Amendment"), aff'd, 985 F.2d 563 (7th Cir. 1993) (Mem.).[6]

This Court faithfully applied these governing precedents in dismissing the substantive due process claims of the intervenors. The Court found that:

> Carnohan disposes of the Intervenors' claims. Regardless of whether the Intervenors have a right to treat themselves with marijuana which they themselves grow (a remedy of their own confection), the Ninth Circuit has held that they do not have a constitutional right to *obtain* marijuana from the medical cannabis cooperatives free of government police power.

February 25, 1999 Memorandum and Order at 2-3 (emphasis in original). This Court also noted that the intervenors' argument that marijuana is the only effective treatment for their symptoms was not persuasive in light of Rutherford. As the Court explained, "[t]he Rutherford plaintiffs had no other treatment alternative. They believed that without the laetrile they would die. The Tenth Circuit nonetheless held that the Rutherford plaintiffs did not have a constitutional right to obtain laetrile." Id. at 4 (citing Rutherford, 616 F.2d at 457). Hence, although noting "[t]he plaintiff members * * * believe, and on a motion

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[6] We are aware of only one district court decision to the contrary, Andrews v. Ballard, 498 F. Supp. 1038 (S.D. Tex. 1980) (finding decision to obtain acupuncture treatment encompassed by the right of privacy), and the continued viability of that decision is questionable after the Fifth Circuit's decision in Burzynski, 819 F.2d at 1313-14.

to dismiss the Court must assume they could prove, that marijuana is the only effective treatment for their symptoms," this Court concluded that "Carnohan and Rutherford hold * * * that there is no fundamental right to obtain the medication of their choice." Id. at 5.

This Court should adhere to this analysis. Neither of the panel decisions relied upon by the OCBC defendants supports a different conclusion. The September 13, 1999 panel decision did not address the OCBC defendants' substantive due process claim at all, and the May 10, 2000 panel decision merely remanded the issue to this Court for reconsideration in light of its September 13, 1999 decision. Neither decision purports to overrule or undermine Carnohan. That case, therefore, continues to control resolution of this issue, and compels rejection of the OCBC defendants' substantive due process claim.

The OCBC defendants complain, however, that even under Carnohan, Congress' prohibition on the distribution and manufacture of marijuana "violate constitutional rights if the government's restrictions are irrational or arbitrary." OCBC Mem. at 15. This contention is easily disposed of. As this Court has previously ruled, "[t]o the extent the Court has jurisdiction to hear defendants' rational basis challenge, the Court must nevertheless reject defendants' argument because the Ninth Circuit has previously determined that the Controlled Substances Act's restrictions on the manufacture and distribution of marijuana are rational." December 3, 1998 Order in Case No. 98-0086 (Marin Alliance for Medical Marijuana) slip op. at 1. In reaching this conclusion, the Court relied on United States v. Miroyan, 577 F.2d 489 (9th Cir. 1978), cert. denied, 439 U.S. 896 (1978), in which the Ninth Circuit stated that it "need not again engage in the task of passing judgment on Congress' legislative assessment of marijuana. As we recently declared, '[t]he constitutionality of the marijuana laws has been settled adversely to [the defendant] in this circuit.'" Id. at 495 (quoting United States v. Rogers, 549 F.2d 107, 108 (9th Cir. 1976)). Hence, like their alleged substantive due process claim, the

OCBC defendants' rational basis challenge to the Controlled Substances Act is foreclosed by binding Ninth Circuit authority.[7]

C. The Public Interest Weighs Against Modification of the Injunction

Finally, the OCBC defendants contend that the public interest weighs in favor of their requested modification. In particular, they argue that "[t]he Ninth Circuit's September 1999 opinion establishes * * * that the injunction is clearly *not* in the public interest," and that the "the government has failed to articulate any interest that would be harmed by allowing distribution of medical cannabis to sick patients." OCBC Mem. at 10.

Contrary to the OCBC defendants' assertion that the government has not identified any interest that would be harmed by allowing the distribution of marijuana, Congress, as noted above, recently reiterated its continuing adherence to the existing FDA drug approval process, and its continuing opposition to any effort to allow the use of marijuana or other Schedule I controlled substances until they are proven safe and effective based on appropriate findings by the FDA. See Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 760-61 (1998). In particular, Congress emphasized the fact that, "before any drug can be approved as a medication in the United States, it must meet extensive scientific and medical standards established by the Food and Drug Administration to ensure it is safe and effective," and stated its opposition to attempts to "circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration * * * *." Id. The United States

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[7] The OCBC defendants' contention that "[t]he government has presented no evidence * * * that the prohibition against all medical use of cannabis is reasonably related to protecting the public health," OCBC Mem. at 16, also misses the mark. The Supreme Court has made clear that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data," Heller v. Doe, 509 U.S. 312, 320 (1993), and, in any event, the Ninth Circuit has held that the Controlled Substances Act's prohibition on the distribution and manufacture of marijuana passes rational basis scrutiny. Mirovan, 577 F.2d at 495.

relies upon this express declaration of the public interest by Congress, which is entitled to deference.

Indeed, the importance of the existing FDA drug approval process was expressly recognized by the Supreme Court in Rutherford, in which the Court stated that:

> It bears emphasis that although the Court of Appeals' ruling was limited to Laetrile, its reasoning cannot be so readily contained. To accept the proposition that the safety and efficacy standards of the Act have no relevance for terminal patients is to deny the Commissioner's authority over all drugs, however, toxic or ineffectual, for such individuals. If history is any guide, this new market would not long be overlooked.

442 U.S. at 557-58. The Rutherford Court also noted that "there is a special sense in which the relationship between drug effectiveness and safety has meaning in the context of incurable illnesses. * * * [I]f an individual suffering from a potentially fatal disease rejects conventional therapy in favor of a drug with no demonstrable curative properties, the consequences can be irreversible." Id. at 556. This reasoning is equally applicable in this case. If the proposed modification were adopted, there is no reason that a defendant charged with offenses involving other Schedule I controlled substances or unapproved drugs -- such as Laetrile -- could not also raise the defense of "medical necessity," thereby undermining the FDA drug approval process. The proposed modification, therefore, has the potential to significantly undermine the FDA drug approval process, a result patently at odds with the public interest as expressed by Congress and recognized by the Supreme Court in Rutherford.

Moreover, a careful examination of the caselaw reveals a substantial body of Supreme Court authority which holds that, in considering the public interest, courts must defer to Congress' considered judgment when that judgment is clearly reflected in enacted legislation. The leading case is Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937), in which the Supreme Court stated that, "[i]n considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress" which is "deliberately expressed in legislation." Id. at 551. This is because "*[t]he fact that*

Congress has indicated its purpose [in a statute] is in itself a declaration of the public interest and policy which should be persuasive in inducing the courts to give relief." Id. at 552 (emphasis supplied).

The Supreme Court adopted a similar analysis in Hecht Co. v. Bowles, 321 U.S. 321 (1944). In that case, the Court held that, in cases in which injunctive relief is sought pursuant to a statutory mandate, a court's equitable discretion must reflect the "large objectives" of the Congress's policy, "[f]or the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases." Id. at 331.

This principle was reaffirmed in Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), in which the Supreme Court held that, in examining whether to enter injunctive relief, a court must be mindful that:

> it is * * * emphatically * * * the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when asked.

Id. at 194. And, just this week, the Supreme Court once again reaffirmed that, although it would "not lightly assume" that Congress meant to restrict the equitable powers of the federal courts, "where Congress has made its intent clear, 'we must give effect to that intent.'" Miller v. French, — S. Ct. —, 2000 WL 775556, at *6 (June 19, 2000) (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962)) (attached as Exhibit 6).

The Ninth Circuit, too, has previously held that, when Congress directly speaks to an issue in legislation, it speaks for the public interest. In People v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1324 (9th Cir. 1985), the Ninth Circuit, citing the Supreme Court's decision in Virginian Railway Co., recognized that "[t]he district court has greater power to fashion equitable relief in defense of the public interest than it has when only private interests are involved," and further held that "[i]t may define the public

interest *by reference to the policies expressed in legislation.*" Id. at 1324 (emphasis supplied). See also Federal Trade Comm'n v. World Wide Factors, Inc., 882 F.2d 344, 346 (9th Cir. 1989) (where the United States is seeking injunctive relief to enforce an Act of Congress, "[h]arm to the public interest is presumed").[8]

This overwhelming body of authority demonstrates that, when Congress has made its intent clear on a particular subject through legislation, it is not a proper role for the courts to second guess the political branches in determining what is in the public interest.[9] Applying these principles to this case, because Congress has clearly expressed its continuing adherence to existing FDA drug approval process and its continuing opposition to any effort to allow the use of marijuana or other Schedule I controlled substances until they are proven safe and effective by the FDA, because that judgment is owed deference by this Court, and because the proposed modification would have the effect of

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[8] Other courts of appeals have also followed this venerable principle. In United States v. Marine Shale Processors, 81 F.3d 1329 (5th Cir. 1996), for example, the Fifth Circuit, also citing Virginian Railway Co., stated that:

> When the United States or a sovereign state sues in its capacity as protector of the public interest, a court may rest an injunction entirely upon a determination that the activity at issue constitutes a risk of danger to the public. * * * This doctrine draws support from the extraordinary weight courts of equity place upon the public interests in a suit involving more than a mere private dispute, *and from the deference courts afford the political branches in identifying and protecting the public interest.*

Id. at 1359 (emphasis supplied). Likewise, in Able v. United States, 44 F.3d 128 (2d Cir. 1995) (per curiam), the Second Circuit held that, when "the full play of the democratic process involving both the legislative and executive branches has produced a policy in the name of the public interest embodied in a statute and implementing regulation," it would be inappropriate for a court "to substitute its own determination of the public interest for that arrived at by the political branches, whether or not there may be doubt regarding the wisdom of their conclusion." Id. at 131-32.

[9] Moreover, it is axiomatic that the clearly expressed will of Congress regarding federal law trumps any countervailing actions taken by the State of California or the Oakland City Council. See United v. Curtis, 965 F.2d 610, 616 (8th Cir. 1992) ("It is a basic principle of constitutional law that, under the Supremacy Clause of Article VI of the Constitution, federal law supersedes state law where there is an outright conflict between such laws.").

undermining this drug approval process, see Rutherford, 442 U.S. at 557-58, the public interest unquestionably weighs against modification of the preliminary injunction.

We acknowledge, of course, that in its September 13, 1999 decision, the panel stated that the United States "has yet to identify any interest it may have in blocking the distribution of cannabis to those with medical needs, relying exclusively on its general interest in enforcing its statutes." 190 F.3d at 1115. The panel did not discuss the 1998 legislation in making this statement, however, nor did the panel purport to overrule Virginian Railway Co. and the other Supreme Court precedents cited above and, indeed, had no power to do so. See State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("The Court of Appeals was correct in applying [stare decisis] * * * for it is this Court's prerogative alone to overrule one of its precedents."); Virginian Railway Co. and its progeny, therefore, are controlling, and require deference to Congress' judgment of the public interest.

CONCLUSION

For the foregoing reasons, the OCBC defendants' motion to dissolve or modify the preliminary injunction order should be denied.

Respectfully submitted,

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Dated: June 23, 2000

CERTIFICATE OF SERVICE

I, Mark T. Quinlivan, hereby certify that on this 23rdd day of June, 2000, I caused to be served a copy of the foregoing Plaintiff's Memorandum in Opposition to Motion to Dissolve or Modify Preliminary Injunction, and the accompanying [Proposed] Order and Exhibits in Support, by overnight delivery upon the following counsel:

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

UNITED STATES OF AMERICA, Plaintiff, v. OAKLAND CANNABIS BUYERS' COOPERATIVE, and JEFFREY JONES, Defendants. AND RELATED ACTIONS	No. C 98-0088 CRB EXHIBITS IN SUPPORT OF OPPOSITION TO MOTION TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION Date: July 14, 2000 Time: 10:00 a.m. Hon. Charles R. Breyer

SEC. 3. ADDITIONAL REQUIREMENTS FOR THE USE OF FUNDS UNDER THE VIOLENT OFFENDER INCARCERATION AND TRUTH-IN-SENTENCING GRANTS PROGRAM.

Section 20105(b) of the Violent Crime Control and Law Enforcement Act of 1994 is amended to read as follows:

"(b) ADDITIONAL REQUIREMENTS.--

"(1) ELIGIBILITY FOR GRANT.--To be eligible to receive a grant under section 20103 or section 20104, a State shall—

"(A) provide assurances to the Attorney General that the State has implemented or will implement not later than 18 months after the date of the enactment of this subtitle, policies that provide for the recognition of the rights of crime victims; and

"(B) subject to the limitation of paragraph (2), no later than September 1, 2000, consider a program of drug testing and intervention for appropriate categories of convicted offenders during periods of incarceration and postincarceration and criminal justice supervision, with sanctions including denial or revocation of release for positive drug tests, consistent with guidelines issued by the Attorney General.

"(2) USE OF FUNDS.--Beginning in fiscal year 1999, not more than 10 percent of the funds provided under section 20103 or section 20104 of this subtitle may be applied to the cost of offender drug testing and intervention programs during periods of incarceration and post-incarceration criminal justice supervision, consistent with guidelines issued by the Attorney General. Further, such funds may be used by the States to pay the costs of providing to the Attorney General a baseline study on their prison drug abuse problem. Such studies shall be consistent with guidelines issued by the Attorney General.".

DIVISION F—NOT LEGALIZING MARIJUANA FOR MEDICINAL USE

It is the sense of the Congress that—

(1) certain drugs are listed on Schedule I of the Controlled Substances Act if they have a high potential for abuse, lack any currently accepted medical use in treatment, and are unsafe, even under medical supervision;

(2) the consequences of illegal use of Schedule I drugs are well documented, particularly with regard to physical health, highway safety, and criminal activity;

(3) pursuant to section 401 of the Controlled Substances Act, it is illegal to manufacture, distribute, or dispense marijuana, heroin, LSD, and more than 100 other Schedule I drugs;

(4) pursuant to section 505 of the Federal Food, Drug and Cosmetic Act, before any drug can be approved as a medication in the United States, it must meet extensive scientific and medical standards established by the Food and Drug Administration to ensure it is safe and effective;

(5) marijuana and other Schedule I drugs have not been approved by the Food and Drug Administration to treat any disease or condition;

(6) the Federal Food, Drug and Cosmetic Act already prohibits the sale of any unapproved drug, including marijuana, that

has not been proven safe and effective for medical purposes and grants the Food and Drug Administration the authority to enforce this prohibition through seizure and other civil action, as well as through criminal penalties;

(7) marijuana use by children in grades 8 through 12 declined steadily from 1980 to 1992, but, from 1992 to 1996, has dramatically increased by 253 percent among 8th graders, 151 percent among 10th graders, and 84 percent among 12th graders, and the average age of first-time use of marijuana is now younger than it has ever been;

(8) according to the 1997 survey by the Center on Addiction and Substance Abuse at Columbia University, 500,000 8th graders began using marijuana in the 6th and 7th grades;

(9) according to that same 1997 survey, youths between the ages of 12 and 17 who use marijuana are 85 times more likely to use cocaine than those who abstain from marijuana, and 60 percent of adolescents who use marijuana before the age of 15 will later use cocaine; and

(10) the rate of illegal drug use among youth is linked to their perceptions of the health and safety risks of those drugs, and the ambiguous cultural messages about marijuana use are contributing to a growing acceptance of marijuana use among children and teenagers;

(11) Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration; and

(12) not later than 90 days after the date of the enactment of this Act—

(A) the Attorney General shall submit to the Committees on the Judiciary of the House of Representatives and the Senate a report on—

(i) the total quantity of marijuana eradicated in the United States during the period from 1992 through 1997; and

(ii) the annual number of arrests and prosecutions for Federal marijuana offenses during the period described in clause (i); and

(B) the Commissioner of Foods and Drugs shall submit to the Committee on Commerce of the House of Representatives and the Committee on Labor and Human Resources of the Senate a report on the specific efforts underway to enforce sections 304 and 505 of the Federal Food, Drug and Cosmetic Act with respect to marijuana and other Schedule I drugs.

DIVISION G—FOREIGN AFFAIRS REFORM AND RESTRUCTURING ACT OF 1998

SEC. 1001. SHORT TITLE.

This division may be cited as the "Foreign Affairs Reform and Restructuring Act of 1998".

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA INC., Plaintiff, vs. PETER McWILLIAMS, TODD McCORMICK, ET. AL. Defendants	CR 97-997(A)-GHK MEMORANDUM AND ORDER

This matter comes before the court on the government's motions in limine to preclude evidence relating to defendants' medical conditions, defendants' reliance on advice of counsel, Proposition 215, the closed single patient investigative new drug program, the medical usefulness of marijuana, and the admissibility of the medical necessity defense. After carefully reviewing the proffers and arguments and authorities presented in the parties' briefing and considering the arguments made by counsel in open court, we rule as follows:

I. Medical Necessity Defense

We conclude that the medical necessity defense is not available as a matter of law. The necessity defense is only available where the legislature "has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs." 1 LaFave & Scott, Substantive Criminal Law § 5.4, at 631 (1986). The Controlled Substances Act ("CSA") does not merely prohibit the use of marijuana, but by classifying marijuana as a Schedule I substance, Congress has explicitly determined that marijuana has no accepted medical use, and no accepted safety for use under medical supervision. 21 U.S.C. § 812 Schedule I (b)(1). By requesting this Court to allow them to assert the medical necessity defense, the defendants seek to contradict this explicit Congressional determination. See State v. Williams, 968 P. 2d 26, 30 (C.A. Wash. 1998) ("The legislature has determined that marijuana has no accepted medical use. [The defendant] has no fundamental right to have marijuana as his preferred treatment over the State's objections.")

Furthermore, the defendants' reliance on United States v. Oakland Cannabis Buyers' Cooperative, 1999 WL 705099 (9th Cir. 1999) ("OCBC"), is misplaced. The Ninth Circuit neither addressed nor decided in its opinion the precise issue of whether the CSA precludes the use of the medical necessity defense. Even if this issue had been presented to the Court in oral or written argument, the Ninth Circuit nonetheless chose not to rule on it.

Because Congress has already determined that there is no accepted medical use for marijuana, and in the absence of controlling precedent

from the Ninth Circuit, we conclude as a matter of law that the medical necessity defense is not available in this case.

However, even if the medical necessity defense were not precluded as a matter of law, we conclude that the defendants cannot meet the threshold requirements for asserting a necessity defense. The fourth prong of the defense, as set forth in United States v. Aguilar, 883 F. 2d 662, 793 (9th Cir. 1989), requires a showing that the defendants have no legal alternative to their criminal conduct available to them. Id. at 693. Here, the defendants do have legal alternatives, which include petitioning the DEA to reschedule marijuana, and registering with the FDA to conduct research on the medical uses of marijuana. See United States v. Richardson, 588 F. 2d 1235, 1239 (9th Cir. 1978) (denying medical necessity defense on grounds that defendants had alternative legal course of action, including petitioning the FDA to reclassify Laetrile). Thus, even if the medical necessity defense were not precluded as a matter of law by the CSA, defendants would be unable to meet the threshold requirements for asserting the defense.

Therefore, we GRANT the government's motion in limine to preclude the defendants from asserting the medical necessity defense.

II. Defendants' Evidentiary Proffers Regarding Proposition 215, Defendants' Medical Conditions, Defendants' Reliance on Advice of Counsel, and the Medical Usefulness of Marijuana

In light of the government's plan to dismiss its charges relating to intent to distribute, we need not decide the merits of the defendants' evidentiary proffers relating to Proposition 215, the defendants' medical conditions, their reliance on advice of counsel, and the medical usefulness of marijuana. We conclude that all of these proffers are irrelevant to the remaining charges of

manufacturing marijuana. Furthermore, to the extent that the defendants intend to offer this evidence to show that they did not intend to violate the law, this evidence is irrelevant as a matter of law because intent to violate the law is not an element of the offenses charged. We therefore GRANT the government's motions in limine: 1) to preclude evidence of Proposition 215, the closed single patient investigative new drug program, and the medical usefulness of marijuana; 2) to preclude the advice of counsel defense; and 3) to preclude evidence of defendants' medical conditions.

Evidence on these subjects shall not be permitted. Counsel for defendants are instructed not to make any reference, in whatever form, including but not limited to argument, questions, comments, testimony or evidence, to Proposition 215, the medical usefulness of marijuana, the closed single patient investigative new drug program, defendants' reliance on the advice of counsel, and defendants' medical conditions. Counsel are further instructed to assure that no other persons, including their clients (the defendants) and their witnesses, make any such prohibited references at trial.

IT IS SO ORDERED

Dated: November 5, 1999

George H. King
United States District Judge

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(The investigative new drug program is the one in which the federal government sends marijuana to 8 patients each month for medical purposes and has been since 1972.)

SER 629

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES, Plaintiff, v. MARTIN LEDERER and B.E. SMITH, Defendants.	CR S-97-556 GEB ORDER DENYING RELEASE PENDING SENTENCE

Following Defendant B.E. Smith's conviction by a jury on May 21, 1999, his counsel argued that he not be detained pending sentence. Under the Bail Reform Act, Smith is required to be detained pending sentence unless the court finds "there is a substantial likelihood that a motion for acquittal or new trial will be granted; or . . . an attorney for the Government has recommended that no sentence of imprisonment be imposed on [Smith]."[1] 18 U.S.C. § 3143(a)(2)(A).

Since the government recommends imprisonment, I must examine whether substantial questions exist which are likely to result in an

[1] If Smith prevails under either of these two requirements, the Court must still detain Smith unless it finds that Smith is not likely to flee or pose a danger to the safety of any other person or the community if he is not detained. See 18 U.S.C. § 3143(a)(2)(B).

order for a new trial or acquittal. "[T]he word 'substantial' defines the level of merit required in the question raised . . . while the phrase 'likely to result in [a new trial]' defines the type of question that must be presented." United States v. Handy, 761 F.2d 1279, 1281 (9th Cir. 1985). "[A] 'substantial question' is one that is 'fairly debatable,' or fairly doubtful. In short, a 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous."[2] Id. at 1283.

Several issues that Smith raised during the trial were examined under this standard. Each issue was previously addressed and rejected orally on the record. On September 23, 1998, I also issued a written order denying discovery on Smith's selective prosecution defense, and on May 13, 1999, I issued a written order denying Smith's recusal motion.

I do not find that any of the legal rulings on these issues involve substantial questions likely to result in an order for a new trial or acquittal. The challenged rulings are addressed below.

1. Discovery and Selective Prosecution

The first adverse ruling Smith received was the ruling on his request for discovery in connection with his selective prosecution claim. Smith's request was denied because, as the Ninth Circuit stated in United States v. Turner, 104 F.3d 1180 (1997), to obtain discovery, the defendant must make the "appropriate threshold showing"

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[2] Smith was unable to identify substantial questions before he was ordered detained. As Smith was being led away pursuant to the detention order, however, Smith's lawyer attempted to argue that other substantial questions exist. Since I had already decided the issue by that time, I directed Smith's lawyer to put his arguments in writing and to file them.

that he would succeed on the defense of selective prosecution by demonstrating "that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose'" through the presentation of "some evidence that similarly situated defendants . . . could have been prosecuted, but were not." Id. at 1184 (quoting United States v. Armstrong, 517 U.S. 456, 469, 470 (1996)).

Although Smith argued he had produced some evidence that the government prosecuted him to suppress his speech, given the factual context in which the prosecution arose, neither this argument nor the public protest evidence Smith proffered constituted "some evidence" of discriminatory purpose. Consistent with the Supreme Court's observation in Wayte v. United States, 470 U.S. 598 (1985), to allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to "protest" the law is untenable where "[t]he First Amendment confers no such immunity from prosecution." Id. at 614. Nor does coupling speech with cultivation of marijuana, which is illegal under federal law, transform these activities into protected political dissent. Such "protest violations" "are not a protected form of political dissent." United States v. Ness, 652 F.2d 890, 892 (9th Cir. 1981). Rather, insofar as a protest group engages in such violations, it is obvious that proper prosecutorial considerations, such as deterrence of wide-spread violations of the marijuana cultivation laws, "will inevitably lead to the prosecution of numerous protest violators." Id.

Smith effectively selected himself for prosecution by violating federal marijuana cultivation law and then speaking publicly

about that violation. See Wayte, 470 U.S. at 614. Even assuming that law enforcement officers monitored Smith's speech, this fact does not amount to "some evidence" that Smith was prosecuted because of his speech. Law enforcement officers are not required to ignore public pronouncements about violations of law, and Smith cannot insulate himself from prosecution simply by cloaking his admissions of illegal activity in protest speech.

Smith further failed to present "some evidence" showing that others similarly situated had not been prosecuted. He relied solely on prosecutorial guidelines to assert that deviation from those guidelines satisfies the requisite showing. The only factor Smith asserted that caused him to be considered the same as this guideline group was the number of marijuana plants grown by the group. However, as the Ninth Circuit reveals in United States v. Estrada-Plata, 57 F.3d 757, 761 (9th Cir. 1995), one is not similarly situated with others when distinguishing characteristics exist such as criminal history. See also United States v Olvis, 97 F.3d 739, 744 (4th Cir. 1996) ("[I]n determining whether persons are similarly situated for equal protection purposes, a court must examine all relevant factors.").

As observed in the Order filed in this case on September 23, 1998, distinguishing characteristics existed between Smith and the guideline group with which he sought to be situated. Smith was growing marijuana on the property of Martin Lederer, who was involved in marijuana cultivation in the past. Lederer was convicted of misprision of a felony on March 10, 1995, for permitting his property to be used to grow marijuana. See Order filed Sept. 23, 1998, at 3-4.

Exhibit F to defendants' motion showed that "subsequent to the Lederer [federal criminal] case, the Lederer property was arrested by the United States for seizure and forfeiture under 21 U.S.C. § 881." Lederer was living on the property under a Stipulation for Occupancy Agreement with the United States at the time of the offenses for which he and Smith were indicted in this action. Thus, the United States Attorney's Office had a particular interest in the subject property. Under these circumstances, Smith failed to present "some evidence" that there exist a group that possesses similar characteristics as defendants with whom Smith could be compared in order to make out the selection element of a selective prosecution claim. See United States v. Aguilar, 883 F.2d 662, 706 (9th Cir. 1989) ("our task is to identify an appropriate control group. Absent a similarly situated control group, the prosecution of a defendant exercising his constitutional rights proves nothing. 'Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances.'").

For these stated reasons, Smith failed to present some evidence tending to show the existence of the essential elements of a selective prosecution claim and his request for discovery motion was properly denied.

2. Medical Necessity Defense

Smith moved *in limine* for an order that would allow him to introduce evidence on the medical necessity defense against the marijuana possession and cultivation charges. He argued that his prosecution under the Federal Controlled Substances Act interfered with his need to provide medical marijuana to California patients

under California's voters' recently-approved Compassionate Use Act of 1996 ("Compassionate Use Act"). Smith contended that the actions he undertook "were necessary to avoid harm to the individuals who designated him as their caregiver" responsible for supplying them with marijuana.

The defense was precluded because the evidence described in Smith's offer of proof was insufficient as a matter of law to support the defense. United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991). The necessity defense is premised on a resolution of conflicting public policy issues involving a dilemma resolved by violation of the literal language of a criminal law to accomplish a greater good for society.

> It therefore justifies criminal acts taken to avert a greater harm, maximizing social welfare by allowing a crime to be committed where the social benefits of the crime outweigh the social costs of failing to commit the crime. . . . [¶] What all the traditional necessity cases have in common is that the commission of the "crime" averted the occurrence of an even greater "harm." In some sense, the necessity defense allows [courts] to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it . . . when a real legislature would formally do the same under those circumstances. For example, by allowing prisoners who escape a burning jail to claim the justification of necessity, we assume the lawmaker, confronting this problem, would have allowed for an exception to the law proscribing prison escapes.

Schoon, 971 F.2d at 196-97.

However, where Congress has enacted law which prescribes congressional resolution of conflicting public matters, it follows that the defense of necessity is abrogated by the enactment absent a showing that Congress would formally allow the defense under the

circumstances in a particular case. This is because when Congress makes a value judgment with respect to behavior in a statutory enactment, that enactment becomes a proscription evincing national public policy. Thus, as LaFave and Scott explain:

> The defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs.

1 LaFave & Scott, Substantive Criminal Law § 5.4, 631 (1986).

"[W]hile the policy underlying the necessity defense is the promotion of greater values at the expense of lesser values, it does not follow that the law should excuse criminal activity intended to express the [actor's] disagreement with the positions reached by the lawmaking branches of the [federal] government." United States v. Dorrell, 758 F.2d 427, 432 (9th Cir. 1985). To hold otherwise would allow the defense to "transgress the principle of separation of powers." Id.

What Smith sought to do by way of the necessity defense would transgress the separation of powers principle, because it is not reasonable to assume that Congress would formally except from the coverage of the federal drug laws the conduct of which Smith was convicted in this case. Under the federal statutory scheme proscribing controlled substances, marijuana is categorized as a Schedule I controlled substance, the most restrictive category. Alliance for Cannabis Therapeutics, 15 F.3d 1131, 1133 (D.C. Cir. 1994). Schedule I controlled substances may be obtained and used lawfully only by doctors who submit a detailed research protocol for approval by the Food and Drug Administration and who agree to abide by

strict recordkeeping and storage rules. Id.; citing 21 C.F.R. §§ 1301.33, 1301.42.

> The [Controlled Substances Act] allows the Attorney General to reschedule a drug if [s]he finds that it does not meet the criteria for the schedule to which it has been assigned. 21 U.S.C. § 811(a). The Attorney General has delegated this authority to the Administrator [of the Drug Enforcement Administration]. See 28 C.F.R. § 0.100(b). In rescheduling a drug, the Administrator must consider, *inter alia*, "[s]cientific evidence of [the drug's] pharmacological effect, if known," and "[t]he state of current scientific knowledge regarding the drug or other substance." 21 U.S.C. § 811(c)(2), (3).
>
> A drug is placed in Schedule I if (1) it "has a high potential for abuse," (2) it has "no currently accepted medical use in treatment in the United States," and (3) "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision." 21 U.S.C. § 812(b)(1)(1988). The Schedule II criteria are somewhat different: (1) the drug "has a high potential for abuse," (2) it "has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions," and (3) "[a]buse of the drug . . . may lead to severe psychological or physical dependence." 21 U.S.C. § 812(b)(2) (1988).

Alliance for Cannabis Therapeutics v. Drug Enforcement Administration, 15 F.3d 1131, 1132 (D.C. Cir. 1994).

Thus, the statutory scheme clearly provides for agency consideration of the very factors Smith asked the Court to analyze in the context of a medical necessity defense.[3] Smith cannot bypass the prescribed administrative procedures by collaterally attacking marijuana's designation through invocation of the necessity defense in

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[3] It should be noted that Smith did not challenge the legitimacy of these provisions for altering the schedule of marijuana, nor has he indicated that he has attempted to alter marijuana's designation as "Schedule I" by this process.

this Court. "[D]eliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." McKart v. United States, 395 U.S. 185, 195 (1969). Beyond lacking the constitutional authority to do so, the Court also lacks the expertise to conduct the inquiry with which the agency has been congressionally charged. "[S]ince agency decisions . . . frequently require expertise, the agency should be given the first chance to . . . apply that expertise." Id. In light of this statutory scheme and the agency's congressionally delegated discretionary powers that require special expertise, the court "[does] not sit to render judgments upon the legality of the conduct of the government at the request of any person who asks [the court] because he happens to think that what the government is doing is wrong." United States v. May, 622 F.2d 1000, 1009 (9th Cir. 1980). Otherwise, the court would usurp the functions that the Constitution has given to Congress, id., and Congress, in turn, has given to the agency, see McKart, 395 U.S. 194.

Since the weighing of values required for the defense of necessity has already been conducted by Congress' proscription of the very acts Smith sought to legitimize through his assertion of the defense, Smith's motion was denied.

While I firmly believe that a necessity defense cannot apply here, assuming *arguendo* that such a defense could apply to invoke the defense, Smith was required to establish the existence of four factors. Under United States v. Aguilar, 883 F.2d 662, 692-93 (9th Cir. 1989). Smith failed to establish the fourth Aguilar factor: the absence of legal alternatives to his alleged violation of federal drug

laws that prohibit growing and dispensing marijuana. As the Ninth Circuit stated in Schoon, 971 F.2d at 198, "[t]he necessity defense requires the absence of any legal alternative to the contemplated illegal conduct which could reasonably be expected to abate an imminent evil," and "legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action." The Ninth Circuit further stated in Schoon, 971 F.2d at 198-99, "the possibility" of congressional action satisfies the "reasonableness requirement in judging whether alternatives exist" for the claimed "necessary" action. Consequently, even when it is doubtful that Congress will change its mind about national policy evinced in federal statutes, the availability of recourse to the political process will preclude the necessity defense for those who seek to challenge the policy. Dorrell, 758 F.2d at 432. Thus, the availability of this option would prevent Smith from raising the necessity defense in this case. See United States v. Richardson, 588 F.2d 1235, 1238 (9th Cir. 1978) (precluding a medical necessity defense where the defendants could have taken "the obvious optional course of action . . . to render the 'necessary' action legal [by] . . . seeking to have the [Food & Drug Administration] classification of Laetrile set aside or to have it approved as a new drug").

For these reasons, Smith's medical necessity defense was rejected.

3. 844(a) Defense

Smith's defense under 21 U.S.C. § 844(a) was also rejected because Smith failed to show during *in limine* proceedings prior to trial that he could assert a viable defense under § 844(a).

Therefore, proof concerning this defense was irrelevant at trial.

The Ninth Circuit has held that a district court may limit evidence to proof that is legally relevant. United States v. Komisaruk, 885 F.2d 490, 493 (9th Cir. 1989). Thus, evidence may be excluded following an *in limine* hearing when it is determined that the evidence described in a "defendant's offer of proof is insufficient as a matter of law to establish a defense." Id.

Smith neither proffered evidence supporting his contention that he had a viable defense under § 844(a) nor law supporting his contention that marijuana, a Schedule I drug, could be used as Smith opined. Cases addressing Schedule I drugs show that Smith's position is legally incorrect. As stated in Roe v. Ingraham, 480 F.2d 102, 103 (2d Cir. 1973), "Schedule I lists drugs with a high potential for abuse, for which there is no generally recognized medical use. . . ." The District of Columbia Circuit Court of Appeals states in Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (D.C. Cir. 1994), that "marijuana is assigned by statute to Schedule I, the most restrictive of [the categories]. Schedule I drugs may be obtained and used lawfully only by doctors who submit a detailed strict recordkeeping and storage rules." Id. That Circuit also stated in National Organization for the Reform of Marijuana Laws (NORML) v. DEA, 559 F.2d 735, 751 (D.C. Cir. 1977), that "the primary difference between substances in CSA Schedule I and those in Schedule II is that the former may be used for research only, whereas the latter may be prescribed by licensed physicians." The Eleventh Circuit states in United States v. Kerr, 778 F.2d 690, 698 n.7 (11th Cir. 1985) that "Schedule I drugs . . . cannot be sold in a pharmacy." Further, Title

21 U.S.C. § 812(b) prescribes that a Schedule I "drug or other substance has no currently accepted medical use in treatment in the United States." To lawfully manufacture or distribute "any controlled substance or list I chemical", a person is required to "obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by [her]." 21 U.S.C. § 822(1). Since this law revealed that Smith's offer of proof failed to establish what was required before he could present a viable defense under the clause in § 844(a) on which Smith relied, the defense was stricken.

4. Entrapment by Estoppel Defense

Smith's motion under the entrapment by estoppel defense was also rejected since his proffered evidence was in sharp contrast to the type of evidence sufficient to justify use of that defense. Fatal to this defense was Smith's failure to proffer evidence that he relied on any authorized federal government official empowered to render the claimed erroneous advice that it was okay for him to engage in the indicted conduct or an authorized agent who was given the authority from the federal government to give such advice.

As stated in United States v. Brebner, 951 F.2d 1017, 1024 (9th Cir. 1991), "the defendant must show [1] that he relied on the false information and [2] that his reliance was reasonable." The court states in Brebner that "in asserting an entrapment by estoppel defense to charges of violating federal law, a defendant is required to show reliance either on a federal government official empowered to render the claimed erroneous advice, or on an authorized agent of the federal government who . . . has been granted the authority from the

federal government to render such advice." Id. at 1027.

None of the evidence Smith proffered authorized him to engage in the marijuana activities for which he was convicted under federal law. In fact, Smith admitted in his May 7, 1999, filing in support of the defense of entrapment by estoppel that the federal government took action against marijuana buyers' clubs to close them; that the Trinity County District Attorney refused to implement the Compassionate Use Act, stating that it would be "'business as usual' regarding marijuana prosecutions."

Nevertheless, Smith said he "relied on an order from a licensed physician at a Veteran's Administration hospital who authorized the medical use of marijuana for a patient. Although the Court assumed the truth of that assertion for purposes of the *in limine* ruling, the assertion did not satisfy the requirement which obligated Smith to show he relied on an authorized federal government official empowered to render the claimed erroneous advice. Smith knew that the federal government was bent on enforcing federal drug laws and had taken action against marijuana buyers' clubs to close them.

