ROBERT A. RAICH (State Bar No. 147515)
1970 Broadway, Suite 1200
Oakland, California 94612
Telephone: (510) 338-0700
Facsimile: (510) 338-0600

GERALD F. UELMEN (State Bar No. 39909)
Santa Clara University School of Law
Santa Clara, California 95053
Telephone: (408) 554-5729
Facsimile: (408) 554-4426

RANDY BARNETT
Harvard Law School
1525 Massachusetts Avenue, Griswold 308
Cambridge, Massachusetts 02138
Telephone: (617) 384-8162
Facsimile: (617) 496-4863
(Admitted *Pro Hac Vice*)

ANNETTE P. CARNEGIE (State Bar No. 118624)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE and
JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Defendants.

AND RELATED ACTIONS.

No. C 98-0088 CRB

DEFENDANTS' MEMORANDUM IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF; AND REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION AFTER REMAND TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION ORDER

Date: March 22, 2002
Time: 10:00 a.m.
Honorable Charles R. Breyer

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INTRODUCTION

Defendants submit this memorandum in support of their motion to dissolve or modify the injunction and in opposition to the Government's motion for summary judgment and a permanent injunction. In their opening brief, Defendants established that pursuant to the Supreme Court's opinion in this case, this Court may exercise its discretion to dissolve or modify the present injunction, which fails to address the needs of seriously ill Californians or to accommodate the interests of the State of California and local government authorities in protecting the public health of their citizens. Defendants established that sound constitutional and prudential reasons exist for dissolving or modifying the injunction, because the injunction issued under the authority of the Controlled Substances Act ("CSA") plainly exceeds the power of Congress and violates Defendants' fundamental rights. In response, the Government relies upon outdated legal authority and an overreaching argument that would make every legislative determination that an activity affects interstate commerce unreviewable by any court, regardless of whether any factual basis exists for such a determination and regardless of whether the determination impairs individual liberties or encroaches upon the sovereignty of the States. This is not the law.

Defendants also established in their opening brief that this Court can and should exercise its discretion to dissolve the injunction. Even apart from the serious constitutional issues raised by the injunction, it cannot be disputed that Defendants lost the protections of the criminal justice system when the government chose to institute civil proceedings. Because the Government may enforce the CSA without stripping Defendants of these important constitutional rights, there is no reason for the injunction to continue.

As discussed below, the Government's motion for summary judgment and permanent injunction is an ill-conceived rush to judgment, which ignores the myriad defenses that preclude entry of a permanent injunction. Accordingly, the Government's motion should be denied. The Court should dissolve the injunction and dismiss the action, or at a minimum hold a hearing to fashion a modification that does not violate the Constitution.

I. THE COURT SHOULD DISSOLVE THE INJUNCTION

In their opening brief, Defendants established that sound reasons exist for this Court to exercise its inherent discretion to dissolve the injunction. The Government's arguments ignore the plain language of the Supreme Court's opinion which clearly states that this Court is not required to issue an injunction on the Government's demand. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483-96 (2001). As dictated by the Supreme Court, this Court must consider: (1) the advantages and disadvantages of an injunction over other available methods of enforcement; and (2) how the "public interest and the conveniences of the parties . . . are affected by the selection of an injunction over other enforcement mechanisms." *Id.* at 498. The Supreme Court also observed that:

> . . . [W]ith respect to the [CSA], criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance with the statute. Congress' resolution of the policy issues can be (and usually is) upheld without an injunction.

Id. at 497.

The Government presents no compelling legal argument and offers no facts that would preclude this Court from exercising its inherent discretion to dissolve the injunction.

First, contrary to the Government's contention, the Court's exercise of the discretion afforded it under the CSA raises no constitutional issues. The Government's contention that the Executive Branch is entitled to choose its method of enforcement under Article II, § 3 of the Constitution, the "take care" clause, is baseless. (Plaintiff's Notice of Motion and Motion for Summary Judgment and Permanent Injunctive Relief, filed Jan. 25, 2002 ("Govt's Br.") at 23.) Unquestionably, the Executive Branch has the "exclusive and absolute discretion to decide whether to prosecute." *United States v. Nixon*, 418 U.S. 683, 693-94 (1974). This principle does not apply to the government's strategic decision in this case to seek injunctive relief. Precluding the government's preferred legal strategy does not fall within the ambit of the "take care" clause. Cases construing the clause only prohibit a court from directing the government's prosecution of a case or dictating the government's choice of statutes under which to prosecute the defendant. *See, e.g., United States v. Edmonson*, 792 F.2d 1492, 1497 (9th Cir. 1986); *see also United States v. Batchelder*, 442 U.S. 114, 123-25 (1979) (affirming that the government controls the election of which statute it wishes to charge in a criminal prosecution). Neither scenario is the case here. The government can decide whether to

prosecute Defendants and can choose the statutory authority for such a prosecution. Here, an injunction is merely the government's preferred legal strategy and does not affect its power to prosecute. To hold otherwise would be to eliminate the discretion expressly recognized by the United States Supreme Court in this case. *See Oakland Cannabis Buyers' Coop.*, 532 U.S. at 497-98 (stating that a court's choice, when faced with an injunction to enforce a statute, "is . . . whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all"); *Mitchell v. Helena Wholesale, Inc.*, 163 F. Supp. 101, 103 (E.D. Ark. 1958) ("[A] court of equity has inherent power to vacate or dissolve an injunction previously entered by it.").[1] By choosing to proceed by civil injunction, the government willingly invoked the traditional equitable jurisdiction of this Court, including this Court's equitable discretion not to issue an injunction.

Second, the government cannot seriously dispute that Defendants have been deprived of the procedural safeguards to which they would be entitled in a criminal prosecution. As this Court's October 13, 1998 Memorandum and Order made clear, Defendants are at a procedural disadvantage precisely because these are *civil*, rather than *criminal*, proceedings: "[T]his is not a criminal proceeding in which a defendant is entitled to a jury trial even if there are no disputes of fact." (*See* October 13, 1998 Memorandum and Order Re: Motion In Limine And Order to Show Cause ("Oct. 13, 1998 Order") 11-12.) The government's arguments to the contrary miss the point. Defendants do not contend that they are entitled to "jury nullification" in a criminal prosecution. The CSA is a criminal statute, and there are two methods to enforce it: civil injunction and criminal prosecution. In the criminal proceeding, there is an absolute right to a jury trial, proof beyond a reasonable doubt and other procedural protections. In this civil injunction proceeding, as the government's recitation of the facts confirm, Defendants were not afforded these rights. (*See* Oct. 13, 1998 Order.)

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[1] Moreover, in *State of Oregon v. Ashcroft*, No. 01-1647-JO, the District Court ordered that the Attorney General refrain from criminally prosecuting physicians and others who take actions in compliance with the Oregon Death with Dignity Act. (*See* Declaration of Annette P. Carnegie in Support of Defendants' Motion to Dissolve and in Opposition to Government's Motion for Summary Judgment and Permanent Injunction ("Carnegie Reply Decl."), Ex. Q).

Third, courts of equity historically have been reluctant to allow the government to circumvent the due process safeguards required in a criminal prosecution by seeking to prohibit allegedly criminal behavior through a civil injunction, which could later be enforced through civil contempt proceedings. In deciding whether to grant an injunction, courts have traditionally considered procedural hardships that a defendant might encounter in equity, as compared to in a criminal proceeding. *See Development in the Law: Injunction, The Changing Limits of Injunctive Relief*, 78 Harv. L. Rev. 997, 1004 (1965) (citing cases); W.E. Shipley, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, at § 5(b) (1956) (discussing the reluctance of courts to enjoin criminal libel because of reduced procedural protections in equity); *Heber v. Portland Gold Mining Co.*, 172 P. 12, 14 (Colo. 1918) (refusing to issue an injunction that would "deny one cited for contempt a trial by jury in what is in effect a criminal case").

Here, if the original injunction remains in place, any future contempt proceeding would be conducted before a civil jury. *See* 21 U.S.C. § 882(b). Members of OCBC who are found to have violated the injunction could then be imprisoned (as a civil penalty) without a criminal trial's basic protections, including: the right to counsel, the right to present a defense, the presumption of innocence, proof of guilt beyond a reasonable doubt, the right to confront witnesses. As happened earlier in this case, the contempt finding could be entered without any jury trial whatsoever. In the contempt order in this case, the Court ruled that Defendants could not invoke their right against self-incrimination, could not receive immunity in these civil proceedings, and were not entitled to a jury trial or a hearing because there were no material disputes of facts. (Oct. 13, 1998 Order at 10-12.) As recognized by the Supreme Court, it is entirely appropriate for a court of equity to consider the impact of these diminished procedural safeguards and its consequences for the parties when the court decides whether an injunction should issue or remain in place.

Moreover, if the original injunction remains in place, Defendants will have no opportunity to present an immunity defense. Contrary to the government's contention, this defense may be available in a criminal trial. The Court's order denied the defense for two separate and *independent* reasons: (1) the defense is unavailable in equitable proceedings, and (2) the Court disagreed with Defendants' interpretation of 21 U.S.C. § 885(d). (*See* September 13, 1998 Order re Motion to

Dismiss at 3-4.) The government cannot predict whether a criminal court would analyze the immunity defense the same way.

Finally, the government fails to adequately address whether the public interest is best served by continuing the injunction. In this case, while ostensibly benign, the government's selection of an injunction as a means of enforcement interferes with the constitutionally protected interests of the State of California and the City of Oakland, as well as the interests of seriously ill patients. Because this Court has suggested that the needs of individual patient-members, which are at the core of this litigation, cannot be considered in this injunction action (*see United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1102-03 (N.D. Cal. 1998) (necessity defense, substantive due process defense inapplicable to injunction action)), this civil proceeding is plainly inadequate to protect their rights. While the government may be loath to criminally prosecute anyone for fear that the public may not support such action, or that the government may not be able to prove its case to a jury, those considerations have no bearing on this Court's determination of whether the injunction should be dissolved.

II. THE UNMODIFIED INJUNCTION IS UNCONSTITUTIONAL

By ignoring and misinterpreting both the Constitution and prior cases, the government in essence contends that Congress has: (a) the unreviewable power to reach wholly intrastate commerce at its own discretion; (b) the unreviewable power to reach noneconomic wholly intrastate activity; (c) the unreviewable implied power under the Necessary and Proper Clause to interfere with the police power of the States to protect the health and safety of their citizens in ways that Congress disapproves; and (d) the unreviewable discretion to restrict the exercise of fundamental individual rights protected by the Due Process Clause and by the Ninth Amendment. Given the text of the Constitution and both recent and venerable opinions by the Supreme Court, none of these contentions can possibly be the law. It would be a serious constitutional error to so rule. The government does not meet or answer most of the careful constitutional analysis presented in Defendants' brief on these issues and as shown below, the government fails to refute the arguments to which it does respond. Accordingly, this Court must modify the injunction to exclude Defendants' wholly intrastate activi-

ties or at a minimum hold an evidentiary hearing to amend the unmodified injunction to avoid constitutional infirmities.

A. The Power of Congress to Reach This Wholly Intrastate Activity Is Not "Necessary"

1. Modern Supreme Court Jurisprudence Requires the Government to Demonstrate that Its Prohibition of Defendants' Wholly Intrastate Activities Is "Necessary" to Carry Out Its Power to Regulate Interstate Commerce

While purporting to instruct on the "first principles of constitutional interpretation and history" (Govt's Br. at 14) the government neglects the most important principle of all: "The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566 (1995); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Any constitutional construction or "interpretation" that leads to the opposite conclusion cannot be correct.

