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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 PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM-IN-INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF Date: January 29, 1999 Time: 10:00 a.m. Courtroom of the Hon. Charles R. Breyer

NOTICE OF MOTION

PLEASE TAKE NOTICE that on January 29, 1999, 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 Hon. Charles R. Breyer, plaintiff, the United States of America, will move this Honorable Court, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the Counterclaim-in-Intervention for Declaratory and Injunctive Relief of interveners Edward Neil Brundridge, Ima Carter, Rebecca Nikkel, and Lucia Y. Vier, for failure to state a claim upon which relief can be granted.

FACTS AND PROCEEDINGS

The procedural background of these related lawsuits is amply set forth in the Court's March 13, 1998, Memorandum and Order. See 5 F. Supp.2d 1086 (N.D. Cal. 1998). We summarize.

On January 9, 1998, the United States filed separate lawsuits against six independent cannabis dispensaries, or "clubs," and numerous individuals associated with those clubs, alleging that these defendants' distribution and cultivation of marijuana, and related activities, constituted violations of the Controlled Substances Act. See 21 U.S.C. §§ 841(a)(1); 846; 856(a)(1). On the same date, the United States moved for a preliminary and permanent injunction, and for summary judgment, to enjoin the defendants' ongoing unlawful conduct.[1]

On May 13, 1998, after full briefing and a hearing on the merits, this Court entered a Memorandum and Order granting the United States' motions for preliminary injunctions in all six related actions. In pertinent part, the Court determined that the United States "has established that it was likely to succeed on the merits of its claim that defendants are in violation of federal law." 5 F. Supp.2d at 1103. The Court further concluded that, because the United States had established that it was likely to succeed on the merits, and because these cases were statutory enforcement

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[1] On January 22, 1998, all six lawsuits were reassigned to this Court as related cases pursuant to Local Rule 3-12(e).

actions brought by the federal government, "irreparable injury is presumed and the injunction must be granted." Id.

On May 19, 1998, the Court entered six Preliminary Injunction Orders which enjoined the defendants from engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). The Preliminary Injunction Orders further 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). Finally, the Preliminary Injunction Orders enjoined the defendants from conspiring to violate 21 U.S.C. § 841(a)(1).

On August 14, 1998, four individuals, Edward Neil Brundridge, Ima Carter, Rebecca Nikkel, and Lucia Y. Vier, who allege that are members of three of the defendant cannabis clubs -- the Oakland Cannabis Buyers' Cooperative, Marin Alliance for Medical Marijuana, and Ukiah Cannabis Buyer's Cooperative -- moved for leave to intervene in these related actions. On September 3, 1998, the Court granted the motion for leave to intervene pursuant to Fed. R. Civ. P. 24(b). Thereafter, on October 1, 1998, the interveners filed a Counterclaim-in-Intervention for Declaratory and Injunctive Relief ("Counterclaim-in-Intervention"), alleging that, by prosecuting these actions, the United States was interfering with their fundamental right to use the medication of their choice. The interveners also seek injunctive relief that would enjoin the United States from interfering with their exercise of this alleged right.

ARGUMENT

I. THE INTERVENER'S ASSERTION OF A FUNDAMENTAL RIGHT TO USE MARIJUANA IS FORECLOSED BY BINDING CIRCUIT PRECEDENT

In their Counterclaim-in-Intervention, the interveners allege a "fundamental right * * * to be free from governmental interdiction of their personal, self-funded medical choice, in consultation with their personal physician, to alleviate their suffering through the only effective

treatment available for them." Counterclaim-in-Intervention ¶ 2. Binding authority forecloses this claim. As we have demonstrated previously, the Ninth Circuit has squarely held that a patient does not have a fundamental substantive due process right to any particular form of treatment or medication.

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 had sought to secure the right to obtain and use laetrile for the prevention of cancer. In pertinent part, the court held that the "[c]onstitutional 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), in which that court had 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.

The Ninth Circuit is not alone in reaching this conclusion. ***Every*** other court of appeals to have considered this issue has reached the same result,[2] as has every district court but one.[3] Most recently, in Smith v. Shalala, 954 F. Supp. 1 (D.D.C. 1996), the United States District Court for

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[2] See Sammon v. New Jersey Bd. of Medical Examiners, 66 F.3d 639, 645 n.10 (3d Cir. 1995) ("In the absence of extraordinary circumstances, state restrictions on a patient's choice of a particular treatment also have been found to warrant only rational basis review."); Mitchell v. Clayton, 995 F.2d 772, 775-76 (7th Cir. 1993) ("[M]ost federal courts have held that 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"); Rutherford, 616 F.2d at 457.

