UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

NO. 98-17044

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Appellants/Defendants,

v.

UNITED STATES OF AMERICA,

Appellee/Plaintiff.

Appeal from Order Denying Motion to Dismiss
Case No. C 98-0088 CRB
dated September 3, 1998, by Judge Charles R. Breyer.

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Oakland Cannabis Buyers' Cooperative ("OCBC") submits the following Corporate Disclosure Statement as required by Federal Rule of Appellate Procedure 26.1.

OCBC, a California corporation, has no parent companies, subsidiaries, or affiliates.

ISSUES PRESENTED

1. Did the district court err when it rejected Appellants' claim of immunity from all civil or criminal liability pursuant to 21 U.S.C. § 885(d) for violation of the Controlled Substances Act?

2. Did the district court err when it denied Appellants' motion to dismiss the complaint based upon the Fifth and Ninth Amendment guarantee of patients' rights to liberty and life?

STATEMENT OF JURISDICTION

On January 9, 1998, the Government filed a civil complaint pursuant to 21 U.S.C. § 882(a) and 28 U.S.C. §§ 2201 and 2202 seeking a declaratory judgment, and preliminary and permanent relief against Appellants' operation of a medical cannabis dispensary in Oakland, California. ER 0001-0008. The Government sought to enforce by this civil action the criminal provisions of the Controlled Substances Act (21 U.S.C. §§ 841(a), 846, and 856). *Id.* The district court had original jurisdiction under 28 U.S.C. §§ 1331, 1345, and 1355(a).

On July 28, 1998, the Oakland City Council unanimously passed a city ordinance pertaining to medical cannabis. ER 0785-0791. Pursuant to the Ordinance, on August 11, 1998, the Oakland City Manager designated the Oakland Cannabis Buyers' Cooperative as a medical cannabis provider

association authorized to "enforce the provisions of [the ordinance]" (ER 0790), and the provisions of the California Compassionate Use Act.[1] ER 0793. On August 14, 1998, Appellants moved the district court to dismiss the Government's complaint based on the immunity provision of 21 U.S.C. § 885(d). ER 0720-0732. By Order dated September 3, 1998, and entered on September 9, 1998, the district court denied Appellants' motion to dismiss the complaint. ER 1118-1122. Appellants timely filed a notice of appeal on October 8, 1998. ER 1723-1724. Fed. R. App. P. 4(a)(1). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1), which provides for appeals from orders refusing to dissolve or modify injunctions.

STATEMENT OF THE CASE

I. SUMMARY OF THE CASE AND THE DISTRICT COURT'S DECISIONS.

Appellant Oakland Cannabis Buyers' Cooperative ("OCBC") is one of several dispensaries that formed in response to California's passage in 1996 of the Compassionate Use Act, which sought to ensure seriously ill patients safe access to medical cannabis when their doctors have recommended it. ER 0594. In January, 1998, the Federal Government filed a civil complaint against Appellants alleging violations of federal criminal

[1] The California Compassionate Use Act allows for distribution of medical cannabis to patients who have obtained a doctor's recommendation to use the medicine.

controlled substances laws and seeking declaratory and injunctive relief. ER 0001-0008. On May 19, 1998, the district court issued a Preliminary Injunction Order (the "Preliminary Injunction Order"), which enjoined the OCBC and the other dispensaries named in the lawsuit from engaging in the manufacture or distribution of marijuana, or possessing marijuana with the intent to manufacture and distribute it, from using their premises for these purposes, and from conspiring to do the same — in violation of 21 U.S.C. §§ 841(a)(1), 846, and 856. ER 0636-0637.

