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

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON,

Defendants.

AND RELATED ACTIONS

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

RELATED

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF; AND OPPOSITION TO OAKLAND CANNABIS BUYERS' COOPERATIVE'S AND JEFFREY JONES' MOTION AFTER REMAND TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION ORDER

Date: March 1, 2002
Time: 10:00 a.m.
Courtroom: 8
Hon. Charles R. Breyer

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on March 1, 2002, at 10:00 a.m., in the United States Courthouse at 450 Golden Gate Avenue, San Francisco, California, in the courtroom normally occupied by the Honorable Charles R. Breyer, plaintiff, the United States of America, will move for summary judgment, and for permanent injunctive relief, against defendants Cannabis Cultivators Club and Dennis Peron in Case No. C 98-0085 CRB; defendants Marin Alliance for Medical Marijuana and Lynnette Shaw in Case No. C 98-0086 CRB; defendants Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman in Case No. C 98-0087 CRB; defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones in Case No. C 98-0088 CRB; and defendants Santa Cruz Cannabis Buyer's Club in Case No. C 98-0245 CRB.

As is demonstrated below, the United States is entitled to summary judgment and permanent injunctive relief because the Court has resolved all relevant legal questions in favor of the United States, and because there are no genuine issues of material fact in dispute. The United States also opposes the motion of defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (collectively the "OCBC Defendants") to dissolve or modify the preliminary injunction.

PRELIMINARY STATEMENT

In United States v. Oakland Cannabis Buyers' Cooperative, 121 S. Ct. 1711 (2001) ("Oakland Cannabis"), a unanimous Supreme Court held that "a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act." Id. at 1718. In particular, the Supreme Court found that "[i]t is clear from the text of the [Controlled Substances] Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception," and stated that it was "[u]nwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute * * *." Id. at 1719. The Court therefore ruled that "medical necessity is not a defense to manufacturing and distributing marijuana." Id.

These cases have returned to this Court on remand from the Supreme Court and Ninth Circuit, and the OCBC Defendants have moved to dissolve or modify the preliminary injunction. None of the arguments raised by the OCBC Defendants has merit. Governing Ninth Circuit authority forecloses the OCBC Defendants' contentions that the preliminary injunction entered by this Court unconstitutionally exceeds the power of Congress under the Commerce Clause; infringes upon the police power of the States under the Tenth Amendment; and violates fundamental constitutional rights protected by the Fifth and Ninth Amendments. Nor are the OCBC Defendants correct in their assertion that this Court should exercise its equitable discretion to dissolve or modify the preliminary injunction. The preliminary injunction entered by the Court has achieved compliance with the Controlled Substances Act, and none of the reasons advanced by the OCBC Defendants would merit dissolution or modification of that injunction.

If therefore is now time for this Court to enter summary judgment against all defendants in favor of the United States, and grant the government's request for permanent injunctive relief. All legal questions have been resolved in favor of the United States, and there are no genuine issues of material fact in dispute. As this Court found in granting the United States' motions for preliminary injunctive relief, "[i]t is undisputed that marijuana is a controlled substance within the meaning of [21 U.S.C.] § 841(a)," and "[i]t is equally undisputed that defendants distribute marijuana." United States v. Cannabis Cultivators Club, 5 F. Supp.2d 1086, 1099 (N.D. Cal. 1998).

Accordingly, now that the Supreme Court has ruled, the entry of summary judgment and permanent injunctive relief in favor of the United States is appropriate and warranted.

FACTS AND PROCEEDINGS

1. On January 9, 1998, the United States filed these related civil actions against six independent cannabis buyers clubs and ten individuals associated with the management of those clubs. The United States sought declaratory relief, and preliminary and permanent injunctive

relief, arising out of the defendants' ongoing distribution and manufacture of marijuana, and related activities, in violation of federal law.

On May 13, 1998, after full briefing and oral argument, this Court issued a comprehensive opinion which granted the United States' motions for preliminary injunctions. See 5 F. Supp.2d at 1091-1106. This Court determined that the uncontradicted evidence established that defendants had violated the Controlled Substances Act, finding that "[i]t is undisputed that marijuana is a controlled substance within the meaning of section 841(a)" and "[i]t is equally undisputed that defendants distribute marijuana." Id. at 1099. The Court therefore concluded that the United States was entitled to preliminary injunctive relief, finding that the government "has established that it is likely to prevail on the merits of its claim that defendants are in violation of federal law," and that, in statutory enforcement actions, "irreparable injury is presumed if the government establishes that it is likely to prevail on the merits." Id. at 1103.

Accordingly, on May 19, 1998, this Court issued preliminary injunctions against each of the six defendant cannabis clubs and the individual defendants associated with those clubs. The preliminary injunctions enjoined the defendants from engaging in the manufacture of distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). The preliminary injunctions also enjoined the defendants from using the premises of the buildings which house the defendant cannabis dispensaries for the purposes of engaging in the manufacture and distribution of marijuana, in violation of 21 U.S.C. § 856(a)(1), and from conspiring to violate 21 U.S.C. § 841(a)(1).

2. Following the entry of the preliminary injunctions, the OCBC Defendants "did not appeal the injunction but instead openly violated it by distributing marijuana to numerous persons." Oakland Cannabis, 121 S. Ct. at 1716. The United States therefore instituted civil contempt proceedings. On October 13, 1998, the Court found that the uncontroverted evidence demonstrated that the OCBC Defendants were in civil contempt of the preliminary injunction entered by the Court. See October 13, 1998 Memorandum and Order re: Motions in Limine and

Order to Show Cause in Case No. 98-0088 ("October 13 Memorandum Opinion and Order"), slip op. at 10-13. Three days later, the Court summarily rejected the OCBC Defendants' motion to modify the preliminary injunction to allow for a medical necessity defense. See October 16, 1998 Order, slip op. at 2. Accordingly, on October 19, 1998, the Court modified the May 19, 1998 preliminary injunction to empower the United States Marshal to enforce the injunction by taking control of the OCBC Defendants' premises. See October 19, 1998 Order Modifying Injunction in Case No. 98-0088, slip op. at 1.[1]

3. On September 13, 1999, the Ninth Circuit, in a per curiam opinion, vacated and remanded this Court's denial of the motion to modify the injunction based on a physician's statement of "medical necessity." The Ninth Circuit stated the medical necessity defense was a "legally cognizable defense that likely would pertain in the circumstances" of this case, and that this Court had erred by believing "that it had no discretion to issue an injunction that was more limited in scope than the Controlled Substances Act itself." United States v. Oakland Cannabis Buyers' Cooperative, 190 F.3d 1109, 1114-15 (9th Cir. 1999), *rev'd* 121 S. Ct. 1711 (2001). Rather, the Ninth Circuit stated, "since the government chose to deal with potential violations [of the Controlled Substances Act] on an anticipatory basis instead of prosecuting them afterward, the government invited an inquiry into whether the injunction should *also* anticipate likely exceptions." Id. at 1114. The Ninth Circuit further stated that "there is no indication that the 'underlying substantive policy' of the [Controlled Substances] Act mandates a limitation on the

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[1] Pursuant to this order, the United States Marshal took control of the premises of the Oakland club on October 20, 1998. On October 30, 1998, upon application by the Oakland defendants, the Court vacated the October 19, 1998 modification to the preliminary injunction and permitted the Oakland defendants to reenter their premises "provided they do not engage in the manufacture or distribution of marijuana from those premises, or use the premises for the purpose of manufacturing or distributing marijuana." October 30, 1998 Order re: Ex Parte Motion in Case No. 98-0088 at 2-3.

district court's equitable powers." Id. (quoting Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1156 (9th Cir. 1988)).

The Ninth Circuit further concluded that this Court must consider the public interest, and stated that the OCBC Defendants had "identified a strong public interest" in allowing the distribution of marijuana to persons with a medical necessity. Id. at 1114-15. The Ninth Circuit therefore instructed this Court "to reconsider the [OCBC Defendants'] request for a modification that would exempt seriously ill individuals who need cannabis for medical purposes." Id. at 1115.