The Commerce Power of Article I extends only to commerce "among the several states" and, by its terms, excludes any power over wholly intrastate commerce. *See Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 195 (1824) ("The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."). That this proposition was well-understood for most of our constitutional history is textually evidenced both by the enactment of the Eighteenth Amendment and by its repeal, each of which presupposed that Congress lacked power to reach into a State and prohibit wholly intrastate commerce of which it disapproved.

The government responds to this by asserting that this Court's analysis of congressional power "must be based, quite obviously, on the Supreme Court's Commerce Clause jurisprudence as it stands *today*, not as it stood as of 1919 . . . or as of 1933." (Govt's Br. at 14-15.) Yet the government would have the Court resist the Supreme Court's Commerce Clause jurisprudence as it actually stands *today* and adhere instead to cases and doctrines adopted in 1937, 1942, or the 1970s without due regard to the changes in those doctrines made by the Supreme Court in 1995 and 2000.

In the wake of the *Lopez* decision in 1995, most academic critics and federal courts assumed that the salient defect of the Gun-Free School Zone Act was the absence of any specific

Congressional findings demonstrating that the activities sought to be reached would have a substantial effect on interstate commerce. It was largely on this ground that various circuits rejected Commerce Clause challenges to the CSA based on *Lopez*. *See, e.g., United States v. Tisor*, 96 F.3d 370, 374 (9th Cir. 1996) ("The presence of Congressional findings in support of the Controlled Substances Act distinguishes this case from the situation presented to the Court in *Lopez*."); *United States v. Edwards*, 98 F.3d 1364, 1369 (D.C. Cir. 1996) ("By contrast, the Drug Act includes specific findings that intrastate drug activity has a substantial effect on interstate drug activities and that effective control of drug activities occurring intrastate requires both interstate and intrastate regulation.").

It therefore surprised many when the Supreme Court in 2000 struck down the portion of the Violence Against Women Act creating a federal civil cause of action for rape, notwithstanding the fact that Congress had held hearings and published extensive "findings" purporting to show that sexual crimes against women had a substantial effect on interstate commerce. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court stated clearly that "[t]he existence of congressional findings *is not sufficient, by itself*, to sustain the constitutionality of Commerce Clause legislation." *Id.* at 614 (emphasis added). In *Morrison*, the Court repeated what it had said in *Lopez* that had apparently been overlooked by Courts of Appeals and academic commentators alike: "'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" *Lopez*, 514 U.S. at 557 n.2 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 299, 311 (1981) (Rehnquist, J., concurring in judgment)). Rather, "'[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" *Lopez*, 514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States,*, 379 U.S. 241, 273 (1964) (Black, J., concurring)). Therefore, any pre-*Morrison* case, such as *Tisor*, that takes Congressional findings at face value is of suspect authority on this issue today.

The government also misconstrues the older post-New Deal cases it cites. While citing *United States v. Darby*, 312 U.S. 100 (1941), the government fails to recognize that *Darby* concerned

not the plenary power of Congress over interstate commerce (which is not at issue here) but its *implied* power to reach other activities "which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. *See McCulloch v. Maryland.*" *Darby*, 312 U.S. at 118-19. *McCulloch*, of course, involved not the Commerce Clause, but the Necessary and Proper Clause.

While citing *Wickard v. Filburn*, 317 U.S. 111 (1942), the government fails to recognize that in *Wickard* the Court limited the reach of this implied power to activities "which *in a substantial way* interfere with or obstruct the exercise of the granted power." *Id.* at 124 (citation omitted; emphasis added); *see also id.* at 125 (activity may "be reached by Congress if it exerts a *substantial* economic effect on interstate commerce . . .") (emphasis added). The Court then went on to explain that Congress could not maintain the interstate price of wheat unless it could also regulate wheat that is not traded between States. No such argument of "necessity" has been made concerning the activities the government seeks to enjoin in this case.

This is not a case in which the government is seeking to regulate *interstate* commerce under its plenary Commerce Power. For better or worse, such actions would clearly be within the plenary power of Congress. Rather, by this injunction, the government seeks to prohibit wholly intrastate activity using its penumbral power to enact laws that are "necessary and proper for carrying into execution" its power over interstate commerce. (*See* Declaration of Michael Alcalay in Support of Defendants' Motion to Dissolve and in Opposition to the Government's Motion for Summary Judgment and Permanent Injunction ("Alcalay III") ¶ 13.)[2] For this reason, *Lopez* holds that such activity must be shown to have a "substantial effect" on interstate commerce, and *Morrison* holds that Congressional findings on this issue are not dispositive. Although for 60 years courts and

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[2] The Declarations of Michael Alcalay (Alcalay III), Lester Grinspoon In Support of Defendants' Motion To Dissolve And In Opposition to Motion For Summary Judgment/Permanent Injunction, Norma Elias, Jeffrey Jones, Harold Tores, James McClelland, Robert Melamede are submitted concurrently herewith. All other declarations referenced herein are attached to the Declaration of Annette P. Carnegie In Support of Defendants' Motion After Remand To Dissolve or to Modify Preliminary Injunction Order as Exs. A-K.

commentators alike thought that Congress had broader powers than this, it is the Commerce Clause jurisprudence of *today* to which this Court must adhere. In its brief, the Government completely ignores the fact that the Supreme Court's constitutional jurisprudence today requires judicial review of whether the exercise of the *implied* penumbral power of Congress over an activity is *necessary* to effectuate an enumerated power (*e.g.*, *Lopez* and *Morrison*) and is also a *proper* means for so doing (*e.g.*, *Printz v. United States*, 521 U.S. 898 (1997)).

The government also seeks to distinguish *Lopez* and *Morrison* from this case by arguing that, whereas *Lopez* (and *Morrison*) involved activities that were noneconomic, "drug trafficking" is an "economic" activity. In this, the government also relies on the *pre-Morrison* case of *Tisor* (Govt's Br. at 10 (quoting *Tisor*, 96 F.3d at 373) ("The activity condemned by the statute interpreted in *Lopez* did not involve a commercial transaction.").) Like the effort to limit *Lopez* to the issue of congressional findings, this new effort to limit the reach of *Lopez* and *Morrison* is misplaced.

First, the government cannot dispute the noneconomic nature of Defendants' activities. Second, the discussion in *Morrison* of the noneconomic nature of the acts being prohibited related primarily to the applicability of the "aggregate effects" test of *Wickard v. Filburn* as a means of reaching intrastate activities. In *Morrison*, the Court stated: "While we need not adopt a categorical rule against *aggregating the effects* of any 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." *Morrison*, 529 U.S. at 613 (emphasis added). The Court therefore limited the reach of the aggregate effects test to intrastate activities that are economic in nature. *See id.* It did not eliminate the need to show that wholly intrastate economic activities, in the aggregate, have a substantial effect on interstate commerce. To hold otherwise would be to give Congress the same plenary power over intrastate commerce that it has over interstate commerce. Defendants know of no Supreme Court case holding that the scope of Congressional power over wholly intrastate commerce is the same as Congress's plenary power over commerce between States. As discussed above, this would violate the text of the Commerce Clause itself. If this implied penumbral power is less than plenary, it has limits, and these limits have been exceeded here.

In sum, while this factor is not dispositive, the noneconomic nature of the activities in *Lopez* and *Morrison* contributed importantly to the Supreme Court's conclusion that the activities at issue were therefore not subject to the "aggregate effects" test of *Wickard.* The Court also insisted that: (a) whatever wholly intrastate conduct *may* be reached by Congress due to the conduct's aggregate effects must be shown to *substantially affect* interstate commerce; and (b) congressional findings on this question are not dispositive.

Even were *Lopez* and *Morrison* limited to holding that Congress may not reach noneconomic intrastate activity, these cases would by no means give carte blanche to Congress to regulate wholly intrastate commerce. And even so cramped an interpretation of the holding of these landmark cases would still require modification of the injunction in this case to exclude application to any *noneconomic* activities, such as the cultivation and distribution of cannabis for medical purposes without economic gain.

The government's sole response to this implication of *Lopez* and *Morrison* is to cite the entirely irrelevant proposition from *Lopez* 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." (Govt's Br. at 12 (quoting *Lopez,* 514 U.S. at 558).) First, this argument assumes what has never been shown in this Court or any other: that the type of activities to which the government seeks to apply the CSA here *does* substantially affect commerce. Second, Defendants have never claimed that their activities are *de minimis* or "that individualized proof of an . . . interstate nexus is required in cases alleging violations of the Controlled Substances Act." (Govt's Br. at 12 (internal citations omitted).) Accordingly, cases dismissing such claims are irrelevant.

Rather, Defendants contend that, pursuant to *Lopez* and *Morrison*, the class or type of wholly intrastate *economic* activities engaged in must, when challenged, be shown to the satisfaction of a court to have in the aggregate a substantial effect on interstate commerce. Additionally, Congressional findings on such an issue are not dispositive and, even if they were, no such findings have been made by Congress as to the aggregate effects of intrastate commerce in medical cannabis on interstate commerce in illicit marijuana. Defendants further contend that the injunction must be tailored to

exclude wholly intrastate *noneconomic* activities that, *even when aggregated*, are outside the scope of Congress's implied powers. To these claims, the government offers no pertinent response.

Defendants agree that, under settled case law, the relevant issue here is not whether any individual act has a substantial effect on interstate commerce, but is instead whether a *class* of economic activity, taken in the aggregate, has this requisite effect. After all, the government seeks in this action, and if successful, in others, to enjoin an entire category of acts—the distribution of medical cannabis authorized by state law—not to prosecute an individual offense.

The class of economic activities to be aggregated cannot be drawn by Congress in its sole unreviewable discretion, however. Were Congress to have such unreviewable discretion, the larger the class of intrastate economic activities Congress seeks to prohibit, the stronger would be its claim because the larger would be the aggregate effects of this class on interstate commerce. For example, if Congress claimed the penumbral power to regulate nationally the practice of medicine (which clearly is an economic activity), this claim would be *stronger* than its claim to regulate the dispensation by doctors (or clinics on their behalf) of medical cannabis, because the larger class of activities would necessarily have a greater effect on interstate commerce than any subset.

Yet it cannot be the case that the more penumbral the power which Congress claims under the Necessary and Proper Clause to reach intrastate activities—i.e., the greater the size of the class of activities it seeks to regulate—the more justified is its claim. Such a doctrine would violate the constitutional first principle that Congress has only limited and enumerated powers and lacks a general police power. *See, e.g., Lopez*, 514 U.S. 549.

In sum, under today's Commerce Clause jurisprudence, Congress has jurisdiction over *all* interstate commerce, but only over that *portion* of intrastate commerce which has a substantial effect on its power to regulate interstate commerce. A court must examine the class of activities subject to a claim of Congressional penumbral power under the Necessary and Proper Clause to determine if it is a proper classification. Otherwise Congress will gain a plenary power over wholly intrastate economic activity that the Constitution denies it.

2. The Court Must Determine Whether the Government Has Acted Pretextually in Seeking to Regulate Defendants' Wholly Intrastate Activities

Defendants' arguments concerning the Commerce Clause cannot be entirely separated from their other arguments, as the government would have the Court do. For it is the People of the State of California who sought to exercise the police power of the State to make medical cannabis available to enhance the safety and health of its citizens. Moreover, the activities involved here are as incident to the exercise of fundamental rights as are the distribution and sale of contraceptives. *See Griswold v. Connecticut*, 381 U.S. 479 (1965). It is both the exercise of the police power of the States and the existence of fundamental rights that require the Court to determine whether it was necessary and proper for Congress to include *this* class of activities and whether this *class* of activities has a substantial effect on interstate commerce. Therefore, this Court must hold a hearing or a trial to examine these issues.

In *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001), the Supreme Court once again reaffirmed the "proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *Id.* at 173 (citations omitted). The Court then made it plain that this requires a court "to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." *Id.* The Court in *Solid Waste* avoided this inquiry only by construing the statute as not reaching the conduct in question. *See id.* This Court must undertake this constitutional inquiry.