On July 28, 1998, the Oakland City Council unanimously passed an ordinance designed to ensure that the Compassionate Use Act would be enforced in Oakland and that seriously ill persons with a doctor's medical recommendation for cannabis would be able to obtain cannabis. ER 0788-0791. In order to advance this express purpose, the Oakland ordinance provides "immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code." *Id.* Section 885(d) immunizes from civil and criminal liability duly authorized state and local government officers who are engaged in the enforcement of laws relating to controlled substances. On August 11, 1998, pursuant to the new Oakland ordinance, the Oakland City Manager designated Appellants as a medical cannabis provider association — duly authorized officers of the City of

Oakland lawfully engaged in the enforcement of the ordinance and the California Compassionate Use Act. ER 0793.

In light of this designation, Appellants moved the district court to dismiss the Government's complaint based on the immunity provided by Section 885(d), and on the basis of the Ninth Amendment. ER 0720-0732. The district court wrongfully denied Appellants' motion. ER 1111-1115.

II. FACTUAL SUMMARY

A. California Proposition 215 And The Oakland Cannabis Buyers' Cooperative

On November 5, 1996, 56% of voters of the State of California participating in a state-wide election passed the "Medical Use of Marijuana" initiative, also known as the Compassionate Use Act of 1996 ("Compassionate Use Act"). *See* Cal. Health & Safety Code § 11362.5; ER 0594. The primary purposes of the Compassionate Use Act are:

- To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief;

- To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction;

- To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of

marijuana to all patients in medical need of marijuana.

Cal. Health & Safety Code § 11362.5. To further these objectives, the Compassionate Use Act authorized under California law the possession and cultivation of cannabis by seriously ill patients and their primary caregivers in cases where the patient's physician has recommended cannabis treatment. ER 0594.[2] At least three other states (Alaska, Oregon, and Washington) also have passed similar laws. Addendum to Opening Brief ("Addendum"), Exhibit 1.

Appellant OCBC is one of several dispensaries formed to provide seriously ill patients safe access to medical cannabis. ER 0594. The OCBC is a well-managed cooperative corporation organized under the laws of California. ER 1340. It provides support services and educational materials concerning medical cannabis. ER 1340, 1345. In addition, since its inception, its mission has been to provide a safe and reliable source of medical cannabis products and plants to seriously ill patients with a physician's recommendation for the medicine. ER 1340, 1345. Appellant Jeffrey Jones is Executive Director of the OCBC.

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[2] Specifically, the Compassionate Use Act exempted seriously ill patients and their primary caregivers from prosecution under California Health and Safety Code § 11357, relating to the possession of marijuana, and § 11358, relating to marijuana cultivation. Cal. Health & Safety Code § 11362.5(d).

B. The Federal Government's Civil Actions To Enforce Federal Criminal Laws And The May 19, 1998 Preliminary Injunction Order

Claiming that the activities of the medical cannabis dispensaries violated federal criminal law (21 U.S.C. § 841 *et seq.*), on January 9, 1998, the Government filed civil complaints seeking a declaratory judgment and preliminary and permanent injunctive relief against six northern California cannabis dispensaries, one of which was the OCBC. ER 0001-0008. These dispensaries had arisen in the wake of the passage of the Compassionate Use Act. ER 0594. As noted by the district court, the Government's invocation of a civil injunctive procedure to address alleged violations of federal criminal laws was rare. ER 0615. Finding that the Government had shown it was likely to succeed on the merits, and presuming irreparable harm to the Government, on May 19, 1998, the district court issued a Preliminary Injunction Order which enjoined the OCBC and the other dispensaries named in the lawsuit from engaging in the manufacture or distribution of marijuana, or possessing marijuana with the intent to manufacture and distribute it, from using their premises for these purposes, and from conspiring to do the same — in violation of 21 U.S.C. §§ 841(a)(1), 846, and 856. ER 0636-0637.

