

UNITED STATES COURT OF APPEAL  
FOR THE NINTH CIRCUIT

---

NO. 98-16950

OAKLAND CANNABIS BUYERS'  
COOPERATIVE and JEFFREY JONES,

Appellants/Defendants,  
v.

UNITED STATES OF AMERICA

Appellee/Plaintiff.

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

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**EXCERPTS OF RECORD  
VOLUME I**

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NORTHERN DISTRICT OF CALIFORNIA

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13 UNITED STATES OF AMERICA, )  
14 Plaintiff, )  
15 v. )  
16 OAKLAND CANNABIS BUYERS' )  
COOPERATIVE, and JEFFREY JONES, )  
17 Defendants. )  
18

Case No. \_\_\_\_\_

COMPLAINT FOR DECLARATORY  
RELIEF, AND PRELIMINARY AND  
PERMANENT INJUNCTIVE RELIEF

19 I. INTRODUCTION

20  
21 1. The United States of America, by its undersigned attorneys, brings this action under the  
22 Controlled Substances Act (hereinafter "the Act"), 21 U.S.C. § 801, et seq., for declaratory relief,  
23 and preliminary and permanent injunctive relief, arising out of defendants Oakland Cannabis  
24 Buyers' Cooperative's and Jeffrey Jones's ongoing manufacture and distribution of marijuana, a  
25 Schedule I controlled substance, and possession of marijuana with the intent to manufacture and  
26 distribute the substance, in violation of 21 U.S.C. § 841(a)(1); defendants Oakland Cannabis  
27 Buyers' Cooperative's and Jeffrey Jones's ongoing use of the premises of 1755 Broadway Avenue,

28 Complaint for Declaratory Relief, and Preliminary  
and Permanent Injunctive Relief

ER0001

1 Oakland, California, for the purpose of manufacturing and distributing marijuana, in violation of  
2 21 U.S.C. § 856(a)(1); and defendant Jeffrey Jones's ongoing conspiracy to violate the Act, in  
3 violation of 21 U.S.C. § 846.

4 II. JURISDICTION AND VENUE

5 2. This action arises under section 512(a) of the Act, 21 U.S.C. § 882(a), which authorizes  
6 injunctive relief; and 28 U.S.C. §§ 2201 and 2202, which authorizes declaratory relief.  
7 Jurisdiction is conferred on this Court pursuant to section 512(a) of the Act, 21 U.S.C. § 882(a);  
8 and 28 U.S.C. §§ 1331, 1345 and 1355(a). Venue lies in this district pursuant to 28 U.S.C. §  
9 1391(b).

10 III. PARTIES

11 3. The plaintiff is the UNITED STATES OF AMERICA.

12 4. Defendant, OAKLAND CANNABIS BUYERS' COOPERATIVE ("OCBC"), is an  
13 organization or unincorporated association operating as a business, and is located at 1755  
14 Broadway Avenue, Oakland, California.

15 5. Defendant, JEFFREY JONES, is a resident of the State of California, is the operator  
16 and/or director of the OCBC, and is named in his individual capacity and as the operator and/or  
17 director of the OCBC.

18 IV. STATUTORY AND REGULATORY REQUIREMENTS

19 6. In 1970, Congress passed the Act, 21 U.S.C. § 801, et seq., as part of the  
20 Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat.  
21 1236.

22 7. Pursuant to section 501(a) of the Act, 21 U.S.C. § 871(a), the functions vested in the  
23 Attorney General under the Act have been assigned to the Administrator of the Drug Enforcement  
24 Administration ("DEA"). See 28 C.F.R. § 0.100(b).

25 8. In section 101 of the Act, 21 U.S.C. § 801, Congress found and declared, in pertinent  
26 part, that:

27

1 (2) The illegal importation, manufacture, distribution, and possession and improper use  
2 of controlled substances have a substantial and detrimental effect of the health and general  
welfare of the American people.

3 (3) A major portion of the traffic in controlled substances flows through interstate and  
4 foreign commerce. Incidents of the traffic or foreign flow, such as manufacture, local  
5 distribution, and possession, nonetheless have a substantial and direct effect upon  
interstate commerce because--

6 (A) after manufacture, many controlled substances are transported in interstate  
commerce,

7 (B) controlled substances distributed locally usually have been transported in  
interstate commerce immediately before their distribution, and

8 (C) controlled substances possessed commonly flow through interstate  
9 commerce immediately prior to such possession.

10 (4) Local distribution and possession of controlled substances contribute to swelling the  
interstate traffic in such substances.

11 (5) Controlled substances manufactured and distributed intrastate cannot be  
12 differentiated from controlled substances manufactured and distributed interstate. Thus, it  
13 is not feasible to distinguish, in terms of controls, between controlled substances  
14 manufactured and distributed interstate and controlled substances manufactured and  
distributed intrastate.

15 (6) Federal control of the intrastate incidents of the traffic in controlled substances is  
essential to the effective control of the interstate incidents of such traffic.

16 9. Section 102(6) of the Act, 21 U.S.C. § 802(6), defines a controlled substance as "a drug  
17 or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of  
18 this subchapter."

19 10. Section 202(b) of the Act, 21 U.S.C. § 812(b), provides that the findings required for a  
20 drug or other substance to be placed in Schedule I are as follows:

21 (A) The drug or other substance has a high potential for abuse.

22 (B) The drug or other substance has no currently accepted medical use in  
23 treatment in the United States.

24 (C) There is a lack of accepted safety for use of the drug or other substance  
under medical supervision.

25 11. Section 202(c) of the Act, 21 U.S.C. § 812(c), further provides that "Schedules I, II,  
26 III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the  
27

1 following drugs or other substances, by whatever official name, common or usual name, chemical  
2 name, or brand name designated:

3 Schedule I

4 \* \* \* \*

5 any material, compound, mixture, or preparation, which contains any of the  
6 following hallucinogenic substances

7 \* \* \* \*

8 (10) Marihuana

9 12 Section 401(a) of the Act, 21 U.S.C. § 841(a)(1), makes it unlawful, except as  
10 otherwise authorized by the Act, for any person knowingly or intentionally "to manufacture,  
11 distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled  
12 substance \* \* \* \*."

13 13. Section 102(15) of the Act, 21 U.S.C. § 802(15), defines "manufacture" as "the  
14 production, preparation, propagation, compounding, or processing of a drug or other substance \* \*  
15 \* \*." 21 U.S.C. § 802(15). Section 102(22) of the Act, 21 U.S.C. § 802(22), defines "production"  
16 as "the manufacturing, planting, cultivation, growing, or harvesting of a controlled substance."

17 14. Section 416(a) of the Act, 21 U.S.C. § 856(a)(1), makes it unlawful, except as  
18 otherwise authorized by the Act, to "knowingly open or maintain any place for the purpose of  
19 manufacturing, distributing, or using any controlled substance."

20 15. Section 406 of the Act, 21 U.S.C. § 846, makes it unlawful for any person to conspire  
21 to violate the Act.

22 16. Section 512(a) of the Act, 21 U.S.C. § 882(a), provides that "[t]he district courts of  
23 the United States . . . shall have jurisdiction in proceedings in accordance with the Federal Rules  
24 of Civil Procedure to enjoin violations of this title."



1 V. STATEMENT OF CLAIMS

2 17. Defendant OCBC is an organization or unincorporated association, operating as a  
3 business, and is located at 1755 Broadway Avenue, in Oakland, California. Defendant Jeffrey  
4 Jones is the operator and/or director of the OCBC.

5 18. At all times relevant to this action, or from sometime in early 1997 to the present,  
6 defendants OCBC and Jeffrey Jones have been engaged in the sale or distribution of marijuana.

7 19. At all times relevant to this action, or from sometime in early 1997 to the present,  
8 defendants OCBC and Jeffrey Jones have been engaged in the manufacture of marijuana.

9 20. At all times relevant to this action, or from sometime in early 1997 to the present,  
10 defendants OCBC and Jeffrey Jones have been engaged in the possession of marijuana with the  
11 intent to manufacture and distribute the substance.

12 21. At all times relevant to this action, or from sometime in early 1997 to the present,  
13 defendants OCBC and Jeffrey Jones have maintained 1755 Broadway Avenue, Oakland,  
14 California, for the purpose of manufacturing and distributing marijuana.

15 22. At all times relevant to this action, or from sometime in early 1997 to the present,  
16 defendant Jeffrey Jones has conspired with unknown officers, agents, employees, or suppliers of  
17 the OCBC to violate the Act.

18 COUNT I

19 23. The United States hereby incorporates by reference paragraphs 1-22.

20 24. In violation of section 401(a) of the Act, 21 U.S.C. § 841(a)(1), defendants OCBC and  
21 Jeffrey Jones have engaged in the manufacture and distribution of marijuana, a Schedule I  
22 controlled substance, and have possessed marijuana with the intent to manufacture and distribute  
23 the substance.

24 25. Defendants OCBC's and Jeffrey Jones's manufacture and distribution of marijuana,  
25 and possession of marijuana with the intent to manufacture and distribute the substance, is  
26  
27

1 ongoing and continuing and, based on information and belief, is likely to continue unless enjoined  
2 by the Court.

3 COUNT II

4 26. The United States hereby incorporates by reference paragraphs 1-25.

5 27. In violation of section 416(a) of the Act, 21 U.S.C. § 856(a)(1), defendants OCBC and  
6 Jeffrey Jones have maintained 1755 Broadway Avenue, Oakland, California, for the purpose of  
7 manufacturing and distributing marijuana.

8 28. Defendants OCBC's and Jeffrey Jones's maintenance of 1755 Broadway Avenue,  
9 Oakland, California, for the purpose of manufacturing and distributing marijuana, is ongoing and  
10 continuing and, based on information and belief, is likely to continue unless enjoined by the  
11 Court.

12 COUNT III

13 29. The United States hereby incorporates by reference paragraphs 1-28.

14 30. In violation of section 406 of the Act, 21 U.S.C. § 846, defendant Jeffrey Jones has  
15 conspired with unknown officers, agents, employees, or suppliers of the OCBC to violate the Act.

16 31. Defendant Jeffrey Jones's conspiracy to violate the Act is ongoing and continuing and,  
17 based on information and belief, is likely to continue unless enjoined by the Court.

18 PRAYER FOR RELIEF

19 WHEREFORE, plaintiff, the United States of America, prays that this Court enter  
20 judgment against defendants, Oakland Cannabis Buyers' Cooperative and Jeffrey Jones, as well as  
21 defendants' "officers, agents, servants, employees, and attorneys, and upon those persons in active  
22 concert or participation with [defendants] who receive actual notice of the order by personal  
23 service or otherwise," Fed. R. Civ. P. 65(d), as follows:

24 (a) Declare that defendants OCBC and Jeffrey Jones are in violation of section  
25 401(a) of the Act, 21 U.S.C. § 841(a)(1), by engaging in the manufacture and distribution of  
26  
27

1 marijuana, a Schedule I controlled substance, and possession of marijuana with the intent to  
2 manufacture and distribute the substance.

3 (b) Declare that defendants OCBC and Jeffrey Jones are in violation of section  
4 416(a) of the Act, 21 U.S.C. § 856(a)(1), by maintaining 1755 Broadway Avenue, Oakland,  
5 California, for the purpose of manufacturing and distributing marijuana.

6 (c) Declare that defendant Jeffrey Jones is in violation of section 406 of the Act,  
7 21 U.S.C. § 846, by conspiring with unknown officers, agents, employees, or suppliers of the  
8 OCBC to violate the Act.

9 (d) Enter a preliminary and permanent injunction enjoining defendants OCBC and  
10 Jeffrey Jones, from hereafter manufacturing or distributing marijuana, a Schedule I controlled  
11 substance, or possessing marijuana with the intent to manufacture or distribute the substance, in  
12 violation of section 401(a) of the Act, 21 U.S.C. § 841(a)(1).


13 (e) Enter a preliminary and permanent injunction enjoining defendants OCBC and  
14 Jeffrey Jones, from hereafter maintaining 1755 Broadway Avenue, Oakland, California, for the  
15 purpose of manufacturing or distributing marijuana, in violation of section 416(a) of the Act, 21  
16 U.S.C. § 856(a)(1).

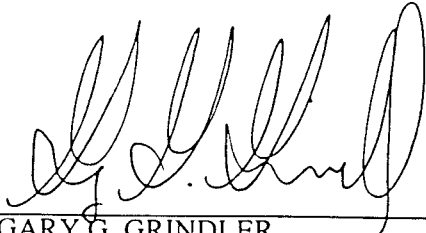
17 (f) Enter a preliminary and permanent injunction enjoining defendant Jeffrey  
18 Jones from hereafter conspiring to violate the Act.

19 (g) Grant such other relief as the Court may deem just and equitable, including  
20 plaintiff's costs.

21 Respectfully submitted,

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Dated: January 9, 1998

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13 UNITED STATES OF AMERICA, )

14 Plaintiff, )

15 v. )

16 OAKLAND CANNABIS BUYERS' )  
17 COOPERATIVE, and JEFFREY JONES, )

18 Defendants. )

Case No. C98-0088 CAL

PLAINTIFF'S MOTION AND  
MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY AND  
PERMANENT INJUNCTION, AND  
FOR SUMMARY JUDGMENT

Date: February 20, 1998

Time: 9:30 a.m.

Courtroom of the Hon. Charles A. Legge

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27 Plaintiff's Motion and Memorandum in Support of Motion for  
28 Preliminary and Permanent Injunction, and for Summary Judgment  
Case No. C98-0088 CAL

ER0009

1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that on February 20, 1998, at 9:00 a.m., in the United States  
3 Courthouse at 450 Golden Gate Avenue, San Francisco, California, in the courtroom normally  
4 occupied by the Hon. Charles A. Legge, plaintiff, the United States of America, will move this  
5 Honorable Court for a preliminary and permanent injunction, as provided for by the Controlled  
6 Substances Act, 21 U.S.C. § 801, et seq. (the "Act"), and for summary judgment, as provided for  
7 by Fed. R. Civ. P. 56.

8 The injunction and judgment sought by the United States pursuant to 21 U.S.C. § 882(a),  
9 in which Congress expressly authorized suits for civil injunctive relief to "to enjoin violations of  
10 [the Controlled Substances Act]," would enjoin defendants, the Oakland Cannabis Buyers'  
11 Cooperative ("OCBC"), and Jeffrey Jones, the operator and/or director of the OCBC, from  
12 continuing to engage in widespread violations of the Act, related to defendants OCBC's and  
13 Jones's ongoing manufacture and distribution of marijuana, a Schedule I controlled substance. In  
14 particular, the injunction and judgment would enjoin defendants OCBC and Jones from further  
15 manufacturing or distributing marijuana, or possessing marijuana with the intent to manufacture  
16 or distribute the substance, in violation of 21 U.S.C. § 841(a)(1). The injunction and judgment  
17 also would enjoin defendants OCBC and Jones from further maintaining 1755 Broadway Avenue,  
18 Oakland, California, the building which houses the OCBC, for the purpose of manufacturing or  
19 distributing marijuana, in violation of 21 U.S.C. § 856(a)(1). Finally, the injunction and judgment  
20 would enjoin defendant Jones from further conspiring to violate the Act, as evidenced by the  
21 foregoing activities, in violation of 21 U.S.C. § 846.





1 in the cultivation and distribution of marijuana, and related activities -- will not be in dispute,  
2 there is no "genuine issue of material fact" to be determined by the Court. Under these  
3 circumstances, the Court should consolidate the hearing on the government's motion for a  
4 preliminary injunction with the merits, and enter a permanent injunction and summary judgment  
5 in favor of the United States.

## 6 STATUTORY AND REGULATORY BACKGROUND

7 In 1970, Congress passed the Controlled Substances Act as part of the Comprehensive  
8 Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. While  
9 recognizing that many controlled substances "have a useful and legitimate medical purpose and  
10 are necessary to maintain the health and general welfare of the American people," 21 U.S.C. §  
11 801(1), Congress found that "[t]he illegal importation, manufacture, distribution, and possession  
12 and improper use of controlled substances have a substantial and detrimental effect of the health  
13 and general welfare of the American people." *Id.* § 801(2).<sup>3</sup> In particular, Congress made the  
14 following express findings:

15 (3) A major portion of the traffic in controlled substances flows through interstate and  
16 foreign commerce. Incidents of the traffic which are not an integral part of the interstate  
17 or foreign flow, such as manufacture, local distribution, and possession, nonetheless have  
18 a substantial and direct effect upon interstate commerce because--

19 (A) after manufacture, many controlled substances are transported in interstate  
20 commerce,

21 (B) controlled substances distributed locally usually have been transported in  
22 interstate commerce immediately before their distribution, and

23 (C) controlled substances possessed commonly flow through interstate  
24 commerce immediately prior to such possession.

25 (4) Local distribution and possession of controlled substances contribute to swelling the  
26 interstate traffic in such substances.

---

27 <sup>3</sup> Congress defined a controlled substance as "a drug or other substance, or immediate  
28 precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." *Id.* § 802(6).

1 (5) Controlled substances manufactured and distributed intrastate cannot be  
2 differentiated from controlled substances manufactured and distributed interstate. Thus, it  
3 is not feasible to distinguish, in terms of controls, between controlled substances  
4 manufactured and distributed interstate and controlled substances manufactured and  
5 distributed intrastate.

6 (6) Federal control of the intrastate incidents of the traffic in controlled substances is  
7 essential to the effective control of the interstate incidents of such traffic.

8 Id. § 801(3)-(6).

9 Congress therefore established a comprehensive regulatory scheme in which controlled  
10 substances are placed in one of five "Schedules" depending on their potential for abuse, the extent  
11 to which they may lead to psychological or physical dependence, and whether they have a  
12 currently accepted medical use in treatment in the United States. Id. § 812(b). Controlled  
13 substances in "Schedule I" have been determined to have a "high potential for abuse," "no  
14 currently accepted medical use in treatment in the United States," and a "lack of accepted safety  
15 for use under medical supervision." Id. § 812(b)(1). Given these characteristics, Congress has  
16 mandated that substances in Schedule I be subject to the most stringent regulation. In particular,  
17 no physician may dispense any Schedule I controlled substance to any patient outside of a strictly  
18 controlled research project registered with the DEA, and approved by the Secretary of Health and  
19 Human Services, acting through the Food and Drug Administration ("FDA"). Id. § 823(f).<sup>4</sup>  
20 When it passed the Act in 1970, Congress placed marijuana in Schedule I, where it remains today.  
21 Id. § 812 Schedule I(c)(10).

22 Congress recognized, however, that the schedules may sometimes need to be modified to  
23 reflect changes in scientific knowledge and patterns of abuse of particular drugs. A controlled  
24

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25 <sup>4</sup> In contrast, controlled substances in Schedules II through V are subject to decreasing levels  
26 of controls because they have been determined to have some currently accepted medical uses in  
27 treatment in the United States. Id. §§ 812(b)(2)-(5). Nonetheless, given their potential for abuse,  
28 the Act requires that all persons involved in the distribution of a substance in Schedules II  
through V to be registered with the DEA and to keep records of all transfers of controlled  
substances. Id. § 823.

1 substance that has been placed in Schedule I (or any other schedule) therefore may be  
2 rescheduled, or removed from the five schedules, in one of two ways. First, Congress itself may  
3 add or delete drugs from, or transfer drugs between, the five schedules. Second, Congress  
4 authorized the Attorney General to promulgate rules to add or delete drugs from, or transfer drugs  
5 between, the five schedules, pursuant to the rulemaking procedures of the Administrative  
6 Procedures Act, 5 U.S.C. § 552.<sup>5</sup> See 21 U.S.C. § 811(a). Such proceedings may be initiated by  
7 the Attorney General, acting through the DEA Administrator: "(1) on his own motion, (2) at the  
8 request of the Secretary [of Health and Human Services], or (3) at the petition of any interested  
9 party." Id. The implementing regulations to the Act thus allow "[a]ny interested person to submit  
10 a petition" asking the DEA Administrator to initiate a rulemaking proceeding to reschedule a  
11 controlled substance. 21 C.F.R. §§ 1308.44(b), (c).<sup>6</sup>

12 Several groups and individuals who believe that marijuana should be permissible for  
13 therapeutic purposes have petitioned the Administrator to move marijuana from Schedule I (where  
14 Congress placed it) to Schedule II. In 1992, the Administrator declined to reschedule marijuana,  
15 finding that the record demonstrated that marijuana had "no currently accepted medical use in  
16 treatment in the United States," and thus had to remain in Schedule I. 57 Fed. Reg. 10,499 (Mar.  
17 26, 1992). This decision was upheld by a unanimous panel of the D.C. Circuit, which held that  
18 the Administrator's findings were "consistent with the view that only rigorous scientific proof can  
19 satisfy the [Controlled Substances Act's] 'currently accepted medical use requirement.'" Alliance

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20  
21 <sup>5</sup> The Attorney General has delegated this authority to the Administrator of the DEA. See 28  
C.F.R. § 0.100(b).

22  
23 <sup>6</sup> For example, in 1986, the DEA Administrator rescheduled "Marinol," or synthetic  
24 dronabinol in sesame oil and encapsulated in soft gelatin capsules, a substance which is the  
25 synthetic equivalent of the isomer of delta-9-tetrahydrocannabinol ("THC"), the principal  
26 psychoactive substance in marijuana, from Schedule I to Schedule II. 51 Fed. Reg. 17,476 (May  
13, 1986). Marinol currently is approved in treatment for nausea and anorexia associated with  
cancer and AIDS patients.

1 | for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1137 (D.C. Cir. 1994).

2 | The petitioners did not seek Supreme Court review.

3 | To control the "problems related to drug abuse," H.R. Rep. No. 91-1444, pt. 1, at 3 (1970),  
4 | Congress made it unlawful, except as otherwise authorized by the Act, to "manufacture [or]  
5 | distribute" any controlled substance without an appropriate DEA registration, or to "possess with  
6 | the intent to manufacture [or] distribute" a controlled substance. 21 U.S.C. § 841(a)(1).<sup>7</sup> For the  
7 | same reason, Congress made it unlawful, except as authorized by the Act, to possess a controlled  
8 | substance. Id. § 844.

9 | In addition, Congress made it unlawful to "knowingly open or maintain any place for the  
10 | purpose of manufacturing, distributing, or using any controlled substance," id. § 856(a)(1), or to  
11 | "manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee,  
12 | or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or  
13 | without compensation, the building, room, or enclosure for the purpose of unlawfully  
14 | manufacturing, storing, distributing, or using a controlled substance." Id. § 856(a)(2). And, as  
15 | with all criminal prohibitions, Congress made it unlawful to conspire to violate the Act. Id. § 846.

16 | Finally, Congress expressly authorized suits for civil injunctive relief to enjoin violations  
17 | of the Act. Id. § 882(a). In pertinent part, Congress provided that:

18 | The district courts of the United States and all courts exercising general jurisdiction in  
19 | the territories and possessions of the United States shall have jurisdiction in proceedings in  
20 | accordance with the Federal Rules of Civil Procedure to enjoin violations of [the Act].

---

21 |  
22 | <sup>7</sup> For controlled substances in Schedule I, DEA may grant a registration to a practitioner to  
23 | conduct research with a Schedule I controlled substance only in a research project that has been  
24 | approved by the Secretary of Health and Human Services, acting through the FDA. 21 U.S.C.  
25 | § 823(f). By contrast, for substances in Schedules II through V, DEA alone has the statutory  
26 | authority to grant registrations to practitioners who are authorized to prescribe, administer, or  
27 | dispense controlled substances. Id. § 823(f).

1 STATEMENT OF FACTS

2 The Oakland Cannabis Buyers' Cooperative is a corporation or unincorporated association  
3 operating as a business, and is located at 1755 Broadway Avenue, in Oakland, California. Jeffrey  
4 Jones is the operator and/or director of the OCBC. Since sometime in early 1997, and continuing  
5 to the present, defendant Jones and other agents or employees of the OCBC have sold different  
6 "brands" of marijuana to club "members" in 1755 Broadway Avenue, in Oakland, in clear  
7 violation of federal law. Defendants OCBC and Jones also have engaged in the cultivation of  
8 numerous marijuana plants.

9 Indeed, there can be no dispute that defendants OCBC and Jeffrey Jones are engaged in  
10 these unlawful activities. To begin with, the organization candidly identifies itself as the  
11 "Oakland Cannabis Buyers' Cooperative," and the OCBC's World Wide Web site provides that  
12 the OCBC "provides medical cannabis and other services to over 1,300 members." Declaration of  
13 Mark T. Quinlivan ("Quinlivan Dec.") ¶ 2 & Exhibit 1. The Web site also notes the hours for the  
14 "Bud Bar," id., and a pamphlet obtained at the OCBC states that the club provides members with  
15 "[a] safe and secure location to purchase cannabis for medicinal use," as well as "[o]ur Cannabis  
16 Grow Center, offering the Medi-Grow System to cultivate your own medical marijuana \* \* \* \*."  
17 Id. ¶ 3 & Exhibit 2.<sup>8</sup>

18 An undercover investigation conducted by the DEA also has revealed a substantial traffic  
19 in the sale and distribution of marijuana by the OCBC. During this investigation, agents of the  
20 DEA have made six undercover purchases of marijuana from the OCBC, observed somewhere  
21 between 33-43 individuals purchasing marijuana at the OCBC, and observed approximately 100  
22 growing marijuana plants inside the OCBC. The undercover purchases are as follows:

23 \_\_\_\_\_  
24 <sup>8</sup> An OCBC newsletter likewise contains a column by defendant Jones, where he states that  
25 the club sells "high-grade" marijuana for \$50-\$60 for one-eighth ounce, and that the club was  
26 "restocked" with "B-Mex" and "House Special" marijuana. Id. ¶ 4 & Exhibit 3.

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24 <sup>8</sup> An OCBC newsletter likewise contains a column by defendant Jones, where he states that  
25 the club sells "high-grade" marijuana for \$50-\$60 for one-eighth ounce, and that the club was  
26 "restocked" with "B-Mex" and "House Special" marijuana. Id. ¶ 4 & Exhibit 3.

1 (1) On May 19, 1997, Special Agent ("S/A") Brian Nehring made an undercover purchase  
2 of one-sixteenth ounce of "Northern Lights" marijuana from the OCBC for \$40. Declaration of  
3 Special Agent Brian Nehring ("Nehring Dec.") ¶¶ 4-15; Declaration of Special Agent Mark  
4 Nelson ¶ 4; Declaration of Phyllis E. Quinn ("Quinn Dec.") ¶ 4. In addition, while inside the  
5 OCBC, S/A Nehring observed three other individuals purchasing marijuana at the OCBC, and  
6 two growing marijuana plants. Id. ¶ 10.

7 (2) On June 23, 1997, S/A Bill Nyfeler made an undercover purchase of one-eighth ounce  
8 of Mexican-grown marijuana from the OCBC for \$7. Declaration of Special Agent Bill Nyfeler  
9 ("Nyfeler Dec.") ¶¶ 4-14; Quinn Dec. ¶ 5. In addition, while inside the OCBC, S/A Nyfeler  
10 observed five other customers purchasing marijuana from the club, and approximately fifty  
11 growing marijuana plants. Id. ¶ 8.

12 (3) On August 8, 1997, S/A Carolyn Porras purchased one-eighth ounce of "Mexican AA-  
13 Grade A" marijuana from the OCBC for \$25. Declaration of Special Agent Carolyn Porras  
14 ("Porras Dec.") 4-16; Quinn Dec. ¶ 6. In addition, while inside the OCBC, S/A Porras observed  
15 approximately 9-15 other individuals standing in line to purchase marijuana, and observed  
16 approximately fifteen growing marijuana plants. Id. ¶ 10, 11, 13.

17 (4) On September 10, 1997, S/A Nyfeler purchased one-eighth ounce of "AA" Mexican-  
18 grown marijuana from the OCBC for \$15. Nyfeler Dec. ¶¶ 15-24; Quinn Dec. ¶ 7. In addition,  
19 while inside the OCBC, S/A Nyfeler observed approximately 8-10 other individuals standing in  
20 line to purchase marijuana, and observed approximately ten growing marijuana plants. Id. ¶¶  
21 19=20.

22 (5) On October 22, 1997, Special Agent Deborah Muusers made an undercover purchase  
23 of one-eighth ounce of "That's Purdy" marijuana from the OCBC for \$60. Declaration of Special  
24 Agent Deborah Muusers ("Muusers Dec.") ¶¶ 4-16; Porras Dec. ¶¶ 17-19; Quinn Dec. ¶ 8. In  
25 addition, while inside the OCBC, S/A Muusers observed approximately 8-10 other individuals  
26

1 standing in line to purchase marijuana, and observed approximately 25-30 growing marijuana  
2 plants. Id. ¶ 10.

3 (6) On November 14, 1997, S/A Nyfeler made an undercover purchase of one-eighth  
4 ounce of "House Special" marijuana from the OCBC for \$45. Nyfeler Dec. ¶¶ 25-33; Quinn Dec.  
5 ¶ 9. In addition, while inside the OCBC, S/A Nyfeler observed that the OCBC also was selling  
6 "Hash Oil." Id. ¶ 29.

7 In summary, agents of the DEA made six undercover purchases of marijuana from the  
8 OCBC between May 21, 1997 and November 14, 1997, and observed somewhere between 33-43  
9 other individuals purchasing marijuana at the OCBC. Each individual such sale of marijuana by  
10 defendants constitutes a separate violation of the federal law. The agents also observed  
11 approximately 100 growing marijuana plants inside the OCBC. During these undercover  
12 purchases, the agents did not observe any other commercial activity ongoing at the OCBC *except*  
13 for the cultivation and distribution of marijuana. Nehring Dec. ¶ 15; Nyfeler Dec. ¶¶ 14, 24, 33;  
14 Porras Dec. ¶ 16; Muusers Dec. ¶ 16.

15 This factual record unambiguously demonstrates that defendants OCBC and Jones, and  
16 other unknown officers, agents, employees, and/or suppliers of the OCBC, are engaged in the  
17 cultivation and distribution of marijuana, the possession of the marijuana with the intent to  
18 cultivate and distribute the drug, and related unlawful activities.

## 19 **ARGUMENT**

### 20 **I. THE UNITED STATES IS ENTITLED TO A PRELIMINARY INJUNCTION TO** 21 **ENJOIN DEFENDANTS' ONGOING VIOLATIONS OF FEDERAL LAW**

#### 22 **A. Standards**

23 In determining whether to grant a preliminary injunction, courts in the Ninth Circuit  
24 traditionally consider "(1) the likelihood of the moving party's success on the merits; (2) the  
25 possibility of irreparable injury to the moving party if the relief is not granted; (3) the extent to  
26



1 | which the balance of hardships favors the respective parties; and (4) in certain cases, whether the  
2 | public interest will be advanced by granting the preliminary relief." Miller v. California Pacific  
3 | Medical Center, 19 F.3d 449, 456 (9th Cir. 1994) (en banc). The moving party must demonstrate  
4 | either "(1) a combination of probable success on the merits and the possibility of irreparable harm,  
5 | or (2) the existence of serious questions going to the merits, the balance of hardships tipping  
6 | sharply in its favor, and at least a fair chance of success on the merits." Id. (internal quotation  
7 | omitted).

8 |         The injunction in this case is sought pursuant to 21 U.S.C. § 882(a), in which Congress  
9 | expressly authorized suits for civil injunctive relief to "to enjoin violations of [the Controlled  
10 | Substances Act]." In statutory enforcement actions, the Ninth Circuit has held that, "[t]he  
11 | function of a court in deciding whether to issue an injunction authorized by a statute of the United  
12 | States to enforce and implement Congressional policy is a different one from that of a court when  
13 | weighing the claims of two private litigants." United States v. Odessa Union Warehouse Co-op.,  
14 | 833 F.2d 172, 174-75 (9th Cir. 1987). In such cases, the Ninth Circuit has explained that:

15 |             Where an injunction is authorized by statute, and the statutory conditions are satisfied  
16 |             \* \* \*, *the agency to whom the enforcement of the right has been entrusted is not required*  
17 |             *to show irreparable injury. No specific or immediate showing of the precise way in which*  
18 |             *violation of the law will result in public harm is required.* The district court accordingly  
19 |             should *presume* that the government would suffer irreparable injury from a denial of its  
20 |             motion.

21 | Id. at 175-76 (emphasis supplied) (internal footnote and citations omitted). See also Miller, 19  
22 | F.3d at 459 ("In statutory enforcement cases where the government has met the 'probability of  
23 | success' prong of the preliminary injunction test, we presume it has met the 'possibility of  
24 | irreparable injury' prong \* \* \*") (quoting United States v. Nutri-Cology, Inc., 982 F.2d 394, 398  
25 | (9th Cir. 1992)); Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449, 453 (9th Cir.  
26 | 1983) ("When the government is seeking compliance pursuant to a statutory enforcement scheme,  
27 | irreparable injury from a denial of enforcement is presumed."); Trailer Train Co. v. State Bd. of

1 Equalization, 697 F.2d 860, 869 (9th Cir. 1983) ("The standard requirements for equitable relief  
2 need not be satisfied when an injunction is sought to prevent the violation of a statute which  
3 specifically provides for equitable relief."); United States v. Alameda Gateway, Inc., 953 F. Supp.  
4 1106, 1109 (N.D. Cal. 1996) ("In statutory enforcement actions \* \* \* [t]he court only inquires as  
5 to the possibility of irreparable harm when the government fails to establish a likelihood of  
6 success on the merits."). In other words, "the passage of the statute is itself an implied finding by  
7 Congress that violations will harm the public \* \* \* [and] *further inquiry into irreparable injury is*  
8 *unnecessary.*" Nutri-Cology, Inc., 982 F.2d at 398 (emphasis supplied).

9 As we demonstrate below, the United States has more than demonstrated "a combination  
10 of probable success on the merits and the possibility of irreparable harm" in this action, and  
11 therefore easily meets its burden of justifying the issuance of preliminary injunctive relief.

12 B. The United States Has Demonstrated a Likelihood of Success on the Merits, as  
13 Defendants are Engaged in Plain and Ongoing Violations of Federal Law

14 There is *no* question in this case that defendants OCBC and Jeffrey Jones are engaged in  
15 the open cultivation and distribution of marijuana, and are possessing marijuana with the intent to  
16 cultivate and distribute the drug. As detailed above, the OCBC's own Web Site and literature  
17 provides that the club is engaged in growing and selling the drug, see Quinlivan Dec. ¶¶ 2-4 &  
18 Exhibits 1-3, and DEA undercover agents have made six undercover purchases of marijuana from  
19 the OCBC, observed several other individuals purchasing marijuana from the OCBC during these  
20 undercover purchases, as well as numerous growing marijuana plants on the premises of the  
21 OCBC. See Nehring Dec. ¶¶ 4-15; Nyfeler Dec. ¶¶ 4-33; Porras Dec. ¶¶ 4-16; Muusers Dec. ¶¶  
22 4-16; Quinn Dec. ¶¶ 4-9. This factual record is incontrovertible, and we do not anticipate that  
23 defendants OCBC and Jones will deny that they are engaged in these activities.

24 This activity, alone, is sufficient to demonstrate that the United States will succeed on the  
25 merits of this action. Because marijuana is listed in Schedule I of the Controlled Substances Act,  
26

1 it cannot lawfully be cultivated, distributed, possessed, or possessed with the intent to cultivate or  
2 distribute the substance, for *any* purpose outside of a research project registered with the DEA and  
3 approved by the Secretary of Health and Human Services, acting through the FDA. See 21 U.S.C.  
4 §§ 841(a)(1); 823(f).<sup>9</sup> Neither defendants OCBC nor Jones has been registered with the DEA to  
5 handle marijuana for any purpose.

6 Nor can there be any doubt that Congress has the constitutional authority to prohibit the  
7 cultivation, distribution, or possession of marijuana. When it passed the Act, Congress made  
8 specific findings that the traffic in controlled substances is of paramount national concern,  
9 including that: "[a] major portion of the traffic in controlled substances flows through interstate  
10 and foreign commerce;" that the "[l]ocal distribution and possession of controlled substances  
11 contribute to swelling the interstate traffic in such substances;" that "[c]ontrolled substances  
12 manufactured and distributed intrastate cannot be differentiated from controlled substances  
13 manufactured and distributed interstate;" and that "[f]ederal control of the intrastate incidents of  
14 the traffic in controlled substances is essential to the effective control of the interstate incidents of  
15  
16  
17

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18 <sup>9</sup> Defendants cannot challenge Congress's placement of marijuana in Schedule I in this case.  
19 Every court of appeals to have considered the issue has held that the decision as to whether or not  
20 marijuana should be reclassified must be presented first to the Administrator of the DEA in the  
21 context of a rescheduling petition under 21 U.S.C. § 811(a). See, e.g., United States v. Burton,  
22 894 F.2d 188, 192 (6<sup>th</sup> Cir. 1990); cert. denied, 498 U.S. 857 (1990); United States v. Greene,  
23 892 F.2d 453, 455-45 (6<sup>th</sup> Cir. 1989); United States v. Fry, 787 F.2d 903, 905 (4<sup>th</sup> Cir.), cert.  
24 denied, 479 U.S. 861 (1986); United States v. Wables, 731 F.2d 440, 450 (7<sup>th</sup> Cir. 1984); United  
25 States v. Fogarty, 692 F.2d 542, 548 & n.4 (8<sup>th</sup> Cir. 1982); United States v. Middleton, 690 F.2d  
26 820, 823 (11<sup>th</sup> Cir. 1982), cert. denied, 460 U.S. 1051 (1983); United States v. Kiffer, 477 F.2d  
27 349, 356-57 (2d Cir. 1972), cert. denied, 414 U.S. 831 (1973). As the Sixth Circuit held in  
28 Greene, a section 811 petition, "and not the judiciary, is the appropriate means by which  
defendant should challenge Congress's classification of marijuana as a Schedule I drug." 892  
F.2d at 456.