4. On May 30, 2000, the OCBC Defendants moved this Court to dissolve or, in the alternative, modify the preliminary injunction. The Court granted the OCBC Defendants' motion on July 17, 2000, and issued an Amended Preliminary Injunction Order which, although reaffirming that the injunction prohibiting the OCBC Defendants from engaging in the distribution or manufacture of marijuana otherwise remained in effect, also provided that:

> [t]he foregoing injunction does not apply to the distribution of cannabis by the Oakland Cannabis Buyers' Cooperative to patient-members who (1) suffer from a serious medical condition, (2) will suffer imminent harm if the patient-member does not have access to cannabis, (3) need cannabis for the treatment of the patient-member's medical condition, or need cannabis to alleviate the medical condition or symptoms associated with the medical condition, and (4) have no reasonable legal alternative to cannabis for the effective treatment or alleviation of the patient-member's medical condition or symptoms associated with the medical condition because the patient-member has tried all other legal alternatives to cannabis and the alternatives have been ineffective in treating or alleviating the patient-member's medical condition or symptoms associated with the medical condition, or the alternatives result in side effects which the patient-member cannot reasonably tolerate.

July 17, 2000 Amended Preliminary Injunction Order ¶ 6, slip op. at 2.

5. On August 29, 2000, the Supreme Court entered an order granting the government's application for a stay of the district court's July 17, 2000, orders, pending appeal of the order to the court of appeals. See 121 S. Ct. 21 (2000). Thereafter, on November 27, 2002, the Supreme Court granted the government's petition for writ of certiorari to the Ninth Circuit. See 121 S. Ct. 563 (2000). On December 12, 2000, the Ninth Circuit vacated oral argument on that appeal pending the Supreme Court's resolution of the medical necessity question.

6. On May 14, 2001, the Supreme Court unanimously reversed the Ninth Circuit. The Supreme Court held that "a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act." 121 S. Ct. at 1718. In particular, the Court stated that:

> In the case of the Controlled Substances Act, the statute reflects a determination that marijuana has no medical benefits worthy of an exception (outside of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, see 21 U.S.C. § 829, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has 'no currently accepted medical use' at all.'

Id. (quoting 21 U.S.C. § 811).

The Supreme Court also rejected the OCBC Defendants' contention that the use of marijuana and other schedule I drugs generally may be medically necessary to a particular patient or class of patients, even if the drug(s) may not yet have achieved general acceptance as a medical treatment. The Court "declin[ed] to parse the statute in this manner," stating that "[i]t is clear from the text of the [Controlled Substances] Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception." Id. at 1719. The Supreme Court therefore held that "medical necessity is not a defense to manufacturing and distributing marijuana." Id.

Justice Stevens, in a concurring opinion joined by Justices Souter and Ginsburg, also concluded that "Congress' classification of marijuana as a schedule I controlled substance -- that is, one that cannot be distributed outside of approved research projects -- makes it clear that the Controlled Substances Act cannot bear a medical necessity defense to *distributions* of marijuana." 121 S. Ct. at 1723 (Stevens, J., concurring) (internal citations and quotations omitted).

7. On December 4, 2001, the Ninth Circuit remanded this case to this Court for proceedings consistent with the Supreme Court's decision in Oakland Cannabis. Thereafter, on January 7, 2002, the OCBC Defendants filed a motion to dissolve or modify the preliminary injunction. See Defendants' Notice of Motion and Motion After Remand to Dissolve or Modify

Preliminary Injunction Order and Memorandum of Points and Authorities in Support Thereof ("OCBC Mem.") at 8-37.

The United States now opposes the OCBC Defendants' motion to dissolve or modify the preliminary injunction, and cross-moves for summary judgment and for permanent injunctive relief against all defendants..

ARGUMENT

I. THE OCBC DEFENDANTS' CONSTITUTIONAL CHALLENGES TO THE PRELIMINARY INJUNCTION ARE WITHOUT MERIT

The OCBC Defendants move to dissolve or modify the preliminary injunction entered by this Court on May 19, 1998, arguing that "[t]he current unmodified injunction is unconstitutional because it exceeds the powers of Congress and violates the fundamental rights of the Defendants." OCBC Mem. at 1. In particular, the OCBC Defendants contend that the unmodified preliminary injunction should be dissolved or modified because section 841(a)(1) of the Controlled Substances Act (1) exceeds Congress' authority under the Commerce Clause, U.S. Const. art I, § 8; (2) unconstitutionally infringes upon the police power of the States in violation of the Tenth Amendment; and (3) unconstitutionally infringes violates fundamental constitutional rights protected by the Fifth and Ninth Amendments. Id. at 11-36.

As we now demonstrate, none of the constitutional arguments raised by OCBC Defendants has merit.

A. Commerce Clause

1. The OCBC Defendants first contend that the preliminary injunction entered by this Court "exceeds the power of Congress under either the Commerce Clause or the Necessary and Proper Clause by prohibiting the wholly intrastate distribution of cannabis for medical purposes." OCBC Mem. at 11. Relying upon the Supreme Court's decisions in United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), the OCBC Defendants

assert that, "[t]o the extent the injunction prohibits these intrastate activities, it is unconstitutional." Id. at 14.

There is no merit to this contention; indeed, it has been foreclosed by circuit precedent. It has long been established in the Ninth Circuit that the Controlled Substances Act's prohibition on the distribution or manufacture of marijuana and other controlled substances "is constitutional under the Commerce Clause." United States v. Bramble, 103 F.3d 1475, 1479 (9th Cir. 1996). Accord United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997); United States v. Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996); United States v. Visman, 919 F.2d 1390, 1393 (9th Cir. 1990), *cert. denied*, 502 U.S. 969 (1991); United States v. Montes-Zarate, 552 F.2d 1330, 1331-32 (9th Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); United States v. Rodriquez-Camacho, 468 F.2d 1220, 1221-22 (9th Cir. 1972), *cert. denied*, 410 U.S. 985 (1973). The Ninth Circuit also has specifically held that the Supreme Court's decision in Lopez does not change this conclusion. See Tisor, 96 F.3d 373-75; Kim, 94 F.3d at 1249-50. The OCBC Defendants' reliance on Lopez and its progeny, therefore, is misplaced.

Lopez involved a challenge to a statute which proscribed the knowing possession of a firearm in a school zone. As the Supreme Court found, the statute challenged in Lopez "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. Similarly, Morrison involved a challenge to a statute that created a federal civil remedy for victims of "[g]ender-motivated crimes of violence [that] are not, in any sense of the phrase, economic activity." 529 U.S. at 613. The Court emphasized in Morrison that, "a fair reading of Lopez shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case," and that "Lopez's review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." Id. at 610. The Supreme Court therefore held that, "[w]hile we need not adopt a categorical rule against aggregating the effects of

noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." Id. at 613.

In contrast to the "noneconomic" conduct at issue in Lopez and Morrison, the Ninth Circuit has expressly held that the "[i]ntrastate distribution and sale of [controlled substances] are commercial activities," Tisor, 96 F.3d at 375, and that, "'[u]nlike education, drug trafficking is a commercial activity which substantially affects interstate commerce.'" Kim, 94 F.3d at 1250 (quoting United States v. Staples, 85 F.3d 461, 463 (9th Cir.), *cert. denied*, 519 U.S. 938 (1996)). Other circuits have reached the same conclusion. See, e.g., United States v. Goodwin, 141 F.3d 394, 399 (2d Cir. 1997) ("We have repeatedly held that the Controlled Substances Act concerns an obviously economic activity substantially affecting interstate commerce, namely narcotics trafficking, and have sustained the Act against criminal defendants' Lopez challenges." (internal quotation omitted)), *cert. denied*, 523 U.S. 1086, 525 U.S. 881 (1998); United States v. Zorrilla, 93 F.3d 7, 8 (1st Cir. 1997) ("Here, unlike in Lopez * * * the underlying conduct possesses a significant economic dimension. Many courts, including this court, have held that drug trafficking is precisely the kind of economic enterprise that substantially affects interstate commerce and that, therefore, comes within Congress's regulatory power under the Commerce Clause."). Thus, in rejecting claims analogous to those advanced by the OCBC Defendants here, the Tenth Circuit explained that:

> In both Morrison and Lopez, * * * the Supreme Court struck down laws which criminalized non-economic behavior. In contrast, § 841(a)(1) makes it illegal to 'manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance.' 21 U.S.C. §841(a)(1). These activities are, by their nature, economic in character. Because Morrison involved the regulation of non-economic activities, while § 841(a)(1) deals with the regulation of economic activities * * * § 841(a)(1) and § 846 are within Congress' power to regulate interstate commerce.