Finally, and perhaps most importantly, the Commerce Power defines the only "proper" end of the CSA: the regulation of commerce in illicit drugs *between State and State.* Congress can reach other intrastate commercial activity under the Necessary and Proper Clause only if it is "necessary" to do so to effectuate this purpose and none other. Congress, to repeat, has no general police power. It may not employ its implied penumbral power as a pretext to reach wholly intrastate activities. As John Marshall stated in *McCulloch v. Maryland*, "should congress under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."

McCulloch, 17 U.S. at 423.[3] And this is the crucial point that the Court must keep in view: The wholly intrastate commerce in medical cannabis is not an object "entrusted to the [federal] government." *Id.* at 407. If it is the government's true objective in bringing this injunction to suppress this type of wholly intrastate activity, then the government is unconstitutionally acting beyond its powers. The government can only reach this class of activities if it establishes (and it has not) that it is necessary for the accomplishment of an activity that is within the government's power, such as the regulation of commerce in cannabis that takes place between state and state.

To determine whether the government is acting pretextually, the Court must scrutinize: (a) the government's choice of classes to regulate; and (b) the government's claim that the distribution of medical cannabis to individual patients by Defendants and others engaged in this otherwise lawful activity substantially affects the government's ability to prohibit commerce in cannabis between the States. As discussed in Defendants' opening brief, the availability of safe, legal intrastate medical cannabis to those who suffer from illness and pain will *reduce*, not increase, the demand for cannabis flowing from other States into California.

B. The Power of Congress to Reach This Wholly Intrastate Commerce Is Not "Proper"

Even if this Court determines that it was necessary for Congress to prohibit wholly intrastate commerce in medical cannabis because such commerce substantially affected Congress's ability to regulate interstate commerce in illicit drugs, it would still be an "improper" exercise of Congress's implied powers if the prohibition violates important principles of federalism or fundamental rights. As noted in Defendants' opening brief, one aspect of the "propriety" of a law is whether it intrudes upon the sovereignty of a state. *See Printz,* 521 U.S. at 923-24.

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[3] Writing anonymously as "A Friend of the Constitution," Marshall defended his decision in *McCulloch* from the charge it granted an unlimited discretion to Congress:

> In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the Constitution. Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, *to such as are appropriate*, but the court expressly says, "should congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."

McCulloch v. Maryland 17 U.S. (4 Wheat.) 316, 423 (1819) (emphasis added).

Even if the unmodified injunction is found to be "necessary" to execute the power of Congress to regulate commerce among the States, the Court must still examine the injunction to determine whether it "improperly": (a) encroaches upon the sovereign power of the State of California; or (b) infringes upon fundamental individual rights. To these arguments, the government's reply is exceedingly thin.

1. The Exercise of Power in This Case Violates the Principle of State Sovereignty

The government argues that "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." (Govt's Br. at 17.) The government misunderstands Defendants' argument. Defendants do not deny that when there is a conflict between Congress's enumerated power over interstate commerce and the police power of a State, it is the power of Congress that prevails. Defendants contend instead that when, under the Necessary and Proper Clause, Congress goes *beyond its authority under the Commerce Power* over "commerce . . . among the several states" to reach wholly intrastate commerce, then such a law must be proper as well as necessary. And "[w]hen a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty . . . it is not a 'Law . . . *proper* for carrying into Execution the Commerce Clause.'" *Printz*, 521 U.S. at 923-24 (citation omitted). The government offers no reply to this argument.

As demonstrated in Defendants' opening brief, the police power of a State to protect the health and safety of their public is the heart of what States are empowered to do. It is the central function performed by the States in our federal system of divided powers. Given the absence of a general congressional power (*Lopez*), if the States cannot exercise such a power, then no unit of government can. Therefore, precisely because Congress has no comparable police power, it may not use its implied penumbral powers as a pretext to countermand a decision by a sovereign State and its people that a particular activity is needed to protect health and safety.

As Chief Justice Marshall indicated, it is a matter for a court to decide whether the government, by seeking this injunction, is really trying to protect interstate commerce (which is a proper purpose of national legislation) or whether instead it is acting pretextually to reach into an area

governed by the police power of a State. There is no doubt as to the government's true intentions here. The government seeks to prevent the use of cannabis for medical purposes *whether or not* such use involves or implicates interstate commerce. This it may not do constitutionally. The government invokes its implied powers over intrastate commerce, not to prevent the flow of cannabis between states, but to prevent its distribution and medical use solely within the sovereign State of California. This is an improper and therefore unconstitutional extension of its enumerated powers. The People of the State of California have instructed their government to exercise its police power to declare that the distribution of medical cannabis is vital to the health of some of their citizens, and federal law enforcement officials disagree with that judgment. No matter how strongly one may disagree, however, the federal government may not, on the pretext of preventing interstate commerce in drugs, interfere with the exercise of the sovereign police power.[4]

The government repeats the refrain that the Tenth Amendment "'states but a truism that all is retained which has not been surrendered'" (Govt's Br. at 17 (quoting *Darby*, 312 U.S. at 124)), but surely it is aware that the Tenth Amendment has increased vitality in *today's* constitutional jurisprudence when the ever-expanding penumbral powers claimed by the national government come into conflict with the sovereignty of a State. *See, e.g., Alden v. Maine*, 527 U.S. 706, 713 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Lest Defendants be misunderstood, the issue is not whether the exercise by a State of the police power trumps an exercise by Congress of its Commerce Power. It does not. The issue before this Court is whether it is *proper* for Congress to claim an unenumerated, implied, or penumbral power under the Necessary and Proper Clause to reach within a State and interfere with the State's vital function of protecting the health and safety of its residents and the State's power over its own internal commerce, on the pretext that such interference is "necessary" to enable Congress to exercise

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[4] Defendants note that under the government's apparent interpretation of the constitution there would be no reason to have the movement for uniform State laws (the UCC being the most obvious example of such laws regulating commerce) if Congress could simply pass a single law rendering the state laws irrelevant, as the government purports to do with the CSA in this case.

its power over interstate commerce. This is a matter for a court, not Congress in its sole discretion, to decide.

2. The Exercise of Power in This Case Violates Fundamental Rights

The same holds true to even greater effect with the government's use of an injunction to violate the fundamental rights of individuals. It is not only "improper" for the government to use the exercise of its implied powers as a pretext for interfering with fundamental rights, it is also "improper" for it to use its enumerated Commerce Power for such purposes. As set forth in Defendants' opening brief, infringements upon fundamental liberties call for heightened scrutiny of the means by which Congress exercises its enumerated powers. The Supreme Court recognized this in *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), which famously states that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . ." *Id.* at 153 n.4. As the Supreme Court has long held, unenumerated liberties can be as fundamental as enumerated liberties. *See, e.g., Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (right of parents to send their children to private Catholic school); *Meyer v. Nebraska,* 262 U.S. 390 (1923) (right of parents to educate their children in the German language); *see also Troxel v. Granville*, 530 U.S. 57 (2000) (right of parents to make decisions concerning care).

Defendants' opening brief established that the unmodified injunction impermissibly interferes with patient-members' fundamental rights: (a) to bodily integrity, to ameliorate pain, and to prolong life; and (b) to consult with and act upon their doctors' recommendation. (Defendants' Notice of Motion and Motion After Remand to Dissolve or Modify Preliminary Injunction Order, filed Jan. 7, 2002 ("Deft's Br.") at 26-32.) As discussed in Section IV.B.2.d below, the government offers no justification for its interference with these fundamental rights. Instead, apart from its reassertion of *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980), and *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980), the government offers only a single paragraph in response to Defendants' lengthy discussion of the fundamental nature of the rights at issue in this case. In that paragraph, the government simply repeats the refrain that the "Ninth Amendment is *not* a source of rights as such, it is simply a rule about how to read the Constitution." (Govt's Br. at 23 (quoting 1 Laurence H. Tribe,

American Constitutional Law 776 n.14 (2d ed. 1988).).[5] The government misreads both the Ninth Amendment and Professor Tribe. Defendants do not claim that the Ninth Amendment is a source of rights. Defendants' lengthy analysis of the fundamental status of the right to ameliorate pain and the right to consult with and follow the advice of a physician is based on history, tradition, and prior Supreme Court opinions. This analysis did not rest on the text of the Ninth Amendment and stands unrebutted by the government.

Defendants contend instead that the Ninth Amendment instructs regarding how to read the Constitution: that just because a fundamental right is unenumerated does not mean that it should be protected any less than a fundamental right that happens to be enumerated — a proposition with which Professor Tribe would agree. In the rest of the footnote partially quoted by the government, Professor Tribe states: "But it is a vital rule — one without which the Bill of Rights might have been more threatening than reassuring . . . and one without which, therefore, the 1787 Constitution might not have lasted." 1 Laurence H. Tribe, *American Constitutional Law* 776 n.14 (2d ed. 1988).[6] In the third edition of his treatise, he clarifies this point: "Understood as a *rule of construction*, this directive . . . appears to provide that the absence of a right from the text may not count as an argument against that right's existence—assuming of course, that its existence may otherwise be established, by appropriate inferences from the Constitution's structure, history, or overarching aims." 1 Laurence H. Tribe, *American Constitutional Law* 34 (3d ed. 2000) (emphasis in original).

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[5] *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996), cited by the government, merely quotes with approval this statement by Professor Tribe with which Defendants do not disagree, before discussing other cases that refuse to hold that possession of firearms is protected by the Ninth Amendment. To the extent that the cursory treatment of the Ninth Amendment in *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991) (on which the court relies in *San Diego County Gun Rights*) or in *Strandberg v. City of Helena*, 791 F.2d 744, 748-49 (9th Cir. 1986) (on which the court relies in *Schowengerdt*) says anything more or different, both cases were decided before the Supreme Court's use of the Ninth Amendment in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Like the Court in *Casey*, Defendants do not view the Ninth Amendment as an independent "source" of rights but as an instruction on how the Constitution should be read to protect unenumerated rights that are found to be fundamental.

[6] In response to the argument that the list of protected rights is a "closed set" and limited to those rights that were enumerated in 1791 or 1868, Tribe replies: "But if, as seems plain, the ninth amendment is not a 'repository' at all but a prohibition against certain forms of argument by negative implication, then the 'closed set' possibility loses most of its plausibility." 1 Laurence H. Tribe, *American Constitutional Law* 776 n.14 (2d ed. 1988).

And later he affirms that "[w]hen expounding the Constitution's substantive guarantees of liberty, which secure the individual's protected sphere of power and autonomy, it is appropriate to read the document broadly in favor of those liberties. Indeed, the Ninth Amendment requires us to do so . . . ." *Id.* at 130 n.30. Finally, and directly pertinent to the present case, he observes that: "The Ninth and Tenth Amendments should, taken together, caution us against . . . 'penumbral thinking' with respect to *grants of national governmental power.*" *Id.* at 131 n.30 (emphasis in original).

Supreme Court precedent also supports Defendants' position. The Supreme Court cited the Ninth Amendment in support of a broad reading of constitutional liberty in the landmark case of *Planned Parenthood,* 505 U.S. at 848, where it stated: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment mark the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. *See U.S.* Const., Amdt. 9." The same proposition holds true for the Due Process Clause of the Fifth Amendment, which protects fundamental rights from encroachment by federal power. Nor is *Casey* the only time in recent history that the Supreme Court appropriately cited the Ninth Amendment in support of its decision to protect an unenumerated right. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 n.15 (1980) ("Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others."). In *Richmond*, the Court concluded that "fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Id.* at 580.