When Smith's proffered evidence was evaluated in light of the elements of the entrapment by estoppel defense, it revealed that Smith's evidence presented, at most, "conflicting indications about his possession and growth of marijuana." See United States v. Smith, 940 F.2d 710, 715 (1st Cir. 1991). But as the First Circuit stated in Smith, "the 'mixed message' could not reasonably have invited Smith's reliance and, therefore, would not have justified a finding of entrapment by estoppel. Nothing about Smith's proffered evidence showed his marijuana activities were authorized by federal officials

or others granted the authority from the federal government to render such advice.

Therefore, his entrapment by estoppel defense was stricken.

5. Mistake of Law Defense

The truism about Smith's entrapment by estoppel defense is that it was actually a mistake of law defense. He was essentially trying to present evidence before the jury indicating that California's passage of the Compassionate Use Act caused him to be mistaken about whether federal drug laws applied to marijuana after that passage. This classic mistake of law defense is invalid and not permitted under federal law.

In United States v. de Cruz, 82 F.3d 856, 867 (9th Cir. 1996), the Ninth Circuit stated that since the defendant in that case "sought to introduce facts which established that she did not know that her conduct violated federal law," she sought to present "a classic mistake or ignorance of law argument," and as such, an invalid defense. In de Cruz the defendant was charged with "knowingly receiving and accepting forged documents" and sought to establish that she did not know that her conduct violated federal law. The Ninth Circuit stated that "the district court properly excluded evidence of defendant's ignorance of the illegality of her conduct." Id.; see United States v. Aguilar, 883 F.2d 662, 676 (9th Cir. 1989) (holding that ruling which prevented defendants "from offering evidence of mistake premised on an erroneous construction of the immigration laws . . . ").

Accordingly, this defense was properly rejected.

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6. Non-Recusal Order

Because of these rulings, Smith sought to recuse me on the basis of hyperbolic and fallacious accusations. The recusal motions reflected Smith's transparent attempts to "judge shop" and to misrepresent the record on appeal. Smith's attorneys' accusations against me seemed aimed at trying to have me bullied, insulted, and humiliated. "But our courts . . . cannot be treated disrespectfully with impunity." Illinois v. Allen, 397 U.S. 337, 346 (1970). Therefore, after being confronted by Smith's lawyers' contemptuous conduct, criminal contempt warnings issued. Additional warnings were issued when the conduct persisted. "It would degrade . . . our judicial system to permit our courts to be bullied, insulted, and humiliated" simply because a defendant disagrees with court rulings. Accordingly, nothing about my conduct was inappropriate.

Since it is clear that Smith's reasons for recusal did not justify the motion, which his lawyers must have known, Smith's ulterior motives for making the motion are evident. As stated by the Supreme Court in Liteky v. United States, 510 U.S. 540, 554-55 (1994):

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or

antagonism as to make fair judgment impossible. Id.

The denial of Smith's recusal motion was appropriate.

For the stated reasons, Smith's motion for release pending sentence is denied.

IT IS SO ORDERED.

DATED: May 21, 1999

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMUEL DEAN DIANA, BENJAMIN LUKE FRANCIS, HENRY JOSEPH CHIAPETTA, LARRY FAY SPINK,

Defendants.

NOS. CR-98-068-RHW
CR-98-069-RHW
CR-98-070-RHW
CR-98-072-RHW

ORDER GRANTING IN PART MOTION IN LIMINE

Before the Court is the Government's Motion in Limine seeking to preclude Defendants' anticipated medical necessity defense. Plaintiff is represented by Assistant United States Attorney Joseph Harrington; Defendant Samuel Diana by John Rodgers; Defendant Benjamin Francis by Gary Penar; Defendant Henry Chiapetta by Tim Trageser; and Defendant Larry Spink by Assistant Federal Defender Roger Peven. Evidence was taken on September 17, 1998.

CHARGES

All Defendants are charged with conspiracy to manufacture a controlled substance (over 100 marijuana plants) in violation of 21 U.S.C. §§ 841 & 846 and manufacturing in violation of 21 U.S.C. § 841. Diana and Francis are also charged with one count each of possession with intent to distribute and distribution in violation of 21 U.S.C. § 841. Diana also faces one count of maintaining a place for manufacture, storage, distribution or use of a controlled substance in violation of 21 U.S.C. § 856. All charges arose out of a marijuana grow operation maintained at Diana's residence in Cheney, Washington.

BACKGROUND

Diana has been afflicted with multiple sclerosis since at least 1973 and perhaps prior to then. Today he is largely confined to a wheelchair. Shortly after being diagnosed, he turned to marijuana to relieve the spasticity which tends to accompany the disease. He had tried conventional medication, but the side effects included vomiting, moodiness and loss of muscle tone. In 1977, he was convicted of possession of marijuana. On appeal, his case made headlines when Washington became one of the few states to recognize a necessity defense based on the medical use of marijuana.[1] *State v. Diana*, 24 Wn. App. 908 (1979). *Diana* overturned the conviction and remanded for a new trial after framing the test a defendant would be required to meet to be entitled to assert the defense. On retrial in 1981, Diana was acquitted upon a finding that he satisfied the test. Since then, he has continued to use marijuana in the belief that he was immunized from prosecution. In the state system, he was.

Life went on uneventfully between 1981 and 1998 when these indictments were handed down. In late 1997, both DEA and local authorities were alerted by tipsters to the grow operation. When police raided Diana's residence pursuant to a warrant, they found 175 marijuana plants and 15 pounds of processed Mexican marijuana. The authorities came to believe that amounts of this magnitude were not for personal consumption nor solely for medicinal use. Three of the four Defendants assert necessity;[2] Diana based on his own circumstances, and the others based on the premise that Diana is physically incapable of growing and processing his own marijuana. They contend this derivative defense is analogous to a "defense of others" situation.

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[1]*See State v. Hastings*, 118 Idaho 854 (1990); *State v. Bachman*, 61 Haw. 71 (1979); *see also*, *State v. Pittman*, 88 Wn. App. 188 (1997).

[2]Francis did not file an offer of proof and accordingly is precluded from arguing necessity at trial. *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989). A fifth Defendant, Guy Gardener, previously pled and has no interest in these proceedings.

DISCUSSION

A. Availability of medical necessity defense as a matter of law

A threshold factual premise is that marijuana may have medicinal value. A threshold legal premise is that the Legislative Branch makes the laws, the Executive Branch enforces them, the Judicial Branch construes them, and the citizenry obeys them, or breaks them, as the case may be. "The defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs." *State v. Hanson*, 468 N.W.2d 77, 78 (Minn. App. 1991), quoting 1 LaFave & Scott, Substantive Criminal Law § 5.4, 631 (1986).

> The common-law defense of "necessity" is often referred to as the "choice-of-evils" defense. Conduct that would otherwise be criminal is justified if the evil avoided is greater than that sought to be avoided by the law defining the offense committed, or, conversely, if the conduct promotes some value higher than the value of compliance with the law. The defense is based on public policy. In essence it reflects a determination that if, in defining the offense, the legislature had foreseen the circumstances faced by the defendant, it would have created an exception. It would have balanced the competing values and chosen the lesser evil. Obviously, then, the defense is available at common law only when the legislature has not foreseen the circumstances encountered by a defendant. If it has in fact anticipated the choice of evils and determined the balance to be struck between the competing values, defendants and courts alike are precluded from reassessing those values to determine whether certain conduct is justified.
>
> The legislature has weighed the competing value of medical use of marijuana against the values served by prohibition of its use or possession, and has set forth the narrow circumstances under which that competing value may be served. Outside those narrow circumstances, the value of medical use of marijuana cannot be deemed to outweigh the values served by its prohibition.

State v. Tate, 102 N.J. 64, 73, 505 A.2d 941, 946 (1986) (citations omitted).

The Ninth Circuit has expressed much the same view.

> In some sense, the necessity defense allows us to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it, subject to court review, when a real legislature would formally do the same under those circumstances. For example, by allowing prisoners who escape a burning jail to claim the justification of necessity, we assume the lawmaker, confronting this problem, would have allowed for an exception to the law proscribing prison escapes.

United States v. Schoon, 971 F.2d 193, 196-97 (9th Cir. 1991).

By placing marijuana in Schedule I, Congress necessarily made a finding that the drug satisfied the following criteria: "(1) it 'has a high potential for abuse,' (2) it has 'no currently accepted medical use in treatment in the United States,' and (3) '[t]here is a lack of accepted safety for use of the drug . . . under medical supervision.'" *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1133 (D.C. Cir. 1994), quoting 21 U.S.C. § 812(b)(1). Once the first prong is found satisfied, the finding is likely to remain static. However, the other two may fluctuate with time and with scientific developments. Congress provided for this possibility by delegating to the Attorney General the authority to reschedule drugs applying the criteria in § 812(b). 21 U.S.C. § 811(a)(1)(B).[3] Petitions seeking to employ that approach have been filed, albeit unsuccessfully. *Alliance for Cannabis*, *supra*, 15 F.3d at 1133; *see also, United States v. Cannabis Cultivators Club*, 5 F. Supp.2d 1086, 1102 (N.D. Cal. 1998).

Congress had in mind that medical uses for Schedule I drugs might develop and to that end enacted 21 U.S.C. § 823(f) which provides for licensing of bona fide researchers

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[3]Section 811(a) provides:

> (a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule--
>
> (1) add to such a schedule or transfer between such schedules any drug or other substance if he--
> (A) finds that such drug or other substance has a potential for abuse, and
> (B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or
> (2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.
>
> Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

to dispense such drugs in their studies even though by definition they have "no currently accepted medical use in treatment in the United States" pursuant to § 812(b)(1). See *United States v. Burton*, 894 F.2d 188, 191 n.2 (6th Cir. 1990) (noting that defendant began participating in research program dispensing marijuana after being convicted).

In sum, Congress was aware of the competing interests in cases such as Defendants' and addressed them. Courts cannot alter the substantive law by allowing a jury to act in a legislative capacity. As the parties accurately observe, no published federal decision has adopted this analysis and the case law instead tends to dispose of the medical necessity defense on the facts. It is strange that state courts have led the way, but while lacking precedential value, *Hanson* and *Tate* were correctly decided. *See also, Kaufman v. State*, 620 So.2d 90, 92-93 (Ala. Crim. App. 1992); *State v. Cramer*, 174 Ariz. 522, 524, 851 P.2d 147, 149 (1992).

B. Availability of medical necessity defense as a matter of fact

Necessity, of which medical necessity is a subcategory, requires satisfaction of the following elements, all of which must be met: (1) choice of the lesser of two or more evils; (2) the conduct was necessary to prevent imminent harm; (3) reasonable anticipation of a causal relation between the illegal conduct and the harm sought to be avoided; and (4) a lack of legal alternatives to violating the law. *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989); *accord, Schoon, supra*, 971 F.2d at 195. Availability of the defense is a proper subject of a motion in limine and "[i]t is well established in this circuit that a district judge may preclude a necessity defense by granting a motion in limine." *Aguilar, supra*, 883 F.2d at 692. In response to a motion in limine, a defendant must present an offer of proof addressing these elements.

> The sole question presented in such situations is whether the evidence, as described in the offer of proof, is insufficient as a matter of law to support the proffered defense. . . . [I]f defendants' offer of proof is deficient with regard to any of the four elements, the district judge must grant the motion to preclude evidence of necessity.

Aguilar, supra, 883 F.2d at 692-93 (internal quotation and citations omitted).

(1) Elements. There is no need to address the first three elements because the

fourth is dispositive; *i.e.*, a lack of legal alternatives to violating the law. Diana essentially gave up on medical treatment when he started using marijuana to address his symptoms in the early 1970's. Dr. Balek, who has been his treating physician since 1981, has never prescribed any medication. On Diana's retrial, the Spokane County Superior Court found that no other available drug was as effective as was marijuana in managing Defendant's symptoms. But that was seventeen years ago.

There was credible testimony at the *Daubert*[4] hearing by both Dr. Balek and Dr. Thrower that vast strides have been made since Diana abandoned conventional medicine almost two decades ago, most particularly in this decade. Dr. Thrower described a new generation of drugs on the market only the past few years which for the first time are capable of slowing or halting progression of the disease. Addressing its symptoms has also seen improvement through development of a programable pump delivery system for administration of drugs directly to the spinal cord which eliminates the unpleasant side effects that oral ingestion entailed. According to Dr. Thrower, these treatments are not inexpensive, but are heavily subsidized by pharmaceutical companies. He was also of the opinion that someone receiving Social Security disability, as Diana is, would receive governmental aid. Moreover, Diana did not even seek out a prescription for Marinol, a legal drug in pill form which contains the THC found in marijuana. This drug has been fully approved since 1986. 51 FR 17476. Nor is there any showing he sought to participate in a controlled research project pursuant to 21 U.S.C. § 823(f).[5]

In sum, there were legal alternatives which work for others, and may have worked

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[4]*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

[5]Which provides in relevant part:

> . . . Registration applications by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary, who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol. The Secretary, in determining the merits of each research protocol, shall consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use.

for Defendant. He did not try them. Failing this fourth prong, there is no need to address the others.

(2) **Quantity**. When an accused's use is truly medicinal, courts can weigh culpability under USSG § 5K2.11, the "lesser harms" provision, but the practical answer is that if an accused's use is truly medicinal, he is not likely be an accused. The charges are conspiracy to manufacture over 100 plants (175 to be exact); manufacturing, possession with intent to distribute, distribution, and in Diana's case, maintaining a drug house. In addition to the 175 plants, the search also yielded 15 pounds of Mexican marijuana. Even if the medical necessity defense were available under federal law in theory, the sheer quantity alone would preclude instructing the jury on it. *See Burton, supra*, 894 F.2d at 191.

Testimony taken at the *Daubert* hearing substantiates this conclusion. One of the more active proponents of medical marijuana in the nation, Dr. Tod Mikuriya, testified that use of the drug in treating spasticity associated with multiple sclerosis might range from one or two grams per week to as much as 28 grams weekly. He saw use on a classic bell curve with consumption by the majority of the population falling in the midrange. Even assuming Diana is at the high end of the scale, he had far more marijuana on hand than could be used for personal consumption.

The search yielded 175 plants. Under the Guidelines, that translates into 17,500 grams. USSG § 2D1.1, application note 20. The 15 pounds of Mexican marijuana found adds another 6,804 grams. *Id.*, application note 10. That is a total of 24,304 grams. Divided by usage of 28 grams per week, the result is 868 weeks, or 16.7 years. *Burton, supra*, found it "borders on the incredible" that someone in possession of more than personal use amounts would advance the medical necessity defense. 894 F.2d at 191. 16.7 years worth of marijuana crosses the border.

C. ***State v. Diana***

The Government's motion also seeks to precluded mention of *Diana, supra*. This will be reserved at present. Presumably, were the decision before the jury, Defendants

would utilize it to forward the reasonableness of their belief that Diana, and by derivation the other Defendants, were immune from prosecution. If so, the reasonableness of their belief would fail basic relevancy because mistake as to the lawfulness of conduct is rarely a defense to a general intent crime. *United States v. Sherbondy*, 865 F.2d 996, 1001 (9th Cir. 1988).

On the other hand, the case should not be tried in a vacuum. If a jury instruction can be framed which will properly instruct on the elements of this federal offense, without creating jury confusion, and still allow Defendants to testify what they were doing and why, that will be explored.

D. *Daubert*

Because the Court has assumed for purposes of disposition that Defendants made an adequate showing on the first three elements of a necessity defense, there is no need to reach the *Daubert* issues.

Accordingly, **IT IS HEREBY ORDERED:**

(1) Plaintiff's Motions in Limine (Ct. Rec. 14 (Diana), 17 (Francis), 20 (Chiapetta) and 13 (Spink)) are GRANTED in part and RESERVED in part.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 21 day of September, 1998.

ROBERT H. WHALEY
United States District Judge

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UNITED STATES OF AMERICA, Plaintiff,
v.
Mark Henry ALLERHEILIGEN, Defendant.

No. 97-40090-01-DES.

United States District Court, D. Kansas.

Nov. 19, 1998.

Robert L. Pottroff, Myers, Pottroff & Ball, Manhattan, KS, William K. Rork, Rork Law Office, Topeka, KS, for Mark Henry Allerheiligen, defendant.

Gregory G. Hough, Office of United States Attorney, Topeka, KS, for U.S.

MEMORANDUM AND ORDER

SAFFELS, J.

*1 This Memorandum and Order is issued to memorialize the court's rulings on the following pretrial motions at the hearing held on November 2, 1998:(1) Government's Motion in Limine Regarding Psychiatric and/or Psychological Testimony (Doc. 59); (2) Government's Motion in Limine Regarding Defendant's Medical Condition (Doc. 60); (3) Government's Motion in Limine Regarding Defendant's Videotape (Doc. 61); (4) Government's Motion in Limine Regarding Rehash of Suppression Hearing Evidence Regarding Legal Matters Before the Jury (Doc. 64); (5) Government's Motion in Limine to Exclude Proffered Testimony of Ed Rosenthal (Doc. 65); (6) Government's Motion in Limine Regarding Condition of Defendant's Property Following the Search, Survey of Defendant's Property, Condition of Defendant's Property That Was Returned to Him, Marijuana Plant Yield, Elements Which Constitute Personal Use of Marijuana, Marijuana Species and the Practices for Growth and Cultivation of Marijuana for Personal and/or Commercial Use, and the Condition of the Farm on 9/4/98 (Doc. 66); (7) Defendant's Motion for Additional Time to Conduct Voir Dire (Doc. 67); (8) Defendant's Motion in Limine Regarding Character Evidence of the Defendant (Doc. 68); (9) Defendant's Motion in Limine Regarding Any Allegations or Inferences of Drug Proceeds with Regard to Property Seized from Defendant's Residence and Bank Accounts (Doc. 69); (10) Defendant's Motion for Protective Order (Doc. 72); (11) Defendant's Motion in Limine to Exclude Testimony about Evidence Which Has Not Been Preserved and to Prohibit Any Testimony Regarding Opinions Based on Scientific, Technical, or Other Specialized Knowledge (Doc. 73); (12) Government's Motion for Decision on the Briefs (Doc. 79); (13) Government's Motion in Limine Regarding William Logan and Walt Carroll and for Decision on the Briefs (Doc. 80); and (14) Defendant's Motion for Sanctions (Doc. 90).

After reviewing the motions and responses, the evidence submitted in support of each motion, the arguments presented by the parties and being fully advised in the premises, the court makes the following findings and rulings.

I. Government's Motion in Limine Regarding Psychiatric and/or Psychological Testimony (Doc. 59)

The government asserts that the defendant's witness list indicates that defendant intends to call Stuart Twemlow, M.D., Psychiatry, 5040 S.W. 28th Street, Topeka, Kansas, in his case-in-chief to testify regarding defendant's "physical, medical and psychological condition." The defendant does not challenge this representation.

In his response, defendant provided a page of defendant's pretrial release form which includes a condition that defendant "participate in a program of substance abuse at the direction of the U.S. Probation Office." Defendant has not provided the court with any examination reports which were prepared by Dr. Twemlow. At oral argument, defense counsel stated that Dr. Twemlow would testify that defendant has an on-going condition of "hyperactivity" and "depression" for which he has imbibed marijuana. Dr. Twemlow would testify that this has created a "chronic" habit of personal

*2 It is apparent to the court that defendant's true intent is to offer a "justification" defense through the use of this testimony. The court notes that in the Omnibus Hearing Report, defendant represented to the court and the government that his sole defense is "general denial; put the government to proof." "Justification" is an option to defense counsel in the Omnibus Hearing Report. This defense option was

not selected by the defendant. Defendant has never modified this original representation to the court and government. Even now, defendant has not sought to amend the Omnibus Hearing Report. The court finds that to allow this testimony in the form proffered now by defendant would be in violation of the Omnibus Hearing Report. See United States v. Russell, 109 F.3d 1503, 1507-12 (10 th Cir.1997), cert. denied, 117 S.Ct. 2525 (1997) (excluding testimony of defendant's witnesses rather than granting continuance for failure to disclose witnesses prior to trial in violation of court order was not abuse of discretion, even if defendant did not act in bad faith).

The determination of whether expert testimony should be admitted rests within the sound discretion of the trial court. United States v. Barton, 731 F.2d 669, 672 (10 th Cir.1984). Prior to trial, the court must carefully scrutinize any psychiatric evidence the defendant intends to offer to determine its admissibility. See United States v. Cameron, 907 F.2d 1051, 1067 (11 th Cir.1990); United States v. Pohlot, 827 F.2d 889, 890 (3d Cir.1987). Excluding psychiatric testimony is well within the court's discretion, especially when the evidence is, in reality, offered to excuse the crime, and not to negate intent. See, e.g., United States v. Holsey, 995 F.2d 960, 962 (10 th Cir.1993) (court excluded expert testimony regarding defendant's stress-induced dissociative state); United States v. Esch, 832 F.2d 531, 535 (10 th Cir.1987) (court excluded expert testimony regarding defendant's dependent personality).

Defendant is charged with possession with intent to distribute marijuana. Defendant's use of marijuana to relieve his "hyperactivity" and "depression", i.e., an availability of marijuana for medical purposes, is prohibited by Schedule I. Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1134 (D.C.Cir.1994). Additionally, "medical necessity" is not a defense to the crime alleged in the Indictment. Courts have rejected requests for such instructions. See United States v. Griffin, 909 F.2d 1222, 1224 (8 th Cir.1990), cert. denied, 498 U.S. 1038 (1991) (rejecting "necessity" defense to heroin possession); United States v. Burton, 894 F.2d 188, 191 (6 th Cir.1990) (rejecting "medical necessity" defense to growing, possessing, and using marijuana). Defendant offers no federal case in which such an instruction was even given, much less approved on appeal.

*3 Because defendant attempts to offer this evidence to justify his possession of the marijuana, and because this is barred by Schedule I, the proffered testimony is irrelevant. It does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. "Evidence which is not relevant is not admissible." Fed.R.Evid. 402. Finally, because the proffered testimony is not relevant, the substance of the proffered testimony is collateral to the issues of this trial and would only serve to confuse and distract the jury. Rule 403 of the Federal Rules of Evidence commands the exclusion of "such detours and excursions." United States v. Buljabasic, 808 F.2d 1260, 1268 (7 th Cir.1987). Therefore, Government's Motion in Limine Regarding Psychiatric and/or Psychological Testimony (Doc. 59) is granted.

II. Government's Motion in Limine Regarding Defendant's Medical Condition (Doc. 60)

The government asserts that the defendant's witness list includes Matthew Schlotterback, M.D., who will allegedly testify regarding "his knowledge of defendant's medical history." Defendant does not dispute this representation of Dr. Schlotterback's proffered testimony. At the hearing on this motion, defense counsel represented to the court that Dr. Schlotterback would testify that defendant has suffered "chronic pain" for a period of years. Defense counsel then asserted that it was for these reasons that defendant had become a chronic personal user of marijuana.

Again, as with Dr. Twemlow's proffered testimony, it is clear to the court that defendant's true purpose is to attempt to justify his possession and use of the marijuana seized from his residence on September 3, 1997. For the same reasons articulated above in granting Government's Motion in Limine Regarding Psychiatric and/or Psychological Testimony, Government's Motion in Limine Regarding Defendant's Medical Condition (Doc. 60) is also granted.

III. Government's Motion in Limine Regarding Defendant's Videotape (Doc. 61)

The government asserts that the defendant's witness list includes witnesses who will allegedly testify regarding "the 9/19/98 video showing the eradication of wild marijuana on defendant's farm." The government submits that this evidence is inadmissible pursuant to Federal Rule of Evidence 403. At the hearing on this motion, defense counsel did not challenge the government's allegations regarding the substance of these witnesses' testimonies. In fact, defense counsel represented that there were actually two videotapes which show wild marijuana plants growing in the area of defendant's property where the marijuana at issue in this case was seized. Both videotapes were made approximately one year after the search warrant in this case was executed. The defendant alleges that all of the marijuana plants shown in these videotapes are wild marijuana plants.

*4 Defendant is charged with possession with intent to distribute marijuana. Defendant admits to personal use of marijuana. Defendant informed agents at the time the search warrant was executed that at least some of the marijuana plants seized had peat pots on them and that he raised and transplanted them. At that time, defendant also informed agents that he had planted some seeds expecting corn and sunflowers, but that the seeds grew marijuana.

The court finds that evidence that there was wild marijuana growing on some portion of defendant's property on September 9, 1998, over a year after the search warrant was executed, is irrelevant to the allegations contained in this Indictment. Therefore, Government's Motion in Limine Regarding Defendant's Videotape (Doc. 61) is granted in regard to both videotapes.

IV. Government's Motion in Limine Regarding Rehash of Suppression Hearing Evidence Regarding Legal Matters Before the Jury (Doc. 64)

In this motion, the government alleges that defendant's witness list demonstrates his intent to seek testimony from six proposed witnesses regarding "other issues previously testified to in the suppression hearing." At the hearing on this motion, defense counsel did not dispute the substance of the proffered testimonies of these witnesses. The court notes that several of these witnesses did not actually testify at the suppression hearing in this matter. The government argues that this evidence is merely offered to "rehash" legal issues previously decided by the court in its order denying defendant's motion to suppress. Thus, the government argues that this proffered evidence is irrelevant and inadmissible pursuant to Federal Rules of Evidence 401, 402, and 403.

Issues of law are the province of the court. Issues of fact are the province of the jury. See Markman v. Westview Instruments, Inc ., 517 U.S. 370, 387- 88 (1996). Legal issues contained in motions to suppress are to be decided by the courts. See, e.g., United States v. McCloud, 127 F.3d 1284, 1286 (10 th Cir.1997).

This court has previously heard all of defendant's challenges to the search and seizure issues related to this matter. The court has decided those issues against the defendant. The court finds that it would serve no legitimate purpose to rehash those issues and evidence solely related to those legal issues previously decided by the court in its order. Therefore, based upon the substance of these witnesses' proffered testimonies and the additional proffers and arguments of counsel at the hearing on this motion, the court finds that allowing this evidence would violate the spirit of Rule 403. This evidence would merely distract the attention of the jury from the true issues within its province and would confuse the jury by directing its attention to legal matters already decided by the court. Thus, to the extent that these witnesses' respective testimonies are offered to address legal issues already decided by the court, they shall not be allowed. As a result, Government's Motion in Limine Regarding Rehash of Suppression Hearing Evidence Regarding Legal Matters Before the Jury (Doc. 64) is granted.

V. Government's Motion in Limine to Exclude Proffered Testimony of Ed Rosenthal (Doc. 65)

*5 In this motion, the government seeks an order excluding the proffered testimony of Ed Rosenthal, citing United States v. Kelley, 6 F.Supp.2d 1168, 1179-85 (D.Kan.1998) (barring proffered trial testimony of Ed Rosenthal regarding marijuana plant, cultivation and growing of it, general practices of outdoor marijuana growers, processing and use of marijuana and yield of marijuana plants). Defendant opposes this motion and, in reliance upon an updated resume from Rosenthal, an affidavit of

Rosenthal, and reviews of Rosenthal's works by various newspapers, submits that he is qualified as an expert or, in the alternative, is qualified based upon his personal experiences with marijuana.

After carefully reading and considering the transcript involving Rosenthal's testimony in United States v. Wyman and Hadley, D. Kan. No. 94-40038-01/02-RDR; the motions, responses and evidence submitted on the government's motion in limine regarding Rosenthal in United States v. Kelley and McCormick, D. Kan. No. 97-40024-01/02-SAC; the evidence submitted with the government's motion in limine in this case; the evidence submitted by the defendant in his response to the government's motion in this case; the evidence, oral and documentary proffers submitted by defendant, and arguments submitted by the parties at the hearing on this motion on November 2, 1998, the court believes it is in a position where it can perform the gatekeeping function required by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Federal Rule of Evidence 702.

As previously stated, a district court has wide latitude in admitting or excluding expert testimony. See Barton, 731 F.2d at 672. The testimony of an expert must be relevant under Federal Rule of Evidence 401. Its probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed.R.Evid. 403. Furthermore, the party offering the expert testimony has the burden of laying a foundation for its admission. United States v. Williams, 95 F.3d 723, 729 (8 th Cir.1996), cert. denied, 117 S.Ct. 750 (1997).

In any case where expert testimony is proffered, the trial judge has the gatekeeping function of determining whether the testimony is not only relevant, but reliable. Kelley, 6 F.Supp.2d at 1182. In a case where the expert testimony is based solely upon experience or training, the individual Daubert factors are unnecessary, but the trial judge still must make a preliminary finding that proffered expert testimony is both relevant and reliable. Id. The court realizes that one can be an expert by reason of experience and knowledge acquired on the job.

The information before the court shows that Rosenthal has no college degrees or formal education in chemistry, botany, biology, or any other field related to the cultivation of marijuana. The defendant does not dispute this. Furthermore, as did the court in Kelley, this court observes several areas where Rosenthal's purported testimony extends beyond his demonstrated areas of specialized knowledge.

***6** Even given the additional substantial information regarding Rosenthal provided to this court by the parties, the fact that Rosenthal writes books on marijuana growing and regularly writes a popular advice column for High Times magazine does not tell the court anything about the scientific reliability of his opinions expressed therein. There is no evidence that any of Rosenthal's writings on marijuana have been recognized as a valid research effort or reference book in the field of botany. Nor is there anything of record that would lead this court to believe that it should rely on readers of High Times magazine or others having an interest in growing marijuana as a valid indicator of reliability.

Based upon the court's opinion in Kelley, the transcript from Wyman and Hadley and the affidavit of Dr. Mahmoud A. ElSohly, the Director of the Marijuana Project at the University of Mississippi since 1980, the court finds that Rosenthal's qualifications are largely a matter provable only through his own opinion. He lacks any academic background, formal education or training, and experience that would qualify him as an expert on the subject of growing, harvesting, and processing of marijuana. His unique exposure to these topics is limited to his self-directed efforts at reading reference works, talking with some researchers and growers, and then summarizing the work of others into popular "how-to" guides.

Before the court can conclude that Rosenthal's testimony is reliable as a result of these self-directed efforts, there must be a foundation from which the court can find that Rosenthal has the training or background for such research and that Rosenthal's methods for conducting this research were reliable. The court is not persuaded, from reading the transcript in Wyman and Hadley and the additional materials now supplied regarding Rosenthal's training, background and methods for conducting his research, that this foundation has been laid.

Even assuming that such a foundation is laid and Rosenthal is able to demonstrate a specialized knowledge concerning the marijuana plant and the cultivation and growing of it, the court would not allow Rosenthal to testify on the issues of yield and intent based on the foundation before this court. Rosenthal's testimony does not appear to be based on any information of a type reasonably relied upon by experts in that field. While Rosenthal offers what he believes are "conservative estimates," without a factual basis for them, they are nothing short of arbitrary opinions. " 'An expert's opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate [his] opinion; the opinion must be an expert opinion (that is, an opinion informed by the witness's expertise) rather than simply an opinion broached by a purported expert." ' United States v. Hall, 93 F.3d 1337, 1343 (7 th Cir.1996) (quoting United States v. Benson, 941 F .2d 598, 604 (7 th Cir.1991)).

*7 As for the general practices of outdoor marijuana growers, the court also finds an inadequate foundation for Rosenthal's testimony on this subject. Rosenthal's assertions that he has talked with "many" outdoor growers and that the practices of growing marijuana are uniform from state to state does not make one an expert on the general practices of outdoor growers in Kansas.

This court, as did the court in Kelley, recognizes that Rosenthal's obvious bias towards those charged with marijuana offenses does not disqualify him from becoming an expert. However, this court concurs with the Kelley court's finding that Rosenthal's self-created advocacy role can be just cause for taking more care in determining his qualifications, the relevance and reliability of his opinions, and the factual foundation for his opinions. The court also concurs with the other findings of fact and conclusions of law, regarding Ed Rosenthal, contained in the court's decision in United States v. Kelley, 6 F.Supp.2d 1168, 1179-85 (D.Kan.1998).

Based upon the information provided to the court, it appears to the court that Rosenthal's proffered testimony lacks objectivity. Furthermore, in Wyman and Hadley, the court expressed its serious reservations with Rosenthal's qualifications, indicating that "[i]t's almost voodoo research we're talking about here." (Wyman and Hadley Tr. January 27, 1995 at 98-100). The court concurs with Judge Rogers' assessment. Therefore, Government's Motion in Limine to Exclude Proffered Testimony of Ed Rosenthal (Doc. 65) is granted.

VI. Government's Motion in Limine Regarding Condition of Defendant's Property Following the Search, Survey of Defendant's Property, Condition of Defendant's Property That Was Returned to Him, Marijuana Plant Yield, Elements Which Constitute Personal Use of Marijuana, Marijuana Species and the Practices for Growth and Cultivation of Marijuana for Personal and/or Commercial Use and the Condition of the Farm on 9/4/98 (Doc. 66)

In this motion, the government challenges the defendant's proffered evidence concerning the following matters: (A) the condition of defendant's property following the search; (B) the survey of defendant's property; (C) the condition of defendant's property that was returned to him; (D) marijuana plant yield; (E) elements which constitute personal use of marijuana; (F) marijuana species; (G) the practices for growth and the cultivation of marijuana for personal and/or commercial use; and (H) the condition of the defendant's farm on September 4, 1998. The court shall discuss each issue separately.

A. Condition of Defendant's Property Following the Search

The concerns raised by the government's motion were modified orally at the hearing on this motion to specifically address evidence proffered to show that agents "tore up defendant's property," or were over-zealous in their search and evidence that the property returned to defendant was not in substantially the same condition as when it was seized. However, defendant has not proffered evidence to support any such allegations. Defendant has offered no proper purpose or explanation for such evidence.

*8 The court recognizes that agents executing the search warrant obviously went through defendant's buildings and belongings in search of evidence authorized by the search warrant. To effectuate this, officers and agents had to disturb things from their original places in search of relevant evidence. Likewise, items seized as evidence are tested in laboratories and/or stored in evidence areas in conditions unlike their normal surroundings. It

would not be unusual for items seized and subsequently tested or stored in evidence areas to be returned to their owners in a different condition than when the items were seized. If property was unnecessarily defaced or destroyed, the officers' actions may give rise to some cause of action wholly unrelated to a subsequent criminal prosecution; however, defendant offers no reason why such evidence would be relevant in the trial of this matter.

The court finds that this is not relevant evidence and shall not be allowed. This is evidence collateral to the issues of this trial, and very likely would cause the jury great sympathy for the defendant in the minds of the jury. Given its lack of relevance, Rule 403 commands the exclusion of "such detours and excursions." Buljabasic, 808 F.2d at 1268.

Defendant asserts in his response to this motion that "the condition of defendant's property after the search where there is wild marijuana is highly relevant." The court disagrees. The officers and agents that testified at the hearing on the motion to suppress testified that they seized cultivated marijuana plants, not wild marijuana plants. Government counsel reiterated this at the hearing on this motion. The presence of additional wild marijuana plants on the property after the search is certainly reasonable if officers and agents only seized what they believed were cultivated marijuana plants. However, the court will allow evidence that wild marijuana was present on defendant's property immediately after the search of defendant's residence, to the extent that defendant can show its relevance at trial. Thus, the government's motion in limine regarding the condition of defendant's property, as modified orally at the hearing and consistent with this order, is granted.

B. Condition of Defendant's Property That Was Returned to Him

Defendant asserts that evidence of the condition of the property which was returned to him is relevant "in case of a dispute regarding what was taken from the defendant's home." Defendant surmises that agents from the Kansas Bureau of Investigation ("K.B.I.") may testify untruthfully regarding gold coins seized from his residence and later returned to him. The court finds no reason to presume that K.B.I. agents will testify untruthfully. Additionally, no such dispute was evidenced by the parties at the hearing in this matter. There is no reason to believe that this evidence is now relevant.

For the reasons stated above, the government's motion in limine regarding the condition of defendant's property that was returned to him is granted, subject to reconsideration by the court during the trial of this matter. Should this evidence become relevant, it shall be allowed.

C. Survey of Defendant's Property

*9 Neither the defendant nor the government challenged that the defendant owns the property that was searched on September 3, 1997. Defendant has not proffered a proper purpose for this evidence. It is wholly collateral to the issues this jury is to decide. Thus, presentation of this evidence would be a waste of time and could confuse the issues before the jury. Evidence of the survey of defendant's property shall not be allowed absent a showing of relevance. Thus, the government's motion in limine regarding the survey of defendant's property is granted.

D. Marijuana Plant Yield

Defendant has included three witnesses on his witness list whom he represents will testify regarding yield of marijuana plants generally, and the marijuana plants seized from his residence specifically. Defendant has represented to the court that this proffered testimony is relevant to the issue of possession with intent to distribute as opposed to simple possession of marijuana.

