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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES, et al. Defendants.	]]]]]]]]]]]	CASE NO. 98-0088 CRB BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION, ET AL., IN SUPPORT OF DEFENDANTS Date: March 22, 2002 Time: 10:00 am Dept: 8 Hon. Charles R. Breyer

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STATEMENT OF INTEREST

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has three regional affiliates in the State of California: the ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego and Imperial Counties. These three California ACLU affiliates supported passage of Proposition 215, the medical marijuana initiative, which led directly to the events giving rise to this litigation. The ACLU has participated in numerous cases nationwide, both as direct counsel and as amicus curiae, to defend the principle that the war on drugs should not be pursued at the expense of traditional legal and constitutional safeguards designed to restrain the government from overreaching in its law enforcement efforts. The proper resolution of this case is therefore a matter of substantial importance to the ACLU and its members throughout the country.

The ACLU and its California affiliates participated as amici curiae in the briefing of the instant case before the United States Supreme Court. The Supreme Court ruled consistently with the reasoning of the ACLU brief as it pertained to equitable discretion. This brief addresses solely the issue of equitable discretion, arguing that this Court should not grant summary judgment or otherwise continue the injunction restraining operation of the Oakland Cannabis Buyers' Cooperative ("OCBC").

INTRODUCTION

When the government elects to bring to task a citizen or organization for violation of the Controlled Substances Act ("CSA"), 21 U.S.C. § 841(a)(1), it ordinarily does so by initiating a criminal prosecution. In the context of such a prosecution, the defendant is entitled to a number of important procedural protections–for example, trial by jury and the requirement that the government prove guilt beyond a reasonable doubt. Here, however, the government has attempted to forsake the important protections attendant to criminal prosecution, seeking the same de facto result through an unprecedented civil injunction case. The United States argues

that it is entitled on summary judgment granting this extraordinary remedy, avoiding any inquiry into a number of factors that should guide this Court's equitable discretion.

The ACLU does not, of course, suggest that the government should prosecute OCBC criminally, for many of the reasons stated in the defendants' briefs filed herein. Rather, we urge that, just as this Court should exercise its equitable discretion not to enjoin the OCBC's activities, the Department of Justice should exercise its prosecutorial discretion to not file charges for activities that both the State of California and the City of Oakland consider necessary to protect the welfare of Oakland residents. As there is nothing about the present case that supports a unique need for the government's utilization of a civil injunction, and as OCBC wishes to avail itself of the protections it is due in the context of a criminal prosecution, if the government indeed wishes to use its discretion to prosecute, this Court should require it to do so through the standard procedures that would provide OCBC with important safeguards.

PROCEDURAL BACKGROUND

On November 5, 1996, the people of California passed Proposition 215, the "Compassionate Use Act of 1996." See Cal. Health & Safety Code § 11362.5.[1] In response, the Oakland Cannabis Buyers' Cooperative organized a dispensary to provide patients with a safe and affordable source of marijuana for medical use. The City of Oakland, in an effort to facilitate safe and reliable provision of medical marijuana, established a Medical Cannabis Distribution Program and designated OCBC to administer the program. See Exhibit L to Decl. of Annette Carnegie in support of Defendant's Motion After Remand to Dissolve or Modify Preliminary Injunction.

The United States filed suit against OCBC on January 9, 1998 pursuant to the federal Controlled Substances Act. Rather than seeking to enforce federal law by prosecuting OCBC criminally before a jury, as is standard, the government requested that the district court pursue

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[1]California law now provides that "seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana." See Cal. Health & Safety Code § 11362.5(b)(1)(A).

the unusual course of entering a civil order, enforceable by contempt, prohibiting the OCBC from continuing its activities. The government invoked a rarely used CSA provision that authorizes federal district courts to entertain the federal government's request for prospective injunctive relief against activity that violates certain provisions of the CSA. See 21 U.S.C. § 882.[2]

On May 19, 1998, this Court preliminarily enjoined OCBC from violating the CSA. See United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1106 (N.D. Cal. 1998). This Court subsequently held OCBC in contempt of the injunction, see United States v. Cannabis Cultivators Club, No. 98-00088, slip op. at 12 (N.D. Cal. Oct. 13, 1998), and denied OCBC's motion to modify the injunction to permit provision of marijuana to seriously ill patients, see United States v. Cannabis Cultivators Club, no. 98-00088, slip op. at 2 (N.D. Cal. Oct. 16, 1998).[3]