United States v. Price, 265 F.3d 1097, 1107 (10th Cir. 2001) (internal citations and footnote omitted).

The Ninth Circuit therefore has rejected as "misplaced" the contention that Lopez supports a Commerce Clause challenge to the Controlled Substances Act because, as compared to section 841(a)(1), "[t]he activity condemned in Lopez did not involve a commercial transaction." Tisor, 96 F.3d at 373. Similarly, this Court, in granting the United States' motion for a preliminary injunction, rejected the identical Commerce Clause challenge raised by the OCBC defendants here, holding that "[t]his case, unlike Lopez, is not about mere possession but rather about distribution, a class of activities that, even if done for the humanitarian purpose of serving the legitimate health care need of seriously ill patients, can affect interstate commerce," and that, furthermore, "there is nothing in the nature of medical marijuana that limits it to intrastate cultivation" because "[m]edical marijuana may be grown locally or out of state or country" and "may be transported across state lines and consumed across state lines." 5 F. Supp.2d at 1098.

In Tisor, the Ninth Circuit distinguished the Controlled Substances Act from the statute at issue in Lopez in another key respect. In enacting the Controlled Substances Act, Congress made detailed findings that the intrastate manufacture, distribution, and possession of controlled substances, as a class of activities, "'have a substantial and direct effect upon interstate commerce.'" 96 F.3d at 374 (quoting 21 U.S.C. § 801(3)). As this Court noted in granting the government's motion for a preliminary injunction:

> Congress found that, 'after manufacture, many controlled substances are transported in interstate commerce,' id. § 801(3)(A); that 'controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution,' id. § 801(3)(B); that "controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.' id. § 801[(3)(C)]; that '[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances,' id. § 801(4); and that '[c]ontrolled substances cannot be differentiated from controlled substances manufactured and distributed interstate,' id. § 801(5). Therefore, '[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.' Id. § 801(6).

5 F. Supp.2d at 1097. "These declarations provide a specific, reasonable finding by Congress that local narcotics activity substantially affects interstate commerce." United States v. Walker, 142 F.3d 103, 111 (2d Cir.), *cert. denied*, 525 U.S. 896, 525 U.S. 988 (1998).

This Court therefore properly relied on these findings in previously upholding the constitutionality of section 841(a)(1) against the defendants' Commerce Clause challenge, holding that "Congress has made detailed findings that the *intrastate* manufacture, distribution, and possession of controlled substances, as a class of activities, 'have a substantial and direct effect upon interstate commerce,'" 5 F. Supp.2d at 1097 (quoting 21 U.S.C. § 801(3)), and that, "[s]ince Lopez, the Ninth Circuit has held that Congress's enactment of the Controlled Substances Act is constitutionally permissible under the Commerce Clause." Id. (citing Bramble, Tisor, Kim, and Staples). Likewise, in Kim, the Ninth Circuit noted that, "[b]ased on [Congress'] findings and the ample judicial recognition that an interstate market for illegal drugs exists, every circuit that has considered a Commerce Clause challenge to § 841 [of the Controlled Substances Act] after Lopez has upheld the provision's constitutionality." Kim, 94 F.3d at 1250. This remains equally true today.[2]

2. Notwithstanding this unbroken line of authority -- which, with the exception of Tisor, they fail to discuss or even cite -- the OCBC Defendants contend that "neither Congress nor any court has made any factual findings whatsoever regarding the effect on interstate commerce of the intrastate distribution of cannabis solely to seriously ill patients," and that "[t]he findings in the

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[2] See United States v. Edwards, 98 F.3d 1364, 1369 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1170 (1997); United States v. Lerebours, 87 F.3d 582, 584-85 (1st Cir. 1996), *cert. denied*, 519 U.S. 1060 (1997); Proyect v. United States, 101 F.3d 11, 13-14 (2d Cir. 1996) (per curiam); United States v. Leshuk, 65 F.3d 1105, 1111-12 (4th Cir. 1995); United States v. Westbrook, 125 F.3d 996, 1009-10 (7th Cir.), *cert. denied*, 522 U.S. 1036 (1997); United States v. Brown, 72 F.3d 96, 97 (8th Cir. 1995) (per curiam), *cert. denied*, 518 U.S. 1033 (1996); United States v. Wacker, 72 F.3d 1453, 1475 (10th Cir. 1995). In addition, the Fifth and Sixth Circuits have upheld the constitutionality of section 841(a)(1) in cases decided prior to the Supreme Court's decision in Lopez, see, e.g., United States v. Lopez, 459 F.2d 949, 953 (5th Cir.), *cert. denied*, 409 U.S. 878 (1972); United States v. Sawyers, 902 F.2d 1217, 1221 (6th Cir. 1990), *cert. denied*, 501 U.S. 1253 (1991), while the Third and Eleventh Circuits have upheld other provisions of the Controlled Substances Act against Commerce Clause challenges. See, e.g., United States v. Orozco, 98 F.3d 105, 107 (3d Cir. 1996) (21 U.S.C. § 860(a)); United States v. Jackson, 111 F.3d 101, 102 (11th Cir.), *cert. denied*, 522 U.S. 878 (1997) (same).

[Controlled Substances Act] with respect to jurisdiction over intrastate activity are general and do not address the effect on intrastate commerce of distribution of cannabis *to seriously ill patients who require this medicine.*" OCBC Mem. at 15, 16 (emphasis in original). The OCBC Defendants further assert that it is not "an economic activity to supply or distribute cannabis to another without charge or gain," and that, "[t]o the extent the injunction prohibits these noneconomic activities, it is unconstitutional and must be modified accordingly." Id. at 17, 18.

These contentions also lack merit. In Lopez, the Supreme Court reaffirmed the principle that, "'where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.'" 514 U.S. at 558 (emphasis in original) (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968) (emphasis by Court)). In other words, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." Perez v. United States, 402 U.S. 146, 154 (1971). Rather, in such circumstances, the only function of a court "is to determine whether the particular activity regulated or prohibited is within the reach of federal power." United States v. Darby, 312 U.S. 100, 120-21 (1941).

The Ninth Circuit therefore has rejected the contention that individualized proof of an interstate nexus is required in cases alleging violations of the Controlled Substances Act. In Visman, the Ninth Circuit held that section 841(a)(1) "'is constitutional" under the Commerce Clause and that "no proof of an interstate nexus is required in order to establish jurisdiction of the subject matter'" because "local criminal cultivation of marijuana is within a class of activities that adversely affects interstate commerce." 919 F.2d at 1393 (quoting United States v. Montes-Zarate, 552 F.2d at 1331). Similarly, the Second Circuit has ruled that, "[b]ecause narcotics trafficking represents a type of activity that Congress reasonably found substantially affected interstate commerce, the actual effect that each drug conspiracy has on interstate commerce is

constitutionally irrelevant." United States v. Genao, 79 F.3d 1333, 1336 (2d Cir. 1996) (emphasis supplied)).

Likewise, in granting the United States' motion for a preliminary injunction, this Court found no merit to the identical argument that the defendants' conduct -- the alleged "distribution of marijuana to seriously ill patients for the patient's personal medical use," 5 F. Supp.2d at 1097 -- was not within the class of activities prohibited by section 841(a)(1), and that such conduct did not substantially affect interstate commerce. Noting that Congress "has the power 'to declare an entire class of activities affects interstate commerce,'" id. (quoting Maryland v. Wirtz, 392 U.S. at 192, this Court held that:

> To hold that the Controlled Substances Act is unconstitutional as applied here would mean that in every action in which a plaintiff seeks to prove a defendant violated federal law, an element of every case-in-chief would be that the defendant's specific conduct at issue, based on the facts proved at an evidentiary hearing or trial, substantially affected interstate commerce. No case so holds and the Court declines to do so for the first time here.

5 F. Supp.2d at 1098. These authorities foreclose the OCBC Defendants' contention that the United States must show that their specific conduct has a sufficient nexus to interstate commerce.