1 such traffic." 21 U.S.C. §§ 801(3)-(6).<sup>10</sup> Based on these express congressional findings, the Ninth  
2 Circuit has uniformly rejected Commerce Clause challenges to the Act. See, e.g., United States v.  
3 Bramble, 103 F.3d 1475, 1479-80 (9th Cir. 1996) ("The district court correctly held that the  
4 Controlled Substances Act, 21 U.S.C. § 841(a), 844(a), is constitutional under the Commerce  
5 Clause. We have so held." (internal citations omitted)); United States v. Tisor, 96 F.3d 370, 373-  
6 75 (9th Cir. 1996) ("In adopting the Controlled Substances Act, Congress expressly found that  
7 intrastate drug trafficking has a 'substantial effect' on interstate commerce."); United States v.  
8 Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996) (rejecting Commerce Clause challenge to Act  
9 premised on United States v. Lopez, 115 S. Ct. 1624 (1995)); United States v. Staples, 85 F.3d  
10 461, 463 (9th Cir. 1996) ("Unlike education, drug trafficking is a commercial activity which  
11 substantially affects interstate commerce."); United States v. Visman, 919 F.2d 1390, 1393 (9th  
12 Cir. 1990) ("Congress may constitutionally regulate intrastate criminal cultivation of marijuana  
13 plants found rooted in the soil."), cert. denied, 502 U.S. 969, 112 S. Ct. 442 (1991).

14 And the Ninth Circuit is not alone in this judgment. *Every* other court of appeals to  
15 consider the issue is in agreement. See, e.g., United States v. Edwards, 98 F.3d 1364, 1369 (D.C.  
16 Cir. 1996); United States v. Lerebours, 87 F.3d 582, 584-85 (1st Cir. 1996); Proyect v. United  
17 States, 101 F.3d 11, 13-14 (2d Cir. 1996); United States v. Leshuk, 65 F.3d 1105, 1112 (4th Cir.  
18 1995); United States v. Clark, 67 F.3d 1154 (5th Cir. 1995), cert. denied, 116 S. Ct. 1432 (1996);  
19 United States v. Tucker, 90 F.3d 1135, 1139-41 (6th Cir. 1996); United States v. Rogers, 89 F.3d  
20 1326, 1338 (7th Cir. 1996); United States v. Bell, 90 F.3d 318, 321 (8th Cir. 1996); United States

21  
22 <sup>10</sup> Congress further found that "[a] major portion of the traffic in controlled substances flows  
23 through interstate and *foreign* commerce," and that "[i]ncidents of the traffic or foreign flow,  
24 such as manufacture, local distribution, and possession, nonetheless have a substantial and direct  
25 effect upon interstate commerce \* \* \* \*". 21 U.S.C. § 801(3). It is undisputed here that, among  
26 the types of marijuana sold by the OCBC is what the OCBC purports to be Mexican-grown  
27 marijuana. See Nyfeler Dec. ¶¶ 4, 16 (purchases of one-eighth ounce of Mexican-grown  
28 marijuana); Porras ¶ 4 (same).

1 v. Wacker, 72 F.3d 1453, 1475 (10th Cir. 1995), cert. denied, 117 S. Ct. 136 (1996); United States  
2 v. Jackson, 111 F.3d 101, 102 (11th Cir. 1997).

3 Accordingly, because the factual record unequivocally demonstrates that defendants  
4 OCBC and Jones are engaged in the cultivation and distribution of marijuana, and the possession  
5 of marijuana with the intent to cultivate and distribute the drug, the United States has established  
6 that it is likely to succeed on the merits of its claim that these activities are in violation of 21  
7 U.S.C. § 841(a)(1). This factual record further demonstrates that defendants OCBC and Jones are  
8 using the premises of 1755 Broadway Avenue, in Oakland, to engage in the cultivation and  
9 distribution of marijuana, which constitutes an unambiguous violation of 21 U.S.C. § 856(a)(1),  
10 which makes it illegal, unless otherwise authorized by the Act, to “knowingly open or maintain  
11 any place for the purpose of manufacturing, distributing, or using any controlled substance.”  
12 Finally, the presence of other individual employees or attendants at the OCBC while the  
13 undercover purchases of marijuana were made demonstrates that defendant Jones is unlawfully  
14 conspiring with these unknown officers, agents, employees, and/or suppliers of the Marin  
15 Alliance, in violation of 21 U.S.C. § 846.

16 C. Irreparable Injury Must Be Presumed Because an Injunction is Authorized by the  
17 Controlled Substances Act, and the Statutory Violation is Plain

18 Congress has specifically authorized suits for civil injunctive relief to enjoin violations of  
19 the Controlled Substances Act. See 21 U.S.C. § 882(a). Hence, as discussed *supra* Part I.A.,  
20 because defendants’ violation of the Act are clear and unambiguous, irreparable injury must be  
21 presumed. As the Ninth Circuit has held: “In statutory enforcement actions \* \* \* the passage of  
22 the statute is itself an implied finding by Congress that violations will harm the public \* \* \* [and]  
23 *further inquiry into irreparable injury is unnecessary.*” Nutri-Cology, Inc., 982 F.2d at 398  
24 (emphasis supplied). Accord Miller, 19 F.3d at 459; Odessa Union Warehouse Co-op, 833 F.2d

1 at 174-75; Navel Orange Admin. Comm., 722 F.2d at 453; Trailer Train Co., 697 F.2d at 869;  
2 Alameda Gateway, Inc., 953 F. Supp. at 1109.

3 This principle was most fully explained by the Ninth Circuit in Odessa Union Warehouse.  
4 In that case, which involved an injunction sought pursuant to the food contamination and  
5 adulteration standards of the Food, Drug and Cosmetic Act, 21 U.S.C. § 301, et seq., the court  
6 stated that:

7 The function of a court in deciding whether to issue an injunction authorized by a statute  
8 of the United States to enforce and implement Congressional policy is a different one from  
9 that of the court when weighing claims by two private litigants. \* \* \* \* Once Congress,  
exercising its delegated powers, has decided the order of priorities in a given area, *it is for*  
*the courts to enforce them when asked.*

10 \* \* \* \*

11 The principles that apply to requests for preliminary injunctions in this circuit are well-  
12 established. So is the presumption of irreparable harm arising from the failure to enforce a  
federal statute intended to protect the public.

13 833 F.2d at 174-75, 177 (emphasis supplied). In then applying this standard, the court held that:  
14 “Had the district court applied the correct standard, the government’s likelihood of success on the  
15 merits and the presumptive finding of irreparable injury would have met the first test for issuance  
16 of a preliminary injunction.” Id. (citing Benda v. Grand Lodge of the Int’l Ass’n of Machinists &  
17 Aerospace Workers, 584 F.2d 308, 314 (9<sup>th</sup> Cir. 1978), cert. dismissed, 441 U.S. 937 (1979)).

18 Similarly here, because the government has demonstrated that defendants OCBC’s and  
19 Jones’s ongoing cultivation and distribution of marijuana, possession of the drug with the intent to  
20 cultivate and distribute it, and related activities, constitute plain and unambiguous violations of  
21 federal law, and because irreparable injury must be presumed under these circumstances, the  
22 United States has more than demonstrated “a combination of probable success on the merits and  
23 the possibility of irreparable harm,” the first test for the issuance of a preliminary injunction.  
24 Miller, 19 F.3d at 456. No further inquiry is necessary.

25

26

27

28

1 Even were the Court to examine the remaining factors governing the issuance or injunctive  
2 relief, the result would be the same. In addition to the presumption of irreparable injury  
3 applicable in statutory enforcement actions, "[h]arm to the public interest is presumed." Federal  
4 Trade Comm'n v. World Wide Factors, Inc., 882 F.2d 344, 346 (9th Cir. 1989) (citing Odessa  
5 Union Warehouse, 833 F.2d at 175-76). Indeed, in passing the Act, Congress expressly found  
6 that "[t]he illegal importation, manufacture, distribution, and possession and improper use of  
7 controlled substances have a substantial and detrimental effect of the health and general welfare of  
8 the American people." 21 U.S.C. § 801(2). As such, the very passage of the Act is, in itself, an  
9 expression of the public interest by the Branches of government entrusted by the Constitution  
10 with the responsibility to make such decisions. See Able v. United States, 44 F.3d 128, 132 (2d  
11 Cir. 1995) (per curiam) (holding that "it would be inappropriate for this court to substitute its own  
12 determination of the public interest for that arrived at by the political branches" where Congress  
13 had made specific findings in a statute which Congress believed justified a policy). The public  
14 interest therefore weighs in favor of the requested injunction.

15 And this determination necessarily dovetails with a determination that the balance of  
16 hardships weighs in favor of the requested injunction. In Caribbean Marine Services Co. v.  
17 Baldrige, 844 F.2d 668 (9th Cir. 1988), the Ninth Circuit made clear that: "[T]he district court  
18 must consider the public interest as a factor in balancing the hardships when the public interest  
19 may be affected." Id. at 674. Here, again, because defendants are in open violation of Congress's  
20 statutory scheme, "[h]arm to the public interest is presumed." World Wide Factors, Inc., 882 F.2d  
21 at 346.

22 Moreover, to the extent defendants believe they are subject to a hardship as a result of  
23 Congress's placement of marijuana in Schedule I, they are entitled to petition the Administrator of  
24 the DEA to reschedule marijuana. As described above, Congress has established an  
25 administrative process to determine whether a controlled substance should be rescheduled so that  
26

1 it may be used for medical purposes. Among other things, the implementing regulations to the  
2 Act allow any "[a]ny interested person to submit a petition" asking the DEA Administrator to  
3 initiate a rulemaking proceeding to reschedule a controlled substance. 21 C.F.R. §§ 1308.44(b),  
4 (c).<sup>11</sup> In thereby ensuring that drugs may be used for medical purposes only after they have been  
5 proven safe, effective, and reliable through a rigorous system of research and testing, this federal  
6 drug approval process has protected the American public from dangerous drugs and unproven  
7 treatments for more than 50 years.<sup>12</sup>

8 Thus, while the Administrator has previously declined to reschedule marijuana -- a  
9 decision that was upheld by a unanimous panel of the D.C. Circuit, see Alliance for Cannabis  
10 Therapeutics, 15 F.3d at 1131-37 -- if defendants believe that new evidence exists, they can  
11 petition the DEA to conduct another rulemaking. But defendants cannot, of course, litigate that  
12 issue in this case. See supra note 9. See also United States v. LaFroschia, 354 F. Supp. 1338,  
13 1341 (S.D.N.Y. 1973) ("[I]f the defendant were to be permitted to seek court review of the  
14 placement of marihuana in Schedule I without first applying to the Attorney General for such  
15 relief under 21 U.S.C. § 811, Congress' statutory scheme would be thwarted.").

16 By contrast, defendants OCBC's and Jones's ongoing violations of the Controlled  
17 Substances Act constitute a direct affront to the laws passed by Congress. Accordingly, the  
18 balance of hardships also weighs in favor of the requested injunction. See Odessa Union

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19  
20 <sup>11</sup> As set forth *supra*, the DEA Administrator also may conduct a rulemaking on his own  
21 motion, or upon the request of the Secretary [of Health and Human Services]. *Id.* § 811(a).

22 <sup>12</sup> Even if marijuana were taken out of Schedule I and placed in Schedule II, it could not  
23 legally be marketed or made available for prescription use unless it were reviewed and approved  
24 by the FDA under the Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.* For a drug to  
25 obtain approval under this Food, Drug and Cosmetic Act, appropriate tests in well-controlled  
26 studies must be conducted to show substantial evidence that the drug is effective for its intended  
27 use and that it is safe. To date, marijuana has not been approved by the FDA to treat any disease  
28 or condition.



1 Warehouse, 833 F.2d at 175 ("Once Congress has decided the order of priorities in a given area, it  
2 is for the courts to enforce them when asked.").

3 **II. BECAUSE DEFENDANTS' VIOLATIONS OF FEDERAL LAW ARE PLAIN AND**  
4 **UNAMBIGUOUS, THE UNITED STATES IS ENTITLED TO SUMMARY**  
5 **JUDGMENT AND PERMANENT INJUNCTIVE RELIEF**

6 Summary judgment is appropriate where "there is no genuine issue of material fact and . . .  
7 the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).<sup>13</sup> In cases in  
8 which the factual record available to a court at the preliminary injunction stage is unequivocal, the  
9 Court may "convert a decision on a preliminary injunction into a final disposition on the merits by  
10 granting summary judgment on the basis of the factual record available at the preliminary  
11 injunction stage." Air Line Pilots Ass'n v. Alaska Airlines, Inc., 898 F.2d 1393, 1397 n.4 (9th  
12 Cir. 1990).

13 This is such a case. As we have demonstrated *supra* Part I.B., the factual record in this  
14 case irrefutably demonstrates that defendants OCBC and Jones are engaged in the unlawful  
15 cultivation and distribution of marijuana, and related activities, and these actions constitute clear  
16 and unambiguous violations of federal law. Hence, "there is no genuine issue of material fact" in  
17 this case to be resolved. See Fed. R. Civ. P. 56(c). Under these circumstances, the United States  
18 is entitled permanent injunctive relief, and judgment as a matter of law.

---

21 <sup>13</sup> The initial burden is on the moving party to point out the absence of any genuine issue of  
22 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the initial burden of the  
23 moving party is satisfied, the burden shifts to the opponent to demonstrate through the  
24 production of probative evidence that there remains an issue of fact to be tried. Anderson v.  
25 Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In order to meet this burden, the non-moving  
26 party must go beyond the pleadings and show "by her own affidavits, or by the 'depositions,  
27 answers to interrogatories, or admissions on file'" that a genuine issue of material fact exists.  
28 Celotex Corp., 477 U.S. at 323 (quoting Fed. R. Civ P. 56(e)).

## FEDERAL LAW IS UNAFFECTED BY PROPOSITION 215

Proposition 215, enacted in November 1996,<sup>14</sup> which decriminalized the possession and cultivation of marijuana for patients and "caregivers" for purported medical purposes under state law, provides no defense to defendants' unlawful activities under federal law. It is well established that the determination of whether the Controlled Substances Act has been violated is a federal issue to be determined in federal courts," and is not dependent on state law. United States v. Rosenberg, 515 F.2d 190, 198 (9th Cir.), cert. denied, 423 U.S. 1031 (1975). Thus, in United States v. Kim, the Ninth Circuit expressly rejected an argument that the Act is an impermissible intrusion "into an area traditionally regulated by the states." In no uncertain terms, the court held that "Congress had authority under the Commerce Clause to criminalize the conduct under § 841(a)(1)," and that "the Supreme Court has recognized Congress' power to regulate illegal drugs." 94 F.3d at 1250 n.4. Indeed, to the extent "a state law purported to eliminate" a duty imposed by the federal Controlled Substances Act, "it would be void under the Supremacy Clause." United States v. Leal, 75 F.3d 219, 227 (6th Cir. 1996). See also 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.").

In any event, we note that, on December 12, 1997, the California Court of Appeal ruled that the ongoing distribution of marijuana by the Cannabis Buyer's Club (now known as the Cannabis Cultivators Club), a marijuana distribution center like the Marin Alliance, continues to be unlawful under state law, even after the passage of Proposition 215. People v. Peron, --- Cal.App.4th ---, --- Cal. Rptr.2d ---, 1997 WL 775828, at \*\* 3-10, No. A077630 (Cal. Ct. App. Dec. 12, 1997). In particular, the California Court of Appeal held that "[t]he sale and possession

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<sup>14</sup> See Cal. Health & Safety Code § 11362.5.

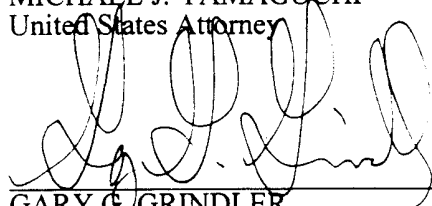
1 **CONCLUSION**

2 For the reasons set forth above, the United States respectfully requests that this Honorable  
3 Court enter the requested injunction and judgment in favor of the United States.

4 Respectfully submitted,

5 FRANK W. HUNGER  
6 Assistant Attorney General

7 MICHAEL J. YAMAGUCHI  
8 United States Attorney

9 

10 GARY C. GRINDLER  
11 Deputy Assistant Attorney General

12 

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18 Civil Division, Room 1048  
19 901 E St., N.W.  
20 Washington, D.C. 20530  
21 Tel: (202) 514-3346

22 Attorneys for Plaintiff  
23 UNITED STATES OF AMERICA

24 Dated: January 9, 1998

CERTIFICATE OF SERVICE

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I, Mark T. Quinlivan, hereby certify that on this 9th day of January, 1998, I served a copy of the foregoing Plaintiff's Motion and Memorandum in Support of Motion for Preliminary and Permanent Injunction, and for Summary Judgment; a [Proposed] Order; and the accompanying declarations in support, by overnight delivery, upon defendants:

Oakland Cannabis Buyers' Cooperative  
Jeffrey Jones  
1755 Broadway Avenue  
Oakland, CA 94612

  
\_\_\_\_\_  
MARK T. QUINLIVAN



ORIGINAL

1 FRANK W. HUNGER  
Assistant Attorney General  
2 MICHAEL J. YAMAGUCHI  
United States Attorney  
3 GARY G. GRINDLER  
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**FILED**

JAN 9 1998

*ndf*

**RICHARD W. WIEKING**  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

9 Attorneys for Plaintiff

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

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 OAKLAND CANNABIS BUYERS'  
17 COOPERATIVE, and JEFFREY JONES,

18 Defendants.

Case No.           C 98-0088-CAL

DECLARATION OF  
SPECIAL AGENT BILL NYFELER

19  
20 I, BILL NYFELER, do hereby declare and say as follows:

21 1. I am a Special Agent with the San Francisco Field Division of the Drug Enforcement  
22 Administration ("DEA"), United States Department of Justice, and have been so employed since  
23 October 1995.

24 2. I have received training from the DEA, Federal Bureau of Investigation, and the  
25 California Narcotics Officers Association, in specialized narcotic investigative matters including,  
26 but not limited to, the following: drug interdiction and detection, money laundering techniques  
27 and schemes, drug identification, and asset identification and forfeiture. This training included

28 Declaration of Special Agent Bill Nyfeler

ER0032

1 specialized training in the preparation of narcotic and document search warrants for residences  
2 and businesses.

3 3. I have participated in numerous investigations specifically involving both the indoor  
4 and outdoor manufacture or cultivation of marijuana. In the course of these investigations, I  
5 have personally participated in the eradication of over 500 indoor and 5,000 outdoor marijuana  
6 plants, and the arrest of more than 50 individuals for violations of federal and state law regarding  
7 controlled substances. I also have received specialized training regarding the techniques used to  
8 grow marijuana. Based on my experience and training, I am familiar with the smell and  
9 appearance of growing and processed marijuana, as well as the smell of marijuana when it is  
10 burning. I also have participated in the obtaining and/or execution of over 50 federal and  
11 California state warrants to search a particular place or premises for controlled substances and/or  
12 related paraphernalia, indicia, and other evidence of the commission of state and/or federal  
13 felony violations of law.

14 4. On June 23, 1997, I made an undercover purchase of one-eighth ounce of Mexican-  
15 grown marijuana for \$7 from the Oakland Cannabis Buyers' Cooperative ("OCBC"), a marijuana  
16 distribution business located in a building at 1755 Broadway Avenue, in Oakland, California. I  
17 made this undercover purchase using the OCBC membership card that had been previously  
18 issued to Special Agent Brian Nehring. The circumstances of this purchase are as follows:

19 5. On June 23, 1997, I was provided with Official Authorized Funds and equipped with  
20 audio and video equipment in anticipation of making an undercover purchase of marijuana from  
21 the OCBC. I also was provided with the OCBC membership card which had previously been  
22 issued to Special Agent Nehring.

23 6. At approximately 2:55 p.m., I approached the entrance of 1755 Broadway Avenue,  
24 entered into a small lobby area, and flashed the OCBC membership card previously issued to  
25 Special Agent Nehring to an unidentified adult male dressed in a security guard uniform. The  
26 guard allowed me to enter, and did not ask me to provide any further identification.

27

28 Declaration of Special Agent Bill Nyfeler

1           7. Upon entering the elevator, I observed a sign stating that the OCBC had moved to the  
2 third floor of the building, and rode the elevator to the third floor. Upon arriving at the third  
3 floor, I walked to a desk where an unidentified adult male ("UM1") asked me to produce my  
4 membership card. I showed UM1 the OCBC membership card previously issued to Special  
5 Agent Nehring, and was allowed to enter the OCBC. I was not asked to provide any other form  
6 of identification.

7           8. I then proceeded to walk through the OCBC. While doing so, I observed  
8 approximately fifty marijuana plants in various stages of growth, from small clones to large  
9 flowering adult plants. Some of the plants were labeled "Educational Grow." I also observed  
10 three customers standing in line at the sales counter purchasing marijuana. Two other customers  
11 were looking at the marijuana plants, and then walked to the sales counter to purchase marijuana.

12           9. I then approached a sales counter, which contained several plastic bags containing  
13 green leafy material at different prices. An unidentified adult male ("UM2") behind the counter  
14 asked me if he could help me. I responded that I wished to purchase one-eighth ounce of  
15 Mexican-grown marijuana.

16           10. UM2 then handed me a clear plastic bag containing a green, leafy substance, and I  
17 handed him \$7 in return.

18           11. At approximately 3:00 p.m., I exited the OCBC, and subsequently met with a fellow  
19 Special Agent at a designated rendezvous location, whereupon I turned over the bag of suspected  
20 marijuana to this agent for evidentiary purposes.

21           12. The bag of suspected marijuana which I purchased from the OCBC on June 23, 1997,  
22 was subsequently marked as Exhibit 11, and transferred to the DEA Western Regional  
23 Laboratory for analysis.

24           13. In addition, the audio and video equipment which I utilized during my undercover  
25 purchase of marijuana from the OCBC on June 23, 1997, successfully recorded this purchase.  
26  
27



1 The original tapes and recordings are currently maintained by a non-drug evidence custodian of  
2 the San Francisco Field Division of the DEA.

3 14. During this visit to the OCBC to make an undercover purchase of marijuana, I did  
4 not observe any other commercial activity ongoing at the OCBC except for the distribution of  
5 marijuana.

6 15. On September 10, 1997, I made an undercover purchase of one-eighth ounce of  
7 "AA" Mexican-grown marijuana for \$15 from the OCBC, using the OCBC membership card that  
8 had been previously been issued to Special Agent Nehring. The circumstances of this purchase  
9 are as follows:

10 16. On September 10, 1997, I was provided with Official Authorized Funds and the  
11 OCBC membership card previously issued to S/A Nehring, in anticipation of making an  
12 undercover purchase of marijuana from the OCBC.

13 17. At approximately 11:10 a.m., I approached the building at 1755 Broadway Avenue  
14 and entered into a small lobby area, where an unidentified adult male who was dressed as a  
15 security guard and seated behind a desk was playing what appeared to be a "Game Boy"  
16 handheld device. Although I had taken the OCBC membership card previously issued to Special  
17 Agent Nehring out of my pocket, I passed the security guard without showing him this card or  
18 any identification, and walked to the elevator, where a second unidentified adult male ("UM1")  
19 was also waiting for the elevator. UM1 stated that he also was going to the OCBC and, upon  
20 noticing the membership card in my hand, mentioned that I could get a new, plastic membership  
21 card with my picture on it for only \$10. I thanked UM1 for the information. At this time, the  
22 security guard put down his "Game Boy," and asked me to show him my membership card. I  
23 flashed the OCBC membership card previously issued to Special Agent Nehring, and was  
24 allowed to enter the elevator.

25 18. Upon arriving at the third floor, I approached the front desk, showed the OCBC  
26 membership card previously issued to Special Agent Nehring, and inquired about obtaining a  
27

1 new membership card. An unidentified adult male ("UM2") seated behind the desk told me that I  
2 would have to fill out an information card. The form, when blank, asked for the customer's  
3 name, address, phone number, physician's name, illness, whether the customer had ever used  
4 marijuana before, and how the customer had used marijuana before (smoked, eaten, etc.). I  
5 completed the form using Special Agent Nehring's undercover identity. UM2 then took two  
6 pictures of me, and informed me that my new membership card would be ready in approximately  
7 30 days. UM2 also gave me a temporary membership card, and informed me that I could use the  
8 temporary card until I had received the new membership card.

9 19. UM2 then asked me if I had been to the OCBC since it had moved from the fifth  
10 floor to the third floor. I responded that I had not, and UM2 gave me a brief tour of the OCBC.  
11 When we reached the marijuana sales area, which UM2 called the "Budbar," UM2 informed me  
12 that smoking and rolling marijuana cigarettes was only allowed in the "Budbar," and that when  
13 anyone left the "Budbar," all marijuana must be kept hidden in a pocket or paper bag. During  
14 this tour, I observed approximately 10 growing marijuana plants in the hallway, under a sign  
15 which read "Educational Grow."

16 20. I then approached the sales counter, where there were approximately 8-10 other  
17 customers standing in line waiting to purchase marijuana. While waiting, I observed a sign on  
18 the sales counter stating that the OCBC accepted Visa, Mastercard, and ATM cards. When I  
19 reached the front of the line, I asked an unidentified adult female ("UF1") behind the sales  
20 counter for one-eighth ounce of "AA" Mexican-grown marijuana. UF1 handed me several bags  
21 containing a green, leafy substance, and informed me that, "it's really good, I've just smoked  
22 some myself."

23 21. I then chose one of the bags, and handed \$15 to UF1.

24 22. At approximately 11:25 a.m., I exited the OCBC, and subsequently met with two  
25 fellow Special Agents at a designated rendezvous location, whereupon I turned over the bag of  
26 suspected marijuana to these agents for evidentiary purposes.

1           23. The bag of suspected marijuana which I purchased from the OCBC on September 10,  
2 1997, was subsequently marked as Exhibit 37, and transferred to the DEA Western Regional  
3 Laboratory for analysis.

4           24. During this visit to the OCBC to make an undercover purchase of marijuana, I did  
5 not observe any other commercial activity ongoing at the OCBC except for the distribution of  
6 marijuana.

7           25. On November 14, 1997, I made an undercover purchase of one-eighth ounce of  
8 marijuana with the brand name of "House Special" for \$45 from the OCBC, using the temporary  
9 OCBC membership card issued to me on September 10, 1997 in the name of Special Agent  
10 Nehring's undercover identity. The circumstances of this purchase are as follows:

11           26. On November 14, 1997, I was provided with Official Authorized Funds and the  
12 OCBC temporary membership card previously issued to me on September 10, 1997 in the name  
13 of Special Agent Nehring's undercover identity, in anticipation of making an undercover  
14 purchase of marijuana from the OCBC. I had obtained this temporary membership card from the  
15 OCBC during my previous visit to the club on September 10, 1997. On that date, I had entered  
16 the OCBC using the membership card previously originally issued to Special Agent Nehring on  
17 May 19, 1997. I never was asked to prove that I was the person named on this membership card  
18 during this visit, and was issued the temporary membership card in the name of Special Agent  
19 Nehring's undercover identity, until a permanent card with my picture was ready.

20           27. At approximately 2:55 p.m., I entered the front door of the building located at 1755  
21 Broadway Avenue, and showed the OCBC temporary membership card to an unidentified adult  
22 male dressed as a security guard, and proceeded to take the elevator to the third floor. Upon  
23 arriving at the third floor, I approached the desk and produced the temporary OCBC membership  
24 card, explaining that I was there to pick up my picture membership card. The clerk informed me  
25 that the picture membership card was ready, and that the cost was \$10.

1           28. I handed the clerk \$10 in Official Authorized Funds, and the clerk handed me a white  
2 plastic identification card. The front of the card contains the OCBC logo and symbol on the left  
3 side, under which is the name of Special Agent Nehring's undercover identity, and the phony  
4 address, phone number, and other identifying information of this individual. The "issue date"  
5 was listed as 9/30/97. The right side of the card contained a picture of myself, and my signature  
6 in the name of Special Agent Nehring's undercover identity. The back of the card contained a  
7 "Certificate of Membership" and OCBC description, with a bar code strip, and listed Jeffrey W.  
8 Jones and Matthew J. Quirk as the Co-Founders of the OCBC.

9           29. After I received the picture membership card, I proceeded to the "Budbar" area of the  
10 OCBC, and showed the new membership card to the guard sitting near the door. I then  
11 approached the sales counter, and observed several clear plastic baggies which contained a green,  
12 leafy material. The sales counter also contained several small bottles marked "Small Hash Oil —  
13 \$30," and "Large Hash Oil — \$60." I also observed a small black square substance that was  
14 labeled "Afghani Hash, 20 grams — \$400." I further observed that the hydroponic marijuana  
15 grow display still contained several live marijuana plants.

16           30. An unidentified adult male ("UM1") approached me from behind the sales counter  
17 and asked me how he could help me. I asked for one-eighth ounce of the "House Special." UM1  
18 stated that this would cost \$45. I handed UM1 \$45, and UM1 gave S/A Nyfeler a clear plastic  
19 baggie containing approximately one-eighth ounce of a green, leafy substance. I thanked UM1  
20 and departed the "Budbar."

21           31. At approximately 3:05 p.m., I exited the OCBC, and subsequently met with a fellow  
22 Special Agent at a designated rendezvous location, whereupon I turned over the bag of suspected  
23 marijuana to these agents for evidentiary purposes.

24           32. The bag of suspected marijuana which I purchased from the OCBC on November 14,  
25 1997, was subsequently marked as Exhibit 55, and transferred to the DEA Western Regional  
26 Laboratory for analysis.





1 FRANK W. HUNGER  
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3 GARY G. GRINDLER  
Deputy Assistant Attorney General  
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**FILED**

JAN 9 1998

*rwf*

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NORTHERN DISTRICT OF CALIFORNIA

9 Attorneys for Plaintiff

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

13 UNITED STATES OF AMERICA, )  
14 Plaintiff, )  
15 v. )  
16 OAKLAND CANNABIS BUYERS' )  
17 COOPERATIVE, and JEFFREY JONES, )  
18 Defendants. )

Case No. C 98-0088-CAL

DECLARATION OF  
SPECIAL AGENT BRIAN NEHRING

19  
20 I, BRIAN NEHRING, do hereby declare and say as follows:

21 1. I am a Special Agent with the San Francisco Field Division of the Drug Enforcement  
22 Administration ("DEA"), United States Department of Justice, and have been so employed since  
23 September 1991.

24 2. I have received training from the DEA and Federal Bureau of Investigation in  
25 specialized narcotic investigative matters including, but not limited to, the following: drug  
26 interdiction and detection, money laundering techniques and schemes, drug identification, and  
27

28 Declaration of Special Agent Brian Nehring

1 asset identification and forfeiture. This training included specialized training in the preparation  
2 of narcotic and document search warrants for residences and businesses.

3 3. I have participated in numerous investigations specifically involving both the indoor  
4 and outdoor manufacture or cultivation of marijuana. In the course of these investigations, I  
5 have personally participated in the eradication of over 1,000 indoor and 10 outdoor marijuana  
6 plants, and the arrest of more than 100 individuals for violations of federal and state law  
7 regarding controlled substances. I also have received specialized training regarding the  
8 techniques used to grow marijuana. Based on my experience and training, I am familiar with the  
9 smell and appearance of growing and processed marijuana, as well as the smell of marijuana  
10 when it is burning. I also have participated in the obtaining and/or execution of over 100 federal  
11 and California state warrants to search a particular place or premises for controlled substances  
12 and/or related paraphernalia, indicia, and other evidence of the commission of state and/or  
13 federal felony violations of law.

14 4. On May 19, 1997, I made an undercover purchase of one-eighth ounce of marijuana  
15 with the brand name of "Northern Lights" for \$40 from the Oakland Cannabis Buyer's  
16 Cooperative ("OCBC"), a marijuana distribution business located at 1755 Broadway Avenue, in  
17 Oakland, California. I made this undercover purchase using an undercover name, identification,  
18 and a phony physician statement. The circumstances of this undercover purchase are as follows:

19 5. On May 19, 1997, I was provided with Official Authorized Funds and a phony  
20 physician statement, in anticipation of making an undercover purchase of marijuana from the  
21 OCBC. The phony physician statement used my undercover identity as the patient's name, and  
22 stated that this person suffered from "Post-Traumatic Stress Disorder." The marijuana  
23 distribution center designated was the "Oakland CBC." The doctor listed on the statement also  
24 was a phony identity. A telephone number for the doctor listed on the statement was for an  
25 undercover telephone line to the DEA San Francisco.



1           6. At approximately 1:55 p.m., I approached the entrance of the OCBC and entered into a  
2 small lobby area which led to an elevator and staircase, where a unidentified adult male dressed  
3 as a uniformed security guard was seated behind a desk. The guard informed me that he would  
4 have to see my identification and physician statement, which I produced. The guard then  
5 directed me to the third floor of the building and told me to take the staircase, being that the  
6 elevator did not work. I walked up the staircase to the third floor of 1755 Broadway Avenue,  
7 along with three other apparent OCBC customers.

8           7. Upon reaching the third floor, I was met by an unidentified adult male ("UM1") who  
9 gave me a form to fill out and took my physician statement to another room at the rear of the  
10 floor. The form I was handed, when blank, asked for the customer's name, address, phone  
11 number, physician's name, illness, what illnesses or conditions the customer had suffered from,  
12 what medications the customer was taking, whether the customer had ever used marijuana  
13 before, and how the customer had used marijuana before (smoked, eaten, etc.). I completed the  
14 form using my undercover identity, and listed "Post Traumatic Stress Disorder" as my ailment.

15           8. While completing this form, I observed two small children, approximately 2-4 years of  
16 age, in the company of an adult who appeared to be working for the OCBC.

17           9. UM1 then led me down a hallway to a room where I was interviewed by another adult  
18 male who introduced himself as "Jim." "Jim" told me that, although the OCBC had not been  
19 able to contact "Dr. Eastwood," my forms appeared acceptable. "Jim" then gave me an OCBC  
20 membership card. The front of the card contains the OCBC symbol on the left, the OCBC's  
21 name on the right, and blank listings for the customer's membership number and name. The  
22 customer's name was filled in with my undercover identity. The back of the card lists the  
23 OCBC's hours as 11:00 a.m. to 7:00 p.m. on Monday and Friday, and 11:00 a.m. to 1:00 p.m.,  
24 and 5:00 p.m. to 7:00 p.m., from Tuesday through Thursday, and contains blank listings for the  
25 customer's name, address, and phone number. My undercover identity was again listed on the  
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1 back of the card, along with an undercover address and telephone number. The membership card  
2 did not contain picture identification.

3 10. "Jim" then led me down a hallway to a room which "Jim" referred to as the "bar  
4 room." In this room, I observed two individuals standing behind a large glass display case  
5 containing numerous samples of marijuana. I also observed an adult male smoking marijuana  
6 while sitting in a chair on the opposite side of the room. The smell of burning marijuana was  
7 readily apparent. This individual was sitting next to a display case which contained two large  
8 growing marijuana plants under lights, and I also observed several large marijuana plants  
9 growing in a Mylar-lined display case at the opposite corner of the room.

10 11. "Jim" informed me that I would be able to purchase one-quarter ounce of marijuana  
11 per visit, and then introduced me to an unidentified adult male ("UM2") who was in charge of  
12 distributing the marijuana. UM2 informed me that the OCBC currently had seven kinds of  
13 marijuana for sale, all displayed, which he claimed ranged in price from between \$28 to \$85 per  
14 one-eighth ounce. UM2 also said that the OCBC was sold out of the Mexican-grown marijuana,  
15 which ordinarily sold for \$28 per one-eighth ounce.

16 12. I then purchased one-eighth ounce of what the OCBC identified as marijuana with  
17 the "brand name" of "Northern Lights" for \$40.

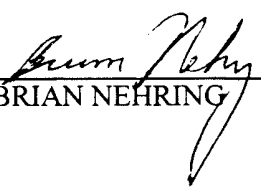
18 13. At approximately 2:25 p.m., I exited the OCBC, and subsequently met with two  
19 fellow Special Agents at a designated rendezvous location, whereupon I turned over the bag of  
20 suspected marijuana to these agents for evidentiary purposes.

21 14. The bag of suspected marijuana which I purchased from the OCBC on May 19, 1997,  
22 was subsequently marked as Exhibit 11, and transferred to the DEA Western Regional  
23 Laboratory for analysis.

24 15. During this visit to the OCBC to establish membership, I did not observe any other  
25 commercial activity ongoing at the OCBC except for the distribution of marijuana.  
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I declare under penalty of perjury that the foregoing is true and correct.