On appeal, the Ninth Circuit remanded for reconsideration of this Court's denial of OCBC's motion to modify the injunction, holding principally that this Court erred in concluding that § 882 eliminated its equitable discretion and that it could not consider the possibility of a

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[2] Section 882 provides:

> (a) Jurisdiction
>
> The district courts of the United States and all courts exercising general jurisdiction in the territories and possessions of the United States shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations of this subchapter.
>
> (b) Jury trial
>
> In case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by a jury in accordance with the Federal Rules of Civil Procedure.

[3] In response to the federal government's shutdown of OCBC, the City of Oakland declared a public health emergency. See Exhibit O to Decl. of Annette Carnegie in support of Defendant's Motion After Remand to Dissolve or Modify Preliminary Injunction. The City expressed concern that "the closure of [OCBC] will cause pain and suffering to seriously ill Oakland residents." See id. The Oakland City Council renews that resolution every two weeks.

medical necessity defense to the CSA. United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109, 1114 (9th Cir. 1999). On remand, this Court granted OCBC's renewed motion to modify the injunction. See United States v. Oakland Cannabis Buyers' Coop., no. 98-00088, slip op. At 1 (N.D. Cal. July 17, 2000). The Supreme Court stayed this Court's order "pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit and further order of this Court," see United States v. Oakland Cannabis Buyers' Coop., 530 U.S. 1298 (2000), and subsequently granted certiorari to review the Ninth Circuit's initial opinion. See United States v. Oakland Cannabis Buyers' Coop., 531 U.S. 1010 (2000).

In reviewing the Ninth Circuit decision, the Supreme Court essentially drew two related conclusions. First, the Court noted that, with respect to the CSA, Congress had made a "determination of values" that "marijuana has no medical benefits worthy of an exception," United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) (internal quotation marks omitted), and that Congress expressly had determined that marijuana has "no currently accepted medical use at all," id. (quoting 21 U.S.C. § 811). As the Supreme Court thus did not consider the statute ambiguous, it did not consider any constitutional issues that might enter into a construction of the statute pursuant to the doctrine of constitutional avoidance, and held that "medical necessity is not a defense to manufacturing and distributing marijuana." United States v. Oakland Cannabis Buyers' Coop., 532 U.S. at 494.

Second, the Supreme Court held that the district court, in exercising its equitable powers, could not construct a de facto medical necessity defense by "considering relevant the evidence that some people have serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms, that those people will suffer serious harm if they are denied cannabis, and that there is no legal alternative to cannabis for the effective treatment of their medical conditions." Id. at 498. In so doing, the Supreme Court nonetheless emphasized that "the District Court in this case had discretion" to determine whether to issue an injunction, since "[f]or 'several hundred years,' courts of equity have enjoyed 'sound discretion' to consider the 'necessities of public interest' when fashioning injunctive relief." Id.

at 496 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944)). The fact that Congress permitted the district court to issue an injunction did not mean that Congress intended that such injunctions be granted automatically: "a 'grant of jurisdiction to issue [equitable relief] hardly suggests an absolute duty to do so under any and all circumstances.'" United States v. Oakland Cannabis Buyers' Coop., 532 U.S. at 496 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). The Court ruled very narrowly--holding that the Ninth Circuit had erred only by directing the district court to consider a medical necessity defense to the CSA as one of the factors it should weigh in exercising its equitable discretion to craft an injunction. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. at 498.

The Ninth Circuit subsequently remanded the case to this Court for proceedings consistent with the Supreme Court's ruling. On January 7, 2002, OCBC moved this Court to dissolve or modify the preliminary injunction. On January 25, the government gave notice of motion for summary judgment and permanent injunctive relief.