Nor is there any merit to the OCBC Defendants' assertion that, in considering their Commerce Clause argument, "it would matter greatly that the intrastate activity at issue here is the distribution of cannabis for the limited purpose of medical use by persons who are acting under advice of a licensed physician, rather than for recreational use. " OCBC Mem. at 15. In Oakland Cannabis, the Supreme Court made clear that the Controlled Substances Act "expressly contemplates that many drugs 'have a useful and legitimate medical purpose and are necessary to maintain the health of the American people,' but it includes no exception at all for any medical use of marijuana," and stated that it was "[u]nwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute * * *." 121 S. Ct. at 1719 (quoting 21 U.S.C. § 801). Hence, even were this Court entitled to consider whether the specific conduct at issue affects interstate commerce -- which, as set forth above, it is not, see, e.g., Lopez,

514 U.S. at 558; Perez, 402 U.S. at 154; Visman, 919 F.2d at 1393 -- the Court could not take into account the alleged medicinal purposes for defendants' actions because the Controlled Substances Act makes no allowance for the medical distribution of marijuana and other Schedule I controlled substances. See Oakland Cannabis, 121 S. Ct. at 1719.

3. In a last-gasp effort to save their Commerce Clause challenge, the OCBC Defendants make the remarkable claim that "[h]ad Congress the power under the Commerce Clause to regulate wholly intrastate commerce, it would have been unnecessary to adopt the Eighteenth Amendment to prohibit the intrastate 'manufacture, sale, or transportation of intoxicating liquors,'" and that "[s]ection 1 of the Twenty-First Amendment, repealing the Eighteenth, would have no purpose or effect if Congress could reach the very same activity under its power to regulate commerce among the States." OCBC Mem. at 13 (quoting U.S. Const. amend. XVIII, *repealed by* U.S. Const. amend. XXI, § 1).

This contention can be easily disposed of. As one court has observed in rejecting an identical argument, "[t]he conclusion that Congress may regulate drugs under the commerce clause disposes of the * * * argument that Congress needed to pass a constitutional amendment equivalent to the Eighteenth Amendment to regulate traffic in drugs." Kuromiya v. United States, 37 F. Supp.2d 717, 725 n.8 (E.D. Pa. 1999).

More fundamentally, the OCBC Defendants' attempt to juxtapose this Court's consideration of whether the Controlled Substances Act, which was enacted in 1970,[3] passes constitutional muster under the Commerce Clause with the question of whether Congress would have had the Commerce Clause authority to prohibit the intrastate manufacture or sale of intoxicating liquors at the time when the Eighteenth or Twenty-First Amendments were enacted reflects, at best, a serious misunderstanding of first principles of constitutional interpretation and history. This Court's consideration of the constitutionality of section 841(a)(1) must be based,

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[3] The Controlled Substances Act was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

quite obviously, on the Supreme Court's Commerce Clause jurisprudence as it stands *today*, not as it stood as of 1919, when the Eighteenth Amendment was passed, or as of 1933, when the Twenty-First Amendment was passed. Indeed, were this Court to adopt the OCBC Defendants' analysis, it would be forced to disregard such watershed Commerce Clause decisions as N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); and Wickard v. Filburn, 317 U.S. 111 (1942), which the Supreme Court in Lopez recognized "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause" and which "reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce." 514 U.S. at 556.

The OCBC Defendants further assert that, because "[s]ection 2 of the Twenty-First Amendment protects the discretion of States to prohibit or legalize intoxicating liquors" and because "[t]he Twenty-First Amendment remains an enforceable part of the Constitution," the powers of Congress "to regulate commerce among the States must be interpreted in a manner that does not contradict it." OCBC Mem. at 13-14.

This argument also fails as a matter of basic constitutional interpretation. Section 2 of the Twenty-First Amendment provides that: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein *of intoxicating liquors*, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI (emphasis supplied). By its terms, section 2 of the Twenty-First Amendment applies *only* to commerce in intoxicating liquors; it has no application outside of this limited context. As one court has noted, section 2 of the Twenty-First Amendment "is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to *one product – intoxicating liquors*." Dunagin v. Oxford, 718 F.2d 738, 744 (5th Cir. 1983) (en banc) (emphasis supplied), *cert. denied*, 467 U.S. 1259 (1984).

In short, rather than serving as a standard by which all legislation under the Commerce Clause must be judged, "Section 2 of the Twenty-first Amendment created an *exception* to the normal operation of the Commerce Clause, to permit States to prohibit commerce in, or the use of, alcoholic beverages." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 532 (1996) (emphasis supplied).

Here, Congress made clear when it enacted the Controlled Substances Act that the term "controlled substance" "does not include distilled spirits, wine, malt beverages, or tobacco * * *." 21 U.S.C. § 802(6). Hence, the OCBC Defendants' assertion that Section 2 of the Twenty-First Amendment controls this Court's consideration of the constitutionality of section 841(a)(1) finds no support either in the text of the Constitution or in the provisions of the Controlled Substances Act.

B. Tenth Amendment

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The OCBC Defendants contend that the preliminary injunction entered by this Court "unconstitutionally interferes with the exercise of state sovereignty as confirmed by the Tenth Amendment." OCBC Mem. at 21. In particular, the OCBC Defendants assert that "the State of California and its voters, through the initiative process, have determined that the health and safety of its citizens are best served by allowing seriously ill persons access to cannabis for medical purposes," that "the City of Oakland has declared a public health emergency, finding that lack of access to medical cannabis impairs public health and safety," and that "[u]nder the circumstances of this case, the Court should respect the choice made both by a sovereign State and by the sovereign people of a State." Id. at 23.

This contention, like the OCBC Defendants' Commerce Clause argument, cannot withstand scrutiny. The Supreme Court "long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority

under the Commerce Clause in a manner that displaces the States' exercise of their police powers" or that "curtail[s] or prohibit[s] the States' prerogatives to make legislative choices respecting subjects the States may consider important." Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 290, 291 (1981). In the absence of federal "commandeer[ing] [of] the state legislative process by requiring state legislature to enact a particular kind of law," Reno v. Condon, 528 U.S. 141, 149 (2000), the Tenth Amendment "states but a truism that all is retained which has not been surrendered," Darby, 312 U.S. at 124, and "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." New York v. United States, 505 U.S. 144, 156 (1992).

Thus, the OCBC Defendants are simply wrong in their suggestion that the Tenth Amendment imposes a restriction on Congress's constitutional authority to enact legislation under the Commerce Clause merely because it involves the police power of the State of California. In Gregory v. Ashcroft, 501 U.S. 452 (1991), the Supreme Court stated that, "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States [and] Congress may legislate in areas traditionally regulated by the States." Id. at 460. Indeed, the Ninth Circuit has specifically rejected a claim closely analogous to that advanced by the OCBC Defendants here -- that a federal grand jury inquiry into the alleged dispensation of anabolic steroids, of which a physician was a target, violated the Tenth Amendment because control of medical practice was asserted to be beyond the power of the federal government. Contrary to this assertion, the Ninth Circuit held that "the Commerce Clause empowers the federal government to regulate prescription drugs," and that, therefore, "a physician may not defend a federal prosecution for improper drug prescription practices on Tenth Amendment grounds." In re Grand Jury Proceedings, 801 F.2d 1164, 1169-70 (9th Cir. 1986).

Similarly, in United States v. Rosenberg, 515 F.2d 190 (9th Cir.), *cert. denied*, 423 U.S. 1031 (1975), the Ninth Circuit rejected as "singularly unpersuasive" the contention that the Tenth Amendment requires that "the determination of whether or not [a physician] was acting in the

course of his professional practice must be determined by the state," and that "Congress intended that the federal government rely on such a state determination." Id. at 198. To the contrary, the Ninth Circuit held that, "[i]f the Constitution allows the federal government to regulate the dispensation of drugs, it allows it to do so *in every case,* and not just where more than a certain quantity of drugs are involved. * * * The question of whether federal criminal laws have been violated is a *federal* issue to be determined in *federal* courts." Id. at 198 n.14 (emphasis supplied).