C. The City Of Oakland's Ordinance Immunizing Appellants From Civil Or Criminal Liability For Dispensing Medical Cannabis

In July 1998, the City Council of the City of Oakland expressed its desire to further the purposes of the Compassionate Use Act of 1996 and to protect the life and liberty interests of its citizens who need medical cannabis. On July 28, 1998, the Oakland City Council unanimously passed Ordinance No. 12076 — An Ordinance of the City of Oakland Adding Chapter 8.42 to the Oakland Municipal Code Pertaining to Medical Cannabis ("Ordinance No. 12076"). ER 0788-0791. The Ordinance was designed to ensure that seriously ill persons with a doctor's recommendation for cannabis would be able to obtain and use cannabis for medical purposes. *Id.*

The Oakland Ordinance also provides "immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code . . . ." ER 0789. Section 885(d) immunizes from civil and criminal liability duly authorized state and local government officers who are engaged in the enforcement of laws relating to controlled substances.

Section 3 of the Oakland Ordinance establishes a Medical Cannabis Distribution Program and requires that the Oakland City Manager designate one or more entities as medical cannabis provider associations:

> The City Manager shall designate one or more entities as a medical cannabis provider association. Any designated medical cannabis provider association shall enforce the provisions of this Chapter, including enforcing its purpose of insuring that seriously ill Californians have the right to obtain and use marijuana for medical purposes.

ER 0789-0790. The Oakland Ordinance further provides that a designated medical cannabis provider association and its agents, employees and directors "shall be deemed officers of the City of Oakland." ER 0790.

On August 11, 1998, the Oakland City Manager designated the Oakland Cannabis Buyers' Cooperative as a medical cannabis provider association pursuant to Section 3 of Ordinance No. 12076. ER 0793. In light of this designation, on August 14, 1998, Appellants moved the district court to dismiss the Government's complaint in C 98-00088 CRB based on the immunity provided to government officers by Section 885(d) of the Controlled Substances Act and on the basis of the Ninth Amendment. ER 0720-0732. By Order dated September 3, 1998, and entered by the Clerk of Court on September 9, 1998, the district court wrongfully denied Appellants' motion to dismiss the complaint. ER 1111-1115.

SUMMARY OF ARGUMENT

The district court failed to apply the plain, unambiguous language of Section 885(d) of the Controlled Substances Act to this case. Section 885(d) provides a broad grant of absolute immunity for duly authorized state or city

officers "lawfully engaged in the enforcement of *any* law or municipal ordinance relating to controlled substances." 21 U.S.C. § 885(d) (emphasis added). Here, the City of Oakland passed an ordinance relating to controlled substances, consonant with California law, to ensure that seriously ill persons with a doctor's recommendation for cannabis would be able to obtain and use cannabis for medical purposes. Once the Oakland City Manager designated Appellants as duly authorized officers of the City engaged in the enforcement of both local and state laws relating to controlled substances, Appellants became immune from liability.

The district court's failure to apply the plain and unambiguous meaning of Section 885(d) was based on two fundamental errors of law. First, the district court failed to recognize the immunity provision's much broader grant of immunity to state and local officers than to federal officers. This led to the district court's interpreting "lawfully engaged" in the statute as requiring the state or local officers to be acting lawfully under the Controlled Substances Act. This interpretation would render the statute's grant of immunity meaningless. The proper construction of the statute would interpret "lawfully engaged" as "acting in conformity with state and local law," which would encompass Appellants' acts. Second, the district court also ignored the plain and unambiguous language of Section 885(d)

when it held that the section's grant of absolute immunity does not immunize officials from equitable relief enjoining their future conduct. If the district court had properly applied the ordinary meaning of the term "liability" as used in the statute, it would have concluded that the language — "no civil or criminal liability imposed by virtue of this subchapter" — grants absolute immunity from *any* duty imposed by the subchapter, including here liability for contempt of court for allegedly violating an injunction.

Moreover, the district court erred when it failed to apply the Ninth Amendment, together with the life and liberty clauses of the Fifth Amendment, to protect from infringement by the federal government the right of seriously ill patients to obtain medical cannabis. This is especially true in light of the fact that both the people of the State of California and the people of the City of Oakland have unequivocally identified these patients' right as a fundamental right and liberty interest of their citizens. The district court therefore should have recognized the people's judgment that this particular life and liberty interest is fundamental, and deserving of heightened scrutiny, and it should have granted Appellants' motion to dismiss the Government's complaint and dissolved the injunction.