  
BRIAN NEHRING

Executed this 5<sup>th</sup> day of January 1998



1 FRANK W. HUNGER  
 Assistant Attorney General  
 2 MICHAEL J. YAMAGUCHI  
 United States Attorney  
 3 GARY G. GRINDLER  
 Deputy Assistant Attorney General  
 4 DAVID J. ANDERSON  
 ARTHUR R. GOLDBERG  
 5 MARK T. QUINLIVAN  
 JEFFREY S. MARKOWITZ  
 6 U.S. Department of Justice  
 Civil Division; Room 1048  
 7 901 E Street, N.W.  
 Washington, D.C. 20530  
 8 Telephone: (202) 514-3346

**FILED**

JAN 9 1998

**RICHARD W. WIEKING**  
 CLERK, U.S. DISTRICT COURT,  
 NORTHERN DISTRICT OF CALIFORNIA

9 Attorneys for Plaintiff

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

13 UNITED STATES OF AMERICA, )

14 Plaintiff, )

15 v. )

16 OAKLAND CANNABIS BUYERS' )  
 17 COOPERATIVE, and JEFFREY JONES, )

18 Defendants. )

Case No. C 98-0088-CAL

DECLARATION OF  
 SPECIAL AGENT CAROLYN PORRAS

20 I, CAROLYN PORRAS, do hereby declare and say as follows:

21 1. I am a Special Agent with the San Francisco Field Division of the Drug Enforcement  
 22 Administration ("DEA"), United States Department of Justice, and have been so employed since  
 23 August 1996.

24 2. I have received training from the DEA and Federal Bureau of Investigation in  
 25 specialized narcotic investigative matters including, but not limited to, the following: drug  
 26 interdiction and detection, money laundering techniques and schemes, drug identification, and  
 27

1 | asset identification and forfeiture. This training included specialized training in the preparation  
2 | of narcotic and document search warrants for residences and businesses.

3 |         3. I have participated in numerous investigations specifically involving both the indoor  
4 | and outdoor manufacture or cultivation of marijuana. In the course of these investigations, I  
5 | have personally examined approximately 15 indoor and outdoor marijuana plants. I also have  
6 | participated in the arrest of more than 30 individuals for violations of federal and state law  
7 | regarding controlled substances. I also have received specialized training regarding the  
8 | techniques used to grow marijuana. Based on my experience and training, I am familiar with the  
9 | smell and appearance of growing and processed marijuana, as well as the smell of marijuana  
10 | when it is burning. I also have participated in the obtaining and/or execution of five federal and  
11 | California state warrants to search a particular place or premises for controlled substances and/or  
12 | related paraphernalia, indicia, and other evidence of the commission of state and/or federal  
13 | felony violations of law.

14 |         4. On August 8, 1997, I made an undercover purchase of one-eighth ounce of marijuana  
15 | for \$25 from the Oakland Cannabis Buyers' Cooperative ("OCBC"), a marijuana distribution  
16 | business located in a building at 1755 Broadway Avenue, in Oakland, California. I made this  
17 | undercover purchase using the OCBC membership card that had been previously been issued to  
18 | Special Agent Brian Nehring. The circumstances of this purchase are as follows:

19 |         5. On August 8, 1997, I was provided with Official Authorized Funds and the OCBC  
20 | membership card previously issued to Special Agent Nehring, in anticipation of making an  
21 | undercover purchase of marijuana from OCBC.

22 |         6. At approximately 2:57 p.m., I approached the building at 1755 Broadway Avenue, and  
23 | walked into the building and entered into a lobby area, where an unidentified adult male dressed  
24 | as a security guard inquired where I was going. In response, I flashed the membership card  
25 | previously issued to Special Agent Nehring, and continued to walk toward the elevator. As I hit  
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1 the elevator button, I noticed a sign advising that the OCBC had moved from the fifth floor to the  
2 third floor.

3 7. Upon arriving at the third floor, I approached a room containing a desk, file cabinets,  
4 sofas, and a door leading to entrances to other rooms. I then was approached by an unidentified  
5 adult female ("UF1"), who asked me if I was there to make a purchase. I responded that I was.  
6 UF1 then asked me for my membership card, and I gave her the OCBC membership card  
7 previously issued to Special Agent Nehring. UF1 then yelled out the membership number to an  
8 unidentified adult male ("UM1") seated in the same room. A few seconds later, UM1 informed  
9 UF1 that the membership number which she had called out was closed.

10 8. I asked UF1 why the membership number was closed. UF1 stated that a possibility  
11 could be that the file doesn't have a physician letter but that she (UF1) would check. I then  
12 observed UF1 hand over the membership card to a second unidentified adult male ("UM2"), who  
13 walked over to a room where there were at least two computers inside. A few seconds later,  
14 UM2, after appearing to work on one computer for a moment, returned and instructed UF1 to  
15 reopen the file.

16 9. UF1 then asked S/A Porras whether the person named on the membership card  
17 (Special Agent Nehring's undercover identity) had called to notify the OCBC that a third party  
18 would be making a purchase for him. I responded that I thought that this person had called, but  
19 that this person was very sick, and thus I could not be sure whether he in fact had called. UF1  
20 explained to me that, as an alternative, I needed to have a letter from this person authorizing me  
21 to make purchases for him. I responded that I would do that the next time, but asked to be  
22 allowed to make a purchase on that day. UF1 stated that I would be allowed to make a purchase  
23 for that day only.

24 10. I then was instructed to go out into another room at the end of the hallway. When I  
25 asked for directions, I was told to "follow my nose." I proceeded to walk down and enter a large  
26 room at the end of the hallway, where the smell of burning marijuana was readily apparent. In  
27

1 this room, I observed at least fifteen marijuana plants being grown, with lights, fans, and timer  
2 clocks pointed directly at the plants.

3 11. I then proceeded to walk towards the glass sales counter which contained several  
4 clear plastic baggies containing green, leafy material. Approximately 4-5 other customers were  
5 standing in line in front of me. When I reached the front of the line, a second unidentified adult  
6 female ("UF2") asked me what I wanted to purchase. I pointed to a clear plastic baggie labeled  
7 "Mexican AA - Grade A," for \$25 for one-eighth ounce.

8 12. I then purchased one-eighth ounce of the OCBC identified as Mexican-grown  
9 marijuana for \$25.

10 13. As I turned to leave the OCBC, I observed approximately 5-10 individuals standing  
11 in line behind me, apparently to purchase marijuana from the OCBC.

12 14. At approximately 3:10 p.m., I exited the OCBC, and subsequently met with two  
13 fellow Special Agents at a designated rendezvous location, whereupon I turned over the bag of  
14 suspected marijuana to these agents for evidentiary purposes.

15 15. The bag of suspected marijuana which I purchased from the OCBC on August 5,  
16 1997, was subsequently marked as Exhibit 33, and was transferred to the DEA Western Regional  
17 Laboratory for analysis.

18 16. During this visit to the OCBC to make an undercover purchase of marijuana, I did  
19 not observe any other commercial activity ongoing at the OCBC except for the distribution of  
20 marijuana.

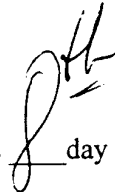
21 17. On October 22, 1997, I received a message on the DEA undercover line from a  
22 "Nurse Laura Lee," who wanted to confirm that the "doctor" had signed the physician statement  
23 used by Special Agent Deborah Muusers, acting in an undercover capacity, to make an  
24 undercover purchase of marijuana from the OCBC. Thereafter, at approximately 3:40 p.m.,  
25 acting in an undercover capacity, I answered a call made to the same undercover telephone line.  
26 An individual who identified himself as "Shawn," and who claimed to be calling from the  
27



1 OCBC, inquired whether the address listed on the phony physician statement used by Special  
2 Agent Muusers had a suite number or floor, or whether the address was a house. I told "Shawn"  
3 that the address was the first floor. "Shawn" then stated that the OCBC wanted to send a  
4 representative to the office to meet with the doctor. I responded that I was walking out the door.  
5 "Shawn" inquired what time the doctor would be in the following day, to which I responded that  
6 the doctor would be in after 10:00 a.m.

7 19. Later on October 22, 1997, at approximately 4:25 p.m., acting in an undercover  
8 capacity, I called "Shawn" at 510-832-5346, and informed him that I was a new doctor to the Bay  
9 Area and didn't want involvement with the OCBC if persons from the club were planning on  
10 visiting me. I further informed "Shawn" that I was requesting that the OCBC cancel this  
11 patient's membership. "Shawn" responded, "We already did."

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

13  
14  
15  
16 Executed this  day of January 1998

  
CAROLYN PORRAS



1 FRANK W. HUNGER  
 Assistant Attorney General  
 2 MICHAEL J. YAMAGUCHI  
 United States Attorney  
 3 GARY G. GRINDLER  
 Deputy Assistant Attorney General  
 4 DAVID J. ANDERSON  
 ARTHUR R. GOLDBERG  
 5 MARK T. QUINLIVAN  
 JEFFREY S. MARKOWITZ  
 6 U.S. Department of Justice  
 Civil Division; Room 1048  
 7 901 E Street, N.W.  
 Washington, D.C. 20530  
 8 Telephone: (202) 514-3346

**FILED** *mf*  
 JAN 9 1998

**RICHARD W. WIEKING**  
 CLERK, U.S. DISTRICT COURT,  
 NORTHERN DISTRICT OF CALIFORNIA

9 Attorneys for Plaintiff

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

13 UNITED STATES OF AMERICA, )  
 )  
 14 Plaintiff, )  
 )  
 15 v. )  
 )  
 16 OAKLAND CANNABIS BUYERS' )  
 17 COOPERATIVE, and JEFFREY JONES, )  
 )  
 18 Defendants. )  
 19

Case No. C 98-0088-CAL

DECLARATION OF  
 SPECIAL AGENT DEBORAH MUUSERS

20 I, DEBORAH MUUSERS, do hereby declare and say as follows:

21 1. I am a Special Agent with the San Francisco Field Division of the Drug Enforcement  
 22 Administration ("DEA"), United States Department of Justice, and have been so employed since  
 23 July 1991.

24 2. I have received training from the DEA in specialized narcotic investigative matters  
 25 including, but not limited to, the following: drug interdiction and detection, money laundering  
 26 techniques and schemes, drug identification, and asset identification and forfeiture. This training  
 27

1 included specialized training in the preparation of narcotic and document search warrants for  
2 residences and businesses.

3 3. I have participated in numerous investigations specifically involving both the indoor  
4 and outdoor manufacture or cultivation of marijuana. In the course of these investigations, I  
5 have personally examined approximately 250 indoor and outdoor marijuana plants. I also have  
6 participated in the arrest of more than 100 individuals for violations of federal and state law  
7 regarding controlled substances. I also have received specialized training regarding the  
8 techniques used to grow marijuana. Based on my experience and training, I am familiar with the  
9 smell and appearance of growing and processed marijuana, as well as the smell of marijuana  
10 when it is burning. I also have participated in the obtaining and/or execution of more than 100  
11 federal and California state warrants to search a particular place or premises for controlled  
12 substances and/or related paraphernalia, indicia, and other evidence of the commission of state  
13 and/or federal felony violations of law.

14 4. On October 22, 1997, I made an undercover purchase of one-eighth ounce of  
15 marijuana with the brand name of "That's Purdy" for \$60 from the Oakland Cannabis Buyers'  
16 Cooperative ("OCBC"), a marijuana distribution business located at 1755 Broadway Avenue, in  
17 Oakland, California. I made this undercover purchase using an undercover name, identification,  
18 and a phony physician statement. The circumstances of this purchase are as follows:

19 5. On October 24, 1997, I was provided with Official Authorized Funds and a phony  
20 physician statement, in anticipation of making an undercover purchase of marijuana from the  
21 Marin Alliance. The phony physician statement used my undercover identity as the patient's  
22 name, and stated that this person suffered from "Menstrual Cramps." The marijuana distribution  
23 center designated was the "Oakland C.B.C." The doctor listed on the statement also was a phony  
24 identity. A telephone number for the doctor listed on the statement was for an undercover  
25 telephone line to the DEA San Francisco. I also was provided with a concealed video and audio  
26 recording device with microphone.

1 9. "Shawn" then informed me that, during my next visit to the OCBC, a photo would be  
2 taken in-house, after the club's camera had been set up, and a undetermined fee would be  
3 charged. "Shawn" then directed me to the "bar," which was back along the corridor. During this  
4 period, I observed three other individuals enter the reception area to speak with "Shawn."

5 10. I then walked down the corridor and came upon a second adult male dressed in a  
6 guard's uniform, stationed at a desk at the entrance to the "bar." I showed the guard my  
7 temporary membership card and was allowed into the "bar." The "bar" area consisted of a large  
8 room with several couches in a sitting area, and several glass counters with various items  
9 enclosed within. Inside one of the glass cases were approximately 20-25 6"-8" inch marijuana  
10 plants growing inside. Against one wall of the "bar" area was a cubicle with grow lights and  
11 approximately 5-6 larger plants, approximately 3'-3 ½' tall. One glass counter contained various  
12 food items that purported to contain marijuana, including brownies and rice krispie treats.  
13 Another glass counter contained drug paraphernalia, including pipes. A third glass counter  
14 contained samples of what was purported to be marijuana, ranging in quantity from 1 gram to  
15 one-eighth ounce. For the one-eighth ounce quantity, the prices ranged from \$15 to \$60. I  
16 observed approximately 3-4 individuals sitting on the couches, and there were approximately 5-6  
17 other customers waiting in line to purchase marijuana. The smell of burning marijuana was  
18 readily apparent.

19 11. When I reached the front of the line, I spoke to an unidentified adult male ("UM1")  
20 behind the counter, and asked to purchase one-eighth ounce of marijuana with the "brand name"  
21 of "That's Purdy." UM1 proceeded to take two ziploc baggies, each containing what appeared to  
22 be marijuana, from a container, and placed the baggies on the counter. I chose one of the  
23 baggies, and gave UM1 \$60 in return. UM1 placed the \$60 in a cash register.

24 12. At approximately 11:30 a.m., I exited the OCBC, and subsequently met with two  
25 fellow Special Agents at a designated rendezvous location, whereupon I turned over the bag of  
26 suspected marijuana to these agents for evidentiary purposes.

1 13. The bag of suspected marijuana which I purchased from the OCBC on October 22,  
2 1997, was subsequently marked as Exhibit 41, and was transferred to the DEA Western Regional  
3 Laboratory for analysis.

4 15. In addition, the audio and video equipment which I utilized during my undercover  
5 purchase of marijuana from the OCBC on October 22, 1997, successfully recorded this purchase.  
6 The original tapes and recordings are currently maintained by a non-drug evidence custodian of  
7 the San Francisco Field Division of the DEA.

8 16. During this visit to the OCBC to establish membership, I did not observe any other  
9 commercial activity ongoing at the OCBC except for the distribution of marijuana.

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

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DEBORAH MUUSERS

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Executed this 9<sup>th</sup> day of January 1998

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1 FRANK W. HUNGER  
 Assistant Attorney General  
 2 MICHAEL J. YAMAGUCHI  
 United States Attorney  
 3 GARY G. GRINDLER  
 Deputy Assistant Attorney General  
 4 DAVID J. ANDERSON  
 ARTHUR R. GOLDBERG  
 5 MARK T. QUINLIVAN  
 JEFFREY S. MARKOWITZ  
 6 U.S. Department of Justice  
 Civil Division; Room 1048  
 7 901 E Street, N.W.  
 Washington, D.C. 20530  
 8 Telephone: (202) 514-3346

**FILED**

JAN 9 1998

**RICHARD W. WIEKING**  
 CLERK, U.S. DISTRICT COURT,  
 NORTHERN DISTRICT OF CALIFORNIA

9 Attorneys for Plaintiff

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

13 UNITED STATES OF AMERICA, )  
 14 Plaintiff, )  
 15 v. )  
 16 OAKLAND CANNABIS BUYERS' )  
 17 COOPERATIVE, and JEFFREY JONES, )  
 18 Defendants. )

Case No. C 98-0088-CAL

DECLARATION OF  
PHYLLIS E. QUINN

19  
20 I, PHYLLIS E. QUINN, do hereby declare and say as follows:

21 1. I am a Senior Forensic Chemist with the Western Laboratory of the Drug Enforcement  
 22 Administration ("DEA"), United States Department of Justice, and have been so employed since  
 23 November 1983.

24 2. My principal duty with the DEA Western Laboratory is the analysis of controlled  
 25 substances. Prior to my current position, I served as a Forensic Chemist with the NIS Regional  
 26 Laboratory in Pearl Harbor, Hawaii, from September 1981 to November 1983, and as a Forensic  
 27

28 Declaration of Phyllis E. Quinn



1 Chemist with the Bureau of Forensic Sciences in Richmond, Virginia, from October 1978 to  
2 August 1981. My principal duty in both positions was the analysis of controlled substances.

3 3. I received a Bachelor of Science in Chemistry from Mary Washington College, in  
4 Fredericksburg, Virginia, in 1977, and a Master of Science in Forensic Chemistry from the  
5 University of Pittsburgh, in Pittsburgh, Pennsylvania, in 1978. Since 1979, I have taken  
6 numerous additional courses and seminars on various issues involving forensic chemistry,  
7 including several specifically related to the analysis of controlled substances. Among others,  
8 these courses and seminars were sponsored by the DEA; American Chemical Society; McCrone  
9 Institute; Bowdoin College; and United States Environmental Protection Agency. I also have  
10 published articles related to the analysis of methamphetamine and phencyclidine ("PCP") in  
11 *Microgram* and the *Journal of Analytical Toxicology*. I am a member of the Mid-Atlantic  
12 Association of Forensic Scientists and the Clandestine Laboratory Investigative Chemists  
13 Association.

14 4. On May 22, 1997, I conducted an analysis of 3.2 grams of a green, leafy substance  
15 contained in two clear plastic bags which had been marked as Exhibit 11. My analysis of the  
16 substances contained in the bags marked as Exhibit 11 identified the presence of marijuana.

17 5. On July 3, 1997, I conducted an analysis of 3.4 grams of a green, leafy substance  
18 contained in a clear plastic bag which had been marked as Exhibit 23. My analysis of the  
19 substance contained in the bag marked as Exhibit 23 identified the presence of marijuana.

20 6. On August 13, 1997, I conducted an analysis of 3.4 grams of a green, leafy substance  
21 contained in a clear plastic bag which had been marked as Exhibit 33. My analysis of the  
22 substance contained in the bag marked as Exhibit 33 identified the presence of marijuana.

23 7. On September 15, 1997, I conducted an analysis of 3.4 grams of a green, leafy  
24 substance contained in a clear plastic bag which had been marked as Exhibit 37. My analysis of  
25 the substance contained in the bag marked as Exhibit 37 identified the presence of marijuana.


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8. On October 28, 1997, I conducted an analysis of 3.3 grams of a green, leafy substance contained inside a clear plastic bag which had been marked as Exhibit 41. My analysis of the substance contained in the bag marked as Exhibit 41 identified the presence of marijuana.

9. On November 21, 1997, I conducted an analysis of 3.3 grams of a green, leafy substance contained inside a clear plastic bag which was marked as Exhibit 55. My analysis of the substance contained in the bag marked as Exhibit 55 identified the presence of marijuana.

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

  
PHYLLIS E. QUINN

Executed this 23 day of December 1997



ORIGINAL

1 FRANK W. HUNGER  
Assistant Attorney General  
2 MICHAEL J. YAMAGUCHI  
United States Attorney  
3 GARY G. GRINDLER  
Deputy Assistant Attorney General  
4 DAVID J. ANDERSON  
ARTHUR R. GOLDBERG  
5 MARK T. QUINLIVAN  
JEFFREY S. MARKOWITZ  
6 U.S. Department of Justice  
Civil Division; Room 1048  
7 901 E Street, N.W.  
Washington, D.C. 20530  
8 Telephone: (202) 514-3346

**FILED**

JAN 9 1998

**RICHARD W. WIEKING**  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

9 Attorneys for Plaintiff

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

13 UNITED STATES OF AMERICA, )  
14 Plaintiff, )  
15 v. )  
16 OAKLAND CANNABIS BUYERS' )  
17 COOPERATIVE; and JEFFREY JONES, )  
18 Defendants. )

Case No. C 98-0088-CAL

DECLARATION OF  
SPECIAL AGENT MARK NELSON

19  
20 I, MARK NELSON, do hereby declare and say as follows:

21 1. I am a Special Agent with the San Francisco Field Division of the Drug Enforcement  
22 Administration ("DEA"), United States Department of Justice, and have been so employed since  
23 December 1985.

24 2. I have received training from the DEA and Federal Bureau of Investigation in  
25 specialized narcotic investigative matters including, but not limited to, the following: drug  
26 interdiction and detection, money laundering techniques and schemes, drug identification, and  
27

28 Declaration of Special Agent Mark Nelson

1 asset identification and forfeiture. This training included specialized training in the preparation  
2 of narcotic and document search warrants for residences and businesses.

3 3. I have participated in numerous investigations specifically involving both the indoor  
4 and outdoor manufacture or cultivation of marijuana. In the course of these investigations, I  
5 have personally participated in the eradication of over 12,000 indoor and 5,000 outdoor  
6 marijuana plants, and the arrest of more than 200 individuals for violations of federal and state  
7 law regarding controlled substances. I also have received specialized training regarding the  
8 techniques used to grow marijuana. Based on my experience and training, I am familiar with the  
9 smell and appearance of growing and processed marijuana, as well as the smell of marijuana  
10 when it is burning. I also have participated in the obtaining and/or execution of over 150 federal  
11 and California state warrants to search a particular place or premises for controlled substances  
12 and/or related paraphernalia, indicia, and other evidence of the commission of state and/or  
13 federal felony violations of law.

14 4. On May 20, 1997, acting in an undercover capacity, I telephoned the Oakland  
15 Cannabis Buyer's Cooperative ("OCBC") at 510-832-5346 and spoke to an individual whom I  
16 assumed was an employee of the OCBC. I informed this individual that I had been contacted by  
17 a patient of the doctor who had been listed on Special Agent Brian Nehring's phony physician  
18 statement, who told me that the OCBC may be calling to verify that he (Special Agent Nehring,  
19 acting in an undercover capacity) was a patient of the doctor. I told this individual that I was  
20 affirming that this individual (Special Agent Nehring, acting in an undercover capacity) was a  
21 patient of this doctor, and that this doctor had signed a physician statement to that effect.

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

23  
24   
25 MARK NELSON

26 Executed this 8<sup>th</sup> day of January 1998

27  
28 Declaration of Special Agent Mark Nelson



ORIGINAL

1 FRANK W. HUNGER  
Assistant Attorney General  
2 MICHAEL J. YAMAGUCHI  
United States Attorney  
3 GARY G. GRINDLER  
Deputy Assistant Attorney General  
4 DAVID J. ANDERSON  
ARTHUR R. GOLDBERG  
5 MARK T. QUINLIVAN  
JEFFREY S. MARKOWITZ  
6 U.S. Department of Justice  
Civil Division; Room 1048  
7 901 E Street, N.W.  
Washington, D.C. 20530  
8 Telephone: (202) 514-3346

**FILED**

JAN 9 1998



**RICHARD W. WIEKING**  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

9 Attorneys for Plaintiff

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

13 UNITED STATES OF AMERICA, )

14 Plaintiff, )

15 v. )

16 OAKLAND CANNABIS BUYERS' )  
17 COOPERATIVE, and JEFFREY JONES, )

18 Defendants. )  
19

Case No. C98-0088 CAL

DECLARATION OF  
MARK T. QUINLIVAN

20 I, MARK T. QUINLIVAN, do hereby declare and say as follows:

21 1. I am currently employed as a Trial Attorney in the Federal Programs Branch, Civil  
22 Division, United States Department of Justice, and am counsel of record in the above-captioned  
23 case. I make this declaration based on personal knowledge, and on information made available  
24 to me in the course of my official duties.

25 2. Attached hereto as Exhibit 1 are true and correct copies of several pages printed from  
26 the World Wide Web site of the Oakland Cannabis Buyers' Cooperative ("OCBC"), at  
27

1 http://www.rxcbc.org. These pages were printed from the OCBC's Web site on December 23  
2 1997.

3 2. Attached hereto as Exhibit 2 is a true and correct copy of a brochure published by the  
4 OCBC, dated May 1997.

5 3. Attached hereto as Exhibit 3 is a true and correct copy of a newsletter published by the  
6 OCBC, dated August 1997.

7 I declare under penalty of perjury that the foregoing is true and correct.  
8  
9

10   
11 MARK T. QUINLIVAN

12 Executed this 9<sup>th</sup> day of January 1998  
13  
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# Oakland Cannabis Buyers' Cooperative

Mission Statement

Services/Calendar

Membership

Related Sites and Organizations

Medical Marijuana

E-mail

**Welcome to the OCBC.** We are a California Consumer Cooperative Corporation, organized by members, for medical-marijuana patients protected by Proposition 215. The Oakland CBC operates on a not-for-profit basis with the assistance of member volunteers. Currently we are providing medical cannabis and other services to over 1,300 members.

---

Oakland Cannabis Buyers' Cooperative  
P.O. Box 70401  
Oakland, CA 94612-0401  
Office (510) 832-5346  
Fax (510) 986-0534  
[ocbc@rxcbc.org](mailto:ocbc@rxcbc.org)



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### Please See it our Way

Please remember the Oakland Cannabis Buyers Cooperative is a **health organization**. Our services are for those who **suffer from serious illnesses and disabilities**. Any other inquires for cannabis will be neither tolerated nor appreciated.

**We do not send, mail or ship cannabis.**

This site provides information for patients who use cannabis with a doctor's recommendation. This site exists because the voters of California have said yes to providing cannabis for medical use. Please don't test the law by trying to establish illegal transactions via this site.

---

These pages look best . . . when viewed through our software on our computer. If they don't look so good on your system, you're probably not the only one. Please let us know about any problems - we're committed to making our site accessible, useful and fun.

Our immutable thanks to Chameleon Productions for this site's initial graphical elements and HTML.

*Last updated: Dec. 19, 1997*

This URL: <http://www.rxcbc.org/>

ER0063



# Oakland Cannabis Buyers' Cooperative

## Mission Statement

### **Mission Statement**

The goal of the Oakland Cannabis Buyers' Cooperative (OCBC) is to provide seriously ill patients with a safe and reliable source of medical cannabis. Our cooperative is open to all patients with a verifiable letter of diagnosis who use cannabis to alleviate or terminate the effects of their illnesses.

### **Services/Calendar**

Federal statutes currently prohibit the use of cannabis as medicine. However, scientific evidence, including anecdotal evidence, documents the relief that cannabis provides to many seriously ill patients. The cooperative is dedicated to reducing the harm these patients encounter due to the prohibition of cannabis. This includes alleviating the fear of arrest, as well as negating problems associated with purchasing cannabis on the illicit market.

### **Membership**

### **Related Sites and Organizations**

### **Medical Marijuana**

### **E-mail**

OCBC's headquarters is a multi-faceted facility, accessible to people with disabilities. We provide a professional atmosphere for patients to procure cannabis, with trained member advocates on hand to offer advice and assistance. We also offer self-help services such as support groups and massage therapy. In addition, OCBC provides information on a variety of topics, including AIDS prevention and treatment, safe sex, and cannabis reform in general. (See our [calendar](#).)

The Oakland CBC currently operates under the auspices of California Proposition 215 and Oakland City Council Resolution No. 72516. Resolution 72516, passed in March 1996, makes the enforcement of medicinal-cannabis laws the lowest priority for the city of Oakland. Furthermore, the city has appointed a working group to oversee OCBC functions and to determine the most effective means to protect and assist seriously ill patients.

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[Related Sites](#) | [Medical Marijuana](#) | [E-mail](#)  
[Home](#)

This URL: <http://www.rxcbc.org/mission.html>

ER0064



# Oakland Cannabis Buyers' Cooperative

## Services

### Mission Statement

### Services/Calendar

### Membership

### Related Sites and Organizations

### Medical Marijuana

### E-mail

☐ Visa, MasterCard, Discover and ATM cards are now accepted at the Bud Bar!



☐ **Bud Bar hours:** 11 am through 7 pm Mondays and Fridays, 11 am until 1 pm Tuesdays through Thursdays. Closed Saturdays, Sundays and holidays. We are located in downtown Oakland, California - members and others who need to know can call 832-5346 for our street address. (A BART station is within one block and the OCBC offices are completely accessible to people using wheelchairs. However, please remember that no smoking is allowed on the premises or in the immediate vicinity of the club.)

## Calendar

*Except as noted,  
events listed below  
take place at the cooperative.*

- ☐ **Bowling Team**, 4 pm Sunday, Dec. 21, at Mel's in Alameda.
- ☐ **Cultivation Meeting**, 5 pm Wednesday, Dec. 24.
- ☐ **Merry Christmas!** Closed on Thursday, Dec. 25.
- ☐ **"Fruit Friday,"** 11 am-7 pm Dec. 26. Relax and enjoy a fresh variety of delicious fruit.
- ☐ **Bowling Team**, 4 pm Sunday, Dec. 28, at Mel's in Alameda.
- ☐ **Happy New Year!** Closed Thursday, Jan. 1.
- ☐ **Members' Buffet**, 1-4 pm Saturday, Jan. 3.

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ER0065



# Oakland Cannabis Buyers' Cooperative

## Membership

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### Protocols

The Oakland Cannabis Buyers' Cooperative operates pursuant to and in accordance with the statewide mandate of Proposition 215 (Exhibit A) and Resolutions passed unanimously by the Oakland City Council (Exhibit B). Its operating procedures have been consolidated as these Protocols.

#### I. Admission and Membership Requirements

A person seeking membership of the Oakland CBC must at the threshold provide a note from a treating physician assenting to cannabis therapy for a medical condition listed on the Medicinal Cannabis User Initial Questionnaire (Exhibit C). Upon acceptance of the note by intake staff, the prospective member will undergo an extensive screening and such questioning as shall establish that the candidate meets the Medical Admissions Criteria (Exhibit D), including, without being limited to, the Cannabis Buyers' Cooperative Information Form (Exhibit E). If, upon the screening by staff members, the candidate does not appear to qualify, he or she will be denied membership with a statement of reasons for his or her being screened out. If the candidate appears to qualify for membership, intake staff will give the candidate the Authorization for Release of Patient Status form (Exhibit F) and the Physician Statement (Exhibit G), with a request that the candidate's treating physician sign it. When the form is returned, the intake staff will verify the physician's approval by telephone. Patients must also complete the Cannabis Patient Registry Program Survey (Exhibit H) gathering past medical data.

No person under the age of eighteen shall be admitted to membership without the written consent of parents, in addition to meeting all other requirements.

#### II. Responsibilities of Membership

All members must sign a Membership Agreement (Exhibit I), whereupon they will receive a Membership Card (Exhibit J). Members agree to conduct themselves discreetly, in accordance with the Statement of Safe Use of Cannabis (Exhibit K) and the Principles of Responsible Cannabis Use (Exhibit L).

#### III. Other Provisions

**A. Purpose.** The purpose of the Oakland CBC is to help provide medicine for people who need it. Accordingly, it shall be operated as a non-profit organization.

**B. Privacy of members.** The staff of the Cooperative shall take steps

to protect the privacy and identity of members. However, neither the Cooperative nor its staff shall be liable for any breach thereof

**C. Changes.** These Protocols, and all medical protocols, are subject to change without notice from time to time in the sole discretion of management.

**D. Cooperative operation.** a. No smoking of anything on premises. b. Members shall observe additional house rules as same maybe posted by management. c. Management may eject any person at any time.

## **Exhibits**

**A. Proposition 215**

**B. Oakland City Council Resolutions**

**C. Medicinal Cannabis User Initial Questionnaire**

**D. Medical Admissions Criteria**

**E. Information Form**

**F. Authorization for Release of Patient Status**

**G. Physician Statement**

**H. Cannabis Patient Registry Program Survey**

**I. Membership Agreement**

**J. Membership Card**

**K. Statement of Safe Use of Cannabis**

**L. Principles of Responsible Cannabis Use**

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# Oakland Cannabis Buyers' Cooperative

## Exhibit C

### Medical Cannabis User Initial Questionnaire

(c)1996 Tod Mikuriya Draft 9, 9-12

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Today's Date \_\_\_\_\_

#### Identifying Data

Last name \_\_\_\_\_, First name \_\_\_\_\_

Middle Initial \_\_\_\_\_

Address \_\_\_\_\_ City \_\_\_\_\_

State \_\_\_\_\_ Zip \_\_\_\_\_

Res Ph \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ Work Ph \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ ext \_\_\_\_\_

Fax \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

Birthdate (MMDDYY) \_\_\_\_\_ SS# \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

Sex M \_ F \_ Ethnic Wh \_ B \_ Hisp \_ Or \_ NatAm \_ Other \_\_\_\_\_

Education \_\_\_\_\_ Occupation(s) \_\_\_\_\_ Unemployed \_ Disabled \_\_\_\_\_

Marital Status: Single \_ Mar \_ Sep \_ Div \_ W \_

Living situation: \_ Alone \_ Couple \_ Group \_ Apartment \_ House \_ Institution \_

Homeless \_\_\_\_\_

Health Insurance: None \_ Medicaid \_ Medicare \_ Workers Compensation \_ Othe

health plan. (specify) \_\_\_\_\_ ID Number \_\_\_\_\_

GroupNumber \_\_\_\_\_

Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ x \_\_\_\_\_

Referred by: Self \_ Name \_\_\_\_\_

Institution \_\_\_\_\_

Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ x \_\_\_\_\_ Fax \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ Pager \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

Chief Complaint(s) circle and rank in importance:

example: AIDS related illness 1 anorexia 2

- |                        |                          |   |
|------------------------|--------------------------|---|
| Alcoholism             | Cough                    | Tic doloroux                                |
| Alcohol Abuse          | Anxiety                  | Tourette's syndrome                         |
| Sedative/Opiate Habit  | Panic attacks            | Glaucoma                                    |
| Cocaine or Speed Habit | Insomnia                 | Menstrual cramps                            |
| Nicotine Habit         | Mania                    | Labor pains                                 |
| AIDS related illness   | Depression               | Migraine                                    |
| Cancer & cancer Rx     | Lethargy                 | Meniereis Disease                           |
| Anorexia               | Weakness                 | Hypertension                                |
| Nausea                 | Chronic Fatigue Syndrome | Itching                                     |
| Vomiting               | Epilepsy                 | Hiccough                                    |
| Diarrhea               | Delirium Tremens         | Arthritis                                   |
| Irritable bowel        | Dementia                 | Carpal Tunnel Syndrome                      |
| Colitis                | Multiple Sclerosis       | Lupus, scleroderma Amyloidosis              |
| Cron's disease         | Huntington's Chorea      | Conjunctivitis                              |
| Gastritis              | Cerebral Palsy           | Other Pain (specify source) _____           |
| Pancreatitis           | Brain Trauma             | External Use _____                          |
| Hepatitis              | Spinal Cord Injury       | Drug Side Effect control (specify) _____    |
| Peptic Ulcer           | Muscle spasm             | Decrease Use of Other Drugs (specify) _____ |
| Antibiotic             | Parkinson's disease      | Substitute for Other Drugs (speci _____     |
| Asthma                 | Tremor                   | Other _____                                 |
| Sinusitis              | Periphial neuropathy     |   |

Chief Complaint \_\_\_\_\_ ICD9-CM Diagnoses \_\_\_\_\_

History of Present Illness: (date of onset, course) \_\_\_\_\_

Past Medical History: (Allergies & adverse drug reactions): \_\_\_\_\_

Family Medical History: \_\_\_\_\_

Social History: \_\_\_\_\_ Drug law arrests/convictions: None\_ Yes (specify) \_\_\_\_\_

Cannabis type preferred: Sinsemilla\_ Mexican\_ Hashish\_ No preference Other \_\_\_\_\_

Age or date Use Begun: \_\_\_\_\_ Marinol Æ(dronabinol) 2.5 mg\_ 5 mg\_ 10 result (+)\_ (0)\_ (-)\_

Route: Oral\_ Inhaled: Joint\_ Pipe\_ Water Pipe\_ Vaporizer\_ Other (specify): \_\_\_\_\_

Frequency: Monthly\_ Weekly\_ Semiweekly\_ Daily\_ Twice a day\_ 3 x a day\_ a day\_ more\_

Other drugs using - Rx and Over the Counter \_\_\_\_\_

Has your physician discussed your use of cannabis with you? Yes\_ No\_ Discuss any non prescribed psychoactive drugs?

(including alcohol and tobacco) Yes\_ No\_ Remarks \_\_\_\_\_

Completed by: \_\_\_\_\_





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# Oakland Cannabis Buyers' Cooperative

## Exhibit D

### Medical Admissions Criteria

Tod H. Mikuriya, M.D.  
Medical Coordinator

Because of the vacuum of clinical knowledge about the therapeutic applications of cannabis caused by marijuana prohibition a widespread condition of ignorance exists. While it is acknowledged that there exists a range of illnesses on the dimension of seriousness objectively, there is none to the person afflicted who is seeking relief. Exclusion because the condition does not appear on a list developed by a group of non-medical politicians or bureaucrats merely perpetuate this clinical ignorance. Therefore the medical criteria are to be inclusive limited only by contemporary classifications of illness.

#### Medical Criteria

Persons shall have a verified specific diagnosis by a licensed physician that is included within the latest revision of the International Classification of Diseases ICD-9. Or the Diagnostic Statistical Manual DSM-IV vague statements about conditions, disorders, or syndromes without specific information or not recognized by either ICD-9 or DSM-IV are not acceptable.

#### Mental Disorders Admissions Protocol

Since the inception of cannabis buyers clubs some have expressed concern about the possibility of adverse effects on individuals suffering from emotional or mental disorders.

In clinical interviews I have conducted with members and patients in my psychiatric practice it is my impression that while many definitely benefit from cannabis there are others for whom use of cannabis is contraindicated.