Accordingly, because Congress had authority under the Commerce Clause to prohibit the distribution or manufacture of marijuana in section 841(a)(1) of the Controlled Substances Act, the argument that the statute "intrudes into area traditionally regulated by the states lacks merit." Kim, 94 F.3d at 1250 n.4.

C. Substantive Due Process/Ninth Amendment

The OCBC Defendants also assert that "[t]he unmodified injunction improperly infringes upon the Cooperative's patient-members' fundamental right to use effective medical treatment available to them pursuant to their physicians' recommendations." OCBC Mem. at 26. The OCBC Defendants assert that "[t]he right articulated *by the patient-members* is concomitant with the established rights to bodily integrity, to ameliorate pain and suffering, and to prolong life." Id. (emphasis supplied).

This contention, too, is foreclosed by binding Ninth Circuit authority. In Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980), the Ninth Circuit affirmed the dismissal of a declaratory judgment action in which the plaintiff, a terminally ill cancer patient,[4] had sought to secure the right to obtain and use laetrile for the prevention of cancer. Among other claims, the patient argued that the regulatory scheme established by the Food and Drug Administration was so burdensome as applied to individuals that it infringed upon constitutional rights. The Ninth Circuit rejected this contention, holding that "[w]e need not decide whether Carnohan has a

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[4] See People v. Privitera, 23 Cal.3d 697, 734, 591 P.2d 919, 942, 153 Cal.Rptr. 431, 454 (1979) (recounting district court proceedings in Carnohan), *cert. denied*, 444 U.S. 949 (1979).

constitutional right to treat himself with home remedies of his own confection. Constitutional rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of the lawful exercise of the government's police power." Id. at 1122.

In so ruling, the Ninth Circuit cited with approval the Tenth Circuit's decision in Rutherford v. United States, 616 F.2d 455 (10th Cir.), *cert. denied*, 449 U.S. 937 (1980), where that court reversed an injunction entered on behalf of a class of terminally ill cancer patients who sought to obtain laetrile. In pertinent part, the Tenth Circuit held that "the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health." Id. at 457.[5]

This Court found Carnohan and Rutherford dispositive in dismissing the identical claims of the intervenors in these cases, who had asserted that they had a "fundamental right to be free from governmental interdiction of their personal, self-funded medical choice, in consideration with their personal physician, to alleviate suffering through the only effective treatment available for them." February 25, 1999 Memorandum and Order, slip op. at 2 (N.D. Cal. Feb. 25, 1999), *vacated and remanded* 221 F.3d 1349 (9th Cir. 2000) (Mem.). Relying on Carnohan, this Court determined that, "[r]egardless of whether the Intervenors have a right to treat themselves with marijuana which they themselves grow (a remedy of their own confection), the Ninth Circuit has held that they do not have a constitutional right to *obtain* marijuana from the medical cannabis

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[5] Every other court of appeals to consider the question has held that individuals do not have a fundamental right to obtain particular medical treatments. See, e.g., Sammon v. New Jersey Bd. of Med. Examiners, 66 F.3d 639, 645 n.10 (3d Cir. 1995) ("In the absence of extraordinary circumstances, state restrictions on a patient's choice of a particular treatment also have been found to warrant only rational basis review"); Mitchell v. Clayton, 995 F.2d 772, 775-76 (7th Cir. 1993) ("A patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider"); United States v. Burzynski, 819 F.2d 1301, 1313-14 (5th Cir. 1987) (rejecting cancer patients' claim of constitutional right to obtain antineoplastin drugs), *cert. denied*, 484 U.S. 1065 (1988).

cooperatives free of government police power." 1999 WL 111893, slip op. at 2-3 (emphasis by the Court).

This reasoning remains sound.[6] If the intervenors have no constitutional right to *obtain* marijuana from the medical cannabis cooperatives free from the government's police power, the OCBC Defendants, by parity of reasoning, have no constitutional right to *distribute* marijuana to the intervenors (or any other individual). As this Court noted, "[t]o hold otherwise would directly contradict the Carnohan holding." 1999 WL 111893, slip op. at 3. The correctness of this decision also is underscored by the Supreme Court's decision in Washington v. Glucksberg, 521 U.S. 702, 723, 728 (1997), in which the Court held that there is no fundamental due process right to obtain medical treatment which would relieve suffering by causing death.

The OCBC Defendants attempt to distinguish this governing body of authority by contending that, "[u]nlike Carnohan, the patient-members here do not seek the reclassification of any drug and do not seek to compel the government affirmatively to give them access to medication." OCBC Mem. at 35. Rather, they assert, "[t]he patient-members simply assert their fundamental right to be free of governmental interference with their obtaining and using intrastate, upon their physician's recommendations in accordance with California's Compassionate Use Act, the medication that has been demonstrated to be effective in alleviating their pain and suffering," and asserting that "[t]hese key facts are absent in Carnohan." OCBC Mem. at 35-36.

There is no merit to this assertion. As a preliminary matter, the OCBC Defendants' articulation of the constitutional claim at issue is inaccurate. It is not the "patient-members" who

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[6] Although recognizing that "the substantive claim of violation of Fifth Amendment rights that underlies plaintiffs' claim in this appeal differs from the defense of medical necessity upon which we ruled in the earlier appeal," the Ninth Circuit vacated and remanded this Court's decision for consideration in light of that court's prior opinion in Oakland Cannabis. See United States v. Oakland Cannabis Buyers' Cooperative, No. 99-15838, 2000 WL 569509, slip op. at 4 (May 10, 2000) (Mem.). Insofar as the Supreme Court has now unanimously reversed that decision, see 121 S. Ct. at 1717-21, this Court's analysis of the Fifth Amendment issue remains sound.

are seeking the right to *obtain* marijuana, it is the OCBC Defendants who are seeking the right to *distribute* and *manufacture* marijuana. Indeed, in his concurring opinion, which was joined by Justices Souter and Ginsburg, Justice Stevens rejected the OCBC Defendants' attempt to equate their distribution of marijuana with a private individual's attempt to obtain the illicit substance, noting that:

> Respondents * * * have not been forced to confront a choice of evils--violating federal law by distributing marijuana to seriously ill patients or letting those individuals suffer--but have *thrust that choice upon themselves by electing to become distributors for such patients*. Of course, respondents also cannot claim necessity based upon the choice of evils facing seriously ill patients, as that is not the same choice respondents face.

121 S. Ct. at 1723 n.1 (Stevens, J., concurring).

Even if this Court were to accept the OCBC Defendants' articulation of the right at issue, however, their attempt to distinguish Carnohan would nonetheless fail. In Carnohan, the plaintiff brought a declaratory action "to secure the right to obtain and use laetrile in a nutritional program for the prevention of cancer," and asserted that the federal regulatory scheme regarding new drug applications were "so burdensome as applied to private individuals as to infringe upon constitutional rights." 616 F.2d at 1121. This is the essentially the same right asserted by the OCBC Defendants here. That the plaintiff in Carnohan was seeking affirmative relief, while the OCBC Defendants are defending against a statutory enforcement action, is a distinction without a difference.

Moreover, as this Court ruled in dismissing the intervenors' complaint, "[t]he fact that California law does not prohibit the distribution of medical marijuana under certain circumstances is not relevant as to whether the Intervenors have a fundamental right. If that were the case, whether one had a fundamental right to treat oneself with marijuana would depend on whether the state in which one lived prohibited such conduct." 1999 WL 111893, slip op. at 3-4. Likewise, this Court also found no "material distinction" in the assertion that the intervenors' personal physicians had recommended marijuana, for "[i]f one does not have a right to obtain medication free from government regulation, there is no reason one would have that right upon a physician's

recommendation." Id. slip op. at 4 (citing Kulsar v. Ambach, 598 F. Supp. 1124, 1126 (W.D.N.Y. 1984)). This disposes of the OCBC Defendants' assertion that this case involves "[t]he right to consult with one's doctor about one's medical condition." OCBC Mem. at 30.