STANDARD OF REVIEW

Appellants challenge the district court's order denying their motion to dismiss on the grounds that 21 U.S.C. § 885(d) provided immunity for their conduct and that the Controlled Substances Act was unconstitutional as applied. These issues are subject to *de novo* review. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997) (district court ruling on motion to dismiss reviewed *de novo*).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS BASED UPON THE IMMUNITY PROVIDED BY 21 U.S.C. SECTION 885(d) AND THE OAKLAND CITY ORDINANCE

The Controlled Substances Act provides a broad grant of absolute immunity for duly authorized officers of any political subdivision of a state:

> (d) Immunity of Federal, State, local and other officials. Except as provided in sections 2234 and 2235 of Title 18, United States Code, no civil or criminal liability shall be imposed by virtue of this title upon any duly authorized Federal officer lawfully engaged in the enforcement of this title, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

In stating the purposes of the Oakland ordinance, the City Council specifically relied upon the immunity clause contained in 21 U.S.C. § 885(d), declaring:

> An additional purpose of this Chapter is to provide immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code, which provides that no liability shall be imposed under the federal Controlled Substances Act upon any duly authorized officer of a political subdivision of a state lawfully engaged in the enforcement of any municipal ordinance relating to controlled substances.

ER 0789. On August 11, 1998, the Oakland Cannabis Buyers' Cooperative was designated as the medical cannabis provider association to administer Oakland's Medical Cannabis Distribution Program. ER 0793.[3]

The district court denied Appellants' motion to dismiss, offering two reasons to justify its decision:

> First, to be entitled to Section 885(d) immunity, defendants must be "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." . . . To be entitled to immunity, however, the law "relating to controlled substances" which the official is enforcing must itself be lawful under federal law, including the Controlled Substances Act. (ER 1113.)
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> [Second,] Section 882(b), by its plain terms, provides an official with immunity from civil and criminal liability. In other words, it protects an official from paying

[3] The district court took judicial notice of both Municipal Ordinance No. 12076 and the designation of OCBC as a medical cannabis provider association. ER 0785-0793, ER 1112.

> compensation or being penalized for conduct in the past which violated the federal Controlled Substances Act. It does not purport to immunize officials from equitable relief enjoining their future conduct.

ER 1114. In both respects, the district court ignored the plain, unambiguous language of Section 885(d) to impose limitations upon the statutory grant of absolute immunity that cannot be justified under the law. As the United States Supreme Court has frequently observed:

> Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.

Negonsott v. Samuels, 507 U.S. 99, 104 (1993) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982)); *see also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

A. The "Law Relating To Controlled Substances" That A Local Officer Is Enforcing Need Not Be Lawful Under The Federal Controlled Substances Act

The grant of immunity conferred upon state and local officers under Section 885(d) is much broader and more absolute than the immunity conferred upon federal officers. This essential difference was completely overlooked in the district court's strained interpretation of Section 885(d). Federal officers are granted immunity only when they are "lawfully engaged in the enforcement of this subchapter." Thus, their activity must be directed to carrying out the objectives of the Controlled Substances Act itself. For

state and local officers, however, the immunity extends to their activity "in the enforcement of *any* law or municipal ordinance *relating to* controlled substances." (Emphasis added). By requiring that the local ordinance itself be "lawful" under the federal Controlled Substances Act, the district court obliterated the grant of immunity and extended to state and local officers the same limitation that the statute imposes upon federal officers: that their activity further the enforcement of "this subchapter."

Clearly, by requiring that state or local officers be "lawfully engaged" in the enforcement of a law or municipal ordinance, the statute does not mean that their conduct cannot violate the federal Controlled Substances Act, or the grant of immunity would be completely meaningless. The statute would say, in effect, "as long as you do not violate this subchapter you have immunity from civil or criminal liability under this subchapter." The district court conceded the correctness of this observation, then proceeded to impose the same tautology by construing "relating to controlled substances" to mean "relating to controlled substances in conformity with this subchapter."