The buyers co-op procedures seek to both address these concerns and study more fully the effects of cannabis on emotional and mental disorders.

All persons seeking membership in the club for treatment of conditions listed in DSM-IV or emotional or mental conditions listed in ICD-9 shall be reviewed by mental health professional after verification by intake staff.

Individuals in whom the use of cannabis is or has been problematic shall be excluded. This group includes persons suffering from cannabis related disorders.

Additionally, other emotional and mental conditions may be

worsened by the use of cannabis. Some persons are involved in treatment requiring abstinence from cannabis especially those involved in twelve step recovery programs.

Cases where verification or suitability for the program is in dispute shall be reviewed by a panel of volunteer psychiatrists who will make final determination.

### **Adverse Effects of Cannabis**

As with any drug, cannabis is a tool. There will always be individuals that experience adverse consequences from any drug use. The abuse of cannabis had been recognized for millennia. These problems were described by O'Shaughnessy during his observations in India in 1839 which included references in the Persian medical literature. With widespread non medical use of the drug for the past thirty years, psychiatrists have developed classifications of cannabis presented in the latest Diagnostic and Statistical Manual, Revision IV (DSM-IV).

### **Intoxication/Overdose**

Overdose is most common by the oral route since the time from taking the drug until the experience of effects begin is from one to three or more hours. Inexperienced and ignorant first time users will have an unforgettable experience.

The effects of overdose have been numerous described in general, clinical, and scientific literature. Cannabis overdose comprises the majority of listings in the Surgeon General's list, 19th century precursor of the Indicus Medicus. American literary accounts in books: FitzHugh Ludlow's Hashish Eater and an essay on Hashish by Victor Robinson M.D are expressly devoted to cannabis. Descriptions of experience with the drug as part of travel to areas of indigenous use may be found in English and European literature over the past three centuries. Scientific and medical descriptions of effects of cannabis overdose have been numerous extensive. Before and after its removal in 1937.

The effects of overdose are from the stimulation and sedation of the central nervous system. Stimulation with a flooding of ideas and images that are vivid and rapidly changing. Attention and concentration are markedly impaired. Time perception is significantly altered with minutes seeming like hours. There may be distortion of spatial perception. Secondary physical effects, aside from a speeding up of the heart rate is generally no more than that associated with mild to moderate exercise.

## **Cannabis-Induced Disorders**

### **Cannabis Intoxication**

- A. Recent use of cannabis.
- B. Clinically significant maladaptive behavior or psychological changes (e.g. impaired motor coordination, euphoria, anxiety, sensation of slowed time, impaired judgment, social withdrawal) that developed during, or shortly after, cannabis

use.

- C. Two (or more) of the following signs, developing within 2 hours of cannabis use: (1) conjunctivae injection (2) increased appetite (3) dry mouth (4) tachycardia. The symptoms are not due to a general medical condition and are not better accounted for by another mental disorder.

- D. Specify if:

With Perceptual Disturbances: This specifier may be noted when hallucinations with intact reality testing or auditory, visual, or tactile illusions occur in the absence of delirium. Intact reality testing means that the person knows that the hallucinations are induced by the substance and do not represent external reality. When hallucinations occur in the absence of intact reality testing, a diagnosis of Substance-Induced Psychotic Disorder, with Hallucinations should be considered.

### **292.81 Cannabis Intoxication Delirium**

### **292.11 Cannabis-Induced Psychotic Disorder, With Delusions**

Specify if with onset during intoxication.

### **292.89 Cannabis-Induced Anxiety Disorder, Specify if: with onset during Intoxication.**

### **Continuing or chronic use.**

Use or abuse? Cannabis, like any other drug, is a tool. Properly utilized with realistic expectations and awareness of its properties, cannabis is a safe and effective medicine. Improperly used with unrealistic expectations and ignorance, adverse effects may result. The onset of unwanted effects may be obvious or insidious. The general etiology is some emotional discomfort for which cannabis is taken to relieve producing undesirable consequences from using the drug itself.

Paranoia and delusional thinking are not uncommon effects of cannabis both acute and chronically. In the acute experience it appears to be from the perceptual distortions of space, time and feelings of detachment.

In chronic use paranoid and delusional thinking appear to be the consequences of the suppression of feelings, the dulling of feelings may alienate the cannabis users from others by diminishing empathetic capabilities. This emotional insensitivity then results in conflict through misperception. Misperception results from the dulling of affect that is important contextual collateral information source. An effective relief of emotional distress then becomes an impediment to relationships with the cannabis user. Feelings are an integral dimension of social perception that convey important contextual information. Cannabis, as an effective sedative and antidepressant, has this undesirable side effect when misused. The relief afforded by the drug may be paid for by complications caused by avoiding dealing with the causes of the emotional pain as well as diminished functioning while under its influence.

Cognitive impairment by continuing or overuse of cannabis creates a form of mild dementia that may persist for up to several weeks after discontinuing the drug. Individuals sensitive to the drug report a

persistent hangover that diminishes the ability to pay attention and concentrate. The onset may be insidious, subtle, and gradual. This condition is reversible with abstinence from cannabis.

### **304.30 Cannabis Dependence**

A maladaptive pattern of cannabis use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same 12 month period:

1. tolerance, as defined by either of the following:
  - a. a need for markedly increased amounts of the substance to achieve intoxication or desired effect.
  - b. markedly diminished by either of the following;
2. withdrawal, as manifested by either of the following:
  - A. the characteristic withdrawal syndrome for the substance.
  - B. the same (or a closely related) substance is taken to relieve or avoid withdrawal symptoms.
3. cannabis is often taken in larger amounts or over a longer period than was intended.
4. there is a persistent desire or unsuccessful efforts to cut down or control cannabis use.
5. a great deal of time is spent in activities necessary to obtain cannabis (e.g. visiting multiple dealers or driving long distances), use the substance (e.g. chain smoking) or recover from its effects
6. important social, occupational, or recreational activities are given up or reduced because of cannabis use
7. cannabis use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance.

### **305.20 Cannabis Abuse**

A. maladaptive pattern of cannabis use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12 month period:

1. recurrent cannabis use resulting in a failure to fulfill major role obligations at work, school, or home (e.g. repeated absences or poor work performance related to substance use; cannabis related absences, suspensions, or expulsions from school; neglect of children or household)
2. recurrent cannabis use in situations in which it is physically hazardous (e.g. driving an automobile or operating a machine when impaired by cannabis use)
3. recurrent cannabis related legal problems (e.g. arrests for cannabis related disorderly conduct)
4. continued cannabis use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g. arguments with spouse about consequences of intoxication, forgotten promises)

B. The symptoms have never met the criteria for Cannabis Dependence for this class of substance.

### **232.9 Cannabis Related Disorder not Otherwise Specified**

The Cannabis Related not Otherwise Specified category is for disorders associated with the use of cannabis that are not classifiable as one of the disorders listed above.

---

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This URL: <http://www.rxcbc.org/exd.html>





### **MEDICAL MARIJUANA FACTS**

Medical marijuana is currently being used in many ways:

- To combat nausea and vomiting induced by chemotherapy.
- To reduce ocular pressure caused by glaucoma.
- As an anticonvulsant and muscle relaxant in spastic disorders.
- As an appetite stimulant in wasting syndrome due to HIV infection.
- To relieve phantom limb pain, and other types of chronic pain including migraines.

*Information above from the Journal of the American Medical Association June 21, 1995*

### HOURS OF OPERATION

Monday and Friday  
11:00am to 7:00pm

Tuesday, Wednesday, Thursday  
11:00am to 1:00pm  
5:00pm to 7:00pm

We are CLOSED Saturdays\* and Sundays

\*except the 1st Saturday of every month, that's when we have our "POTLUCK"!

POTLUCK HOURS  
1:00pm to 4:00pm

Please call for directions.

All new applicants must complete intake procedures.

Oakland Cannabis Buyers' Cooperative

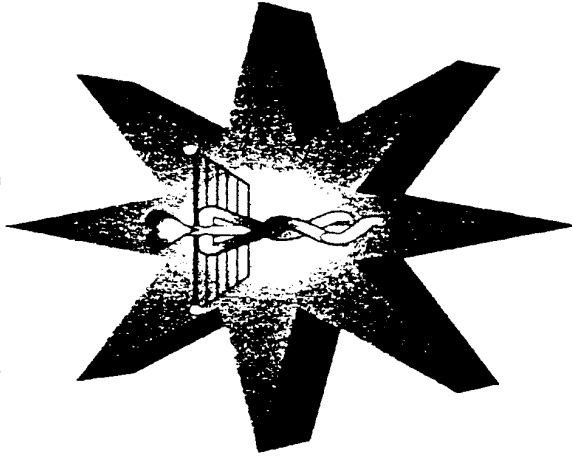
P.O. Box 70401  
Oakland, CA 94612

phone: (510) 832-5346  
fax: (510) 986-0534  
email: ocbc@rxcbc.org

Visit our website: [www.rxcbbc.org](http://www.rxcbbc.org)

O.C.B.C. Brochure updated May 1997

Oakland Cannabis  
Buyers' Cooperative



Compassion

**YES...**

**...MEDICAL MARIJUANA IS LEGAL!**

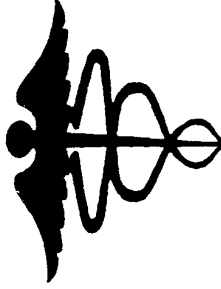
The Oakland City Counsel Resolution 72516 protects The Oakland Cannabis Buyers' Cooperative and the members we serve. In 1996 the mayor of Oakland and the Oakland City Council declared that:

- The investigation and arrest of members of the Oakland Cannabis Buyers' Coop for purchasing, selling, and distributing marijuana for medicinal purposes shall be low priority.
- The investigation and arrest of persons for planting, cultivating, purchasing, and/or distributing marijuana shall be low priority if such persons have been diagnosed as suffering from an illness which may be alleviated by the use of medicinal marijuana
- It shall be a low priority to investigate and arrest people who possess, purchase, cultivate, and distribute cannabis to patients in Oakland.

**MEMBER SERVICES**

The Oakland Cannabis Buyers' Cooperative provides the following services:

- A safe and secure location to purchase cannabis for medicinal use.
- Medicinal marijuana can be purchased in several different forms including flower tops, leaves, tincture, marijuana butter, and a great selection of fresh baked goods.
- Monthly potluck dinners and member cultivation club meetings.
- Information on a variety of subjects including AIDS awareness, needle exchange, safe sex, and drug reform policies.
- Our Cannabis Grow Center, offering the Medi-Grow System to cultivate your own medical marijuana, as well as information and hands-on learning of techniques.

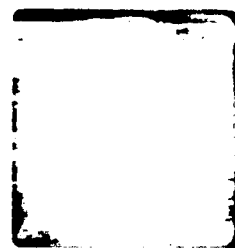


**MEMBER QUALIFICATIONS**

To secure membership, patients must:

- Be suffering from a serious medical condition which is recognized as benefiting from medical marijuana.
- Provide an original letter of diagnosis from a California licensed physician.
- Produce a California photo I.D.
- Secure a written statement from a physician documenting their use of cannabis for medicine.







Compassion

# THE LEAF NEWSLETTER

THE OAKLAND CANNABIS BUYERS' COOPERATIVE - AUGUST 1997, FIFTH EDITION

## Hello Members

It's August and I hope that everyone is doing fine this month.

Some good news to pass along is that we are no longer carrying the \$65. eighth. You will find all of our high grades that are available now range from \$50. - \$60., (instead of \$50. - \$65.) and after the end of the summer drought we plan on introducing even more price reductions!

Also as you may have noticed we were out of B-Mex this past month for a short time. This was due to some quality control problems and has now been restocked.

Please note also that our House Special, priced at \$50. per eighth will be available throughout the end of the year.

With the office relocation nearly complete and the summer well into swing, look for new programs for members as well as other improvements within the Cooperative.

*Your Advocate* - Jeff Jones

## Thank You!

A thank you to Jim McClelland for the wonderful idea for Fruit Friday, and to Tim Sidwell for buying and preparing the unique and great looking variety of fruit trays each week.

Also, a big thank you to Tim for the beautiful bouquets of flowers in the Bud Bar recently.

*Gracias, Danke, Merci, Obrigada!*  
(basically, thank you)

## Culinary Corner

### *Marijuana Butter*

4 oz. California Cooking Leaf, powdered  
1 lb. Unsweetened Butter

MELT butter over low heat, or in a Crock Pot.  
ADD California Cooking Leaf.  
SIMMER for about 1 hour.  
COOL enough to handle.  
STRAIN through a cheese cloth and sieve.

USE Marijuana Butter as regular butter or oil in any recipe.

HINT: For stronger butter, re-melt Marijuana Butter and Repeat process.

**ENJOY!**

*-Mark The Baker*

## Softball Up Date

Hey Sports Fans!

The OCBC Softball Team is continually growing and improving, we now have six new ball players and another game scheduled with Flower Therapy coming up later in August. Please keep an eye out for new happenings and events posted on the new Softball Board located at the Bud Bar.

Note: During Football Season practices will be changed to Saturday, to accommodate those all around sports fans who must see their 49ers and Raiders play on Sundays!

*Play Ball! - Vic*

ER0079

## **New HIV + Discussion Group Forming Now!**

On August 14, 1997 a new group will form to discuss the Benefits of Cannabis use as it relates to HIV+ and AIDS patients. Anyone who is HIV positive, is encouraged to attend.

We want to find out how HIV+ people are using Cannabis to alleviate symptoms of AIDS and symptoms caused by the retro-viral drugs that AIDS patients are currently taking. Dr. Mike Alcalay will lead the discussion. Future meetings will be determined at this first gathering.

As well we are seeking other ways AIDS patients may benefit from Cannabis use. For example, we know that Cannabis is very helpful to those who are suffering from wasting syndrome and can help to stimulate the appetite.

We want to find other many ways Cannabis is being used to help alleviate the symptoms of AIDS, please attend this meeting, to help us to help others.

**What:** Discussion with AIDS patients who use Cannabis  
**When:** Thursday, August 14, 1997 at 1:15 p.m.  
**Where:** Oakland Cannabis Buyer's Cooperative  
**Who:** Anyone who is HIV+

## **OCBC Employee Profile AUGUST 1997**

### ***Helen Reading***

As a 43 year old breast cancer survivor, I became involved at OCBC as a Volunteer in October 1996 inputting data, as this was very much needed at the time and well within my area of expertise. As Board of Director Secretary I tend to spend most of my time working in the Administrative office as the self proclaimed "Bottle Washer and Diaper Changer".

I have been interested in growing Marijuana for years and I try to be as helpful to all the members who frequent as well as work here at OCBC.

I am very happy seeing the Medical Marijuana Initiative succeed and Survive as it has.

NAMASTA.  
***Helen Reading***

## **From The Field...**

Lately, with so many members cultivating, I've been getting many questions about *BUGS, BUGS, BUGS!*

Cannabis is subject to many common pests including spider mites, thrips, aphids, white flies, fungus gnats as well as other bugs that could hurt your plants.

**REMEMBER:** Prevention is always better than having to cure a pest problem.

But once you get a pest problem, act quickly! Spraying your plants (especially under the leaves) with tobacco juice, soft soaps and other natural and not so natural insecticides are usually necessary. We at OCBC always advise natural or organic cures to problems with pests.

Most insects have a specific parasite or predator bug that will control and usually eliminate your unwanted pest problems. Identifying your pest bugs is very important in diagnosing the best cure. You can buy a grow book (several are available at the OCBC Bud Bar!) or seek help at our Grow Center (next to the Bud Bar). Looking under the leaves with a magnifying glass will help you to see your bugs and then choosing the proper cure will be easy!

***-Matthew***



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11 COOPERATIVE; JEFFREY JONES,

12 See signature pages for complete list  
of parties joining in this pleading, Civil L.R. 3-4(a)(1).  
13

14  
15 IN THE UNITED STATES DISTRICT COURT  
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 UNITED STATES OF AMERICA, )  
 )  
18 Plaintiff, )  
 )  
19 v. )  
 )  
20 CANNABIS CULTIVATORS' CLUB; )  
and DENNIS PERON, )  
21 Defendants. )

Nos. C 98-00085 CRB  
C 98-00086 CRB  
C 98-00087 CRB  
C 98-00088 CRB  
C 98-00089 CRB  
C 98-20013 CRB

DEFENDANTS' JOINT MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
OPPOSITION TO PLAINTIFF'S  
MOTIONS FOR PRELIMINARY  
INJUNCTION

22 \_\_\_\_\_ )  
23 AND RELATED ACTIONS. )  
24 \_\_\_\_\_ )

Date: March 24, 1998  
Time: 2:30 p.m.  
Courtroom: 8

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1 TO THE HONORABLE CHARLES R. BREYER, UNITED STATES  
2 DISTRICT JUDGE, AND TO ALL PARTIES TO THE ABOVE-CAPTIONED ACTION:  
3

4 Defendants herein, by and through their respective counsel, specially  
5 appearing, submit the following Opposition to Plaintiff United States' Motion For Preliminary  
6 Injunction And Permanent Injunction And For Summary Judgment:  
7

8 I. INTRODUCTION  
9

10 On January 9th 1998, the Government filed the instant suit against six medical  
11 cannabis dispensaries pursuant to 21 USC § 882. On January 30, 1998, over the  
12 government's objections, this Honorable Court granted defendants' Motion for Continuance  
13 and directed defendants to file Memoranda addressing the effect of federal law on defendants'  
14 activities protected by Proposition 215, codified as California Health & Safety Code §  
15 11362.5. Defendants submit their Opposition herein.  
16

17 A. History of Medical Marijuana  
18

19 The medicinal use of cannabis can hardly be characterized as a "recent"  
20 phenomenon. The first recorded use of marijuana medicinally was over five thousand years  
21 ago. During the reign of the Chinese Emperor, Chen Nung, it was written that cannabis  
22 provided relief for malaria, constipation, rheumatic pains, and other conditions.

23 In the *Anatomy of Melancholy*, published in 1621, the English clergyman  
24 Robert Burton suggested the use of cannabis in the treatment of depression.. The New  
25 English Dispensary of 1764 recommended applying a cannabis compress to the skin to  
26 relieve inflammation.

27 Between 1840 and 1900, more than 100 papers were published in Western  
28

1 medical literature concerning the medicinal benefits of cannabis. In 1839, Dr. W.B.  
2 O'Shaughnessy, a professor at the medical college of Calcutta wrote that a tincture made of  
3 hemp proved to be an effective analgesic.

4 Cannabis was first listed in the United States Dispensatory in 1854. It was  
5 common during that era for commercial cannabis preparations to be available in drugstores.  
6 In 1860, Dr. R.R. M'Meens reported numerous medical uses for cannabis to the Ohio State  
7 Medical Society. In 1887, H.A. Hare wrote of the benefits of cannabis in the treatment of  
8 terminal patients. In 1891, Dr. J. B. Mattison urged physicians to use hemp as an analgesic  
9 and to treat such conditions as chronic rheumatism and migraine. In 1937, the United States  
10 passed the Marihuana Tax Act at the urging of Harry Anslinger, a government agent who  
11 had essentially been put out of business with the repeal of prohibition. Mr. Anslinger was  
12 instrumental in convincing the public of the dangers of marijuana through such means as the  
13 film "refer madness"

14 In 1938, Mayor Fiorello LaGuardia appointed a committee of scientists to  
15 study the medical, sociological, and psychological effects of marijuana use in New York.  
16 The study was published in 1944, finding no proof that major crime was associated with  
17 marijuana, or that it caused any aggressive or antisocial behavior. Harry Anslinger  
18 denounced this report and it was essentially ignored by the government.

19 In 1970, Congress passed the Controlled Substances Act, at which time  
20 President Nixon appointed the Presidential Commission on Marihuana and Drug Abuse, aka  
21 the Shafer Commission, to study marijuana and report back to Congress. The purpose was to  
22 assist Congress in determining the appropriate scheduling of marijuana. When the  
23 Commission found that there was no basis for placing marijuana in Schedule I, Congress and  
24 the President virtually ignored its scientific judgment.

25 On September 6, 1988, after a Court order forced the DEA to hold two years  
26 of hearings before its own administrative law judge, the Honorable Francis L. Young ruled  
27 that approval by a significant minority of physicians was enough to meet the standard of  
28

1 "currently accepted medical use in treatment in the United States" established by the  
2 Controlled Substances Act for a Schedule II drug. Judge Young wrote that "marihuana, in its  
3 natural form, is one of the safest therapeutically active substances known to man.... One must  
4 reasonably conclude that there is accepted safety for use of marihuana under medical  
5 supervision. To conclude otherwise, on the record, would be unreasonable, arbitrary, and  
6 capricious." Judge Young's findings were, not surprisingly, ignored by the government.

7  
8 B. History of Dispensaries

9  
10 Proposition 215 was not the first effort in California to allow for the use of  
11 medicinal marijuana. In two consecutive years, the California legislature passed medical  
12 marijuana bills, only to see them vetoed by Gov. Pete Wilson. Finally, in 1996, the voters of  
13 the state placed an initiative on the ballot. It passed on November 5, 1996, receiving 56% of  
14 the vote. In response to the voters' demand that "seriously ill Californians have the right to  
15 obtain and use marijuana for medical purposes where the medical use is deemed appropriate  
16 by a physician", numerous medical cannabis dispensaries, including the defendants herein,  
17 sprang up to meet the needs of patients. These dispensaries provided safe and affordable  
18 medicine that patients had previously only found available on the black market, and then  
19 only at exorbitant prices and of questionable quality.

20  
21 II. ARGUMENT

22  
23 Defendants herein contend that the government's pending motion should be  
24 denied. Defendants' argument can be summarized as follows:

- 25 A. Substantive Due Process Bars The Government From Enforcing The  
26 Sections Of the Controlled Substances Act It Seeks To Apply To Defendants.  
27 B. The Controlled Substances Act Does Not Reach The Defendants'

28

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1 Activities Which Are Wholly Intrastate In Nature.

2 C. Defendants' Activities Are Exempt From Application Of The  
3 Controlled Substances Act.

4 D. Defendants' Activities Are Justified By The Defense Of Necessity.

5 E. The Government Cannot Meet The Standards For The Injunctive Relief It  
6 Seeks.

7 A. SUBSTANTIVE DUE PROCESS BARS THE  
8 GOVERNMENT FROM ENFORCING THE SECTIONS  
9 OF THE CONTROLLED SUBSTANCES ACT  
10 IT SEEKS TO APPLY TO DEFENDANTS.

11 1. Substantive Due Process Protects Individuals  
12 from Government Actions That Violate  
13 Protected Personal Liberty Interests.

14 The United States Supreme Court has established that individuals arey  
15 protected under the Due Process clauses of the Fourteenth and Fifth Amendments from State  
16 or Federal intrusions into their "fundamental liberty interests". Substantive Due Process has  
17 come to stand for protection of numerous un-enumerated liberties. As Justice Rehnquist  
18 recently described in *Washington v. Glucksberg*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 2258 (1997).

19 The Due Process Clause guarantees more than fair process, and  
20 the "liberty" it protects includes more than the absence of  
21 physical restraint. . . . The Clause also provides heightened  
22 protection against government interference with certain  
23 fundamental rights and liberty interests. In a long line of cases,  
24 we have held that, in addition to the specific freedoms protected  
25 by the Bill of Rights, the "liberty" specially protected by the  
26 Due Process Clause includes the rights to marry; to have  
27 children; to direct the education and upbringing of one's  
28 children; to marital privacy; to use contraception; to bodily  
integrity; and to abortion. We have also assumed, and strongly  
suggested, that the Due Process Clause protects the traditional  
right to refuse unwanted lifesaving medical treatment.

*Glucksberg* at 2267, (citations omitted).

In applying Substantive Due Process analysis, the Chief Justice in *Glucksberg*  
explained that government action must be "narrowly tailored to serve a compelling

1 [government] interest" where a "fundamental liberty interest" is involved. Such interests  
2 arise where the interest protected is firmly rooted in history and tradition and is carefully  
3 described:

4 Our established method of substantive due process analysis has  
5 two primary features: First, we have regularly observed that the  
6 Due Process Clause specially protects those fundamental rights  
7 and liberties which are, objectively, "deeply rooted in this  
8 Nation's history and tradition," ("so rooted in the traditions and  
9 conscience of our people as to be ranked as fundamental"), and  
10 "implicit in the concept of ordered liberty," such that "neither  
11 liberty nor justice would exist if they were sacrificed" . . . .  
12 Second, we have required in substantive due process cases a  
"careful description" of the asserted fundamental liberty interest.  
Our Nation's history, legal traditions, and practices thus provide  
the crucial "guideposts for responsible decision-making," that  
direct and restrain our exposition of the Due Process Clause. As  
we stated recently . . . , the Fourteenth Amendment "forbids the  
government to infringe ... 'fundamental' liberty interests at all,  
no matter what process is provided, unless the infringement is  
narrowly tailored to serve a compelling state interest."

13 *Glucksberg*, at 2268 (citations omitted).

14 Justice Souter in his concurrence to *Glucksberg* argues the application of  
15 Substantive Due Process based on a "concept of 'ordered liberty'... comprising a continuum of  
16 rights to be free from 'arbitrary impositions and purposeless restraints.'" *Glucksberg*, at 2281-  
17 2 (Souter, J., concurring). Justice Souter described his standard for a substantive due  
18 process right as follows:

19 This approach calls for the court to assess the relative "weights"  
20 or dignities of the contending interests .... [This] method is  
21 subject to two important constraints.... First, such a court is  
22 bound to confine the values that it recognizes to those truly  
23 deserving constitutional stature, either to those expressed in  
24 constitutional text, or those exemplified by the "the traditions  
25 from which [the nation] developed" or revealed by contrast with  
26 "the traditions from which it broke."

24 The second constraint, again, simply reflects the fact that  
25 constitutional review, not judicial lawmaking, is a court's  
26 business here. ... It is only when the legislation's justifying  
27 principle, critically valued, is so far from being commensurate  
28 with the individual interest as to be arbitrarily or pointlessly  
applied that the statute must give way.

27 *Glucksberg*, at 2283 (Souter, J., concurring) (citations omitted).

28



1 Under either the Rehnquist or Souter standard, the High Court would resolve  
2 Defendants' Substantive Due Process claims similarly

3  
4 2. The Due Process Clause Protects Clearly  
5 Established Fundamental Liberty Interests.

6 Defendants' liberty interests meet the first prong of the Rehnquist analysis of  
7 Substantive Due Process: The right of patients to obtain physician-recommended treatment  
8 that would alleviate pain and preserve life is strongly reflected in our nation's traditions and  
9 the Supreme Court's historic Substantive Due Process analysis. The Court has found Due  
10 Process interests in preserving life and caring for oneself. *Id.* Moreover, Substantive Due  
11 Process analysis indicates that the Fourteenth and Fifth Amendments protect a fundamental  
12 interest *to receive palliative treatment for a painful medical condition.* *Id.*

13 "Many of the rights and liberties protected by the Due Process Clause sound in  
14 personal autonomy". *Glucksberg*, at 2271. There is no liberty more firmly established than  
15 the fundamental interest to be free from physical pain imposed by the government for  
16 arbitrary and capricious reasons. The highest Court in the land has continuously and  
17 persistently measured and evaluated Substantive Due Process claims in terms of the physical  
18 pain imposed upon the individual by government restraints. *Furman v. Georgia*, 408 U.S.  
19 238 (1972). (Substantive Due Process implicated where death penalty imposed under a  
20 method inflicting "unnecessary pain"); *Doe v. Bolton*, 410 U.S. 179 (1973), (considerations of  
21 an individual's Substantive Due Process right to abortion include the fact that pregnancy  
22 requires one "to incur pain" and a "higher mortality rate"); *Ingraham v. Wright*, 430 U.S. 651  
23 (1977) (school children's Substantive Due Process violated by corporal punishment, discussed  
24 *infra*); *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (arrestee's Substantive Due Process violated  
25 by police utilizing unnecessarily painful chokeholds); *Cruzan v. Director, MDH*, 497 U.S.  
26 261 (1990), (pain suffered by patient in persistent vegetative state relevant to inquiry of  
27 fundamental interest to deprive oneself of nutrition and hydration, discussed *infra*); *Planned*

28

1 *Parenthood v. Casey*, 505 U.S. 833 (1992) ("anxieties," "physical constraints," and "pain" of  
2 women carrying child to term basis of Substantive Due Process right for a woman to elect an  
3 abortion); *Rochin v. California*, 342 U.S. 165 (1952) (violation of Substantive Due Process to  
4 pump arrestee's stomach to preserve evidence); and *Washington v. Glucksberg*, \_\_\_ U.S. \_\_\_  
5 (1997) (terminally ill patient rights to palliative treatment implicate to Substantive Due  
6 Process, discussed *infra*).

7 In *Ingraham v. Wright*, *supra*, the Supreme Court cited the long history and  
8 tradition of constitutional rights respecting individual integrity:

9 The Due Process Clause of the Fifth Amendment, later  
10 incorporated into the Fourteenth, was intended to give  
11 Americans at least the protection against governmental power  
12 that they had enjoyed as Englishmen against the power of the  
13 Crown. The liberty preserved from deprivation without due  
14 process included the right "generally to enjoy those privileges  
15 long recognized at common law as essential to the orderly  
16 pursuit of happiness by free men." Among the historic liberties  
17 so protected was a *right to be free from, and to obtain judicial  
18 relief for, unjustified intrusions on personal security.*

19 While the contours of this historic liberty interest in the context  
20 of our federal system of government have not been defined  
21 precisely, they always have been thought to encompass freedom  
22 from bodily restraint and punishment. It is fundamental that the  
23 state cannot hold and physically punish an individual except in  
24 accordance with due process of law.

25 This constitutionally protected liberty interest is at stake in this  
26 case. . . . where school authorities, acting under color of state  
27 law, inflict *appreciable physical pain*, we hold that [Due  
28 Process] liberty interests are implicated.

29 *Ingraham*, at 672-3 (footnotes and citations omitted) (*emphasis added*).

30 Not only is the prevention of unnecessary pain established under the Due  
31 Process Clause, but is also clearly established as a basic *enumerated* fundamental right in  
32 regard to punishment under the Eighth Amendment barring cruel and unusual punishment.  
33 As was true in *Ingraham*, the High Court has drawn from the history of the Eighth  
34 Amendment in defining the parameters of Substantive Due Process. Where the issue of  
35 unnecessary pain is involved, Substantive Due Process is often analyzed as a parallel to the

1 Eighth Amendment. Thus, in *Furman v. Georgia*, 408 U.S. 238 (1972), the Court surmised a  
2 confluence between the two approaches. "[C]ruel and unusual punishment and substantive  
3 due process become so close as to merge." *Furman*, at 359.

4 The relevance of infliction of pain by the state as the basis for Substantive  
5 Due Process claims is not limited to those areas involving discipline or criminal punishment.  
6 Pain analysis was also highly relevant to Substantive Due Process analysis in *Cruzan, supra*.  
7 There, the Court considered whether the state of Missouri could require "clear and  
8 convincing" evidence that a patient wished to terminate artificial nutrition treatment after an  
9 automobile accident left her in a persistent vegetative state.

10 Most recently, the Supreme Court considered whether an individual had a  
11 Substantive Due Process right to have the assistance of a physician in committing suicide.  
12 *Washington v. Glucksberg, supra*. In that case, four terminally ill patients and their doctors  
13 petitioned the court for the permission to proceed with doctor-assisted suicides. As in the  
14 previous instances, the notion that the state would subject an individual to unnecessary pain  
15 weighed heavy in the minds of the Justices.

16 Although the Court's opinion in *Glucksberg* was unanimous in result, it was  
17 not so in its reasoning. Justice O'Connor and four other Justices filed separate concurrences,  
18 each of which supports the position maintained by Defendants herein that Substantive Due  
19 Process protects an individual's right to obtain medical treatment that alleviates unnecessary  
20 pain. Her opinion makes clear that suffering patients are presumed to have access to any  
21 palliative medication that would alleviate pain even were such medication might hasten  
22 death. "[A] patient who is suffering from a terminal illness and who is experiencing great  
23 pain has *no legal barriers* to obtaining medication, from qualified physicians". *Glucksberg*,  
24 at 2303 (emphasis added).

25 Similarly, Justice Breyer's concurrence turned on issues of a consideration of  
26 the pain suffered by patients. Breyer's opinion suggested that a "right to die with dignity"  
27 may in fact be protected under the Constitution. He argued that such a right would include a  
28

1 right to "professional medical assistance" and "the avoidance of unnecessary and severe  
2 physical suffering." *Glucksberg*, at 2311 (J. Breyer, concurring). Justice Breyer made clear  
3 that the presence of pain was a determinative factor in his mind: "[I]n my view, the  
4 avoidance of severe physical pain (connected with death) would have to comprise an  
5 essential part of any successful claim". *Id.*

6 Justice Souter's concurrence similarly stresses an individual's right to make  
7 decisions with one's own doctor along with considering the pain and incumbent indignity  
8 suffered by an individual. Justice Souter writes, "[The] liberty interest in bodily integrity  
9 was phrased . . . by [Justice] Cardozo when he said, '[e]very human being of adult years and  
10 sound mind has a right to determine what shall be done with his own body' in relation to his  
11 medical needs." *Glucksberg* at 2288 (Souter, J., concurring). He explained further,

12 [T]he Court [has] recognized that the good physician is not just  
13 a mechanic of the human body whose services have no bearing  
14 on a person's moral choices, but one who does more than treat  
15 symptoms, one who ministers to the patient .... This idea of the  
16 physician as serving the whole person is a source of the high  
17 value traditionally placed on the medical relationship.

18 *Glucksberg*, at 2288-89, (citation omitted).

19 Finally, Justice Stevens asserts with regard to the protected "sphere of  
20 substantive liberty":

21 Whatever the outer limits of the concept may be, it definitely  
22 includes protection for matters "central to personal dignity and  
23 autonomy." It includes, "the individual's right to make certain  
24 unusually important decisions that will affect his own, or his  
25 family's, destiny. The Court has referred to such decisions as  
26 implicating 'basic values,' as being 'fundamental,' and as being  
27 dignified by history and tradition.

28 *Glucksberg*, at 2307 (Stevens, J., concurring) (citation omitted).

Defendants herein assert that they maintain a fundamental liberty interest in  
physician recommended treatment to alleviate physical pain in the face of governmental  
restraint. The Defendant dispensaries are cooperatives composed of members who are  
patients whose doctors have recommended cannabis for medical purposes. Many of the

1 members are terminally ill cancer or AIDS patients. As a result of their conditions, they  
2 experience intense pain and nausea. Others are glaucoma patients, threatened with permanent  
3 blindness. Defendants can prove that cannabis is unique in its ability to relieve these  
4 symptoms. The government now seeks an injunction that would prevent these Defendants  
5 from obtaining this necessary treatment.

6 In a similar vein, Defendants' interests are bolstered by a second established  
7 fundamental interest in the *right to provide care for oneself*. Although this right is usually  
8 implicated where an individual is incarcerated and does not have access to necessary medical  
9 treatment, the argument is equally applicable to a situation where the government denies  
10 medical treatment by enacting laws proscribing such:

11 [W]hen the State by the affirmative exercise of its power so  
12 restrains an individual's liberty that it renders him unable to care  
13 for himself, and at the same time fails to provide for his basic  
14 human needs – e. g., food, clothing, shelter, *medical care*, and  
15 reasonable safety – it transgresses the substantive limits on state  
16 action set by the Eighth Amendment and the Due Process  
17 Clause. In the substantive due process analysis, it is the State's  
18 affirmative act of restraining the individual's freedom to act on  
19 his own behalf – through incarceration, institutionalization, or  
20 other *similar restraint of personal liberty* – which is the  
21 "deprivation of liberty" triggering the protections of the Due  
22 Process Clause.

23 *Deshaney v. Winnebago Cty. Soc.Servs. Dept.*, 489 U.S. 189, 200  
24 (1989) (citation omitted).

25 The government's restraint on the distribution of cannabis prevents the  
26 defendant patients from obtaining medical care for themselves, as protected by *Deshaney*.  
27 This is particularly egregious where the treatment sought is that to alleviate pain as discussed  
28 above.

29 The interest of some of these member/patients in preventing unnecessary pain,  
30 in treating themselves, and in preserving eyesight, is surpassed only by a third firmly rooted  
31 liberty interest, that of preserving life. It is without question that an individual has a liberty  
32 interest in preserving his or her life. As the Supreme Court explained in *Cruzan, supra*, "[i]t

1 cannot be disputed that the Due Process Clause protects an interest in life." *Cruzan*, at 281.  
2 Many of the cooperative members would needlessly place their lives in jeopardy were they  
3 denied the right to the medical use of cannabis. Many chemotherapy patients and AIDS  
4 patients are so plagued with nausea and discomfort that they are unable to eat. Without basic  
5 nourishment, their conditions are aggravated and they are essentially at risk of starving to  
6 death.

7 Defendants herein present compelling circumstances. The history and  
8 traditions of Substantive Due Process make clear that bodily integrity is an area of  
9 fundamental importance. The interests protected, relief from pain, self care, and preservation  
10 of life, are so ingrained in our nation's traditions and are so firmly rooted in our concepts of  
11 ordered liberty that they are fundamental. The right to live, pain-free under the care of one's  
12 physician without arbitrary interference from the government, is at stake.

13  
14 3. The Substantive Due Process  
15 Interest At Issue Is Narrowly Defined.