Neither *Carnohan* nor *Rutherford,* upon which the government continues to rely, has a bearing on the issues raised here. In *Carnohan*,[7] the Ninth Circuit's brief opinion did not reach the

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[7] Defendants also note, to avoid confusion, that neither *Carnohan* nor *Rutherford* is germane to the issue of the scope of Congressional power raised here (in Section III.A) because both cases involved the *interstate* distribution of laetrile (the jurisdiction over which Congress has given the FDA). In other words, if Congress has exceeded its enumerated or penumbral powers in the present case, *Carnohan* and *Rutherford* present no obstacle to so finding. If they bear on this case at all, *Carnohan* and *Rutherford* pertain only to the claim of a fundamental right that limits the exercise of implied and enumerated powers alike. Defendants do not take the government's brief to be suggesting otherwise.

due process issue because it ruled that Carnohan's "claim that the requirements of state and federal law deny him due process are premature since he has not availed himself of the procedures which those laws afford." *Carnohan*, 616 F.2d at 1122. The Court also asserted that "[t]he FDA and the California State Department of Health Services have primary jurisdiction to determine whether persons may traffic in new drugs." *Id.* It did not, therefore, address the situation that arises when state and federal authorities differ. The constitutional resolution of this conflict is obvious. The FDA has jurisdiction over interstate commerce and the State of California has jurisdiction over intrastate commerce. It is absurd to think that the only police power to protect health and safety held by the State of California is the power to say no, rather than also the power to say yes. The government would create a conflict where the Constitution sees a complementarity.

Similarly, in *Rutherford*, the decision rested on "governmental interest in protecting public health." *Rutherford*, 616 F.2d at 457. Here, both California and the City of Oakland have a clear government interest in protecting public health.

As to fundamental rights, Defendants contend that, when deciding whether a liberty is or is not fundamental, judges should pay great heed to the judgment of the People of a State and their government. In *Carnohan*, it was solely the individual who asserted the fundamentality of his right. In the present case, it is the individual members of the Cooperative as well as the governments of California, the County of Alameda, the City of Oakland, and the People of the State of California themselves, who have chosen to stand with Defendants in asserting their fundamental rights. If nothing else, this renders the case substantially different from *Carnohan* or the other cases cited by the government[8] in which individual rights claims made solely by individuals have been rejected.

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[8] *Sammon v. N. J. Bd. of Med. Exam'rs*, 66 F.3d 639, 645 n.10 (3d Cir. 1995), merely cites *Carnohan* and *Rutherford* and then refuses to reach the issue of standards of review in the case before it. ("Because the challenged statute does not regulate the manner in which a mother gives birth, we have no occasion to determine the appropriate standard of review for a statute that regulates the manner of birthing.") *Mitchell v. Clayton*, 995 F.2d 772, 775-76 (7th Cir. 1993), did not involve any argument comparable to that offered here to the effect that a right to receive acupuncture from an unlicensed chiropractor either was a fundamental right itself or implicated any other fundamental rights. *United States v. Burzynski Cancer Research Inst.*, 819 F.2d 1301 (5th Cir. 1987), similarly lacked any plausible claim that the right at issue was fundamental. Moreover, in none of these cases had the police power of a State been exercised on behalf of the persons claiming a right to treatment and thereby added constitutional weight to their claims of fundamentality. Further, as discussed in

(Footnote continues on following page.)

Deciding whether a particular right is fundamental is a difficult matter. For this reason, courts have long looked to tradition and history to justify their conclusions, lest it appear that it is solely their personal views that lead them to oppose the act of an elected legislature. In contrast, here a single federal judge is being asked to reject the judgments, not just of the Defendants before him, but of the governments of the State of California, the County of Alameda, and the City of Oakland, all supporting Defendants as *amici*, and the People of the State of California itself who have spoken through Proposition 215, and the People of Alaska (Measure 8), Arizona (Proposition 200), Colorado (Amendment 19), Maine (Question 2), Nevada (Question 9), Oregon (Measure 67), Washington (Initiative 692), and the District of Columbia (Initiative 59). The Court should reject these judgments only reluctantly, and only when it concludes that individual rights have been violated as in *Romer v. Evans,* 517 U.S. 620 (1996), not when, as here, the federal government seeks to interfere with citizens' fundamental rights by use of its implied powers. To this argument, the government has not replied.

In this type of case only a federal judge can protect the will and judgment of the people (and their State and city) that a right is fundamental against an overreaching application of a federal statute. When countless citizens have marshaled their resources, not to engage in civil disobedience, but to channel their efforts through the political process, as they have in this and other States, a court should not lightly tell them that their efforts were in vain and that the right they have tried to secure by political means deserves no heightened scrutiny. An adverse decision by this Court would be a slap in the face to the thousands of citizens who put their faith and energies into the political process and the millions of others who supported these efforts by their votes.

III. THE GOVERNMENT IS NOT ENTITLED TO PERMANENT INJUNCTIVE RELIEF

A. The Legal Standard for Permanent Injunction

The government's motion seeks a severe sanction, permanent closure of the OCBC, and a permanent, blanket prohibition against distribution of medical cannabis, even to those severely-ill

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(Footnote continued from previous page)
section IV.B.2.d, at a minimum, Defendants are entitled to a trial in which evidence concerning whether Congress had a legitimate basis for depriving seriously ill patients of cannabis that is necessary for their survival may be considered.

patients with a legally-defined medical need for cannabis. To achieve this drastic and draconian end, the government bears a heavy burden that it cannot meet. The Court must consider three factors in determining whether to issue a permanent injunction: (a) whether plaintiff has prevailed on the merits; (b) whether the balance of equities favors injunctive relief; and (c) which type of relief is appropriate. *See LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985); *Ca. First Amendment Coalition v. Lungren,* No. C 95-0440-FMS, 1995 U.S. Dist. LEXIS 11655, at *8 (N.D. Cal. 1995); *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998). In deciding whether to grant permanent injunctive relief, the Court must consider the balance of hardships or equities-weighing on the one hand the harm to the government if the Court declines to prohibit Defendants' actions, and on the other hand, the harm to Defendants from an injunction ordering them to cease their activities. *See United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 857 (9th Cir. 1995); *McCormick v. Cohn*, No. CV 90-0323 H, 1992 WL 687291, at *20 (S.D. Cal. 1992). In this case, the Supreme Court has further refined this analysis by stating that the Court must consider the advantages and disadvantages of injunctive relief versus criminal prosecution. *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 497-98.

The government's articulation of the standard for a permanent injunction overlooks one key factor: a separate showing of the inadequacy of plaintiff's legal remedy is a prerequisite to a permanent injunction. *See Cont'l Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir. 1994) ("[F]or equitable relief to be appropriate, there must generally be no adequate legal remedy.") The government makes a circular argument. First, the government accurately states that irreparable injury is not independent of the requirement of an inadequate legal remedy for a permanent injunction, as it is for a preliminary injunction. (Govt's Br. at 29.) The government then cites this Court's statement that, in connection with a preliminary injunction, irreparable injury is presumed where the federal government seeks to enforce a statute. (*Id.* at 34.)

Under the government's reasoning, all permanent injunctions would issue automatically where the government seeks to enjoin violation of a federal statute. This cannot be the standard. As articulated by the government, the standard would obviate the necessity of any analysis for either inadequate legal remedy or irreparable injury, as they would be one and the same. The effect would

be to deprive the federal courts of their discretion to deny a permanent injunction where the government seeks to enforce a statute. The Supreme Court has indicated otherwise:

> The Controlled Substances Act vests district courts with jurisdiction to enjoin violations of the Act . . . . But a "grant of jurisdiction to issue [equitable relief] hardly suggests an absolute duty to do so under any and all circumstances . . . ." Because the District Court's use of equitable power is not textually required by any "clear and valid legislative command," the court did not have to issue an injunction.

Oakland Cannabis Buyers' Coop., 532 U.S. at 496 (citation omitted).

The CSA does not mandate an injunction in every case. The Court retains its equitable discretion to balance the equities and to consider the adequacy of the legal remedy as well as any showing of irreparable injury flowing from the selection of an injunction.

As shown below, the government has not met its burden. An adequate remedy at law exists, and a showing of irreparable injury is completely absent. The government has not prevailed on the merits of this case, the balance of equities does not favor the permanent injunction that the government seeks, and the government is guilty of unclean hands.

B. The Government Has an Adequate Legal Remedy

1. Equity Will Not Enjoin the Commission of a Crime

The government is not entitled to permanently enjoin defendants' activities, because an adequate remedy at law exists. "As a general rule, courts [] are reluctant to issue injunctions against the commission of a crime even when no question of federalism is present." 11A Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d § 2942, at 70 (2d ed. 1995). An adequate remedy at law exists where the crime being enjoined could be prosecuted and criminal penalties imposed. *See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1244 n.10 (11th Cir. 1999) ("In so holding, the court seemed to be cognizant of the rule that equity will not enjoin the commission of a crime, which is a corollary of the more general principle that injunctive relief is unavailable when there is an adequate remedy at law.") (citations omitted). As one authority notes:

> [T]wo major justifications have been asserted for the rule that equity will not enjoin a crime: the desire to protect defendants' rights to safeguards of criminal procedure . . . and the adequacy of the criminal remedy to protect plaintiff's interests. If the criminal law forbids certain conduct, and provides sanctions of fine or imprisonment for disobedience, what purpose will be served by an injunction against the same conduct, under pain of contempt punishment? Enjoining a crime may seem not only superflu-

> ous, but also unmindful of legislative determination of the appropriate sanction for the enforcement of a given statutory command.

11A Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d § 2942, at 70-71 (2d ed. 1995) (citation omitted). As these comments demonstrate, an adequate legal remedy exists as a matter of law, precluding the issuance of a permanent injunction, where the behavior to be enjoined can be prosecuted criminally. Nor would the purpose of the CSA be thwarted if an injunction did not issue. As recognized by the Supreme Court in this case:

> with respect to the Controlled Substances Act, criminal enforcement is an alternative, and indeed the customary means of ensuring compliance with the statute. Congress' resolution of the policy issues can be (and usually is) upheld without an injunction.

Oakland Cannabis Buyers' Coop., 532 U.S. at 497.

2. The Government Has Failed to Demonstrate Irreparable Harm

The government does not attempt to demonstrate irreparable harm, nor could it. For permanent injunctions, "irreparable injury is not an independent requirement . . . it is only one basis for showing the inadequacy of the legal remedy." 11A Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d § 2944, at 94 (2d ed. 1995). The government relies on the same authority in an attempt to dismiss its obligation to prove that it will suffer irreparable injury. (Govt's Br. at 29.) Given the existence of an adequate remedy in the form of criminal prosecution, the government cannot claim irreparable injury. The government will suffer no hardship by being denied the extraordinary remedy of a permanent injunction, nor has it even argued that it will suffer any harm.

Defendants already have suffered hardship by being deprived of the constitutional protections of the criminal justice system. They will suffer the same harm in any subsequent contempt proceedings, where they may be subject to imprisonment without a jury trial. Defendants also have shown the substantial hardships to be suffered by patient-members if the injunction continues. The injunction is a blanket prohibition against any OCBC patient-member receiving medical cannabis. The government could not achieve such relief in a criminal trial.

Moreover, numerous patient-members suffer from AIDS, cancer, glaucoma, and other serious illnesses for which cannabis is the only operative treatment for pain and such conditions as loss of appetite that could otherwise lead to death, blindness, or other permanent debilitation. (*See, e.g.,*

Declarations of Michael Alcalay, Willie Beal, Robert Bonardi, Albert Dunham, Creighton Frost, Terry Stodgell, Harold Sweet attached as Exhs. A-F, J-K to Carnegie Decl.; *see also* Alcalay III ¶¶ 6-12; Decls. of Harold Tores, Norma Bureau Elias.) Inflicting immediate and life-threatening medical hardships on patient-members surely offends the public interest. These patients also have been foreclosed from having a jury consider whether the government has established that they are using medical cannabis in violation of the CSA. Finally, issuance of a permanent injunction frustrates the intent of the majority of California voters, that seriously ill people should have access to medicinal cannabis, and is contrary to the public interest.