The OCBC Defendants alternatively attempt to distinguish Rutherford by asserting that "[t]here is no indication that the plaintiff in Rutherford attempted to establish that the drug at issue represented the only effective treatment for him" but, "[i]nstead, he simply sought to have a particular type of treatment option declared to be a fundamental right." OCBC Mem. at 37. But this purported distinction is, in reality, no distinction at all. The plaintiffs in Rutherford were a class of terminally ill cancer patients who, by definition, believed that laetrile was the only effective treatment that was available. As this Court noted, "[t]he Rutherford plaintiffs had no other treatment available. They believed that without the laetrile they would die. The Tenth Circuit nonetheless held that the Rutherford plaintiffs did not have a constitutional right to obtain laetrile." 1999 WL 111893, slip op. at 4. Indeed, even presuming that marijuana were the only effective treatment for the symptoms of the intervenors, this Court held that "Carnohan and Rutherford hold, however, that there is no fundamental right to obtain the medication of choice." Id. slip op. at 5.

Finally, the OCBC Defendants' invocation of the Ninth Amendment in support of their alleged right to distribute marijuana must be rejected. The Ninth Amendment provides that: "The enumeration In The Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people." U.S. Const. amend. IX. The Ninth Circuit has squarely held that the Ninth Amendment "'has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation.'" San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1125 (9th Cir. 1996) (quoting Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992)). See also Laurence H. Tribe, *American Constitutional Law* 776 n.14 (2d ed. 1988) ("It is a common error, but an error

nonetheless, to talk of 'ninth amendment rights.' The ninth amendment is *not* a source of rights as such; it is simply a rule about how to read the Constitution." (emphasis in original)).

Accordingly, the OCBC Defendants' substantive due process and Ninth Amendment challenges to the preliminary injunction entered by the Court are devoid of merit.

II. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT DISSOLUTION OR MODIFICATION OF THE PRELIMINARY INJUNCTION

The OCBC Defendants also contend that this Court should examine "whether the extraordinary remedy of injunction [sic] is appropriate," and that, "[i]f it were to do so, the court would conclude that other means of enforcement that do not violate the Constitution are available to the government." OCBC Mem. at 9. This contention also is unpersuasive.

As a preliminary matter, the OCBC Defendants are simply wrong in their assertion that, if it were to consider "the advantages and disadvantages of employing the extraordinary remedy of injunction, over other available methods of enforcement," Oakland Cannabis, 121 S. Ct. at 1722 (internal quotation omitted), this Court would be compelled to dissolve the preliminary injunction and require the government to seek to enforce the Controlled Substances Act through other means. See OCBC Mem. at 1, 9-10. Besides the obvious constitutional issues that any such ruling would present,[7] the OCBC Defendants wholly ignore the fact that the government acted reasonably in proceeding by way of civil enforcement, choosing a measured method of

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[7] Pursuant to the President's power to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, the Executive Branch has "exclusive authority and absolute discretion to decide whether to prosecute a case," United States v. Nixon, 418 U.S. 683, 693 (1974), and "[t]he power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws." Community for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986). As the Supreme Court reaffirmed in Printz v. United States, 521 U.S. 928 (1997), "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says 'shall take Care that the Laws be faithfully executed,' personally and through officers whom he appoints * * *." Id. at 922. Hence, any order that would have the effect of dictating to the Executive Branch how best to enforce the Controlled Substances Act would raise significant separation of powers concerns under the Take Care Clause.

enforcement. As this Court itself indicated during the March 24, 1998 preliminary injunction hearing, "my sense was that the Government chose this avenue of redress because they thought it was most humane, and they thought it was the least obtrusive. * * * And I thought that they had taken this approach because they thought that rather than arresting people and subjecting them to criminal prosecution * * * [t]hat it would be better to test the legal issues that were involved in the context of a civil injunctive proceeding rather than the criminal proceeding." Transcript, March 24, 1998 Hearing, at 104-05.

Moreover, the preliminary injunction entered by the Court has been effective in achieving compliance with the Controlled Substances Act from the OCBC Defendants. On October 30, 1998, after this Court had found them in civil contempt, the OCBC Defendants purged themselves of contempt by "[telling] the court that [they] would comply with the injunction." 190 F.3d at 1113. Indeed, the Court was able to achieve compliance without having "fined or jailed members of OCBC as a result of the contempt." Id. at 1112.[8]

Hence, because compliance with the Controlled Substances Act has already been achieved, it would serve neither the public interest nor the interests of judicial economy for this Court to reopen this controversy by dissolving the injunction and allowing the OCBC Defendants to engage in further violations of the Controlled Substances Act, only to be forced to revisit this dispute by way of a criminal prosecution. The Supreme Court surely did not intend for this Court, after having already exercised its discretion to issue preliminary injunctions against the defendants, to now second-guess the reasonable enforcement judgments of the Executive Branch.

Moreover, none of the specific grounds advanced by the OCBC Defendants would, in any event, warrant dissolution of the preliminary injunction. The OCBC Defendants first argue that

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[8] In contrast to the situation presented in these cases, the Supreme Court affirmed the lower courts' equitable discretion not to issue injunctions in Hecht Co. v. Bowles, 321 U.S. 321 (1944), and Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), both of which involved the federal government, because the defendants were taking steps to ensure compliance with the underlying statutory schemes. See Hecht. Co., 321 U.S. at 325-31; Romero-Barcelo, 456 U.S. at 310-20.

"the government's tactical decision to proceed by civil injunction deprived Defendants of important procedural safeguards that normally accompany criminal prosecution." OCBC Mem. at 9. Specifically, he OCBC Defendants contend that, "[g]iven the importance of the right to a jury trial, particularly where as here the government has charged Defendants with criminal activity, this Court must carefully exercise its discretion to consider whether a civil injunction is the appropriate means of enforcing the [Controlled Substances Act]." Id. at 10.

These assertions flatly mischaracterize the nature of the underlying proceedings in this case. This is *not* a criminal action, and the OCBC Defendants were *not* found by this Court to be in criminal contempt. Rather, the underlying action against the OCBC Defendants is a *civil* statutory enforcement action which has been expressly authorized by Congress, see 21 U.S.C. § 882(a), and the OCBC Defendants were found by this Court to be in *civil* contempt of the preliminary injunction. See October 13, 1998 Memorandum Opinion and Order, slip op. at 10 (discussing standards for civil contempt).

Moreover, in granting the United States' request for preliminary injunctions against the OCBC Defendants and other defendants, this Court rejected an identical argument that the government had improperly "chosen to bring a civil injunctive action rather than charge defendants with a violation of the criminal laws, in order to deprive defendants of the same right to a jury trial to which they would be entitled in a criminal action." 5 F. Supp.2d at 1104. The Court stated that the procedural differences between civil enforcement and criminal actions "do not compel the conclusion that the federal government is acting in bad faith." Id. In pertinent part, the Court found that, "in any contempt proceeding, the Court will determine the appropriate number of jurors, up to twelve, which must still return a unanimous verdict," and that, "even assuming the federal government could bring a motion for summary judgment in a contempt proceeding * * * summary judgment may be granted, and a party denied the right to a jury, only if *no reasonable jury* could find for the nonmoving party." Id. (emphasis by the Court).

This is precisely what transpired in this case. In finding the OCBC Defendants in civil contempt of the preliminary injunction entered on May 19, 1998, this Court stated that:

> The question presented is thus whether there are any 'facts' for a jury to decide. Defendants have offered no facts whatsoever to controvert plaintiff's evidence that defendants distributed marijuana at the OCBC Defendants on May 21, 1998. Nor have they identified any evidence that they could present to a jury that they have not already presented that would create a dispute of fact. *If there are no facts to be decided by a jury, there is no reason to have a jury trial.*

Id. (emphasis by the Court). The Court also determined that "its decision that defendants are entitled to a jury trial only if there is a material dispute of fact is not inconsistent with [21 U.S.C. § 882(b)]," for "Congress provided defendants with a right to a jury trial 'in accordance with the Federal Rules of Civil Procedure,'" and "this is *not* a criminal proceeding in which a defendant is entitled to a jury trial even if there are no disputes of fact." Id. at 11-12 (emphasis supplied).