16 The Defendant patients assert Constitutional protection from the federal  
17 government's interference with their right legally to obtain cannabis, with a doctor's  
18 recommendation, for treatment of painful and life-threatening medical conditions. Unlike the  
19 plaintiff doctors in *Glucksberg* various Defendants in the instant action assert personal  
20 interests as the Controlled Substances Act applies specifically to them. Each of the  
21 Defendant cooperative's members has a medical condition for which a physician has  
22 recommended treatment with cannabis. Without the treatment some will suffer pain, some  
23 will risk blindness, and others will die of malnutrition. The only barrier to this treatment is  
24 the broad federal proscription against the distribution of marijuana. The interest asserted by  
25 Defendants is sufficiently defined to pass the "narrowly described" standard of the Rehnquist  
26 analysis.

27 ///

28

1                   4.     The Government Cannot Establish That The  
2                             Broad Federal Proscription Against Distribution  
3                             And Use Of Marijuana Is Narrowly Tailored  
4                             To Meet A Compelling State Interest.

5                   As the Court laid out in *Glucksberg*, where fundamental liberty interests that  
6 are narrowly described are demonstrated, any restraint on those interests must be narrowly  
7 tailored to serve a compelling state interest. Defendants contend that the federal proscription  
8 against the possession and distribution of marijuana is unnecessarily overbroad and arbitrary  
9 where it restrains the terminally ill and others in chronic pain from obtaining an essential  
10 medication to alleviate their pain and in some cases contribute to the preservation of life<sup>1</sup>.

11                   Congress has recognized and declared that "[m]any... drugs... have a useful and  
12 legitimate medical purpose and are necessary to maintain the health and general welfare of  
13 the American people." 21 USC §801(1). Congress has also declared that "[t]he illegal  
14 importation, manufacture, distribution, and possession and improper use of controlled  
15 substances have a substantial and detrimental effect on the health and general welfare of the  
16 American people." 21 USC § 801(2). Thus the government has a legitimate interest both in  
17 assuring that appropriate medicines are made available, and in stemming the abuse of  
18 controlled substances.

19                   In the case of numerous other substances, the government has acted to provide  
20 for medical use while limiting abuse. In the case of marijuana, however, the means  
21 employed by the government abysmally fail to accomplish the purpose stated in 21 USC §  
22 801(1) and are therefore an affront to the concept of Substantive Due Process.

23 ///

24 ///

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26 1. Although Defendants do not present evidence in support of this claim in the present  
27 briefing, they certainly will be prepared to do so at an evidentiary hearing. Such evidence would  
28 include not only medical evidence verified by volumes of scientific research, but also thousands of  
testimonials from patients who have obtained relief from pain and other conditions and who have  
gained a life-saving appetite from the medical use of cannabis.

1 B. THE CONTROLLED SUBSTANCES  
2 ACT IS NOT APPLICABLE  
3 TO DEFENDANTS' ACTIVITIES

4 1. Congress May Only Regulate Those Purely  
5 Intrastate Activities Which Have A  
6 Substantial Effect On Interstate Commerce.

7 In determining whether congress may properly regulate an activity pursuant to  
8 its power derived under the Commerce Clause, Courts have recognized that the activity to be  
9 regulated must fall into one of three categories.

10 "First, Congress may regulate the use of the channels of  
11 interstate commerce. Second, Congress is empowered to  
12 regulate and protect the instrumentalities of interstate commerce,  
13 or persons or things in interstate commerce, even though the  
14 threat may come only from intrastate activities. Finally,  
15 Congress's commerce authority includes the power to regulate  
16 those activities having a substantial relation to interstate  
17 commerce, i.e., those activities that substantially affect interstate  
18 commerce." *Lopez*, — U.S. at — - —, 115 S.Ct. at 1629-30  
19 (citations omitted); see also *Perez*, 402 U.S. at 150, 91 S.Ct. at  
20 1359 (same).

21 *U.S. v. Pappadopoulos*, 64 F.3d 522, 525-526 (9th Cir. 1995).

22 In the *Lopez* case, the Supreme Court declared the Gun-Free School Zones Act  
23 unconstitutional on the basis that the act purported to reach purely intrastate conduct that had  
24 no substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995).  
25 Relying on this holding, this Circuit found that a particular activity may be regulated by the  
26 Controlled Substances Act, (21 USC §801, et seq.), only if it can be found to fall into one of  
27 the three categories identified in *Lopez*. *U.S. v. Tisor*, 96 F.3d 370, 374 (9th Cir. 1996).

28 It cannot be argued that defendants' activities constitute either 1) channels or  
2) instrumentalities of interstate commerce. Defendants will be able to prove that their  
activities are purely intrastate in nature. Thus, in order for Congress to lawfully regulate  
defendants' activities through the promulgation, and enforcement of the sections of the  
Controlled Substances Act now advanced by the Government, (21 USC §§841, 846, and  
856), the Government must establish that defendants' intrastate activities are substantially



1 related to or affect interstate commerce. *Tisor*, at 375.

2 This Circuit has previously considered and rejected Commerce Clause  
3 challenges to prosecutions under the Controlled Substances Act, both before and after *Lopez*.  
4 However, a review of these cases, when juxtaposed against defendants' activities, establishes  
5 that they are materially distinguishable from the matter now before the Court.

6

7 a) Pre-Lopez Cases

8

9 Prior to the Supreme Court's recent decision in *Lopez*, this Circuit considered  
10 four cases in which defendants, charged with one or more of the sections of the Controlled  
11 Substances Act now relied upon by the Government, challenged the applicability of the Act  
12 to their allegedly intrastate activities: *U.S. v. Rodriquez-Camacho*, 468 F.2d 1220, (9th Cir.  
13 1972), (possession of 99 pounds of marijuana with intent to distribute, in violation of 21  
14 U.S.C. §841); *U.S. v. Montes-Zarate*, 552 F.2d 1330 (9th Cir. 1977), (possession of  
15 marijuana with intent to distribute, in violation of 21 U.S.C. §841); *U.S. v. Thornton*, 901  
16 F.2d 738 (9th Cir. 1990), (sale of PCP within 1000 feet of a school, in violation of 21 USC  
17 §845a, (currently §860), which provided for an enhancement to the penalty for violation of  
18 §841); and *U.S. v. Visman*, 919 F.2d 1390 (9th Cir. 1990), (Cultivation of marijuana, in  
19 violation of §§841, 846, and 856).

20 In these cases this Circuit recognized that Congress could regulate wholly  
21 intrastate activity only if it had an effect on interstate commerce. *Rodriquez-Camacho*, at  
22 1221; see also *Visman*, at 1392.

23 In finding such a relationship in each case, the court relied on Congressional  
24 findings, as set forth in 21 USC §801, that the intrastate activities in controlled substances  
25 affects interstate commerce. *Rodriquez-Camacho*, at 1221; *Montes-Zarate* at 1331; *Thornton*,  
26 at 741; *Visman*, at 1392.

27 This Circuit recognized, however, that the Congressional findings in 21 USC  
28

1 §801 were not inherently dispositive, but created, in effect, a rebuttable presumption. "This  
2 court will certainly not substitute its judgment for that of Congress in such a matter unless  
3 the relation of the subject to interstate commerce and its effect upon it are clearly  
4 nonexistent. [Citation Omitted]." *Rodriquez-Camacho*, at 1222; *Visman*, at 1393.

5  
6 b) Post-Lopez Cases

7  
8 Following the *Lopez* decision, this Circuit revisited the question of regulation  
9 of intrastate activity under the Controlled Substances Act, considering four new challenges:  
10 *U.S. v. Staples*, 85 F.3d 461 (9th Cir. 1996), (use of firearm while distributing cocaine, in  
11 violation of 18 U.S.C. §924(c)(1), the underlying offense being a violation of §841); *U.S. v.*  
12 *Kim*, 94 F.3d 1247, 1248 (9th Cir. 1996), (possession of methamphetamine with the intent to  
13 distribute, in violation of 21 USC §841); *U.S. v. Tisor*, 96 F.3d 370 (9th Cir. 1996),  
14 (conspiracy to distribute and distribution of methamphetamine, in violation of §§841 and  
15 846); and *U.S. v. Henson* 123 F.3d 1226 (9th Cir. 1997), (distribution of PCP in violation of  
16 §§841 and 846).

17 In these cases considered in the aftermath of *Lopez*, this Circuit noted that  
18 Congress could properly regulate intrastate activity that "*substantially* affected interstate  
19 commerce." [Emphasis added]. *Staples*, at 463; see also *Tisor*, at 375; *Henson*, at 1233.  
20 Once again, the decisions in these cases rested upon Congressional findings that intrastate  
21 drug trafficking has a substantial effect on interstate commerce. *Kim*, at 1250;

22 As the *Tisor* Court explained:

23 The challenged laws are part of a wider regulatory scheme  
24 criminalizing interstate and intrastate commerce in drugs. In  
25 adopting the Controlled Substances Act, Congress expressly  
26 found that intrastate drug trafficking had a "substantial affect"  
on interstate commerce. Accordingly, we hold that the  
Controlled Substances Act does not exceed Congressional  
authority under the Commerce Clause.

27 *Tisor*, at 375.

28

1           Each of these cases, both pre- and post-*Lopez*, is materially distinguishable  
2 from the matter now before the Court on two distinct grounds: 1) each of the above cases  
3 involved intrastate activities that inarguably constituted violations of state law, as opposed to  
4 the case at bar where the defendants' activities are sanctioned by California Health & Safety  
5 Code §11362.5; and 2) each of these cases involved intrastate illicit drug trafficking activities  
6 in the same "class of activities" as those interstate activities prohibited by the Controlled  
7 Substances Act, while the defendants now before the Court, as will be established below, are  
8 involved in conduct that is not in the "class of activities" prohibited by the sections of the  
9 Controlled Substances Act relied upon by the government.

10

11                           2.     Congress Did Not Intend The Controlled  
12                                     Substances Act To Reach Defendants' Activities.

13

14           As noted above, Courts have consistently found that Congress may lawfully  
15 regulate those purely intrastate activities which substantially affect interstate commerce. In  
16 applying this principle to prosecutions under the Controlled Substances Act, Courts have  
17 deferred to Congressional findings that intrastate drug trafficking has just such a substantial  
18 effect on interstate drug trafficking. Just as consistently, though, it has been recognized that  
19 a Court will not defer to this Congressional finding where "the relation of the subject to  
20 interstate commerce and its effect upon it are clearly nonexistent." *Stafford v. Wallace*, 258  
21 U.S. 495, 521, (1922); *U.S. v. Rodriquez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972);  
*U.S. v. Visman*, 919 F.2d 1390, 1392 (9th Cir. 1990).

22

23           A review of the Congressional findings to which the Courts refer in the above-  
24 referenced decisions, in the context of defendants' conduct herein, is illustrative of the  
25 inapplicability of §§841, 846, and 856 of the Controlled Substances Act to these defendants.

26

27           The first Congressional finding, 21 USC §801(1), states:

28

(1) Many of the drugs included within this subchapter have  
a useful and legitimate medical purpose and are necessary to  
maintain the health and general welfare of the American people.

29

1                   Thus it is clear that Congress has recognized that a drug may serve a  
2 legitimate, beneficial medical purpose.<sup>2</sup> In subsection (2), Congress recognized the converse:

3                   (2) The illegal importation, manufacture, distribution, and  
4 possession and improper use of controlled substances have a  
5 substantial and detrimental effect on the health and general  
6 welfare of the American people.

7                   Here Congress focused specifically on "illegal" and "improper" use which has  
8 a "detrimental" effect on health. The conduct of the defendants (providing cannabis for the  
9 relief of seriously ill patients who have obtained a recommendation and/or approval of a  
10 physician for the medical use of cannabis, all under color of state law) can only rationally be  
11 viewed as falling within the activities envisioned by Congress in subsection (1) as opposed to  
12 subsection (2).

13                   In subsection (3) Congress declared:

14                   (3) A major portion of the traffic in controlled substances  
15 flows through interstate and foreign commerce. Incidents of the  
16 traffic which are not an integral part of the interstate or foreign  
17 flow, such as manufacture, local distribution, and possession,  
18 nonetheless have a substantial and direct effect upon interstate  
19 commerce because --

20                   (a) after manufacture, many controlled substances are  
21 transported in interstate commerce,

22                   (b) controlled substances distributed locally usually have  
23 been transported in interstate commerce immediately before  
24 their distribution, and

25                   (c) controlled substances possessed commonly flow  
26 through interstate commerce immediately prior to such  
27 possession.

28                   Here Congress identified three distinct grounds for its conclusion that intrastate  
trafficking in controlled substances substantially effects interstate commerce.

                  Congress first noted that controlled substances are often transported across  
state lines after manufacture. Such a concern is not applicable to defendants' activities.

---

<sup>2</sup>It is interesting to note that the government, in quoting 21 USC §801 in its Memorandum, left this particular subsection out of its argument. (See e.g. Government Memorandum in Oakland Case, 3:15).

1 Defendants will be able to prove that they distribute individually small amounts of cannabis  
2 to a discreet class of persons for relatively immediate medicinal use in California, all in  
3 accordance with the state law that specifically prohibits diversion for nonmedical purposes.  
4 (See H&S §11362.5(b)(2)).

5 Congress next recognized that controlled substances are often transported over  
6 state lines immediately prior to their distribution. Again this concern is not applicable to  
7 defendants' activities. Defendants will be able to prove that the medicinal cannabis they  
8 distribute is cultivated under controlled conditions in California.

9 Finally Congress found that controlled substances are often transported over  
10 state lines immediately prior to their possession. As established above, this concern is  
11 equally inapplicable to defendants' activities as defendants will be able to prove that the  
12 medicinal cannabis they distribute is grown, distributed, and consumed wholly within the  
13 borders of California.

14 Congress next found, in subsection (4), that:

15 (4) local distribution and possession of controlled substances  
16 contribute to swelling the interstate traffic in such substances.

17 In considering this finding it is easy to see how defendants' activities, which  
18 are condoned by state law, have no relation to the illicit interstate trafficking Congress sought  
19 to proscribe. Unlike the intrastate trafficking considered by this Circuit in previous cases,  
20 defendants' activities in providing a medicine to a discreet class of persons do not have any  
21 effect on interstate illicit drug trafficking. Judge Fern Smith of this Honorable Court  
22 recognized such when she ruled that "the government's fears in this case are exaggerated and  
23 without evidentiary support. It is unreasonable to believe that use of medical marijuana by  
24 this discrete population for this limited purpose will create a significant drug problem."  
25 *Conant v. McCaffrey*, 172 F.R.D. 681, 694 n5 (N.D.Cal. 1997).

26 Congress next found that:

27 (5) Controlled substances manufactured and distributed  
28 intrastate cannot be differentiated from controlled substances

1 manufactured and distributed interstate. Thus, it is not feasible  
2 to distinguish, in terms of controls, between controlled  
3 substances manufactured and distributed interstate and controlled  
4 substances manufactured and distributed intrastate.

5 If considering intrastate illicit drug trafficking versus interstate illicit drug  
6 trafficking, Congress' findings here are clearly applicable. However, the concerns evidenced  
7 by Congress in this subsection are once again allayed when viewed in the context of  
8 defendants' conduct. Defendants will be able to prove that the medicinal cannabis they  
9 distribute is clearly and unambiguously labeled as such. No reasonable person could confuse  
10 the labeled medicinal cannabis distributed by the defendants herein with illicit black market  
11 marijuana, or vice versa.

12 In subsection (6) Congress noted that:

13 (6) Federal control of the intrastate incidents of the traffic in  
14 controlled substances is essential to the effective control of the  
15 interstate incidents of such traffic.

16 Again, it is clear that Congress is concerned with intrastate trafficking  
17 effecting interstate trafficking. As noted above and recognized by Judge Smith, the  
18 suppression of defendants' activities, clearly separate from and unrelated to black market drug  
19 trafficking, be it intrastate or interstate, is not essential to the control of illegal interstate  
20 commerce in drugs. In fact, the converse is true: Barring these defendants from providing a  
21 safe affordable source of medicinal cannabis will only serve to drive seriously ill patients  
22 into the waiting and willing arms of the black marketeers, thus swelling the interstate illicit  
23 drug trade. This certainly was not the intention of Congress in promulgating the Controlled  
24 Substances Act.

25 Finally, Congress recognized the international attempt to curb the illicit traffic  
26 in drugs, finding that:

27 (7) The united states is a party to the single convention on  
28 narcotic drugs, 1961, and other international conventions  
designed to establish effective control over international and  
domestic traffic in controlled substances.

1 Here again, the emphasis is on "drug trafficking", a class of activity in which  
2 the defendants herein are not involved.

3 Thus it is readily apparent that the Congressional findings stated in 21 USC  
4 §801 are not applicable to the defendants' conduct herein. When defendants' activities are  
5 observed under the illumination of these findings, it is clear that defendants' activities are not  
6 within the "class of activities" that adversely effect interstate commerce. (See *U.S. v. Kim*,  
7 94 F.3d 1247, 1249 (9th Cir. 1996); *U.S. v. Visman*, 919 F.2d 1390, 1392-93 (9th Cir. 1990).  
8 The Government cannot show that defendants' purely intrastate activities have any substantial  
9 effect on interstate commerce. Under these circumstances, the Controlled Substance Act is  
10 unconstitutional as applied to these defendants.

11 C. Defendants' Activities Are  
12 Exempt From Application Of  
13 The Controlled Substances Act.

14 1. Joint Acquisition and Use of Cannabis for  
15 Medical Purposes Is Not "Distribution" or  
16 "Possession for Distribution" under the  
17 Federal Controlled Substances Act.

18 In *United States v. Swiderski*, 548 F.2d. 445 (2nd Cir. 1977), two individuals  
19 purchased cocaine together, then shared it. After they were convicted of the federal crime of  
20 distribution, the Second Circuit Court of Appeal held that "where two or more individuals  
21 simultaneously and jointly acquire possession of a drug for their own use, intending only to  
22 share together, the only crime is personal drug abuse – simple joint possession, without any  
23 intent to distribute the drug further." *Id.* at 450. The court reasoned that Congress, in  
24 making the penalties much harsher for distributing drugs than for possessing them, was  
25 concerned that distribution has the dangerous, unwanted effect of drawing additional  
26 participants into the web of drug abuse. *Id.* Because the concerns are not present in a  
27 situation of joint purchasers, it was error not to instruct the jury that it could find possession  
28 without any distribution. *Id.* at 452

At a trial on the merits, Defendants herein would be able to demonstrate that

1 under *Swiderski*, they are not guilty of the federal crimes of distribution, or possession for  
2 distribution, because their alleged control of medical cannabis is established through a  
3 cooperative enterprise, shared equally among all of the members thereto, for the exclusive  
4 medicinal use of each of them, individually. Defendants will be able to demonstrate that  
5 there are no third parties involved, nor is anyone else being brought into a "web" of drug  
6 use.

7 Further, Defendants will be able to establish that this is an enterprise that is  
8 legal under the laws of the State of California. Cooperatives are a commonly authorized  
9 legal entity. The activity allegedly being conducted is lawful and authorized under the  
10 Compassionate Use Act of 1996 (H&S § 11362.5).

11 In the context of illicit drug transactions, the Ninth Circuit limited *Swiderski* to  
12 its facts in *United States v. Wright*, 593 F.2d. 105 (1979). In *Wright*, a person asked the  
13 defendant to purchase heroin, and gave him money for that purpose. The defendant went out  
14 on his own, procured the heroin, brought it back and then participated in its consumption.  
15 The court held that it was not error to deny a jury instruction based on the doctrine of joint  
16 possession, because the defendant "facilitated the transfer of the narcotic; he did not simply  
17 simultaneously and jointly acquire possession of a drug for their (his and another's) own  
18 use." *Id.*

19 At a trial of this matter on the merits, Defendants in this case will be able to  
20 demonstrate that, unlike the situation in *Wright*, Defendants do not give money to others for  
21 the purposes of procuring drugs for recreational use. Rather, Defendants in this case act in  
22 concert as cooperatives to ensure the safe and affordable access to cannabis for medicinal  
23 purposes for each of the members. In *Wright*, the Court was concerned with defendants  
24 using the *Swiderski* defense in a "typical" drug deal. Here, any cannabis possessed is  
25 exclusively for medicinal purposes. The activity is not illicit, because it is medicinal in  
26 nature and authorized by California law.

27 In *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984), the Court upheld a  
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1 Swiderski instruction in a case involving "tons" of marijuana. The Court concluded, "[T]he  
2 Swiderski defendants were entitled to pursue whatever factual defense they could support,  
3 however implausible it might seem to a finder of fact in this case they may have had a  
4 colorable alternative." *Id.* at 514. As the Court noted in *United States v. Escobar De Bright*:

5 [T]he general principle is well established that a criminal  
6 defendant is entitled to have a jury instruction on any defense  
7 which provides a legal defense to the charge against him and  
8 which has some foundation in the evidence, even though the  
evidence be weak, insufficient, inconsistent and doubtful of  
credibility.

9 *Id.*, 742 F.2d 1196, 1198 (9th Cir. 1984),

10 Here, the evidence is strong, sufficient, consistent, and  
11 credible and would almost certainly result in an acquittal of the Defendants by a jury.

12 2. Defendants Are Not in Violation of  
13 the Controlled Substances Act,  
14 Because They Are "Ultimate Users".

15 Section 802(27) of the Controlled Substances Act defines an "ultimate user" as  
16 "a person who has lawfully obtained, and who possesses a controlled substance for his own  
17 use or for the use of a member of his household ...." Under the Act, an ultimate user is  
18 permitted to possess a Schedule I controlled substance, including marijuana, without being in  
19 violation of the Act and without being required to register with the Attorney General.

20 At a trial on the merits, Defendants would be able to demonstrate that they fit  
21 squarely into the "ultimate user" exemption of the Controlled Substances Act. Defendants  
22 could show that California Health & Safety Code § 11362.5 authorizes their possession of  
23 cannabis. Further, under *Swiderski, supra*, any medical cannabis possessed by any of the  
24 Defendants as members of their respective cooperatives would be for the exclusive medicinal  
25 purposes of each of them under the doctrine of joint possession. See also, *United States v.*  
26 *Bartee*, 479 F.2d 1390 (10th Cir. 1973) (ultimate user "obtain[s] the drug for his own use").

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D. DEFENDANTS' ACTIVITIES  
ARE JUSTIFIED BY THE  
DEFENSE OF NECESSITY.

1. The Defense Of Medical Necessity Provides  
Complete Justification For The Defendants' Acts.

The common law defense of necessity is well-established as a defense to federal criminal prosecutions not involving homicides. *United States v. Holmes*, 26 Fed.Cas.No. 15, 383, p. 360 (C.C.E.D. Pa. 1842); *United States v. Ashton*, 24 Fed.Cas.No. 14,470, p. 873 (C.C.D. Mass. 1834). In *United States v. Bailey*, 444 U.S. 394, 414 (1980), the Supreme Court held that criminal defendants may assert the defense of necessity when charged with prison escape, provided they proffer the necessary evidence to support the claim. The defense of medical necessity is simply a specialized application of the common law defense of necessity available in all federal criminal prosecutions. 1 LaFave & Scott, *Substantive Criminal Law*, § 5.4(c)(7), pp. 631-33 (1986). Although neither the Supreme Court nor this Circuit have ruled directly on the issue in the context of marijuana use, ample authority exists to recognize the viability of the defense of medical necessity in prosecutions for possession, distribution, and cultivation of marijuana.

In *United States v. Randall*, 104 Daily Wash.L.Rptr. 2249, 2252 (D.C. Super. 1976), a defendant successfully asserted medical necessity as a defense to a charge of marijuana possession in the Washington D.C. Superior Court. He grew marijuana plants and used them to treat his own condition of glaucoma after conventional medications were ineffective. The court concluded that the defendant's right to preserve his sight outweighed the government's interest in outlawing the drug.

In *United States v. Burton*, 894 F.2d 188 (6th Cir. 1990), the defendant, who also suffered from glaucoma, asserted a defense of medical necessity when charged with three counts of possession of marijuana with intent to distribute. The jury convicted him of the lesser offense of simple possession, however, and on appeal the Court declined to hold

1 that the medical necessity defense was available to the possession charge, while noting,  
2 "Medical necessity has been recognized by some courts and by some authority." *Id.* at 191.  
3 The reason the court found the defense unavailable was that, subsequent to the *Randall* case,  
4 a government program was established to study the effects of marijuana on glaucoma  
5 sufferers, and the defendant failed to utilize this "reasonable legal alternative." Since the  
6 *Burton* decision, however, that experimental government program has been closed to  
7 additional applicants. Thus, the "reasonable legal alternative" is no longer available, and the  
8 *Burton* court's grudging acceptance of the medical necessity defense remains good law.

9           The medical necessity defense has received a warmer reception in the  
10 Appellate Courts of many states in this Circuit. In *State v. Hastings*, 801 P.2d 563 (Idaho  
11 1990), the Supreme Court of Idaho held that a defendant who claimed her use of marijuana  
12 was necessary to control the pain and muscle spasms associated with rheumatoid arthritis  
13 presented a legitimate defense of necessity, and it was "for the trier of fact to determine  
14 whether or not she has met the elements of that defense." *Id.* at 565. In *State v. Diana*,  
15 604 P.2d 1312 (Wash.App. 1979), the Washington Court of Appeals, citing *United States v.*  
16 *Randall*, held that medical necessity was encompassed in the common law defense of  
17 necessity:

18           The wisdom of the *Randall* decision was recognized by the  
19 legislature in our State when it enacted the Controlled  
20 Substances Therapeutic Research Act, Laws of Washington  
21 1979, Reg.Sess. Ch. 136, eff. March 27, 1979. That legislation  
22 recognizes marijuana as a medicinal drug and makes it available  
23 under controlled circumstances to alleviate the effects of  
24 glaucoma and cancer chemotherapy. The patient must be  
25 certified to the State Board of Pharmacy by a licensed  
26 physician. In addition, under the Act other disease groups may  
27 be included if pertinent medical data is presented to the Board.  
28 We believe that the defendant here should be given the  
opportunity to demonstrate the alleged beneficial effect, if any,  
of marijuana on the symptoms of multiple sclerosis.  
Accordingly, we remand his case to the trial court, here the trier  
of fact, for determination of whether medical necessity exists.

604 P.2d at 1316-17.

In *State v. Bachman*, 595 P.2d 287 (Hawaii 1979), the Hawaii Supreme court

1 concluded "it is entirely possible that medical necessity could be asserted as a defense to a  
2 marijuana charge in a proper case." However, the Court held the defense was properly  
3 rejected in that case because the defense failed to proffer competent medical testimony "of  
4 the beneficial effects upon the defendant's condition of marijuana use, as well as the absence  
5 or ineffectiveness of conventional medical alternatives." *Id.* at 288.

6 Most recently, the California Court of Appeal, assuming that a medical  
7 necessity defense is valid in California, and that it is composed of the same elements as the  
8 general necessity defense, concluded that the defendant's offer of proof was insufficient to  
9 meet those elements because she failed to establish she had no adequate alternative but to  
10 possess and transport the marijuana as charged. Nonetheless, based on the subsequent  
11 enactment of H&S § 11362.5 and its retroactive application, the court remanded the case for  
12 a limited retrial to determine whether H&S § 11362.5 provided a partial defense to the  
13 charges. *People v. Trippet*, 56 Cal.App.4th 1532, (1997).

14 Thus, clear authority exists for the availability of a medical necessity defense  
15 in a federal criminal prosecution for marijuana distribution or possession with intent to  
16 distribute. The medical necessity defense is simply a corollary of the fully accepted common  
17 law defense of necessity, and presents a factual question for the jury to determine in a  
18 particular case.

19 The Ninth Circuit has established a four part test regarding the availability of  
20 the necessity defense. To invoke the necessity defense Defendants must offer proof that: "(1)  
21 they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent  
22 imminent harm; (3) they reasonably anticipated a direct causal relationship between their  
23 conduct and the harm to be averted; and (4) they had no legal alternatives to violating the  
24 law." *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir.1989), *cert. denied*, 498 U.S.  
25 1046, (1991).

26 Defendants are able to prove each element of the necessity defense.  
27 Defendants faced a choice of evils. Thousands of people within the Defendants' geographic  
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1 range suffer from debilitating and often deadly diseases, including cancer, AIDS, and  
2 glaucoma.

3           A common cause of death for AIDS patients is wasting syndrome. Those  
4 afflicted lose all appetite and literally waste away from starvation. Similarly, chemotherapy  
5 often causes intense nausea and loss of appetite. Patients face the choice quitting  
6 chemotherapy or enduring it and risking starvation and malnutrition. For many people  
7 afflicted with these two diseases, cannabis provides relief as a pain reliever and, more  
8 importantly, as an appetite stimulant. In short, cannabis saves these people's lives. Similarly,  
9 many glaucoma patients find that cannabis is the only medication that effectively relieves the  
10 intraocular pressure in their eyes, a condition that threatens permanent blindness.

11           But cannabis is, for many, difficult or impossible to obtain. The Defendants  
12 solve this problem by providing cannabis to their members. By doing so they run the risk of  
13 potentially running afoul of federal drug laws. Such is the choice of evils, and Defendants  
14 have clearly chosen the lesser one.

15           The Defendants also meet the second and third prongs of the necessity test:  
16 The harm sought to be averted was (and continues to be) imminent and life threatening and  
17 the act of supplying cannabis is a necessary component to averting that harm.

18           The fourth prong of the necessity defense is the one the government will most  
19 likely insist the Defendants have not met. The Defendants are prepared to show that there  
20 are no legal alternatives to the distribution of medical cannabis via the cannabis cooperatives.  
21 The Defendants will present evidence from doctors and patients showing that for many  
22 people Marinol or other "legal" drugs simply do not work in treating their symptoms.  
23 Cannabis, however, does work. Defendants will also show that their members have no legal  
24 or safe alternative to acquire marijuana from other sources, including the government.  
25 Additionally, Defendants will show that they have attempted (and continue to attempt) to  
26 change marijuana laws at the local, state, and federal level. Such legal alternatives have, for  
27 purposes of a necessity defense, been exhausted. Moreover, even if such legal alternatives as

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1 rescheduling were an option, such "alternatives" are not adequate to render the necessity  
2 defense unavailable to patients who will likely die, waste away, or go blind long before any  
3 rescheduling actually is accomplished.

4 Defendants' actions fall squarely within those contemplated by the necessity  
5 defense as articulated by the Ninth Circuit. As such, Defendants possess a valid defense to  
6 the charges underlying the government's motions for an injunction.

7

8 2. The Defense of Entrapment is Available  
9 to the Extent That a Defense of Medical  
10 Necessity Would Be Precluded for  
11 Distribution to DEA Agents.

12

13 The entrapment defense was first recognized by the United States Supreme  
14 Court in *Sorrels v. United States*, 287 U.S. 435 (1932). The Court held that the defense  
15 should be available when the government instigates criminal activity by an otherwise  
16 innocent defendant. This subjective test, focused on the predisposition of the defendant, was  
17 reaffirmed in *United States v. Russell*, 411 U.S. 423 (1972).

18 When examining a defendant's predisposition, the court looks to persistent and  
19 extended efforts by government agents to target the defendant. Illustrative is *Sherman v.*  
20 *United States*, 356 U.S. 369 (1958), where the government agent met the defendant while  
21 both were undergoing treatment for drug abuse. The government agent claimed he was  
22 suffering from withdrawal and repeatedly implored the defendant to provide a source for  
23 illicit drugs. The Court found the government conduct so extreme that it ruled Sherman was  
24 entrapped as a matter of law. In determining the defendant was not "predisposed," the Court  
25 distinguished the "unwary innocent" from the "unwary criminal," and examined both the  
26 personal characteristics of the defendant and the persistent and extended government  
27 behavior.

28 Clearly, the defendants in this case were not predisposed to commit any crime.  
The cannabis dispensaries were established for the sole purpose of providing marijuana to

1 patients with doctors' recommendations, to alleviate the nausea associated with cancer  
2 chemotherapy, AIDS treatment, and the symptoms of other debilitating diseases. The DEA  
3 initiated an extensive undercover sting operation lasting over seven months, to infiltrate the  
4 clubs under the guise of needing medical marijuana. The DEA created phony physician's  
5 orders, with an agent posing as a doctor to verify the orders. Similar to the egregious  
6 behavior in *Sherman*, the undercover DEA agents falsely simulated illness to gain the  
7 sympathy of the defendants, resulting in the entrapment of "unwary innocents."

8           The defendants' reasonable belief that the marijuana they were providing to  
9 the DEA agents would be used for medicinal purposes confirms their lack of predisposition.  
10 The Cannabis Buyers' Cooperatives can be analogized to the drug treatment center in  
11 *Sherman*. Government infiltration of a humanitarian venture to alleviate pain should be  
12 viewed with great skepticism. Certainly a jury would be justified in questioning the vast  
13 investment of governmental investigative resources demonstrated here in order to seduce  
14 "unwary innocents" whose primary motivation is providing comfort and relief for those who  
15 are seriously ill. In part, the entrapment defense is an effective way of controlling the  
16 behavior of overzealous police who themselves create the "crime" they are responsible for  
17 suppressing.

18           In *Matthews v. United States*, 485 U.S. 58 (1988), the defendant denied having  
19 committed the crime and simultaneously requested an instruction on entrapment. The lower  
20 court denied his request to present the entrapment defense to the jury, requiring that he admit  
21 the crime before he could assert the defense of entrapment. The Supreme Court reversed,  
22 holding that he was entitled to an entrapment instruction as long as a reasonable juror could  
23 find that entrapment existed. The Court restated the well-established rule applicable to all  
24 defenses:

25                           As a general proposition a defendant is entitled to an instruction  
26                           as to any recognized defense for which there exists evidence  
                              sufficient for a reasonable jury to find in his favor.

27 *Id.* at 63.

28

1           Once the defendant presents some evidence of entrapment, the prosecution  
2 bears the burden of proving beyond a reasonable doubt that the defendant was predisposed to  
3 commit the crime of which he is charged before he was approached by the government.  
4 *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966); *United States v. Jacobson*, 112 S.Ct.  
5 1535, 1540-41 (1992). Here, the only "predisposition" on the part of the defendants was a  
6 humane willingness to respond to the legitimate medical needs of the sick, in the context of a  
7 cooperative venture approved by state law. The government inducements to persuade them  
8 to provide marijuana to DEA agents who had no legitimate medical need would be  
9 entrapment as a matter of law.

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11           E.           **THE GOVERNMENT CANNOT MEET**  
12                           **THE STANDARDS FOR THE**  
13                           **INJUNCTIVE RELIEF IT SEEKS**

14           1.           **Traditional Equitable Principles Apply To**  
15                           **An Injunction Sought under Section 882.**

16           Section 882 grants federal courts jurisdiction to enjoin violations of the  
17 Controlled Substances Act.

18           The district courts of the United States and all courts exercising  
19 general jurisdiction in the territories and possessions of the  
20 United States shall have jurisdiction in proceedings in  
accordance with the Federal Rules of Civil Procedure to enjoin  
violations of this subchapter.

21 21 USC § 882(a).

22           Although Congress has the power to limit a court's equitable jurisdiction, it has  
23 not done so here. The statute contains no language that suggests any limitation on a court's  
24 equitable powers. On the contrary, by explicitly stating that injunction proceedings must  
25 follow the Federal Rules of Civil Procedure, Congress intended courts to conduct § 882  
26 actions in the same manner as any other civil proceeding in equity.

27           The Supreme Court squarely addressed the issue of the application of equitable  
28



1 principles to statutory enforcement actions in *Weinberger v. Romero-Barcelo*, 456 U.S. 305  
2 (1982). In *Romero*, the Court explained, "unless a statute in so many words, or by a  
3 necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope  
4 of that jurisdiction is to be recognized and applied." *Id.* at 313. As the Court further  
5 explained:

6 [A] major departure from the long tradition of equity practice  
7 should not be lightly implied... we construe the statute at issue  
8 in favor of that interpretation which affords a full opportunity  
9 for equity courts to treat enforcement proceedings... in  
accordance with their traditional practices, as conditioned by the  
necessities of the public interest which Congress has sought to  
protect.

10 *Id.* at 320.

11 Section 882 does not restrict the court's jurisdiction in equity, and  
12 consequently the full scope of that jurisdiction applies.

13

14 2. The Government Has Failed To Meet The  
15 Equitable Criteria For A Preliminary Injunction.

16 The Ninth Circuit has established a four pronged analysis to use in  
17 determining whether to grant a preliminary injunction. A court should consider:

18 (1) [T]he likelihood of the moving party's success on the merits;  
19 (2) the possibility of irreparable injury to the moving party if  
relief is not granted; (3) the extent to which the balance of  
20 hardships favors the respective parties; and (4) in certain cases,  
whether the public interest will be advanced by granting the  
21 preliminary relief.

22 *Miller v. California Pacific Medical Center*, 19 F.3d 449, 456

23 (9th Cir. 1994) (en banc).

24 The moving party must show:

25 [E]ither (1) a combination of probable success on the merits and  
26 the possibility of irreparable harm, or (2) the existence of  
serious questions going to the merits, the balance of hardships  
27 tipping sharply in its favor, and at least a fair chance of success  
on the merits. These two formulations represent two points on a  
28 sliding scale in which the required degree of irreparable harm

1 increases as the probability of success decreases.”

2 *Id.* at 456.

3 The government has failed to make the requisite showing under either test to  
4 warrant granting it a preliminary injunction.

5

6 a) The Government Has Failed  
7 To Show Probability Of  
8 Success On The Merits.