C. The Government Has Not Demonstrated Actual Success on the Merits

The government has not established actual success on the merits of this case nor, can it rely upon materials submitted in connection with the Preliminary Injunction or upon the Preliminary Injunction Order itself to do so. A preliminary injunction motion is preliminary only. A party should not be foreclosed on the merits by a proceeding that addresses only preliminary matters. *See SEC v. N. Am. Research*, 59 F.R.D. 111, 113 (S.D.N.Y. 1972). As expressly recognized by this Court, its decision concerning Defendants' legal defenses was by no means dispositive and was not intended to foreclose Defendants from litigating these defenses at trial. *Cannabis Cultivators Club*, 5 F. Supp. 2d at 1101.

To prove that Defendants have violated the CSA and that Defendants are not entitled to any defenses, the government cannot simply rest upon unsupported allegations as it has done here. "[T]he plaintiff seeking an injunction must prove the plaintiff's own case and adduce the requisite proof, by a preponderance of the evidence, of the conditions and circumstances upon which the plaintiff bases the right to and necessity for injunctive relief." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990). As shown in Section IV.B.2 below, Defendants have provided detailed, uncontroverted evidence establishing the validity of their legal defenses.

One of the mandatory prerequisites to a permanent injunction is "actual success on the merits." *See Walters v. Reno*, 145 F.3d at 1048; *Orantes-Hernandez*, 919 F.2d at 558 (citation omitted). "[P]ermanent injunctions may be granted on summary judgment, *given the proper record*." *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980) (citations omitted) (emphasis added). Plaintiff's

reliance upon an improper factual record makes a permanent injunction inappropriate in this case. Therefore, the government cannot satisfy the requirement of "actual success on the merits."

D. Defendants Have Fully Complied with the Preliminary Injunction

Because federal courts are reluctant to award injunctions in the absence of compelling circumstances, a plaintiff must demonstrate that there is a real danger, more than a mere possibility or fear, that the injury will occur. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *Rose v. City of Los Angeles*, 814 F. Supp. 878, 884 (S.D. Cal. 1993). On October 20, 1998, Defendants turned the keys to their premises over to the United States Marshal. On October 28, 1998, the OCBC moved the District Court to allow them to reenter the premises for limited purposes. Defendants submitted a sworn declaration from Jeff Jones that he would "follow the terms of the Injunction . . . with respect to the premises" and he would "take all reasonable steps . . . to ensure compliance . . . with the injunction." (Declaration of Jeffrey Jones ("Jones Decl.") at ¶ 2, filed Dec. 23, 1998.)

Injunctive relief is designed to deter future misdeeds, not to punish past misconduct. *Orantes-Hernandez*, 919 F.2d at 564 (permanent injunctive relief warranted where defendant repeatedly and continuously violated the preliminary injunction). Here, the government has offered no evidence suggesting that a permanent injunction is necessary at this time to secure Defendants' compliance with the law.

E. The Government's Unclean Hands Preclude Entry of a Permanent Injunction

The government cannot prevail in its attempts to obtain an injunction if it comes to court with unclean hands. *See E.E.O.C. v. Recruit U.S.A.*, 939 F.2d 746, 752 (9th Cir. 1991) (the doctrine that "one who seeks equity must come to the court without blemish" applies to the government as well as to private litigants).

The government's record regarding marijuana in general and medical cannabis in particular demonstrates a pattern of bad faith that precludes it from obtaining equitable relief. The government has ignored the numerous and uncontroverted scientific studies discussed in Section IV.B.2.d below establishing the medical efficacy of cannabis. (*See also* Declaration of Lester Grinspoon in Support of Defendants' Motion to Dissolve and In Opposition to Motion for Summary Judgment/Permanent Injunction ("Grinspoon II"); Morgan Decl. ¶¶ 2-9, 11-12.) As set forth in the Declaration of

Dr. Robert Melamede, the government also has placed serious obstacles in the path of research concerning medical cannabis. (Melamede Decl. ¶¶ 13-14.) Under the CSA, the government controls the availability of cannabis for research. (*Id.* ¶ 12.) The government has wielded this power unfairly. For example, the government delayed release of a study indicating that rats and mice that are given cannabis have fewer tumors and live longer. It was only after tremendous effort by concerned groups that the study was released. (*Id.* ¶ 9.) There are also no clinical studies into areas in which cannabis may be beneficial, *e.g.*, the prevention of seizures and human gliomas. (*Id.* ¶ 10.) Although studies are underway in other countries, no studies are underway in the United States, despite evidence that cannabis has painkilling properties and can ameliorate multiple sclerosis. (*Id.*) The government also has made it difficult for researchers to conduct studies. (*Id.* ¶¶ 13-14; Grinspoon II ¶ 34.) For all of these reasons, the government cannot obtain equitable relief from this Court.

IV. THE GOVERNMENT IS NOT ENTITLED TO SUMMARY JUDGMENT

A. The Legal Standards for Summary Judgment

In deciding a summary judgment motion, the Court must consider all "justifiable" and "legitimate" inferences in favor of the nonmoving party. *Matsushita Elec. Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986); *United Steel Workers of Am. v. Phelps Dodge*, 865 F.2d 1539, 1545 (9th Cir. 1989) (*en banc*). The evidence of the nonmoving parties "is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451 (1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Inferences may be drawn from underlying facts not in dispute, such as background or contextual facts, "as well as from disputed underlying facts which the judge must assume will be resolved at trial in favor of the non-movant." *United Steel Workers*, 865 F.2d at 1545; *see also T.W. Elec. Serv. v. Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). Even when the basic facts are agreed upon, "there must also be no controversy regarding the inferences to be drawn from them." *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir. 1987).

In ruling on a summary judgment motion, the non-moving parties' version of any disputed fact is "presumed correct." *Eastman Kodak*, 504 U.S. at 456. All ambiguities must be resolved against the moving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The Court

must not weigh the evidence or determine its truth. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992); *Morales v. Merit Sys. Prot. Bd.*, 932 F.2d 800, 802 (9th Cir. 1991). Rather, the Court is only to make a threshold determination as to whether the trier of fact could reasonably infer from the evidence submitted that plaintiff could prove its claim. *Anderson*, 477 U.S. at 249-50. Summary judgment is inappropriate "if reasonable minds would differ as to the import of the evidence." *Id.* at 250.

As shown below, Defendants have presented sufficient evidence for a reasonable jury to find that the government is not entitled to summary judgment and permanent injunctive relief.

B. The Existence of Material Disputed Facts Precludes Summary Judgment

The record establishes that significant factual disputes exist that preclude summary judgment here. The government appears to base its summary judgment motion upon information gathered in 1997 when government agents infiltrated OCBC by posing as sick patients. (*See* Declarations of Special Agents Brian Nehring, Carolyn Porras, Deborah Muusers, Mark Nelson, and Bill Nyfeler filed January 9, 1998). These agents tendered fraudulent medical information and identification to gain access to OCBC. The information submitted by the government purports to establish that, in 1997, marijuana was distributed at OCBC. Even assuming the truth of the government's allegations, these allegations do not establish any present violation of the CSA or of the preliminary injunction. Moreover, there is ample evidence in the record to support each defense raised by Defendants. Because the government's evidence fails to refute any of these defenses, Defendants are entitled to a jury trial to respond to the government's charges.

1. The Government Cannot Rely upon the Legally Defective Factual Record of the Preliminary Injunction

The government's reliance upon the factual record of the preliminary injunction is inappropriate. First, the factual record that serves as the basis for a preliminary injunction is not necessarily sufficient to sustain the issuance of a permanent injunction. *Cf. Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982) ("[B]ecause the fully developed factual record may be materially different from that initially before the district court, our disposition of

appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits.").

Second, it is well-established that "only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment." *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Federal Rule of Evidence 901 requires "authentication or identification as a condition precedent to admissibility." Fed. R. Evid. 901(a). "A writing is not authenticated simply by attaching it to an affidavit." *United States v. Dibble*, 429 F.2d 598, 602 (9th Cir. 1970). Hearsay documents and testimony are also inadmissible in support of summary judgment. *Id.*; *Beyene*, 854 F.2d at 1182-83. And, "a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978). Thus, documents or testimony that would require a jury to speculate cannot be considered on a motion for summary judgment.

Third, federal law does not give undue weight to evidence merely because several witnesses testify to the same effect. *See Banks Const. Co. v. United States*, 364 F.2d 357, 372 (Ct. Cl. 1966) ("The probative value of evidence is not strengthened by cumulative testimony.").

As set forth in Defendants' separately filed Statement of Objections In Support of Motion to Dissolve and in Opposition to the Government's Motion for Summary Judgment and Permanent Injunctive Relief, the Court should not consider portions of the factual record relied upon by the government, as they are inadmissible under the relevant Federal Rules of Evidence.[9] In connection with the government's Motion and Memorandum in Support of Motion for Preliminary Injunction and Permanent Injunction, and for Summary Judgment, the government relied exclusively upon, and gave undue weight to, the declarations of Mark T. Quinlivan and Special Agents Brian Nehring, Carolyn Porras, Deborah Mousses, Mark Nelson, and Bill Nyfeler. (Motion for Preliminary Injunction filed Jan. 9, 1998 at 8-9, 11, 13.) These declarations are replete with hearsay, unsupported conclusions, unauthenticated exhibits, and the declarants' speculation as to factual matters. Every

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[9] To the extent that the government intends to rely upon the declarations submitted in connection with its Motion for Order to Show Cause, the evidence is objectionable for the reasons stated in Defendants' Motion to Strike, dated August 13, 1998.

one of these declarations violates the requirements of Rule 56(e) that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matters stated therein." Fed. R. Civ. P. 56(e). Such evidence does not satisfy the government's burden of demonstrating "that there is "no genuine issue as to any material fact" for trial. Fed. R. Civ. P. 56(c); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970) ("As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party.").[10]

2. Significant Legal and Factual Disputes Remain Concerning Defendants' Defenses

Contrary to the government's contention, neither the Supreme Court's decision in this matter, nor this Court's decision to issue a preliminary injunction, forecloses Defendants' defenses. The Supreme Court opinion did not address the constitutional issues raised in Section II, *supra*. Apart from the narrow question of whether the CSA deprived the Cooperative of a medical necessity defense to the manufacture and distribution of cannabis, the Supreme Court did not address the other issues Defendants raise. Similarly, in granting the preliminary injunction, this Court explicitly

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[10] The defective evidence submitted by the government also supports two affirmative defenses in favor of Defendants: entrapment and mistake of law. The declarations of Special Agents Brian Nehring, Carolyn Porras, Deborah Muusers, Mark Nelson, and Bill Nyfeler detail the results of the government's fraudulent conduct that resulted in the illegal entrapment of Defendants. Entrapment requires government inducement to commit the crime and the absence of predisposition by the defendant. *See Jacobson v. United States*, 503 U.S. 540, 549 (1992); *United States v. Thickstun*, 110 F.3d 1394, 1396 (9th Cir. 1997). Defendants were not predisposed to providing cannabis to persons without the proper authorization. Defendants also have a mistake of law defense. Defendants can claim a mistake of law defense where they in good faith relied upon a statute or judicial decision. *See Cheek v. United States*, 498 U.S. 192, 206-07 (1991) (holding that a mistake of law defense encompasses a reasonable or a subjective good-faith reliance upon the law); *People v. Marrero*, 69 N.Y.2d 382, 390 (1987) ("[M]istake of law is a viable exemption in those instances where an individual demonstrates an effort to learn what the law is, relies upon that law, and, later, it is determined that there is a *mistake in the law itself*."); Model Penal Code 2.04(3)(b) (permitting a "reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous . . . ."). Here, Defendants relied in good faith upon valid credentials that constituted legal distribution of cannabis under Proposition 215, which remains a valid law. Even though the Court later ruled that Defendants' conduct may have violated federal law, at the time the agents infiltrated the OCBC there had been no ruling that federal law prohibited Defendants' conduct. Defendants have a viable mistake of law defense.