The court notes that evidence regarding "yield," at one time, would have been appropriate at defendant's sentencing. Such is no longer the case. See United States v. Robinson, 35 F.3d 442, 447 (9 th Cir.1994), cert. denied, 513 U.S. 1197 (1995) ("the guidelines formulation is not dependent on yield"). See also United States v. Beaver, 984 F.2d 989, 991 (9 th Cir.1993) (rejecting argument that weight or potential yield of marijuana plants is relevant under 21 U.S.C. § 841(b)(1)). The sex of the plants, the yield of the plants and the variety of the plants are not elements of a violation of 21 U.S.C. § 841(a)(1). Thus, this evidence does not appear to be relevant at the trial of this matter. Furthermore, such testimony at trial will merely

confuse and mislead the jury regarding collateral matters. The court does not believe that sentencing issues, such as plant yield, are proper matters for the jury's consideration. Therefore, the government's motion in limine with regard to marijuana plant yield is granted.

E. Elements Which Constitute Personal Use of Marijuana

The government next seeks an order barring defendant's proffered testimony regarding "elements which constitute personal use of marijuana." Personal use of marijuana may, in an appropriate case, justify an instruction to the jury regarding simple possession of marijuana in violation of 21 U.S.C. § 844. Simple possession of marijuana is a lesser included offense of possession with intent to distribute marijuana. See generally, United States v. Lacey, 86 F.3d 956, 970 (10 th Cir.1996).

Defendant filed a belated proposed jury instruction regarding simple possession of marijuana on November 4, 1998, the day of trial and one day after arguments on these motions. Prior to defense counsel announcing at the hearing on November 2, 1998, that some of the evidence named in the government's motions in limine were for the purpose of seeking an instruction on simple possession of marijuana, the court was unaware that defendant intended to allege personal use.

***10** The court will instruct the jury on the essential elements of the offense alleged in the violation. If appropriate, the court will instruct the jury on the elements of the offense of simple possession of marijuana, the lesser included offense.

> Defendant is entitled to a lesser included offense instruction if (1) there was a proper request; (2) the lesser included offense includes some but not all of the elements of the offense charged; (3) the elements differentiating the two offenses are in dispute; and (4) a jury could rationally convict the defendant of the lesser offense and acquit him of the greater offense.

United States v. Moore, 108 F.3d 270, 272 (10 th Cir.1997) (citing Fitzgerald v. United States, 719 F.2d 1069, 1071 (10 th Cir.1983)). However, the court finds that to allow a lay witness's opinion testimony regarding the elements of the offense would be inappropriate. Thus, the court grants the government's motion in limine regarding the elements which constitute personal use of marijuana.

F. Marijuana Species

The government next seeks an order barring defendant's proffered testimony regarding marijuana species. Title 21, United States Code, Section 841(a)(1) makes it illegal to possess with intent to distribute or dispense marijuana, regardless of species. Thus, evidence of marijuana plant species does not appear relevant for the jury's consideration. The Congressional prohibition against marijuana was intended to apply to all forms of marijuana. United States v. Dinapoli, 519 F.2d 104, 106 (6 th Cir.1975). It appears clear from the legislative history of this law "that Congress meant to outlaw all plants popularly known as marijuana to the extent those plants possessed THC," regardless of species. United States v. Walton, 514 F.2d 201, 203-04 (D.C.Cir.1975). Therefore, the court grants the government's motion in limine regarding defendant's proffered testimony regarding marijuana plant species.

G. Practices for Growth and Cultivation of Marijuana for Personal Use and/or Commercial Use

The government next seeks an order barring defendant's proffered expert testimony regarding the practices for growth and cultivation of marijuana for personal and/or commercial use. The court notes that defendant has proffered only three witnesses to testify regarding this matter: Mr. Logan, Mr. Rosenthal and Mr. Carroll. For the reasons stated in part V of this order concerning Mr. Rosenthal and in part XIII concerning Mr. Logan and Mr. Carroll, the court finds that the defendant has failed to meet his burden regarding each of the three proffered expert testimonies. Thus, the court grants the government's motion in limine regarding defendant's proffered expert testimony regarding the practices for growth and cultivation of marijuana for personal and/or commercial use.

H. Condition of the Farm on 9/4/98

Finally, the government seeks an order barring defendant's proffered testimony regarding the condition of his property on September 4, 1998. The court notes that this is just over one year after the search of defendant's residence which gave rise to this Indictment. Defendant's response to the

government's motion asserts that this evidence is relevant because "[t]he areas from which marijuana was seized looks the exact same this year, as it did last year" and "because law enforcement officials testified there was no wild marijuana on the [sic] property the day of the search."

*11 At the hearing on this motion, both the government and defense counsel admitted that wild marijuana grows in numerous rural areas of Marshall County, Kansas, and that it will recur each year. This is not a disputed issue. Neither does it appear to be a fact in consequence, given that the government's theory of the case is cultivated marijuana, not wild marijuana. The evidence before the court is that officers and agents chopped down the marijuana plants with machetes or uprooted them entirely. Defendant alleges that officers and agents left behind wild marijuana on defendant's property.

Based upon the defendant's proffer at the hearing in this matter, the court finds that this evidence has no relevant value. It does not have any tendency to make the existence of a fact that is of consequence to the determination of this action more or less probable. Fed.R.Evid. 401. In fact, the proffer of wild marijuana is not disputed at all. "Evidence which is not relevant is not admissible." Fed.R.Evid. 402. While the court could grant the government's motion in limine for this reason alone, the court has also carefully studied the defendant's proffer of this evidence and finds that any purported probative value is substantially outweighed by its danger of unfair prejudice and confusion of the issues. Thus, pursuant to Federal Rule of Evidence 403, the court shall not allow this evidence.

I. Conclusion

For all of the reasons stated above, Government's Motion in Limine Regarding Condition of Defendant's Property Following the Search, Survey of Defendant's Property, Condition of Defendant's Property That Was Returned to Him, Marijuana Plant Yield, Elements Which Constitute Personal Use of Marijuana, Marijuana Species and the Practices for Growth and Cultivation of Marijuana for Personal and/or Commercial Use and the Condition of the Farm on 9/4/98 (Doc. 66) is granted.

VII. Defendant's Motion for Additional Time to Conduct Voir Dire (Doc. 67)

Defendant seeks additional time to conduct voir dire, mistakenly relying on the court's rules of practice and procedure in civil cases. This court does not ordinarily limit the amount of time given to attorneys in criminal cases to conduct voir dire. For this reason, the Defendant's Motion for Additional Time to Conduct Voir Dire (Doc. 67) is denied as moot.

VIII. Defendant's Motion in Limine Regarding Character Evidence (Doc. 68)

The defendant seeks an order barring the government from introducing evidence pursuant to Rule 404(b) of the Federal Rules of Evidence. The government has responded that it does not intend to offer evidence pursuant to Rule 404(b). Thus, defendant's Motion in Limine Regarding Character Evidence is denied as moot.

IX. Defendant's Motion in Limine Regarding Any Allegations or Inferences of Drug Proceeds with Regard to Property Seized from Defendant's Residence and Bank Accounts (Doc. 69)

Defendant seeks an order barring the government from offering any evidence that items of value seized from his home pursuant to the search warrant were "a result of proceeds from drug sales." The government's response acknowledges that to the extent that the evidence shows that a defendant's wealth is explicable, it is not generally relevant. However, the government asserts that to the extent that the evidence shows a defendant's wealth is inexplicable, it is admissible.

*12 Courts have routinely held unexplained wealth admissible. See United States v. All Right, Title and Interest, 983 F.2d 396, 405 (2d Cir.1993) (allowing use of unexplained wealth in conjunction with evidence of drug trafficking as proof of probable cause); United States v. Antzoulatos, 962 F.2d 720, 727 (7 th Cir.1992) (presence of unexplained wealth evidence admissible). Given the government's representations to the court that this evidence would only be offered to the extent that defendant's wealth is inexplicable, defendant's motion is without merit. Therefore, Defendant's Motion in Limine Regarding Any Allegations or Inferences of Drug Proceeds with Regard to Property Seized from Defendant's

Residence and Bank Accounts (Doc. 69) is denied.

X. Defendant's Motion for Protective Order (Doc. 72)

Defendant seeks a protective order barring the government "from taking any action to influence the testimony of Walt Carroll through contacting his employer, and to prevent the State of Nebraska from terminating or constructively discharging Mr. Carroll because he has been subpoenaed to testify as an expert for the defense." Government's counsel has responded that he has independently confirmed that Sheriff Coggins and the Marshall County Attorney did contact Carroll and Carroll's supervisor sometime prior to the government's receipt of this motion. Both men indicated that this contact was to determine Carroll's qualifications to testify as an expert on marijuana matters. Both men indicated that Carroll's supervisor did not have knowledge of Carroll's participation in this case.

The court finds that this was an appropriate reason for government representatives to contact Mr. Carroll and his supervisor. Additionally, government counsel has represented to the court that he has directed Sheriff Coggins, SA Christy, K.B.I., and the Marshall County Attorney to have no further contact with Carroll and his supervisor. Furthermore, this court does not have jurisdiction to order the state of Nebraska not to discharge Mr. Carroll. Therefore, Defendant's Motion for Protective Order (Doc. 72) is denied.

XI. Defendant's Motion in Limine to Exclude Testimony about Evidence Which Has Not Been Preserved and to Prohibit Any Testimony Regarding Opinions Based on Scientific, Technical, or Other Specialized Knowledge (Doc. 73)

Defendant's motion alleges that the government's formal witness list did not contain addresses, dates of birth, statements, qualifications of the witnesses, or any reports generated by the witnesses listed. His motion further alleges that the government did not state that any of its witnesses would testify as experts. Additionally, his motion alleges that for these reasons any evidence regarding "plants with peat pots" should be limited to those "plants with peat pots that were properly preserved for evidentiary purposes through videotape, photographing, or physically taken into custody."

The parties acknowledge, and the Omnibus Hearing Report shows, that this is a full discovery matter. The parties further acknowledge that full discovery has been provided to defendant. The government's witnesses authored reports, or their observations and activities were recorded in agents' reports authored by others present at the time. At the suppression hearing in this matter, the government presented the bulk of its case against this defendant. The court finds that the identities of the government's witnesses, their business addresses and the substance of their respective testimonies has been revealed to defendant.

*13 The court further finds that included in the government's full discovery were the reports of Jim Schieferecke, Forensic Chemist with the K.B.I. Schieferecke performed the analysis of the substances seized in this matter. Additionally, the Omnibus Hearing Report filed in this matter and signed by counsel for the parties fully disclosed the government's intent to offer expert testimony in this matter. Mr. Schieferecke is well known to this court and counsel for defendant, through his numerous testimonies on the behalf of the K.B.I. in the United States District Court for the District of Kansas and in the Kansas state courts. The court finds that Schieferecke's qualifications and proposed trial testimony has been fully disclosed to the defendant.

The court also finds that the Omnibus Hearing Report does not compel the government to disclose the dates of birth of witnesses. However, the defendant has agreed to make such a disclosure of its witnesses to the government. The clear purpose of this requirement is to ensure that criminal history checks can be done to determine whether witnesses have previously been convicted of any crime which would form the basis of impeachment questions. Counsel for the government has disclosed that the officers, agents and employees of law enforcement have no criminal history records and that the witnesses that the government intends to call in its case-in-chief do not have any criminal histories.

The court finds that the K.B.I., like most law enforcement agencies, has limited storage space for evidence seized by its agents. For this reason, in appropriate cases, only representative samples of evidence are kept when large quantities of like evidence are seized. Defendant complains that

agents did not seize and/or photograph all of the peat pots that they observed on his property. Defendant alleges that they should be barred from offering any testimony regarding their respective observations at or about defendant's residence which were not reported, videotaped, photographed, or seized.

After establishing to the court's satisfaction that a witness can offer an opinion as a lay witness under Federal Rule of Evidence 701, witnesses may testify to their relevant observations, upon proper foundation, whether contained in a report or not. If an agent offers testimony not contained in a report, this may be inquired into on cross-examination to challenge the credibility of the statement. This goes to the weight of the evidence and not to its admissibility. Therefore, the court finds that the defendant is free to make this argument to the jury, but the government shall not be barred from offering this testimony.

The court finds that the agents responsible for the count, and those who personally attended the plant gathering and counting, observed the plants and peat pots and can testify to their respective observations. The court further finds that photographs and a video tape of the marijuana patch may also be admitted into evidence. See United States v. Cody, 7 F.3d 1523, 1527 (10 th Cir.1993) (finding testimony of agent responsible for counting plants, photographs, and a videotape of the count to be sufficient evidence of quantity). For all of the above reasons, Defendant's Motion in Limine to Exclude Testimony about Evidence Which Has Not Been Preserved and to Prohibit Any Testimony Regarding Opinions Based on Scientific, Technical, or Other Specialized Knowledge (Doc. 73) is denied.

XII. Government's Motion for Decision on the Briefs (Doc. 79)

***14** The government seeks an order, regarding its motion in limine to exclude the defendant's proffered trial testimony of Ed Rosenthal, on the briefs without an evidentiary hearing. Defendant's response acknowledges that the court is not required to hold an evidentiary hearing on this issue, but argues that the government's reliance on the transcript from United States v. Wyman and Hadley, D. Kan. No. 94-40038-01/02-RDR and the opinion in United States v. Kelley, 6 F.Supp.2d 1168, 1179-85 (D.Kan.1998) is misplaced. Defendant asserts that these decisions are not binding on this court and that the additional information regarding Rosenthal merits an evidentiary hearing.

The court finds that while the courts' respective opinions in United States v. Wyman and Hadley and United States v. Kelley, are not binding on this court, these opinions, and the analysis contained therein, are instructive regarding Mr. Rosenthal's alleged qualifications and proffered testimony. The court further finds that, although a defendant may seek an evidentiary hearing on the government's motion in limine,

> Daubert does not mandate one. Nevertheless, an appellate court must have before it a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law. The analysis outlined in Daubert is extensive, requiring the district court to 'carefully and meticulously' review the proffered scientific evidence.

United States v. Call, 129 F.3d 1402, 1405 (10 th Cir.1997) (citation omitted).

The court allowed defense counsel an unlimited opportunity to proffer information regarding Rosenthal's qualifications and proposed testimony at the hearing on the government's motion in limine on November 2, 1998. Counsel for defendant, William K. Rork, has sponsored Rosenthal on at least two prior occasions in the District of Kansas: United States v. Wyman and Hadley, D. Kan. No. 94-40038-01/02-RDR and United States v. Kelley and McCormick, D. Kan. No. 97-40024-01/02-SAC. Thus, Mr. Rork is intimately familiar with Rosenthal's qualifications and proposed testimony. At the hearing on the government's motion in limine to exclude Rosenthal's proffered testimony, Mr. Rork provided the court, orally and in documentary form, every reason known to defendant to allow Rosenthal's proffered testimony in this trial.

In considering this motion, the court has fully reviewed and considered the transcripts of Rosenthal's testimony from United States v. Wyman and Hadley, D. Kan. No. 94-40038-01/02-RDR; the motions, pleadings and evidence submitted regarding the government's motion in limine, and defendant's responses thereto, regarding Rosenthal in United States v. Kelley and McCormick, D. Kan. No. 97-40024-01/02-SAC; the evidence submitted with the government's motion in limine in this case; the

evidence submitted by the defendant in his responses to the government's motion in this case; and the evidence and arguments submitted by the parties at the hearing on this motion on November 2, 1998. Based on a review of all of the above material, the court finds that it has been provided with sufficient evidence to decide this motion. The alleged changes in Rosenthal's credentials have been provided to the court. Additionally, the court finds that defendant's proffered testimony from Rosenthal is essentially the same as his prior testimony in the matter of United States v. Wyman and Hadley. Therefore, the Government's Motion for Decision on the Briefs (Doc. 79) is granted.

XIII. Government's Motion in Limine Regarding William Logan and Walt Carroll and for Decision on the Briefs (Doc. 80)

***15** The government seeks an order barring the proffered trial testimonies of William Logan and Walt Carroll, based upon the information provided to the government during reciprocal discovery. At the hearing on this motion, neither Logan nor Carroll appeared to testify for the defendant. The defendant submitted a resume from Carroll with attachments that show he has attended several law enforcement related schools and an affidavit that evidences what his proffered testimony would be. The defendant has also submitted Logan's resume and an affidavit indicating his unavailability to testify at the hearing on the pretrial motions.

The defendant bears the burden of laying a foundation for the expert testimony. Williams, 95 F.3d at 729. " 'Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." ' United States v. Diallo, 40 F.3d 32, 34 (2d Cir.1994) (quoting United States v. Lewis, 954 F.2d 1386, 1390 (7 th Cir.1992)).

The court finds that Carroll's credentials evidence no training, experience or schooling in matters specifically related to marijuana identification, marijuana eradication, marijuana processing, marijuana use, and marijuana processing. In addition, the court finds that the information supplied by defendant regarding Logan fails to meet the standards discussed above regarding the admissibility of his proffered expert testimony. Based upon the information provided to the court in defendant's response and at the hearing on this motion, the court finds that defendant has failed to meet the burden of laying the foundation for this expert testimony. The court finds that the purported testimonies of Logan and Carroll extend beyond their respective demonstrated areas of specialized knowledge.

As noted with regard to Rosenthal, the information provided to the court by defendant tells the court nothing about the scientific reliability of the opinions proffered by Logan and Carroll. There is no evidence that either man's writings on marijuana have been recognized as a valid research effort or reference book in the field of botany. There is nothing of record that would lead this court to believe that it should rely on Mr. Logan's former clients, members of the California criminal defense bar, California marijuana users or the readers of his articles as a valid indicator of reliability. Nor is there anything of record that would lead this court to believe that it should rely on Mr. Carroll's perusal of defendant's property after officers and agents had seized the evidence that will be admitted in this trial and of the general area wherein wild marijuana plants grew as evidence of the yield of the plants seized. Additionally, Mr. Carroll's resume shows very limited, if any, training and experience in marijuana eradication and cultivation. This tells the court that Mr. Carroll's proffered testimony is not scientifically reliable.

***16** The court finds that an evidentiary hearing is not necessary to resolve the government's motion in limine. The court has before it a sufficiently developed record in order to allow the court to properly apply the relevant law. The court has carefully and meticulously reviewed the substantial proffer of evidence submitted by defendant in support of both Mr. Carroll and Mr. Logan. Defendant has presented the areas about which each witness would testify and all of the evidence available regarding each alleged expert. Defendant does not allege that additional relevant evidence exists regarding either man.

For all of the reasons stated above, Government's Motion in Limine Regarding William Logan and Walt Carroll and for Decision on the Briefs (Doc. 80) is granted.

XIV. Defendant's motion for sanctions (Doc. 90)

Defendant's motion alleges that, in December of 1997, defense counsel visited the Kansas Bureau of Investigation laboratory in Topeka to examine all of the evidence. He alleges that at that time, counsel "were not shown 100 marijuana plants with root systems" or evidence of "peat pots and their origin." The motion states that on October 29, 1998, government's counsel informed defense counsel that he had observed over 100 plants with root systems attached at the K.B.I. laboratory. Defendant seeks sanctions against the government for failure to disclose material evidence.

Defense counsel admits that government's counsel was unaware of this alleged mix-up, and that the government's counsel has offered to make the marijuana plants available for their perusal on Monday, November 2, 1998. The court further notes that in the government's response to defendant's pretrial motions, government's counsel has again offered to make available all of the reports and evidence in this case at any mutually convenient time prior to trial. The government's response to this motion indicates that this offer remains open. Counsel for the government reiterated this at the hearing on this motion.

The court finds that, based upon the representations of counsel, it appears to the court that what has occurred is a simple misunderstanding. The court further finds that the government's standing offer to allow defense counsel to examine all of the reports and evidence in this case at any mutually convenient time prior to trial is curative of the matters alleged by defendant. Therefore, Defendant's Motion for Sanctions (Doc. 90) is denied.

IT IS THEREFORE BY THE COURT ORDERED that Government's Motion in Limine Regarding Psychiatric and/or Psychological Testimony (Doc. 59); Government's Motion in Limine Regarding Defendant's Medical Condition (Doc. 60); Government's Motion in Limine Regarding Defendant's Videotape (Doc. 61); Government's Motion in Limine Regarding Rehash of Suppression Hearing Evidence Regarding Legal Matters Before the Jury (Doc. 64); Government's Motion in Limine to Exclude Proffered Testimony of Ed Rosenthal (Doc. 65); Government's Motion in Limine Regarding Condition of Defendant's Property Following the Search, Survey of Defendant's Property, Condition of Defendant's Property That Was Returned to Him, Marijuana Plant Yield, Elements Which Constitute Personal Use of Marijuana, Marijuana Species and the Practices for Growth and Cultivation of Marijuana for Personal and/or Commercial Use and the Condition of the Farm on 9/4/98 (Doc. 66); Government's Motion for Decision on the Briefs (Doc. 79); and Government's Motion in Limine Regarding William Logan and Walt Carroll and for Decision on the Briefs (Doc. 80) are granted.

*17 IT IS FURTHER ORDERED that Defendant's Motion in Limine Regarding Any Allegations or Inferences of Drug Proceeds with Regard to Property Seized from Defendant's Residence and Bank Accounts (Doc. 69); Defendant's Motion for Protective Order (Doc. 72); Defendant's Motion in Limine to Exclude Testimony about Evidence Which Has Not Been Preserved and to Prohibit Any Testimony Regarding Opinions Based on Scientific, Technical, or Other Specialized Knowledge (Doc. 73); and Defendant's Motion for Sanctions (Doc. 90) are denied.

IT IS FURTHER ORDERED that Defendant's Motion for Additional Time to Conduct Voir Dire (Doc. 67) and Defendant's Motion in Limine Regarding Character Evidence of the Defendant (Doc. 68) are denied as moot.

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Charles B. MILLER, Superintendent, Pendleton Correctional Facility, et al., petitioners,
v.
Richard A. FRENCH et al.
United States, petitioner,
v.
Richard A. French et al.

Nos. 99-224, 99-582.

Supreme Court of the United States

Argued April 18, 2000.

Decided June 19, 2000. [FN*]

FN* Together with No. 99-582, United States v. French et al., also on certiorari to the same court.

After state prison inmates obtained injunction against certain unconstitutional prison conditions, which was upheld, 777 F.2d 1250, state petitioned to terminate injunction under Prison Litigation Reform Act (PLRA). The United States District Court for the Southern District of Indiana, Hugh Dillin, J., granted preliminary injunction against enforcement of PLRA's automatic stay provision, and state appealed. The Court of Appeals, Diane P. Wood, Circuit Judge, 178 F.3d 437, affirmed. Certiorari was granted. The Supreme Court, Justice O'CONNOR, held that: (1) automatic stay provision of the PLRA does not permit district courts to exercise their equitable authority to suspend operation of stay; (2) automatic stay provision does not violate separation of powers principles; and (3) Congress' imposition of time limit after which the filing of motion to terminate prospective relief under a "prison conditions" consent decree would operate as automatic stay of decree did not, in itself, offend structural concerns underlying separation of powers.

Reversed and remanded.

Justice SOUTER concurred in part and dissented in part, and filed opinion, in which Justice GINSBURG joined.

Justice BREYER dissented and filed opinion, in which Justice STEVENS joined.

[1] FEDERAL COURTS ⚿34
170Bk34
Federal courts do not lightly assume that Congress meant to restrict their equitable powers.

[2] CONSTITUTIONAL LAW ⚿48(3)
92k48(3)
Constitutionally doubtful constructions of statute should be avoided where fairly possible.

[3] STATUTES ⚿181(1)
361k181(1)
Where Congress has made its intent clear, courts must give effect to that intent.

[4] FEDERAL CIVIL PROCEDURE ⚿2397.5
170Ak2397.5
Automatic stay provision of the Prison Litigation Reform Act (PLRA), which provides that any motion to terminate prospective relief under a "prison conditions" consent decree shall, after specific time, operate as automatic stay of decree, does not permit district courts to exercise their equitable authority to suspend operation of stay. 18 U.S.C.A. § 3626(e)(2).

[5] MANDAMUS ⚿1
250k1
Mandamus is extraordinary remedy that is granted only in exercise of sound discretion.

[5] MANDAMUS ⚿7
250k7
Mandamus is extraordinary remedy that is granted only in exercise of sound discretion.

[6] MANDAMUS ⚿10
250k10
Extraordinary remedy of mandamus requires a showing of clear and indisputable right to issuance of writ.

[7] EQUITY ⚿2
150k2
Courts should not construe statute to displace their traditional equitable authority, absent the clearest command or an inescapable inference to the contrary.

[8] CONSTITUTIONAL LAW ⚿48(3)
92k48(3)
Canon of constitutional doubt permits court to construe statute so as to avoid constitutional questions only where the saving construction is not plainly contrary to intent of Congress; court cannot press statutory construction to the point of

disingenuous evasion, not even to avoid constitutional question.

[8] CONSTITUTIONAL LAW ⚖48(8)
92k48(8)
Canon of constitutional doubt permits court to construe statute so as to avoid constitutional questions only where the saving construction is not plainly contrary to intent of Congress; court cannot press statutory construction to the point of disingenuous evasion, not even to avoid constitutional question.

[9] CONSTITUTIONAL LAW ⚖50
92k50
While the boundaries between the three branches of government are not hermetically sealed, the Constitution prohibits one branch from encroaching upon central prerogatives of another.

[10] FEDERAL COURTS ⚖12.1
170Bk12.1
Article III gives federal judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy. U.S.C.A. Const. Art. 3, § 1 et seq.

[11] CONSTITUTIONAL LAW ⚖57
92k57
Automatic stay provision of the Prison Litigation Reform Act (PLRA), which provides that any motion to terminate prospective relief under a "prison conditions" consent decree shall, after specific time, operate as automatic stay of prior decree, does not violate separation of powers principles, as direct legislative suspension of court order; provision does not unconstitutionally suspend or reopen judgment of Article III court, but merely implements new standards established by Congress for grant of prospective relief under the Prison Litigation Reform Act by requiring court to stay any such relief which was granted in absence of findings required under the PLRA. U.S.C.A. Const. Art. 3, § 1 et seq.; 18 U.S.C.A. § 3626(e)(2).

[11] FEDERAL CIVIL PROCEDURE ⚖3
170Ak3
Automatic stay provision of the Prison Litigation Reform Act (PLRA), which provides that any motion to terminate prospective relief under a "prison conditions" consent decree shall, after specific time, operate as automatic stay of prior decree, does not violate separation of powers principles, as direct legislative suspension of court order; provision does not unconstitutionally suspend or reopen judgment of Article III court, but merely implements new standards established by Congress for grant of prospective relief under the Prison Litigation Reform Act by requiring court to stay any such relief which was granted in absence of findings required under the PLRA. U.S.C.A. Const. Art. 3, § 1 et seq.; 18 U.S.C.A. § 3626(e)(2).

[11] FEDERAL CIVIL PROCEDURE ⚖2397.5
170Ak2397.5
Automatic stay provision of the Prison Litigation Reform Act (PLRA), which provides that any motion to terminate prospective relief under a "prison conditions" consent decree shall, after specific time, operate as automatic stay of prior decree, does not violate separation of powers principles, as direct legislative suspension of court order; provision does not unconstitutionally suspend or reopen judgment of Article III court, but merely implements new standards established by Congress for grant of prospective relief under the Prison Litigation Reform Act by requiring court to stay any such relief which was granted in absence of findings required under the PLRA. U.S.C.A. Const. Art. 3, § 1 et seq.; 18 U.S.C.A. § 3626(e)(2).

[12] FEDERAL COURTS ⚖1.1
170Bk1.1
Decision of inferior court within Article III hierarchy is not final word of judicial department, unless time for appeal has expired, and it is obligation of the last court in hierarchy that rules on case to give effect to Congress' latest enactment, even when that has the effect of overturning judgment of inferior court. U.S.C.A. Const. Art. 3, § 1 et seq.

[12] FEDERAL COURTS ⚖445
170Bk445
Decision of inferior court within Article III hierarchy is not final word of judicial department, unless time for appeal has expired, and it is obligation of the last court in hierarchy that rules on case to give effect to Congress' latest enactment, even when that has the effect of overturning judgment of inferior court. U.S.C.A. Const. Art. 3, § 1 et seq.

[13] CONSTITUTIONAL LAW ⚖57
92k57
Once judicial decision achieves finality, it becomes last word of judicial department, and because Article III gives federal judiciary the power, not merely to rule on cases, but to decide them, Congress cannot retroactively command Article III courts to reopen

their final judgments. U.S.C.A. Const. Art. 3, § 1 et seq.

[14] FEDERAL CIVIL PROCEDURE ⚖2397.4
170Ak2397.4
Prospective relief under consent decree is subject to continuing supervisory jurisdiction of court, and may therefore be altered according to subsequent changes in the law.

[15] FEDERAL CIVIL PROCEDURE ⚖2397.4
170Ak2397.4
Prospective relief under consent decree must be modified if, as it later turns out, one or more of obligations placed upon parties has become impermissible under federal law.

[16] CONSTITUTIONAL LAW ⚖57
92k57
Congress' imposition of time limit after which the filing of motion to terminate prospective relief under a "prison conditions" consent decree would operate as automatic stay of decree did not, in itself, offend structural concerns underlying the Constitution's separation of powers. U.S.C.A. Const. Art. 3, § 1 et seq.; 18 U.S.C.A. § 3626(e)(2).

[16] FEDERAL CIVIL PROCEDURE ⚖3
170Ak3
Congress' imposition of time limit after which the filing of motion to terminate prospective relief under a "prison conditions" consent decree would operate as automatic stay of decree did not, in itself, offend structural concerns underlying the Constitution's separation of powers. U.S.C.A. Const. Art. 3, § 1 et seq.; 18 U.S.C.A. § 3626(e)(2).

[16] FEDERAL CIVIL PROCEDURE ⚖2397.5
170Ak2397.5
Congress' imposition of time limit after which the filing of motion to terminate prospective relief under a "prison conditions" consent decree would operate as automatic stay of decree did not, in itself, offend structural concerns underlying the Constitution's separation of powers. U.S.C.A. Const. Art. 3, § 1 et seq.; 18 U.S.C.A. § 3626(e)(2).

[17] CONSTITUTIONAL LAW ⚖308
92k308
Whether time for litigating matter is so short that it deprives litigants of meaningful opportunity to be heard is due process question. U.S.C.A. Const.Amend. 14.

[18] CONSTITUTIONAL LAW ⚖67
92k67
In contrast to due process, which serves principally to protect personal rights of litigants to full and fair hearing, separation of powers principles are primarily addressed to structural concerns of protecting role of independent judiciary within the constitutional design. U.S.C.A. Const. Art. 3, § 1 et seq.; Amend. 14.

[18] CONSTITUTIONAL LAW ⚖251.6
92k251.6
In contrast to due process, which serves principally to protect personal rights of litigants to full and fair hearing, separation of powers principles are primarily addressed to structural concerns of protecting role of independent judiciary within the constitutional design. U.S.C.A. Const. Art. 3, § 1 et seq.; Amend. 14.

Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

*1 In 1975, prison inmates at the Pendleton Correctional Facility brought a class action, and the District Court issued an injunction, which remains in effect, to remedy violations of the Eighth Amendment regarding conditions of confinement. Congress subsequently enacted the Prison Litigation Reform Act of 1995 (PLRA), which, as relevant here, sets a standard for the entry and termination of prospective relief in civil actions challenging prison conditions. Specifically, 18 U.S.C. § 3626(b)(2) provides that a defendant or intervenor may move to terminate prospective relief under an existing injunction that does not meet that standard; § 3626(b)(3) provides that a court may not terminate such relief if it makes certain findings; and § 3626(e)(2) dictates that a motion to terminate such relief "shall operate as a stay" of that relief beginning 30 days after the motion is filed and ending when the court rules on the motion. In 1997, petitioner prison officials (hereinafter State) filed a motion to terminate the remedial order under § 3626(b). Respondent prisoners moved to enjoin the operation of the automatic stay, arguing that § 3626(e)(2) violates due process and separation of powers principles. The District Court enjoined the stay, the State appealed, and the United States intervened to defend § 3626(e)(2)'s constitutionality. In affirming, the

Seventh Circuit concluded that § 3626(e)(2) precluded courts from exercising their equitable powers to enjoin the stay, but that the statute, so construed, was unconstitutional on separation of powers grounds.

Held:

1. Congress clearly intended to make operation of the PLRA's automatic stay provision mandatory, precluding courts from exercising their equitable power to enjoin the stay. The Government contends that (1) the Court should not interpret a statute as displacing courts' traditional equitable authority to preserve the status quo pending resolution on the merits absent the clearest command to the contrary and (2) reading § 3626(e)(2) to remove that equitable power would raise serious separation of powers questions, and therefore should be avoided under the canon of constitutional doubt. But where, as here, Congress has made its intent clear, this Court must give effect to that intent. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215, 82 S.Ct. 1328, 8 L.Ed.2d 440. Under § 3626(e)(2), a stay is automatic once a state defendant has filed a § 3626(b) motion, and the command that it "shall operate as a stay during" the specified time period indicates that it is mandatory throughout that period. The statute's plain meaning would be subverted were § 3626(e)(2) interpreted merely as a burden-shifting mechanism that does not prevent courts from suspending the stay. Viewing the automatic stay provision in the context of § 3626 as a whole confirms the Court's conclusion. Section 3626(e)(4) provides for an appeal from an order preventing the automatic stay's operation, not from the denial of a motion to enjoin a stay. This provision's one-way nature only makes sense if the stay is required to operate during a specific time period, such that any attempt by a district court to circumvent the mandatory stay is immediately reviewable. Mandamus is not a more appropriate remedy because it is granted only in the exercise of sound discretion. Given that curbing the courts' equitable discretion was a principal objective of the PLRA, it would have been odd for Congress to have left § 3626(e)(2)'s enforcement to that discretion. Section 3626(e)(3) also does not support the Government's view, for it only permits the stay's starting point to be delayed for up to 90 days; it does not affect the stay's operation once it begins. While construing § 3626(e)(2) to remove courts' equitable discretion raises constitutional questions, the canon of constitutional doubt permits the Court to avoid such questions only where the saving construction is not plainly contrary to Congress' intent. Pp. --- - ----, 6-12.

2. Section 3626(e) does not violate separation of powers principles. The Constitution prohibits one branch of the Government from encroaching on the central prerogatives of another. Article III gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior Article III courts. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-219, 115 S.Ct. 1447, 131 L.Ed.2d 328. Respondents contend that § 3626(e)(2) violates the separation of powers principle by legislatively suspending a final judgment of an Article III court in violation of Plaut and Hayburn's Case, 2 U.S. (Dall.) 408, 409, 1 L.Ed. 436. Unlike the situation in Hayburn's Case, § 3626(e)(2) does not involve direct review of a judicial decision by the Legislative or Executive Branch. Nor does it involve the reopening of a final judgment, as was addressed in Plaut. Plaut was careful to distinguish legislation that attempted to reopen the dismissal of a money damages suit from that altering the prospective effect of injunctions entered by Article III courts. Prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law. Cf. Landgraf v. USI Film Products, 511 U.S. 244, 273, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). This conclusion follows from the Court's decision in Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 432, 15 L.Ed. 435 (Wheeling Bridge II), that prospective relief it issued in Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 14 L.Ed. 249 (Wheeling Bridge I), became unenforceable after Congress altered the law underlying the ongoing relief. Applied here, the Wheeling Bridge II principles demonstrate that § 3626(e)(2)'s automatic stay does not unconstitutionally suspend or reopen an Article III court's judgment. It does not tell judges when, how, or what to do, but reflects the change implemented by § 3626(b), which establishes new standards for prospective relief. As Plaut and Wheeling Bridge II instruct, when Congress changes the law underlying the judgment awarding such relief, that relief is no longer enforceable to the extent it is inconsistent with the new law. Although the remedial injunction here is a final judgment for purposes of appeal, it is not the last word of the judicial department, for it is subject to the court's continuing supervisory jurisdiction, and therefore may be altered according to subsequent changes in the law. For the same reasons, § 3626(e)(2) does not violate the separation of powers

principle articulated in United States v. Klein, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519, where the Court found unconstitutional a statute purporting to prescribe rules of decision to the Federal Judiciary in cases pending before it. That § 3626(e)(2) does not itself amend the legal standard does not help respondents; when read in the context of § 3626 as a whole, the provision does not prescribe a rule of decision but imposes the consequences of the court's application of the new legal standard. Finally, Congress' imposition of the time limit in § 3626(e)(2) does not offend the structural concerns underlying the separation of powers. Whether that time is so short that it deprives litigants of an opportunity to be heard is a due process question not before this Court. Nor does the Court have occasion to decide here whether there could be a time constraint on judicial action that was so severe that it implicated structural separation of powers concerns. Pp. --- - ----, 12-21.

*2 178 F.3d 437, reversed and remanded.

*3 O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined, and in which SOUTER and GINSBURG, JJ., joined as to Parts I and II. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined.

Jon Laramore, Indianapolis, IN, for petitioners.

Barbara D. Underwood, Washington, DC, for the United States.

Kenneth J. Falk, Indianapolis, IN, for respondents.

Justice O'CONNOR delivered the opinion of the Court.