9 The government has not shown probability of success on the merits. To  
10 succeed on the merits the government must prove that Defendants violated §§ 841(a)(1),  
11 856(a)(1), and 846 of the Controlled Substances Act. The government in its moving papers  
12 has not done so. Even if the facts were, as the government claims, uncontroverted, the  
13 government has not shown violations of the Controlled Substances Act. As explained in  
14 detail above, the Controlled Substances Act *cannot* constitutionally reach the Defendants’  
15 behavior. Even if it could reach the Defendants’ behavior, the Controlled Substances Act  
16 *does not* reach their behavior in this circumstance. Finally, even if the federal statutes were  
17 applied to the Defendants’ acts, the Defendants possess valid defenses that would preclude a  
18 finding of probability of success on the merits for the government.

19

20 b). The Government Has Not  
21 Established Irreparable Injury.

22 The government claims that it need not prove irreparable injury. It cites  
23 *United States v. Odessa Union Warehouse Co-op*, (833 F.2d 172 (9th Cir. 1987)), for the  
24 proposition that in statutory enforcement actions irreparable injury is presumed. Such a  
25 presumption is limited, however, to situations in which the statutory violation underlying the  
26 injunctive action is conceded. The Ninth Circuit sitting en banc clarified the limits of  
27 *Odessa Union*.

28

1 There, the traditional requirement of irreparable injury was  
2 inapplicable because the parties *conceded* that the federal statute  
3 involved was violated. However, when the violation is *disputed*  
4 (as it is here), *Odessa Union* does not relieve the governmental  
5 agency of its burden of showing that the statutory conditions are  
6 met. See *Id.* Rather, as we recently indicated in *United States*  
7 *v. Nutri-Cology, Inc.*, 982 F.2d 394 (9th Cir.1992), the strength  
8 of the government's showing on the likelihood of prevailing on  
9 the merits will affect the degree to which it must prove  
10 irreparable injury.

11 *Miller*, 19 F.3d at 459 (emphasis added).

12 In *Nutri-Cology*, because the statutory violation was disputed and the  
13 government did not establish likelihood of success on the merits, the court held, "the  
14 government is not entitled to a presumption, rebuttable or otherwise, of irreparable injury."  
15 *Nutri-Cology*, at 398.

16 In the instant case Defendants do not concede that any federal statute is being  
17 violated. Whether or not such statutes are being violated is the central factual and legal issue  
18 in this action. Because the government has not shown probability of success on the merits, it  
19 is certainly not entitled to a presumption of irreparable injury.

20 Other than relying on a presumption of irreparable injury, to which it is not  
21 entitled, the government has proffered no evidence to show any injury to the public caused  
22 by Defendants' acts. The government has made no such showing because it *cannot* make  
23 such a showing. As noted above, in a case arising out of another recent attempt by the  
24 federal government to interfere with patients' access to medical marijuana, Judge Smith of  
25 this Honorable Court found the government's claims of injury and hardship unsubstantiated.

26 Moreover, the government's fears in this case are exaggerated  
27 and without evidentiary support. It is unreasonable to believe  
28 that use of medical marijuana by this discrete population for this  
limited purpose will create a significant drug problem.

*Conant v. McCaffrey*, 172 F.R.D. 681, 694 n5 (N.D. Cal. 1997).

If the government truly possessed a good faith belief that the activities of the  
Defendants was causing irreparable injury, it would not have waited over two years from the



1 effective treatment for intractable pain and conditions that could otherwise lead to death,  
2 blindness or other permanent debilitation. For the government to assert that such hardships  
3 can be alleviated by petitioning the DEA to reschedule marijuana, *Plaintiff's Motion* at p. 18,  
4 (a process in which Defendants have attempted in the past and continue to pursue), shows a  
5 lack of compassion and a distorted view of reality that is truly frightening. The patients who  
6 Defendants serve suffer hardships that are immediate and life threatening. These cannot be  
7 alleviated by an administrative process that all parties agree could take years to effectuate,  
8 even if the government abandoned its arbitrary and capricious practices and dealt with this  
9 issue in good faith.

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d). Public Interest Favors Denial  
Of The Government's Motion.

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3. No Injunction Should Issue.

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As demonstrated above, the government has met none of the equitable criteria for the issuance of an injunction against defendants. Even if the government were able to establish that Defendants' actions were violative of federal law, the facts and circumstances

1 of this case do not, as the government contends, require that an injunction automatically  
2 issue. The Supreme Court made this clear in *Romero*. "The grant of jurisdiction to ensure  
3 compliance with a statute hardly suggests an absolute duty to do so under any and all  
4 circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant  
5 an injunction for every violation of law." *Romero*, at 313. The public interest and the  
6 balance of hardships dictate that no injunction should issue here.

7  
8 4. Equitable Defenses  
9 Preclude Injunctive Relief.

10 The government's attempt to invoke equitable relief against defendants is  
11 barred by the doctrine of unclean hands.

12  
13 a) Unclean Hands

14  
15 The government cannot prevail in its attempt to prohibit the distribution of  
16 medical marijuana since it comes to the Court with unclean hands. The applicability of the  
17 doctrine to government action was explained by the Ninth Circuit in *Equal Employment*  
18 *Opportunity Commission v. Recruit U.S.A.*, 939 F.2d 746 (1991).

19 They [defendants] rely on the "clean hands" doctrine, which  
20 insists that one who seeks equity must come to the court  
21 without blemish. See, e.g., *Johnson v. Yellow Cab Transit Co.*,  
22 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814 (1944).  
23 This maxim "is a self-imposed ordinance that closes the doors  
24 of a court of equity to one tainted with an inequity or  
25 bad faith relative to the matter in which he seeks relief, however  
improper may have been the behavior of the  
defendant." *Precision Instrument Mfg. Co. v. Automotive*  
*Maintenance Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 997,  
89 L.Ed. 1381 (1945). This rule applies to the government as  
well as to private litigants. See *United States v. Desert Gold*  
*Mining Co.*, 448 F.2d 1230, 1231 (9th Cir.1971).

26 *Id.* at 752.

27 The government's record regarding marijuana in general and medical marijuana  
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1 specifically demonstrates a pattern of bad faith that should preclude it from attaining  
2 equitable relief. The government has at least a twenty-five year history of bad faith and  
3 unclean hands in its dealings with medical marijuana. Such behavior is violative of the  
4 legislative intent of the Controlled Substances Act and of the United States' obligations under  
5 the Single Convention Treaty. It also flies in the face of virtually every comprehensive study  
6 commissioned by the government during the twentieth century. Defendants are prepared to  
7 show that 1) numerous and uncontroverted scientific studies exist firmly establishing the  
8 medical efficacy of marijuana and 2) the government has obstructed, suppressed or ignored  
9 all attempts by citizens to reschedule or otherwise make marijuana legally available for  
10 medical purposes. Having in bad faith resisted all attempts by Defendants and others to  
11 explicitly legalize medical marijuana under federal law, the government cannot now invoke  
12 equity in its attempts to squelch Defendants' good faith efforts to legally provide medical  
13 marijuana through the cooperatives. One who comes to equity must do so with clean hands.  
14 The government, in this instance, does not.

15           Perhaps the most glaring example of the government's unclean hands is that of  
16 the Investigative New Drug (IND) program. Under the IND program the federal government  
17 provides marijuana to eight individuals suffering from a variety of ailments including cancer  
18 and glaucoma. The government claims in prosecuting this action that there are no medically  
19 accepted uses for marijuana, while, simultaneously, the DEA distributes marijuana for those  
20 very same medical purposes that the cooperatives serve. The government's own actions  
21 demonstrate the falsity of its arguments. Not only does the very existence of the IND  
22 program counter the government argument of no legitimate medical use for marijuana, but  
23 the government's administration of the program exhibits a complete lack of good faith. Only  
24 eight people currently receive marijuana under the program. No new enrollments are  
25 accepted. These eight people do not differ from the several thousand members of the  
26 cannabis clubs in any medical sense. Their illnesses are no more or less severe than those of  
27 the club members not part of the IND program. The only distinction is political. The IND

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1 patients were all enrolled prior to the War on Drugs of the 1980's. They also predate the  
2 AIDS epidemic. The government admits that it stopped approving applications under the  
3 program because it feared an upswing in applications by AIDS patients would "send the  
4 wrong message." The decision had nothing to do with the efficacy of marijuana as medicine.  
5 The history of the IND program demonstrates that the federal government has not dealt with  
6 medical marijuana in a rational, scientific good faith manner. For the government to seek  
7 injunctive relief here, when it has itself failed to treat its ailing citizens in an equitable  
8 fashion, runs afoul of all principles upon which equitable jurisdiction is based.

9

10 5. The Government Is Not Entitled  
11 To Summary Judgment And  
12 A Permanent Injunction.

12

13 a) Because Genuine Issues of Fact Exist  
14 That Are Material to the Defenses Raised  
15 By Defendants, Summary Judgment and  
16 Permanent Injunctive Relief Are Inappropriate.

15

16 If the Court does grant the government's request for a preliminary injunction it  
17 must not simultaneously grant its request for summary judgement and a permanent  
18 injunction. Even without considering issues of facts, it is apparent that plaintiffs have  
19 violated the procedural rules governing summary judgment, and as such, should be precluded  
20 from a final judgment. According to the summary judgment rules applicable to claimants,  
21 "[a] party seeking to recover upon a claim, ... may, at any time after the expiration of  
22 20 days from the commencement of the action ..., move with or without supporting affidavits  
23 for a summary judgment in the party's favor upon all or any part thereof."

24 Fed.R.Civ.P.56(a). Defendants were served with plaintiff's *Motion for Preliminary and*  
25 *Permanent Injunction, and for Summary Judgment* on January 8, 1998, thereby commencing  
26 this action. As demonstrated by the motion's title, plaintiffs included with their request for a  
27 preliminary injunction a request for summary judgment. Such a procedure of including at the

28



1 commencement of the action a motion for summary judgment, is barred by the federal rules.  
2 To be in compliance, plaintiff was required to wait until 20 days after the filing of the  
3 complaint to move for summary judgment. Since the government failed to do so, the motion  
4 should be denied.

5           Aside from plaintiff's procedural error, the existence of issues of material fact  
6 also warrants denial of plaintiff's motion. The threshold inquiry in summary judgment  
7 motions is "determining whether there is the need for a trial—whether, in other words, there  
8 are any factual issues that can be properly resolved only by a finder of fact because they may  
9 reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 US  
10 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A factual dispute is genuine if the  
11 nonmovant's evidence is substantial enough to require trial. *Id.* at 249-250. All reasonable  
12 inferences to be drawn from the facts "must be viewed in the light most favorable to the  
13 party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
14 574, 587 (1986).

15           Defendants have sustained their burden of identifying for the Court a multitude  
16 of facts that illustrate the presence of genuine issues requiring a hearing. In outlining their  
17 defenses above, Defendants have made fact specific offers of proof regarding constitutional,  
18 legal, and equitable defenses to the government's charges.

19           Since no legally adequate notice has been provided to Defendants, summary  
20 judgement at this juncture would be premature. Moreover, as previously discussed, genuine  
21 issues of fact exist which mandate a hearing. By granting summary judgement on the basis  
22 of the currant record, Defendants would be effectively deprived of their day in court. Thus,  
23 the government's motion for summary judgement and permanent injunctive relief should be  
24 denied.

25 ///

26 ///

27 ///

28

1 F. THE COURT SHOULD FASHION  
2 PROTECTIVE MEASURES TO  
3 ENSURE THAT DEFENDANTS'  
4 PROCEDURAL DUE PROCESS  
5 RIGHTS ARE NOT VIOLATED.

6 The Government has brought the within action under 21 USC §882, a novel  
7 use of a statute for which there is a dearth of precedence. In so doing, the government has  
8 placed the defendants at a critical disadvantage. If the government had sought to prosecute  
9 Defendants criminally, Defendants would have been afforded the Constitutional protections of  
10 the Fourth, Fifth, and Sixth Amendments. By seeking to enjoin Defendant's lawyers the  
11 government is interfering with the right to counsel to such a degree that in a criminal context  
12 would surely be a Sixth Amendment violation. Perhaps most importantly, by first bringing a  
13 civil proceeding against Defendants, the government has placed them in an unavoidable Fifth  
14 Amendment conundrum. Defendants cannot adequately defend the civil proceedings without  
15 effectively waiving Constitutional rights against self-incrimination in any future criminal  
16 proceedings. At a minimum, before the government can seek equitable relief against  
17 defendants it must guarantee them immunity from any possible criminal prosecutions for the  
18 acts which it seeks to enjoin. The government cannot fairly contend that legal remedies are  
19 unavailable and at the same time waive the hammer of those very same legal remedies over  
20 the heads of Defendants.

21  
22 III. CONCLUSION

23  
24  
25 It is unfortunate that the federal government is undertaking this effort to  
26 prohibit access to the only supply of affordable, safe medical cannabis on which numerous  
27 seriously ill and suffering patients depend for relief. The federal government is acting in  
28

1 direct defiance to the will of the voters of California who clearly and unambiguously  
2 mandated that patients who can attain relief through the use of medical marijuana should be  
3 allowed to do so under a physician's care. The citizens of California have called on the  
4 federal government to make medical cannabis available. Instead the federal government has  
5 responded by initially threatening California physicians. When Judge Smith of this  
6 Honorable Court barred the government from making good on its threats, the government  
7 aimed its crosshairs at the sick and dying. Accordingly, defendants request that this  
8 Honorable Court deny the government's request for a preliminary injunction, permanent  
9 injunction and summary judgment.

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Dated: February 27, 1998

Respectfully submitted,



---

WILLIAM G. PANZER  
Specially Appearing  
for Defendants  
MARIN ALLIANCE FOR MEDICAL  
MARIJUANA; LYNNETTE SHAW;  
OAKLAND CANNABIS BUYERS'  
COOPERATIVE; JEFFREY JONES;



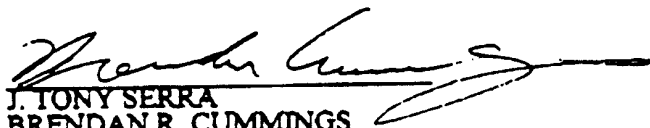
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ROBERT A. RAICH  
Specially Appearing  
for Defendants  
OAKLAND CANNABIS BUYERS'  
COOPERATIVE; JEFFREY JONES;

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SIGNATURE PAGE

The undersigned counsel, Specially Appearing on behalf of CANNABIS  
CULTIVATOR'S CLUB and DENNIS PERON, hereby submit the foregoing DEFENDANTS'  
JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO  
PLAINTIFF'S MOTIONS FOR PRELIMINARY INJUNCTION on February 27, 1998.



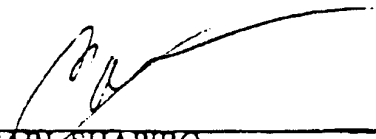
J. TONY SERRA  
BRENDAN R. CUMMINGS  
Pier 5 North  
San Francisco, California 94111  
(415) 986-5511


Defendants' Joint Memorandum  
in Opposition to Preliminary Injunction: Case Nos.  
C 98-00085 CRB, C 98-00086 CRB, C 98-00087 CRB,  
C 98-00088 CRB, C98-00089 CRB, C 98-20013 CRB

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SIGNATURE PAGE

The undersigned counsel, Specially Appearing on behalf of FLOWER THERAPY MEDICAL MARIJUANA CLUB, JOHN HUDSON, MARY PALMER, and BARBARA SWEENEY, hereby submit the foregoing DEFENDANTS' JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTIONS FOR PRELIMINARY INJUNCTION on February 27, 1998.

  
\_\_\_\_\_  
CARL SHAPIRO  
404 San Anselmo Avenue  
San Anselmo, California 94960  
(415) 453-7611

  
\_\_\_\_\_  
HELEN SHAPIRO  
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SIGNATURE PAGE

The undersigned counsel, Specially Appearing on behalf of UKIAH CANNABIS BUYER'S CLUB, CHERRIE LOVETT, MARVIN LEHRMAN, and MILDRED LEHRMAN, hereby submit the foregoing DEFENDANTS' JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTIONS FOR PRELIMINARY INJUNCTION on February 27, 1998.



SUSAN B. JORDAN  
515 South School Street  
Ukiah, California 95482  
(707) 462-2151

DAVID NELSON  
106 North School Street  
Ukiah, California 95482  
(707) 462-1351

Defendants' Joint Memorandum  
in Opposition to Preliminary Injunction: Case Nos.  
C 98-00085 CRB, C 98-00086 CRB, C 98-00087 CRB,  
C 98-00088 CRB, C98-00089 CRB, C 98-20013 CRB


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SIGNATURE PAGE

The undersigned counsel, Specially Appearing on behalf of UKIAH CANNABIS BUYER'S CLUB, CHERRIE LOVETT, MARVIN LEHRMAN, and MILDRED LEHRMAN, hereby submit the foregoing DEFENDANTS' JOINT NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION (F.R.C.P. 12(b)(1)) and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION (F.R.C.P. 12(b)(1)) on February 27, 1998.

\_\_\_\_\_  
SUSAN B. JORDAN  
515 South School Street  
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SIGNATURE PAGE

The undersigned counsel, Specially Appearing on behalf of SANTA CRUZ CANNABIS BUYERS CLUB, hereby submit the foregoing DEFENDANTS' JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTIONS FOR PRELIMINARY INJUNCTION on February 27, 1998.

GERALD F. DELMEN  
Santa Clara University  
School of Law  
Santa Clara, California 95053  
(408) 554-5729

  
KATE WELLS  
201 Maple Street  
Santa Cruz, California 95060  
(408) 457-1545

Defendants' Joint Memorandum  
in Opposition to Preliminary Injunction; Case Nos.  
C 98-00085 CRB, C 98-00086 CRB, C 98-00087 CRB,  
C 98-00088 CRB, C98-00089 CRB, C 98-20013 CRB



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SIGNATURE PAGE

The undersigned counsel, Specially Appearing on behalf of SANTA CRUZ CANNABIS BUYERS CLUB, hereby submit the foregoing DEFENDANTS' JOINT NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION (F.R.C.P. 12(b)(1)) and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION (F.R.C.P. 12(b)(1)) on February 27, 1998.

*Gerald F. Uelman*

GERALD F. UELMEN  
Santa Clara University  
School of Law  
Santa Clara, California 95053  
(408) 554-5729

\_\_\_\_\_  
KATE WELLS  
201 Maple Street  
Santa Cruz, California 95060  
(408) 457-1545

1 PROOF OF SERVICE BY MAIL

2  
3 The undersigned hereby declares:

4 I am employed in the City of Oakland, County of Alameda, am  
5 over the age of 18 years, and am not a party to the within  
6 action; my business address is 370 Grand Avenue, Suite 3,  
7 Oakland, California, 94610. On February 27, 1998, I served the  
8 attached:

9 DEFENDANTS' JOINT MEMORANDUM  
10 OF POINTS AND AUTHORITIES IN  
11 OPPOSITION TO PLAINTIFF'S  
12 MOTIONS FOR PRELIMINARY INJUNCTION

13 on the parties in said action by placing a true copy thereof,  
14 enclosed in a sealed envelope with postage thereon fully  
15 prepaid, in the United States mail at Oakland, California,  
16 addressed as follows:

17  
18 Mark T. Quinlivan  
19 U.S. Dept. of Justice  
20 910 E Street, N.W.  
21 Washington D.C. 20530

22 I declare under penalty of perjury that the foregoing is  
23 true and correct and that this declaration was executed on  
24 February 27, 1998, at Oakland, California.

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27   
28



1 J. TONY SERRA  
 Pier 5 North  
 2 San Francisco, CA 94111  
 (415) 986-5591  
 3  
 4 Brendan R. Cummings (SBN 193952)  
 2325b Carleton St.  
 Berkeley, CA 94704  
 5 (510) 848-5486  
 6 Attorneys for Defendants  
 CANNABIS CULTIVATORS' CLUB  
 7 and DENNIS PERON

**RECEIVED**

MAR 13 1998

RICHARD W. WIEKING  
 CLERK, U.S. DISTRICT COURT,  
 NORTHERN DISTRICT OF CALIFORNIA

**FILED**

MAR 13 1998

RICHARD W. WIEKING  
 CLERK, U.S. DISTRICT COURT,  
 NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA, )  
 12 )  
 Plaintiff, )

v. )

14 CANNABIS CULTIVATORS' CLUB, )  
 15 and DENNIS PERON, )  
 16 )  
 Defendants. )

17 AND RELATED ACTIONS. )  
 18 )

Nos. C 98-00085 CRB  
 C 98-00086 CRB  
 C 98-00087 CRB  
 ✓ C 98-00088 CRB  
 C 98-00089 CRB  
 C 98-20013 CRB

DECLARATION OF BRENDAN  
 CUMMINGS IN  
 SUPPORT OF MOTION TO DISMISS  
 UNDER THE DOCTRINE  
 OF ABSTENTION

Date: March 24, 1998  
 Time: 2:30 p.m.  
 Courtroom: 8

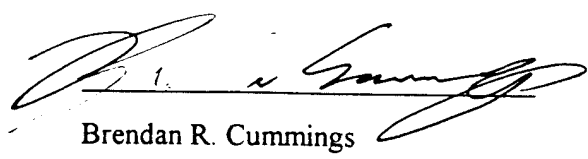
21 I, Brendan R. Cummings, declare:

- 22 1. I am an attorney at law duly licensed to practice before this Court and all California state  
 23 courts. I have personal knowledge of the matters set forth in this Declaration and could  
 24 and would testify competently to them if called upon to do so. I submit this declaration  
 25 in support of Defendants Motion to Dismiss Under the Doctrine of Abstention.  
 26 2. Attached hereto as Exhibit A is a true and correct copy of an order issued on March 9,  
 27 1998 by California Superior Court Judge David Garcia in the case of The People of the  
 28 State of California v. Dennis Peron.

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- 3. Attached hereto as Exhibit B is a true and correct copy of an article entitled "Grass Roots Take Hold of Prop 215" published in The Reporter on March 11, 1998.
- 4. Attached hereto as Exhibit C is a true and correct copy of a letter dated January 22, 1998, sent by San Francisco District Attorney Terence Hallinan to the Chief Justice of the California Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 13<sup>th</sup> day of March, 1998 in Berkeley, California.

  
Brendan R. Cummings

**FILED**  
San Francisco County Superior Court  
MAR 10 1998  
BY: ALAN CARLSON, Clerk  
*[Signature]*

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CALIFORNIA SUPERIOR COURT  
CITY AND COUNTY OF SAN FRANCISCO  
LAW & MOTION DEPARTMENT, ROOM 301

THE PEOPLE OF THE STATE OF )  
CALIFORNIA, ex rel., DANIEL E. )  
LUNGREN as the Attorney General )  
of the State of California, )  
Plaintiff, )  
vs. )  
DENNIS PERON, BETH MOORE, and )  
Does II through XX, )  
Defendants.


NO. 980105  
ORDER DENYING PLAINTIFFS'  
EX PARTE APPLICATION FOR  
ENTRY OF AMENDED ORDER

Plaintiffs' Application for Entry of Amended Order came on for ex parte hearing March 3, 1998. Both Plaintiffs' and Defendants' attorneys were present for the ex parte hearing. The Honorable David A. Garcia was not present for the ex parte hearing, and so the matter was taken under submission pending Judge Garcia's review of Plaintiffs' written application and Defendants' March 3, 1998 written objection. Upon review of these documents, it is hereby Ordered that Plaintiffs' Ex Parte Application for Entry of Amended Order is Denied. Issues

**Ex. A**

1 regarding Defendants' violation of this Court's Reinstated  
2 Preliminary Injunction in light of People v. Peron, regarding  
3 enforcement of that Injunction and provisions relating to  
4 abatement will be addressed on April 3, 1998 at the hearing for  
5 Permanent Injunction. The Court will discuss these issues after  
6 reviewing the evidentiary record of the Defendants' actions,  
7 including Plaintiffs new declarations and evidence in support of  
8 their Motion for Summary Judgment.

9  
10 Dated: 3/9/98

By:   
Honorable David A. Garcia

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ER0138

# THE RECORDER

THE BAY AREA'S LEGAL NEWSPAPER SINCE 1877

## JAMS Exec Faces Heat for Expenses, Shake-up

During major overhaul, CEO Steve Price awarded a contract to his son's employer

By JENNA WARD

As JAMS/Endispute CEO Steve Price continues to reorganize the ranks of the company's upper management, criticism within the company is surfacing about the new leader's management style.

By the end of April, four regional managers and a senior vice president are expected to leave the nation's largest for-

profit ADR provider, while in the next 30 days, Price said JAMS will add yet another top executive, this one in charge of brand image and client experience.

In an interview, Price refused to confirm specific personnel changes, although he defended his reorganization plan as a necessary step to make the financially troubled company profitable.

But along with the changes have come criticism of Price for wastefulness and favoritism. For example, Price recently

See JAMS page 11

**BREAKING EGGS:** "Some people are worried about their jobs," said Price, adding that he recognized that the transition at the top is making him less than popular with some.



STEPHANIE TURNER



SHAWN WALKER

## Grass Roots Take Hold Of Prop 215

Some cities OK pot clubs while the AG, feds aim to shutter them

By KATE RIX

State and federal prosecutors are officially at war with California's medical marijuana clubs, with the prosecution of San Francisco's notorious pot club owner pending alongside a federal effort to shut down several of the clubs that sprouted up in the wake of Proposition 215.

But in the Humboldt County community of Arcata, deep in the heart of California's "emerald triangle," the battle looks more like a partnership.

Arcata Police Chief Mel Brown, a cop for 25 years and a chief in Arcata for eight, personally issues a watermarked card with the medical marijuana patient's photograph, the city's seal, and his own signature to those who have a physician's recommendation to use pot.

"Initially people thought I was crazy or medicated myself," says

Brown, 52. "The spirit of the law here is you have a defense, let's assert it on the corner instead of in court. It's a 10-second contact where before it would take hours."

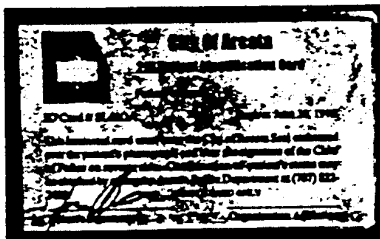
Brown says he's issued about 40 cards. His efforts have been backed by Arcata city officials, who passed an ordinance that essentially authorizes Brown to regulate the legal pot trade.

The law sets guidelines for Arcata's cannabis center to help navigate the tricky areas of Prop 215 involving sales and transportation that have landed other clubs in trouble.

Several other jurisdictions, including San Jose and San Francisco, are crafting their own responses to the pot clubs and their clients.

"The state and federal governments haven't set up [Prop 215]

See CITIES page 2



The spirit of the law here is (if) you have a defense, let's assert it on the corner instead of in court.

— Arcata Police Chief Mel Brown

## Blumenthal v. Drudge, or, Politics v. The Law

By ROBERT SCHMIDT

WASHINGTON — When Sidney Blumenthal filed his libel suit in August 1997, he had just begun a new job as a high-level

Blumenthal briefly made headlines after Independent Counsel Kenneth Starr slapped him with a subpoena that sought accounts of his conversations with

ing today before U.S. District Judge Paul Friedman, could set precedents in cyber-law, its legal aspects may end up overrun by the politics of the Lewinsky mess.

Scaife also is a major donor to Pepperdine University, where Starr is slated to work once he is finished as independent counsel.

Ex. B

ER0139



# Cities Roll Their Own Way on Pot Clubs

Continued from page 1  
implementation guidelines," says Robert Harris, a lobbyist who helped draft Arcata's February 1998 law. "Local governments are creating a white market for medical marijuana."

Brown says his effort is a purely practical one aimed at ensuring that the Humboldt Cannabis Center operates legally. He says he will pack up his card-making machinery if the medical marijuana law is rescinded.

But even state prosecutors — who have vowed to close clubs across the state — say Arcata might be on to something.

Deputy Attorney General John Gordner, who is handling a civil suit against San Francisco's Cannabis Buyers' Club — concedes that Arcata's center is "a reasonably thought-out plan."

In a concession that some pot clubs are worse scofflaws than others, he says: "We'll work with each local jurisdiction and see that the clubs are closed down. But we recognize that there are different kinds of clubs."

Passed in 1996, Prop 215 made it legal for sick Californians and primary caregivers to possess pot for medical use. But vague language in the law didn't address selling or transporting the drug, leaving local governments to hash it out.

First District Court of Appeal Justice J. Anthony Kline recognized this conundrum in December, when that court ruled the San Francisco Cannabis Buyers' Club isn't a "primary caregiver" under Prop 215.

"The 'right to obtain' marijuana is, of course, meaningless, if it cannot legally be satisfied," Kline wrote in a separate opinion concurring with the majority.

## LOCAL EFFORTS

Cities, including San Francisco and San Jose, are now trying to legally satisfy those problems on their own.

In Santa Clara County, prosecutors are

allowing a local cannabis center to stay open under a strict local ordinance passed in 1997.

Assistant District Attorney Karyn Sinunu says the Santa Clara County Medical Cannabis Center has to grow all the pot it distributes on the premises and can't deal with patients who have more than one caregiver.

Sinunu says the center endeared itself to law enforcement by turning in two people last year who had phony prescriptions for pot.

"They've been cooperative and we appreciate that they turned those people in, but we're proceeding with a lot of caution with this," Sinunu says.

Late last month, the San Francisco Board of Supervisors passed a resolution asking

**'Local governments are creating a white market for medical marijuana.'**

— Medical pot lobbyist Robert Harris

public health and law enforcement agencies to come up with a local ordinance that would implement Prop 215.

"The language of 215 is so vague," says Robert Chan, an aide to Supervisor Tom Ammianno, who sponsored the resolution. "Should there be a legal challenge to [the proposition], the supervisor wanted an ordinance so the city will know where it stands."

S.F. Deputy City Attorney Paula Jesson says her office has studied Arcata's ordi-



**TOM AMMIANO:** The San Francisco supervisor wants the city to come up with a local ordinance to implement Prop 215.

nance as well as San Jose's but has not come up with a blueprint yet for San Francisco.

"We're getting as much information as we can to take into consideration," Jesson says. She will meet with Ammianno next week to discuss the ordinance.

## 'PERFECTLY WITHIN THE LAW'

Arcata officials say their ordinance has worked around prohibitions against paying for pot by allowing primary caregivers to be reimbursed only for the cost of cultivation. The ordinance also authorizes transporting pot when the quantity is "reasonably related" to the patient's medical needs.

At the Humboldt Cannabis Center in Arcata, members pay \$20-a-month toward the upkeep of the facility and tend the plants in exchange for anywhere from an eighth of an ounce to an ounce and a half of pot a week.

"As far as we're concerned, we're perfectly within the law," says Jason Browne, a trustee at the center. He adds: "It helps to have an open-minded city government."

Browne says the center's screening process for members is similar to that of Police Chief Mel Brown: They telephone doctors and check their licenses. So far about 75 patients and primary caregivers care for about 60 plants that grow inside the leased, single-story house.

Patients can either receive their pot from a caregiver affiliated with the center or not, Browne says. The center does not itself act

as a caregiver, though, which is different from how the San Francisco club operates.

"My argument all along is no clinics or clubs [as primary caregivers]," says Police Chief Brown. "I'm not going to participate if you're trying to be a caregiver. I'll use all the resources I can to run you out because that's not what the law says."

Harris, the Arcata-based medical pot lobbyist who helped draft his city's ordinance, says the local law may need to be adapted to suit bigger cities. San Francisco, for example, may want to appoint a city-employed liaison to oversee the caregivers and the way marijuana is distributed.

"You need an ordinance to spell out what's lawful, but you've also got to have credibility with law enforcement," says Harris. A nurse practitioner, Harris notes, could oversee who receives medical pot and who gives it out — effectively doing what Mel Brown does in Arcata.

Whether or not San Francisco follows Arcata's model, Chan says the idea will be to create a safeguard against state or federal prosecution — which is precisely what motivated Arcata lawmakers.

"The best thing we can do here is make it easier for people to assert their medical-need defense," says Arcata City Attorney Nancy Diamond. "215 is now law. We have to live with it."

Reporter Kate Rix's e-mail address is [krix@therecorder.com](mailto:krix@therecorder.com)

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**THE RECORDER**  
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Official newspaper by rules of state  
District Court for Northern California,  
Superior Court and San Francisco



TERENCE HALLINAN  
DISTRICT ATTORNEY  
CITY AND COUNTY OF SAN FRANCISCO

January 22, 1998

The Honorable Ronald George  
Chief Justice of the Supreme Court  
of the State of California  
303 Second Street  
South Tower, 8th Floor  
San Francisco, CA 94107

Dear Chief Justice George:

The purpose of this letter is to strongly recommend that the California Supreme Court accept for review the Proposition 215 case, People v. Peron A077630.

This case presents issues that are important throughout California and should be addressed by the Supreme Court.

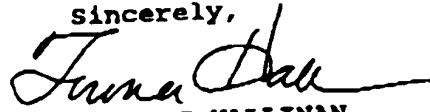
Proposition 215 specifically provides that one of its purposes is to "ensure that patients and their primary caregivers who obtain and use marijuana for medicinal purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." Health and Safety Code 11362.5(B). This section was disregarded by the First District, Division Five decision on December 12, 1997.

In People v. Trippet, 56 Cal.App.4th, 1532, the Attorney General conceded that "practical realities dictate that there be some leeway in applying section 11360 in cases where a Proposition 215 defense is asserted to companion charges." People v. Trippet, 56 Cal.App.4th, 1532, 1550.

There should be some "leeway" when addressing the ability of a primary caregiver to furnish or sell marijuana to patients.

In San Francisco we are working on a Health Department model to establish requirements for any establishment that qualifies as a primary caregiver. It is clear that other jurisdictions are developing their approach to the same issue. I ask the California Supreme Court to accept for review People v. Peron to clarify and finalize the interpretation of Proposition 215.

Sincerely,

  
TERENCE HALLINAN  
District Attorney

Ex. C

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**PROOF OF SERVICE BY MAIL**

I declare that:

I am a citizen of the United States and employed in the city of Berkeley in Alameda County, CA. I am over eighteen years of age and not a party to the attached action. My business address is 2325B Carleton St., Berkeley, CA 94704.

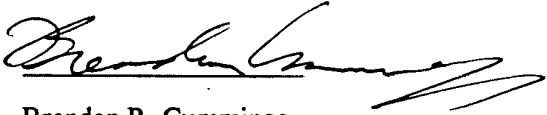
On March 13, 1998, I served the following documents:

- EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME
- DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS UNDER THE DOCTRINE OF ABSTENTION
- ORDER (PROPOSED)
- DECLARATION OF BRENDAN R. CUMMINGS IN SUPPORT OF MOTION TO DISMISS UNDER THE DOCTRINE OF ABSTENTION

on the below parties in said action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Berkeley, CA, addressed as follows:

Mark T. Quinliven  
U.S. Department of Justice  
910 E. Street, N.W.  
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 13, 1998 at Berkeley, CA.

  
Brendan R. Cummings

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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NORTHERN DISTRICT OF CALIFORNIA

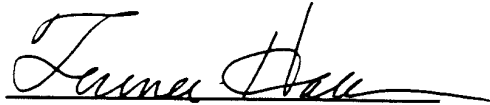
UNITED STATES OF )  
AMERICA, )  
Plaintiff, )  
v. )  
CANNABIS CULTIVATOR'S )  
CLUB et al., )  
Defendants. )

Case Number C98-0085-CRB and  
related cases ✓ C-98-0088 CRB  
MOTION OF SAN FRANCISCO  
DISTRICT ATTORNEY TO FILE  
ADDENDUM TO BRIEF AMICI CURIAE  
NO HEARING REQUESTED

The District Attorney of San Francisco hereby moves for permission to file an addendum to its previously filed brief amici curiae in this action and related cases, in order to assist the court in deciding this case. The District Attorney of San Francisco prays that this Court issue an order granting this motion and accepting the attached addendum.

DATED: April 13, 1998

Respectfully Submitted,



TERENCE HALLINAN  
San Francisco District  
Attorney  
850 Bryant St. 3d Floor  
San Francisco CA 94103  
(415) 553-1752

ER0143



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U.S. DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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10 UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA, )  
 )  
 14 Plaintiff, )  
 )  
 15 v. )  
 )  
 16 CANNABIS CULTIVATOR'S CLUB; )  
 and DENNIS PERON, )  
 )  
 17 Defendants. )  
 )  
 18 AND RELATED ACTIONS )  
 19

Nos. C 98-0085 CRB  
 C 98-0086 CRB  
 C 98-0087 CRB  
 C 98-0088 CRB  
 C 98-0089 CRB  
 C 98-0245 CRB

PLAINTIFF'S CONSOLIDATED REPLY  
 IN SUPPORT OF MOTIONS FOR  
 PRELIMINARY INJUNCTIONS; AND  
 OPPOSITION TO DEFENDANTS'  
 MOTION TO DISMISS

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27 Plaintiff's Cons. Reply in Support of Motions for Prel. Inj.;  
 and Opposition to Defendants' Motion to Dismiss  
 Case Nos. C 98-0085 CRB; C 98-0086 CRB; C 98-0087 CRB  
 28 C 98-0088 CRB; C 98-0089 CRB; C 98-0245 CRB

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and Opposition to Defendants' Motion to Dismiss  
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27	Plaintiff's Cons. Reply in Support of Motions for Prel. Inj.;	
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1 **STATEMENT**

2 In our opening memoranda, the United States demonstrated that defendants' ongoing  
3 manufacture and distribution of marijuana, and possession of marijuana with the intent to  
4 manufacture and distribute the substance, constitute plain and unambiguous violations of the  
5 Controlled Substances Act (the "Act"), 21 U.S.C. §§ 841(a)(1); 846; 856(a)(1). We further  
6 demonstrated that where, as here, defendants' unlawful activities are in direct defiance of an Act of  
7 Congress, irreparable injury and harm to the public are presumed. We therefore established that  
8 the United States has more than demonstrated "a combination of probable success on the merits  
9 and the possibility of irreparable harm," the first test for the issuance of a preliminary injunction in  
10 the Ninth Circuit. See Miller v. California Pacific Medical Center, 19 F.3d 449, 456 (9th Cir.  
11 1994) (en banc).