recognized that its view of OCBC's defenses was preliminary only. *Cannabis Cultivator Club*, 5 F. Supp. 2d at 1101-03.

a. Defendants Are Entitled to Immunity

Defendants respectfully submit that the immunity offered by 21 U.S.C. § 885(d) is a valid defense that bars entry of summary judgment or a permanent injunction. Under the plain language of the statute, Defendants are engaged in enforcing a law related to controlled substances. Pursuant to Chapter 8.42 of the Oakland Municipal Code, Defendants are "officers" who are to "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." (Oakland, Ca., Ordinance 12,076 ("Ordinance 12,076") § 3 (July 28, 1998) attached to Declaration of Annette P. Carnegie in Support of Defendants' Motion After Remand to Dissolve or to Modify Preliminary Injunction Order ("Carnegie Decl.") as Ex. L.) This requires ensuring that cannabis is only made available to eligible patients. Defendants are implementing a law that seeks to control the illicit use of drugs as well as promote the availability of medicine to those who have legitimate medical need. The "enforcement" of the law implicates both beneficence and punishment, a subtlety that escapes the government. The Oakland Ordinance does more than "legalize a species of conduct." It requires close regulation and supervision of that conduct, the issuance of identification cards to patients who qualify, and verification of patients' status and qualifications. (*Id.* §§ 5, 6.) Violations of the Ordinance are punishable as a misdemeanor. (*Id.* § 9.)

Defendants are also "officers" within the meaning of Section 885(d). The Oakland Ordinance clearly states that one of its purposes is to "provide immunity to medical cannabis provider associations pursuant to Section 885(d)." (Ordinance 12,076 § 1-D.) That is not the "sole" purpose, but a purpose in addition to the City's goals of providing for the health and safety of its citizens by ensuring "access to safe and affordable medical cannabis pursuant to the Compassionate Use Act of 1996." (*Id.* § 1-C.)

Section 885(d) confers immunity upon "any duly authorized officer of any . . . political subdivision [of any State]." The Oakland Ordinance explicitly declares:

> For the purposes of this Chapter only, a medical cannabis provider association, and its agents, employees and directors while acting within the scope of their duties on behalf of the association, shall be deemed officers of the City of Oakland.

(Ordinance 12,076 § 3.)

The term "officer" contained in Section 885(d) must be given its plain meaning. Defendants are "officers" of the City of Oakland within the meaning of Section 885(d) when they are engaged in any activity authorized by the Ordinance.

The government has contended that application of the plain language of Section 885(d) would nullify the CSA, and lead to "absurd results" by allowing any city to authorize the distribution of controlled substances forbidden by federal law. This argument ignores the true meaning of Section 885(d)'s requirement that an officer be "lawfully engaged" in the enforcement of a municipal ordinance. Immunity is confined to officers who comply with both state and local law. The fact that several states now recognize the legitimate, wholly intrastate medical use of cannabis is far from a "nullification" of the CSA. It is an accommodation invited by the CSA itself, which expressly rejects any purpose to preempt all regulation of controlled substances, including criminal penalties. 21 U.S.C. § 903. Oakland's specific reference to Section 885(d) in the Ordinance confirms that this Ordinance was not designed to contradict federal law, or to defy federal authority. It was a conscious effort to harmonize the obligations of the City Council to exercise its police powers to protect the health and safety of Oakland's citizens, with the applicable provisions of federal law. Section 903 of the CSA obligates this Court to uphold the Oakland Ordinance unless it cannot consistently stand with the CSA. There is no conflict between the CSA that properly applies to interstate commerce, and the commendable effort of the City of Oakland to carry out the mandate of the People of California to ensure that seriously ill Californians can obtain and use cannabis for medical purposes by means of the police power of a State over its own internal commerce.

Moreover, Section 885(d) cannot be given the circular reading urged by the government, that only those whose activity is lawful under the CSA are eligible for immunity. That would be the most absurd result of all, decreeing that immunity is conferred only upon those who have no need for immunity. A grant of immunity implicitly recognizes that without it, one would be in violation of the law. Section 885(d) expressly contemplates that local officers whose conduct would otherwise

violate the CSA should face no civil or criminal liability. Giving the provision its literal effect thus accommodates both the interests of the federal government and the interests of the City of Oakland.

b. The Joint User Defense Precludes Entry of Summary Judgment

Contrary to the government's contention, this Court did not foreclose the joint user defense:

> The Court cautions, however, that it is not ruling that defendants are not entitled to such a defense at trial or in a contempt proceeding for violation of a preliminary or permanent injunction, or that defendants could not as a matter of law defeat a motion for summary judgment with evidence of mere possession.

Cannabis Cultivators Club, 5 F. Supp. 2d at 1101.

Defendants have submitted evidence that their patient-members are joint users within the meaning of *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977). There the court held that defendants who jointly purchase drugs and share them among themselves are not engaged in "distribution" within the meaning of the Controlled Substances Act. The *Swiderski* court applied the defense to the simultaneous purchase and immediate consumption by a husband and wife.

Swiderski's rationale applies with equal force to the use of medical cannabis in compliance with state and local laws. Judicial resistance to expansion of the *Swiderski* doctrine clearly has been based on concerns about its possible use as a "cover" for illicit drugs. Those concerns are not present in this context, however. Just as in *Swiderski*, no one other than the co-acquisitioners is involved in the use of the medical cannabis. The members are not drawn into drug use through the Defendants; rather, they seek the cannabis to alleviate their serious medical conditions, and receive a doctor's approval to do so. (*See, e.g.*, Bonardi Decl. ¶ 9.) These individuals are not using cannabis for recreational purposes. (*See, e.g.*, Bonardi Decl. ¶ 9.) They are merely attempting to alleviate their painful ailments. No "distribution" took place because the Cooperative and its patient-members jointly acquired the cannabis for medical purposes to be shared among themselves and not with anyone else. (Amended Alcalay Decl. ¶ 29; McClelland Decl. ¶ 18.)

Defendants have established that when the use of medical cannabis was shared by members of the Oakland Cannabis Buyers' Cooperative, the participants agreed to the following statement of conditions:

> The Oakland Cannabis Buyers' Cooperative would like to assure all Members that the Cooperative will continue to operate in the good faith belief that it is not engaging in the distribution of cannabis in violation of law. Federal law excludes from the definition of "distribution" the joint purchase and sharing of controlled substances by users. As a Member of the Oakland Cannabis Buyers' Cooperative, you are a joint participant in a cooperative effort to obtain and share medical cannabis. Each transaction in which you participate is not a "sale" or "distribution," but a sharing of jointly obtained medical cannabis. If you make a payment to the Cooperative, such payment is a reimbursement for administrative expenses and operations, which all Members who utilize the services of the Cooperative agree to share.

Oakland Cannabis Buyers' Cooperative Statement of Conditions. (*See* McClelland Decl. ¶¶ 18-19, Ex. 4.)

Defendants have established that the sharing of jointly purchased medical cannabis is conducted in complete conformity with state law requiring medical approval, and with local regulations that govern the use of medical cannabis. (Amended Alcalay Decl. ¶¶ 23-25, 32.) Immediate consumption in each other's presence was precluded by a prohibition against smoking on the premises of the cannabis dispensary. (*Id.* ¶ 29.)

Defendants also have demonstrated that no third persons are involved other than "primary caregivers," and that no one else is brought into a "web" of drug use. (Alcalay Decl. ¶ 29.) The evidence establishes that the joint users are bound together by a shared commitment to the alleviation of each other's pain and compassion for each other's suffering. (McClelland Decl. ¶ 18, Ex. 4.)

Thus, all of the circumstances that led the *Swiderski* court to recognize the joint user defense can be established by the evidence, and all elements of the defense can be proven to a jury's satisfaction. Whether this evidence in fact is sufficient for Defendants to prevail on the joint user defense at trial is a question for the jury to determine. That is not the same question as whether Defendants have adduced facts sufficient to raise a triable issue of fact as to this defense. To be entitled to the defense, Defendants need only show "some foundation in the evidence." *United States v. Duran*, 59 F.3d 938, 941 (1995). The evidence of the cooperative structure of Defendants' organization is one of the several facts, discussed above, that present a triable factual issue under the joint user defense. The government, for its part, fails to address this evidence. The jury should be instructed that the injunction does *not* preclude mere possession of medical cannabis, even if unlawful, and that the joint use of medical cannabis under the heavily regulated and controlled

circumstances of this case is simple possession of the substance, not distribution. The *Swiderski* court emphasized that determining whether the joint user defense applies in a particular case involves a fact-dependent inquiry. *United States v. Swiderski*, 548 F.2d at 450.

Application of the joint user defense promotes the CSA's objectives by eliminating numerous individual clandestine transactions in favor of one monitored transaction. Under these unique circumstances, Defendants' evidence establishes, at a minimum, a triable issue of fact regarding the joint user defense.

c. Defendants Are "Ultimate Users" Within the Meaning of the CSA

The CSA defines an "ultimate user" as "a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household . . . ." 21 U.S.C. § 802(27).

Defendants' evidence also establishes that they are "ultimate users" within the meaning of the CSA. Defendants are authorized to possess medical cannabis under California Health & Safety Code Section 11362.5 and under the authority of Chapter 8.42 of the Oakland Municipal Code. (*See* Carnegie Decl., Exs. L-O.) Moreover, under *Swiderski*, any medical cannabis possessed by Defendants would be for the exclusive medicinal purposes of each of them under the doctrine of joint possession. *See also United States v. Bartee*, 479 F.2d 484 (10th Cir. 1973) (ultimate user "obtain[s] the drug for his own use").

d. The Government Has Neither a Compelling Interest Nor a Rational Basis for Prohibiting the Acquisition of Medical Cannabis by OCBC's Patient-Members

This Court similarly did not rule that Defendants were conclusively prohibited from raising a substantive due process defense. *Cannabis Cultivator Club*, 5 F. Supp. 2d at 1103. As discussed in Section II, *supra*, none of the legal precedents cited by the government forecloses the defense. Defendants' evidence also establishes that the prohibition against distribution to OCBC's patient-members violates the substantive due process rights of these individuals. Defendants' evidence establishes that for many patient-members, cannabis is the only means of alleviating serious or life-threatening conditions. (*See, e.g.*, Bonardi Decl., Alcalay Decl., Beal Decl.) This evidence shifts the burden to the government to demonstrate a compelling interest for infringing on these fundamental

rights. *Washington v. Glucksberg,* 521 U.S. 702, 773 (1997) (where fundamental liberty interest is involved, government action must be "narrowly tailored to serve a compelling [government] interest") (citations omitted).