The Prison Litigation Reform Act of 1995 (PLRA) establishes standards for the entry and termination of prospective relief in civil actions challenging prison conditions. §§ 801-810, 110 Stat. 1321-66 to 1321-77. If prospective relief under an existing injunction does not satisfy these standards, a defendant or intervenor is entitled to "immediate termination" of that relief. 18 U.S.C. § 3626(b)(2) (1994 ed., Supp. IV). And under the PLRA's "automatic stay" provision, a motion to terminate prospective relief "shall operate as a stay" of that relief during the period beginning 30 days after the filing of the motion (extendable to up to 90 days for "good cause") and ending when the court rules on the motion. §§ 3626(e)(2), (3). The superintendent of the Pendleton Correctional Facility, which is currently operating under an ongoing injunction to remedy violations of the Eighth Amendment regarding conditions of confinement, filed a motion to terminate prospective relief under the PLRA. Respondent prisoners moved to enjoin the operation of the automatic stay provision of § 3626(e)(2), arguing that it is unconstitutional. The District Court enjoined the stay, and the Court of Appeals for the Seventh Circuit affirmed. We must decide whether a district court may enjoin the operation of the PLRA's automatic stay provision and, if not, whether that provision violates separation of powers principles.

I

A

This litigation began in 1975, when four inmates at what is now the Pendleton Correctional Facility brought a class action under Rev. Stat. § 1979, 42 U.S.C. § 1983, on behalf of all persons who were, or would be, confined at the facility against the predecessors in office of petitioners (hereinafter State). 1 Record, Doc. No. 1, p. 2. After a trial, the District Court found that living conditions at the prison violated both state and federal law, including the Eighth Amendment's prohibition against cruel and unusual punishment, and the court issued an injunction to correct those violations. French v. Owens, 538 F.Supp. 910 (S.D.Ind.1932), aff'd in part, vacated and remanded in part, 777 F.2d 1250 (C.A.7 1985). While the State's appeal was pending, this Court decided Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), which held that the Eleventh Amendment deprives federal courts of jurisdiction over claims for injunctive relief against state officials based on state law. Accordingly, the Court of Appeals for the Seventh Circuit remanded the action to the District Court for reconsideration. 777 F.2d, at 1251. On remand, the District Court concluded that most of the state law violations also ran afoul of the Eighth Amendment, and it issued an amended remedial order to address those constitutional violations. The order also accounted for improvements in living conditions at the Pendleton facility that had occurred in the interim. Ibid.

The Court of Appeals affirmed the amended remedial order as to those aspects governing overcrowding and double celling, the use of mechanical restraints, staffing, and the quality of food

and medical services, but it vacated those portions pertaining to exercise and recreation, protective custody, and fire and occupational safety standards. Id., at 1258. This ongoing injunctive relief has remained in effect ever since, with the last modification occurring in October 1988, when the parties resolved by joint stipulation the remaining issues related to fire and occupational safety standards. 1 Record, Doc. No. 14.

B

*4 In 1996, Congress enacted the PLRA. As relevant here, the PLRA establishes standards for the entry and termination of prospective relief in civil actions challenging conditions at prison facilities. Specifically, a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A) (1994 ed., Supp. IV). The same criteria apply to existing injunctions, and a defendant or intervenor may move to terminate prospective relief that does not meet this standard. See § 3626(b)(2). In particular, § 3626(b)(2) provides:

> "In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."

A court may not terminate prospective relief, however, if it "makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means necessary to correct the violation." § 3626(b)(3). The PLRA also requires courts to rule "promptly" on motions to terminate prospective relief, with mandamus available to remedy a court's failure to do so. § 3626(e)(1).

Finally, the provision at issue here, § 3626(e)(2), dictates that, in certain circumstances, prospective relief shall be stayed pending resolution of a motion to terminate. Specifically, subsection (e)(2), entitled "Automatic Stay," states:

> "Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--
> "(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); ... and
> "(B) ending on the date the court enters a final order ruling on the motion."

As one of several 1997 amendments to the PLRA, Congress permitted courts to postpone the entry of the automatic stay for not more than 60 days for "good cause," which cannot include general congestion of the court's docket. § 123, 111 Stat. 2470, codified at 18 U.S.C. § 3626(e)(3). [FN*]

> FN* As originally enacted, § 3626(e)(2) provided that "[a]ny prospective relief subject to a pending motion [for termination] shall be automatically stayed during the period ... beginning on the 30th day after such motion is filed ... and ending on the date the court enters a final order ruling on the motion." § 802, 110 Stat. 1321-68 to 1321-69. The 1997 amendments to the PLRA revised the automatic stay provision to its current form, and Congress specified that the 1997 amendments "shall apply to pending cases." 18 U.S.C. § 3626 note (1994 ed., Supp. IV).

C

*5 On June 5, 1997, the State filed a motion under § 3626(b) to terminate the prospective relief governing the conditions of confinement at the Pendleton Correctional Facility. 1 Record, Doc. No. 16. In response, the prisoner class moved for a temporary restraining order or preliminary injunction to enjoin the operation of the automatic stay, arguing that § 3626(e)(2) is unconstitutional as both a violation of the Due Process Clause of the Fifth Amendment and separation of powers principles. The District Court granted the prisoners' motion, enjoining the automatic stay. See id., Doc. No. 23; see also French v. Duckworth, 178 F.3d 437, 440-441 (C.A.7 1999). The State appealed, and the United States intervened pursuant to 28 U.S.C. § 2403(a) to defend the constitutionality of § 3626(e)(2).

The Court of Appeals for the Seventh Circuit affirmed the District Court's order, concluding that although § 3626(e)(2) precluded courts from exercising their equitable powers to enjoin operation of the automatic stay, the statute, so construed, was unconstitutional on separation of powers grounds. See 178 F.3d, at 447-448. The court reasoned that Congress drafted § 3626(e)(2) in unequivocal terms, clearly providing that a motion to terminate under §

3626(b)(2) "shall operate" as a stay during a specified time period. Id., at 443. While acknowledging that courts should not lightly assume that Congress meant to restrict the equitable powers of the federal courts, the Court of Appeals found "it impossible to read this language as doing anything less than that." Ibid. Turning to the constitutional question, the court characterized § 3626(e)(2) as "a self-executing legislative determination that a specific decree of a federal court ... must be set aside at least for a period of time." Id., at 446. As such, it concluded that § 3626(e)(2) directly suspends a court order in violation of the separation of powers doctrine under Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995), and mandates a particular rule of decision, at least during the pendency of the § 3626(b)(2) termination motion, contrary to United States v. Klein, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871). See 178 F.3d, at 446. Having concluded that § 3626(e)(2) is unconstitutional on separation of powers grounds, the Court of Appeals did not reach the prisoners' due process claims. Over the dissent of three judges, the court denied rehearing en banc. See id., at 448-453 (EASTERBROOK, J., dissenting from denial of rehearing en banc).

We granted certiorari, 528 U.S. 1045, 120 S.Ct. 578, 145 L.Ed.2d 481 (1999), to resolve a conflict among the Courts of Appeals as to whether § 3626(e)(2) permits federal courts, in the exercise of their traditional equitable authority, to enjoin operation of the PLRA's automatic stay provision and, if not, to review the Court of Appeals' judgment that § 3626(e)(2), so construed, is unconstitutional. Compare Ruiz v. Johnson, 178 F.3d 385 (C.A.5 1999) (holding that district courts retain the equitable discretion to suspend the automatic stay and that § 3626(e)(2) is therefore constitutional); Hadix v. Johnson, 144 F.3d 925 (C.A.6 1998) (same), with 178 F.3d 437 (C.A.7 1999) (case below).

II

***6** [1][2][3][4] We address the statutory question first. Both the State and the prisoner class agree, as did the majority and dissenting judges below, that § 3626(e)(2) precludes a district court from exercising its equitable powers to enjoin the automatic stay. The Government argues, however, that § 3626(e)(2) should be construed to leave intact the federal courts' traditional equitable discretion to "stay the stay," invoking two canons of statutory construction. First, the Government contends that we should not interpret a statute as displacing courts' traditional equitable authority to preserve the status quo pending resolution on the merits "[a]bsent the clearest command to the contrary." Califano v. Yamasaki, 442 U.S. 682, 705, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). Second, the Government asserts that reading § 3626(e)(2) to remove that equitable power would raise serious separation of powers questions, and therefore should be avoided under the canon of constitutional doubt. Like the Court of Appeals, we do not lightly assume that Congress meant to restrict the equitable powers of the federal courts, and we agree that constitutionally doubtful constructions should be avoided where "fairly possible." Communications Workers v. Beck, 487 U.S. 735, 762, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988). But where Congress has made its intent clear, "we must give effect to that intent." Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962).

The text of § 3626(e)(2) provides that "[a]ny motion to ... terminate prospective relief under subsection (b) shall operate as a stay " during a fixed period of time, i.e., from 30 (or 90) days after the motion is filed until the court enters a final order ruling on the motion. 18 U.S.C. § 3626(e)(2) (1994 ed., Supp. IV) (emphasis added). The stay is "automatic" once a state defendant has filed a § 3626(b) motion, and the statutory command that such a motion "shall operate as a stay during the [specified time] period" indicates that the stay is mandatory throughout that period of time. See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998) ("[T]he mandatory 'shall' ... normally creates an obligation impervious to judicial discretion").

Nonetheless, the Government contends that reading the statute to preserve courts' traditional equitable powers to enter appropriate injunctive relief is consistent with this text because, in its view, § 3626(e)(2) is simply a burden-shifting mechanism. That is, the purpose of the automatic stay provision is merely to relieve defendants of the burden of establishing the prerequisites for a stay and to eliminate courts' discretion to deny a stay, even if those prerequisites are established, based on the public interest or hardship to the plaintiffs. Thus, under this reading, nothing in § 3626(e)(2) prevents courts from subsequently suspending the automatic stay by applying the traditional standards for injunctive relief.

*7 Such an interpretation, however, would subvert the plain meaning of the statute, making its mandatory language merely permissive. Section 3626(e)(2) states that a motion to terminate prospective relief "shall operate as a stay during" the specified time period from 30 (or 90) days after the filing of the § 3626(b) motion until the court rules on that motion. (Emphasis added.) Thus, not only does the statute employ the mandatory term "shall," but it also specifies the points at which the operation of the stay is to begin and end. In other words, contrary to Justice BREYER's suggestion that the language of § 3626(e)(2) says nothing ... about the district court's power to modify or suspend the operation of the "stay," post, at ----, 6 (dissenting opinion), § 3626(e)(2) unequivocally mandates that the stay "shall operate during " this specific interval. To allow courts to exercise their equitable discretion to prevent the stay from "operating" during this statutorily prescribed period would be to contradict § 3626(e)(2)'s plain terms. It would mean that the motion to terminate merely may operate as a stay, despite the statute's command that it "shall" have such effect. If Congress had intended to accomplish nothing more than to relieve state defendants of the burden of establishing the prerequisites for a stay, the language of § 3626(e)(2) is, at best, an awkward and indirect means to achieve that result.

Viewing the automatic stay provision in the context of § 3626 as a whole further confirms that Congress intended to prohibit federal courts from exercising their equitable authority to suspend operation of the automatic stay. The specific appeal provision contained in § 3626(e) states that "[a]ny order staying, suspending, delaying, or barring the operation of the automatic stay" of § 3626(e)(2) "shall be appealable" pursuant to 28 U.S.C. § 1292(a)(1). § 3626(e)(4). At first blush, this provision might be read as supporting the view that Congress expressly recognized the possibility that a district court could exercise its equitable discretion to enjoin the stay. The two Courts of Appeals that have construed § 3626(e)(2) as preserving the federal courts' equitable powers have reached that conclusion based on this reading of § 3626(e)(4). See Ruiz v. Johnson, 178 F.3d, at 394; Hadix v. Johnson, 144 F.3d, at 938. They reasoned that Congress would not have provided for expedited review of such orders had it not intended that district courts would retain the power to enter the orders in the first place. See ibid. In other words, "Congress understood that there would be some cases in which a conscientious district court acting in good faith would perceive that equity required that it suspend" the § 3626(e)(2) stay, and "Congress therefore permitted the district court to do so, subject to appellate review." Ruiz v. Johnson, supra, at 394.

The critical flaw in this construction, however, is that § 3626(e)(4) only provides for an appeal from an order preventing the operation of the automatic stay. § 3626(e)(4) ("Any order staying, suspending, delaying, or barring the operation of the automatic stay" under § 3626(e)(2) "shall be appealable"). If the rationale for the provision were that in some situations equity demands that the automatic stay be suspended, then presumably the denial of a motion to enjoin the stay should also be appealable. The one-way nature of the appeal provision only makes sense if the automatic stay is required to operate during a specific time period, such that any attempt by a district court to circumvent the mandatory stay is immediately reviewable.

*8 [5][6] The Government contends that if Congress' goal were to prevent courts from circumventing the PLRA's plain commands, mandamus would have been a more appropriate remedy than appellate review. But that proposition is doubtful, as mandamus is an extraordinary remedy that is "granted only in the exercise of sound discretion." Whitehouse v. Illinois Central R. Co., 349 U.S. 366, 373, 75 S.Ct. 845, 99 L.Ed. 1155 (1955). Given that curbing the equitable discretion of district courts was one of the PLRA's principal objectives, it would have been odd for Congress to have left enforcement of § 3626(e)(2) to that very same discretion. Instead, Congress sensibly chose to make available an immediate appeal to resolve situations in which courts mistakenly believe--under the novel scheme created by the PLRA--that they have the authority to enjoin the automatic stay, rather than the extraordinary remedy of mandamus, which requires a showing of a "clear and indisputable" right to the issuance of the writ. See Mallard v. United States Dist. Court for Southern Dist. of Iowa, 490 U.S. 296, 309, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989). In any event, § 3626(e) as originally enacted did not provide for interlocutory review. It was only after some courts refused to enter the automatic stay, and after the Court of Appeals for the Fifth Circuit would not review such a refusal, that Congress amended § 3626(e) to provide for interlocutory review. See In re Scott, 163 F.3d 282, 284 (C.A.5 1998); Ruiz v. Johnson, supra, at 388; see also 18 U.S.C. § 3626(e)(4) (1994 ed., Supp. IV).

Finally, the Government finds support for its view in

§ 3626(e)(3). That provision authorizes an extension, for "good cause," of the starting point for the automatic stay, from 30 days after the § 3626(b) motion is filed until 90 days after that motion is filed. The Government explains that, by allowing the court to prevent the entry of the stay for up to 60 days under the relatively generous "good cause" standard, Congress by negative implication has preserved courts' discretion to suspend the stay after that time under the more stringent standard for injunctive relief. To be sure, allowing a delay in entry of the stay for 60 days based on a good cause standard does not by itself necessarily imply that any other reason for preventing the operation of the stay--for example, on the basis of traditional equitable principles--is precluded. But § 3626(e)(3) cannot be read in isolation. When §§ 3626(e)(2) and (3) are read together, it is clear that the district court cannot enjoin the operation of the automatic stay. The § 3626(b) motion "shall operate as a stay during" a specific time period. Section 3626(e)(3) only adjusts the starting point for the stay, and it merely permits that starting point to be delayed. Once the 90-day period has passed, the § 3626(b) motion "shall operate as a stay" until the court rules on the § 3626(b) motion. During that time, any attempt to enjoin the stay is irreconcilable with the plain language of the statute.

[7][8] Thus, although we should not construe a statute to displace courts' traditional equitable authority absent the "clearest command," Califano v. Yamasaki, 442 U.S., at 705, 99 S.Ct. 2545, or an "inescapable inference" to the contrary, Porter v. Warner Holding Co., 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), we are convinced that Congress' intent to remove such discretion is unmistakable in § 3626(e)(2). And while this construction raises constitutional questions, the canon of constitutional doubt permits us to avoid such questions only where the saving construction is not "plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." United States v. Locke, 471 U.S. 84, 96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985) (quoting George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379, 53 S.Ct. 620, 77 L.Ed. 1265 (1933)); see also Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) (constitutional doubt canon does not apply where the statute is unambiguous); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (constitutional doubt canon "does not give a court the prerogative to ignore the legislative will"). Like the Court of Appeals, we find that § 3626(e)(2) is unambiguous, and accordingly, we cannot adopt Justice BREYER's "more flexible interpretation" of the statute. Post, at ----, 3. Any construction that preserved courts' equitable discretion to enjoin the automatic stay would effectively convert the PLRA's mandatory stay into a discretionary one. Because this would be plainly contrary to Congress' intent in enacting the stay provision, we must confront the constitutional issue.

III

*9 [9][10] The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this "very structure" of the Constitution that exemplifies the concept of separation of powers. INS v. Chadha, 462 U.S. 919, 946, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). While the boundaries between the three branches are not " 'hermetically' sealed," see id., at 951, 103 S.Ct. 2764, the Constitution prohibits one branch from encroaching on the central prerogatives of another, see Loving v. United States, 517 U.S. 748, 757, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996); Buckley v. Valeo, 424 U.S. 1, 121-122, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam). The powers of the Judicial Branch are set forth in Article III, § 1, which states that the "judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as Congress may from time to time ordain and establish," and provides that these federal courts shall be staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office. As we explained in Plaut v. Spendthrift Farm, Inc., 514 U.S., at 218-219, 115 S.Ct. 1447, Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy."

[11] Respondent prisoners contend that § 3626(e)(2) encroaches on the central prerogatives of the Judiciary and thereby violates the separation of powers doctrine. It does this, the prisoners assert, by legislatively suspending a final judgment of an Article III court in violation of Plaut and Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436 (1792). According to the prisoners, the remedial order governing living conditions at the Pendleton Correctional Facility is a

final judgment of an Article III court, and § 3626(e)(2) constitutes an impermissible usurpation of judicial power because it commands the district court to suspend prospective relief under that order, albeit temporarily. An analysis of the principles underlying Hayburn's Case and Plaut, as well as an examination of § 3626(e)(2)'s interaction with the other provisions of § 3626, makes clear that § 3626(e)(2) does not offend these separation of powers principles.

*10 Hayburn's Case arose out of a 1792 statute that authorized pensions for veterans of the Revolutionary War. See Act of Mar. 23, 1792, ch. 11, 1 Stat. 243. The statute provided that the circuit courts were to review the applications and determine the appropriate amount of the pension, but that the Secretary of War had the discretion either to adopt or reject the courts' findings. Hayburn's Case, supra, at 408-410. Although this Court did not reach the constitutional issue in Hayburn's Case, the opinions of five Justices, sitting on Circuit Courts, were reported, and we have since recognized that the case "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." Plaut, supra, at 218, 115 S.Ct. 1447; see also Morrison v. Olson, 487 U.S. 654, 677, n. 15, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988). As we recognized in Plaut, such an effort by a coequal branch to "annul a final judgment" is " 'an assumption of Judicial power' and therefore forbidden." 514 U.S., at 224, 115 S.Ct. 1447 (quoting Bates v. Kimball, 2 Chipman 77 (Vt.1824)).

Unlike the situation in Hayburn's Case, § 3626(e)(2) does not involve the direct review of a judicial decision by officials of the Legislative or Executive Branches. Nonetheless, the prisoners suggest that § 3626(e)(2) falls within Hayburn's prohibition against an indirect legislative "suspension" or reopening of a final judgment, such as that addressed in Plaut. See Plaut, supra, at 226, 115 S.Ct. 1447 (quoting Hayburn's Case, supra, at 413 (opinion of IREDELL, J., and SITGREAVES, D.J.) (" '[N]o decision of any court of the United States can, under any circumstances, ... be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested' ")). In Plaut, we held that a federal statute that required federal courts to reopen final judgments that had been entered before the statute's enactment was unconstitutional on separation of powers grounds. 514 U.S., at 211, 115 S.Ct. 1447. The plaintiffs had brought a civil securities fraud action seeking money damages. Id., at 213, 115 S.Ct. 1447. While that action was pending, we ruled in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), that such suits must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation. In light of this intervening decision, the Plaut plaintiffs' suit was untimely, and the District Court accordingly dismissed the action as time barred. Plaut, supra, at 214, 115 S.Ct. 1447. After the judgment dismissing the case had become final, Congress enacted a statute providing for the reinstatement of those actions, including the Plaut plaintiffs', that had been dismissed under Lampf but that would have been timely under the previously applicable statute of limitations. 514 U.S., at 215, 115 S.Ct. 1447.

[12][13] We concluded that this retroactive command that federal courts reopen final judgments exceeded Congress' authority. Id., at 218-219, 115 S.Ct. 1447. The decision of an inferior court within the Article III hierarchy is not the final word of the department (unless the time for appeal has expired), and "[i]t is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court , since each court, at every level, must 'decide according to existing laws.' " Id., at 227, 115 S.Ct. 1447 (quoting United States v. Schooner Peggy, 1 Cranch 103, 109, 2 L.Ed. 49 (1801)). But once a judicial decision achieves finality, it "becomes the last word of the judicial department." 514 U.S., at 227, 115 S.Ct. 1447. And because Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy," id., at 218-219, 115 S.Ct. 1447, the "judicial Power is one to render dispositive judgments," and Congress cannot retroactively command Article III courts to reopen final judgments, id., at 219, 115 S.Ct. 1447 (quoting Easterbrook, Presidential Review, 40 Case W. Res. L.Rev. 905, 926 (1990) (internal quotation marks omitted)).

*11 Plaut, however, was careful to distinguish the situation before the Court in that case--legislation that attempted to reopen the dismissal of a suit seeking money damages--from legislation that "altered the prospective effect of injunctions entered by Article III courts." 514 U.S., at 232, 115 S.Ct. 1447. We emphasized that "nothing in our holding today calls ... into question" Congress' authority to alter the prospective effect of previously entered injunctions.

Ibid. Prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law. Cf. Landgraf v. USI Film Products, 511 U.S. 244, 273, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive"). This conclusion follows from our decisions in Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 14 L.Ed. 249 (1851) (Wheeling Bridge I) and Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1855) (Wheeling Bridge II).

In Wheeling Bridge I, we held that a bridge across the Ohio River, because it was too low, unlawfully "obstruct[ed] the navigation of the Ohio," and ordered that the bridge be raised or permanently removed. 54 U.S. (13 How.) 518, at 578, 14 L.Ed. 249. Shortly thereafter, Congress enacted legislation declaring the bridge to be "lawful structur[e]," establishing the bridge as a " 'post-roa[d] for the passage of the mails of the United States,' " and declaring that the Wheeling and Belmont Bridge Company was authorized to maintain the bridge at its then-current site and elevation. Wheeling Bridge II, 59 U.S. (18 How.), at 429, 15 L.Ed. 435. After the bridge was destroyed in a storm, Pennsylvania sued to enjoin the bridge's reconstruction, arguing that the statute legalizing the bridge was unconstitutional because it effectively annulled the Court's decision in Wheeling Bridge I. We rejected that argument, concluding that the decree in Wheeling Bridge I provided for ongoing relief by "directing the abatement of the obstruction" which enjoined the defendants' from any continuance or reconstruction of the obstruction. Because the intervening statute altered the underlying law such that the bridge was no longer an unlawful obstruction, we held that it was "quite plain the decree of the court cannot be enforced." Wheeling Bridge II, 59 U.S. (18 How.), at 431-432, 15 L.Ed. 435. The Court explained that had Wheeling Bridge I awarded money damages in an action at law, then that judgment would be final, and Congress' later action could not have affected plaintiff's right to those damages. See 59 U.S. (18 How.), at 431, 15 L.Ed. 435. But because the decree entered in Wheeling Bridge I provided for prospective relief--a continuing injunction against the continuation or reconstruction of the bridge--the ongoing validity of the injunctive relief depended on "whether or not [the bridge] interferes with the right of navigation." 59 U.S. (18 How.), at 431, 15 L.Ed. 435. When Congress altered the underlying law such that the bridge was no longer an unlawful obstruction, the injunction against the maintenance of the bridge was not enforceable. See id., at 432.

Applied here, the principles of Wheeling Bridge II demonstrate that the automatic stay of § 3626(e)(2) does not unconstitutionally "suspend" or reopen a judgment of an Article III court. Section § 3626(e)(2) does not by itself "tell judges when, how, or what to do." 178 F.3d, at 449 (EASTERBROOK, J., dissenting from denial of rehearing en banc). Instead, § 3626(e)(2) merely reflects the change implemented by § 3626(b), which does the "heavy lifting" in the statutory scheme by establishing new standards for prospective relief. See Berwanger v. Cottey, 178 F.3d 834, 839 (C.A.7 1999). Section 3626 prohibits the continuation of prospective relief that was "approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means to correct the violation," § 3626(b)(2), or in the absence of "findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of a Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means necessary to correct the violation," § 3626(b)(3). Accordingly, if prospective relief under an existing decree had been granted or approved absent such findings, then that prospective relief must cease, see § 3626(b)(2), unless and until the court makes findings on the record that such relief remains necessary to correct an ongoing violation and is narrowly tailored, see § 3626(b)(3). The PLRA's automatic stay provision assists in the enforcement of §§ 3626(b)(2) and (3) by requiring the court to stay any prospective relief that, due to the change in the underlying standard, is no longer enforceable, i.e., prospective relief that is not supported by the findings specified in §§ 3626(b)(2) and (3).

***12** [14][15] By establishing new standards for the enforcement of prospective relief in § 3626(b), Congress has altered the relevant underlying law. The PLRA has restricted courts' authority to issue and enforce prospective relief concerning prison conditions, requiring that such relief be supported by findings and precisely tailored to what is needed to remedy the violation of a federal right. See Benjamin v. Jacobson, 172 F.3d 144, 163 (C.A.2 1999) (en banc); Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 184-185 (C.A.3 1999); Tyler v. Murphy, 135 F.3d 594, 597 (C.A.8 1998); Inmates of Suffolk

County Jail v. Rouse, 129 F.3d 649, 657 (C.A.1 1997). We note that the constitutionality of § 3626(b) is not challenged here; we assume, without deciding, that the new standards it pronounces are effective. As Plaut and Wheeling Bridge II instruct, when Congress changes the law underlying a judgment awarding prospective relief, that relief is no longer enforceable to the extent it is inconsistent with the new law. Although the remedial injunction here is a "final judgment" for purposes of appeal, it is not the "last word of the judicial department." Plaut, 514 U.S., at 227, 115 S.Ct. 1447. The provision of prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law. See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). Prospective relief must be "modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." Ibid.; see also Railway Employees v. Wright, 364 U.S. 642, 646-647, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961) (a court has the authority to alter the prospective effect of an injunction to reflect a change in circumstances, whether of law or fact, that has occurred since the injunction was entered); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329, 58 S.Ct. 578, 82 L.Ed. 872 (1938) (applying the Norris-LaGuardia Act's prohibition on a district court's entry of injunctive relief in the absence of findings).

The entry of the automatic stay under § 3626(e)(2) helps to implement the change in the law caused by § § 3626(b)(2) and (3). If the prospective relief under the existing decree is not supported by the findings required under § 3626(b)(2), and the court has not made the findings required by § 3626(b)(3), then prospective relief is no longer enforceable and must be stayed. The entry of the stay does not reopen or "suspend" the previous judgment, nor does it divest the court of authority to decide the merits of the termination motion. Rather, the stay merely reflects the changed legal circumstances--that prospective relief under the existing decree is no longer enforceable, and remains unenforceable unless and until the court makes the findings required by § 3626(b)(3).

***13** For the same reasons, § 3626(e)(2) does not violate the separation of powers principle articulated in United States v. Klein, 13 Wall. 128, 20 L.Ed. 519 (1871). In that case, Klein, the executor of the estate of a Confederate sympathizer, sought to recover the value of property seized by the United States during the Civil War, which by statute was recoverable if Klein could demonstrate that the decedent had not given aid or comfort to the rebellion. See id., at 131. In United States v. Padelford, 9 Wall. 531, 542-543, 19 L.Ed. 788 (1869), we held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. Klein, 13 Wall., at 133-134. We concluded that the statute was unconstitutional because it purported to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." Id., at 146.

Here, the prisoners argue that Congress has similarly prescribed a rule of decision because, for the period of time until the district court makes a final decision on the merits of the motion to terminate prospective relief, § 3626(e)(2) mandates a particular outcome: the termination of prospective relief. As we noted in Plaut, however, "[w]hatever the precise scope of Klein, ... later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.' " 514 U.S., at 218, 115 S.Ct. 1447 (quoting Robertson v. Seattle Audubon Soc., 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992)). The prisoners concede this point but contend that, because § 3626(e)(2) does not itself amend the legal standard, Klein is still applicable. As we have explained, however, § 3626(e)(2) must be read not in isolation, but in the context of § 3626 as a whole. Section 3626(e)(2) operates in conjunction with the new standards for the continuation of prospective relief; if the new standards of § 3626(b)(2) are not met, then the stay "shall operate" unless and until the court makes the findings required by § 3626(b)(3). Rather than prescribing a rule of decision, § 3626(e)(2) simply imposes the consequences of the court's application of the new legal standard.

[16][17] Finally, the prisoners assert that, even if § 3626(e)(2) does not fall within the recognized prohibitions of Hayburn's Case, Plaut, or Klein, it still offends the principles of separation of powers because it places a deadline on judicial decisionmaking, thereby interfering with core judicial functions. Congress' imposition of a time limit in § 3626(e)(2), however, does not in itself offend the structural concerns underlying the Constitution's separation of powers. For example, if the PLRA

granted courts 10 years to determine whether they could make the required findings, then certainly the PLRA would raise no apprehensions that Congress had encroached on the core function of the Judiciary to decide "cases and controversies properly before them." United States v. Raines, 362 U.S. 17, 20, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). Respondents' concern with the time limit, then, must be its relative brevity. But whether the time is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question, an issue that is not before us. We leave open, therefore, the question whether this time limit, particularly in a complex case, may implicate due process concerns.

***14** [18] In contrast to due process, which principally serves to protect the personal rights of litigants to a full and fair hearing, separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design. In this action, we have no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns. The PLRA does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly.

Through the PLRA, Congress clearly intended to make operation of the automatic stay mandatory, precluding courts from exercising their equitable powers to enjoin the stay. And we conclude that this provision does not violate separation of powers principles. Accordingly, the judgment of the Court of Appeals for the Seventh Circuit is reversed, and the action is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOUTER, with whom Justice GINSBURG joins, concurring in part and dissenting in part.

I agree that 18 U.S.C. § 3626(e)(2) (1994 ed., Supp. IV) is unambiguous and join Parts I and II of the majority opinion. I also agree that applying the automatic stay may raise the due process issue, of whether a plaintiff has a fair chance to preserve an existing judgment that was valid when entered. Ante, at ----, 21. But I believe that applying the statute may also raise a serious separation-of-powers issue if the time it allows turns out to be inadequate for a court to determine whether the new prerequisite to relief is satisfied in a particular case. [FN1] I thus do not join Part III of the Court's opinion and on remand would require proceedings consistent with this one. I respectfully dissent from the terms of the Court's disposition.

> FN1. The Court forecloses the possibility of a separation-of-powers challenge based on insufficient time under the PLRA: "In this action, we have no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns. The PLRA does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly." Ante, at ----, 21.

A prospective remedial order may rest on at least three different legal premises: the underlying right meant to be secured; the rules of procedure for obtaining relief, defining requisites of pleading, notice, and so on; and, in some cases, rules lying between the other two, such as those defining a required level of certainty before some remedy may be ordered, or the permissible scope of relief. At issue here are rules of the last variety. [FN2]

> FN2. Other provisions of the PLRA narrow the scope of the underlying entitlements that an order can protect, but some orders may have been issued to secure constitutional rights unaffected by the PLRA. In any event, my concern here is solely with the PLRA's changes to the requisites for relief.

***15** Congress has the authority to change rules of this sort by imposing new conditions precedent for the continuing enforcement of existing, prospective remedial orders and requiring courts to apply the new rules to those orders. Cf. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 232, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). If its legislation gives courts adequate time to determine the applicability of a new rule to an old order and to take the action necessary to apply it or to vacate the order, there seems little basis for claiming that Congress has crossed the constitutional line to interfere with the performance of any judicial function. But if determining whether a new rule applies requires time (say, for new factfinding) and if the statute provides insufficient time for a court to make that determination before the statute invalidates an extant remedial order, the application of the statute raises a serious question whether Congress has in practical terms assumed the judicial function. In such a case, the prospective order suddenly turns unenforceable not because a court has made a

judgment to terminate it due to changed law or fact, but because no one can tell in the time allowed whether the new rule requires modification of the old order. One way to view this result is to see the Congress as mandating modification of an order that may turn out to be perfectly enforceable under the new rule, depending on judicial factfinding. If the facts are taken this way, the new statute might well be treated as usurping the judicial function of determining the applicability of a general rule in particular factual circumstances. [FN3] Cf. United States v. Klein, 13 Wall. 128, 146, 20 L.Ed. 519 (1871).

FN3. The constitutional question inherent in these possible circumstances does not seem to be squarely addressed by any of our cases. Congress did not engage in discretionary review of a particular judicial judgment, cf. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 226, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) (characterizing Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436 (1792)), or try to modify a final, non-prospective judgment, cf. 514 U.S., at 218-219, 115 S.Ct. 1447. Nor would a stay result from the judicial application of a change in the underlying law, cf. Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 431, 15 L.Ed. 435 (1856); Plaut, supra, at 218, 115 S.Ct. 1447 (characterizing United States v. Klein, 13 Wall. 128, 20 L.Ed. 519 (1871)). Instead, if the time is insufficient for a court to make a judicial determination about the applicability of the new rules, the stay would result from the inability of the Judicial Branch to exercise the judicial power of determining whether the new rules applied at all. Cf. Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

Whether this constitutional issue arises on the facts of this action, however, is something we cannot yet tell, for the District Court did not address the sufficiency of the time provided by the statute to make the findings required by § 3626(b)(3) in this particular action. [FN4] Absent that determination, I would not decide the separation-of-powers question, but simply remand for further proceedings. If the District Court determined both that it lacked adequate time to make the requisite findings in the period before the automatic stay would become effective, and that applying the stay would violate the separation of powers, the question would then be properly presented.

FN4. Neither did the Court of Appeals. It merely speculated that "[i]t may be ... that in some cases the courts will not be able to carry out their adjudicative function in a responsible way within the time limits imposed by (e)(2)," French v. Duckworth, 178 F.3d 437, 447 (C.A.7 1999), without deciding whether this case presented such a situation. The court then concluded that "under Klein [the Congress] cannot take away the power of the court in a particular case to preserve the status quo while it ponders these weighty questions." Ibid.

Justice BREYER, with whom Justice STEVENS joins, dissenting.

The Prison Litigation Reform Act of 1995 (PLRA) says that "any party or intervener" may move to terminate any "prospective relief" previously granted by the court, 18 U.S.C. § 3626(b)(1) (1994 ed., Supp. IV), and that the court shall terminate (or modify) that relief unless it is "necessary to correct a current and ongoing violation of [a] Federal right, extends no further than necessary to correct the violation ... [and is] the least intrusive means" to do so. 18 U.S.C. § 3626(b)(3).

We here consider a related procedural provision of the PLRA. It says that "[a]ny motion to modify or terminate prospective relief ... shall operate as a stay" of that prospective relief "during the period" beginning (no later than) the 90th day after the filing of the motion and ending when the motion is decided. § 3626(e)(2). This provision means approximately the following: Suppose that a district court, in 1980, had entered an injunction governing present and future prison conditions. Suppose further that in 1996 a party filed a motion under the PLRA asking the court to terminate (or to modify) the 1980 injunction. That district court would have no more than 90 days to decide whether to grant the motion. After those 90 days, the 1980 injunction would terminate automatically--regaining life only if, when, and to the extent that the judge eventually decided to deny the PLRA motion.

*16 The majority interprets the words "shall operate as a stay" to mean, in terms of my example, that the 1980 injunction must become ineffective after the 90th day, no matter what. The Solicitor General, however, believes that the view adopted by the majority interpretation is too rigid and calls into doubt the constitutionality of the provision. He argues that the statute is silent as to whether the district court can modify or suspend the operation of the automatic stay. He would find in that silence sufficient authority for the court to create an exception to the 90-day time limit where circumstances make it necessary to do so. As so read, the statute would neither displace the courts' traditional equitable authority nor raise

significant constitutional difficulties. See Califano v. Yamasaki, 442 U.S. 682, 705, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (only "clearest" congressional "command" displaces courts' traditional equity powers); Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (the Court will construe a statute to avoid constitutional problems "unless such construction is plainly contrary to the intent of Congress").

I agree with the Solicitor General and believe we should adopt that " 'reasonable construction' " of the statute. Ibid. (quoting Hooper v. California, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895), stating " 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality' ").

I

At the outset, one must understand why a more flexible interpretation of the statute might be needed. To do so, one must keep in mind the extreme circumstances that at least some prison litigation originally sought to correct, the complexity of the resulting judicial decrees, and the potential difficulties arising out of the subsequent need to review those decrees in order to make certain they follow Congress' PLRA directives. A hypothetical example based on actual circumstances may help.