12 In this consolidated reply in support of our motions for preliminary injunction and  
13 opposition to defendants' motion to dismiss, we respond to each of the issues raised by defendants  
14 in their various memoranda. As we demonstrate below, defendants have offered nothing to alter  
15 our showing that the United States is likely to succeed on the merits of these actions, and that the  
16 other factors weigh in favor of injunctive relief. Accordingly, this Court should enter the proposed  
17 injunction and judgment in favor of the United States. See United States v. Odessa Union  
18 Warehouse Co-op, 833 F.2d 172, 175 (9th Cir. 1987) ("Once Congress has decided the order of  
19 priorities in a given area, it is for the courts to enforce them when asked.").

20 **ARGUMENT**

21 **I. DEFENDANTS' JURISDICTIONAL CHALLENGE TO THE INSTANT ACTIONS**  
22 **IS MERITLESS**

23 In their joint motion to dismiss, defendants argue that this Court lacks subject matter  
24 jurisdiction because the Controlled Substances Act is not applicable to their activities. Defendants  
25 assert that their activities "are purely intrastate in nature," and that, therefore, the government  
26 "must establish that defendants' intrastate activities are substantially related to interstate

1 commerce" in order for Congress to lawfully regulate these activities. Memorandum of Points and  
2 Authorities in Support of Defendants' Motion to Dismiss ("Def. Mem.") at 4. This contention is  
3 squarely at odds with binding Supreme Court and Ninth Circuit authority.

4 1. In United States v. Lopez, 115 S. Ct. 1624 (1995), the Supreme Court reaffirmed the  
5 cardinal principle that, "where a general regulatory statute bears a substantial relation to  
6 commerce, the *de minimis* character of individual instances arising under that statute is of no  
7 consequence." Id. at 1629 (quotation omitted). Stated differently, "[w]here the class of activities  
8 is regulated and that class is within the reach of federal power, the courts have no power 'to excise,  
9 as trivial, individual instances' of the class." Perez v. United States, 402 U.S. 146, 154 (1971).  
10 See also United States v. Smaldone, 485 F.2d 1333, 1342 (10th Cir. 1973) ("[A]ctivities within a  
11 regulated class of activities which do not exceed the reach of federal power under the Commerce  
12 Clause need not be shown, in each individual case, to affect interstate commerce."), cert. denied,  
13 416 U.S. 936 (1974).

14 The Supreme Court has also emphasized that Congress has the power "to declare that an  
15 entire class of activities affects interstate commerce." Maryland v. Wirtz, 392 U.S. 183, 192  
16 (1968). In such circumstances, "[t]he only question for the courts then is whether the class is  
17 within the reach of the federal power." Id. at 192-93. See also United States v. Darby, 312 U.S.  
18 100, 120-21 (1941) (where "Congress itself has said that a particular activity affects the  
19 commerce," the only function of a court "[i]n passing on the validity of legislation \* \* \* is to  
20 determine whether the particular activity regulated or prohibited is within the reach of federal  
21 power").

22 Here, in enacting the Controlled Substances Act, Congress made detailed findings that the  
23 intrastate manufacture, distribution, and possession of controlled substances, as a class of  
24 activities, "have a substantial and direct effect upon interstate commerce." 21 U.S.C. § 801(3). In  
25 particular, Congress found that, "after manufacture, many controlled substances are transported in  
26

1 interstate commerce, id. § 801(3)(A); that "controlled substances distributed locally usually have  
2 been transported in interstate commerce immediately before their distribution," id. § 801(3)(B);  
3 and that "controlled substances possessed commonly flow through interstate commerce  
4 immediately prior to such possession." Id. § 801(3)(C). Congress further found that the intrastate  
5 traffic in controlled substances: "contribute[s] to swelling the interstate traffic in such substances,"  
6 id. § 801(4); "cannot be differentiated from controlled substances manufactured and distributed  
7 interstate," 801(5); and that "[f]ederal control of the intrastate incidents of the traffic in controlled  
8 substances is essential to the effective control of the interstate incidents of such traffic." Id. §  
9 801(6).

10 Congress therefore has found that, as a class of activities, the intrastate manufacture,  
11 distribution, and possession of controlled substances affect interstate commerce. Based on these  
12 findings, the Ninth Circuit has expressly rejected contentions that individualized proof of an  
13 interstate nexus is required in cases alleging violations of the Controlled Substances Act. In United  
14 States v. Visman, 919 F.2d 1390 (9th Cir. 1990), cert. denied, 502 U.S. 969 (1991), the defendant  
15 contended that the federal jurisdiction was lacking in his case because there was no reasonable  
16 basis to assume that "marijuana plants found rooted in the soil" affect interstate commerce. The  
17 Ninth Circuit disagreed, holding that the "local criminal cultivation of marijuana is within a class of  
18 activities that adversely affects interstate commerce." Id. at 1393 (internal citation omitted).  
19 Likewise, in United States v. Montes-Zarate, 552 F.2d 1330 (9th Cir. 1977), cert. denied, 435  
20 U.S. 947 (1978), the Ninth Circuit held that, because the Controlled Substances Act was a valid  
21 exercise of Congress' Commerce Clause authority, "no proof of interstate nexus is required in  
22 order to establish jurisdiction." Id. at 1331.<sup>1</sup>

23  
24 <sup>1</sup> The cases cited by defendants -- Stafford v. Wallace, 258 U.S. 495 (1922), and United States  
25 v. Rodriguez-Camacho, 468 F.2d 1220, 1221-22 (9th Cir. 1972), cert. denied, 410 U.S. 985  
26 (1973) -- are not to the contrary. These cases merely stand for the proposition that, as a general  
(continued...)



1 Every other court of appeals to have considered this question is in agreement. In United  
2 States v. Genao, 79 F.3d 1333 (2d Cir. 1996), for example, the Second Circuit held that,  
3 "[b]ecause narcotics trafficking represents a type of activity that Congress reasonably found  
4 substantially affected interstate commerce, the actual effect that each drug conspiracy has on  
5 interstate commerce is *constitutionally irrelevant*." Id. at 1336 (emphasis supplied). Similarly, in  
6 United States v. Lopez, 459 F.2d 949 (5th Cir.), cert. denied, 409 U.S. 878 (1972), the Fifth  
7 Circuit held that, because Congress has determined that the intrastate traffic in controlled  
8 substances burdens interstate commerce, "courts have no power 'to excise, as trivial, individual  
9 instances' of the class. The contention that a court has this power in Commerce Clause cases has  
10 been put to rest." Id. at 952 (quoting Perez, 402 U.S. at 154). See also United States v. Leshuk,  
11 65 F.3d 1105, 1112 (4th Cir. 1995); United States v. Sawyers, 902 F.2d 1217, 1221 (6th Cir.  
12 1990), cert. denied, 501 U.S. 1253 (1991).

13 Defendants' assertion that they can demonstrate that their conduct does not affect interstate  
14 commerce, therefore, is "constitutionally irrelevant." Genao, 79 F.3d at 1336. Because Congress  
15 has expressly found that the intrastate manufacture and distribution of controlled substances is  
16 within a class of activities that have a substantial effect on interstate commerce, this Court has no  
17 authority to determine, as a factual matter, whether defendants' individual activities affect interstate  
18  
19

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20 <sup>1</sup>(...continued)  
21 matter, a court should not "substitute its judgment for that of Congress \* \* \* unless the relation of  
22 the subject to interstate commerce and its effect upon it are clearly nonexistent." Stafford, 258  
23 U.S. at 521. Neither case stands for the proposition that a court may conduct a factual inquiry to  
24 determine whether a particular activity burdens interstate commerce.

25 Nor does the decision in Conant v. McCaffrey, 172 F.R.D. 681 (N.D. Cal. 1997), in any  
26 way call these decisions into question. Indeed, the Conant court stated that "neither the Court nor  
27 plaintiffs dispute the government's authority to enforce federal drug laws \* \* \* ." Id. at 697.

1 commerce.<sup>2</sup> Rather, the only question relevant to this Court's inquiry (to the extent it is even  
2 raised by defendants) is whether, as a general matter, Congress' determination that intrastate drug  
3 trafficking affects interstate commerce is constitutionally permissible under the Commerce Clause.  
4 As we demonstrated in our opening memoranda, this question has been settled by the Ninth  
5 Circuit. See, e.g., United States v. Bramble, 103 F.3d 1475, 1479-80 (9th Cir. 1996); United  
6 States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), cert. denied, 117 S. Ct. 1012 (1997); United  
7 States v. Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996); United States v. Staples, 85 F.3d 461, 463  
8 (9th Cir. 1996), cert. denied, 117 S. Ct. 318 (1996); Visman, 919 F.2d at 1393; Montes-Zarate,  
9 552 F.2d at 1331-32; Rodriguez-Camacho, 468 F.2d at 1221-22.<sup>3</sup>

10 2. Defendants fare no better in arguing that, in contrast to the cases discussed above,  
11 federal jurisdiction is defeated here because defendants' activities allegedly "are sanctioned by  
12

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13 <sup>2</sup> Even if this Court had authority to engage in a factual review of this issue, defendants have  
14 entirely failed to rebut the government's detailed evidentiary showing that *each* of the six clubs at  
15 issue has been engaged in the sale of marijuana claimed by them to be grown in Mexico.  
16 *Cannabis Cultivators Club*: Declaration of Mark T. Quinlivan ¶ 2 & Exhibit 1; Declaration of  
17 Special Agent Brian Nehring ¶ 4; Declaration of Special Agent Carolyn Porras Dec. ¶¶ 4, 17;  
18 *Flower Therapy Medical Marijuana Club*: Declaration of Special Agent Brian Nehring ¶ 16;  
19 *Oakland Cannabis Buyers' Cooperative*: Declaration of Special Agent Bill Nyfeler ¶¶ 4, 16;  
20 Declaration of Special Agent Carolyn Porras ¶ 4; *Ukiah Cannabis Buyer's Club*: Declaration of  
Special Agent Brian Nehring Dec. ¶ 4; Declaration of Special Agent Bill Nyfeler ¶ 4; *Marin*  
*Alliance for Medical Marijuana*: Declaration of Special Agent Carolyn Porras ¶ 7; *Santa Cruz*  
*Cannabis Buyer's Club*: Declaration of Special Agent Brian Nehring ¶ 4. This unrebutted  
evidentiary showing refutes defendants' assertion that "all of the alleged activity of the Defendants  
is completely intrastate, without any impact on interstate commerce." Def. Mem. at 2.

21 <sup>3</sup> Every other court of appeals is in agreement. See United States v. Edwards, 98 F.3d 1364,  
22 1369 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1437 (1997); United States v. Lerebours, 87 F.3d  
23 582, 584-85 (1st Cir. 1996), cert. denied, 117 S. Ct. 694 (1997); Proyect v. United States, 101  
24 F.3d 11, 13-14 (2d Cir. 1996), cert. denied, 510 U.S. 822 (1999); Leshuk, 65 F.3d at 1112; Lopez,  
459 F.2d at 951-53; United States v. Tucker, 90 F.3d 1135, 1139-41 (6th Cir. 1996); United  
25 States v. Westbrook, 125 F.3d 996, 1008-10 (7th Cir.), cert. denied, 118 S. Ct. 643 (1997);  
26 United States v. Bell, 90 F.3d 318, 321 (8th Cir. 1996); United States v. Wacker, 72 F.3d 1453,  
1475 (10th Cir. 1995), cert. denied, 117 S. Ct. 136 (1996); United States v. Jackson, 111 F.3d  
101, 102 (11th Cir.), cert. denied, 118 S. Ct. 200 (1997).

1 California Health & Safety Code §11362.5." Def. Mem. at 4-5. As we set forth in our opening  
2 memoranda, it is well established that the determination of whether the Controlled Substances Act  
3 has been violated is "a federal issue to be determined in federal courts," and is not dependent on  
4 state law. United States v. Rosenberg, 515 F.2d 190, 198 n.14 (9th Cir.), cert. denied, 423 U.S.  
5 1031 (1975). In Rosenberg, for example, a doctor contended that federal jurisdiction was lacking  
6 because his prescriptions of controlled substances were within the legal limits established by  
7 California law. The Ninth Circuit rejected this contention that "the Constitution somehow requires  
8 that the state of California must first find that [a defendant's] acts were unauthorized before federal  
9 prosecution is permissible." Id. In pertinent part, the court held that "[i]f the Constitution allows  
10 the federal government to regulate the dispensation of drugs, it allows it to do so *in every case*,  
11 and not just where more than a certain quantity of drugs are involved. \* \* \* The question of  
12 whether federal criminal laws have been violated is a federal issue to be determined in federal  
13 courts." Id. (emphasis supplied). Likewise, in In re Grand Jury Proceedings, 801 F.2d 1164 (9th  
14 Cir. 1986), the Ninth Circuit rejected a physician's argument that grand jury inquiry into alleged  
15 dispensation of anabolic steroids, of which he was a target, violated the Tenth Amendment  
16 "because control of medical practice is beyond the power of the federal government." Relying on  
17 Rosenberg, the Ninth Circuit held that "the Commerce Clause empowers the federal government to  
18 regulate prescription drugs," and that, therefore, "a physician may not defend a federal prosecution  
19 for improper drug prescription practices on Tenth Amendment grounds." Id. at 1169-70. See also  
20 Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 291-92 (1981) ("The  
21 Court long ago rejected the suggestion that Congress invades areas reserved to the States by the  
22 Tenth Amendment simply because it exercises its authority under the Commerce Clause in a  
23 manner that displaces the States' exercise of their police powers."); Kim, 94 F.2d at 1250 n.4  
24 (rejecting argument that Controlled Substances Act intrudes into area traditionally regulated by the  
25 states).

1 Hence, the passage of Proposition 215 in California in no way undermines the  
2 constitutionality of the Controlled Substances Act as applied to defendants.<sup>4</sup>

3 3. Finally, while not determinative of the issues before the Court, we note in passing that  
4 defendants' assertion that their conduct is sanctioned by Proposition 215 does not reflect the  
5 current state of California law. In People v. Peron, 59 Cal.App.4th 1383, 70 Cal.Rptr.2d 20  
6 (1997), review denied, the California Court of Appeal determined that, even following the passage  
7 of Proposition 215, "one who sells, furnishes, or gives away marijuana to a patient or a qualified  
8 primary caregiver authorized to acquire it for the patient's physician-approved medicinal use,  
9 violates the law. Those sellers have no defense because of section 11362.5 to charges of violation  
10 of sections 11359 or 11360(a)." Id. at 1395, 70 Cal.Rptr.2d at 28. The California Court of  
11 Appeal further held that:

12 A person purchasing marijuana for medicinal purposes cannot simply designate seriatim,  
13 and on an ad hoc basis \* \* \* sales centers such as the Cannabis Buyer's Club as the patient's  
14 'primary caregiver.'

14 \* \* \* \*

15 Respondent's enterprise is simply a commercial one, open to the public, and one source of  
16 supply for any patient who chooses in the patient's discretion to shop there. Respondent's  
17 cannot be the 'consistent['] primary caregiver's of a patient's health or safety merely because  
18 they condition their marijuana sales to thousands of purchasers on receipt from them of a  
19 rote designation as such, tracking the language of section 11362.5.

18 \* \* \* \*

19 Section 11362.5 provides a defense against prosecution only of patients and their primary  
20 caregivers and only for two criminal offenses regarding marijuana: section 11357  
21 (possession) and section 11358 (cultivation). Sale and possession for sale of marijuana  
22 remain prohibited \* \* \* regardless of whether the seller obtains a net profit therefrom.

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23  
24 <sup>4</sup> Indeed, an argument by the proponents of Proposition 215 contained in the official ballot  
25 pamphlet recognized that "federal laws prevent the sale of marijuana, and a state initiative cannot  
26 overrule those laws." Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters,  
27 Gen Elec. (Nov. 5, 1996) (quoted in People v. Peron, 59 Cal.App.4th 1383, 1393, 70 Cal.Rptr.2d  
28 20, 27 (1997)).

1 | Id. at 1396-97, 1400, 70 Cal.Rptr.2d at 29-30, 31. On February 25, 1998, the California Supreme  
2 | Court unanimously denied the respondents' petitions for review. Consequently, there is no  
3 | justification for defendants' assertions that their activities are sanctioned by California law.

4 | **II. PULLMAN ABSTENTION IS INAPPROPRIATE IN THIS CONTEXT**

5 | Defendants next contend that the Court should abstain from hearing the government's  
6 | motions for preliminary injunctive relief "until the courts of the State of California have had an  
7 | opportunity more clearly to define what activity state law permits, in order to minimize any conflict  
8 | between state and federal law." Def. Mem. at 12 (citing Railroad Comm. of Texas v. Pullman Co.,  
9 | 312 U.S. 496 (1941)). The Court should reject this entreaty. Pullman abstention is entirely  
10 | inappropriate in the context of these cases.

11 | The Supreme Court has written that, as a general matter:

12 | The doctrine of abstention \* \* \* is an extraordinary and narrow exception to the duty of a  
13 | District Court to adjudicate a controversy properly before it. Abdication of the obligation  
14 | to decide cases can be justified under this doctrine only in the exceptional circumstances  
15 | where the order to the parties to repair to the state court would clearly serve an important  
16 | countervailing interest.

15 | Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (quotation  
16 | omitted). Thus, under the doctrine of Pullman abstention, "federal courts should abstain from  
17 | decision when difficult and unsettled questions of state law must be resolved before a substantial  
18 | federal question can be decided." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 236 (1984).<sup>5</sup>

19 | Defendants' request that the Court invoke Pullman abstention fails for at least three  
20 | reasons. First, as set forth above, the instant actions involve the interpretation and application of  
21 | federal law. In these circumstances, whatever the state of California law, the outcome of the

22 |

23 | <sup>5</sup> The Ninth Circuit has identified three criteria for the application of Pullman abstention:  
24 | (1) the issue must touch a sensitive area of social policy into which the federal courts should not  
25 | enter unless there is no alternative to adjudication; (2) a definitive ruling on the state issues by a  
26 | state court could obviate the need for constitutional adjudication by the federal court; and (3) the  
27 | proper resolution of the potentially determinative issue is uncertain. Kollsman v. City of Los  
28 | Angeles, 737 F.2d 830, 833 (9th Cir. 1984), cert. denied, 461 U.S. 1211 (1985).

27 | Plaintiffs Cons. Reply in Support of Motions for Prel. Inj.;  
and Opposition to Defendants' Motion to Dismiss  
Case Nos. C 98-0085 CRB; C 98-0086 CRB; C 98-0087 CRB  
28 | C 98-0088 CRB; C 98-0089 CRB; C 98-0245 CRB

1 instant actions will be the same. If, as is now the case, the California courts adhere to the decision  
2 in Peron, there is no possible conflict between federal and state law regarding the cultivation and  
3 distribution of marijuana by the defendants. If, on the other hand, the decision in Peron were to be  
4 someday overruled, and the manufacture and distribution of marijuana by “cannabis clubs” allowed  
5 under state law, the Controlled Substances Act still would apply. See, e.g., Hodel, 452 U.S. at  
6 291-92; Kim, 94 F.2d at 1250 n.4; Rosenberg, 515 F.2d at 198 n.14. Hence, these actions are  
7 singularly inappropriate for Pullman abstention.

8         Second (and relatedly), even if California law somehow could be interpreted to vitiate the  
9 requirements of the Controlled Substances Act as to defendants, it would implicate the Supremacy  
10 Clause. See United States v. Leal, 75 F.3d 219, 227 (6th Cir. 1996) (to the extent “a state law  
11 purported to eliminate” a duty imposed by the federal Controlled Substances Act, “it would be  
12 void under the Supremacy Clause”). In Knudsen Corp. v. Nevada State Dairy Comm’n, 676 F.2d  
13 374 (9th Cir 1982), the Ninth Circuit held that Pullman abstention is inappropriate for preemption  
14 questions grounded in the Supremacy Clause. In pertinent part, the court held that, “[a]lthough  
15 preemption has its doctrinal base in the Constitution, the question is largely one of determining the  
16 compatibility of a state and a federal statutory scheme. No constitutional issues of substance are  
17 presented.” Id. See generally 17 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper,  
18 17A *Federal Practice and Procedure* § 4242, at 33-34 & n.13 (2d ed. 1988) (Pullman abstention  
19 is inappropriate in Supremacy Clause cases).

20         Finally, even assuming the dubious proposition that California law is somehow implicated  
21 here, it cannot be said to be uncertain. Uncertainty for purposes of Pullman abstention means that  
22 a federal court cannot predict with any confidence how the state’s highest court would decide the  
23 issue of state law.” Pearl Investment Co. v. City and County of San Francisco, 774 F.2d 1460,  
24 1465 (9th Cir. 1985), cert. denied, 476 U.S. 1170 (1986). In view of the California Court of  
25 Appeal’s decision in Peron, and the California Supreme Court’s denial of the respondents’ petition  
26

1 for review of this decision, the resolution of California law is not uncertain. See Intex Plastics  
2 Sales Co. v. United Nat'l Ins. Co., 23 F.3d 254, 261 (9th Cir. 1994) (on questions of state law,  
3 federal courts are bound to "follow an intermediate appellate court's decision unless there is  
4 compelling evidence that the state supreme court would decide the issue differently. This is  
5 particularly true where \* \* \* the California Supreme Court has denied review.").

6 **III. THERE IS NO FUNDAMENTAL RIGHT TO OBTAIN MARIJUANA FOR**  
7 **ALLEGED MEDICAL PURPOSES<sup>6</sup>**

8 Turning to defendants' opposition to the government's motions for preliminary injunction,  
9 defendants' primary contention appears to be that substantive due process bars the United States  
10 from enforcing the Controlled Substances Act against them. Joint Memorandum in Opposition to  
11 Preliminary Injunction ("Joint Mem.") at 4. In particular, defendants assert that there exists a  
12 fundamental, constitutional right "to obtain cannabis, with a doctor's recommendation, for  
13 treatment of painful and life-threatening medical conditions." Id. at 11. As we demonstrate below,  
14 there is no merit to this contention.

15 1. Defendants assert a fundamental right to be free "from the federal government's  
16 interference with their right legally to obtain cannabis, with a doctor's recommendation, for  
17 treatment of painful and life-threatening medical conditions." Joint Mem. at 11. Noting the  
18 Supreme Court's recognition that "[m]any of the rights and liberties protected by the Due Process  
19 Clause sound in personal autonomy," Washington v. Glucksberg, 117 S. Ct. 2258, 2271 (1997),  
20 defendants contend the asserted right to obtain cannabis for medical use is derived from an  
21 individual's fundamental liberty interests in "receiv[ing] palliative treatment for a painful medical  
22 condition;" in "provid[ing] care for oneself;" and in "preserving his or her life." Id. at 6-11.

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23 <sup>6</sup> Defendants do not appear to assert a general right to obtain or distribute marijuana, nor  
24 could they. See, e.g., United States v. Fry, 787 F.2d 903, 905 (4th Cir. 1986), cert. denied, 479  
25 U.S. 861 (1986); United States v. Fogarty, 692 F.2d 542, 547 (8th Cir. 1982), cert. denied, 460  
26 U.S. 1040 (1983); United States v. Kiffer, 477 F.2d 349, 352 (2d Cir. 1972), cert. denied, 414  
U.S. 831 (1973).

1 Defendants argue that "the history and traditions of Substantive Due Process make clear that  
2 bodily integrity is an area of fundamental importance," and that "[t]he interests protected, relief  
3 from pain, self care, and preservation of life, are so ingrained in our nation's traditions and are so  
4 firmly rooted in our concepts of ordered liberty that they are fundamental." Joint Mem. at 11.

5         2. Defendants' assertion of a fundamental right to obtain marijuana for medical purposes  
6 cannot withstand scrutiny. Defendants have failed to demonstrate, as they must, that the use of  
7 marijuana for medical purposes is so "deeply rooted in this Nation's history and tradition" or  
8 "implicit in the concept of ordered liberty" as to be deemed fundamental. Glucksberg, 117 S. Ct.  
9 at 2267. As a preliminary matter, defendants cannot point to a single federal or state court which  
10 has upheld such a claim. As the Supreme Court indicated in Glucksberg, the absence of any such  
11 authority counsels against the creation of a new substantive due process right. 117 S. Ct. at 2269  
12 (quoting Reno v. Flores, 507 U.S. 292, 303 (1993), for proposition that "[t]he mere novelty of  
13 such a claim is reason enough to doubt that 'substantive due process' sustains it").

14         In contrast, the Washington Supreme Court has recently rejected a nearly identical claim to  
15 that proffered by defendants here. Seeley v. State, 132 Wash.2d 776, 940 P.2d 604 (Wash. 1997).  
16 In Seeley, a terminally ill cancer patient who preferred smoking marijuana to control the side  
17 effects of chemotherapy contended he had a constitutionally protected interest in having his  
18 physician prescribe marijuana for medical treatment. The Washington Supreme Court rejected this  
19 claim. After reviewing several decisions holding held that a patient does not have a constitutional  
20 right to any particular form of treatment or medication, the Court determined that, "[A]lthough the  
21 respondent is facing a terminal illness, he is not part of a suspect class nor does he have a  
22 fundamental right to have marijuana prescribed as his preferred treatment over the legitimate  
23 objections of the state." Id. at 794, 940 P.2d at 613.

24         Moreover, as the Seeley Court recognized, federal courts, including the Ninth Circuit, have  
25 consistently held that a patient does not have a substantive due process right to any particular form  
26



1 of treatment. The leading cases are Rutherford v. United States, 616 F.2d 455 (10th Cir.), cert.  
2 denied, 449 U.S. 937 (1980), and Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980). In  
3 Rutherford, a group of terminally ill cancer patients brought suit alleging, *inter alia*, that they had a  
4 constitutional right of privacy to obtain and use laetrile. On remand from the Supreme Court, the  
5 Tenth Circuit rejected this claim. In pertinent part, the court of appeals held that, "[T]he decision  
6 by the patient whether to have a treatment or not is a protected right, *but his selection of a*  
7 *particular treatment, or at least a medication, is within the area of governmental interest in*  
8 *protecting public health.*" Id. at 457 (emphasis supplied).

9 The Ninth Circuit adopted this reasoning in Carnohan. In that case, as in Rutherford, the  
10 plaintiff had brought a declaratory judgment action seeking to secure the right to obtain and use  
11 laetrile for the prevention of cancer. Relying on Rutherford, the Ninth Circuit declined to create  
12 such a right, holding that, "Constitutional rights of privacy and personal liberty do not give  
13 individuals the right to obtain laetrile free of the lawful exercise of the government's police power.  
14 Id. at 1122.

15 This prevailing view has been adopted by virtually every other federal court to have  
16 considered the issue. See, e.g., Sammon v. New Jersey Bd. of Medical Examiners, 66 F.3d 639,  
17 645 n.10 (3d Cir. 1995) ("In the absence of extraordinary circumstances, state restrictions on a  
18 patient's choice of a particular treatment also have been found to warrant only rational basis  
19 review."); Mitchell v. Clayton, 995 F.2d 772, 775-76 (7th Cir. 1993) ("[A] patient does not have a  
20 constitutional right to obtain a particular type of treatment or to obtain treatment from a particular  
21 provider if the government has reasonably prohibited that type of treatment or provider"); United  
22 States v. Vital Health Products, Ltd., 786 F. Supp. 761, 777 (E.D. Wis. 1992) ("Even under the  
23 string of Supreme Court cases which have held that individuals have various rights of privacy,  
24 Congress still has the authority to limit a patient's choice of medication."), aff'd, 985 F.2d 563 (7th  
25 Cir. 1993) (Mem.); Kulsar v. Ambach, 598 F. Supp. 1124, 1126 (W.D.N.Y. 1984) ("The  
26

1 constitutional right of privacy does not give individuals the right to obtain a particular medical  
2 treatment 'free of the lawful exercise of the government police power.'" (quoting Carnohan, 616  
3 F.2d at 1122)). But see Andrews v. Ballard, 498 F. Supp. 1038, 1052-53 (S.D. Tex. 1980)  
4 (finding a constitutionally protected right to acupuncture treatments).<sup>7</sup>

5 These precedents foreclose recognition of a constitutionally protected interest in obtaining  
6 marijuana for medical purposes.

7 3. Nor does the fact that defendants predicate their claim upon general principles of  
8 personal autonomy, including the relief of pain, provision of self care, and preservation of life, in  
9 any way change this analysis. "That many of the rights and liberties protected by the Due Process  
10 Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all  
11 important, intimate, and personal decisions are so protected." Glucksberg, 117 S. Ct. at 2271.  
12 Thus, although defendants quote extensively from the Supreme Court's decision in Glucksberg in  
13 asserting their alleged right to obtain marijuana for medical purposes, the Supreme Court's decision  
14 in that case strongly supports rejection of the claimed right. In Glucksberg, the Supreme Court  
15 unanimously determined that terminally ill patients do not have a constitutionally protected right to  
16 be free from physical pain by virtue of physician assisted suicide. Id. at 2267-75. By a parity of  
17 reasoning, plaintiffs' claimed right to obtain marijuana for medical purposes, including relief from  
18 pain, must also be rejected. See generally Collins v. Harker Heights, 503 U.S. 115, 125 (1992)  
19 ("We always been reluctant to expand the concept of substantive due process because guideposts  
20 for responsible decisionmaking in this unchartered area are scarce and open-ended.").

21 4. Defendants also have failed to "carefully describe" the asserted fundamental liberty  
22 interest at issue. In Glucksberg, the Supreme Court stated that a primary feature of substantive

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23 <sup>7</sup> The California Supreme Court also has reached the same conclusion. In People v. Privitera,  
24 23 Cal.3d 697, 708-09, 591 P.2d 919, 925-26, 153 Cal.Rptr. 431, 437-38 (Cal.), cert. denied, 444  
25 U.S. 949 (1979), the California Supreme Court found no merit in the argument that the California  
26 statutory prohibition on the sale and prescription of laetrile violated the due process clauses of the  
federal or California constitutions. .

1 | due process analysis is the requirement that there be a "careful description" of the asserted  
2 | fundamental liberty interest. Id. at 2268. This is because the Court must "exercise the utmost care  
3 | whenever we are asked to break new ground in the field, lest the liberty protected by the Due  
4 | Process Clause be subtly transformed into the policy preferences of the members of this Court."  
5 | Id. at 2268 (internal quotation omitted).

6 |         Here, defendants contend that the right which they assert is "to obtain cannabis, with a  
7 | doctor's recommendation, for treatment of painful and life-threatening medical conditions," and  
8 | that this right is derived from, among other things, the "fundamental liberty interest in physician  
9 | recommended treatment to alleviate physical pain in the face of governmental restraint." Joint  
10 | Opp. at 9. See also id. at 11 (referring to the liberty interests in relief from pain, self care, and  
11 | preservation of life). Yet the category described is inherently unstable. If, as they assert,  
12 | defendants' liberty interest is in receiving "physician recommended treatment" to relieve pain,  
13 | provide self care, and preserve life, there is no way to limit this right to the obtaining of marijuana.  
14 | Rather, under defendants' theory, the asserted right must be interpreted to allow for the receipt of  
15 | *any* treatment which has been recommended by a physician. As we have demonstrated above, any  
16 | such assertion is squarely refuted by established precedent. See, e.g., Carnohan, 616 F.2d at 1122;  
17 | Rutherford, 616 F.2d at 457.

18 |         Defendants attempt to remedy this problem by asserting that they "can prove that cannabis  
19 | is unique in its ability to relieve these symptoms." Joint Mem. at 10. Any such factual inquiry  
20 | would engage the Court, improperly, in a detailed fact inquiry into the medical efficacy of  
21 | marijuana in order to determine whether a substantive due process right to obtain marijuana for  
22 | medical purposes existed. That is not the object or design of fundamental rights analysis. Indeed,  
23 | any such inquiry would effectively be an end-run around the statutory and regulatory scheme  
24 | designed by Congress to determine whether drugs are safe, effective, and reliable. As we  
25 | demonstrated in our opening memoranda, every court of appeals to have considered the issue has  
26 |

1 held that the decision as to whether or not marijuana has medical value must be presented first to  
2 the Administrator of the Drug Enforcement Administration ("DEA") in the context of a  
3 rescheduling petition under 21 U.S.C. § 811(a), with review in a court of appeals.<sup>8</sup>

4 Similarly, although defendants assert that the right which they propose is for the "treatment  
5 of painful and life-threatening medical conditions, Joint Opp. at 11, the category again cannot be  
6 so limited. Because defendants purport to represent all the thousands of "members" at the six  
7 clubs at issue, their challenge to the application of the Controlled Substances Act to them on  
8 substantive due process grounds must be deemed a facial challenge. This is a stringent test. "A  
9 facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully,  
10 since the challenger must establish that no set of circumstances exists under which the Act would  
11 be valid. The fact that the \* \* \* Act might operate unconstitutionally under some conceivable set  
12 of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'over-  
13 breadth' doctrine outside the limited context of the First Amendment." United States v. Salerno,  
14 481 U.S. 739, 745 (1987). Here, defendants do not assert that all of their customers suffer from  
15 painful conditions or life-threatening illnesses, nor could they. See generally Cal. Health & Safety  
16 Code § 11362.5(b)(1)(A) (among conditions for which patient may use marijuana is "any other  
17 illness for which marijuana provides relief").

18 In sum, defendants have failed to provide a "careful description" of the asserted  
19 fundamental liberty interest which they assert.

20 5. Finally, assuming *arguendo* that a viable legal argument exists for the creation of the  
21 novel fundamental right that defendants seek to advance, these defendants lack standing to make  
22 any such argument. The only persons with standing to raise such a claim would be an individual

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23  
24 <sup>8</sup> See United States v. Burton, 894 F.2d 188, 192 (6th Cir. 1990); cert. denied, 498 U.S. 857  
25 (1990); United States v. Greene, 892 F.2d 453, 455-45 (6th Cir. 1989), cert. denied, 495 U.S. 955  
26 (1990); Fry, 787 F.2d at 905; United States v. Wables, 731 F.2d 440, 450 (7th Cir. 1984);  
Fogarty, 692 F.2d at 548 & n.4; United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982),  
cert. denied, 460 U.S. 1051 (1983); Kiffer, 477 F.2d at 356-57.

1 defendant who is seeking to obtain and use marijuana for allegedly medical purposes. See, e.g.,  
2 Warth v. Seldin, 422 U.S. 490, 499 (1975) (a party "must assert his own legal rights and interests,  
3 and cannot rest his claim to relief on the legal rights or interests of third parties"). Defendants do  
4 not meet this requirement. The defendant cannabis clubs are not individuals, and none of the  
5 individual defendants have submitted declarations attesting that they seek to use marijuana for  
6 these purposes.

7 Defendants attempt to avoid this constitutional obstacle by asserting that "[t]he Defendan  
8 dispensaries are cooperatives composed of members who are patients whose doctors have  
9 recommended cannabis for medical purposes." Joint Opp. at 9. However, the declarations  
10 supplied by the United States established that the defendant clubs are business enterprises engaged  
11 in the distribution of marijuana, and that individuals can purchase marijuana from these clubs  
12 without being members of the "cooperative" or having any ongoing relationship with the club.  
13 Accordingly, defendants lack standing to assert this novel right.

#### 14 **IV. THE DEFENSE OF MEDICAL NECESSITY HAS NO APPLICATION IN THESE** 15 **CASES**

16 Defendants next assert that the common law defense of "medical necessity" provides a  
17 complete justification for their actions. Here again, defendants' assertion cannot withstand  
18 scrutiny.

19 1. The defense of "medical necessity" is unavailable to the defendants in these actions. In  
20 United States v. Bailey, 444 U.S. 394 (1980), the Supreme Court made clear that, under any  
21 theory of necessity, "one principle remains constant: if there was a reasonable, legal alternative to  
22 violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened  
23 harm,' the defenses will fail." Id. at 410. Stated differently, "[t]he assertion of the necessity  
24 defense requires that optional courses of action appear unavailable." United States v. Mowatt, 582  
25 F.2d 1194 (9th Cir.), cert. denied, 439 U.S. 967 (1978). Thus, although "[t]hose who wish to  
26 protest in an unlawful manner frequently are impatient with less visible and more time-consuming

1 alternatives,” such impatience “does not constitute the ‘necessity’ that the defense of necessity  
2 requires.” United States v. Dorell, 758 F.2d 427, 431 (9th Cir. 1985).