Instead of introducing any evidence to justify the absolute prohibition against medical use of cannabis, the government asks this Court simply to defer to Congress, without citing any medical evidence whatsoever. But, where legislation infringes upon fundamental rights, the courts have a duty to look beyond legislative findings to determine independently whether the infringement is justified under the Constitution. "A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether . . . the legislation is consonant with the Constitution." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 844 (1978). Furthermore, "courts are obligated to assure that, in formulating its judgments, Congress has drawn reasonable inferences, based on substantial evidence." *Ca. Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998) (deference to a legislative finding cannot limit judicial inquiry when constitutional rights are at stake) (quotations and citations omitted), *Planned Parenthood*, 505 U.S. at 887-98 (invalidating provision requiring spousal notification for pregnancy termination; court rejected legislative determination that requirement promoted the family relationship). A court cannot simply defer to Congress when constitutional rights are at stake. The government's failure to offer any evidence precludes entry of summary judgment or a permanent injunction.[11]

The government has failed to show a compelling interest for the absolute prohibition against the medical use of cannabis. Even if the government is correct in its position that it need only show a rational basis for its proscription against all medical use of cannabis, however, a review of the years

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[11] Contrary to the government's contention, Defendants do not seek rescheduling of cannabis. Instead, Defendants assert that regardless of how marijuana is classified, the government may not, without justification, prohibit its acquisition for medical use by seriously ill patients where that medical use is authorized by State and local government, and where the prohibition infringes upon the constitutional rights of these patients. Accordingly, the government's claim that the Court lacks jurisdiction to hear such a challenge is misplaced.

of extensive research and history of this benign and effective medicine will confirm that the government cannot meet even this minimal standard.

Humans have used cannabis as an effective medicine for over 3,000 years. (T. Mikuriya, M.D., *Marijuana: Medical Papers 1839-1972,* xiv (1973). *See* Carnegie Reply Decl., Ex. A; *see also* Grinspoon II. ¶¶ 8-16 and Exs. B-L thereto.) As discussed below, every objective, independent study for over a century has recommended permitting patients access to medical cannabis, or has recommended decriminalizing marijuana generally, and therefore needed to make no specific recommendation regarding medical cannabis.

i. Indian Hemp Drugs Commission

In 1893, the British Parliament appointed the Indian Hemp Drugs Commission, which undertook a monumental inquiry that remains relevant today in assessing cannabis policies. The Commission decisively concluded,

> Total prohibition of the cultivation of the hemp plant for narcotics, and of the manufacture, sale or use of the drugs derived from it, is neither necessary nor expedient in consideration of their ascertained effects . . . and of the possibility of its driving consumers to have recourse to other stimulants or narcotics which may be more deleterious . . . .

(Report of the Indian Hemp Drugs Commission, ¶ 740.I (1894). *See* Carnegie Reply Decl., Ex. B.) The Commission studied the failure of cannabis prohibition in other countries that tried it, and reported that "in the case of other countries, where the use of the drugs has been prohibited, the Commission do not find in the literature available to them many arguments for prohibition." (*Id.* at ¶ 562.) Explaining the methodology it would use, the Commission stated,

> Starting, therefore, from the position that what is known of the hemp drugs in the past is not sufficient to justify their prohibition in India, and that for such a measure there must be strong justification based on ascertained facts scientifically and systematically examined, the first question for the Commission is to decide whether such justification is to be found in the evidence before them, and the second whether, if this is so, prohibition is feasible and advisable on other grounds.

(*Id.* at ¶ 563.) In summarizing the Commission's conclusion on this point, the Report stated, "The Commission consider that the effects are not such as to call for prohibition, and on the general principles discussed in the opening paragraphs of this chapter, such interference would be unjustifiable." (*Id.* at ¶ 565.) The Report then described its extensive and objective review of the evidence

and concluded, "The weight of the evidence above abstracted is almost entirely against prohibition." (*Id.* at ¶ 585.)

ii. American Medical Association Opposition to the Marijuana Tax Act

Following repeal of the failed "noble experiment" of alcohol prohibition, certain newspapers and politicians whipped up hysteria concerning the newly-renamed drug "marijuana." Ignoring the advice of the Indian Hemp Drugs Commission and the American Medical Association, Congress in 1937 passed the first federal marijuana prohibition act, the Marijuana Tax Act. When testifying before Congress, the administration "caused the officials to ignore anything qualifying or minimizing the evils of marihuana. . . . [T]he political pressure to put 'something on the books' and the doubt that it could be done combined to make the marihuana hearings a classic example of bureaucratic overkill." (D. Musto, M.D., *The 1937 Marijuana Tax Act, reprinted in* T. Mikuriya, M.D., ed., *Marijuana: Medical Papers, supra,* 419, 432-33 (1972). *See* Carnegie Reply Decl., Ex. C.) The administration's "goal, however, was to have a prohibitive law to the fullest extent possible. Exceptions, particularly trade or *medical exceptions,* would make enforcement considerably more expensive . . . ." (*Id.* at 435 (emphasis added).) At the Congressional hearings, the American Medical Association's (AMA's) spokesman William C. Woodard, M.D., "was barraged with hostile questions. . . . Nevertheless, he was able to get his message across: there was no need to burden the health profession with the bill's restrictions . . . ." (*Id.* at 436.)

In a letter to the subcommittee's chair, dated July 10, 1937, Dr. Woodard plainly stated, "I have been instructed by the board of trustees of the American Medical Association to protest on behalf of the association against the enactment in its present form of so much of H.R. 6906 as relates to the medicinal use of cannabis and its preparations and derivatives." (*Taxation of Marihuana: Hearing on H.R. 6906 Before Subcomm. of the Senate Comm. on Finance,* 75th Cong., 1st Sess. 33 (1937). *See* Carnegie Reply Decl., Ex. D.) The AMA correctly warned that "the prevention of the use of the drug for medicinal purposes can accomplish no good end whatsoever. How far it may serve to deprive the public of the benefits of a drug that on further research may prove to be of substantial value, it is impossible to foresee." (*Id.*) In his testimony, Dr. Woodard spoke at length against the bill, but said, "It is with great regret that I find myself in opposition to any measure that is

proposed by the Government." (*Taxation of Marihuana: Hearings on H.R. 6385 Before the House Comm. on Ways and Means,* 75th Cong., 1st Sess. 87 *et seq.* (1937). *See* Carnegie Reply Decl., Ex. E.) Nonetheless, Congress passed the Marihuana Tax Act.

iii. LaGuardia Committee

To protect "the health, safety, and welfare of our citizens," New York City Mayor Fiorello LaGuardia appointed a committee to make a thorough scientific investigation concerning marijuana (the "LaGuardia Committee"). (Mayor's Comm. on Marihuana, *The Marihuana Problem in the City of New York: Sociological, Medical, Psychological and Pharmacological Studies,* v (1944). *See* Carnegie Reply Decl., Ex. F.) Following an extensive five-year study, the committee concluded: "The publicity concerning the catastrophic effects of marihuana smoking in New York City is unfounded." (*Id.* at 25.) Nevertheless, the prohibition of marijuana, including medical cannabis, continued unabated, and persists to this day.

iv. Shafer Commission

When passing the CSA, Congress appropriated $1,000,000 to commission a thorough study to provide recommendations for appropriate marijuana legislation. According to the legislative history, "[S]ection 601 of the bill provides for establishment of a Presidential Commission on Marihuana and Drug Abuse. The recommendations of this Commission will be of aid in determining the appropriate disposition of this question in the future." 1970 U.S. Code Cong. & Admin. News 4579. Unfortunately, as discussed below, Congress ignored the recommendations of that Commission.

Congress instructed the Commission to "conduct a comprehensive study and investigation of the causes of drug abuse and their relative significance. The Commission shall . . . submit to the President and the Congress a final report which shall contain . . . such recommendations for legislation and administrative actions as it deems appropriate." Public Law 91-513, § 601(e) (October 27, 1970). Specifically, with respect to marijuana, Congress mandated, "The Commission shall conduct a study of marihuana including, but not limited to, the following areas: . . . (B) an evaluation of the efficacy of existing marihuana laws; (C) a study of the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological . . . ." *Id.* at § 601(d)(1).

The Commission became known as the "Shafer Commission." Its members were not "soft" on drugs. One historian described its composition as follows:

> The new Presidential Commission on Marijuana was shaping up to be a reefer-madness folly. Its chairman, hand-picked by Nixon, was the retired Republican governor of Pennsylvania, Raymond Shafer, a known drug hawk. The commission was stacked with conservative doctors. Senator Harold Hughes of Iowa — who never tired of frightening Congress with drug horror stories — was one of four congressional members. Of the rest, only Jacob Javits could be said to be remotely reasonable, and even he was no legalizer. Worst of all, the commission's executive director — the man who decided whom to call for testimony — had been involved in some of the darkest recent episodes in drug policy. His name was Michael Sonnenreich.

D. Baum, *Smoke and Mirrors: The War on Drugs and the Politics of Failure* 52 (1996). Despite its composition, the Shafer Commission — as has every other entity that has conducted an honest review of the facts — made recommendations contrary to current government policy regarding cannabis.

> Sonnenreich was no ideologue. He'd been assigned to gather the facts about marijuana use, and these were the facts he was finding. He also hadn't yet heard any medical evidence convincing him the stuff was as dangerous as the "reefer-madness crowd" liked to say it was. The gateway theory, he thought, was "crap." One afternoon, while poring over some medical research in his office, Sonnenreich suddenly looked up at his assistant and said, "There's nothing the matter with this drug."
>
> Having come to that conclusion, and appalled by the waste of court time, corrections money, and young lives on the alter of marijuana prohibition, Sonnenreich and his staff set out . . . . It wasn't that he thought marijuana was "good"; he still believed smoking it was foolish. But it was clear to his lawyer's eye that criminalizing it was cheapening the criminal justice system and overwhelming the prisons.

Id. at 63.

In response to "the threshold question: why has the use of marihuana reached problem status in the public mind?" the Shafer Commission concluded that the answer was not with its health effects, the behavior it causes, or any pharmacological property of the drug. Rather, according to the Commission, "Marihuana becomes more than a drug; it becomes a symbol" of the "counterculture." *Id.* at 71.

Ultimately, the Shafer Commission recommended decriminalization of marijuana. (National Comm. on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding; First Report of the National Commission on Marihuana and Drug Abuse,* 145-46 (1972). *See* Carnegie Reply Decl., Ex. G.) Congress ignored the recommendations of the Commission it established, and has never reconsidered the classification of marijuana in light of the Shafer Commission's recommendations.

v. Dutch Policy

Ironically, although the U.S. government ignored the Schafer Commission's report, the Dutch relied in part upon the report when developing their successful marijuana policy, as established in a 1975 white paper to Parliament. (Ministry of Welfare, Health and Cultural Affairs, *Dutch Drug Policy: Some Facts and Figures* ("Dutch Drug Policy") 1-2 (1992). *See* Carnegie Reply Decl., Ex. H.) In Holland, authorities do not prosecute the sale of personal-use quantities of marijuana (*i.e.*, no more than 30 grams per transaction). (Netherlands Institute for Alcohol and Drugs, *Fact Sheet: Cannabis Policy* 2 (1995). *See* Carnegie Reply Decl., Ex. I.) As a result, the prevalence of marijuana use among school children is relatively low: just 2.7%. (Dutch Drug Policy at 8.)

vi. DEA Administrative Findings

In 1988, the DEA's own Administrative Law Judge, Francis L. Young, conducted extensive evidentiary hearings regarding the medical efficacy and safety of cannabis. On the basis of a thorough review of the record, Judge Young issued an Opinion & Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge ("Decision"). *Reprinted in* 2 R. Randall, *Marijuana, Medicine & the Law,* 403-46 (1989); (*see also* Carnegie Reply Decl., Ex. J.)

In the Decision, Judge Young recommended that the DEA Administrator reschedule marijuana from Schedule I. 2 R. Randall at 445-46.

> The evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasoning, arbitrary and capricious for the DEA to continue to stand between those sufferers and the benefit of this substance in light of the evidence in this record.