The concern which led to this misconstruction was that it would permit a "loophole" in the Controlled Substances Act that might permit municipalities to allow distribution of controlled substances on demand to anyone. ER 0920. A proper construction of the requirement that the officers

be "lawfully engaged" in the enforcement of the ordinance avoids such a result. Based upon the plain language of Section 885(d), "lawfully engaged" must mean that municipal officers must be acting in conformity with state and local law. A municipality that authorized the distribution of cannabis without the approval of a state law, such as California's Compassionate Use Act, would not qualify for the immunity contained in Section 885(d), because it would not be "lawfully engaged" in the enforcement of a municipal ordinance. Clearly, the plain meaning of the immunity clause contained in Section 885(d) is that those who are acting lawfully under state and local law, and who qualify as "duly authorized officers," are permitted to enforce even local laws that permit the distribution of controlled substances that would otherwise be unlawful under the federal Controlled Substances Act.

To suggest, as the Government did below (ER 0920), that the immunity granted by Section 885(d) might be abused by opening city-operated programs to the distribution of recreational drugs on demand is an insult to the state and local officers whose autonomy Section 885(d) was designed to respect. The ordinance is a careful and good-faith effort to implement the will of the people of California, as expressed through a popular initiative. This mandate recognizes the right of seriously ill

Californians to obtain and use cannabis for medical purposes, and calls upon the federal and state governments to implement a plan to provide for the safe and affordable distribution of cannabis to all patients in need of medical cannabis. While federal authorities have chosen not to accept that invitation, that does not mean that Oakland's efforts threaten to nullify the entire Controlled Substances Act. Judge Fern Smith put it well when she responded to the same argument in *Conant v. McCaffrey*, 172 F.R.D. 681, 694 n.5 (N.D. Cal. 1997):

> It is unreasonable to believe that use of medical marijuana by this discrete population for this limited purpose will create a significant drug problem.

While the application of Section 885(d) immunity in this context is a result the Government dislikes, and did not anticipate, it is not an absurd result. It is within the plain, unambiguous language of the statutory grant of immunity enacted by Congress. Rejecting the argument that Congress could not have intended to include prisons under the Americans With Disabilities Act, Justice Scalia spoke for a unanimous Court in declaring:

> As we have said before, the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.

Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1956 (1998) (internal quotation and citation omitted).

A proper construction of the immunity clause demonstrates that there is *no* conflict between state and federal law, because California's Compassionate Use Act can be implemented under the umbrella of a Congressional grant of immunity. *See Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 370 (1986) (it is a "familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict"); *United States v. Menashe*, 348 U.S. 528, 538-39 (1955) ("a court is obligated to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section") (citations and quotations omitted). Section 903 of the Controlled Substances Act itself demands respect for state efforts to rationalize drug policy:

> No provision of this title shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, *including criminal penalties*, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903 (emphasis added.) The immunity granted in Section 885(d) *does* permit the Compassionate Use Act enacted by the voters of California, Oakland City Ordinance No. 12076, and the federal Controlled Substances Act to stand consistently together. That being the case, Section 903 required the district court to dismiss the action and dissolve the injunction.

B. Immunity From All Civil Or Criminal Liability Includes Immunity From Liability For Contempt Of Court For Violation Of An Injunction

In holding that the Section 885(d) grant of absolute immunity does not immunize officials from equitable relief enjoining their future conduct, the district court again ignored the plain and unambiguous statutory language of Section 885(d). The district court instead read into the statute limitations that are nowhere to be found in the language used by Congress.