ARGUMENT

As the Supreme Court specifically has held within the law of this case, this Court has the equitable authority to refuse the government's request for permanent injunctive relief against OCBC. The Supreme Court's ruling, founded in principles of equity and the plain language of §882, indicates that this Court retains discretion to shape an injunction that takes into account all of the factors that traditionally influence the exercise of equity, including legal and factual hardship to the parties, and the efficacy of the proposed injunction. The government here nevertheless has argued that summary judgment is appropriate, contending that there is simply no issue of fact in contention, not only as to whether or not OCBC has violated the CSA, but no issue as to whether extraordinary injunctive relief is the most appropriate method for resolving the government's claims. This is not the case. While the Supreme Court eliminated one factor (the medical necessity defense) that this Court may consider in its balance of equities, this Court is left with significant questions of fact regarding the remaining rights and equities of the parties affected by any injunction, and so this Court should exercise its authority to deny the

government's summary judgment motion. Most significantly, permitting the government to use the unusual injunctive remedy it has requested would deny OCBC the procedural protections attendant to the standard enforcement mechanism of criminal prosecution under the CSA, an extraordinary remedy for which the government has failed to offer tenable justification.

Courts of equity historically have been loathe to permit the government to circumvent the due process safeguards required in a criminal prosecution by seeking to prohibit allegedly criminal behavior through a civil injunction enforceable through civil contempt proceedings, making the exercise of this Court's discretion to deny the government's motion for summary judgment appropriate. Here, if this Court were to permanently enjoin the OCBC's activities, future contempt proceedings would be resolved either without a jury under Fed. R. Civ. P. 50, as has occurred already in the present case, or by a trial conducted before a civil jury. See 21 U.S.C. § 882(b). Members of OCBC who were found during such proceedings to have violated the injunction could then be, as a civil penalty, imprisoned, without the basic protections of a criminal trial, including, principally: the right to counsel, the right to present a defense, the presumption of innocence unless guilt is proven beyond a reasonable doubt, and the right to confront witnesses. Should this Court refuse the government's request for injunctive relief, the government still would be permitted to exercise its normal prosecutorial discretion in deciding whether to pursue its case against OCBC–but through procedures that would offer OCBC the fundamental protections available to persons being prosecuted for alleged criminal activity.

I. THIS COURT HAS DISCRETION TO REFUSE INJUNCTIVE RELIEF.

This Court clearly has the same equitable power to refuse the government's request for a civil injunction as it would in any other context. As noted supra, the Supreme Court, in considering this case, clearly has held that § 882 does not restrict this Court from exercising its equitable powers to deny to the government the injunction it seeks. See Oakland Cannabis Buyers' Cooperative, 532 U.S. at 496. While "'Congress may intervene and guide or control the exercise of the courts' discretion,'" the Court "'do[es] not lightly assume that Congress has intended to depart from established principles.'" Id. (quoting Weinberger v. Romero-Barcelo,

456 U.S. 305, 313 (1982)). Here, as "the District Court's use of equitable power is not textually required by any clear and valid legislative command, the court does not have to issue an injunction." United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. at 496.

In affirming that a district court retains broad discretion to deny injunctive relief in an action brought under the CSA, the Supreme Court imposed only one restriction on the exercise of such discretion, observing that a court sitting in equity "cannot ignore the judgement of Congress, deliberately expressed in legislation." Id. at 497. The only policy judgment Congress deliberately expressed here, according to the Court, was that it would reject a necessity defense to the Controlled Substances Act based on the medical necessity of marijuana use for certain patients. Id. at 499. As the Supreme Court specifically affirmed the power of the district courts to decline an injunction under the CSA on equitable grounds and identified only a single, discrete restriction on the courts' equitable discretion, this Court has the ability–indeed, the duty–to deny the government's request for an injunction if the balance of equitable considerations dictates such a result.

Contrary to the government's assertion that this Court would raise constitutional issues by electing not to grant the government's injunction, Gov. Br. at 23 & n.7, this Court would in no way usurp the "exclusive authority and absolute discretion [of the executive branch] to decide whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693 (1974). On the contrary, the Supreme Court, in the context of this case, noted that courts indeed may determine "whether a particular means of enforcing the statute should be chosen over another permissible means." Oakland Cannabis Buyers' Cooperative, 532 U.S. at 497-98. The government here seems to confuse a court's legitimate exercise of its equitable power to deny an injunction with the government's prior decision to seek such an injunction. When evaluating the propriety of an injunctive remedy, as this Court must do in the present case, a court of equity is not performing an administrative function; rather, it is undertaking the quintessential judicial activity of evaluating a prior administrative action against the applicable legal and equitable standards. Just as the U.S. Attorney can choose to pursue or decline a particular criminal case due to a range of

factors, this Court is similarly permitted to exercise its judgment and discretion as it sits in equity. Not every criminal case must be prosecuted, and not every violation of the CSA (assuming one has been shown here) must be enjoined.