In January 1979, a Federal District Court made 81 factual findings describing extremely poor--indeed "barbaric and shocking"--prison conditions in the Commonwealth of Puerto Rico. Morales Feliciano v. Romero Barcelo, 497 F.Supp. 14, 32 (D.P.R.1979). These conditions included prisons typically operating with twice the number of prisoners they were designed to hold; inmates living in 16 square feet of space (i.e., only 4 feet by 4 feet); inmates without medical care, without psychiatric care, without beds, without mattresses, without hot water, without soap or towels or toothbrushes or underwear; food prepared on a budget of $1.50 per day and "tons of food ... destroyed because of ... rats, vermin, worms, and spoilage"; "no working toilets or showers," "urinals [that] flush into the sinks," "plumbing systems ... in a state of collapse," and a "stench" that was "omnipresent"; "exposed wiring ... no fire extinguisher, ... [and] poor ventilation"; "calabozos," or dungeons, "like cages with bars on the top" or with two slits in a steel door opening onto a central corridor, the floors of which were "covered with raw sewage" and which contained prisoners with severe mental illnesses, "caged like wild animals," sometimes for months; areas of a prison where mentally ill inmates were "kept in cells naked, without beds, without mattresses, without any private possessions, and most of them without toilets that work and without drinking water." Id., at 20-23, 26-27, 29, 32. These conditions had led to epidemics of communicable diseases, untreated mental illness, suicides, and murders. Id., at 32.

*17 The District Court held that these conditions amounted to constitutionally forbidden "cruel and unusual punishment." Id., at 33-36. It entered 30 specific orders designed to produce constitutionally mandated improvement by requiring the prison system to, for example, screen food handlers for communicable diseases, close the "calabozos," move mentally ill patients to hospitals, fix broken plumbing, and provide at least 35 square feet (i.e., 5 feet by 7 feet) of living space to each prisoner. Id., at 39-41.

The very pervasiveness and seriousness of the conditions described in the court's opinion made those conditions difficult to cure quickly. Over the next decade, the District Court entered further orders embodied in 15 published opinions, affecting 21 prison institutions. These orders concerned, inter alia, overcrowding, security, disciplinary proceedings, prisoner classification, rehabilitation, parole, and drug addiction treatment. Not surprisingly, the related proceedings involved extensive evidence and argument consuming thousands of pages of transcript. See Morales Feliciano v. Romero Barcelo, 672 F.Supp. 591, 595 (D.P.R.1986). Their implementation involved the services of two monitors, two assistants, and a Special Master. Along the way, the court documented a degree of "administrative chaos" in the prison system, Morales Feliciano v. Hernandez Colon, 697 F.Supp. 37, 44 (D.P.R.1988), and entered findings of contempt of court against the Commonwealth, followed by the assessment and collection of more than $74 million in fines. See Morales Feliciano v. Hernandez Colon, 775 F.Supp. 487, 488 and n. 2 (D.P.R.1991).

Prison conditions subsequently have improved in some respects. Morales Feliciano v. Rossello Gonzalez, 13 F.Supp.2d 151, 179 (D.P.R.1998). I express no opinion as to whether, or which of, the earlier orders are still needed. But my brief summary of the litigation should illustrate the potential difficulties involved in making the determination of continuing necessity required by the PLRA. Where prison litigation is as complex as the litigation I have

just described, it may prove difficult for a district court to reach a fair and accurate decision about which orders remain necessary, and are the "least intrusive means" available, to prevent or correct a continuing violation of federal law. The orders, which were needed to resolve serious constitutional problems and may still be needed where compliance has not yet been assured, are complex, interrelated, and applicable to many different institutions. Ninety days might not provide sufficient time to ascertain the views of several different parties, including monitors, to allow them to present evidence, and to permit each to respond to the arguments and evidence of the others.

*18 It is at least possible, then, that the statute, as the majority reads it, would sometimes terminate a complex system of orders entered over a period of years by a court familiar with the local problem--perhaps only to reinstate those orders later, when the termination motion can be decided. Such an automatic termination could leave constitutionally prohibited conditions unremedied, at least temporarily. Alternatively, the threat of termination could lead a district court to abbreviate proceedings that fairness would otherwise demand. At a minimum, the mandatory automatic stay would provide a recipe for uncertainty, as complex judicial orders that have long governed the administration of particular prison systems suddenly turn off, then (perhaps selectively) back on. So read, the statute directly interferes with a court's exercise of its traditional equitable authority, rendering temporarily ineffective pre-existing remedies aimed at correcting past, and perhaps ongoing, violations of the Constitution. That interpretation, as the majority itself concedes, might give rise to serious constitutional problems. Ante, at ----, 21.

II

The Solicitor General's more flexible reading of the statute avoids all these problems. He notes that the relevant language says that the motion to modify or terminate prospective relief "shall operate as a stay" after a period of 30 days, extendable for "good cause" to 90 days. 18 U.S.C. § 3626(e)(2); see also Brief for United States 12. The language says nothing, however, about the district court's power to modify or suspend the operation of the "stay." In the Solicitor General's view, the "stay" would determine the legal status quo; but the district court would retain its traditional equitable power to change that status quo once the party seeking the modification or suspension of the operation of the stay demonstrates that the stay "would cause irreparable injury, that the termination motion is likely to be defeated, and that the merits of the motion cannot be resolved before the automatic stay takes effect." Ibid. Where this is shown, the "court has discretion to suspend the automatic stay and require prison officials to comply with outstanding court orders until the court resolves the termination motion on the merits," id., at 12-13, subject to immediate appellate review, 18 U.S.C. § 3626(e)(4).

Is this interpretation a "reasonable construction" of the statute? Edward J. DeBartolo Corp., 485 U.S., at 575, 108 S.Ct. 1392. I note first that the statutory language is open to the Solicitor General's interpretation. A district court ordinarily can stay the operation of a judicial order (such as a stay or injunction), see Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9- 10, and n. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942), when a party demonstrates the need to do so in accordance with traditional equitable criteria (irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public, see Doran v. Salem Inn, Inc., 422 U.S. 922, 931, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); Yakus v. United States, 321 U.S. 414, 440, 64 S.Ct. 660, 88 L.Ed. 834 (1944)). There is no logical inconsistency in saying both (1) a motion (to terminate) "shall operate as a stay," and (2) the court retains the power to modify or delay the operation of the stay in appropriate circumstances. The statutory language says nothing about this last- mentioned power. It is silent. It does not direct the district court to leave the stay in place come what may.

*19 Nor does this more flexible interpretation deprive the procedural provision of meaning. The filing of the motion to terminate prospective relief will still, after a certain period, operate as a stay without further action by the court. Thus, the motion automatically changes the status quo and imposes upon the party wishing to suspend the automatic stay the burden of demonstrating strong, special reasons for doing so. The word "automatic" in the various subsection titles does not prove the contrary, for that word often means self-starting, not unstoppable. See Websters Third New International Dictionary 148 (1993). Indeed, the Bankruptcy Act uses the words "automatic stay" to describe a provision stating that "a petition filed ... operates as a stay" of certain other judicial proceedings--despite the fact that a later portion of that same provision makes clear that under certain circumstances the bankruptcy court may

terminate, annul, or modify the stay. 11 U.S.C. § 362(d); see also 143 Cong. Rec. S12269 (Nov. 9, 1997) (statement of Sen. Abraham) (explaining that § 3626(e)(2) was modeled after the Bankruptcy Act provision). And the Poultry Producers Financial Protection Act of 1987 specifies that a court of appeals decree affirming an order of the Secretary of Agriculture "shall operate as an injunction" restraining the "live poultry dealer" from violating that order, 7 U.S.C. § 228b-3(g); yet it appears that no one has ever suggested that the court of appeals lacks the power to modify that "injunction" where appropriate. Moreover, the change in the legal status quo that the automatic stay would bring about, and the need to demonstrate a special need to lift the stay (according to traditional equitable criteria), mean that the stay would remain in effect in all but highly unusual cases.

In addition, the surrounding procedural provisions are most naturally read as favoring the flexible interpretation. The immediately preceding provision requires the court to rule "promptly" upon the motion to terminate and says that "[m]andamus shall lie to remedy any failure to issue a prompt ruling." 18 U.S.C. § 3626(e)(1). If a motion to terminate takes effect automatically through the "stay" after 30 or 90 days, it is difficult to understand what purpose would be served by providing for mandamus--a procedure that itself (in so complicated a matter) could take several weeks. But if the automatic stay might be modified or lifted in an unusual case, providing for mandamus makes considerable sense. It guarantees that an appellate court will make certain that unusual circumstances do in fact justify any such modification or lifting of the stay. A later provision that provides for immediate appeal of any order "staying, suspending, delaying or barring the operation of the automatic stay" can be read as providing for similar appellate review for similar reasons. § 3626(e)(4).

*20 Further, the legislative history is neutral, for it is silent on this issue. Yet there is relevant judicial precedent. That precedent does not read statutory silence as denying judges authority to exercise their traditional equitable powers. Rather, it reads statutory silence as authorizing the exercise of those powers. This Court has said, for example, that "[o]ne thing is clear. Where Congress wished to deprive the courts of this historic power, it knew how to use apt words--only once has it done so and in a statute born of the exigencies of war." Scripps-Howard, supra, at 17, 62 S.Ct. 875. Compare Lockerty v. Phillips, 319 U.S. 182, 186-187, 63 S.Ct. 1019, 87 L.Ed. 1339 (1943) (finding that courts were deprived of equity powers where the statute explicitly removed jurisdiction), with Scripps-Howard, 316 U.S., at 8-10, 62 S.Ct. 875 (refusing to read silence as depriving courts of their historic equity power), and Califano, 442 U.S., at 705-706, 99 S.Ct. 2545 (same). These cases recognize the importance of permitting courts in equity cases to tailor relief, and related relief procedure, to the exigencies of particular cases and individual circumstances. In doing so, they recognize the fact that in certain circumstances justice requires the flexibility necessary to treat different cases differently--the rationale that underlies equity itself. Cf. Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case").

Finally, the more flexible interpretation is consistent with Congress' purposes as revealed in the statute. Those purposes include the avoidance of new judicial relief that is overly broad or no longer necessary and the reassessment of pre-existing relief to bring it into conformity with these standards. But Congress has simultaneously expressed its intent to maintain relief that is narrowly drawn and necessary to end unconstitutional practices. See 18 U.S.C. §§ 3626(a)(1), (a)(2), (b)(3). The statute, as flexibly interpreted, risks interfering with the first set of objectives only to the extent that the speedy appellate review provided in the statute fails to control district court error. The same interpretation avoids the improper provisional termination of relief that is constitutionally necessary. The risk of an occasional small additional delay seems a comparatively small price to pay (in terms of the statute's entire set of purposes) to avoid the serious constitutional problems that accompany the majority's more rigid interpretation.

The upshot is a statute that, when read in light of its language, structure, purpose, and history, is open to an interpretation that would allow a court to modify or suspend the automatic stay when a party, in accordance with traditional equitable criteria, has demonstrated a need for such an exception. That interpretation reflects this Court's historic reluctance to read a statute as depriving courts of their traditional equitable powers. It also avoids constitutional difficulties that might arise in unusual cases.

*21 I do not argue that this interpretation reflects the

most natural reading of the statute's language. Nor do I assert that each individual legislator would have endorsed that reading at the time. But such an interpretation is a reasonable construction of the statute. That reading harmonizes the statute's language with other basic legal principles, including constitutional principles. And, in doing so, it better fits the full set of legislative objectives embodied in the statute than does the more rigid reading that the majority adopts.

For these reasons, I believe that the Solicitor General's more flexible reading is the proper reading of the statute before us. I would consequently vacate the decision of the Court of Appeals and remand this action for further proceedings.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. OAKLAND CANNABIS BUYERS' COOPERATIVE, AND JEFFREY JONES Defendants. AND RELATED ACTIONS.	No. C 98-0088 CRB **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION ORDER** (Fed. R. Civ. P. 60(b), Local Rule 7-11) Date: July 14, 2000 Time: 10:00 a.m. Hon. Charles R. Breyer

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INTRODUCTION

Defendants Oakland Cannabis Buyers' Cooperative ("OCBC") and Jeffrey Jones submit this reply memorandum in support of their Motion to Dissolve or Modify Preliminary Injunction. In their opening memorandum ("Op. Br.") Defendants established that given the factual record and the Ninth Circuit's recent opinions in this case, this Court should either dissolve the preliminary injunction or modify the injunction to allow seriously ill patients with a physician confirmed medical necessity to obtain cannabis.

The government does not seriously challenge the factual showing made by Defendants. The government does not dispute that these patients are seriously ill, nor that cannabis is the only medicine that has provided relief to these patients (*See, e.g.*, Declarations of Paul Allen, Willie Beal, Creighton Frost, Jr., Steven Kubby, Miles Saunders, Renee Sheperd, Lorrie Valentine and Edward Brundridge.) The government also leaves unrefuted the declarations establishing that cannabis is a safe and effective medicine. (*See* Declarations of John Morgan, M.D., Lester Grinspoon, M.D; *see also* Defendants' Request for Judicial Notice filed September 14, 1998, and declarations of Drs. Flynn, Estes, Leff, Macabee, Tripathy, Follansbee, O'Brien, Northfelt, Cafaro, and Scott attached thereto).

Instead, the government invites this Court to ignore the clear mandate of the Ninth Circuit, and the controlling precedent that the Ninth Circuit's September 1999 and May 2000 opinions represent. This Court should decline the government's invitation. These opinions confirm the availability of a medical necessity defense in these p oceedings and confirm the viability of the substantive due process rights of OCBC's patient-members. The Ninth Circuit opinions plainly require this Court specifically to consider, and to protect the rights and interests of these seriously ill patients.

ARGUMENT

I. THE PRELIMINARY INJUNCTION SHOULD BE DISSOLVED

In their opening memorandum Defendants established that the preliminary injunction must be dissolved because the government is no longer entitled to the presumption of irreparable injury relied upon by this Court when it issued that injunction. Defendants also established that, in the absence of

such a presumption, the irreparable injury suffered by OCBC's patient-members far outweighs any theoretical harm to the government. (*See* Op. Br. at 8-10.) Nothing in the government's opposition refutes these crucial facts. Refusing to address, much less dispute Defendants' strong showing of irreparable harm, the government instead continues to seek refuge in a presumption to which it is no longer entitled.

The presumption of irreparable harm upon which the government seeks to rely applies *only* in very limited circumstances: (1) when the defendant concedes a statutory violation (*Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994); *United States v. Nutri-Cology*, 982 F.2d 394, 398 (9th Cir. 1992), or (2) when the government demonstrates that it is likely to prevail on the merits. *Miller*, 19 F.3d at 460. "If the charge is disputed, or if [the government] has only a fair chance of succeeding on the merits, the court *must* consider the possibility of irreparable injury." *Id.* (emphasis added); *see also Nutri-Cology*, 982 F.2d at 398 (where statutory violation disputed and government makes only colorable showing that it will prevail on claim, presumption of irreparable injury does not apply).

The government concedes that Defendants have vigorously disputed their liability for allegedly violating the Controlled Substances Act ("CSA") and argues instead that it has made the required showing of likelihood of success on the merits. The unavailability of *any* defense, including necessity, to an alleged violation of the CSA has always been central to the government's claims against Defendants. *See, e.g., United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1101-1102 (1998). The Ninth Circuit's opinion makes plain, however, that such defenses are available in this proceeding and that Defendants have established medical necessity. *See, e.g., United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1115 (9th Cir. 1999) (finding that Defendants had established medical necessity" for a class of people"). The government also ignores the May 10, 2000 opinion directing that this court reconsider its ruling on the substantive due process claims asserted in this case. Under these circumstances, the government cannot seriously argue that it continues to demonstrate a likelihood of success on the merits.

Finally, the government completely ignores the separate and independent reason for dissolving the injunction — this Court's failure to consider whether the injunction is in the public

interest. Even where a statutory violation has been established, a court must consider the public interest when imposing the extraordinary remedy of injunction. *Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1115, *see also*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). Had the Court done so here, the Court would have concluded, as did the Ninth Circuit, that the injunction is *not* in the public interest. *Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1114-1115.

The government has failed to establish that it is entitled to any presumption of irreparable harm arising from Defendants' alleged violation of the CSA. Moreover, as the Ninth Circuit found, the public interest clearly mandates permitting distribution of cannabis to seriously ill patients with a confirmed medical necessity. Accordingly the injunction should be dissolved.

II. THE COURT SHOULD GRANT THE REQUESTED MODIFICATION

In their opening brief, Defendants made a strong factual showing that established each element of the necessity defense under *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). The government has offered no facts to contradict this evidence. Instead, the government ignores the Ninth Circuit's rulings in this case, mischaracterizes Defendants' position and rehashes arguments that have been squarely rejected by the Ninth Circuit.

A. Defendants Are Entitled To The Medical Necessity Defense In These Proceedings

1. The CSA Does Not Preclude A Necessity Defense

Contrary to the government's contention, nothing in the text or legislative history of the CSA prohibits the equitable relief that Defendants seek here. The Ninth Circuit's opinion is controlling precedent that establishes the availability of medical necessity as a defense to a claimed violation of the CSA. *Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1113–1115. That opinion also confirms this Court's inherent equitable power to grant the relief requested here. *Id.* The Ninth Circuit held that this Court incorrectly concluded that it was powerless to modify the injunction to permit an exemption for medical necessity. As the Ninth Circuit correctly determined, "there is no evidence that Congress intended to divest the district court of its broad equitable discretion to formulate appropriate relief. . . . . [T]here is no indication that the 'underlying substantive policy' of the [CSA]

mandates a limitation on the district court's equitable powers." *Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1114.

There is ample support for the Ninth Circuit's decision. First, contrary to the government's contention, there is no evidence that Congress intended to abrogate the necessity defense. It is well established that common-law defenses may be raised as defenses to a statutory crime. *United States v. Newcomb*, 6 F.3d 1129, 1134 (6th Cir. 1993) (holding necessity defense available to defendant charged with violations of federal firearm possession statutes). As the *Newcomb* court explained:

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

Newcomb, 6 F.3d at 1134.

The government also ignores the numerous decisions that recognize the availability of the medical necessity defense in prosecutions concerning marijuana. For example, *United States v. Burton*, 894 F.2d 188 (6th Cir. 1990), did not question the applicability of the defense. Rather, the court concluded that defendant had failed to establish one element of the defense. *Id.* at 191.[1] State courts also have held, consistent with *Newcomb* and *Bailey*, that the medical necessity defense is not precluded by the fact that the state legislature placed cannabis in a category analogous to Schedule I

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[1] See *also United States v. Randall*, 104 Daily Wash.L.Rptr. 2249, 2252 (D.C. Super. 1976) (glaucoma patient successfully asserted medical necessity defense to a charge of marijuana possession); *State v. Hastings*, 801 P.2d 563, 565 (Idaho 1990) (defendant presented a legitimate defense of medical necessity in marijuana prosecution; trier of fact would determine whether the elements had been met); *State v. Diana*, 604 P.2d 1312, 1316-17 (Wash. App. 1979) (medical necessity is encompassed in the common law defense of necessity and applies in the context of possession of marijuana; case remanded to allow trier of fact to determine whether defense established); *State v. Bachman*, 595 P.2d 287, 288 (Hawaii 1979) (medical necessity could be asserted as a defense to a marijuana charge in a proper case); *Jenks v. State of Florida*, 582 So.2d 676, 677 (Fla. Dist. Ct. App.), *review denied*, 589 So.2d 292 (Fla. 1991) (medical necessity defense applied to charge of possession of marijuana and was established by Defendants); and *People v. Trippet*, 56 Cal. App. 4th 1532, 1538-40, *review denied*, 1997 Cal. LEXIS 8225 (1997) (assumed validity of medical necessity defense).

of the CSA. *See, e.g., Jenks v. State of Florida*, 582 So.2d 676, 677 (Fla. Dist. Ct. App.), *review denied*, 589 So.2d 292 (Fla. 1991) (necessity defense not precluded because marijuana placed in the Florida equivalent of Schedule I).[2]

Second, Congress made no finding concerning the medical uses of cannabis and had no basis for doing so. The legislative history of the CSA confirms that Congress intended to place cannabis *only tentatively* in Schedule I "until the completion of certain studies now underway." Act of Oct. 14, 1970, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. 4579. In 1970, Congress instructed the Presidential Commission on Marihuana and Drug Abuse ("Shafer Commission") to conduct a comprehensive study of cannabis and its effects. *Id.* at § 601, 4625-26. Ultimately, the Commission recommended full decriminalization of marijuana. *Marihuana: A Signal of Misunderstanding: First Report of the National Commission on Marihuana and Drug Abuse*, 152 (1972). Congress did not act on this report. Years later, with no scientific studies to support its actions, the Senate and the House of Representatives issued resolutions opposing both the medical use and the allocation of funds for research into to the medical use of cannabis. Act of Oct. 21, 1998, Pub. L. No. 105-277,

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[2] The government's reliance on cases decided before the Ninth Circuit's decision in this case is equally unavailing. *See United States v. Lederer*, Nos. CR-97-558 GEB (E.D. Cal. May 21, 1999); *United States v. Diana*, Nos. CR-98-068-RHW, CR-98-069-RHW, CR-98-070-RHW, and CR-98-072-RHW, slip op. at 5 (E.D. Wash. Sept. 21, 1998); *United States v. Allerheiligen*, No. 97-40090-01-DES, 1998 WL 918841 (D. Kan. Nov. 19, 1998) (attached as Exs. 3-5 to government's brief ("Oppos. Br."). Moreover, in *United States v. Diana* (Oppos. Br., Ex. 4) the court rejected the necessity defense on the facts. The court found that the defendant failed to pursue legal alternatives, and possessed quantities of marijuana far exceeding that necessary for personal use. In *United States v. Allerheiligen* (Oppos. Br., Ex. 5) the court rejected evidence concerning medical use, in part because defendant had offered no federal case in which necessity had been approved. The government's citation to *United States v. Lederer* also is misleading, because that case had been remanded by the Ninth Circuit to the District Court to consider the necessity defense. (*See* Request for Judicial Notice Ex. 1.) Finally, *United States v. McWilliams*, No. CR 97-997(A)-GHK (C.D. Cal. Nov. 5, 1999) (Oppos. Br., Ex. 2) on which the government also relies both misreads and misapplies the Ninth Circuit's decision in this case. The court in *McWilliams* incorrectly held that the Ninth Circuit did not address the availability of the necessity defense. This conclusion is plainly wrong, as was the court's rejection of Mr. McWilliams' necessity defense on the ground that he had the legal alternative of petitioning to reschedule marijuana. Mr. McWilliams tragically has died since that decision, thereby confirming that petitioning for rescheduling was not a viable alternative for him. Finally, the court in the *McWilliams* case was not faced with circumstances presented here — the proposed modification of an injunction calling upon the Court's inherent equitable powers. The Ninth Circuit has confirmed that at least in this context, the CSA does not prohibit this Court from ordering equitable relief based upon medical necessity.

1998 U.S.C.C.A.N. (112 Stat.) 2681. Thus, Congress never actually considered the medical utility of cannabis *before* placing it in Schedule I and has not formally revisited the issue since.[3]

Contrary to the government's contention, nothing in *United States v. Rutherford*, 442 U.S. 544 (1979) requires that this Court depart from the Ninth Circuit's ruling. In *Rutherford*, plaintiffs brought an affirmative case to exempt laetrile, an unproven drug, from the requirements of the Federal Food, Drug and Cosmetic Act. Defendants do not seek that relief here. There was also no claim in *Rutherford* that laetrile was the *only* effective treatment for the patients, and indeed there was a significant concern that these patients would forego conventional treatment in favor of laetrile. In contrast, OCBC's patient-members are the target of a civil injunction action brought by the government to preclude their use of the *only* medicine that has proven effective in relieving their life-threatening symptoms. As the Ninth Circuit recognized, if the government had sought to prosecute Defendants individually, they would have been able to litigate the issue of necessity in due course. *Oakland Cannabis Buyers' Coop.*, 190 F.2d at 1114. They should not be penalized because the government sought to proceed by injunction.

Moreover, the continued placement of marijuana in Schedule I does not constitute any finding whatsoever concerning the medical necessity of an individual patient. The DEA definition of "currently accepted medical use" is quite different than the legal test for "necessity." Under the DEA's guidelines, the test of whether a drug is in currently acceptable medical use for the general public requires that:

1. The drug's chemistry be known and reproducible;
2. There must be adequate safety studies;
3. There must be adequate and well-controlled studies proving efficacy;

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[3] The government's contention that Congress's refusal to reclassify cannabis despite the opportunity to do somehow evidences an intention to abrogate the medical necessity defense is likewise meritless. *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1137 (D.C. Cir. 1994), on which the government relies, did not hold that cannabis has no accepted medicinal value — only that it had not been proven in that case.

4. The drug must be accepted by qualified experts; and

5. The scientific evidence must be widely available.

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

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

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

Oakland Cannabis Buyers' Coop., 190 F.3d at 1115.

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

Finally, the federal government has itself recognized the medical efficacy of cannabis by providing it to a group of patients. The federal government operates the Compassionate Investigative New Drug program through which NIDA provides cannabis to eight individuals suffering from a range of illnesses. (*See* Ex. A hereto.) These individuals are no different from OCBC's patient-members in the sense of medical need. The mere existence of this program demonstrates the federal government's recognition that there are in fact, legitimate medical uses for cannabis. [4]

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[4] The government also has placed Marinol in Schedule III, and it contains only the psychoactive and therefore most dangerous cannaboid found in natural cannabis. (*See* Ex. B hereto.) This further confirms that the government does in fact recognize medical uses for cannabis.

2. Defendants Have Established That They Have No Legal Alternatives To Cannabis To Alleviate Their Symptoms

The government does not dispute that Defendants meet three of the four necessity defense criteria established in *Aguilar*: that Defendants were faced with a choice of evils and chose the lesser evil; that Defendants acted to prevent imminent harm; and that Defendants reasonably anticipated a causal relation between their conduct and the harm to be avoided. *Aguilar*, 883 F.2d at 693. The government's only dispute concerns whether Defendants have legal alternatives to violating the law, such as seeking legislative or administrative relief, and therefore should not be entitled to the necessity defense. *See United States v. Dorrell*, 758 F.2d 427, 431 (9th Cir. 1985).[5] The government makes the incredible claim that sick and dying patients should forego the only medicine that helps them, and endure intolerable symptoms while awaiting a rescheduling of marijuana that may never come within their lifetimes. A rescheduling petition was filed in 1995 and on December 17, 1997 the DEA referred the petition to the secretary of Health and Human Services "upon determining that the petition raised scientific and medical issues that had not previously been evaluated by HHS." *Cannabis Cultivators Club*, 5 F. Supp. 2d at 1105. Although this Court expected that the Secretary would act "expeditiously" on the petition in light of the concerns expressed by the citizens of California. *Id.* at 1105. HHS has yet to take any action on the petition. (*See* Declaration of John Gettman attached hereto as Ex. C)

The government's contention that the purported availability of recourse to "the political and judicial process" precludes the availability of the necessity defense in this case is untenable. The option of seeking administrative or legislative relief as suggested by the government is not an alternative for Defendants. Just as "[a] prisoner fleeing a burning jail . . . would not be asked to wait

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[5] The government also argues illogically, based upon *United States v. Bailey*, 444 U.S. 394 (1980) that chronically ill patient-members also must show "bona fide effort to comply with federal law as soon as the asserted necessity has lost its coercive force." (Oppos. Br. at 16.) The government's argument is nonsensical; Defendants have never asserted a desire to dispense cannabis on "a permanent, ongoing basis" as the government asserts. Defendants' patient-members are seriously ill persons for whom necessity will continue until their conditions improve, other therapies are found, or they die. Their situation cannot be compared to that of a prisoner who flees from custody while avoiding a fire.

in his cell because someone might conceivably save him" — patient-members cannot be asked to forego their medication and risk dying while they await the possibility of reclassification of cannabis. *United States v. Schoon*, 971 F.2d 193, 198 (9th Cir. 1992). Whether a legal alternative exists for the purposes of the necessity defense cannot be determined in a vacuum. "[T]he law implies a reasonableness requirement in judging whether legal alternatives exist." *Id.* at 198.

Defendants' circumstances are clearly distinguishable from those in the government's cited cases. Unlike the defendant in *United States v. Richardson*, 588 F.2d 1235, 1239 (9th Cir. 1978), Defendants here have been denied access to a medicine whose efficacy has been established, and have no immediately available means of obtaining this needed medicine. Unlike the Defendants in *Dorrell*, Defendants here are not merely involved in a "political protest." OCBC's patient-members suffer from chronic and life threatening illnesses and may die without medical cannabis.[6] (*See, e.g.*, Declarations of Kenneth Estes, Steven Kubby, and Willie Beal.)

Furthermore, a petition to reschedule can take over 20 years. *See Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994) (petitioners' final attempt to reschedule marijuana after extensive litigation over the course of 22 years). Accordingly, petitioning for rescheduling would be futile while immediate relief is needed, thereby making valid Defendants' medical necessity claim here. *See United States v. Contento-Pachon*, 723 F.2d 691, 693-95 (9th Cir. 1984) (triable issue of fact regarding necessity in drug trafficking case where there was evidence that going to police would be futile). In this regard, Defendants' circumstances here are clearly

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[6] In *Richardson*, the FDA had specifically classified laetrile as a "new drug." 588 F.2d at 1237. Defendant failed to avail himself of numerous available options to challenge immediately the FDA's classification of and seizure of an experimental drug. *Id.* at 1239. In both *Schoon* and *Dorrell* the court precluded the necessity defense as a matter of law, finding that the Defendants did not present sufficient facts to raise the defense. In *Schoon*, defendants asserted a necessity defense, "contending that their acts in protest of American involvement in El Salvador were necessary to avoid further bloodshed in that country." 971 F.2d at 195. In *Dorrell*, defendant asserted the necessity defense arguing that his actions were necessary to change United States nuclear policy and to avert the risk of nuclear war. 758 F.2d at 429. In both cases, defendants engaged in "indirect political" protest that could not achieve their stated goal of changing the government's policies. *Schoon*, 971 F.2d at 200; *Dorrell*, 758 F.2d at 433.

distinguishable from those of the defendants in *Aguilar*, who had the immediate opportunity to seek provisional judicial relief and prompt resolution of the aliens' asylum claims.

In the words of this Court, "it hardly seems reasonable to require an AIDS, glaucoma, or cancer patient to wait twenty years if the patient requires marijuana to alleviate a current medical problem." *Cannabis Cultivators Club*, 5 F. Supp. at 1102. Indeed, some patient-members have died during the course of these proceedings. (*See* Declaration of Michael Alcalay, M.D. ¶ 11.) Because of the immediacy of the patient-members' medical needs and the harm they will suffer, the government's argument must be rejected.

3. The Proposed Modification Contains Specific Criteria That Can Be Applied To Establish Medical Necessity

Defendants presented both to the Ninth Circuit and to this court, detailed declarations from patients that establish their particular medical conditions, the imminent harm they face without medical cannabis, and their lack of legal alternatives. In the face of the particularized showing, which it cannot refute, the government mischaracterizes the relief sought by Defendants and disparages the integrity and ability of the California doctors who treat these patients.

This circumstance is clearly different than that presented in *Aguilar*, 883 F.2d at 693. In *Aguilar*, the only evidence of the aliens' necessity came from workers who relied upon a screening process as evidence of the dangers faced by these aliens in their respective countries. There was no showing that the "particular aliens assisted were in danger of imminent harm". *Id.* at n.28. In contrast, individual patients have provided particularized declarations about their medical condition and need for medical cannabis. Thus, contrary to the government's contention, Defendants do not here rely upon generalized statements of medical necessity.

Moreover, in *Aguilar* there was a particular concern that the generalized screening process relied upon by defendants would usurp the traditional role of the Immigration and Naturalization Service to determine asylum status. That concern is not present here. California physicians are well qualified to assist their patients in making informed choices about appropriate medical care. They do so in extremely sensitive areas in which the legislature and the voters have spoken. Patients, in

consultation with their physicians, rather than the courts, are in the best position to determine whether a medical necessity actually exists.

As noted by the Ninth Circuit, the government's selection of an injunctive procedure has dictated the remedies available to OCBC's patient-members:

> The government did not need to get an injunction to enforce the federal marijuana laws. If it wanted to, it could have proceeded in the usual way, by arresting and prosecuting those it believed had committed a crime. Had the government proceeded in that fashion, the [D]efendants would have been able to litigate their necessity defense under *Aguilar* in due course. However, since the government chose to deal with potential violations on an anticipatory basis instead of prosecuting them afterward, the government invited an inquiry into whether the injunction should also anticipate likely exceptions.

Oakland Cannabis Buyers Coop., 190 F.3d at 1114. Having chosen to address violations on a prospective basis through an injunction, the government cannot legitimately block Defendants' efforts to ensure that the injunction does not preclude a "legally privileged or justified" use of cannabis. *Id.*[7] This Court should defer to the wisdom of the common law and recognize Defendants' necessity defense.

B. Defendants Are Entitled To A Substantive Due Process Defense

In their opening brief, Defendants established that a faithful appreciation of the Due Process analysis required by the Federal Constitution compels the conclusion that depriving seriously ill patients of the one medicine that alleviates their symptoms and in many cases saves their lives, violates their fundamental rights. (Op. Br. at 14-15.) Defendants established that they have a well-recognized liberty interest in being free from pain and in preserving their lives. *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 2288, 2303 (O'Connor, J. concurring). Defendants also established that an examination of our "nation's history, legal traditions and practices" (*Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 2262 (1997)) reveals the long

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[7] The government's disingenuous argument concerning the absence of physician declarations cannot be credited. Given the government's commitment to prosecuting physicians for providing medical guidance to their patients concerning cannabis (*see Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997)), it is not surprising that physicians are reluctant to come forward.

accepted use of cannabis as a medicine, and current legislation in six states allowing the medical use of cannabis.

The government attempts to trivialize Defendants' claims, however, by relying on *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980), and *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980), for the proposition that there is no fundamental, constitutional right to obtain a particular medical treatment. The government mischaracterizes Defendants' position. This case does not involve (a) an attempted reclassification of any drug, (b) a suit by persons who have found no medically effective treatment to relieve their pain and suffering (compare *Rutherford*) or (c) an attempt to obtain access to a wholly experimental drug that has not been shown to be effective in relieving patient-members' pain and suffering. *See, e.g., Smith v. Shalala*, 954 F. Supp. 1 (D.C. 1996).

To permit the government to interfere with the right of seriously ill patient-members to use of medical cannabis is to deny them the right recognized by *Rutherford*: the right to decide whether or not to have effective medical treatment at all. Cannabis is not simply the "medication of choice." It is the *only* medication for these patient-members and, therefore, enjoys constitutional protection. The various cases cited by the government are inapposite because they all involved attempts to have a particular *type* of treatment declared to be a fundamental right without any allegation or proof that the medication at issue had been demonstrated to be the only effective medication available. *See e.g., Sammon v. New Jersey Bd. of Med. Examiners*, 66 F.3d 639 (3d Cir. 1995); *Mitchell v. Clayton*, 995 F.2d 772 (7th Cir. 1993); *United States v. Burzynski*, 819 F.2d 1301 (5th. Cir. 1987); *Kuromiya v. United States*, 37 F. Supp. 2d 717 (E.D. Pa. 1999); *Smith v. Shalala*, 954 F. Supp. 1 (D.D.C. 1996); *United States v. Vital Health Products, Ltd.*, 786 F. Supp. 761 (E.D. Wis. 1992).

Likewise, Defendants do not seek a federal declaration requiring a federal or state agency to do anything. Unlike the patients in *Carnohan* and *Rutherford*, Defendants are not asking for the government to permit doctors to prescribe, or to permit pharmacies throughout the country to stock and dispense cannabis for medical purposes. Defendants' patient-members have a right under California law to use and obtain cannabis to relieve their suffering. This right is recognized as fundamental by the voters themselves in California, as well as by the voters of Alaska, Arizona,

Colorado, District of Columbia, Maine, Nevada, Oregon, and Washington, and by the legislature and governor of Hawaii. Those inescapable facts are an obvious feature distinguishing the Defendants in this case from parties in the cases cited by the government. Those facts also remove any lingering doubt that American citizens consider access to medical cannabis to be a fundamental right, which is subject to protection by this Court.

C. The Public Interest Mandates Modification Of The Injunction

The government makes no specific showing regarding how the public interest would be harmed by the modification Defendants propose. Instead, the government urges this court to ignore the factual record, and defer to a judgment that Congress has never made. Defendants do not here seek broad-based legalization of marijuana or its removal from Schedule I. Rather, by this motion Defendants request that a narrow group of individuals with demonstrable medical need, who face imminent harm, be permitted to receive medical cannabis through an exception to the injunction issued by this Court. The government apparently contends, however, that this Court may not exercise its equitable discretion to consider for itself whether the proposed modification actually serves the public interest, but instead must defer to the purported judgment of Congress regarding this matter. The government's position is plainly wrong. Nothing in either the Congressional pronouncements or the cases relied upon by the government, addresses this narrow issue.

The Ninth Circuit has already rejected the claim that the government makes here, finding that this Court must determine for itself where the public interest lies:

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

Oakland Cannabis Buyers Coop., 190 F.3d at 1114.