Id. at 445. Moreover, the Decision, in numerous other contexts, termed elements requiring marijuana's inclusion in Schedule I as "unreasonable, arbitrary and capricious." *Id.* at 427, 438, 444. With regard to the safety of cannabis, the Decision stated, "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man. By any measure of rational analysis marijuana can be safely used within a supervised routine of medical care." *Id.* at 440. Unfortunately, the Decision was advisory, not mandatory. The DEA ignored its Administrative Law Judge, ignored the evidence in the record, and contended that cannabis has "no currently accepted medical use"; so it remains in Schedule I.

vii. *New England Journal of Medicine*

In 1997, the prestigious *New England Journal of Medicine* weighed in, editorializing that

> a federal policy that prohibits physicians from alleviating suffering by prescribing marijuana for seriously ill patients is misguided, heavy-handed, and inhumane. . . . It is also hypocritical to forbid physicians to prescribe marijuana while permitting them to use morphine and meperidine to relieve extreme dyspnea and pain. With both these drugs the difference between the dose that relieves symptoms and the dose that hastens death is very narrow; by contrast, there is no risk of death from smoking marijuana.

(Kassirer, M.D., *Federal Foolishness and Marijuana*, New Eng. Journal of Medicine, Jan. 30, 1997, at 366. *See* Carnegie Reply Decl., Ex. K.) The *Journal* was prescient when it opined:

> Some physicians will have the courage to challenge the continued proscription of marijuana for the sick. Eventually, their actions will force the courts to adjudicate between the rights of those at death's door and the absolute power of bureaucrats whose decisions are based more on reflexive ideology and political correctness than on compassion.

(*Id.*)

viii. Sociological Research

In addition to the medical research, sociological research also illustrates the benefits of medical cannabis providers:

> After almost two years of investigation into the functions of cannabis clubs . . . as social scientists the authors conclude that the cannabis clubs are not only a desirable method but a preferred method for the distribution of medical marijuana. Without question, of the available ways of providing cannabis, the CBCs provide the safest and least expensive commercial method for patients to purchase medical marijuana.

(Feldman & Mandel, *Providing Medical Marijuana: The Importance of Cannabis Clubs*, Journal of Psychoactive Drugs, Apr.-June 1998, at 179, 185. *See* Carnegie Reply Decl., Ex. L.) The researchers explained:

> Members who probably would have been content to find only a legitimate source of medical marijuana were even more pleased to discover that the setting itself served therapeutic purposes for them by providing a natural environment in which to socialize with others who were struggling not only with serious disease but who were frequently isolated, frightened, and depressed. As a result, members often stated that the socialization they encountered and the friends they made at the clubs were health producing. Most frequently members referred to these friendship circles as "support groups" because they offered mutual help in a number of critical emotional areas: adjusting to a terminal illness, or managing the grief which accompanies the many deaths an epidemic like HIV/AIDS leaves in its wake.

(*Id.*) With respect to the government's position, the study stated, "At the moment, the DEA simply ignores all scientific and medical evidence, and with apparent blindness continues to argue that marijuana has *no* legitimate medical use." (*Id.*)

The study concluded that "[a]s a new and promising strategy, the cannabis club concept is boldly imaginative and, according to our investigations, highly effective in providing its sick and terminally ill members both a medicine and a social setting which has improved the quality of their lives." (*Id.*)

ix. British House of Lords

In November 1998, the Science and Technology Committee of the British House of Lords recommended that physicians be able to prescribe cannabis for their patients. (Select Committee on Science and Technology, Ninth Report, *Cannabis: The Scientific and Medical Evidence* (1998). *See* Carnegie Reply Decl., Ex. M.) Following 12 public hearings, the House of Lords Committee reported, "[W]e have received enough anecdotal evidence . . . to convince us that cannabis almost certainly does have genuine medical applications . . . ." (*Id.* at ¶ 8.2.)

In a recommendation analogous to Judge Young's in the United States, the House of Lords report stated, "We therefore recommend that the Government should take steps to transfer cannabis and cannabis resin from Schedule 1 . . . , so as to allow doctors to prescribe an appropriate preparation of cannabis . . . ." (*Id.* at ¶ 8.6.)

x. Institute of Medicine

The recent comprehensive scientific review conducted by the National Academy of Sciences Institute of Medicine ("IOM") in 1999 concluded that cannabis can be a safe and effective medicine for seriously ill patients with no other legal alternatives:

- "The accumulated data indicate a potential therapeutic value for cannabinoid drugs, particularly for symptoms such as pain relief, control of nausea and vomiting, and appetite stimulation . . . ." Institute of Medicine, *Marijuana and Medicine, Assessing the Science Base,* 3 (1999).

- "[T]here will likely always be a subpopulation of patients who do not respond well to other medications. The combination of cannabinoid drug effects (anxiety reduction, appetite stimulation, nausea reduction, and pain relief) suggests that cannabinoids would

be moderately well-suited for certain conditions such as chemotherapy-induced nausea and vomiting and AIDS wasting." *Id.* at 3-4.

- "[T]he adverse effects of marijuana use are within the range of effects tolerated for other medications." *Id.* at 5.

- "[T]he short-term immunosuppressive effects [of cannabis] are not well established but if they exist, are not likely great enough to preclude a legitimate medical use." *Id.*

- "There is no conclusive evidence that marijuana causes cancer in humans, including cancer usually related to tobacco use . . . ." *Id.* at 119.

- "Until the development of rapid onset antiemetic drug delivery systems, there will likely remain a sub-population of patients for whom standard antiemetic therapy is effective and who suffer from debilitating emesis [vomiting]. It is possible that the harmful effects of smoking marijuana for a limited period of time might be outweighed by the antiemetic benefits of marijuana, at least for patients for whom standard antiemetic therapy is ineffective and who suffer from debilitating emesis . . . ." *Id.* at 154.

- "Terminal cancer patients pose different issues. For those patients, the medical harms of smoking are of little consequence. For terminal patients suffering debilitating pain or nausea and for whom all indicated medications have failed to provide relief, the medical benefits of smoking marijuana might outweigh the harms." *Id.* at 159.

Also, a patient can avoid many of the posited alleged health risks by ingesting cannabis through means other than smoking (*e.g.*, by use of vaporization, eating, capsules, suppositories, tinctures, compresses, salves, etc.) and by utilizing more potent strains or forms of cannabis to reduce the amount of it required in order to achieve the desired result. This IOM report reinforces what OCBC's patient-members already know — that cannabis has therapeutic value. Of particular relevance is the fact that the IOM encouraged allowing patients to conduct "n-of-1" studies while other research progresses.

In conducting its study, the IOM visited the OCBC and specifically acknowledged its contributions. (*See* Carnegie Reply Decl., Ex. N (June 22, 1999, letter from IOM to Jeffery Jones).)

xi. Ontario Court of Appeal

The Court of Appeal for Ontario recently held invalid the Canadian marijuana prohibition law because that law did not make provision for the medical use of cannabis. (*Queen v. Parker*, 75 C.R.R. (2d) 233 (Ont. Ct. App. 2000), slip op. at ¶ 210. *See* Carnegie Reply Decl., Ex. O.) The court

did suspend its ruling for 12 months in order to give the government time to amend the law (*id.* at ¶ 207), which Canada has done.

Although obviously not binding precedent on any U.S. court, the case is persuasive authority. Canada, our close neighbor to the north, uses a legal system also based on the common law.

The court's decision is comprehensive and thorough. It observes that the history of marijuana regulation in Canada "is, in fact, an embarrassing history based upon misinformation and racism." (*Id.* at ¶ 126.) The court relies, *inter alia,* upon the recent Institute of Medicine report, *supra,* to proclaim, "There is no apparent support for a blanket prohibition on medicinal use of marihuana and to the contrary some recognition that *at the moment there may be no alternative than to permit patients* to smoke marihuana to relieve the symptoms for certain serious illnesses." (*Id.* at ¶ 142 (emphasis added).) Moreover, the court quotes from the House of Lords report, *supra*:

> [P]eople who use cannabis for medical reasons are caught in the front line of the war against drug abuse. This makes criminals of people whose intentions are innocent, it adds to the burden on enforcement agencies, and it brings the law into disrepute. Legalizing medical use on prescription, in the way that we recommend, would create a clear separation between medical and recreational use, under control of the health care professions. We believe it would in fact make the line against recreational use easier to hold.

(*Id.*) Canada has since enacted comprehensive regulations governing the medical use of cannabis. (*See* Carnegie Reply Decl., Ex. P.)

C. Defendants Are Entitled to a Hearing on the Merits

Furthermore, for two reasons Defendants are entitled to a hearing on the merits of their defenses. First, Section 882 expresses a policy in favor of a jury trial. *See* 21 U.S.C. § 882(b) ("In case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by a jury in accordance with the Federal Rules of Civil Procedure."). Second, in the two cases where Section 882 was used to enjoin criminal activity under the Controlled Substances Act, the defendants were at least given a hearing at which they could challenge the government's evidence and present their own. *See, e.g., United States v. Barbacoff*, 416 F. Supp. 606, 607 (D.D.C. 1976) (before granting the government's motion for partial summary judgment, "the Court held a hearing . . . at which plaintiff and defendants had an opportunity to present witnesses and cross-examine"); *United States v. Williams,* 416 F. Supp. 611, 612 (D.D.C. 1976)

(before granting the government's motion for partial summary judgment, "the Court held a hearing on the penalty to be assessed at which plaintiff and defendants had an opportunity to present witnesses and cross-examine"). To date, Defendants have yet to have an evidentiary hearing like the defendants in every other case brought under Section 882(b). This Court should not enter a permanent injunction based on summary proceedings.

D. Defendants Are Entitled to Further Discovery

The government seeks permanent injunctive relief and summary judgment on the strength of allegations from witnesses who have never been subjected to cross-examination. If the government intends to rely upon the statements of the DEA agents as the basis for these motions, then Defendants are entitled to discovery from these witnesses.[12] Defendants also are entitled to discovery concerning information in the government's possession regarding the medical efficacy of cannabis.

Where, as here, a party opposing a motion for summary judgment can demonstrate the need for additional discovery, the Court may order a continuance to permit such discovery to be completed before ruling on the motion. Fed. R. Civ. P. 56(f); *see, e.g., Sundstrom v. McDonnell Douglas Corp.*, 816 F. Supp. 577, 586 (N.D. Cal. 1992). Defendants seek discovery to determine whether the government's evidence establishes a violation of the CSA. Defendants also seek discovery concerning whether the government has a legitimate justification for denying medical cannabis to seriously ill patients; whether the solely intrastate cultivation, distribution, or consumption of medical cannabis under the authority of state and local governments substantially affects interstate commerce; and whether the government has acted unfairly or with unclean hands by preventing or suppressing research into the medical efficacy of cannabis. (*See* Carnegie Reply Decl. ¶¶ 3-4.)

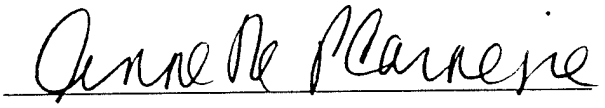
[12] (*See* Carnegie Reply Decl. ¶ 2.)

CONCLUSION

The Constitution places specific limits upon the power of the federal government, designed to strike a balance between limited and enumerated federal powers, the sovereignty of States, and the protection of fundamental rights. The arguments advanced by the government ignore this delicate balance and claim for the federal government powers which the Constitution does not grant. The government has failed to demonstrate that its attempt to prohibit the wholly intrastate activities at issue here is necessary to regulate interstate commerce. Nor has the government justified its infringement on fundamental rights protected by the Constitution or on the sovereign powers of the States. Further, the government has not established that all legal and factual issues related to Defendants' constitutional claims and common law and statutory defenses have been resolved. For these reasons, the injunction should be dissolved or modified, and the government's request for summary judgment and a permanent injunction should be denied.

Dated: March 8, 2002

ANNETTE P. CARNEGIE
MORRISON & FOERSTER LLP

By: 
Annette P. Carnegie

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES