Nos. 98-16950, 98-17044, and 98-17137

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE
and JEFFREY JONES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLEE'S REPLY TO BRIEF OF AMICUS CURIAE

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The United States hereby submits its reply to the Brief filed by the City of Oakland ("City") as amicus curiae in this case.[1] As we demonstrate below, the arguments advanced by the City of Oakland are baseless and provide no ground for reversal.

I. Section 885(d) Of The Controlled Substances Act Does Not Reach Defendants' Conduct.

The City argues that "[b]ecause Appellants acted pursuant to a municipal ordinance as well as state law, they are immune under the plain meaning" of 21 U.S.C. § 885(d) (Amicus Br. at 5), which protects "duly authorized" state and local officers from "civil or criminal liability" while they are "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." 21 U.S.C. § 885(d). As explained in our principal brief (at pp. 48-55), this argument fundamentally misconstrues the statute.

As the district court held, and as we explained in our brief, § 885(d) does not purport to shield officers from suits for prospective injunctive relief designed to require compliance with federal law. See Appellee Br. at 50-52. The City fails even to acknowledge this fatal defect in its argument.

Moreover, even assuming that § 885(d) barred suits for prospective injunctive relief, the City's arguments are wholly untenable. The City purports to rely upon the "plain language" of § 885(d), but provides no explanation of how the plain language supports its position. As discussed in our principal

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[1] A motion for leave to file this brief is being filed concurrently herewith.

brief, a city may not legalize conduct prohibited by federal law and then declare that persons who engage in the conduct are "enforcing" the city ordinance within the meaning of § 885(d). Appellee Br. at 53-55. Moreover, as discussed in our principal brief, the Cannabis Cooperative, which was deputized for the sole purpose of distributing marijuana, cannot plausibly be considered to be a "duly authorized" officer within the meaning of § 885(d). Ibid. Thus, the district court's conclusion that the defendants were not "lawfully engaged in the enforcement of" an ordinance within the meaning of § 885(d) (ER 1121) was clearly correct, and it does not rest on any "circular logic" (see Amicus Br. at 5).[2/]

The City further contends that its ordinance is not preempted by Federal law because "[t]he government has not proven that state law is in positive conflict with the [Controlled Substances Act] and that there is no way the two can stand together." Amicus Br. at 8. It is unclear what the City has in mind when it makes this assertion. The Controlled Substances Act prohibits the manufacture and distribution of marijuana, including distribution for medical use except as part of a

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[2] The City's argument that its interpretation of § 885(d) "harmonizes" the provisions of the Controlled Substances Act (Amicus Br. at 7) is meritless. The provisions of the statute do not require any such "harmonizing." The statute bars the distribution of controlled substances and makes clear that officers acting to "enforce" the drug laws are not subject to "liability" under the Act. The City's interpretation would not harmonize the Controlled Substances Act, but would instead rewrite it to allow municipalities to legalize conduct proscribed by federal law.

stringently controlled research project approved by the Secretary of Health and Human Services and registered by the Attorney General. 21 U.S.C. §§ 841(a)(1), 812(b)(1)(B), 812(c), 823(f). The Oakland ordinance purports to authorize the distribution of marijuana for medical purposes. ER 789 ("medical cannabis provider association * * * may * * * distribute safe and affordable medical cannabis").[3] The ordinance plainly cannot make legal what is barred by federal statute without creating a "positive conflict." The only question is whether the suit against defendants is barred by § 885(d). As we have shown, and as the district court concluded, it plainly is not.

II. Disagreement With Congressional Findings Is Not A Basis For Disregarding Federal Law.

The City suggests that although Congress placed marijuana in Schedule I, its classification should be disregarded because Congress has not sufficiently considered the medical utility of marijuana. Amicus Br. at 9-12. In essence, the City seems to argue that it and the defendants are free to violate the Controlled Substances Act because Congress did not give enough weight to their point of view in the legislative process.

Of course, the law does not work that way. But in any event, the City has misconstrued the structure of the statute and the careful legislative judgments underlying it.

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[3] For purposes of the Oakland ordinance, "Cannabis means marijuana and all parts of the plant Cannabis * * *." ER 789.

The City criticizes Congress's alleged lack of response to a report by the Shafer Commission issued in 1972[4] (Amicus Br. at 10-11), a complaint that, so far as we can ascertain, is wholly irrelevant here. But in any event, Congress clearly has considered the medical utility of marijuana, and recently reaffirmed its judgment that marijuana has no valid medical use. Pub. L. 105-277, 112 Stat 2681 (Oct. 21, 1998) ("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").[5]

Moreover, the statutory scheme developed by Congress specifically allows for the modification of the classification schedules as needed, and for removal, through rulemaking proceedings, of "any drug or other substance from the schedules if [the Attorney General] finds that the drug or other substance

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[4] Marihuana: A Signal of Misunderstanding, First Report of the National Commission on Marihuana and Drug Abuse (1972).