As numerous Supreme Court and Ninth Circuit decisions demonstrate, when a court decides whether to modify an injunction, the court *must* independently consider the public interest even when

a violation of a federal statute has been shown.[8] In *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962 (9th Cir. 1983), the court rejected plaintiffs' argument that because they had shown violations of the National Environmental Policy Act (NEPA), the district court was compelled to issue a preliminary injunction. The appellate court acknowledged that when a likely violation of a federal statute is shown, it is possible to infer that irreparable damage will occur as a result of the statutory violation, which is a modification of the general and more stringent standard for granting an injunction. *Id.* at 965-66. The court explicitly recognized, however, that "[t]here are nevertheless cases where public concerns other than failure to comply with NEPA must be weighed in determining whether to grant an injunction." *Id.* at 966. In particular, the court explained that Ninth Circuit precedent "authorizes the court not only to weigh the relative hardship and harms to the parties, but to examine how the *greater public interest may be affected.*" *Id.* (emphasis added). The court concluded that under these principles, the district court did not abuse its discretion in declining preliminarily to enjoin a likely violation of a federal statute on the ground that the injunction would not have served the public interest.

[8] None of the government's cited cases establish any rule that deprives this Court of discretion to consider fully the greater public interest, nor do they mandate deference to Congress in this area. *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) fully supports Defendants' position here. *Hecht* involved a violation of the Emergency Price Control Act. The issue was whether the Administrator was entitled to injunctive relief once a violation of the Act had been established. The Supreme Court concluded that notwithstanding the statutory language, traditional principles of equity required that the district court retain its discretion to refuse an injunction because the injunction was not in the public interest. *FTC v. WorldWide Factors*, 882 F.2d 344 (9th Cir. 1989) was a suit by the FTC for consumer fraud and to freeze assets for potential distribution to the public. The court did *not* presume harm to the public interest but rather explicitly balanced the harm to the public against the private interests of the litigant. *Id.* at 346-47. *Virginian Ry. Co. v. Sys. Fed'n*, 300 U.S. 515 (1937) was a suit involving mandatory duties expressed in legislation to negotiate with union representatives. The employer attempted to argue, however, that the duty to negotiate was not a proper subject for equitable relief. In this context, the court concluded that given the mandatory duties to negotiate imposed by the statute, the court properly could issue the injunction. *Tennessee Valley Auth. v. Hull*, 437 U.S. 153 (1978) concerned a conflict between the requirements of the Endangered Species Act and pronouncements by Congress that it would be in the public interest to allow completion of a dam. The court in that case ignored the subsequent pronouncements of Congress (similar to ones made here by Congress in Pub. L. No. 105-277, Div. F, 112 Stat. 2681 760-61 (1998)) and considered the ramifications to the public interest as actually raised by the specific case before the Court.

Similarly, in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), the Court explained that although the district court found a violation of the Federal Water Pollution Control Act, it was nevertheless appropriate to consider the public interest rather than automatically to issue an injunction. *Id.* at 309-10, 313, 320. The Court explained:

> In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. . . . *The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.*

Id. at 312 (emphasis added).[9]

Nor has Congress concluded, as the government contends, that individuals with established necessity are absolutely prohibited from obtaining cannabis for medical use. The CSA was originally enacted as an omnibus measure to prevent widespread drug abuse, and to treat and rehabilitate drug abusers. Act of Oct. 14, 1970, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. 4566-67. Congress did not address the criteria for medical necessity nor did it abrogate the common law necessity defense. Despite numerous opportunities to do so, Congress has never amended the CSA to preclude medical necessity. Moreover, through its own Compassionate Investigative New Drug Program, the government has itself acknowledged the legitimacy of medical uses for cannabis. Finally, as discussed in section II.A.1 *infra*, the fact that marijuana is in Schedule I has no bearing on whether an individual with a medical necessity is permitted to use it. Accordingly, there is no judgment of Congress that forecloses this Court's consideration of medical necessity.

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[9] Other Ninth Circuit and Supreme Court authorities reaffirm these principles. *See Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1155-58 (9th Cir. 1988) (rejecting the argument that district courts must issue an injunction when a violation of the Federal Coal Leasing Amendments Act is shown, and ordering that on remand, the district court should consider the public interest); *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (stating that "[]when the public interest is involved, it must be a necessary factor in the district court's consideration of whether to grant preliminary injunctive relief"). Moreover, federal courts have not hesitated to reject an unfounded legislative determination that impinges upon fundamental rights. *See, e.g. Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 434-38 (1983) (invalidating ordinance requiring all second trimester abortions to be performed in a hospital — the court rejected a legislative determination that such a requirement was a reasonable health regulation).

The government's reliance on Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 760-61 (1998) is equally unavailing. While this pronouncement spoke to the benefits of the process for drug approval, it did not address the traditional criteria for injunctive relief or seek in any way to circumscribe this Court's equitable power. *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1114. Moreover, Congress would not have had the authority under any circumstances to nullify the fundamental Constitutional rights at issue in this litigation.

The Ninth Circuit explicitly held that "OCBC has identified a strong public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of a large group of persons with serious or fatal illnesses." *Id.* Defendants have presented considerable evidence from patient-members, describing how cannabis has kept them alive. Without access to cannabis, patient-members will suffer severe pain or debilitating spasticity will lose their sight, will lose weight from AIDS "wasting syndrome" and nausea due to chemotherapy, and some will die. (*See, e.g.*, Declarations of Paul Allen, Willie Beal, Creighton Frost, Steven Kubby, Miles Saunders, Kerie Campbell, Walter Hatchett, and Liza Jane Allen.) In addition to providing the declarations of patient-members, Defendants have established that the City of Oakland considers inability of these seriously ill individuals to receive medical cannabis to constitute a public health emergency. Medical groups, such as the prestigious California Medical Association, also have supported the availability of cannabis to treat seriously ill patients. (*See* Request for Judicial Notice Ex. 2.) While the CMA supports the process for approving drugs for medical use, it recognizes that the immediate needs of seriously ill patients, in consultation with their physicians, may require pursuit of other treatments while that process is underway. This position was joined by the California Nurses Association, the City of Oakland, the County of Alameda and the County of San Francisco, all of whom plainly have a stake in identifying and protecting "the public interest." (*See Id.*)

The government has not refuted Defendants' strong factual showing and instead urges this Court to defer to "the political branches in identifying and protecting the public interest." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1359 (5th Cir. 1996). In so doing, however, the government would have this Court ignore the political process which has clearly concluded that the public interest in this case is well served by permitting seriously ill patients access to cannabis to

ameliorate their pain, and prolong their lives. The people of California, through the initiative process, as well as the City of Oakland through its repeated declarations of a public health emergency, have made clear where the public interest truly lies. In contrast, the government has not established that Congress' interest in preventing drug abuse or in protecting the public welfare is promoted by denying necessary medicine to sick patients, or that these interests will be harmed if the court grants the requested modification.

Finally, the government argues that the Court should not "substitute its own determination of the public interest for that arrived at by the political branches, whether or not there may be doubt regarding the wisdom of their conclusion". (Oppos. Br. at 24.) Defendants have provided this Court with definitive expressions of the public interest by entities charged with identifying and promoting the public welfare. The government has not. Accordingly, a "faithful" application of this salutary principle in this case compels the conclusion that the Court should respect these expressions of the public interest and grant Defendants' request for modification of the injunction.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the injunction be dissolved. In the alternative, Defendants respectfully request that, consistent with the Ninth Circuit's opinions in this case, the injunction be modified.

Dated: July 5, 2000

MORRISON & FOERSTER LLP

By: _____
Annette P. Carnegie

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

PROOF OF SERVICE BY OVERNIGHT DELIVERY
FRCivP 5(b)

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.

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REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION ORDER (Fed.R.Civ.P. 60(b), Local Rule 7-11)

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:

United States of America

Mark T. Quinlivan
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Washington, D.C. 20530

Mark Stern
U.S. Department of Justice
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Washington, D.C. 20530

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

Executed at San Francisco, California, this **5th day of July, 2000**.

STEPHANIE A. CHENARD
(typed)

Stephanie A. Chenard
(signature)

PROOF OF SERVICE BY MAIL
FRCivP 5(b)

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REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION ORDER (Fed.R.Civ.P. 60(b), Local Rule 7-11)

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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 **5th day of July, 2000**.

STEPHANIE A. CHENARD
(typed)

Stephanie A. Chenard
(signature)

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Miami Herald, November 18, 1996

U.S. dealing pot to eight sick people

Program costs government $200,000

The Associated Press

The small silver canister that looks like a cookie tin arrives promptly once a month for Florida stockbroker Irvin Rosenfeld.

Its contents: 300 tightly rolled marijuana joints.

His supplier: the U.S. government.

"The quality is unsatisfactory," Rosenfeld says appreciatively. "And I don't have to buy it on the street."

The 44-year-old suffers from a rare bone disease and is one of eight people legally supplied with marijuana under the government's long-standing "compassionate use" program.

It's run by the same health and drug agencies that condemn marijuana as part of the national war on drugs. And this fall, top government officials from those agencies campaigned against ballot measures in California and Arizona to legalize marijuana for medical purposes. The [illegible] passed in both states, although the courts likely will determine their fate.

"Research shows that marijuana is harmful to one's brain, heart, lungs and immune system," wrote Health and Human Services Secretary Donna Shalala in a recent statement. "Any law premised on the notion that marijuana or these other illicit drugs are medically useful is suspect."

So why does the government continue supplying it?

"When we have a compassionate-use situation, out of feeling for the patient, we don't take that away," says Don McLearn, a spokesman for the Food and Drug Administration. "We just don't add to it."

The federal marijuana program started in the 1970s and was discontinued in 1992 — partly because of a huge increase in applications from AIDS patients. The 13 people already receiving monthly pot shipments were allowed to continue. Five have since died. The others will be supplied — at taxpayer expense — for as long as they want.

They suffer from cancer, glaucoma, multiple sclerosis and rare genetic diseases.

Marijuana, they say, helps control nausea and muscle spasms, ease eye pressure and pain and stimulate appetites. Pot patients insist it works better than other drugs, including the highly expensive Marinol, a pill form of marijuana that has the same active ingredient, THC.

"We are sick people. We are desperate people," says Elvy Musikka of Florida, who has glaucoma and carries her daily ration of marijuana "brownies" in her pocketbook. She bakes them from the 300 joints the National Institute on Drug Abuse sends her every month.

"This medicine gives us quality of life."

The government crop is harvested on a 7.5-acre pot farm at the Research Institute of Pharmaceutical Sciences at the University of Mississippi. From there, the marijuana is shipped by airplane to Raleigh, N.C., where the cigarettes are rolled by machine, packed in canisters and delivered to medical centers for the eight patients to pick up.

The entire operation costs about $200,000 a year.

It's a tiny — but thorny — sum for the various agencies involved: the FDA, which administers the program, and its parent, the Department of Health and Human Services; the National Institute on Drug Abuse, which acts as supplier; and the Drug Enforcement Agency, which must approve the use of any controlled substance.

The official position of these agencies today is that marijuana is more likely to cause health problems than ease them.

"We still have a federal law that says marijuana has no medical value, and that it is against the law to grow it, distribute it and prescribe it as medicine," says President Clinton's drug czar Barry McCaffrey.

Others say such statements reflect the hypocrisy of a political war on drugs that denies many seriously ill people a cheap medicine whose benefits are so obvious the government supplies it. They point out that more than 20 states have laws allowing the medical use of marijuana, but they are ineffective as long as the federal ban remains.

"They say that people using it are criminals," says Jackie Rickert of Wisconsin, who has a rare joint disease called Ehlers-Danlos Syndrome and smokes marijuana to relieve the pain. "I think withholding medication from sick people is inhumane and cruel and that in itself should be considered a crime."

Rickert, 45, speaks bitterly about how she just missed being part of the federal marijuana program. She received all the proper approvals, she said, right down to a government brochure on how to properly smoke a joint.

Then, as she was waiting for her first shipment, the program was closed.

Today, Rickert relies on "cannabis angels" to provide her with pot.

Asks Rickert: "Why should we have to break the law to get marijuana that the government provides to others free of charge?"

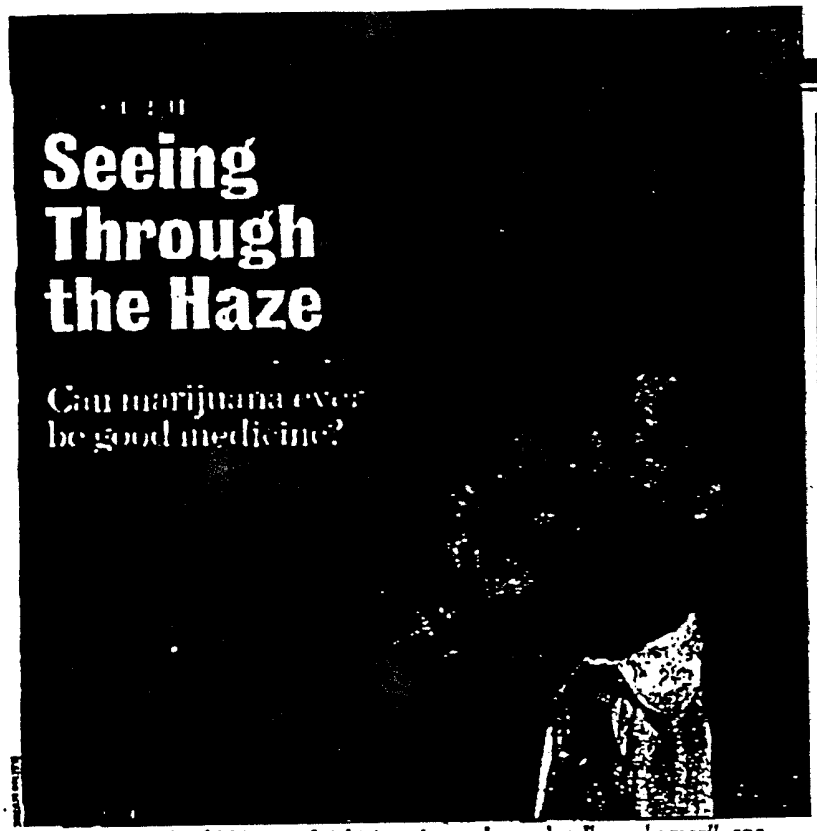
The Associated Press

Irvin Rosenfeld, a 44-year-old stockbroker from Boca Raton, Fla., holds the can that he receives from the U.S. government containing his monthly supply of 300 marijuana joints.

Newsweek, January 13, 1997

Seeing Through the Haze

Can marijuana ever be good medicine?



Public puffer: Rosenfeld is one of eight Americans who can legally smoke marijuana

By Adam Rogers

When Irvin Rosenfeld was 10, he contracted a rare cancer. Today, 33 years later, his muscles and blood vessels stretch over tumors on the ends of his arm and leg bones. To relieve the pain and the dangerous muscle tension, the stockbroker from Boca Raton, Fla., smokes 10 to 15 marijuana cigarettes a day, courtesy of the United States government. He's one of eight people in the country with that privilege. "There's not as much tension, not as much pain," says Rosenfeld, who has also tried such prescription drugs as Dilaudid and morphine. "Quite frankly," he says, "this is the best medicine I've discovered."

Legal marijuana may stop with Rosenfeld's group of eight. In November voters in California and Arizona gave doctors the right to prescribe marijuana for some patients, but last week the federal government just said no. At a joint press conference, drug czar Barry McCaffrey, Health and Human Services Secretary Donna Shalala and Attorney General Janet Reno said that doctors who prescribed marijuana risked losing their licenses to prescribe drugs and might face prosecution. Few doctors think marijuana is the panacea that some advocacy groups argue it is, but many want to be able to give their patients the legal right to buy and possess it.

The case for medical marijuana has its merits, and a history. In their book, "Marihuana: The Forbidden Medicine," Harvard psychiatrist Lester Grinspoon and his writing partner, James Bakalar, describe a dozen of marijuana's possible benefits, which include easing nausea and vomiting from cancer chemotherapy, improving the appetite of people with AIDS and lowering pressure inside the eye due to glaucoma. Indeed, studies in the 1970s and 1980s began to confirm many of these effects in human beings. States were developing Compassionate Investigational New Drug programs (a federal one gave Rosenfeld his pot), but they largely fell victim to the War on Drugs in the early 1990s. Rigorous research is still lacking, but illicit clinical use continues. Many glaucoma and AIDS sufferers still rely on marijuana, and in a 1991 study of oncologists, 48 percent said they would prescribe it if they could and 44 percent said they had recommended it to patients. "Marijuana is not meant to replace all the medications that have been devised since the dawn of time," says Richard Cohen, an oncologist in San Francisco. "It is for select groups of individuals."

Those against legalization say marijuana shouldn't be for anyone. The administration fears that any sanctioned use would lead to further liberalization of drug laws, which could in turn lead to increased drug use. Others argue that newer drugs and therapies have filled the niches marijuana once might have (chart). They point out that smoking marijuana is harmful to the lungs and may cause hormonal and reproductive problems. "These propositions are not about compassion," McCaffrey said at the press conference. "They are about legalizing dangerous drugs." Both the government and the American Medical Association say that there is no scientific evidence that marijuana is useful.

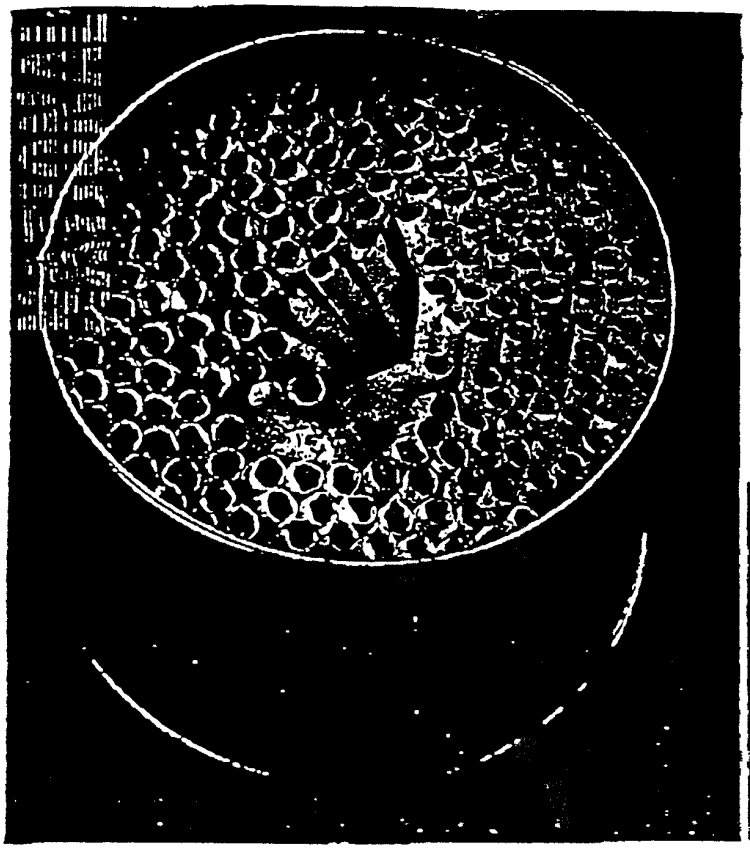
That evidence is not forthcoming. The plant is so cheap—it is, after all, a weed—that drug companies don't have a financial incentive to fund its study. Marijuana has more than 460 different chemicals in it, making it hard to parse out active ingredients. A synthetic version of one main ingredient, tetrahydrocannabinol, is sold as the appetite stimulant and anti-nausea drug Marinol, but its value is not entirely proven.

So is there a medical role for marijuana? It's cheap, probably nontoxic and—with chemotherapy patients, at least—anecdotally effective. But marijuana is still classified as a Schedule I drug with a high potential for abuse, like heroin and LSD. By stopping legalization, the government has eliminated any impetus for further study. "I don't care what makes me survive," says Irvin Rosenfeld. "I just want the best cure." To the very sick, neither politics nor science really matters. ■

Alternatives to the Alternative

Advocates support several medicinal uses for marijuana, all with some evidence to back them up. Below, some of the disorders and their conventional, legal treatments:

AIDS-Related Wasting Syndrome	Experimental therapies involving anabolic steroids may allow people with AIDS to regain muscle mass more effectively than appetite stimulants like Megase or marijuana.
Cancer Chemotherapy	Drugs like Zofran can reduce nausea and are administered intravenously, for patients who can't eat. Smoked marijuana is also effective.
Glaucoma	Many drugs reduce pressure inside the eye, but with side effects like pain or dimming of vision. A new drug, Xalatan, is easier to use and won't lower blood pressure like marijuana.
Pain and Muscle Spasm	Many different drugs and therapies work, but marijuana may also alleviate symptoms.



"The reality is that it works," says Randall (below) of the unpalatably rolled joints (left) he receives regularly from the government for his glaucoma. "It's easy to joke about, but the government is causing people to suffer needlessly. Imagine a doctor saying, 'I'd like to give you chemotherapy, but you have to wander the streets looking for it.'"

TEN JOINTS A DAY KEEPS YOUR ILLNESS AT BAY, THANKS TO A GOVERNMENT STASH IN MISSISSIPPI'S HIGHLANDS. *BY DAVID SALTONSTALL*

Robert Randall did not attend the big symposium in February on the medical uses of marijuana, hosted by the National Institutes of Health. But if he had, the 49-year-old glaucoma sufferer would surely have thanked Uncle Sam for providing him with enough free pot to allow him to smoke ten joints every day for the past 21 years. "It has saved my eyesight," says Randall of the government-grown ganja that the National Institute on Drug Abuse, an offshoot of the NIH, has been shipping to his local pharmacy since 1976.

Randall receives his provisions under NIDA's Marijuana Project, a little-known federal program established in the 1960s to grow marijuana for research purposes. After learning about the government's hidden stash in 1975, Randall sued for access and became its first recipient. Soon after, he received his first shipment, paving the way for 13 others. Although the program has been closed to new applicants since 1992, it is still providing a ready supply of U.S.-approved reefer for its eight surviving patients.

That such people exist might come as something of a harsh toke to anyone who has followed the Clinton administration's latest exhalations on medical marijuana. Last fall, Attorney General Janet Reno announced she may prosecute doctors in California and Arizona who try to prescribe the drug, despite approval of pro-pot referenda in both states last November. And the White House drug-policy czar, retired army general Barry McCaffrey, calls medical marijuana "a threat to the national drug strategy" that also sends "a very mixed and confusing message to the young."

Uncle Sam's pot farm is located at the University of Mississippi in Oxford, behind a 12-foot-high fence bounded by four prisonlike watchtowers. The feds have been running the seven-acre patch, known to agency bureaucrats simply as the Farm, since 1968. Over the past ten years, the Farm has produced about 5,000 pounds of U.S.-inspected marijuana—worth roughly $22 million on the street.

Not surprisingly, when asked to reconcile the Marijuana Project's pro-pot message with recent White House policy, federal officials act as if they've just been handed a smolder joint. They decline and nervously pass it alo "We just do what we're told," says Sheryl M sano, a NIDA spokeswoman. "If we are told provide marijuana to eigh people, then th what we do." She defers to the Food and Dr Administration, which granted the "comp sionate IND" (investigational new dr waivers that have made it possible for a f people to benefit from the program. "It's re not an FDA question," counters FDA spok man Don McLean, who says it was the FD parent agency, the U.S. Public Health Servi that decided back in 1992 due to a sudden surge in a plications from AIDS p tients—to close the program to all but t remaining eight participants. When press he adds that "technically, these [eight] are search subjects," a convenient feint also pick up by McCaffrey's office. "The general has objection to research," says McCaffre spokesman Bob Weiner. "Those are peo who are being researched."

If true, then score one for medical ma juana. When Randall was diagnosed wi glaucoma in 1972, at the age of 24, doctor told him that he would be blind within fi years. More than two decades and countl joints later, Randall, a former college instru tor living in Sarasota, Florida, says he se sees as well as he did on that dark morni in 1972. "Marijuana is clearly helpful in wa other drugs are not," insists Randall, who r ceives approximately $25,000 worth of po year. Indeed, research gathered by scienti such as Dr. Lester Grinspoon at Harva Medical School suggests that marijuana c help combat any number of ailmen including epilepsy, multiple sclerosis, m graine headaches, menstrual cramps, a depression, in addition to nausea resulti from chemotherapy and AIDS treatmen

EXHIBIT B

2ND ITEM of Level 1 printed in FULL format.

FEDERAL REGISTER
Vol. 64, No. 127

Rules and Regulations

DEPARTMENT OF JUSTICE (DOJ)
Drug Enforcement Administration (DEA)

21 CFR Parts 1308 1312

[DEA-180F]

Schedules of Controlled Substances: Rescheduling of the Food and Drug Administration Approved Product Containing Synthetic Dronabinol [(-)-[DELTA]<9> -(trans)-Tetrahydrocannabinol] in Sesame Oil and Encapsulated in Soft Gelatin Capsules From Schedule II to Schedule III

64 FR 35928

DATE: Friday, July 2, 1999

ACTION: Final rule.

To view the next page, type .np* TRANSMIT.
To view a specific page, transmit p* and the page number, e.g. p*1

[*35928]

SUMMARY: This is a final rule of the Deputy Administrator of the Drug Enforcement Administration (DEA) transferring a drug between schedules of the Controlled Substances Act (CSA) pursuant to *21 U.S.C. 811*. With the issuance of this final rule, the Deputy Administrator transfers from schedule II to schedule III of the CSA the drug containing synthetic dronabinol [(-)-[DELTA]<9> -(trans)-tetrahydrocannabinol] in sesame oil and encapsulated in soft gelatin capsules in a product approved by the Food and Drug Administration (FDA). This rule also designates this drug as a schedule III non-narcotic substance requiring an import/export permit. As a result of this rule, the regulatory controls and criminal sanctions of schedule III will be applicable to the manufacture, distribution, importation and exportation of this drug.

EFFECTIVE DATE: July 2, 1999.

FOR FURTHER INFORMATION CONTACT: Frank Sapienza, Chief, Drug and Chemical Evaluation Section, Drug Enforcement Administration, Washington, DC 20537, 202-307-7183.

SUPPLEMENTARY INFORMATION:

Background

Dronabinol is the United States Adopted Name (USAN) for the (-)-isomer of [DELTA]<9> -(trans)-tetrahydrocannabinol [(-)-[DELTA]<9> -(trans)-THC], which is believed to be the major psychoactive component of Cannibas sativa L. (marijuana). On May 31, 1985, FDA approved for marketing the product Marinol(R) which contains synthetic dronabinol in sesame oil and encapsulated in soft gelatin capsules-for the treatment of nausea and vomiting associated with cancer chemotherapy. Following this FDA approval, DEA issued a final rule on May 13, 1986, transferring FDA-approved products of the same formulation as Marinol(R) from schedule I to schedule II of the CSA in accordance with *21 U.S.C. 811*(a). (For simplicity within this document, the term "Marinol(R)" will be used hereafter to refer to Marinol(R) and any other products, which may by approved by FDA in the future, that have the same formulation as Marinol(R).) The 1986 rescheduling of Marinol(R) was based on a medical and scientific evaluation and scheduling recommendation from the Assistant Secretary for Health in accordance with *21 U.S.C. 811*(b). The transfer of Marinol(R) to schedule II did not affect the CSA classification of pure dronabinol, which-as a tetrahydrocannabinol with no currently accepted medical use in treatment in the United States-remains a schedule I controlled substance. On December 22, 1992, FDA expanded Marinol(R)'s indications to include the treatment of anorexia associated with weight loss in patients with AIDS.

The Petition To Reschedule Marinol<(R)>

On February 3, 1995, UNIMED Pharmaceuticals, Inc. petitioned the Administrator of DEA to transfer Marinol<(R)> from schedule II to schedule III. In response to this petition, and in view of supplemental information that UNIMED provided to DEA on December 11, 1996, DEA had to determine whether this proposed rescheduling of Marinol<(R)> would comport with United States obligations under the Convention on Psychotropic Substances, 1971 (Psychotropic Convention). See *21 U.S.C. 811*(d). Under the Psychotropic Convention, dronabinol and all dronabinol-containing products, such as Marinol<(R)>, are listed in schedule II. As a result, the United States is obligated under the Psychotropic Convention to impose certain restrictions on the export and import of Marinol<(R)>. DEA has concluded that, in order for the United States to continue to meet its obligations under the Psychotropic Convention, DEA will continue to require import and export permits for international transactions involving Marinol<(R)>, even though Marinol<(R)> will be transferred to schedule III of the CSA. (As set forth below, to accomplish this, DEA is hereby amending 21 CFR 1312.30 to require import and export permits for international transactions involving Marinol<(R)>.)

After determining that Marinol<(R)> could be transferred to schedule III while maintaining the controls required by the Psychotropic Convention, and after gathering the necessary data, on August 7, 1997, DEA requested from the Acting Assistant Secretary for Health, Department of Health and Human Services (DHHS), a scientific and medical evaluation, and recommendation, as to whether Marinol<(R)> should be rescheduled, in accordance with *21 U.S.C. 811*(b).

On September 11, 1998, the Acting Assistant Secretary for Health sent to DEA a letter recommending that Marinol<(R)> be transferred from schedule II to schedule III of the CSA. Enclosed with the September 11, 1998, letter was a document prepared by the FDA entitled "Basis for the Recommendation for Rescheduling Marinol<(R)> Capsules from schedule II to schedule III of the

Controlled Substances Act (CSA)." In this document, the FDA defines the Marinol<(R)> product as "an FDA-approved drug product containing synthetically produced dronabinol dissolved in sesame oil and encapsulated in soft [*35929] gelatin capsules (2.5 mg, 5 mg, and 10 mg per dosage unit)." The document contained a review of the factors which the CSA requires the Secretary to consider, which are set forth in *21 U.S.C. 811*(c).

The Proposed Rule

On November 7, 1998, the then-Acting Deputy Administrator of DEA published a notice of proposed rule making in the Federal Register *(63 FR 59751)*, proposing to transfer Marinol<(R)> from schedule II to schedule III of the CSA. The proposed rule was based on the DHHS scientific and medical evaluation and scheduling recommendation and DEA's independent evaluation. Also under the proposed rule, 21 CFR 1312.30 would be amended to include Marinol<(R)> as a schedule III non-narcotic controlled substance specifically designated as requiring import and export permits pursuant to *21 U.S.C. 952*(b)(2) and 953(e)(3). As discussed above, this proposed amendment to 21 CFR 1312.30 is necessary for the United States to continue to meet its obligations under the Psychotropic Convention. The notice of proposed rule provided an opportunity for all interested persons to submit their comments, objections, or requests for hearing in writing to DEA on or before December 7, 1998.

Comments From the Public

DEA received comments regarding the proposed rule from ten persons. Nine of the commenters supported the proposed rule. One commenter objected to the proposed rule and requested a hearing thereon. The comments are briefly summarized below.

The nine commenters who supported the proposed rule included organizations, physicians, and one individual. Eight of the nine commenters who supported the proposed rule expressed the opinion that Marinol<(R)> is a safe and effective alternative to smoking marijuana for treatment of nausea and loss of appetite and has low abuse potential.

One commenter who supported the proposed rule expressed the view that the rescheduling of Marinol<(R)> should not serve as a substitute for making marijuana legally available for medical use. This commenter stated that it supported the use of marijuana for medical purposes and, therefore, wished to emphasize that the proposed rule affected the CSA status of Marinol<(R)> -not that of marijuana, which remains a schedule I controlled substance.

The one commenter who objected to the proposed rule, and requested a hearing thereon, asserted that Marinol<(R)> should not be transferred to schedule III unless and until marijuana and all other THC-containing drugs are simultaneously and likewise rescheduled. This commenter asserted that Marinol<(R)> has the same potential for abuse as marijuana and all other THC-containing drugs. This commenter agreed with the proposed rule that Marinol<(R)> 's potential for abuse is less than the "high potential for abuse" commensurate with schedules I and II of the CSA. Accordingly, this commenter agreed that Marinol<(R)> should be transferred to a less restrictive schedule than schedule II. However, this commenter disagreed with what would be the resultant status of Marinol<(R)> vis-a-vis marijuana and THC if the NPRM becomes final: Marinol<(R)> would be in

schedule III while marijuana and THC would remain in schedule I. This commenter asserted that the CSA prohibited transferring Marinol<(R)> to a less restrictive schedule unless marijuana and all THC-containing drugs are simultaneously transferred to the same schedule. DEA has determined that this commenter's objections are based on a misinterpretation of the CSA, which can be addressed, as a matter of law, without conducting a fact-finding hearing. Accordingly, as this commenter presented no material issues of fact, DEA denied this commenter's request for a hearing.

Findings

Relying on the scientific and medical evaluation and scheduling recommendations of the Assistant Secretary for Health, and based on DEA's independent review thereof, the Deputy Administrator of the DEA, pursuant to *21 U.S.C. 811*(a) and 811(b), finds that:

(1) Based on information now available, Marinol<(R)> has a potential for abuse less than the drugs or other substances in schedules I and II.

(2) Marinol<(R)> is a FDA-approved drug product and has a currently accepted medical use in treatment in the United States; and

(3) Abuse of Marinol<(R)> may lead to moderate of low physical dependence or high psychological dependence.

Rescheduling Action

Based on the above findings, the Deputy Administrator of the DEA concludes that Marinol<(R)> should be transferred from schedule II to schedule III. Schedule III regulations will, among other things, allow five prescription refills in six months and lessen record keeping requirements and distribution restrictions. The schedule III control of Marinol<(R)> will become effective July 2, 1999, except that certain regulatory provisions governing registrants who handle Marinol will take effect as indicated below. In the event that the regulations impose special hardships on the registrants, the DEA will entertain any justified request for an extension of time to comply with the schedule III regulations regarding Marinol<(R)>. The applicable regulations are as follows.

1. Registration. Any person who manufactures, distributes, dispenses, imports or exports Marinol<(R)> or who engages in research or conducts instructional activities with Marinol<(R)>, or who proposes to engage in such activities, must be registered to conduct such activities in accordance with part 1301 of Title 21 of the Code of Federal Regulations.

2. Security. Marinol<(R)> must be manufactured, distributed and stored in accordance with §§ 1301.71, 1301.72(b), (c), and (d), 1301.73, 1301.74, 1301.75(b) and (c) and 1301.76 of Title 21 of the Code of Federal Regulations.

3. Labeling and Packaging. All commercial containers of Marinol<(R)>, which are packaged on or after January 3, 2000 must have the appropriate Schedule III labeling as required by §§ 1302.03-1302.07 of Title 21 of the Code of Federal Regulations. Commercial containers of Marinol<(R)> packaged before January 3, 2000. After April 3, 2000, all commercial containers of Marinol must bear the CIII labels as specified in §§ 1302.03-1302.07 of Title 21 of the Code of

Federal Regulations.

4. Inventory. Registrants possessing Marinol<(R)> are required to take inventories pursuant to §§ 1304.03, 1304.04 and 1304.11 of Title 21 of the Code of Federal Regulations.

5. Records. All registrants must keep records pursuant to §§ 1304.03, 1304.04 and 1304.21-1304.23 of Title 21 of the Code of Federal Regulations.

6. Prescriptions. All prescriptions for Marinol<(R)> are to be issued pursuant to §§ 1306.03-1306.06 and 1306.21-1306.26 of Title 21 of the Code of Federal Regulations. All prescriptions for Marinol<(R)> issued on or after July 2, 1999, if authorized for refilling, shall as of that date be limited to five refills and shall not be refilled after January 2, 2000.

7. Importation and Exportation. Due to its international control status, import and export permits for Marinol<(R)> will be required in accordance with 21 CFR 1312.30. All importation and exportation of Marinol<(R)> shall be in compliance with part 1312 of Title 21 of the CFR.

8. Criminal Liability. Any activity with Marinol<(R)> not authorized by, or in violation of, the CSA or the Controlled [*35930] Substances Import and Export Act shall continue to be unlawful.

In accordance with the provisions of the CSA *(21 U.S.C. 811*(a)), this action is a formal rule making "on the record after opportunity for a hearing." Such proceedings are conducted pursuant to the provisions of *5 U.S.C. 556* and 557 and, as such, are exempt from review by the Office of Management and Budget pursuant to Executive Order (E.O.) 12866, section 3(d)(1). The Deputy Administrator, in accordance with the Regulatory Flexibility Act *(5 U.S.C. 605*(b)), has reviewed this final rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. Marinol<(R)> is a prescription drug used to treat nausea due to cancer chemotherapy and AIDS wasting. Handlers of Marinol<(R)> are likely to handle other controlled substances used to treat cancer or AIDS which are already subject to the regulatory requirements of the CSA. Further, placement of Marinol<(R)> in schedule III of the CSA will mean a significant decrease in the regulatory requirements for persons handling Marinol<(R)>.

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $ 100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under provisions of the Unfunded Mandates Reform Act of 1995.

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $ 100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the

distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E.O. 12612, it is determined that this rule, if finalized, will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects

21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Narcotics, Prescription drugs.

21 CFR Part 1312

Administrative practice and procedure, Drug traffic control, Exports, Imports, Narcotics, Reporting requirements.