Finally, the Court noted that, insofar as a civil contempt proceeding must be conducted in accordance with the Federal Rules of Civil Procedure, "[i]f the question of whether defendants violated the Court's [preliminary injunction] were tried to a jury, the Court would be obligated to grant judgment in accordance with [Fed. R. Civ. P.] 50 since there is no dispute that defendants violated the injunction and the Court has concluded that defendants do not have a defense to their violations as a matter of law." Id. at 12. The Court noted that the United States had "produced uncontroverted evidence that a government agent visited the OCBC Defendants at the time defendants announced they were going to distribute marijuana and that the agent personally witnessed fourteen marijuana transactions," and found that "[t]his uncontroverted evidence is clear and convincing evidence that defendants violated the injunction and thus are in contempt of [the] May 19, 1998 order." Id. Hence, the OCBC Defendants' contention that they were improperly deprived of the right to a trial by jury in these proceedings finds no support as a matter of law or fact.

To be sure, the OCBC Defendants' argument here may be that a court, sitting in equity, has the power to "require" that the government enforce the Controlled Substances Act by bringing a

criminal action, because of the possibility that a jury might nullify. Any such suggestion is foreclosed by governing authority. Although a jury may have the *de facto* power to render a criminal verdict "in the teeth of both law and facts," Horning v. District of Columbia, 254 U.S. 135, 138 (1920), a court has no authority to instruct a jury that it has the power to engage in disregard the law or proof of guilt beyond a reasonable doubt and engage in nullification. See, e.g., United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991). Accord United States v. Edwards, 101 F.3d 17, 19-20 (2d Cir. 1996) (noting that "[i]t appears that every circuit that has considered this issue agrees," and collecting cases). A court likewise has no discretion to refrain from enjoining ongoing violations of the Controlled Substances Act because a jury in a criminal action might find the violations sympathetic and therefore nullify the Act.

The OCBC Defendants alternatively contend that "permitting the government to pursue injunctive relief in this context also deprives Defendants of the immunity to which they are otherwise entitled under 21 U.S.C. § 885." OCBC Mem. at 10. The OCBC Defendants assert that, "[i]n denying Defendants' motion to dismiss based on Section 885(d), the Court interpreted Section 885(d) to provide immunity only against civil or criminal liability, and not against a suit for equitable relief." Id. at 11. Therefore, the OCBC Defendants contend, "the government has deprived Defendants of immunity by seeking injunctive relief." Id.

This contention is baseless, and mischaracterizes this Court's September 3, 1998 ruling. In denying the OCBC Defendants' motion to dismiss this action under section 885(d), this Court ruled on two alternative grounds, the first of which disposes of their argument here. In pertinent part, this Court stated that "[t]o be entitled to immunity * * * the law 'relating to controlled substances' which the official is enforcing must itself be lawful under federal law, including the federal Controlled Substances Act," and found that, "[s]ince Chapter 8.42 [of Oakland City Ordinance No. 12076] provides for the distribution of marijuana, it and the Controlled Substances Act are in 'positive conflict.'" September 3, 1998 Order re: Motion to Dismiss in Case No. 98-0088, slip op. at 3 (quoting 21 U.S.C. § 903)). The OCBC Defendants' assertion that this Court's

denial of their motion to dismiss was based solely on the distinction between suits for civil or criminal liability, and suits for equitable relief, is simply wrong.

Finally, the OCBC Defendants contend that, because the preliminary injunction issued by this Court "unconstitutionally exceeds the powers of Congress under the Commerce Clause," "interferes with powers reserved to the State and to the People under the Tenth Amendment," and "impermissibly disparages the fundamental rights retained by the People and protected by the Ninth Amendment and the Due Process Clause of the Fifth Amendment," this Court should exercise its discretion and dissolve or modify the injunction. OCBC Mem. at 11. Because, as demonstrated above, see *infra* Parts I.A.-C., none of these contentions has merit, this Court should decline the OCBC Defendants' invitation to dissolve or modify the preliminary injunction.

III. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF

Because all legal questions have been resolved in these cases, and because there are no material issues of fact in dispute, it is appropriate for the Court to grant summary judgment and enter permanent injunctive relief in favor of the United States.

A. Standards

1. Summary Judgment

Summary judgment is appropriate where "there is no genuine issue of material fact and * * * the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to establish the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the initial burden of the moving party is satisfied, the burden shifts to the opponent to demonstrate, through the production of probative evidence, that there remains an issue of fact to be tried. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In order to meet this burden, the non-moving party must go beyond the pleadings and show "by her own affidavits, or by the 'depositions, answers to interrogatories, or admissions on file'" that a genuine issue of material fact exists. Celotex Corp., 477 U.S. at 324

(quoting Fed. R. Civ P. 56(e)). The non-moving party must make a sufficient showing on all essential elements of the case with respect to which the non-moving party has the burden of proof. Id. at 323. In other words, a party must do more than create "some metaphysical doubt as to the material facts." Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

Summary judgment is an appropriate vehicle for granting a permanent injunction in cases in which the factual record developed at the preliminary injunction stage is not in dispute. As the Ninth Circuit has recognized, in the absence of a genuine issue of material fact, "[t]here is nothing novel about a permanent injunction issued on summary judgment rather than after a trial. Such a procedure comports with Federal Rule of Civil Procedure 56." Continental Airlines, Inc. v. Intra Brokers, Inc., 24 F.3d 1099, 1102 (9th Cir. 1994).

2. Permanent Injunction

The standards for permanent injunctive relief differ from the standards applicable to a preliminary injunction in two key respects. First, to be entitled to permanent injunctive relief, the plaintiff must show actual success on the merits rather than a mere likelihood of success. See, e.g., Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987); University of Texas v. Camenisch, 451 U.S. 390, 393 (1981).

Second, while "[i]rreparable injury is required for preliminary injunctions, * * * once actual success on the merits has been established, 'a party is entitled to relief as a matter of law irrespective of the amount of irreparable injury which may be shown.'" Continental Airlines, 24 F.3d at 1104 (quoting Western Systems, Inc. v. Ulloa, 958 F.2d 864, 872 (9th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993)). This is because irreparable injury "'is not an independent requirement for obtaining a permanent injunction [as opposed to a preliminary injunction or temporary restraining order]; it is only one basis for showing the inadequacy of the legal remedy.'" Id. (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2944, at 401 (1973)).

B. All Legal Questions Have Been Resolved

To begin with, the entry of summary judgment and permanent injunctive relief is appropriate in these related cases because all relevant legal questions have been resolved by courts up to and including the Supreme Court. As set forth above, in its Memorandum and Order of May 13, 1998, the Court found that the uncontradicted evidence established a clear violation of the Controlled Substances Act, stating that "[i]t is undisputed that marijuana is a controlled substance within the meaning of section 841(a)" and "[i]t is equally undisputed that defendants distribute marijuana." 5 F. Supp.2d at 1099. The Court therefore determined that the United States had established that it is likely to prevail on the merits of its claim that defendants are in violation of federal law and that, because these cases are statutory enforcement actions, irreparable injury would be presumed. Id. at 1103.

In addition, the Court rejected each of the legal defenses that had been raised by the defendants. The Court first held that it had jurisdiction to hear these cases, and declined the defendants' suggestion that it dismiss the government's actions on abstention grounds. Id. at 1094-98. In particular, as set forth above, the Court reasoned that, because the activity in which the defendants were engaged -- the "non-profit distribution of medical marijuana" -- fell within a class of activities which Congress determined has a substantial and direct effect upon interstate commerce, see 21 U.S.C. § 801(3), the federal prohibition on the distribution and manufacture of marijuana was within Congress's Commerce Clause authority. 5 F. Supp.2d at 1096-98.

Turning to the merits, the Court rejected the defendants' contention that the Controlled Substances Act did not apply to the distribution or manufacture of "medical" marijuana, holding that "[s]ection 841 prohibits the distribution of marijuana except for use in an approved research project. It does not exempt the distribution of marijuana to seriously ill persons for their personal medical use." Id. at 1100. The Supreme Court also has now unanimously held, because "[i]n the case of the Controlled Substances Act, the statute reflects a determination that marijuana has no medical benefits worthy of an exception (outside of a Government-approved research project),"

and, therefore, that "for purposes of the Controlled Substances Act, marijuana has 'no currently accepted medical use' at all.'" Oakland Cannabis, 121 S. Ct. at 1718 (quoting 21 U.S.C. § 811).