Certainly, the United States Supreme Court, in defining the *common law* qualified immunity of local government officials in civil rights actions, has distinguished liability for damages from liability for injunctive or declaratory relief. *Pulliam v. Allen*, 466 U.S. 522 (1984); *see also Roe v. City and County of San Francisco*, 109 F.3d 578, 586 (9th Cir. 1997); *Fry v. Melaragno*, 939 F.2d 832, 839 (9th Cir. 1991). Both *Fry* and *Roe* were cited and relied upon by the district court. ER 1114. In other contexts, however, the absolute immunity conferred upon state legislators and federal judges has been construed to preclude suits for injunctive or declaratory relief as well as suits for damages. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 732-34 (1980); *Mullis v. United States Bankruptcy Court,* 828 F.2d 1385 (9th Cir. 1987); *Moore v. Brewster*, 96 F.3d 1240 (9th Cir. 1996), *cert. denied*, 518 U.S. 1118 (1997).

None of these cases involved construing statutory language conferring a grant of immunity. Rather than applying case law defining common law immunity, the district court should have looked to the grant of immunity contained in the statute. The question presented in this case is whether a grant of immunity in the broadest terms, that "no civil or criminal liability shall be imposed by virtue of this subchapter," permits the imposition of liability for contempt of court. It certainly does not.

The statutory language used by Congress to confer a grant of immunity in Section 885(d) extends to all liability "imposed by virtue of this subchapter." "This subchapter" is the entire Controlled Substances Act, which includes the statutory grant of jurisdiction to seek injunctive relief upon which the this suit is based, 21 U.S.C. § 882. Absent Section 882 of "this subchapter," the Government would have no jurisdictional authority even to seek injunctive relief to restrain violations of the Controlled Substances Act. To construe this language as only immunizing officers from suits for damages or criminal prosecutions is to engage in legislative redrafting and to ignore the plain meaning of the words Congress chose.

The ordinary meaning of the term "liability" was settled long before the enactment of the federal Controlled Substances Act in 1970. In *Krenger v. Pennsylvania R.R. Co.*, 174 F.2d 556, 559 (2d Cir. 1949), two

giants of federal jurisprudence reflected upon the breadth of the term "liability" when used in a statutory grant of exemption. The question presented was the meaning of "liability" in Section 5 of the Federal Employees' Liability Act, 45 U.S.C. § 55, which provides:

> Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from *any liability created by this chapter*, shall to that extent be void.

(Emphasis added.) Judge Charles E. Clark, former Dean of the Yale Law School, wrote:

> Significance should be attached to the inclusive nature of the statutory phrase — "any liability created by this chapter." Had a restricted meaning been intended, it would have surely been simple, indeed, to limit the statutory provision to the duty to pay damages. That could have been done by this precise, though natural, phrase, or indeed, by descriptions used in other parts of the Act, such as the "right of action" of Sec. 59 or even the "cause of action" of Sec. 56. . . . Under the analysis of Professor Hohfeld, adopted by the American Law Institute, liability is quite differentiated from a mere duty to pay damages and serves as the correlative of power and the opposite of immunity or exemption.

174 F.2d at 558-59 (citations omitted). Judge Learned Hand, concurring, offered an even more succinct definition:

> The term "liability" in colloquial speech has indeed no certain boundaries, but in law, unless the context otherwise demands, it means a duty to another enforceable by sanctions; and to "exempt" one from "liability" means

> to relieve him of the duty, in whole or in part, which in the case at bar would mean the payment of damages.

174 F.2d at 560. Thus, a statutory declaration that "no civil or criminal liability shall be imposed by virtue of this subchapter" grants absolute immunity from any duty imposed by the subchapter, including in this case, liability for contempt of court for allegedly violating an injunction.

Where Congress intended a grant of immunity to be limited to the payment of damages, it has explicitly said so. For example, in the Administrative Procedure Act, 5 U.S.C. § 702, Congress declared:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied be on the ground that it is against the United States or that the United States is an indispensable party.