The decision to deny an equitable remedy leaves the government entirely free to evaluate whether it deems this case appropriate for an ordinary criminal prosecution or whether it should refrain from doing so as an act of prosecutorial discretion. This Court would in no way usurp the government's authority to prosecute cases by denying the government the extraordinary relief it seeks here; as the Supreme Court itself indicated, "with respect to the Controlled Substances Act, criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance with the statute." Oakland Cannabis Buyers' Cooperative, 532 U.S. at 497.

There is nothing anomalous about the Supreme Court's preservation of this Court's equitable discretion in the present case. Concern over the use of civil injunctions to enforce criminal law has a long and well-founded history in this country. In particular, as legislatures increasingly authorized injunctions against criminal activity in the late nineteenth century, prominent commentators voiced loud opposition. In their view, the statutes permitted government to pursue exactly the same law enforcement goals as they would have in a criminal prosecution, without having to observe the bothersome requirements of criminal procedure. They coined the phrase "government by injunction" to characterize their protest. See Forrest R. Black, The Expansion of Criminal Equity Under Prohibition, 5 Wisc. L. Rev. 412 (1930); Recent Cases, Injunctions, 43 Harv. L. Rev. 499 (1930); Edwin S. Mack, The Revival of Criminal Equity, 16 Harv. L. Rev. 389, 392 (1903); Charles Noble Gregory, Government By Injunction, 11 Harv. L. Rev. 389, 392 (1903); William H. Dunbar, Government By Injunction, 13 L.Q. Rev. 347, 356-57 (1897). Following these critiques, cases were brought challenging the statutes on constitutional grounds. Justice Field, then a Justice of the Supreme Judicial Court of Massachusetts, considered one such challenge, involving an injunction against the sale of intoxicating liquors:

> The only effect of the injunction is to subject the respondent to the process used for punishing persons guilty of violating injunctions, in addition to, or in substitution for,

> criminal process. The legislature apparently thought that a remedy in equity would be more speedy or more certain or more efficient than that by complaint or indictment. The issuing of the injunction of itself adds nothing to the prohibition of the statutes, but the intention plainly is to call into use the peculiar process employed by courts of equity in punishing persons guilty of willful violations of injunctions . . . . Indeed, there are many indications that the principal reason why the statute was passed was to avoid a trial by jury . . . .

Carleton v. Rugg, 22 N.E. 55, 58 (Mass. 1889) (Field, J., dissenting). Despite the protests, criminal equity statutes were nearly uniformly held to be constitutional. See id. at 57; see also Eilenbecker v. District Ct. of Plymouth County, 134 U.S. 31 (1890), overruled in part by Bloom v. Illinois, 391 U.S. 194, 195-96 (1968); Kansas v. Ziebold, 123 U.S. 623 (1997). But see Hedden v. Hand, 107 A. 285 (N.J. 1919),

Congress responded to the forceful criticism leveled at the increasing jurisdiction of criminal equity by passing statutes designed to preserve a criminal jury trial in certain cases. In 1914, Congress passed the Clayton Act, § 21 of which provided for a criminal-style jury trial, upon demand of the accused, in all contempt proceedings where violation of an injunction also constituted violation of a criminal law. See 18 U.S.C. § 402; see also Felix Frankfurter & James M. Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1039-58 (1924) (discussing the origins of § 21 of the Clayton Act). Congress passed § 21 of the Clayton Act in direct response to the outcry:

> There had been much complaint that a jury trial, to which an accused was entitled if the thing charged against him was a crime, would be denied him if it was called a contempt. Congress felt that substantial rights should not depend upon what appeared to many to be nothing but a play upon words.

Taliaferro v. United States, 290 F. 906, 910 (4th Cir. 1923).[4] Section 21 contains an exemption

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[4] The legislative history to § 21 confirms this impression:

> That complaints have been made and irritation has arisen out of the trial of persons charged with contempt in the Federal courts is a matter of general and common knowledge. The charge most commonly made is that the courts, under the equity power, have invaded the criminal domain, and under the guise of trials for contempt, have really convicted persons of substantive crimes for which, if

for actions brought by the United States, but Congress provided for a jury trial in many such actions by including provisions like § 882(b) in individual statutes.