Under the authority vested in the Attorney General by section 201(a) of the CSA (*21 U.S.C. 811*(a)), and delegated to the Administrator of the DEA by the Department of Justice regulations (28 CFR 0.100) and redelegated to the Deputy Administrator pursuant to 28 CFR 0.104, the Deputy Administrator hereby amends 21 CFR parts 1308 and 1312 as follows:

PART 1308--[AMENDED]

1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: *21 U.S.C. 811*, 812, 871(b) unless otherwise noted.

§ 1308.12 -- [Amended]

2. Section 1308.12 is amended by removing paragraph (f)(1) and redesignating the existing paragraph (f)(2) as (f)(1).

3. Section 1308.13 is amended by adding a new paragraph (g) to read as follows:

§ 1308.13 -- Schedule III.

* * * * *

(g) Hallucinogenic substances.

(1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved product-7369.

[Some other names for dronabinol: (6a R-trans)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6 H -dibenzo [b,d]pyran-1-ol] or (-)-delta-9-(trans)-tetrahydrocannabinol]

(2) [Reserved]

PART 1312--[AMENDED]

1. The authority citation for part 1312 continues to read as follows:

Authority: *21 U.S.C. 952*, 953, 954, 957, 958.

2. Section 1312.30 is amended by adding a new paragraph (a) and reserving paragraph (b) to read as follows:

§ 1312.30 -- Schedule III, IV and V non-narcotic controlled substances requiring an import and export permit.

* * * * *

(a) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved product.

(b) [Reserved]

Dated: June 28, 1999.

Donnie R. Marshall,

Deputy Administrator, Drug Enforcement Administration.

[FR Doc. 99-16833 Filed 7-1-99; 8:45 am]

BILLING CODE 4410-09-M

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES, Defendants. AND RELATED ACTIONS.	No. C 98-0088 CRB **DECLARATION OF JON GETTMAN, Ph.D.**

I, JON GETTMAN, Ph.D., declare:

1. I am over 18 years of age and am of sound mind. I make the following statements upon my own personal knowledge of the facts stated herein. If called as a witness, I could and would testify competently to such matters.

2. I am the petitioner of a petition filed with the Drug Enforcement Administration on July 10, 1995, to remove cannabis from Schedule I status.

3. A previous rescheduling petition filed in 1972 eventually resulted in a comprehensive review of the then-existing evidence by the DEA's chief administrative law judge, Francis Young, who ruled in 1989 that cannabis had accepted medical use. The DEA rejected Judge Young's decision, a rejection eventually upheld by the D.C. Circuit Court of Appeals, which in 1994 ruled that the DEA had used reasonable standards in its determination.

4. In 1995 I filed my petition, which argues that cannabis does not have the high potential for abuse required for Schedule I classification. The petition reviewed extensive scientific, medical, and government reports published between 1989, when the record in Judge Young's proceedings was closed, and 1994, the most up-to-date information available when I prepared and filed my petition.

5. After reviewing the petition for two and one-half years, the DEA certified on December 19, 1997, that the petition provided sufficient grounds for removing cannabis and all cannabinoids from Schedules I and II. The DEA then referred the petition to the Department of Health and Human Services for scientific and medical review.

6. HHS has now been considering the petition for more than 30 months, but has still taken absolutely no action on the petition.

7. When review by HHS is eventually complete, the DEA will make a rulemaking proposal for rescheduling cannabis. That proposal, whether it provides for rescheduling or not, will then be subject to public comment, public hearings, administrative action, and judicial review.

/////

/////

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 30th day of June, 2000, at Lovettsville, Virginia.

Jon Gettman, Ph.D.

COPY

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE, AND JEFFREY JONES

Defendants.

AND RELATED ACTIONS.

No. C 98-0088 CRB

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

(Fed. R. Civ. P. 60(b), Local Rule 7-11)

Date: July 14, 2000
Time: 10:00 a.m.
Hon. Charles R. Breyer

Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones hereby request the Court to take judicial notice pursuant to Federal Rule of Evidence 201 of the following:

1. Order in United States v. B.E. Smith No. 99-10447 dated February 3, 2000. (Ex. 1)

///

2. Brief of Amicus Curiae California Medical Association and the joinders of the California Nurses Association, the County of Alameda, the County of San Francisco and the City of Oakland therein. (Ex. 2)

Dated: July 5, 2000

MORRISON & FOERSTER LLP

By: _____
Annette P. Carnegie
Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

PROOF OF SERVICE BY OVERNIGHT DELIVERY
FRCivP 5(b)

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' REQUEST FOR JUDICIAL NOTICE
(Fed.R.Civ.P. 60(B), Local Rule 7-11)

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:

United States of America

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

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

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

Executed at San Francisco, California, this **5th day of July, 2000**.

STEPHANIE A. CHENARD
(typed)

Stephanie A Chenard
(signature)

PROOF OF SERVICE BY MAIL
FRCivP 5(b)

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 mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

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

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE
(Fed.R.Civ.P. 60(B), Local Rule 7-11)

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing 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 **5th day of July, 2000**.

STEPHANIE A. CHENARD
(typed)

Stephanie H. Chenard
(signature)

SERVICE LIST

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. B. E. SMITH, Defendant-Appellant.	No. 99-10447 DC# CR-97-558-GEB Eastern California (Sacramento) ORDER

Before: BROWNING and WALLACE, Circuit Judges

Appellee's motion for leave to file a late opposition to the motion for reconsideration is granted.

Appellant's motion for reconsideration of this court's October 13, 1999 order denying bail pending appeal is granted.

To be eligible for bail, appellant must demonstrate that his appeal raises a substantial question of law likely to result in an order for new trial, and that he is not likely to pose a danger to the safety of any other person or the community. *See* 18 U.S.C. § 3143(b). In light of this court's decision in *United States v. Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109 (9th Cir. 1999) ("*OCBC*"), Smith is entitled to bail pending appeal if he can demonstrate: 1) a likelihood that he was

entitled to present a medical necessity defense at trial; and 2) his release does not pose a danger that he will distribute marijuana to people not falling within the class of individuals described in *OCBC*.

Accordingly, we remand for the limited purpose of allowing the district court to conduct this inquiry in the first instance.

The appellate briefing schedule shall remain in effect.

EXHIBIT 2

Nos. 98-16950, 98-17044, and 98-17137

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Appellee/Plaintiff

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Appellants/Defendants

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.

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT'S RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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CALIFORNIA MEDICAL ASSOCIATION

Nos. 98-16950, 98-17044, and 98-17137

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Appellee/Plaintiff

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Appellants/Defendants

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.

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT'S RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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I. INTRODUCTION

The California Medical Association ("CMA") is a non-profit, incorporated professional association of more than 30,000 physicians practicing in the State of California. CMA's membership includes California physicians engaged in the private practice of medicine, in all specialties. CMA's primary purposes are "...to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession. CMA and its members share the objective of promoting high quality, cost-effective health care for the people of California.

The California Medical Association wishes to express its strong support for the panel's ruling on medical necessity in this case. CMA believes that a medical necessity defense, as narrowly defined by the panel, is wholly appropriate, and indeed essential, to protect the integrity and effectiveness of the physician-patient relationship.[1] Furthermore, the panel's ruling is entirely consistent with both the traditional common law doctrine of necessity and the federal Controlled Substances Act. Accordingly, there is no basis for the extraordinary review sought by the federal government, and CMA therefore urges this Court to deny the petition for rehearing and rehearing *en banc*.

CMA is in agreement with Attorney General Bill Lockyer that there are circumstances, such as those in this case, in which a patient should be allowed to

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[1] Under the panel's ruling, the medical necessity defense applies only to patients: 1) who have serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms; 2) who will suffer serious harm if they are denied cannabis; and 3) **for whom there are no legal alternative to cannabis for the effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects.** U.S. v. Oakland Cannabis Buyers' Cooperative 190 F.3d 1109, 1114 (9th Cir. 1999).

"present evidence that use of marijuana, under certain narrow conditions, may be a lawful exception to the federal drug laws." *See* Exhibit A, Letter from California Attorney General Bill Lockyer to United States Attorney General Janet Reno, dated October 6, 1999. CMA thus concurs that this matter should be allowed to proceed immediately back to the District Court for a determination of whether there are patients in this case who meet the panel's medical necessity criteria.

II. DISCUSSION

A. The Panel's Ruling on Medical Necessity Supports the Effectiveness of the Physician-Patient Relationship and Promotes Good Patient Care.

A patient and his or her physician must sometimes embark together on a difficult and frustrating process of exploration and discovery. The patient and physician must explore all therapeutic options, and the physician must be able to offer the patient his or her opinion and advice on any and all potential courses of treatment. Neither the courts, nor any other governmental entity, should punish or otherwise impede a desperate patient, acting with the advice and approval of his or her physician, who 1) seeks to relieve his or her serious suffering by using an unconventional treatment that has been shown to be effective in his or her case and 2) has tried other standard, lawful treatments without success. Furthermore, those who attempt to aid the patient in that effort should be similarly free from sanction.

Good medicine does not involve just the application of cold data to "a case." Rather, it requires the application of intuition, sensitivity, and creativity to the circumstances of a specific patient. If the patient has an intractable problem, various measures may be tried and abandoned; consultation may be sought; research may be undertaken. To be sure, standard therapies, if available, will

certainly be tried first, but if those fail, different options must be explored[2]. Sometimes an option will involve the use of unconventional, unapproved, and, in rare instances, even unlawful substances. But the substance may offer the only hope of effective treatment for a particular patient. The practice of medicine is at its best when it discovers the one option that relieves the suffering of an otherwise "untreatable" patient. Nothing should stand in the way of the patient and physician who are genuinely seeking such a goal.

The fact that a substance or therapy has not been proven to be effective, by controlled clinical trials, for a particular condition should not invariably preclude its use by a patient. Controlled clinical trials have contributed greatly to scientific knowledge, but they are not the only means of obtaining useful information about a potential treatment modality. "Anecdotal" cases, particularly if they are meaningful in number, may offer critically important guidance to physicians and patients. It is well accepted that patients make take, on prescription, an approved medication for an unapproved medical use, i.e., "off-label" prescription.[3] To deny

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[2] It is incontrovertible that some patients with serious medical conditions cannot be helped by standard therapies. For example, in a recent report on medicinal marijuana, the prestigious Institute of Medicine noted that, despite new advances in antiemetic (anti-vomiting) medications, 20-30% of cancer patients who receive highly emetogenic chemotherapy will still experience acute emesis. Institute of Medicine, Marijuana and Medicine: Assessing the Science Base (1999) at p. 151. Others will suffer from conditions for which there is no standard therapy or for whom the side effects of such therapy are intolerable.

[3] The American Medical Association (AMA) takes the position that "a physician may lawfully use an FDA approved drug product for an unlabeled indication when such use is based upon sound scientific evidence and sound medical opinion." Policy 120.988, AMA Policy Compendium 1996. The AMA Council on Scientific Affairs has reviewed the issue of off-label prescription. The Council stated that the prevalence and clinical importance of unapproved indications are substantial, especially in the areas of oncology, rare diseases, and pediatrics. Report of the Council on Scientific Affairs 3-A-97, "Unlabeled Indications of Food and Drug Administration-Approved Drugs." The California Attorney General has opined that the state and federal drug approval laws were intended to protect consumers from drug manufacturers, not to

physicians and their patients that right would seriously eviscerate the practice of medicine.

In some cases, the only alternative may involve a drug that has been approved for marketing in other countries, but has not yet received FDA approval in the U.S. For example, there are patients who suffer from debilitating seizures who can obtain relief only from drugs available in Europe, but not the U.S. In other cases, patients may seek relief from various types of alternative therapies, such as herbs, vitamins[4], meditation, yoga, acupuncture, etc.. Physicians may assist patients in identifying whether any of such therapies are likely to be helpful. These therapies may not have been shown to be effective through controlled clinical trials. Yet they may provide a patient's sole source of relief.

The "medical necessity" defense fits well into this patient-physician dynamic. As applied by the panel, it represents, not a wholesale judicial nullification of a federal statutory scheme, but an appropriately narrow recognition that individual patients (with their physicians' advice) will sometimes seek unusual or even unlawful remedies when nothing else will alleviate their suffering. Congress would surely not have presumed to overrule, with the broad brush of the federal Controlled Substances Act (CSA), such a basic aspect of medicine.

CMA wishes to stress that it fully supports the appropriate regulation of the safety and efficacy of new drugs by the Food, Drug, and Cosmetic Act and the

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interfere with the physician's judgment regarding individual patient treatment. *See* 61 Ops.Cal.Atty.Gen. 192 (1978).

[4] Herbs, vitamins, minerals, botanicals, and similar substances are regulated as "dietary supplements," rather than "new drugs," by the FDA, so long as they are not accompanied by claims of specific medical or health benefits. The Dietary Supplement Health and Education Act (DSHEA), 21 U.S.C. sec. 343(r)(6). Therefore, they have not been rigorously tested for safety and efficacy by controlled clinical trials.

appropriate control of drugs potentially subject to abuse by the Controlled Substances Act. CMA would not support any judicial determination that created a wholesale undermining of those Acts. However, by enacting these general laws to protect public health and safety, Congress cannot have intended to prevent the courts from recognizing and accommodating the desperate need of individual patients. The panel's ruling in this case strikes a sound balance between the basic integrity of the federal statutory scheme and the compassionate wisdom of the common law.

B. The Panel's Ruling on Medical Necessity Does Not Contravene the Controlled Substances Act.

The federal government contends that the panel's ruling on medical necessity is inconsistent with the Controlled Substances Act and re-balances the factors already weighed by Congress when it placed marijuana in Schedule I of the CSA. However, the concept of medical necessity, as set forth by the panel, can quite logically coexist with that congressional determination.

By placing a substance in Schedule I, Congress has **not** thereby decided that the substance can provide **no** medical benefit to **any** individual under **any** circumstances. The following factors determine a substance's categorization as Schedule I:

(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.

The finding that a substance lacks "currently accepted medical use" within the meaning of the **statutory term** does not suggest that there is **no** evidence of

the substance's medical effectiveness, and, indeed, **the federal government has never before made such a claim.** The requirements for a finding of "currently accepted medical use" are both stringent and complex. In a proceeding seeking to move a substance from Schedule I to Schedule II, the Drug Enforcement Administration (DEA) has stated that it will examine the following factors in determining whether the drug has a "currently accepted medical use":

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

See Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131 (D.C.Cir. 1994).[5]

During litigation involving a petition to reschedule marijuana, the DEA explained the meaning of each of these factors. *See* 57 Fed.Reg. 10499,10506 (March 26, 1992). According to the DEA, a failure to meet **any** of the factors precludes a drug from having a "currently accepted medical use." 57 Fed.Reg. at 10507.

1. Known and Reproducible Chemistry

To satisfy this criterion, the substance's chemistry must be scientifically established to permit it to be reproduced into dosages which can be standardized. The listing of the substance in a current edition of one of the official compendia, as defined by the Food, Drug & Cosmetic Act, 21 U.S.C. sec. 321(j), is sufficient

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[5]These factors were created by the Final Order of the DEA Administrator in the course of rescheduling litigation, *see* 57 Fed.Reg. 10499 (March 26, 1992) and subsequently approved by the Court of Appeals.

generally to meet this requirement.[6]

2. Adequate Safety Studies

To satisfy this criterion, there must be adequate pharmacological and toxicological studies, done by all methods reasonably applicable, on the basis of which it could fairly and responsibly by concluded, by experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, that the substance is safe for treating a specific, recognized disorder.

3. Adequate and Well-Controlled Studies Proving Efficacy

Under this criterion, there must be adequate, well-controlled, well-designed, well-conducted, and well-documented studies, including clinical investigations, by experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs on the basis of which it could fairly and reasonably be concluded by such experts, that the substance will have its intended effect in treating a specific, recognized disorder.

4. Drug Accepted by Qualified Experts

Under this requirement, the drug must have a New Drug Application (NDA) approved by the FDA, or a consensus of the national community of experts,

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[6]In 1992, at the end of the NORML rescheduling litigation, see text *infra*, the DEA Administrator found that marijuana does not meet this standard:

> [M]arijuana's chemistry is neither fully known, nor reproducible. Thus far, over 400 different chemicals have been identified in the plant. The proportions and concentrations differ from plant to plant, depending on growing conditions, age of the plant, harvesting and storage factors. THC levels can vary from less than 0.2% to over 10%. It is not known how smoking or burning the plant material affects the composition of all these chemicals. It is not possible to reproduce the drug in dosages which can be considered standardized by any currently accepted scientific criteria. Marijuana is not recognized in any current edition of the official compendia, 21 U.S.C. sec. 321(j).

57 Fed.Reg. 10499, 10507.

qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, must accept the safety and effectiveness of the substance of use in treating a specific, recognized disorder. A "material" conflict of opinion among experts precludes a finding of "consensus."

5. Scientific Evidence Must Be Widely Available

This element requires that, in the absence of NDA approval, information concerning the chemistry, pharmacology, toxicology, and effectiveness of the substance must be reported, published, or otherwise widely available in sufficient detail to permit experts, qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, to fairly and responsibly conclude the substance is safe and effective for use in treating a specific, recognized disorder. 57 Fed.Reg. at 10506.

The DEA Administrator has made it clear that, in determining whether the above five standards have been met, the DEA will **not** consider as proof either "isolated case reports" or the "clinical impressions of practitioners."[7] 57 Fed.Reg. at 10506-07. In other words, in refusing to remove marijuana from Schedule I, the

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[7] The Administrator also will not consider:

- Opinions of person not qualified by scientific training and experience to evaluate the safety and effectiveness of the substance at issue;
- Studies or reports so lacking in detail as to preclude responsible scientific evaluation;
- Studies or reports involving drug substances other than the precise substance at issue;
- Studies or reports involving the substance at issue combined with other drug substances;
- Studies conducted by persons not qualified by scientific training and experience to evaluate the safety and effectiveness of the substance at issue;
- Opinions of experts based entirely on unrevealed or unspecified information; or
- Opinion of experts based entirely on theoretical evaluations of safety or effectiveness.

Id.

DEA Administrator did not reject evidence that in individual instances, marijuana may have provided great benefit, but rather ruled that such "anecdotal cases" could not satisfy the **demanding statutory criterion** of "currently accepted medical use."

The panel's ruling on medical necessity therefore does not "set aside" the congressional judgment concerning placement of a substance in Schedule I. Instead, its ruling recognizes that the CSA humanely leaves room for the reality of "anecdotal cases," i.e., individual patients who, in consultation with their physicians, have discovered relief from their tormenting medical condition only by using a particular substance.

Despite the federal government's argument to the contrary, the panel's ruling in this case is quite unlike that of the Court of Appeals reviewed in U.S. v. Rutherford, 442 U.S. 544 (1979), which involved an improper judicial interference with congressional intent. In Rutherford, the Court of Appeals had ruled that the "safety" and "effectiveness" requirements of the federal Food, Drug and Cosmetic Act could have "no reasonable application" to terminally ill patients, thereby creating a wholesale exception to the requirements of the Act for all such persons. The panel's ruling does not involve such a broad rewriting of a federal law. Rather, it applies only to a limited number of patients who, **in the face of an enforcement action brought by the federal government[8], merely desire to be left alone —to be allowed to obtain and use a medication that has been shown**

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[8] Rutherford involved a class action composed of "terminally ill cancer patients" seeking to enjoin the government from enforcing a provision of the Food, Drug and Cosmetic Act that prohibits the interstate shipment of any substance which has not been proved safe and effective for a particular medical use. *See* 21 U.S.C. sec. 355.

to the satisfaction of their physician be the only source of relief for their torments.

In Rutherford, the Supreme Court stressed that the ruling of the Court of Appeals would effectively have "den[ied] the [FDA] Commissioner's authority over all drugs, however toxic or ineffectual," for terminal cancer patients. 442 U.S. 557-58, citing U.S. v. Rutherford, 582 F.2d 1234, 1236 (10th Cir. 1978).[9] This would clearly have contravened the intent of Congress, which "could reasonably have determined to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise." Id. The panel's limited ruling on medical necessity in this case cannot be compared to such a far-reaching judicial fiat.

C. The Availability of Complex and Prolonged Legislative, Political and Judicial Processes Does Not Offer A Reasonable "Lawful" Alternative Where Seriously Ill and Dying Patients Are Involved.

The federal government further argues that the medical necessity defense "has no application when a defendant can seek relief through the political, administrative process." While this contention may hold true for the defense of necessity in certain other contexts, it certainly cannot apply in cases involving patients with an urgent need for medical treatment.

A patient with a life-threatening or otherwise serious medical condition, who has not been able to obtain medical relief from standard therapies, cannot be expected to suffer until the completion of complex, expensive and time-consuming political, legislative, and judicial processes. Any effort to seek the rescheduling of

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[9] The Court of Appeals further directed the FDA to promulgate regulations "as if" the substance in question (Laetrile) had been found "safe" and "effective" for terminally ill cancer patients. Id.

marijuana, even if ultimately successful, would necessitate many years of waiting. In 1972, the National Organization for the Reform of Marijuana Laws (NORML) filed a petition to reschedule marijuana under the CSA. After prolonged litigation and 14 days of hearings, an administrative law judge recommended that marijuana be rescheduled to Schedule II. In so doing, Judge Francis Young made extensive findings of fact on the issue of marijuana's currently accepted medical use." He found that a "significant minority" of physicians accepted marijuana as medically useful and concluded:

> The evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision.

In The Matter of Marijuana Rescheduling Petition, Docket No. 86-22 (Sept. 6, 1988). However, the DEA Administrator rejected Judge Young's recommendation and findings:

> [T]he effectiveness of marijuana has not been documented in humans with scientifically-designed clinical trials. While many individuals have used marijuana and claim that it is effective in treating their ailments, these testimonials do not rise to the level of scientific evidence.

Marijuana Scheduling Petition, 54 Fed. Reg. 53767, 53784. The Administrator did not deny that a "significant minority" of physicians accepted the medical efficacy of marijuana, nor that patients had benefitted from its use; but rather ruled, among other things, that this was not sufficient to meet the "currently accepted medical use" statutory standard. Id. at p.53783-4. The Administrator's findings were upheld in 1994 by a federal Court of Appeals under a "substantial evidence" standard. *See* Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131 (D.C.Cir. 1994). *See also* Alliance for Cannabis Therapeutics v. DEA, 930 F.2d

936 (D.C.Cir. 1994); NORML v. DEA, 559 F.2d 735 (D.C.Cir. 1977); NORML v. Ingersoll, 497 F.2d 654 (D.C.Cir. 1977). This litigation dragged on for 22 years.

Another marijuana rescheduling petition was filed on July 10, 1995.[10] That petition has been forwarded by the DEA to the Department of Health and Human Services (HHS) for a scientific and medical review and scheduling recommendation. The petitioner is still awaiting a response from HHS. After almost five years, he has still not received even this initial determination, much less a final disposition after the culmination of any ensuing litigation. Surely desperately sick and dying patients and their physicians should not be required to await the completion of such an onerous route. Indeed, the federal government's suggestion that dying patients, and those attempting to assist them, should petition the government to reschedule marijuana ignores this Court's own clear statement that "[T]he law implies a reasonableness requirement in judging whether legal alternatives exist." U.S. v. Schoon, 971 F.2d 193, 198 (9th Cir. 1992), cert. denied, 504 U.S. 990 (1992).

This is not a case like U.S. v. Schoon , supra, or U.S. v. Dorrell, 758 F.2d 427 (9th Cir. 1985), in which political protesters, frustrated with the political process, took matters into their own hands to try to change congressional policy or decisions. The political protesters in Schoon and Dorrell were not themselves sick and suffering; they did not have a special relationship with those whom they were purportedly trying to protect; nor could their actions be expected to achieve the goal sought. Their "impatience" therefore did not constitute a true emergency.

By sharp contrast to the protesters in those cases, a patient who satisfies the panel's medical necessity criteria is more like a prisoner "fleeing a burning jail"

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[10] *See* Exhibit B, Letter from Jon Gettman to Sandra Bressler, dated July 9, 1998.

described by this Court in Schoon, who, without the medical necessity defense, must either "perish or wait in his cell" in the hope that he or she might be saved (in this case, that marijuana will be rescheduled or a treatment or cure miraculously found). U.S. v. Schoon, supra, 971 F.2d at 198. Such a patient has no "legal alternative to the illegal conduct contemplated that would abate the evil." Id. The patient will suffer unspeakably and perhaps die before the "legal alternative," i.e., a petition seeking the rescheduling of marijuana, will even be reviewed, much less finally resolved. Under no stretch of the imagination can such a "legal alternative" be considered reasonable.

The "alternatives" described in U.S. v. Richardson, 588 F.2d 1235 (9th Cir. 1978) are also not available in this case. In Richardson, the defendants were criminally prosecuted for conspiring to smuggle a substance (Laetrile) into the U.S., in violation of 18 U.S.C. sec. 545, which makes it a crime knowingly and willfully, with intent to defraud the U.S., to smuggle into the U.S. any merchandise (legal or illegal) that should have been invoiced. The Court, in declining to apply the necessity defense, stressed that several lawful alternatives had been available to the defendants: 1) bringing an action to reclassify Laetrile or have it approved by the FDA; ***or*** 2) declaring the substance at the border and challenging its inevitable seizure by the government ***or*** 3) producing the substance in the U.S. 588 F.2d at 1239.

In this case, none of those alternatives is viable. As demonstrated above, the reclassification route is not a reasonable alternative for suffering patients. Furthermore, the choice of producing the substance in the U.S. is not a "lawful alternative" available to these defendants. While the provisions of the Food, Drug, and Cosmetic Act, applicable to the substance in question in Richardson, apply only to new drugs that are shipped and marketed interstate (or imported), the

provisions and prohibitions of the Controlled Substances Act apply **both** to interstate and intrastate activity. Compare 21 U.S.C. sec. 321(b), 355(a) with 21 U.S.C. sec. 801(5). Indeed, manufacturing and distributing marijuana are precisely the activities that precipitated the federal government's enforcement action. Finally, the federal government's decision to proceed with a civil action deprived the defendants of the opportunity to "challenge the seizure of the medicinal marijuana.

Had the federal government initiated a criminal action to prosecute the defendants (and concomitantly to seize the medicinal marijuana), rather than a civil action to enjoin their conduct, the defendants could have directly availed themselves of this "lawful alternative" recommended by Richardson. The government should not be allowed both to deny the defendants this alternative by its choice of enforcement methods and then to claim that defendants have not exercised any of the lawful options described in Richardson.

III. CONCLUSION

The panel's ruling on medical necessity comports fully with the practice of medicine and good patient care, with the common law, and with the CSA. Accordingly, for the foregoing reasons, the petition for rehearing and rehearing *en banc* should be denied.

DATE: January 11, 2000

Respectfully submitted,

California Medical Association
CATHERINE I. HANSON
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By: Alice P. Mead
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SER 758

EXHIBIT A

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

BILL LOCKYER
ATTORNEY GENERAL

October 6, 1999

The Honorable Janet Reno
Attorney General
United States Department of Justice
Constitution Avenue & 10th Street, NW
Washington, DC 20530

Dear Attorney General Reno:

On September 13, 1999, a panel of the Ninth Circuit Court of Appeals decided a case raising issues related to the medicinal use of marijuana. The court's final decision potentially has a substantial impact on the implementation of Proposition 215, the Compassionate Use Act of 1996, in the State of California. In a matter entitled *United States of America* v. *Oakland Cannabis Buyers' Cooperative*, No. 98-16950, the appellate court concluded that the United States District Court could properly consider the needs of seriously ill patients in a proposed order modifying a previously issued injunction enjoining the Oakland Cannabis Buyers' Cooperative from furnishing marijuana to patients. The court directed the District Court upon remand to determine whether there exists "...a class of people with serious medical conditions for whom the use of cannabis is necessary..." and who would suffer serious harm if they are denied the use of cannabis.

I understand your office has not yet made a decision whether to request a rehearing in the case. I write to ask that you consider foregoing the filing of a petition for rehearing and allow the matter to proceed back to the District Court for further proceedings. As you know, the voters in my state have endorsed the medicinal use of marijuana and the court's decision holding that a citizen may present evidence that use of marijuana, under certain narrow conditions, may be a lawful exception to the federal drug laws is consistent with that expression of their will.

Sincerely,

Bill Lockyer

BILL LOCKYER
Attorney General

SER 759

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SER 760

EXHIBIT B

July 9, 1998

Sandra Bressler
Director of Professional and Scientific Policy
California Medical Association
221 Main Street
P.O. Box 7690
San Francisco, CA 94120-7690

Dear Ms Bressler:

The federal government is currently reviewing the scheduling of marijuana under the Controlled Substances Act (CSA). I filed the 1995 petition responsible for this review. I am writing to request that the petition and two related articles be reviewed by the California Medical Association.

I realize that formal review by expert panels is a complicated exercise even for federal government agencies, and that such an independent review is not practical. I believe that information about the petition will be of interest to the CMA given your recent recommendations on marijuana's re-scheduling. Any review of the petition that you can bring before your members and the public will be in the public interest.

The issue of medical access to marijuana has heightened public and professional interest in the federal process for regulating controlled substances. As I will explain further below, I believe the public interest would be served by additional scrutiny of the case I have made for marijuana's rescheduling. I don't know what the appropriate form of such scrutiny should be, and I make this request for review without condition. I have enclosed a description and electronic copies of the relevant documents. Some background information follows below.

In December, 1997 the Drug Enforcement Administration (DEA) determined that my petition provided "sufficient grounds" for the removal of marijuana and all cannabinoid drugs from schedules 1 and 2 of the CSA. The petition was forwarded to the Department of Health and Human Services (HHS) for a scientific and medical review and a binding scheduling recommendation. The HHS review is currently underway.

The organization and composition of the petition was specified by law. The petition is a 70,000 word non-exhaustive review of the scientific literature in each of 8 areas designated by the CSA. For legal reasons the scope of this review and the presentation of material was heavily influenced by the last proceedings of record concerning the scheduling of marijuana. The petition focuses on literature published between 1988, when the record of the prior proceedings closed, and 1994, the most recent published material available at the time the petition was filed. The Trans-High Corporation joined me as co-petitioners in 1995 and helped to secure pro bono legal representation from the law offices of Michael Kennedy.

A drug must have a high potential for abuse to be subject to either the absolute prohibition of schedule 1 or the tightest possible regulations for controlled substances provided by schedule 2 controls. The petition argues that marijuana does not have the abuse potential necessary for schedule 1 status. Furthermore, the petition argues that neither marijuana, Marinol, or Nabilone has sufficient abuse potential for schedule 2 status. The petition proposes rules removing all of these substances from their current schedules and asks that they be rescheduled as required by the CSA, beginning with a review and recommendation from HHS.

I am a former National Director of the National Organization for the Reform of Marijuana Laws (NORML). I have degrees in anthropology and justice, and am now working on my doctorate at The Institute of Public Policy of George Mason University. The petition has already passed review and inspection by the professional staff at the DEA. I would hope that this provides the scientific and legal argument of the petition with some credibility. The public policy process and public discussion would benefit from independent review of the scientific and legal issues discussed in the petition.

Independent review of this material will also greatly contribute to the public's understanding of the HHS review and subsequent national debate and discussion on the appropriate regulation of marijuana.

There are several reasons why independent review is important to me as petitioner in this administrative rule making proceeding. The most important reason is that I want to make these proceedings as transparent and as public as possible. This is the public's business. The public should understand the issues, the law, and the relevant scientific findings. I remain confident in obtaining an objective and constructive review from HHS, however I'd also like to get at least one second opinion before the public as well. I am also sending this request to the New England Journal of Medicine, the Journal of the American Medical Association, and the American Journal of Public Health.

I would also greatly appreciate any advice you may have on other ways I can bring these issues before the public. Thank you for your time and consideration of this request.

Sincerely,

Jon Gettman
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Lovettsville, VA 20180

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enclosures

Certification Pursuant to Circuit Rule 32(e)(4), Form of Brief

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the attached brief

- ■ Uses proportionately spaced, has a typeface of 14 points or more and contains 4,157 words, or

- □ Uses monospaced, has 10.5 or less characters per inch and

  - □ Does not exceed 40 pages (opening and answering briefs) or 20 pages (reply briefs), or

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1/10/2000 lit — Alice P. Mead

Date — Signature of Attorney or Unrepresented Party

PROOF OF SERVICE

I am employed in the City and County of San Francisco, California; I am over the age of 18 years and not a party to the within cause; my business address is 221 Main Street, San Francisco, California 94105.

I served the document(s) listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Date Served: January 11, 2000

Document Served: **Amicus Curiae Brief of California Medical Association in Support of Appellant's Response to Petition for Rehearing and Rehearing En Banc.**

Parties Served: See attached list.

■ **(BY MAIL)** I caused such envelope to be placed for collection and mailing on that date in accordance with ordinary business practice for deposit in the United States at San Francisco, California. I am readily familiar with the practice of this office of the California Medical Association for collection and processing of correspondence for mailing with the United States Postal Service and that this correspondence will be deposited with the United States Postal Service on the same day as I deposit it in the office mail system in the ordinary course of business.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

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■ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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Executed on January 11, 2000, at San Francisco, California.

Ernesto B. Tanjuan

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OAKLAND CANNABIS BUYER'S COOPERATIVE and JEFFREY JONES, Appellants/Defendants, vs. UNITED STATES OF AMERICA, Appellee/Plaintiff.	Ninth Circuit Appeal Nos. 98-16950, 98-17044, 98-17137

JOINDER OF COUNTY OF ALAMEDA, CITY OF OAKLAND, CITY AND COUNTY OF SAN FRANCISCO AND CALIFORNIA NURSES ASSOCIATION IN BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR REHEARING AND REQUEST FOR EN BANC HEARING

RICHARD E. WINNIE [68048]
County Counsel
Kristen J. Thorsness [142181]
Deputy County Counsel
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Attorneys for County of Alameda

The County of Alameda, the City of Oakland, the City and County of San Francisco, and the California Nurses Association ("Joining *Amici*"), hereby join in the brief of *amicus curiae* the California Medical Association filed in support of Appellants/Defendants the Oakland Cannabis Buyer's Cooperative and Jeffrey Jones (collectively "the Cooperative") in opposition to the United States' petition for rehearing and request for rehearing *en banc*. The City of Oakland, the City and County of San Francisco, and the California Nurses Association have each authorized the County of Alameda to file this joinder on their behalf.

The Cooperative operates and is located within the geographical boundaries of the County and the City of Oakland, and is located geographically close to the City and County of San Francisco. This action involves issues of interest to the Joining *Amici*, and they have approved joining in support of the Cooperative in this action.

The interests of the California Nurses Association and its members are equivalent to those of the California Medical Association. Moreover, the issues presented in this matter implicate the joining government entities' authority and obligation to protect the public safety and public health of the residents of their cities and county and raise public health issues as described in the California

///

Medical Association's *amicus* brief which are of interest to all Joining *Amici*.

DATED: January 11, 2000

RICHARD E. WINNIE, County Counsel in and for the County of Alameda, State of California

By _____
Kristen J. Thorsness
Deputy County Counsel

Attorneys for County of Alameda

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(e)(4)

I, Kristen J. Thorsness, certify that this joinder is proportionately spaced, has a New Roman typeface of 14 points or more and contains 225 words.

DATED: January 11, 2000

RICHARD E. WINNIE, County Counsel in and for the County of Alameda, State of California

By _____
Kristen J. Thorsness
Deputy County Counsel

Attorneys for County of Alameda

DECLARATION OF SERVICE BY MAIL

I am employed in the City of Oakland, California, over the age of eighteen and not a party to the within cause. My business address is 1221 Oak Street, Suite 463, Oakland, California 94612-4296. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service and that correspondence would be deposited with the United States Postal Service the same day in the ordinary course of business. I placed copies of the following documents sealed in envelopes in a place for collection and mailing on this date following ordinary business practices and addressed to the persons listed below:

DOCUMENTS

JOINDER OF COUNTY OF ALAMEDA, CITY OF OAKLAND, CITY AND COUNTY OF SAN FRANCISCO AND CALIFORNIA NURSES ASSOCIATION IN BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR REHEARING AND REQUEST FOR EN BANC HEARING

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Oakland, California on January 11, 2000.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE; JEFFREY JONES,

Defendants-Appellants.

Nos. 98-16950
98-17044
98-17137

D.C. No. C 98-00088-CRB
(Northern California)

ORDER

Before: SCHROEDER, REINHARDT, and SILVERMAN, Circuit Judges.

The panel as constituted above has voted to deny the Petition for Rehearing and to deny the Petition for Rehearing En Banc.

The full court was advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street, P. O. Box 193939
San Francisco, CA 94119-3939

March 8, 2000

USDC, San Francisco
Northern District of California (San Francisco)
Federal Building
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, CA 94102

C.A. NO.	TITLE	AGENCY/ D.C. NO.
98-16950	USA v. Oakland Cannabis	CV-98-00088-CRB
98-17044	USA v. Oakland Cannabis	CV-98-00088-CRB
98-17137	USA v. Oakland Cannabis	CV-98-00088-CRB

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter. Counsel are being served with a copy of this letter only.