The Supreme Court also rejected the OCBC Defendants' contention that the use of marijuana and other schedule I drugs generally may be medically necessary to a particular patient or class of patients, even if the drug(s) may not yet have achieved general acceptance as a medical treatment. The Court "declin[ed] to parse the statute in this manner," stating that "[i]t is clear from the text of the [Controlled Substances] Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception." 5 F. Supp.2d at 1719. The Supreme Court therefore held that "medical necessity is not a defense to manufacturing and distributing marijuana." Id.

The Court also rejected the defendants' contentions that they should not be enjoined because their sales were subject to a "joint user" or "ultimate user" exception. As the Court noted, the joint user exception was recognized in United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977), in which the Second Circuit held that a husband and wife who acquired cocaine simultaneously for their own use were not guilty of unlawful "distribution" of the drug. The Court declined to extend this exception to distribution within a cooperative where "the controlled substance is not literally purchased simultaneously for immediate consumption." 5 F. Supp.2d at 1101.[9] The Court also determined that the defendants were not "ultimate users" within the meaning of the Controlled Substances Act "because they have not lawfully obtained the marijuana at issue." Id.

The Court further found no merit to the defendants' assertion of medical necessity, id. at 1101-02, and the Supreme Court has now unanimously held that "medical necessity is not a defense to manufacturing and distributing marijuana." 121 S. Ct. at 1719. The Court also rejected

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[9] The Court again "decline[d] to extend Swiderski to the facts as presented by defendants' proffer, namely a medical marijuana cooperative" in it ruling of October 13, 1998, which found the OCBC Defendants to be in civil contempt. See October 13 Memorandum Opinion and Order, slip op. at 6-7.

the defendants' substantive due process arguments, see 5 F. Supp.2d at 1102-03, and, as set forth above, see *infra* Part I.C., this conclusion is mandated by the Ninth Circuit's decision in Carnohan.

Finally, the Court rejected the defendants' various equitable defenses. The Court determined that the United States was within its rights to seek civil injunctions against the defendants under 21 U.S.C. § 882(a), and that the Federal Rules of Civil Procedure provided the defendants with adequate procedural protections in any future contempt proceedings. Id. at 1104. This Court also rejected the defendants' "unclean hands" argument, reasoning that the fact that medical marijuana advocates have been unsuccessful in convincing the federal government to reclassify marijuana as a Schedule II controlled substance "does not mean that the federal government has acted with unclean hands." Id. at 1105. Rather, the Court noted, as recently as 1994, the United States Court of Appeals for the District of Columbia Circuit had upheld the refusal of the Administrator of the Drug Enforcement Administration ("DEA") to reschedule marijuana from Schedule I. Id. (citing Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131 (D.C. Cir. 1994)).

The Court has also considered and rejected several other arguments that had not been raised during the preliminary injunction proceedings. As noted above, on September 3, 1998, the Court denied the OCBC Defendants' motion to dismiss brought under 21 U.S.C. § 885(d). See September 3, 1998 Order re: Motion to Dismiss in Case No. 98-0088, slip op. at 3. And, on December 3, 1998, the Court rejected the Marin Alliance defendants' rational basis challenge to the Controlled Substances Act's prohibition on the manufacture and distribution of marijuana. In pertinent part, the Court determined that the Ninth Circuit's decision in United States v. Miroyan, 577 F.2d 489, 495 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978), foreclosed any such claim. See December 3, 1998 Order in Case No. 98-0086, slip op. at 1-2. The Court further held that, no matter how framed, the Marin Alliance defendants' rational basis challenge to the Controlled Substances Act "is in essence an argument that this Court should reclassify marijuana because there is no substantial evidence to support its current classification," and that "[r]eview of the

Attorney's General decision as to the classification of a controlled substance is limited to the District of Columbia Court of Appeals or the circuit in which petitioner's place of business is located." Id. slip op. at 2 (internal citation omitted).

In sum, all relevant legal questions have been resolved in favor of the United States. These cases are therefore ripe for summary judgment.

C. There Are No Genuine Issues Of Material Fact In Dispute

Nor are there any genuine issues of material fact in dispute. The evidence produced by the United States during the preliminary injunction proceedings unequivocally demonstrates that each of the defendants made multiple sales of marijuana to undercover agents of the Drug Enforcement Administration. As this Court recognized in granting the government's motions for preliminary injunctions, "[i]t is * * * undisputed that defendants distribute marijuana," and "[d]efendants do not challenge the federal government's evidence to the extent it establishes that defendants provide marijuana to seriously ill patients or their primary caregivers for personal use by the patient upon a physician's recommendation." 5 F. Supp.2d at 1099.

A district court "[may] convert a decision on a preliminary injunction into a final disposition on the merits by granting summary judgment on the basis of the factual record available at the preliminary injunction stage." Air Line Pilots Assoc, Inc. v. Alaska Airlines, Inc., 898 F.2d 1393, 1397 n.4 (9th Cir. 1990). This is because, under Fed. R. Civ. P. 65(a)(2), "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." See, e.g., Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 938 (4th Cir. 1995) ("[S]everal courts have held that a court need not conduct an evidentiary hearing before issuing a permanent injunction if the affidavits and documentary evidence clearly establish the plaintiff's right to the injunction such that a hearing would not have altered the result."); United States v. McGee, 714 F.2d 607, 613 (6th Cir. 1983) (no hearing necessary before permanent injunction issued because issue in dispute was a purely legal question); Socialist

Workers Party v. Illinois State Bd. of Elections, 566 F.2d 586, 587 (7th Cir. 1977) (district court did not err in granting permanent injunction without evidentiary hearing where no material issues of fact in dispute), *aff'd*, 440 U.S. 173 (1979); Chauvin Int'l, Ltd. v. Goldwitz, 927 F. Supp. 40, 46 (D. Conn. 1996) ("Summary judgment may be an appropriate vehicle for granting a permanent injunction in cases, such as this, where all factual disputes were determined at the hearing on the preliminary injunction."), *aff'd*, 113 F.3d 1229 (2d Cir. 1997) (Mem.).

Consequently, pursuant to Fed. R. Civ. P. 65(a)(2), the Court should adopt the government's uncontested evidence that the defendants have engaged in the distribution and cultivation of marijuana.

D. Permanent Injunctive Relief Is Warranted

The United States also is entitled to permanent injunctive relief because it has demonstrated actual success on the merits, and because there is no adequate legal remedy. As this Court recognized in granting the government's motions for preliminary injunctions: "Since this is an action by the federal government to enforce a statute, the injunction must be granted if the federal government establishes a probability of success since, in such cases, the possibility of irreparable injury is presumed." 5 F. Supp.2d at 1099. See generally Continental Airlines, 24 F.3d at 1104 (irreparable injury is one basis for showing the inadequacy of the legal remedy).

A district court has "broad power to restrain acts * * * whose commission in the future, unless enjoined, may be fairly anticipated from the defendant's conduct in the past." N.L.R.B. v. Express Publishing Co., 312 U.S. 426, 435 (1941). These cases present just such circumstances. In the absence of permanent injunctive relief, it can be fairly anticipated that the defendants will continue to engage in the distribution and cultivation of marijuana in violation of federal law, and "[permanent injunctive relief is warranted where, as here, the defendant's past and present misconduct indicates a strong likelihood of future violations." Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 564 (9th Cir. 1990).

CONCLUSION

For the foregoing reasons, the Court should deny the OCBC Defendants' motion to dissolve or modify the preliminary injunction, grant the United States' motion for summary judgment against all defendants, and issue permanent injunctive relief against all defendants.

Respectfully submitted,

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Dated: January 25, 2002

CERTIFICATE OF SERVICE BY OVERNIGHT DELIVERY

I, Mark T. Quinlivan, Senior Counsel, Civil Division, United States Department of Justice, whose address is 901 E Street, N.W., Room 1048, Washington, D.C. 20530, hereby certify that on the 25th day of January, 2002, I caused to be served a copy of the following documents:

- Notice of Motion and Plaintiff's Motion for Summary Judgment and for Permanent Injunctive Relief; and Opposition to Oakland Cannabis Buyers' Cooperative's and Jeffrey Jones' Motion After Remand to Dissolve or Modify Preliminary Injunction Order; and
- a [Proposed] Order

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