Given this history, it would be implausible to suggest that the inclusion of a civil jury trial provision in § 882(b) was meant to strip the district court of all discretion to consider the procedural consequences of proceeding by injunction rather than by prosecution. Fairly read, § 882(b) represents a due process floor in cases where the exercise of judicial discretion nonetheless leads to issuance of an injunction under the CSA. But nothing in § 882(b) suggests that Congress meant to foreclose equity courts from weighing the diminished procedural protections available in a civil contempt proceeding when deciding whether to issue an injunction in the first place. As Congress plainly knew, courts in this country have done precisely that for more than a century.

Specifically, in deciding whether to grant an injunction, courts traditionally have considered procedural hardships that a defendant might encounter in equity, as compared to in a criminal proceeding. See Development in the Law—Injunction, The Changing Limits of Injunctive Relief, 78 Harv. L. Rev. 997, 1004 (1965) (citing cases); W.E. Shipley, Injunction as Remedy Against Defamation of Person, 47 A.L.R.2d 715, at § 5(b) (1956) (discussing the reluctance of courts to enjoin criminal libel because of reduced procedural protections in equity); see, e.g., Heber v. Portland Gold Mining Co., 172 P. 12, 14 (Colo. 1918) (refusing to issue an injunction that would "deny one cited for contempt a trial by jury in what is in effect a criminal case"). A Congressional intent to cabin this well-established rule of equity would have required a clearer statement. See Hecht Co., 321 U.S. at 329 ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal

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> indicted, they would have a constitutional right to be tried by a jury. It has been the purpose of your Committee in this Bill to meet this complaint . . . .

H. Rep. No. 613, at 6 (1914) (quoted in Frankfurter & Landis, 37 Harv. L. Rev. at 1055); see also United States v. Pyle, 518 F. Supp. 139, 152 (E.D. Pa. 1981) (discussing legislative history); 48 Cong. Rec. 8778 (1912) ("The courts have, under the guise of contempt of court, had men arrested and tried for crimes without the intervention of a jury.") (statement of Rep. Clayton).

statement of its purpose would have been made.").

II. THIS COURT SHOULD USE ITS DISCRETION TO DENY SUMMARY JUDGMENT UPON THE GOVERNMENT'S REQUEST FOR PERMANENT INJUNCTIVE RELIEF.

Summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. Robi v. Reed, 173 F.3d 736, 739 (9th Cir.), cert. denied, 528 U.S. 952 (1999). Here, there remain unresolved issues of fact relevant to the equities this Court must consider in deciding whether to issue an injunction, and those issues of fact suggest that an injunction would be an inappropriate remedy in this case.

When shaping an injunction, the district court properly may consider the fact that OCBC members may be subject to imprisonment and other severe sanctions if they fail to comply with the terms of the injunction and are found in contempt, without the due process safeguards that normally accompany criminal prosecution. While § 882(b) does provide for a jury trial, that jury trial would be civil in nature. The statute does not offer the protections of criminal procedure, inter alia: the right to appointed counsel; the right to confront witnesses; compulsory process for obtaining witnesses; the right to a speedy and public trial; the right to be indicted by a grand jury; the right against self incrimination; and the presumption of innocence unless guilt is proven beyond a reasonable doubt.[5] This Court properly may take the absence of procedural protections

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[5] The proceedings thus far illustrate the absence of such protections in the context of the government's proposed course of action. This Court denied OCBC's request for jury trial made pursuant to § 882(b), noting that "this is not a criminal proceeding in which a defendant is entitled to a jury trial even if there are no disputes of fact." United States v. Cannabis Cultivators Club, No. 98-00088, slip op. at 12. This Court noted the applicability of judgment as a matter of law pursuant to Fed. R. Civ. P. 50, a procedure not available in the context of a criminal trial. See id. It also applied a "clear and convincing evidence" standard, rather than the more demanding "beyond a reasonable doubt" standard attendant to a criminal prosecution. See id.

into account in deciding whether and to what extent the government may pursue law enforcement aims by abandoning criminal prosecution in favor of civil injunction and in deciding that such an extraordinary remedy would be inappropriate in the circumstances presented here. Nothing in the language of § 882 is inconsistent with the use of such discretion, which is rooted firmly in the history of equity jurisdiction.