[3] See Sifre v. Robles, 917 F. Supp. 133, 137 (D.P.R. 1996); United States v. Vital Health Products, Ltd., 786 F. Supp. 761, 777 (E.D. Wis. 1992), aff'd, 985 F.2d 563 (7th Cir. 1993) (Mem.); Jacob v. Curt, 721 F. Supp. 1536, 1539 (D.R.I. 1989), aff'd, 898 F.2d 838 (1st Cir. 1990); Kulsar v. Ambach, 598 F. Supp. 1124, 1126 (W.D.N.Y. 1984). But see Andrews v. Ballard, 498 F. Supp. 1038, 1052-53 (S.D. Tex. 1980).

the District of Columbia rejected a claim identical to that interposed by the interveners here. In Smith, a plaintiff, who was suffering from an advanced stage of Hodgkin's lymphoma, sought an injunction barring the FDA from prohibiting the Burzynski Cancer Institute from treating him with Antineoplastons, an experimental anti-cancer agent. The plaintiff posited "the right of a competent terminally ill cancer patient to choose among available treatments that he or she can accept and endure." Id. at 2. The district court denied the requested injunction. Noting that "where courts have been presented with claims like [the plaintiff's] they have refused to find a 'right' to receive unapproved drugs," the court held that there was no substantive due process right "'to obtain unapproved drugs free of the lawful exercise of government police power.'" Id. at 3 (quoting Carnohan, 616 F.2d at 1122).[4]

Accordingly, because binding authority forecloses the interveners' assertion of a fundamental right to use marijuana, this Court should dismiss this claim.

II. THE INTERVENERS' REQUEST FOR INJUNCTIVE RELIEF ALSO MUST BE DISMISSED

In their Counterclaim-in-Intervention, the interveners also seek injunctive relief which would enjoin the United States from "interfering with the Members' exercise of this fundamental right and from hindering, obstructing, preventing ro attempting to enjoin the Oakland Coop, the Marin Alliance, the Ukiah Coop or any of the other defendants from providing the Members" with marijuana. Counterclaim-in-Intervention ¶ 26. Because (as we have demonstrated above) the interveners have no fundamental right to use marijuana, this request for relief must also be dismissed.

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[4] Nor can the interveners attempt to evade the effect of this binding authority by alleging that marijuana is "the only effective treatment available for them." Counterclaim-in-Intervention ¶ 2. Certainly the advocate of laetrile in Carnohan, or the plaintiff suffering from advanced stage Hodgkin's lymphoma in Smith, believed the drugs which they wished to use was the only effective medicine to treat their respective cancers. The Ninth Circuit and other courts nonetheless rejected, as a matter of law, the substantive due process arguments raised by the plaintiffs in those cases.

Moreover, should not escape mention that the interveners' proposed injunction would have the extraordinary effect of prospectively enjoining the operation of a federal criminal statute. There is no authority for such an action. The distribution and manufacture of marijuana continues to be prohibited by federal law, see 21 U.S.C. § 841(a)(1), and Congress has made no exception for any medical use. On the contrary, Congress placed marijuana in schedule I of the Controlled Substances Act, which, by definition, means that it has "no currently accepted medical use in treatment in the United States" and "a lack of accepted safety for use * * * under medical supervision ." Id. § 812(b)(1). In addition, Congress recently underscored its adherence to the existing federal process for the determination of the safety and efficacy of drugs, including Schedule I controlled substances such as marijuana. In the recent omnibus consolidated and emergency appropriation act of 1998, which was passed on October 21, 1998, see Pub. L. No. 105-277, 112 Stat. 2681, Congress provided as follows:

> DIVISION F--NOT LEGALIZING MARIJUANA FOR MEDICINAL USE
>
> It is the sense of Congress that--
>
> (1) certain drugs are listed on Schedule I of the Controlled Substances Act if they have a high potential for abuse, lack any currently accepted medical use in treatment, and are unsafe, even under medical supervision;
>
> (2) the consequences of illegal use of Schedule I drugs are well documented, particularly with regard to physical health, highway safety, and criminal activity;
>
> (3) pursuant to section 401 of the Controlled Substances Act, it is illegal to manufacture, distribute, or dispense marijuana, heroin, LSD, and more than 100 other Schedule I drugs;
>
> (4) pursuant to section 505 of the Federal Food, Drug and Cosmetic Act, before any drug can be approved as a medication in the United States, it must meet extensive scientific and medical standards established by the Food and Drug Administration to ensure it is safe and effective;
>
> (5) marijuana and other Schedule I drugs have not been approved by the Food and Drug Administration to treat any disease or condition;
>
> (6) the Federal Food, Drug and Cosmetic Act already prohibits the sale of any unapproved drug, including marijuana, that has not been proven safe and effective for medical purposes and grants the Food and Drug Administration the authority to enforce this prohibition through seizure and other civil action, as well as through criminal penalties;

* * * *

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

Pub. L. No. 105-277, 112 Stat. 2681 (emphasis supplied).

In derogation of this clear Congressional policy, the interveners proposed injunction would allow the defendant cannabis clubs, prospectively, to distribute marijuana in violation of federal law. It is, of course, one thing for the interveners to ignore controlling law. They cannot expect this Court to do so.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Counterclaim-in-Intervention with prejudice for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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UNITED STATES OF AMERICA

Dated: December 3, 1998

CERTIFICATE OF SERVICE

I, Mark T. Quinlivan, hereby certify that on this 3rd day of December, 1998, I caused to be served a copy of the foregoing Plaintiff's Motion to Dismiss Counterclaim-in-Intervention for Declaratory and Injunctive Relief, and the accompanying [Proposed] Order, upon counsel for the interveners and defendants, by overnight delivery:

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