[X] Certified copy of the Decree of the Court *COSTS TAXED*
[ ] Judgment of the National Labor Relations Board
[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Gail Nelson-Hom
Deputy Clerk

Enclosure(s)
cc: ALL COUNSEL, WITHOUT ENCLOSURES

COPY

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and JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Defendants.

AND RELATED ACTIONS.

No. C 98-0088 CRB

FURTHER DECLARATION OF ANNETTE P. CARNEGIE IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE OR TO MODIFY PRELIMINARY INJUNCTION ORDER

(Fed. R. Civ. P. 60(b), Local Rule 7-11)

Date: July 14, 2000
Time: 10:00 a.m.
Hon. Charles R. Breyer

RLJ

I, ANNETTE P. CARNEGIE, declare as follows:

1. I am a member of the law firm of Morrison & Foerster LLP and am admitted to practice before this Court. I am one of the counsel of record for defendants OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES.

2. Attached hereto as Exhibit A is a true and correct copy of an article from the San Francisco Examiner dated July 13, 2000 concerning the results of a study showing that cannabis is safe for use by patients infected with HIV.

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 July 2000, at San Francisco, California.

Annette P. Carnegie

aminer.com

Thursday
Jul 13, 2000
1:24 PM PDT

News

San Francisco Examiner
Thursday Jul 13, 2000

Study finds pot use safe for HIV patients

By Ulysses Torassa
EXAMINER MEDICAL WRITER

DURBAN, South Africa — The first U.S. study using medical marijuana to treat people with HIV has found that smoking the plant does not disrupt the effect of anti-retroviral drugs that keep the virus in check.

The results were announced Thursday at the 13th International AIDS Conference and are the first to be released from research conducted at San Francisco General Hospital into the use of marijuana by people infected with HIV. Given the scarcity of data about the possible medical uses of marijuana, the results have been eagerly awaited by advocates in this heavily debated issue.

It took four years for UC-San Francisco Professor Donald Abrams to jump through hurdles erected by the federal government to get the research under way, and in the process he was restricted to focusing on marijuana's safety rather than its effectiveness. The 67 people who participated in the study were kept in the hospital during the 25-day study period.

John James, editor and publisher of the San Francisco-based AIDS Treatment News, said the study will do away with the fear people with HIV may have had about using marijuana in conjunction with their drug therapy.

"The use of medical marijuana is driven by serious need," James said. "When somebody has that serious need, they're usually not concerned about theoretical risks. But this puts those theoretical risks to rest."

"The fact of the matter is that any good clinician with his eyes and ears open has known for a long time that cannabis is very useful in the treatment of the AIDS reduction syndrome and does not harm patients," said Dr. Lester Greenspoon, professor of psychiatry at Harvard University and author of "Marijuana: the Forbidden Medicine."

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"When all the dust settles, and when marijuana is admitted to the U.S. pharmacopia, it will be seen as one of the least toxic drugs in the whole compendium. What Don (Abrams) has done is put the seal of approval on a new drug with his double blind study."

"This study tells AIDS patients what they have known all along" and exposes the reason why the federal government has resisted tests of the sort Abrams conducted, said Richard Cowan, editor of the national publication Marijuana News.

"You cannot have marijuana used under medical supervision and then maintain the 'reefer madness' claims," he said.

Medical marijuana is legal in eight states: Alaska, Arizona, California, Hawaii, Maine, Nevada, Oregon and Washington, as well as in the District of Columbia. But because the federal government regards it as illegal, "from a public policy viewpoint, it's an incredibly gray area," said Allen St. Pierre, executive director of NORML, a national organization advocating the legalization of marijuana.

The significance of Abrams' study "is that it was done at all," James said. "The de facto government policy has been to only allow marijuana studies when they're designed to find some harm."

St. Pierre said "from an anecdotal point of view, we're not surprised at the results of the study. Even within the narrow political guidelines the government gave (Abrams), the results appear to prove what he thought going in."

Researchers were especially keen to study people on drug regimes that contain protease inhibitors, because the key ingredient in marijuana is metabolized by the same system in the liver as those drugs.

The participants, nearly all men, were divided into three groups, with one set smoking marijuana, another taking a Food and Drug Administration-approved pill containing marijuana's main ingredient, and a third taking a placebo pill.

In all groups, tests showed that the level of virus in the blood dropped or remained undetectable by current tests. But those taking marijuana either by smoking or in a pill form saw their level drop slightly more than those on the placebo.

Furthermore, researchers found that those using the pill or smoking marijuana gained an average of 2.2 kilograms, compared to 0.6 kilograms in the placebo group. Marijuana

was first used widely by people with AIDS to combat the nausea and extreme weight loss that comes with the disease.

Abrams called the lower viral levels in the marijuana patients intriguing, but said it was not statistically significant.

"The good news is that there is no statistical difference between the three groups," he said.

"Now that we've demonstrated the safety in a population as vulnerable as people with HIV, I think it paves the way for doing studies of efficacy," Abrams said.

Indeed, Abrams, an oncologist, said he hopes to soon begin studying the use of smoked marijuana for cancer patients to see if it can control nausea and pain, including the nerve-based pain that is often beyond the reach of opiate painkillers like morphine.

Abrams said he expects to release more results from the study soon, including marijuana's effect on appetite, testosterone levels and body composition.

Eric Brazil of The Examiner staff contributed to this report.

PROOF OF SERVICE BY MAIL
FRCivP 5(b)

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 mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

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

FURTHER DECLARATION OF ANNETTE P. CARNEGIE IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE OR TO MODIFY PRELIMINARY INJUNCTION ORDER

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing 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 **14th day of July, 2000**.

Aileen S. Martinez
(typed)

(signature)

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PROOF OF PERSONAL SERVICE

I am employed by Morrison & Foerster, whose address is 425 Market Street San Francisco, California; 94105. I am not a party to the within cause; and I am over the age of eighteen years.

I further declare that on July 14, 2000, I hand-served a copy of:

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on the following:

Mark T. Quinlivan
United States District Court
450 Golden Gate Avenue
San Francisco, CA

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 July, 2000.

Annette P. Carnegie
(typed)

Annette P. Carnegie
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Attorneys for Plaintiff

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE, and JEFFREY JONES,

Defendants.

AND RELATED ACTIONS

No. C 98-0088 CRB

PLAINTIFF'S EX PARTE MOTION FOR A STAY PENDING APPEAL OR, IN THE ALTERNATIVE, FOR A TEMPORARY STAY ALLOWING THE UNITED STATES TO SEEK INTERIM APPELLATE RELIEF
(Fed. R. Civ. P. 62; Local Rule 7-11)

Date: None scheduled
Time: None scheduled
Hon. Charles R. Breyer

NOTICE OF MOTION AND EX PARTE MOTION FOR STAY PENDING APPEAL OR, IN THE ALTERNATIVE, FOR TEMPORARY STAY ALLOWING THE UNITED STATES TO SEEK INTERIM APPELLATE RELIEF

PLEASE TAKE NOTICE THAT, pursuant to Federal Rule of Civil Procedure 62 and Local Rule 26(c), Local Rules 37-1 and Local Rule 7-11, plaintiff, the United States of America, hereby moves ex parte for a stay pending appeal of the Court's July 17, 2000 Amended Preliminary Injunction Order. In the alternative, in conformity with the Court's

October 13, 1998 Order Modifying Injunction in Case No. 98-0088, the United States moves for a temporary stay of three business days in which to seek appellate relief.

ARGUMENT

I. THE UNITED STATES IS ENTITLED TO A STAY PENDING APPEAL

1. The standard for granting a stay pending appeal "is similar to that employed by district courts in deciding whether to grant a preliminary injunction." Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir.1983), stay granted pending appeal, 463 U.S. 1328 (1983) (Rehnquist, J., in chambers). In the Ninth Circuit, a party is entitled to a preliminary injunction when it "demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in [its] favor." GoTo.com, Inc. v. The Walt Disney Co., 202 F.3d 1199, 1204 (9th Cir. 2000). The Supreme Court also has stated that the factors regulating the issuance of a stay pending appeal generally are (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

Under any of these formulations, the United States is entitled to a stay pending appeal.

2. The United States has presented a strong showing that it will succeed on its contention that the OCBC defendants are not entitled to the modification entered by this Court. At a bare minimum, the government has established the existence of serious questions going to the merits.

To begin with, and as we demonstrated in our opposition to the motion of the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (collectively the "OCBC

defendants") to dissolve or modify the preliminary injunction, the United States has presented a strong showing case that Congress has precluded any possibility of a medical necessity defense for marijuana and other Schedule I controlled substances,[1] both by placing marijuana in Schedule I, see 21 U.S.C. § 812(b)(1),[2] and establishing an exclusive framework wherein controlled substances that have been placed in Schedule I (or any other schedule) may be transferred between, or removed from the five schedules to reflect changes in scientific knowledge. See 21 U.S.C. § 811[3] In addition, Congress recently reaffirmed that it "continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration * * * *." Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 760-61 (1998). These congressional actions preclude invocation of the medical necessity defense by the OCBC defendants. See United States

---

[1] See generally United States v. Schoon, 971 F.2d 193, 196-97 (9th Cir. 1991) (defense of necessity available only "when a real legislature would formally do the same under those circumstances"), cert. denied, 504 U.S. 990 (1992); 1 Walter LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.4, at 631 (1986) ("The defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs.").

[2] This designation means that marijuana has a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a "lack of accepted safety for use under medical supervision." Id.

[3] Any party aggrieved by a final decision of the DEA may seek review in the court of appeals, see 21 U.S.C. § 877, a process which the courts of appeals have uniformly held is the exclusive means by which to challenge marijuana's placement in Schedule I. See United States v. Burton, 894 F.2d 188, 192 (6th Cir. 1990), cert. denied, 498 U.S. 857 (1990); United States v. Greene, 892 F.2d 453, 455-45 (6th Cir. 1989), cert. denied, 495 U.S. 935 (1990); United States v. Fry, 787 F.2d 903, 905 (4th Cir.), cert. denied, 479 U.S. 861 (1986); United States v. Wables, 731 F.2d 440, 450 (7th Cir. 1984); United States v. Fogarty, 692 F.2d 542, 548 n. (8th Cir. 1982), cert. denied, 460 U.S. 1040 (1983); United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); United States v. Kiffer, 477 F.2d 349 (2d Cir.), cert. denied, 414 U.S. 831 (1973).

v. Rutherford, 442 U.S. 544, 552-59 (1979) (reversing order holding that the safety and efficacy standards of the Food, Drug and Cosmetic Act had no application to a class of terminally ill cancer patients who wanted to use Laetrile, holding that federal law "makes no special provision for drugs used to treat terminally ill patients," and that "[w]hen construing a statute so explicit in scope," it is the incumbent upon the courts to give it effect); id. at 555, 559 ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. * * * * Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference.").

The United States also has shown that the Court's modification of the preliminary injunction to allow a broad "medical necessity" exemption is inconsistent with the principles set forth in United States v. Bailey, 444 U.S. 394 (1980), in which the Supreme Court held that "[u]nder any definition of [the necessity] defense[] one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail." Id. at 410. Here, the OCBC defendants can seek relief through the administrative process and can have marijuana's classification set aside by the courts if it is determined to be unreasonable or unconstitutional. The existence of these reasonable, legal alternatives forecloses the proposed modification offered by the OCBC. See, e.g., United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989) (recourse to courts defeats necessity defense), cert. denied, 498 U.S. 1046 (1991); United States v. Richardson, 588 F.2d 1235, 1239 (9th Cir. 1978) (necessity defense was unavailing for defendants who wanted to use Laetrile because they could have sought "to have the FDA classification of Laetrile set aside or to have it approved as a new drug."), cert. denied, 441 U.S. 931 (1979).

Moreover, in Bailey, the Supreme Court held that the defendants were not entitled to a necessity instruction after having escaped from prison because they had offered no

evidence justifying their continued absence from custody. 444 U.S. at 412-15. In particular, the Court held that:

> [I]n order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure, and that an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force.

Id. at 412-13. Similarly here, the OCBC defendants have offered no comparable evidence of a bona fide effort to comply with federal law as soon as the asserted necessity has lost its coercive force. On the contrary, the OCBC defendants straightforwardly seek to distribute marijuana on a permanent, ongoing basis to its customers under an all-encompassing "necessity" exemption. This is the very antithesis of the "absolute and uncontrollable necessity" that is the hallmark of the necessity defense. See The Diana, 74 U.S. (7 Wall.) 354, 360 (1869).

Finally, the modification, which allows the OCBC defendants to distribute marijuana to an anonymous class of individuals, with no judicial testing, is inconsistent with Aguilar, in which the Ninth Circuit rejected the necessity defense because there was insufficient evidence that the particular refugees assisted by the defendants had been in danger of imminent harm:

> We also doubt the sufficiency of the proffer to establish irreparable harm. *The offer fails to specify that the particular aliens assisted were in danger of imminent harm.* Instead, it refers to general atrocities committed by Salvadoran, Guatemalan, and Mexican authorities. The only indication that appellants intended to show that the aliens involved in this action faced imminent harm was their proffer that they adopted a process to screen aliens in order to assure themselves that those helped actually were in danger. *This allegation fails for lack of specificity.* Moreover, even a specific proffer would establish only appellants deliberative assessment that certain aliens faced imminent harm, and not that these aliens in fact were in danger. * * * * In the immigration area * * * allowing this showing to establish a necessity defense essentially would result in sanctioning the creation of religious boards of review to determine asylum status. The executive branch, not appellants, is assigned this task.

883 F.2d at 693 n.28 (emphasis supplied). Similarly here, the OCBC defendants made no showing that the particular individuals to whom they wish to distribute marijuana meet the

necessity tests that would justify modification entered by the Court; rather, the modification allows them to distribute marijuana to an anonymous class of individuals with neither a court nor jury hearing the facts that would justify a particular distribution of marijuana. This result cannot be squared with Aguilar.

In sum, we submit that the United States has presented a strong showing that it will succeed on the merits of its claim that the OCBC defendants are not entitled to the modification entered by the Court and, at a bare minimum, has shown that there are serious questions going to the merits of this claim.

3. The United States also will be irreparably harmed by the modification entered by the Court on July 17, 2000, because it has the effect of enjoining an Act of Congress as to a particular group of activities. "[A] temporary injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect. Thus judicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." Heart of Atlanta Motel v. United States, 85 S. Ct. 1, 2 (1964) (Black, Circuit Justice). An Act of Congress is "presumptively constitutional," and this "presumption of constitutionality * * * [is] an equity to be considered in favor of [the government] in balancing hardships." Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, Circuit Justice). Therefore, the challenged statute should "remain in effect pending a final decision on the merits by this Court." Turner Broadcasting Sys. v. FCC, 113 S. Ct. 1806, 1807 (1993) (Rehnquist, Circuit Justice).

Moreover, because this is a statutory enforcement action, and because the United States demonstrated a strong likelihood of success on the merits that the OCBC defendants were violating federal law by distributing marijuana, irreparable injury to the government is presumed. See, e.g., Miller v. California Pacific Medical Center, 19 F.3d 449, 459 (9th Cir. 1994) (en banc) ("In statutory enforcement cases where the government has met the

'probability of success' prong of the preliminary injunction test, we presume it has met the 'possibility of irreparable injury' prong * * * *."); United States v. Nutri-Cology, Inc., 982 F.2d 394, 398 (9th Cir. 1992) (once the government has met the "probability of success" prong of the preliminary injunction test in a statutory enforcement action, "further inquiry into irreparable injury is unnecessary"); United States v. Alameda Gateway, Inc., 953 F. Supp. 1106, 1109 (N.D. Cal. 1996) ("In statutory enforcement actions * * * [t]he court only inquires as to the possibility of irreparable harm when the government fails to establish a likelihood of success on the merits.").

4. Finally, the United States has shown that Congress' continuing adherence to the existing FDA drug approval process, and its continuing opposition to any effort to allow the use of marijuana or other Schedule I controlled substances until they are proven safe and effective based on appropriate findings by the FDA, see Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 760-61 (1998), is an express declaration of the public interest which is entitled to deference. See, e.g., Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 551, 552 (1937) ("In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress" which is "deliberately expressed in legislation [because] [t]he fact that Congress has indicated its purpose [in a statute] is in itself a declaration of the public interest and policy which should be persuasive in inducing the courts to give relief."); People v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1324 (9th Cir. 1985) ("The district court has greater power to fashion equitable relief in defense of the public interest than it has when only private interests are involved," and further held that "[i]t may define the public interest by reference to the policies expressed in legislation.").

For all these reasons, the United States is entitled to a stay pending appeal.

III. IN THE ALTERNATIVE, THE UNITED STATES IS ENTITLED TO A TEMPORARY STAY TO SEEK APPELLATE RELIEF

When it entered its October 13, 1998 Order Modifying Injunction in Case No. 98-0088, this Court "stay[ed] the imposition of the modification to the injunction until 5:00 p.m. on Friday, October 16, 1998 to give defendants the opportunity to seek interim appellate relief. We respectfully submit that, now that the Court has modified the May 19, 1998 Preliminary Injunction Order to allow the distribution of marijuana to individuals who meet the "necessity" test set forth in Aguilar, basic notions of fairness dictate that the United States is entitled to the same consideration. Accordingly, even were it to deny the government's motion for a stay pending appeal, this Court should enter a temporary stay of the July 17, 2000 Amended Preliminary Injunction Order for three business days to allow the United States to seek interim appellate relief, in accordance with its October 13, 1998 order affording the OCBC defendants a similar temporary stay.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant a stay pending appeal of the Court's July 17, 2000 Amended Preliminary Injunction Order or, in the alternative, enter a temporary stay of three business days to allow the United States to seek interim appellate relief.

Respectfully submitted,

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Dated: July 18, 2000

CERTIFICATE OF SERVICE

I, Mark T. Quinlivan, hereby certify that on this 18th day of July, 2000, I caused to be served a copy of the foregoing Plaintiff's Ex Parte Motion for Stay Pending Appeal or, in the Alternative, for Temporary Stay Allowing the United States to Seek Interim Appellate Relief, and the accompanying [Proposed] Order, by overnight delivery upon the following counsel:

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE, AND JEFFREY JONES

Defendants.

AND RELATED ACTIONS.

No. C 98-0088 CRB

DEFENDANTS' OPPOSITION TO REQUEST FOR STAY

Date: None Scheduled
Time: None Scheduled
Hon. Charles R. Breyer

INTRODUCTION

Defendants Oakland Cannabis Buyers' Cooperative ("OCBC") and Jeffrey Jones (collectively "Defendants") submit this memorandum in opposition to the government's *Ex Parte* Motion For A Stay Pending Appeal.[1] For over 18 months, Defendants have been unable to provide medicine to sick and dying patients. During that time, these patients have been deprived of the only safe means, authorized by state and local law, of obtaining medicine that their physicians have deemed necessary to their very survival. During that time, some patients died and others lived in severe pain with chronic, debilitating, and life-threatening illnesses. The Ninth Circuit directed that the rights and interests of these patient-members be considered and protected by this Court, and this Court has issued an order that faithfully adheres to that directive. Justice and fairness now require that this Court continue to protect the rights of these fragile individuals and put an end to their needless suffering.

There is simply no factual or legal basis for a stay. The government does not dispute that these patients are seriously ill, or that cannabis is the only medicine that has provided relief to these patients. Nor does the government challenge the evidence establishing that cannabis is a safe and effective medicine. (*See* Declarations of John Morgan, M.D., Lester Grinspoon, M.D; *see also* Defendants' Request for Judicial Notice filed September 14, 1998, and declarations of Drs. Flynn, Estes, Leff, Macabee, Tripathy, Follansbee, O'Brien, Northfelt, Cafaro, and Scott attached thereto). All of this evidence clearly establishes that OCBC's patient members will suffer irreparable injury if the Court stays its order modifying the preliminary injunction.

The government has failed to present any legal argument that would justify a stay of this Court's order. Instead, the government merely rehashes legal arguments that the Ninth Circuit and this Court already have rejected. Thus the government cannot establish an essential prerequisite for a stay--the likelihood that it will succeed on the merits of any appeal.

---

[1] Defendants request that the Court judicially notice and hereby incorporate by reference herein the moving and reply papers and evidence submitted in support of Defendants' Motion to Dissolve or Modify Preliminary Injunction.

Finally, as this Court already has found, the Court's modification of the preliminary injunction clearly is in the public interest. The government fails to explain how denying necessary medicine to seriously ill and dying patients during a protracted appellate process possibly could advance the public interest. Accordingly, this Court should deny in its entirety the government's request for a stay.

ARGUMENT

I. THE GOVERNMENT'S STAY REQUEST MUST BE DENIED

The factors regulating the issuance of a stay include: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). As explained by the Ninth Circuit, the balance of hardships is crucial to determining whether a stay should issue:

> At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury . . . At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor . . .. "The relative hardship to the parties" is the 'critical element' in deciding at which point a stay is justified."

Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983).

In this circuit, the Court also must consider strongly the public interest in cases such as this. *Id.* All of these factors require that, in this case, the government's request for a stay pending appeal and a stay to seek interim appellate relief be denied.

A. The Government Has Failed to Establish A Likelihood of Success on The Merits

The government has failed to establish any likelihood of success on the merits. As this Court recognized, the Ninth Circuit's opinion is clear, and plainly requires the modification ordered by this Court:

> In United States v. Oakland Cannabis Buyers' Cooperative, 190 F. 3d 1109 (9th Cir. 1999), the Ninth Circuit reversed the Court's order denying defendants' motion to modify the injunction and instructed the Court "to reconsider the [defendants'] request for a modification that would exempt from the injunction distribution to seriously ill individuals who need cannabis for medical purpose." Id. at 1115. In doing so, the court held that this Court must consider the public interest, and that the evidence in the record "show[s] that the proposed amendment to the injunction clearly related to a matter affecting thee public interest." Id. at 1114. Significantly, the Ninth Circuit also held that the government had not "identif[ied] any interest it may have in blocking the distribution of cannabis to those with medical needs, relying exclusively on its general interest in enforcing its statutes." Id. The court noted that the government "has offered no evidence to rebut OCBC's evidence that cannabis is the only effective treatment for a large group of seriously ill individuals". Id.
>
> *On remand the government has still not offered any evidence to rebut defendants' evidence that cannabis is medically necessary for a group of seriously ill individuals. Instead the government continues to press arguments which the Ninth Circuit rejected, including the argument that the Court must find that enjoining the distribution of cannabis to seriously ill individuals is in the public interest because Congress has prohibited such conduct in favor of the administrative process regulating the approval and distribution of drugs. As a result of the government's failure to offer any new evidence in opposition to defendants' motion, and in light of the Ninth Circuit's opinion, the Court must conclude that modifying the injunction as requested is in the public interest and exercise its equitable discretion to do so.*

July 17, 2000 Order at 1-2 (emphasis added).

Given this Court's findings and the Ninth Circuit's directive, the government cannot establish that it likely will succeed on the merits of its appeal. Moreover, as shown below, the government's arguments, all of which already have been rejected by the Ninth Circuit, are meritless.

1. The Controlled Substances Act Does Not Prohibit The Modification Ordered By This Court

Nothing in the text or legislative history of the Controlled Substance Act ("the CSA") prohibits the equitable relief ordered by this Court. The Ninth Circuit's opinion is controlling precedent that establishes the availability of medical necessity as a defense to a claimed violation of the CSA. *Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1113–1115. That opinion also confirms this Court's inherent equitable power to modify the injunction as it did here. *Id.* As the Ninth Circuit correctly determined, "there is no evidence that Congress intended to divest the district court of its broad equitable discretion to formulate appropriate relief. . . . . [T]here is no indication that the

'underlying substantive policy' of the [CSA] mandates a limitation on the district court's equitable powers." *Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1114.

There is ample support for the Ninth Circuit's decision. There is no evidence that Congress intended to abrogate the necessity defense. It is well established that common-law defenses may be raised as defenses to a statutory crime. *See, e.g., United States v. Newcomb*, 6 F.3d 1129, 1134 (6th Cir. 1993) ("Congress's failure to provide specifically for a common-law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating that statute from relying on such a defense").

The government also ignores the numerous decisions that recognize the availability of the medical necessity defense in prosecutions concerning marijuana. *See e.g., United States v. Burton*, 894 F.2d 188, 191 (6th Cir. 1990) (applicability of the necessity defense not questioned; the court concluded that defendant had failed to establish one element of the defense). State courts also have held that the medical necessity defense is not precluded by the fact that the state legislature placed cannabis in a category analogous to Schedule I of the CSA. *See, e.g., Jenks v. State of Florida*, 582 So.2d 676, 677 (Fla. Dist. Ct. App.), *review denied*, 589 So.2d 292 (Fla. 1991).

Moreover, Congress made no finding concerning the medical uses of cannabis and had no basis for doing so. The legislative history of the CSA confirms that Congress intended to place cannabis *only tentatively* in Schedule I "until the completion of certain studies now underway." Act of Oct. 14, 1970, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. 4579. In 1970, Congress instructed the Presidential Commission on Marihuana and Drug Abuse ("Shafer Commission") to conduct a comprehensive study of cannabis and its effects. *Id.* at § 601, 4625-26. Ultimately, the Commission recommended full decriminalization of marijuana. *Marihuana: A Signal of Misunderstanding; First Report of the National Commission on Marihuana and Drug Abuse*, 152 (1972). Congress did not act on this report. The resolutions of the Senate and the House of Representatives opposing the medical use of cannabis were issued without scientific studies. Act of Oct. 21, 1998, Pub. L. No. 105-277, 1998 U.S.C.C.A.N. (112 Stat.) 2681. These resolutions also did not address the circumstance presented here — the equitable power of a court faced with a request to modify an injunction where the public interest requires the modification.

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

The DEA guidelines are intended to be used to scrutinize a drug for use by the general public. In contrast, the medical necessity test (*see Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1115) is intended to apply to a particular defendant or a class of persons with the same or similar medical conditions, and provides a safety valve for a person who must violate the general law to prevent a greater harm. Because the classification of marijuana as a Schedule I drug serves an entirely different purpose than the medical necessity defense, there is no reason to conclude that the classification has any bearing on the viability of a necessity defense.

2. Defendants Established That They Have No Legal Alternatives To Cannabis To Alleviate Their Symptoms

The government's contention that seriously ill people, many of whom are dying, must await the rescheduling of cannabis, is simply too callous to be credited. A rescheduling petition was filed in 1995 and on December 17, 1997 the DEA referred the petition to the secretary of Health and Human Services "upon determining that the petition raised scientific and medical issues that had not previously been evaluated by HHS." *Cannabis Cultivators Club*, 5 F. Supp. 2d at 1105. Although this Court expected that the Secretary would act "expeditiously" on the petition in light of the concerns expressed by the citizens of California. *Id.* at 1105. HHS has yet to take any action on the petition. (*See* Declaration of John Gettman attached to Defendants' Reply Mem. In Supp. of Motion to Dissolve or Modify Preliminary Inj. as Ex. C)

The option of seeking administrative or legislative relief as suggested by the government is not an alternative for Defendants. Just as "[a] prisoner fleeing a burning jail . . . would not be asked to wait in his cell because someone might conceivably save him" — patient-members cannot be asked to forego their medication and risk dying while they await the possibility of reclassification of cannabis. *United States v. Schoon*, 971 F.2d 193, 198 (9th Cir. 1992). OCBC's patient-members suffer from chronic and life threatening illnesses and may die without medical cannabis, and are thus

are in a very different position than the individuals in the cases upon which the government relies.[2] (*See, e.g.*, Declarations of Kenneth Estes, Steven Kubby, and Willie Beal.)

Furthermore, a petition to reschedule can take over 20 years. *See Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994) (petitioners' final attempt to reschedule marijuana after extensive litigation over the course of 22 years). Accordingly, petitioning for rescheduling would be futile while immediate relief is needed, thereby making valid Defendants' medical necessity claim here. *See United States v. Contento-Pachon*, 723 F.2d 691, 693-95 (9th Cir. 1984) (triable issue of fact regarding necessity in drug trafficking case where there was evidence that going to police would be futile). In this regard, Defendants' circumstances here are clearly distinguishable from those of the defendants in *Aguilar*, who had the immediate opportunity to seek provisional judicial relief and prompt resolution of the aliens' asylum claims.

In the words of this Court, "it hardly seems reasonable to require an AIDS, glaucoma, or cancer patient to wait twenty years if the patient requires marijuana to alleviate a current medical problem." *United States v. Cannabis Cultivators Club*, 5 F. Supp.2d 1086, 1102 (N.D. Cal. 1998). Because of the immediacy of the patient-members' medical needs and the harm they will suffer, the government's argument must be rejected.

3. The Modification Contains Specific Criteria That Can Be Applied To Establish Medical Necessity

Defendants presented both to the Ninth Circuit and to this Court, detailed declarations from patients that establish their particular medical conditions, the imminent harm they face without

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[2] Unlike the defendant in *United States v. Richardson*, 588 F.2d 1235 (9th Cir. 1978) patient-members are being deprived of a medicine that has proven to be effective for their condition. In *Richardson*, the FDA had specifically classified laetrile as a "new drug." 588 F.2d at 1237. Defendant failed to avail himself of numerous available options to challenge immediately the FDA's classification of and seizure of an experimental drug. *Id.* at 1239. In *Schoon*, 971 F.2d 193, the court precluded the necessity defense as a matter of law, finding that the defendants did not present sufficient facts to raise the defense. In *Schoon*, defendants asserted a necessity defense, "contending that their acts in protest of American involvement in El Salvador were necessary to avoid further bloodshed in that country." 971 F.2d at 195. Defendants engaged in "indirect political" protest that could not achieve their stated goal of changing the government's policies. *Schoon*, 971 F.2d at 200.

medical cannabis, and their lack of legal alternatives. In the face of the particularized showing, which it cannot refute, the government mischaracterizes the relief sought by Defendants and disparages the integrity and ability of the California doctors who treat these patients.

This circumstance is clearly different than that presented in *Aguilar*, 883 F.2d 682 (9th Cir. 1989). In *Aguilar*, the only evidence of the aliens' necessity came from workers who relied upon a screening process as evidence of the dangers faced by these aliens in their respective countries. There was no showing that the "particular aliens assisted were in danger of imminent harm". *Id.* at n.28. In contrast, individual patients have provided particularized declarations about their medical condition and need for medical cannabis. Thus, contrary to the government's contention, Defendants do not here rely upon generalized statements of medical necessity.

Moreover, in *Aguilar* there was a specific concern that the generalized screening process relied upon by defendants would usurp the traditional role of the Immigration and Naturalization Service to determine asylum status. That concern is not present here. California physicians are well qualified to assist their patients in making informed choices about appropriate medical care. They do so in extremely sensitive areas in which the legislature and the voters have spoken. Patients, in consultation with their physicians, rather than the courts, are in the best position to determine whether a medical necessity actually exists.

As noted by the Ninth Circuit, the government's selection of an injunctive procedure has dictated the remedies available to OCBC's patient-members:

> ... [S]ince the government chose to deal with potential violations on an anticipatory basis instead of prosecuting them afterward, the government invited an inquiry into whether the injunction should also anticipate likely exceptions.

Oakland Cannabis Buyers' Coop., 190 F.3d at 1114. Having chosen to address violations on a prospective basis through an injunction, the government cannot legitimately block Defendants' efforts to ensure that the injunction does not preclude a "legally privileged or justified" use of cannabis. *Id.*

B. DEFENDANTS HAVE ESTABLISHED IRREPARABLE INJURY

As it has done in the past, the government makes no showing of irreparable injury, and argues instead that irreparable injury must be presumed. The government is not entitled to any such presumption, however, because it has failed to establish a likelihood of success on the merits. *Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994). Moreover, as discussed above, nothing in the CSA prohibits the modification ordered by this Court. Thus there is no harm to any generalized interest of the government in statutory enforcement that would justify a stay of the order modifying the injunction.

In contrast, Defendants have provided strong and persuasive evidence that they will suffer severe hardship if the stay is granted. Defendants have submitted detailed and specific evidence showing that its patient members have serious medical conditions and will suffer severe and irreparable injury without the modification. In sum, if ever the balance of hardships tips sharply in a party's favor, this is that case. The death or physical suffering of a patient-member clearly constitutes "irreparable injury" requiring that the request for the stay be denied. *See Lopez v. Heckler*, 713 F.2d 1432, 1436 (9th Cir. 1983) (stay of injunction denied where stay would allow continuation of illness, death and human suffering).

C. The Public Interest Mandates That The Stay Be Denied

As this Court found, the government made no specific showing regarding how the public interest would be harmed by modification of the injunction. In contrast, the Ninth Circuit and this Court both have concluded that Defendants have established that the modification is in the public interest. For the same reasons, a stay of the Court's order, thereby nullifying the modification, is clearly not in the public interest.

The government offers no evidence upon which this Court could conclude that a stay is in the public interest. Instead, the government continues to rely on the generalized interest in enforcing statutes that this Court and Ninth Circuit previously have rejected.

Congress has not concluded, as the government contends, that individuals with established necessity are absolutely prohibited from obtaining cannabis for medical use. The CSA was originally enacted as an omnibus measure to prevent widespread drug abuse, and to treat and rehabilitate drug

abusers. Act of Oct. 14, 1970, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. 4566-67. Congress did not address the criteria for medical necessity nor did it abrogate the common law necessity defense. Despite numerous opportunities to do so, Congress has never amended the CSA to preclude medical necessity. Moreover, through its own Compassionate Investigative New Drug Program, the government has itself acknowledged the legitimacy of medical uses for cannabis. The fact that marijuana is in Schedule I has no bearing on whether an individual with a medical necessity is permitted to use it. Accordingly, there is no judgment of Congress that forecloses this Court's consideration of medical necessity in this injunctive relief action.

The Ninth Circuit explicitly held that "OCBC has identified a strong public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of a large group of persons with serious or fatal illnesses." *Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1115. Defendants have presented considerable evidence from patient-members, describing how cannabis has kept them alive. Without access to cannabis, patient-members suffer severe pain or debilitating spasticity will lose their sight, lose weight from AIDS "wasting syndrome" and nausea due to chemotherapy, and some will die. (*See, e.g.*, Declarations of Paul Allen, Willie Beal, Creighton Frost, Steven Kubby, Miles Saunders, Kerie Campbell, Walter Hatchett and Liza Jane Allen.) Additionally, Defendants have established that the City of Oakland considers the inability of these seriously ill individuals to receive medical cannabis to constitute a public health emergency. Medical groups, such as the prestigious California Medical Association, also have supported the availability of cannabis to treat seriously ill patients. (*See* Request for Judicial Notice Ex. 2.) This position was joined by the California Nurses Association, the City of Oakland, the County of Alameda and the County of San Francisco, all of whom plainly have a stake in identifying and protecting "the public interest." (*See Id.*)

Both the Ninth Circuit and this Court have ruled that the modification ordered by the Court is in the public interest, and the government has not submitted any evidence to contradict this finding. Accordingly the Court should deny in its entirety, the government's request for a stay.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the government's request for a stay be denied.

Dated: July 19, 2000

MORRISON & FOERSTER LLP

By: Annette Carnegie
Annette P. Carnegie

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

PROOF OF SERVICE BY OVERNIGHT DELIVERY
(FRCivP 5(b))

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.

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[PROPOSED] ORDER DENYING PLAINTIFF'S *EX PARTE* MOTION FOR A STAY PENDING APPEAL OR, IN THE ALTERNATIVE, FOR A TEMPORARY STAY ALLOWING THE UNITED STATES TO SEEK INTERIM APPELLATE RELIEF

(Fed. R. Civ. P. 60(b), Local Rule 7-11)

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:

United States of America

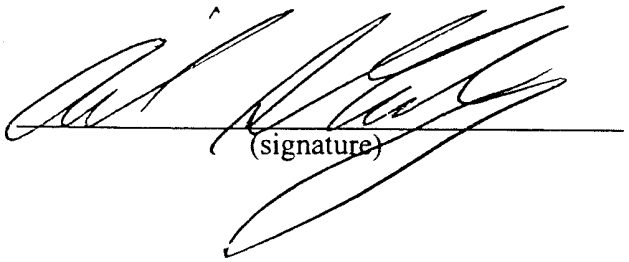
Mark T. Quinlivan
U.S. Department of Justice
901 E Street, N.W., Room 1048
Washington, D.C. 20530

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

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

Executed at San Francisco, California, this 19th day of July, 2000.

Aileen S. Martinez
(typed)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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 mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

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(Fed. R. Civ. P. 60(b), Local Rule 7-11)

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

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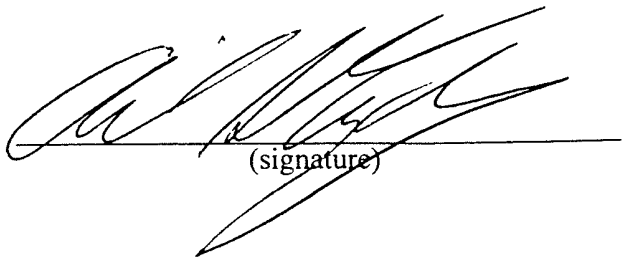
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 19th day of July, 2000.

Aileen S. Martinez
(typed)


(signature)

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