The concern for procedural hardship is most compelling in cases such as this one, where the proposed injunction is coterminous with a criminal statute. Federal prosecutors evidently wished to avoid a jury comprising California voters who recently had approved overwhelmingly Proposition 215. They have thus far succeeded in this goal, obtaining an injunction as well as a contempt order without confronting a jury, and without any of the other protections that would have been afforded OCBC members in a criminal trial. The government's apparent insistence upon bypassing a jury troubled members of the Supreme Court during the oral argument in the present case. One Justice specifically asked:

> [I]sn't the real concern behind this that with the passage of the California proposition and the popularity within the California population that that necessarily entails, it will be very, very difficult for the government ever to get a criminal conviction in a jury trial, and the reason, it seems to me, that the reason I assumed this was being brought was to avoid hung juries in criminal cases.
>
> If the trial court in fact were to conclude that that is the reason and that's why the injunctive remedy was being invoked, would that be a good reason for the court to say it is not certainly a necessary and maybe not an appropriate use of equity to give the government an alternative to six month or less sentences for criminal contempt in order, in effect, to make a criminal statute enforceable which in the normal criminal course is not. Would that be an abuse of discretion?

Tr. of Oral Argument, March 28, 2001, United States v. Oakland Cannabis Buyers' Cooperative, 530 U.S. 1010., available at 2001 U.S. TRANS LEXIS 23, at *12.[6]

The Solicitor General, of course, opined that the district court would be obliged to grant injunctive relief in virtually all circumstances, so long as the government showed a violation of the CSA. Id. But, given the Supreme Court's rejection of that formulation (i.e., given the ruling

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[6] Several other questions by different Justices focused on this same theme. See Id. at *8-13.

that equitable concerns other than medical necessity remained valid considerations), it becomes quite important to ascertain whether the government is operating here in a way designed to subvert the jury process. Again, the Supreme Court seemed concerned about this dynamic, as evidenced by this exchange:

> QUESTION: Do we know whether this United States attorney brought this as a civil -- as a civil matter precisely because of the legal doubt or rather in order to avoid a jury trial, do we have any idea which of the two it is.
>
> GENERAL UNDERWOOD: I was not -- I don't have the answer to that question . . . .

Id. at *13-14.

If the Solicitor General did not know the answer to the Justice's question, it seems apparent that this fact remains in dispute before this Court. On that ground alone, summary judgment would seem inappropriate.

The United States here seeks to enforce a federal criminal statute in circumstances that should give pause on a number of axes: the defendant is an organization that specifically has been designated by a local government to perform the functions the United States wants to proscribe; the defendant's conduct specifically is permitted by relevant local penal law' and the defendant's evident goal is to alleviate suffering. Facing a prosecution that might be difficult and unpopular, the United States has asked this Court to permit it to make an end-run around criminal process for no identifiable reason besides what may be its fear of what might result were it to submit its case to the normal vetting process of a criminal prosecution. Fear of acquittal simply is not sufficient reason to deprive persons of their basic constitutional protections that attach to criminal prosecution. The right to counsel, the right to determination of guilt beyond a reasonable doubt, and the right to due process, inter alia, are the defining characteristics of the mechanism that we have established for ensuring that the government cannot enforce criminal law against individuals without requisite deliberation and community review. In exercising its equitable discretion, this Court must weigh the personal and societal consequences of denying these and related protections (such as the right not to have guilt adjudicated by a judge on a motion for judgment as a matter of law). Against these

considerations, the government's reasons for seeking an injunction are insufficient.

The lack of procedural protections is particularly troubling in the context of this case, where the maintenance of an injunction does not by necessity constitute the end to court proceedings. Because OCBC members have a demonstrated determination to serve patients who they believe have a proven medical necessity for marijuana, the risk of future incarceration for contempt is real. This risk of contempt, as well as the fact that OCBC's "guilt" has not been demonstrated beyond a reasonable doubt or by a jury, contradicts the government's assertion that the public interest cannot be served by granting OCBC's motion, as the government believes that "compliance with the Controlled Substances Act already has been achieved." Gov. Br. at 24. On the contrary, OCBC's record of litigating vigorously the instant case illustrates that OCBC wishes to continue the conduct challenged by the government and raises the possibility of future contempt prosecutions. At the least, this record of vigorous litigation indicates that there are unresolved factual issues–notably, whether OCBC is likely to violate a civil injunction in the future–that militate against granting summary judgment at this stage.