[5] Moreover, contrary to the City's assertion that "Congress did not even contemplate medicinal cannabis in passing the [Controlled Substances Act]," Amicus Br. at 9, at least one Senator specifically referenced the placement of marijuana on Schedule I during the Senate debates. See 116 Cong. Rec. 1664 (Jan. 28, 1970) (statement of Sen. Hruska) (noting that marijuana was placed on Schedule I because it "comes squarely within the criteria of that schedule," i.e., "highest abuse potential" and "little or no accepted medical use in this country").

does not meet the requirements for inclusion in any schedule." 21 U.S.C. § 811(a)(2). The Attorney General delegated this rulemaking authority to the Drug Enforcement Administration (DEA), 28 C.F.R. § 0.100(b), which determined that marijuana should remain in Schedule I. 57 Fed. Reg. 10,499 (Mar. 26, 1992). The D.C. Circuit affirmed this determination, finding that the DEA's findings were supported by substantial evidence, including "the testimony of numerous experts that marijuana's medicinal value has never been proven in sound scientific studies." Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1137 (D.C. Cir. 1994). If the defendants believe that they have evidence that warrants reconsideration of the DEA's determination, their remedy is to petition the agency for a hearing. See 21 U.S.C. § 811(a); 28 C.F.R. § 0.100(b); see also United States v. Burton, 894 F.2d 188, 192 (6th Cir.), cert. denied, 498 U.S. 857 (1990) (reclassification of controlled substances "is clearly a task for the legislature and the attorney general and not a judicial one"); United States v. Wables, 731 F.2d 440, 450 (7th Cir. 1984) (trial court properly refused to reclassify marijuana based on its use in treatment of cancer and glaucoma, because "the proper statutory classification of marijuana is an issue that is reserved to the judgment of Congress and to the discretion of the Attorney General"). The defendants are not free to violate Federal law.

III. The City's Constitutional Arguments Are Baseless.

The City claims that its ordinance is protected by the Ninth and Tenth Amendments because it seeks to retain the "rights of the people" to use marijuana for medical purposes. Amicus Br. at 12-21. The City fundamentally misunderstands the nature of our constitutional system.

As the district court below correctly concluded, applying this Court's rulings, the Controlled Substances Act is a proper exercise of Congress' Commerce Clause powers. United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1097 (N.D. Cal. 1998), citing, inter alia, United States v. Bramble, 103 F.3d 1475, 1479-80 (9th Cir. 1996); United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), cert. denied, 117 S. Ct. 1012 (1997). Defendants do not challenge that ruling on appeal.

Valid enactments of Congress do not violate the Ninth or Tenth Amendments simply because they displace state policy choices. See Appellee Br. at 55-57. Contrary to the City's contention, the Ninth Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992). Nor are there any cases in which the "right" to use marijuana for medical purposes has been deemed fundamental.[6]

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[6] Cf. Carnohan v. United States, 616 F.2d 1120, 1122 (9th Cir. 1980) (rejecting assertion that individuals had a (continued...)

Moreover, the fact that Californians voted in favor of Proposition 215 does not create a fundamental right to use marijuana. The states are not free to hold referenda stating their disagreement with a federal statute and thereby make the enforcement of that federal statute unconstitutional. The Seventh Circuit thus recently rejected a comparable Ninth Amendment challenge to the sentencing provisions of the Controlled Substances Act, which were alleged to conflict with the Illinois constitution's requirement that punishments be proportional to the gravity of the offense. United States v. Spencer, 160 F.3d 413, 414 (7th Cir. 1998). As the Spencer court observed in rejecting the plaintiff's challenge:

> [T]he swelling chorus [of critics of the challenged sentencing provisions] cannot help this defendant. The Ninth Amendment does not invert the supremacy clause and allow state constitutional provisions to override otherwise lawful federal statutes. Illinois could not by creating a state constitutional right to possess child pornography preempt the federal laws that prohibit such possession.

160 F.3d at 414.

The City's reliance on New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 117 S. Ct. 2365 (1997), is wholly misplaced. Those decisions condemned federal statutes that require states to enact legislation or enforce a federal regulatory program. The Controlled Substances Act imposes no such requirement. It simply bars the manufacture and sale of

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[6](...continued)
fundamental right to use laetrile for medical purposes).

controlled substances. That a state might wish to legalize conduct prohibited by federal law does not implicate the rule against commandeering established by New York and Printz.[7]

CONCLUSION

For the reasons stated herein and for those set forth in our principal brief, this Court should dismiss for lack of appellate jurisdiction defendants' appeal from the denial of their motion to dismiss in No. 98-17044, dismiss as moot defendants' appeal from the court's now-vacated modification of its preliminary injunction in No. 98-16950, and affirm the order denying defendant's motion to modify the preliminary injunction in No. 98-17137.

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[7] In any event, defendants have not presented a Tenth Amendment challenge to the Controlled Substances Act (and would not have standing to do so). The issue cannot properly be raised by an amicus. See Lane v. First Nat'l Bank of Boston, 871 F.2d 166, 175 (1st Cir. 1989) ("an amicus [cannot] interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore"); Edison Electric Institute v. OSHA, 849 F.2d 611, 625 (D.C. Cir. 1988); National Commission on Egg Nutrition v. FTC, 570 F.2d 157, 160 n.3 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978).

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CERTIFICATE OF COMPLIANCE

I certify that:

The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a reply brief of no more than 15 pages.

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January 22, 1999