In *Presbyterian Church v. United States*, 870 F.2d 518, 524 (9th Cir. 1989), this Court held that the clear objective of Section 702 was to waive sovereign immunity as a defense in actions seeking relief other than money damages. More recently, the Health Care Quality Improvement Act of 1986 included a provision for immunity for professional peer reviews that declared a professional review body "shall not be liable *in damages* under any law of the United States or of any State (or political subdivision thereof) . . . ." 42 U.S.C. § 11111(a)(1) (emphasis added). Relying upon the

italicized language, the court in *Imperial v. Suburban Hosp. Ass'n*, 37 F.3d 1026 (4th Cir. 1994), permitted a suit for injunctive relief to proceed.

Whether contempt of court for violating an injunction is characterized as "civil" or "criminal," the fact remains that it can be punished by fine or imprisonment or both. *See* 18 U.S.C. § 402 (even in suits brought on behalf of the United States, contempt of court "may be punished in conformity to the prevailing usages at law"). Thus, even if the district court did not intend to enforce its injunction by fining or imprisoning Appellants, they still faced potential liability for fine or imprisonment. To declare that such liability is not "civil or criminal liability" simply defies common sense. The district court concluded that liability for injunctive relief necessarily includes liability for contempt, since, "if that were not the law, the fact that a prosecutor is not entitled to immunity from equitable actions under 42 U.S.C. § 1983 would be meaningless since a court could never enforce its injunctions." ER 1115. The opposite, of course, is equally true. Immunity from contempt necessarily includes immunity from a suit for injunctive relief. The defendants' immunity from contempt flows from a statutory grant of immunity from all civil or criminal liability. The liability of prosecutors to suits for injunctive relief, and hence their liability for contempt, flows from the judicial construction of their common law

qualified immunity in actions pursuant to 42 U.S.C. § 1983. Giving Section 885(d) its plain meaning does not imperil or threaten in any way the judicial construction of prosecutorial immunity in suits under the Civil Rights Act.

The absolute immunity conferred upon local officers by 21 U.S.C. § 885(d) must be applied in this case with the breadth that Congress intended. As the United States Supreme Court concluded in *United States v. James*, 478 U.S. 597, 612 (1986):

> But our role is to effectuate Congress' intent, and Congress rarely speaks more plainly than it has in the provision we apply here. If that provision is to be changed, it should be by Congress and not by this Court.

II. THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS BASED UPON THE NINTH AMENDMENT.

The district court also erred in denying Appellants' motion to dismiss based upon the Ninth Amendment. Both the people of the State of California, through its legislative initiative process, resulting in the enactment of Health and Safety Code Section 11362.5, and the people of the City of Oakland, through unanimous vote by its City Council resulting in the passage of City Ordinance No. 12076, have unequivocally identified a patient's right to medical cannabis as a "fundamental right[] and liberty interest[]." *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 2267

(1997). *See* California Health & Safety Code § 11362.5; Oakland Ordinance No. 12076, Section 1.A (ER 0788). As such, the Fifth and Ninth Amendments to the United States Constitution protect the right to medical cannabis for seriously ill patients from infringement by the federal government.

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. All patient-members of the OCBC have a fundamental right to medical cannabis based upon the "liberty" interest specified in the Due Process Clause. Moreover, those patients whose lives depend on access to medical cannabis have the additional fundamental right based upon their right to "life" guaranteed by the same Clause. The Ninth Amendment guarantees to the patients these same rights perhaps even more broadly defined.

The Ninth Amendment provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. Once forgotten, it has been much discussed in recent years by Constitutional scholars.[4] In the

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[4] *See, e.g., The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (Randy E. Barnett, ed., vol. 1, 1989; vol. 2, 1993) (collection of Ninth Amendment scholarship).

landmark case of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the opinion of the Court, jointly authored by Justices Kennedy, Souter, and O'Conner, cited the Ninth Amendment as authority for protecting liberties not specifically enumerated in the Constitution. "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. *See* U.S. Const. Amend. 9." *Casey*, 505 U.S. at 848. The Justices then went on to quote with approval Justice Harlan's statement that the "substantive sphere of liberty . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and . . . also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs to justify their abridgement." *Id.*