3 In United States v. Richardson, 588 F.2d 1235 (9th Cir. 1978), cert. denied, 440 U.S. 947  
4 (1979), the Ninth Circuit rejected application of the medical necessity defense in a case where the  
5 defendants had been arrested (and ultimately convicted) of conspiring to smuggle, possess, and  
6 distribute laetrile in the United States. At the time, laetrile had been classified as a “new drug” by  
7 the Food and Drug Administration (“FDA”), and it therefore was unlawful to import or transport  
8 the drug in interstate commerce without FDA approval. On appeal, the defendants argued that the  
9 district court had erred by denying a proposed jury instruction raising the medical necessity  
10 defense. The Ninth Circuit rejected this contention, holding that, because the defendants could  
11 have taken alternative courses of actions that did not violate the law, including “hav[ing] the FDA  
12 classification of Laetrile set aside or to have it approved as a new drug,” the defendants could not  
13 invoke the defense of necessity. Id. at 1239.

14 Richardson forecloses defendants’ invocation of the medical necessity defense in the instant  
15 actions. As we set forth in our opening memoranda, Congress has established a comprehensive  
16 regulatory scheme that allows the rescheduling of a controlled substance, in appropriate  
17 circumstances, so that it may be used for medical purposes. Among other things, the implementing  
18 regulations to the Act allow any “[a]ny interested person to submit a petition” asking the DEA  
19 Administrator to initiate a rulemaking proceeding to reschedule a controlled substance. 21 C.F.R.  
20 §§ 1308.44(b), (c) (emphasis supplied). Thus, while the Administrator of DEA denied a petition  
21 to reschedule marijuana in 1992 upon determining that there was “no currently accepted medical  
22 use [for marijuana] in treatment in the United States,” 57 Fed. Reg. 10499 (March 26, 1992), a  
23 decision that was upheld by a unanimous panel of the D.C. Circuit, see Alliance for Cannabis

1 Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1137 (D.C. Cir. 1994),<sup>9</sup> if defendants  
2 believe that new evidence exists, they can petition the DEA to conduct another rulemaking.  
3 Defendants also can present evidence to the FDA purporting to demonstrate that marijuana is  
4 effective for its intended use and that it is safe.<sup>10</sup>

5 Here, none of the defendants has alleged that they have pursued any of these legal,  
6 available remedies. This failure is enough to preclude defendants' assertion of the medical  
7 necessity defense. Furthermore, defendants' purported lack of faith in this process in no way  
8 undercuts this binding rule. As the Ninth Circuit made clear in Dorell, impatience with "less  
9 visible and more time-consuming alternatives \* \* \* does not constitute the 'necessity' that the  
10 defense of necessity requires." 758 F.2d at 431. Indeed, "[t]o accept [defendants'] position would  
11 amount to recognizing that an individual may assert a defense to criminal charges whenever he or  
12 she disagrees with a result reached by the political process." Id. at 432.

13 In any event, as with defendants' assertion of a novel substantive due process right, their  
14 argument here is another attempt to make an end-run around the statutory and regulatory scheme  
15 designed by Congress to determine whether drugs are safe, effective, and reliable. As set forth  
16 *infra* note 8, every court of appeals to have considered the issue has held that the decision as to  
17

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18  
19 <sup>9</sup> Among other things, the Administrator noted that "marijuana has been rejected as medicine  
20 by the American Medical Association, the National Multiple Sclerosis Society, the American  
21 Glaucoma Society, the American Academy of Ophthalmology, the American Cancer Society. Not  
22 one American health association accepts marijuana as medicine." Id. The Administrator further  
noted that "[r]elying on the same scientific standards used to judge all other drugs, FDA experts  
repeatedly have rejected marijuana for medical use." Id.

23 <sup>10</sup> As we described in our opening brief, even if marijuana were taken out of Schedule I and  
24 placed in Schedule II, it could not legally be marketed or made available for prescription use  
25 unless it were reviewed and approved by the FDA under the Food, Drug and Cosmetic Act, 21  
26 U.S.C. § 301, *et seq.* For a drug to obtain approval under this Food, Drug and Cosmetic Act,  
appropriate tests in well-controlled studies must be conducted to show substantial evidence that  
the drug is effective for its intended use and that it is safe.

1 whether or not marijuana has medical value must be presented in the context of a rescheduling  
2 petition under 21 U.S.C. § 811(a).

3 2. In addition, as was the case with their asserted substantive due process right, the only  
4 persons with standing to raise such a claim would be an individual defendant who is seeking to  
5 obtain and use marijuana for allegedly medical purposes. Here again, the defendant cannabis clubs  
6 are not individuals, and none of the individual defendants have submitted declarations attesting that  
7 they seek to use marijuana for these purposes.

8 **V. DEFENDANTS ARE NOT JOINT PURCHASERS**

9 Defendants also contend, relying on United States v. Swiderski, 548 F.2d 445 (2d Cir.  
10 1977), that they “are not guilty of the federal crimes of distribution, or possession for distribution,  
11 because their alleged control of medical cannabis is established through a cooperative enterprise,  
12 shared equally among all of the members thereto, for the exclusive medicinal use of each of them,  
13 individually.” Joint Mem. at 20-21.

14 This contention cannot be taken seriously. Even if Swiderski had been adopted by the  
15 Ninth Circuit, which it has not, see United States v. Wright, 593 F.2d 105, 108 (9th Cir. 1979)  
16 (expressing no opinion as to whether Swiderski is good law), this case has generally been limited  
17 to its facts. In Swiderski, the Second Circuit held that, “where two individuals simultaneously and  
18 jointly acquire possession of a drug for their own use, intending only to share it together, their only  
19 crime is personal drug abuse simple possession, without any intent to distribute the drug further.”  
20 548 F.2d at 450. While recognizing that the quantity of the drugs and number of people involved  
21 might dictate a contrary result, the court found that “the mere existence of joint possession by two  
22 closely related persons here an engaged couple who later married one another is alone not enough  
23 to provide the basis for such an inference” of distribution. Id.

24 This decision cannot be extended to the facts of these actions, where the defendants, by  
25 their own admissions, distribute marijuana to hundreds, if not thousands of individuals. See United

26



1 States v. Taylor, 683 F.2d 18, 21 (1st Cir.) (finding Swiderski inapplicable to complex marijuana  
2 distribution organization), cert. denied, 459 U.S. 945 (1982). Indeed, in Wright, the Ninth Circuit  
3 held that Swiderski was inapplicable where the controlled substance in question had not been  
4 simultaneously and jointly acquired. 593 F.2d at 108. Moreover, several courts have raised  
5 question as to the continuing validity of Swiderski. See, e.g., United States v. Speer, 30 F.3d 605,  
6 608 (5th Cir. 1994) ("This Circuit has not adopted the Swiderski doctrine nor have we found that  
7 any other circuit has done so."), cert. denied, 513 U.S. 1098 (1995); United States v. Washington,  
8 41 F.3d 917, 920 n.2 (4th Cir. 1994) (same).

9 **VI. DEFENDANTS ARE NOT ULTIMATE USERS**

10 Defendants' contention that they are "ultimate users" under the Controlled Substances Act,  
11 21 U.S.C. § 802(27), is equally misplaced. An "ultimate user" is defined as, "[A] person who has  
12 lawfully obtained, and who possess, a controlled substance for his own use or for the use of a  
13 member of his household \* \* \* ." Id. Here, defendants cannot constitute "ultimate users"  
14 because they have not "lawfully obtained" marijuana.

15 By definition, marijuana, as a schedule I controlled substance, has "no currently accepted  
16 medical use in treatment in the United States," and "a lack of accepted safety for use \* \* \* ." Id.  
17 § 812(b)(1). As a result, the only way in which marijuana may be lawfully obtained is in a  
18 controlled research setting conducted pursuant to a protocol that has been approved by the FDA,  
19 and where the researcher has been registered with the DEA. See id. § 823(f); 21 C.F.R. §  
20 1301.13(e)(1). Likewise, no one may cultivate marijuana without a DEA registration. 21 U.S.C.  
21 § 822(b). Defendants are not (and do not claim to be) engaged in DEA-authorized research or  
22 manufacturing.

23 **VII. DEFENDANTS' REMAINING CLAIMS ARE INSUBSTANTIAL**

24 Defendant John Hudson argues that marijuana "is a 'traditional medicine' that was  
25 statutorily 'grandfathered' into the FDCA regulatory scheme back in 1938. Memorandum of John

1 Hudson at 8. This contention is meritless. When it enacted the Controlled Substances Act,  
2 Congress itself placed marijuana in Schedule I, see 21 U.S.C. § 812 Schedule I(c)(10), which by  
3 definition means that it has been determined to have a "high potential for abuse," "no currently  
4 accepted medical use in treatment in the United States," and a "lack of accepted safety for use  
5 under medical supervision." Id. § 812(b)(1). In any event, if defendant Hudson wishes to pursue  
6 this issue, he must first exhaust his administrative remedies before the Food and Drug  
7 Administration. Carnohan, 616 F.2d at 1122.

8 Defendants also jointly claim that the government's action is precluded by the doctrine of  
9 "unclean hands." In support of this proposition, defendants assert that, "[t]he government has at  
10 least a twenty-five year history of bad faith and unclean hands in its dealings with medical  
11 marijuana." Joint Opp. at 36. As discussed above, the Ninth Circuit's decision in Dorell provides a  
12 complete answer to this assertion. "To accept [defendants'] position would amount to recognizing  
13 that an individual may assert a defense to criminal charges whenever he or she disagrees with a  
14 result reached by the political process." 723 F.2d at 432.

15 Nor is there any merit to defendants' entrapment argument. "A defense of entrapment is  
16 established if the defendant was (1) induced to commit the crime by a government agent and (2)  
17 not otherwise predisposed to commit the crime." United States v. Kessee, 992 F.2d 1001, 1003  
18 (9th Cir. 1993). Defendants have not made (and cannot make) either showing. By their own  
19 admission, defendants were engaged in the cultivation and distribution of marijuana long before the  
20 first undercover purchase by a DEA undercover agent. Hence, there is no merit whatsoever to this  
21 argument.

## 22 **VIII. PLAINTIFFS HAVE MET THE STANDARDS FOR PRELIMINARY** 23 **INJUNCTIVE RELIEF**

24 As we demonstrated in our opening memoranda, and further explained above, the United  
25 States has more than demonstrated that it is likely to succeed on the merits of this action. When  
26 such a showing has been made, irreparable injury is presumed, whether or not defendants dispute

1 the statutory violation. See Miller, 19 F.3d at 459; United States v. Nutri-Cology, Inc., 982 F.2d  
2 394, 398 (9th Cir. 1992). Defendants' contention that irreparable injury is lacking, therefore, is  
3 baseless.

4 Moreover, in addition to the presumption of irreparable injury applicable in statutory  
5 enforcement actions, "[h]arm to the public interest is presumed." Federal Trade Comm'n v. World  
6 Wide Factors, Inc., 882 F.2d 344, 346 (9th Cir. 1989) (citing Odessa Union Warehouse, 833 F.2d  
7 at 175-76). And, as we demonstrated in our opening memoranda, because Congress has  
8 specifically found that "[t]he illegal importation, manufacture, distribution, and possession and  
9 improper use of controlled substances have a substantial and detrimental effect of the health and  
10 general welfare of the American people," 21 U.S.C. § 801(2), "it would be inappropriate for [a]  
11 court to substitute its own determination of the public interest for that arrived at by the political  
12 branches." Able v. United States, 44 F.3d 128, 132 (2d Cir. 1995) (per curiam).

13 Finally, the balance of hardships weighs strongly in favor of the United States. Defendants'  
14 assertion that they should be given an exception from the statutory and regulatory scheme designed  
15 by Congress, which has ensured that drugs may be used for medical purposes only after they have  
16 been proven safe, effective, and reliable through a rigorous system of research and testing, cannot  
17 be sustained. In United States v. Rutherford, 442 U.S. 544 (1979), a unanimous Supreme Court  
18 rejected the argument that the safety and effectiveness standards of the Food, Drug, and Cosmetic  
19 Act did not apply to the terminally ill. Id. at 557-59. In pertinent part, the Court held whether  
20 such an exemption should be created "is a question for legislative judgment, not judicial  
21 interference." Id. at 559. Similarly, in Carnohan, the Ninth Circuit held that, "[i]f Carnohan  
22 wishes to obtain laetrile, he must exhaust his administrative remedies before seeking judicial relief."  
23 616 F.2d at 1122.

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1           Indeed, the reasoning in Hanson v. United States, 417 F. Supp. 30 (D. Minn.), aff'd, 540  
2 F.2d 947 (8th Cir. 1976) is particularly apt here. In that case, in which the court denied a motion  
3 to enjoin a declaratory judgment regarding the use of laetrile, the court observed that:

4           The history of the Food, Drug, and Cosmetic Act in the courts demonstrates that  
5 there is no shortage of peddlers who claim that their miracle drug must be made available  
6 to the consuming public without further delay. A parallel history of product liability  
7 litigation also demonstrates the danger that new drugs may be released without adequate  
8 testing, too often with tragic consequences. The balance between these competing  
9 considerations is one which has already been struck by Congress, and it is one which has  
10 been repeatedly upheld by the courts.

11 Id. at 37. See also United States v. Maas, 551 F. Supp. 645, 646 (D.N.J. 1982) ("There are many  
12 instances in which drugs deemed to be lawful and safe have reeked havoc years later on their users  
13 and offspring. The action of Congress should not be reversed for erring on the side of caution in  
14 the public interest despite the clamor to legalize and decriminalize. In the fact of dispute in the  
15 scientific community, Congress has the right to choose which opinion shall guide its legislative  
16 hand. Having chosen, this court has not right to say that it should have decided otherwise.").

17 **IX. THE COURT MAY ENTER SUMMARY JUDGMENT**

18           Defendants contend the Court cannot enter summary judgment because the motions were  
19 filed on January 9, 1998, the same day on which the underlying complaints were filed. See Fed. R.  
20 Civ. P. 56(a). This contention is in error. Defendants fail to acknowledge that, on January 22,  
21 1998, this Court entered a Related Case Order which, by its terms, vacated all motions then  
22 currently pending. The motions were renoticed during the scheduling hearing on January 31,  
23 1998. Accordingly, there is no barrier to the Court's entry of summary judgment.

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28 ///

1 **CONCLUSION**


2 For the reasons set forth above, and for the reasons set forth in our opening memoranda.  
3 the United States respectfully requests that this Court enter the requested injunction and judgment  
4 in favor of the United States.

5 Respectfully submitted,

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27 Plaintiff's Cons. Reply in Support of Motions for Prel. Inj.;  
28 and Opposition to Defendants' Motion to Dismiss  
Case Nos. C 98-0085 CRB; C 98-0086 CRB; C 98-0087 CRB  
C 98-0088 CRB; C 98-0089 CRB; C 98-0245 CRB

ER0177





No. C98-0085 and related cases

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IN THE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT  
OF CALIFORNIA

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UNITED STATES OF AMERICA,  
plaintiff,  
v.  
CANNABIS CULTIVATOR'S CLUB, et al.,  
defendants.

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BRIEF OF THE DISTRICT ATTORNEY OF SAN FRANCISCO AS AMICUS CURIAE

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## I. INTRODUCTION and STATEMENT OF INTEREST

This case involves an action by the United States to obtain declaratory and injunctive relief against individuals and organizations ["Cannabis Buyer's Clubs", hereinafter "medical marijuana dispensaries" or "MMDs"] that distribute or have been distributing marijuana to seriously ill persons in San Francisco and surrounding counties. The District Attorney [hereinafter "DA"] and City and County of San Francisco [hereinafter "CCSF"] have long supported the safe, controlled, and efficient distribution of medical marijuana to seriously ill persons, see Initiative P (approved by the voters of CCSF November 1991), and continue to do so during the pendency of this litigation. There are three principal reasons for this support. First, the DA believes that the operation of the MMDs contributes to the health and welfare of city residents by ameliorating the pain and suffering of those who suffer from serious medical conditions, including AIDS. Second, the DA believes that the MMDs contribute to the public safety of the City by providing a safe, regulated environment for seriously ill persons to obtain their marijuana, obviating any need for such patients to resort to street-level drug dealers who may traffic in more dangerous drugs in addition to marijuana and who may use violence to resolve disputes. Third, CCSF has a responsibility under the Compassionate Use Act of 1996, codified at Cal. Health & Safety Code § 11362.5, "to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." Cal. Health & Safety Code § 11362.5(b)(1)(C).

## II. SUMMARY OF ARGUMENT

The DA understands that the United States may<sup>1</sup> have the right to an injunction limiting the operation of the MMDs. Even if this is true, however, the federal government is not entitled to an order requiring the MMDs to cease all operations. This Court has broad discretion to fashion injunctive relief, balancing the equities so as to achieve justice. In addition, some, but perhaps not all, of the patients who use the MMDs' services can or will in the future be able to assert a valid necessity defense that takes them outside the prohibitions of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* Finally, the CCSF may in the future decide that, in order to reduce street-level drug dealing as well as public suffering, it is necessary to authorize City officials to distribute, or assist in the distribution of, medical marijuana, possibly in conjunction with some of defendants, and thereby fall within an exception to the C.S.A.'s prohibitions. *See* 21 U.S.C. § 885(d). Although it would be premature for this Court to address directly the merits of these possible defenses as applied to any individual, in light of the Court's duty to enter a detailed, specific injunction, the Court should take these issues into account when crafting any injunctive or declaratory relief.

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<sup>1</sup> Defendants have provided ample arguments as to why the United States is not entitled to any sort of injunctive relief, and this brief does not mean to imply that these arguments should not prevail. The interests of CCSF, however, are most strongly affected by the scope, rather than the issuance *vel non*, of injunctive relief. Therefore, for purposes of argument, this brief assumes that this Court has jurisdiction over this matter and that it will grant some sort of injunctive relief.

### III. ARGUMENT

#### A. Closing the Medical Marijuana Dispensaries would Adversely Affect the City and County of San Francisco

If an injunction completely halts operations of the MMDs, patients who are currently receiving marijuana through these dispensaries will either have to obtain their marijuana elsewhere or will stop using what the people of California have decided is a much-needed medicine. Either of these alternatives will adversely affect CCSF. If, on the one hand, patients decide to continue purchasing marijuana, they will undoubtedly turn to the sidewalks, parks, and playgrounds of our City to obtain their medicine. What is now a reasonably well-controlled, safe distribution system—one that has been characterized by cooperation with city officials and one that is inspected by the Health Department—will instead devolve into a completely unregulated, and unregulatable, public nuisance. Street-corner drug dealers—who may also deal in more dangerous drugs and use violence to enforce agreements and resolve disputes—will have a new market of seriously ill patients who have nowhere else to turn, and their ranks and influence on City life will increase. The police will be spread thin dealing with these new street criminals. As matters stand now, the MMDs do the work of separating bona fide patients from others who would buy marijuana for non-medical purposes (and, given the complex scheme that the federal DEA agents found necessary to use to gain access to the MMDs, they are apparently doing a good job at this); if the MMDs close, the police will be forced to spend time and effort sorting out the medical purchasers from the non-medical purchasers, or simply give up on arresting anyone purchasing marijuana.

If, on the other hand, seriously ill residents of CCSF stop using marijuana to relieve their medical symptoms, this will increase suffering in the City and force the County to allocate additional resources to provide alternative medical resources and treatment. AIDS has taken a terrible toll on the people of this city,

and even the new treatments cannot save some seriously ill patients who, without medical marijuana, cannot force themselves to eat the food they need to survive. Nor can cancer patients benefit from chemotherapy if the nausea that results from such treatment means that they are weak and malnourished. Inevitably, people who would otherwise have lived will die. Cf. Washington v. Glucksberg, ---U.S.---, 117 S. Ct. 2258, 2272 (1997) (noting government's "unqualified" interest in preserving the life of its citizens). As a matter of public policy, then, CCSF strongly supports the operations of the MMDs.

**B. This Court has Broad Discretion to Tailor any Injunction to the Necessities of this Particular Case**

As an initial matter, it is important to note that courts sitting in equity have broad discretion to fashion fair and just remedies. As then-Chief Justice Burger wrote,

[i]n shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. . . . [E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.

\* \* \*

In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . . .

Lemon v. Kurtzman, 411 U.S. 192, 200-201 (1973) (plurality opinion) (Burger, C.J.) (citations and internal quotation marks omitted); see Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 (1975) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.") (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944)); Cabo Dist. Co., Inc. v. Brady, 821 F. Supp. 582, 594 (N.D. Cal. 1992) ("As the Court is acting in equity, the decision to enter a



preliminary injunction is largely left to its discretion.”). Declaratory, as well as injunctive, relief is subject to these equitable considerations.<sup>2</sup> Eccles v. People’s Bank of Lakewood, 333 U.S. 426, 431 (1948).

Even if the federal government is entitled to some sort of declaratory and injunctive relief, then, any such relief should be narrowly tailored so as to permit the medical marijuana dispensaries to operate in ways that do not violate federal law. The court’s decision in United States v. Jenks, 22 F.3d 1513, 1519 (10th Cir. 1994), is persuasive in this regard. Jenks involved a dispute between the United States Forest Service and a private party who owned several islands of land surrounded by the Apache National Forest. In the early 1980s, the Forest Service notified Jenks that he must apply for a permit if he wanted to continue to use several roads that provided the only access to his land; when Jenks refused to apply for the permits, the government sued for an injunction to enjoin Jenks from using the roads without proper authorization. Id. at 1516-17. The district court issued a broad injunction and Jenks appealed. Id. at 1517.

The Court of Appeals affirmed the entry of an injunction but modified the scope of that injunction, holding that the injunction was “overbroad” in that it failed to take into account the possibility that Jenks could assert common-law rights of access to his property over the roads. Id. at 1519. That it would have been premature for the Court of Appeals to address the merits of these common-law claims, id. at 1519 n.6, did not mean that it was proper to fail to take them into account when fashioning the scope of the injunction. Similarly, in the case at bar the government asserts a general right to prohibit the conduct in question. This

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<sup>2</sup> Title 21 U.S.C. § 882(a) does not limit the Court’s discretion in this area. Actions brought under this provision are to proceed “in accordance with the Federal Rules of Civil Procedure,” id., which, of course, also applied in the above-cited cases. In addition, the most relevant of these rules, Federal Rule of Civil Procedure 65, is little more than a restatement of prior equity rules. See 11A Wright, Miller, and Kane, Federal Practice and Procedure §2941 at 31 (2d ed. 1995).

right, however, is qualified in light of the options available to defendants and CCSF, as discussed below. It would therefore be inappropriate for this Court to enter an overly broad injunction that prohibits conduct that may, under legal or equitable principles, not be subject to an injunction under 21 U.S.C. § 882(a). See Jenks, 22 F.2d at 1519; cf. Hughey v. IMS Dev't Corp., 78 F.3d 1523, 1531 (11th Cir. 1996) (cautioning against injunctions that simply command defendants to "obey the law"). This Court, then, should exercise caution so that any relief it may order does not inadvertently preclude CCSF or the MMDs from distributing medical marijuana to seriously ill patients in a manner that does not, for reasons of necessity or immunity, violate the C.S.A.

**C. At Least Some of the MMDs' Patients' Use of Medical Marijuana is a Medical Necessity and is therefore Not Violative of the C.S.A.**

The law has long held that otherwise-illegal conduct may nonetheless be lawful if done to avoid a greater harm: "[A] man may break the words of the law, and yet not break the law itself where the words of them are broken through necessity." United States v. Dorrell, 758 F.2d 427, 436 (9th Cir. 1985) (Ferguson, J., concurring) (internal punctuation omitted) (quoting Reninger v. Fagossa, 1 Plowd. 1 (1551)). See generally 1 LaFave & Scott, Substantive Criminal Law § 5.4 (1986) (discussing necessity defense). Federal and California courts have recognized that this "necessity defense" may apply in a wide variety of circumstances. See United States v. Lopez, 662 F. Supp. 1083 (N.D. Cal. 1987), aff'd, 885 F.2d 1428 (9th Cir. 1989). See also United States v. Bailey, 444 U.S. 394, 409-11 (1980) (prison escape); Dorrell, 758 F.2d at 430-31 & n.2; (aiding and abetting escape); People v. Pena, 149 Cal. App. 3d Supp. 14, 197 Cal. Rptr. 264 (1983) (drunk driving). The defense serves as a justification rather than an excuse: when the defendant acts by reason of necessity,

no crime is committed. Lopez, 662 F. Supp. at 1086-87; see Dorrell, 758 F.2d at 436 (9th Cir. 1985) (Ferguson, J., concurring).

This Court has previously set forth a detailed description of the defense:

The Ninth Circuit recognizes that the defense of necessity is available when a person is faced with a choice of two evils and then must decide whether to commit a crime or an alternative act that constitutes a greater evil. The defense requires a showing that the defendant acted to prevent an imminent harm which no available options could similarly prevent. It is also clear that the necessity defense applies to a defendant who commits a crime in an effort to rescue or protect an unrelated third person or persons.

Lopez, 662 F. Supp. at 1087 (citations and internal punctuation omitted). Although it is not within the scope of this brief to repeat the details of medical necessity doctrine discussed in defendants' brief or to discuss the facts surrounding any specific individual, it is clear to the DA that the necessity defense applies to at least some of the actions that the MMDs have taken. The two evils in the case at bar are, on the one hand, violation of federal marijuana law, and on the other, the excruciating suffering of people whose bodies are wasting away from AIDS or cancer therapy and of people in intractable physical pain. Whatever one's view of the hazards of marijuana, the limited, controlled distribution of the drug exclusively to such patients (and no others)<sup>3</sup> cannot rationally be seen as more harmful than such suffering and death. The harm with respect to at least some of these patients is imminent: their suffering will resume immediately without medical marijuana, and many of them were dying before they began marijuana therapy and will likely die if forced to go without it. There are, for some patients at least, no other options:

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<sup>3</sup> To the extent some MMDs are suspected of distributing marijuana to other than bona fide patients, it is clear that the State of California will act to stop such activity. See People ex rel Lungren v. Peron, 59 Cal. App. 4th 1383 (1997).

Medically, they have found that nothing else, including Marinol,<sup>4</sup> works to give them the appetite they need to survive or to relieve their pain without leaving them unable to function. From a practical standpoint, many of them are too ill to grow marijuana for themselves and, in any case, would endure months of suffering before they were able to obtain medically useful material this way. For many people, resorting to street-level drug dealers may be an option, but, as discussed above, this alternative is bad public policy for a number of reasons.<sup>5</sup> Finally, it is clear that, even if the political obstacles that prevent rescheduling of marijuana so that it might be prescribed were removed,<sup>6</sup> rescheduling would not be instantaneous, and patients would continue to suffer in the interim. Thus, it is medically necessary for

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<sup>4</sup> Marinol is a prescription drug that contains some of the active components of marijuana. See Queen v. Parker, 1997 Ont. C.J.P. Lexis 277, at \*17 (Ontario (Canada) Court, Provincial Div. 1997) (concluding that Marinol may not be an effective substitute for medical marijuana). See generally id. (factual findings).

<sup>5</sup> It additionally involves conduct that violates state and federal law. See State ex rel Lungren v. Peron, 59 Cal. App. 4th 1383 (1997).

<sup>6</sup> Compare Opinion and Recommended Ruling In the Matter of Marijuana Rescheduling Petition, No. 86-22 ("The evidence in th[e] 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. It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence in this record."), reprinted in II Marijuana, Medicine, & the Law, 405, 445 (R.C. Randall, ed. (1989)), with NORML v. DEA, 559 F.2d 735 (D.C. Cir. 1977) (rejecting DEA's position as to authority to reschedule marijuana), with Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936 (D.C. Cir. 1991) (vacating DEA's reversal of the above Opinion and Recommended Ruling on the grounds that the Administrator "appears to have relied on several factors that are unreasonable because logically impossible to satisfy"), with Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131 (D.C. Cir. 1994) (upholding DEA Administrator's refusal to reschedule marijuana). These political factors, including DEA's conception of its authority to reschedule marijuana under international conventions, see NORML, 559 F.2d 735, distinguish the matter at hand from United States v. Richardson, 588 F.2d 1235 (9th Cir. 1978), where defendants had several alternative options. See Dorrell, 758 F.2d at 431 n.4 (noting that defendants in Richardson had options including local production and use of regulatory process).

some patients to obtain medical marijuana from the MMDs, and the MMDs may assert the necessity defense with respect to providing such medical marijuana.

In light of these factors, it is not surprising that courts throughout North America have ruled that the criminal prohibitions against marijuana must give way to medical necessity . See State v. Hastings, 801 P.2d 563 (Idaho 1990); State v. Diana, 604 P2d 1312 (Wash. App. 1979); State v. Bachman, 595 P.2d 287 (Hawaii 1979) (dicta); United States v. Randall, 104 Wash. Daily L. Rep. 2249 (D.C. Sup. Ct. 1976) (attached). See also Queen v. Parker, 1997 Ont. C.J.P. Lexis 277 (Ontario (Canada) Court, Provincial Div. 1997) (holding that criminal prohibition against marijuana could not be applied against medical user).<sup>7</sup> In fact, with respect to some of the sickest medical marijuana patients, this common-law necessity defense may be reinforced by constitutional protections: "Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly 'at the heart of the liberty to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'" Washington v. Glucksberg, ---U.S.--, 117 S. Ct. 2258, \_\_\_ (Stevens, J., concurring) (quoting Planned Parenthood of Eastern Penn. v. Casey, 505 U.S. 833, 851 (1992) (internal punctuation omitted). See Parker supra (holding that person has right under Canadian Charter of Rights and Freedoms to use marijuana to control epileptic seizures); see generally Glucksberg, supra; Casey, supra. Unlike the rights at issue in Casey and Glucksberg, of course, the right to live is explicitly protected by the Constitution. U.S. Const. amend. V ("No person shall be . . . deprived of life . . . without due process of law."). In any case, whether the source of authority be the common law, the Constitution, or the standards of fairness inherent in equity jurisdiction, any injunction this Court

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<sup>7</sup> Nor, incidentally, is it surprising that there are few federal cases involving the necessity defense and medical marijuana. Federal prosecutors rarely expend their resources to charge people with small quantities of marijuana, and would in any case be unlikely to select seriously ill persons for such prosecutions.

chooses to enter should be crafted so as not prevent seriously ill patients from obtaining the medicine they need to survive without unnecessary suffering.

In short, at least some of the patients served by defendant MMDs are so seriously ill and in need of marijuana that they, the patients, could assert a medical necessity defense to a charge of possession of marijuana under the C.S.A. Under the law discussed in Lopez, defendants' provision of marijuana to some of these patients (those without viable alternate supplies) similarly falls outside the strictures of the C.S.A.<sup>8</sup> Therefore, because this portion of the MMDs conduct does not violate the C.S.A., the plaintiff has no right to prohibit this conduct, and any injunction the Court chooses to issue should provide accordingly.

**D. At Least Some of the MMDs' Patients' Acquisition of Medical Marijuana Qualifies as a "Joint Purchase" and therefore is Not Violative of the C.S.A. prohibition on "Distribution."**

The injunction requested in this case would not enjoin simple possession of marijuana, but only the distribution or possession for distribution. At least some of the activities of the MMD's would qualify as "joint purchases," and thus come within the legal doctrine that such activity is only the offense of possession, and not the offense of distribution. Any injunctive relief granted in this case should exempt activity of the MMD's that qualifies as joint purchases for shared use.

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<sup>8</sup> As noted above, ostensibly illegal conduct that is necessary (in the legal sense) is not illegal. Lopez, 662 F. Supp. at 1086-87.

**E. CCSF May Fight Unregulated Street-Level Drug Dealing by Authorizing its Officials to Engage in the Controlled Distribution of Medical Marijuana to Seriously Ill Patients without Violating the C.S.A.**

As discussed above, the DA reasonably expects that closing the MMDs would significantly contribute to unregulated, street-level drug dealing and the public-health and safety problems associated therewith. One way that the City could respond to this law-enforcement problem would be to authorize CCSF health and law-enforcement officials to operate marijuana distribution centers for seriously ill patients. In other words, CCSF, as a political subdivision of the State of California, may in the future authorize its officers to enforce a "law or municipal ordinance relating to controlled substances" by distributing marijuana to seriously ill patients. See 21 U.S.C. § 885(d). Such officials would then be "lawfully engaged in the enforcement of" CCSF's drug laws, and would therefore be immune from federal prosecution. See id. Cf. Prinz v. United States —U.S.—, 117 S. Ct. 2365 (1997) (federal government is without authority to require local officials to enforce federal law).

The questions of whether such a plan would be lawful under the C.S.A. is, obviously, not presently before the Court. However, the DA would like to ensure that any injunction that the Courts sees fit to issue does not inadvertently foreclose possible legal avenues the CCSF could use to maintain its public health and safety without running afoul of federal law.

#### IV. CONCLUSION

For the reasons discussed above, this Court should limit the declaratory and injunctive relief it chooses to issue in this case, if any, so as not to exclude the distribution of medical marijuana to those patients for whom such distribution is a legal necessity. Furthermore, this Court should ensure that any relief does not inadvertently preclude CCSF from creating a plan for the lawful distribution of medical marijuana under the C.S.A.

Respectfully Submitted on this

16 day of March, 1998,

A handwritten signature in cursive script, appearing to read "Terence Hallinan", written over a horizontal line.

Terence Hallinan  
District Attorney of the  
City and County of  
San Francisco





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IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
 Plaintiff,  
 v.  
 CANNABIS CULTIVATORS' CLUB and  
 DENNIS PERON,  
 Defendants.  
 AND RELATED ACTIONS.

Case Nos. C-98-0085 CRB  
 C-98-0086 CRB  
 C-98-0087 CRB  
 C-98-0088 CRB  
 C-98-0089 CRB  
 C-98-0245 CRB  
 CITY OF OAKLAND SUPPORT OF  
 AMICUS BRIEF FILED BY THE  
 DISTRICT ATTORNEY FOR THE CITY  
 AND COUNTY OF SAN FRANCISCO  
 ON MARCH 17, 1998

19 On March 17, 1998, the amicus brief of the District  
 20 Attorney for the City and County of San Francisco ("District  
 21 Attorney") was filed in this Court. The City of Oakland  
 22 (hereinafter "Oakland") supports and joins in the arguments  
 23 presented in the District Attorney's amicus brief regarding the  
 24 public health and safety ramifications of the relief the United  
 25 States is seeking in the above-referenced cases.

26 The parties have not addressed Oakland's interest in the

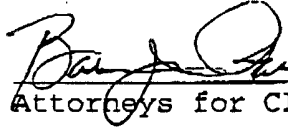
1 public health and safety ramifications of this litigation as yet.  
2 Therefore, the City hereby advises the Court that it supports the  
3 District Attorney's amicus brief insofar as it addresses the  
4 public health and safety ramifications that will flow if the Court  
5 grants the relief the United States seeks in this litigation. The  
6 impacts on the City and County of San Francisco that the District  
7 Attorney articulates in his amicus brief will reverberate  
8 throughout the City of Oakland with equal or perhaps even greater  
9 force.

10           The option presented in the amicus brief of City and  
11 County of San Francisco health and law-enforcement officials  
12 operating medicinal marijuana distribution centers for seriously  
13 ill patients is inapplicable to Oakland. The ability to dispense  
14 marijuana is unique to the City and County of San Francisco  
15 because it operates a health department, health facilities and  
16 hospitals; Oakland does not provide the aforementioned services.  
17 Health facilities for residents of Oakland, including a health  
18 department and a county hospital are operated by the County of  
19 Alameda.

20           For the reasons, set forth above, the City of Oakland  
21 respectfully requests that the Court deny the injunction.

22 Dated: March 20, 1998

23 JAYNE W. WILLIAMS, City Attorney  
24 JOYCE M. HICKS, Assistant City Attorney  
25 BARBARA J. PARKER, Deputy City Attorney

26 By:   
Attorneys for CITY OF OAKLAND

1 PROOF OF SERVICE

2 United States of America v. Cannabis Cultivator's Club, et al.

3 United States District Court Case Nos. C-98-0085 CRB,  
4 C-98-0086 CRB, C-98-0087 CRB, C-98-0088 CRB,  
5 C-98-0089 CRB, C-98-0245 CRB

6 I am a resident of the State of California, over the age of  
7 eighteen years, and not a party to the within action. My business  
8 address is City Hall, One City Hall Plaza, 6th Floor, Oakland,  
9 California 94612. On March 20, 1998, I served the within  
10 documents:

11 CITY OF OAKLAND SUPPORT OF AMICUS BRIEF FILED BY THE DISTRICT  
12 ATTORNEY FOR THE CITY AND COUNTY OF SAN FRANCISCO ON MARCH 17,  
13 1998

- 14  by transmitting via facsimile the document(s) listed  
15 above to the fax number(s) set forth below, or as  
16 stated on the attached service list, on this date  
17 before 5:00 p.m.
- 18  by placing the document(s) listed above in a sealed  
19 envelope with postage thereon fully prepaid, in the  
20 United States mail at Oakland, California addressed as  
21 set forth.
- 22  by causing personal delivery by \_\_\_\_\_ of the  
23 document(s) listed above to the person(s) at the  
24 address(es) set forth below.
- 25  by personally delivering the document(s) listed above  
26 to the person(s) at the address(es) set forth below.
- by causing such envelope to be sent by Federal  
Express/ Express Mail.

19 FRANK W. HUNGER  
20 Assistant Attorney General  
21 MICAHUEL J. YAMAGUCHI  
22 United States Attorney  
23 GARY G. GRINDLER  
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23	Council Member Nate Miley Office of the City Council CITY OF OAKLAND One City Hall Plaza, 2nd Floor Oakland, CA 94612	
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I am readily familiar with the City of Oakland's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

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

Executed on March 20, 1998, at Oakland, California.

  
\_\_\_\_\_  
Kristin Ericsson