Further, this Court should weigh in its equitable equation the extent to which patients are likely to seek alternative sources for their perceived medical marijuana needs. This is not an argument that raises the medical needs of patients, but rather focuses upon the likelihood that, as a factual matter, patients will seek access to marijuana and in the absence of the OCBC will face serious dangers and hardship as they rely on sources that are far less safe and affordable than OCBC. Marijuana purchased on the street is far more likely to contain adulterants or fungi that directly imperil the health of already ill patients. Moreover, entry by these patients into an underground, unregulated market raises the possibility of violence or theft by unscrupulous drug dealers. Such hardship must weigh into an overall assessment of the equities, counseling that OCBC should not have its activities curtailed in an extraordinary manner that would not provide the procedural protections of criminal prosecution. This Court should, at the least, deny the government's request for summary judgment so that the dangers to persons who the court has reason to expect will continue to purchase marijuana can be explored.

It is not difficult to imagine circumstances in which a civil injunction under § 882 might be the appropriate means for relief. For example, where the government and a private party simply seek an interpretation of the CSA in the context of a fairly arcane issue and there is no real concern about proving criminal conduct, as appears to be the normal use of this statute. At oral argument for this case, in fact, the Solicitor General discussed the other occasions when the CSA's injunctive provision generally have been used, stating that they are cases "where there is a business enterprise going on that has a dispute with the government about whether what they're doing is outside the statute." Tr. of Oral Argument, Oakland Cannabis Buyers' Cooperative, 530 U.S. 1010, at *16. [7] Relatedly, we can certainly imagine cases where both the government and the defendant might prefer to resolve the case under the rules of civil procedure, in contrast to OCBC, which wishes to avail itself of the protections of criminal process. Far from automatically issuing an injunction upon a purported violation of federal law, a district court in such a situation should consider the absence of procedural safeguards, both in the injunction proceeding itself and in any subsequent contempt proceeding. In the context of this case, such consideration can yield only one result: if the government wishes to enforce the CSA against OCBC, it must convince a criminal jury beyond a reasonable doubt that OCBC's conduct violates the statute.

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[7] The Solicitor General elaborated that:

> [I]t is customary to seek injunctions against, for instance, manufacturing plants that are claiming that their use of particular chemicals is–what they're doing is within the Act or without the Act, I mean, when there is essentially a dispute with the business enterprise about the legality and propriety of what they're doing . . . the kind of occasion when an injunction is used to resolve the legal dispute on the assumption that once that legal dispute is resolved it will not be necessary to seek further enforcement . . . .

Id. at *16-17.

The case here bears no resemblance to even this "customary" use of the unusual remedy of injunction. OCBC wishes, and perhaps intends, to continue its activity in spite of the CSA; as the litigation thus far illustrates, OCBC and the government are not trying to resolve a legal dispute, but, rather, the OCBC actively is trying to prevent the government from shutting down its activities.

CONCLUSION

For the foregoing reasons, this Court should deny the government's motion for summary judgment against OCBC and should grant OCBC's motion to dissolve or modify the preliminary injunction.

DATED: March 8, 2002

Respectfully submitted,

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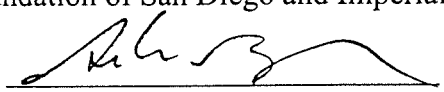
By: 
Graham A. Boyd

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CERTIFICATE OF SERVICE

CASE:United States v. Oakland Cannabis Buyers' Cooperative

CASE NO: United States District Court for the Northern District of California, 98-0088

I am employed in the City of New Haven, Connecticut. I am over the age of eighteen and not a party to the within action; my business address is 85 Willow Street, New Haven, Connecticut 06511. On March 8, 2002, I served the following document:

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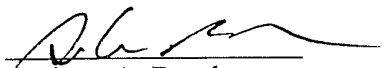

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