The Ninth Amendment establishes an even broader protection of liberty.[5] It establishes a presumption in favor of any rightful exercise of liberty (or "liberty interest") such that the burden falls upon the Government to show that any infringement of that liberty is both *necessary* and *proper* —

[5] *See, e.g.,* Randy E. Barnett, Introduction: *Implementing the Ninth Amendment* in *The Rights Retained by the People,* vol. 2, *supra*, at 23.

the standard supplied by the Constitution itself.[6] This burden the Government cannot meet. In sum, though the Government may *regulate* the exercise of liberties retained by the people, heightened scrutiny applies to ensure that any regulation is "necessary." It is "improper" for the *regulation* of a liberty, protected by the Ninth Amendment, to be used as pretext to *prohibit* its exercise, as would be the case under the district court's decision that the Controlled Substances Act completely prohibits Appellants' alleged activities with regard to medical cannabis.

But this Court need not go this far in the present case, for even the most conservative reading of the Ninth Amendment would see it as protecting rights that the people, acting through state processes, have explicitly chosen to retain.[7] For this reason, the fact that the people of the State of California have, through their initiative process, spoken on this issue should be decisive in determining this liberty to be fundamental. While

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[6] *See* U.S. Const. art. I, § 8, cl. 18. *See also* Gary Lawson & Patricia Granger, *The "Proper" Scope of the Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993) (Addendum, Exhibit 2); Randy E. Barnett, *Necessary and Proper*, 44 U.C.L.A. L. Rev. 745 (1997) (Addendum, Exhibit 3).

[7] *See, e.g.,* Robert Bork, *The Tempting of America* 184 (1990) ("[T]he people retained certain rights because they were guaranteed by the various state constitutions, statutes, and common law."). *See also* Calvin Massey, *Silent Rights* (1995) (arguing that rights retained by the people should be defined by state law).

courts should be skeptical of even popular *interference* with individual rights or liberties, courts should give great deference to a considered judgment by the people that a particular individual liberty interest is fundamental, and deserving of the heightened scrutiny that protects all fundamental rights from governmental infringement.

CONCLUSION

For all of the foregoing reasons, Appellants respectfully request that this Court (1) vacate the district court's order denying Appellants' motion to dismiss, and (2) remand to the district court for entry of an order dissolving the Preliminary Injunction Order.

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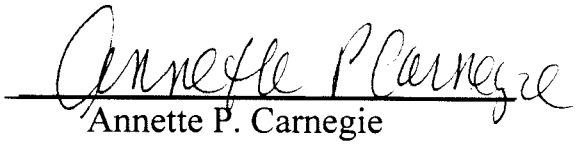
By 
Annette P. Carnegie

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants state that there are currently two pending related cases:

1. Appellants' Appeal from Order Refusing to Modify Injunction by the United States District Court for the Northern District of California Case No. C98-0088 CRB entered on October 16, 1998, by Judge Charles R. Breyer. This case arises out of the same case in the district court and raises the same or closely related issues.

2. Court of Appeals No. 98-16950: Appellants' Appeal from Order Modifying Injunction by the United States District Court for the Northern District of California Case No. C98-0088 CRB entered on October 13, 1998, by Judge Charles R. Breyer. This case arises out of the same case in the district court and raises the same or closely related issues.

Appellants moved to consolidate these three cases on October 28, 1998 and November 2, 1998. The Government has no objection to consolidation of these three cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32(e)(4), Appellants hereby certify that their Opening Brief is prepared in proportionately spaced Times New Roman typeface in fourteen point.

The brief, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, the Statement of Related Cases, the Corporate Disclosure Statement, and the Proof of Service, contains 5,754 words based on a count by the word processing system at Morrison & Foerster LLP.

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U.S. Department of Justice
901 E Street, N.W., Room 1048
Washington, D.C. 20530

Mark Stern
U.S. Department of Justice
601 D Street, N.W., Room 9108
Washington, D.C. 20530

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 13th day of November, 1998.

D.K. Halladay
(typed)

_____
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D.K. Halladay
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