·11 (rev. 5/00)

Form 6. Civil Appeals Docketing Statement

USCA DOCKET # (IF KNOWN)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT

LEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL:

UNITED STATES v. MARIN ALLIANCE FOR MEDICAL MARIJUANA: LYNETTE SHAW, D.C.

DISTRICT: Northern CA **JUDGE:** Hon. Charles Breye

DISTRICT COURT NUMBER: CV-98-00086-CRB

DATE NOTICE OF APPEAL FILED:

IS THIS A CROSS-APPEAL? ☐ YES

IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):
Please see attachment.

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

Please see attachment.

PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:

Please see attachment.

PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POST-JUDGMENT MOTIONS):

Please see attachment.

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

☐ Possibility of settlement

☐ Likelihood that intervening precedent will control outcome of appeal

☐ Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify) ____________

☐ Any other information relevant to the inclusion of this case in the Mediation Program ____________

☐ Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges

LOWER COURT INFORMATION

Page 2 of 2

JURISDICTION

FEDERAL

☒ FEDERAL QUESTION

☐ DIVERSITY

☐ OTHER (SPECIFY):

APPELLATE

☒ FINAL DECISION OF DISTRICT COURT

☐ INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT

☐ INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY):

☐ OTHER (SPECIFY):

DISTRICT COURT DISPOSITION

TYPE OF JUDGMENT/ORDER APPEALED

☐ DEFAULT JUDGMENT

☐ DISMISSAL/JURISDICTION

☐ DISMISSAL/MERITS

☒ SUMMARY JUDGMENT

☒ JUDGMENT/COURT DECISION

☐ JUDGMENT/JURY VERDICT

☐ DECLARATORY JUDGMENT

☐ JUDGMENT AS A MATTER OF LAW

☐ OTHER (SPECIFY):

RELIEF

☐ DAMAGES:
SOUGHT $__________
AWARDED $__________

☒ INJUNCTIONS:
- ☐ PRELIMINARY
- ☒ PERMANENT
- ☒ GRANTED
- ☐ DENIED

☐ ATTORNEY FEES:
SOUGHT $__________
AWARDED $__________
- ☐ PENDING

☐ COSTS: $__________

CERTIFICATION OF COUNSEL

I CERTIFY THAT:

1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.
2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).
3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.
4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.

Greg Anton
GREG ANTON
Signature

August 1, 2005
Date

COUNSEL WHO COMPLETED THIS FORM

NAME: GREG ANTON

FIRM: LAW OFFICES OF GREG ANTON

ADDRESS: P.O. BOX 299, Lagunitas, CA 94938

E-MAIL: greganton@saber.net

TELEPHONE: 415-789-8535

FAX: 415-663-0350

THIS DOCUMENT SHOULD BE FILED IN THE DISTRICT COURT WITH THE NOTICE OF APPEAL
IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS

ATTACHMENT TO NINTH CIRCUIT COURT OF APPEALS
DOCKETING STATEMENT

United States v. Marin Alliance for Medical Marijuana; Lynette Shaw, D.C.
Northern District of California, Case No. C-98-00086-CRB

I. If This Matter Has Been Before This Court Previously, Please Provide The Docket Number and Citation (If Any):

United States v. Marin Alliance for Medical Marijuana; Lynette Shaw, Case No.. 02-16335 has previously been before the Ninth Circuit Court of Appeals as part of a consolidation with the case of *United States v. Oakland Cannabis Buyer's Cooperative* No. CV-98-00088. The issues are very similar in both cases and most previous pleadings and orders involving *United States v. Oakland Cannabis Buyer's Cooperative* pertain to *U.S. v. Marin Alliance et al.* As well, Marin Alliance intends a similar consolidation on this appeal.

II. Brief Description of Nature of Action and Result Below:

In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996 (Proposition 215), to permit seriously ill patients and their primary caregivers to possess and cultivate cannabis with the approval or recommendation of a physician. To implement the will of California voters, Appellants organized a Cooperative to provide seriously ill patients with a safe and reliable source of medical cannabis. The Cooperative, a not-for-profit organization, operates in downtown Fairfax, in cooperation with the City of Fairfax and its police department.

On January 9, 1998, the United States sued in the United States District Court for the Northern District of California, seeking to enjoin Appellants from distributing cannabis to patient-members. On May 19, 1998, the district court issued a preliminary injunction enjoining Appellants from "engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. Section 841(a)(1)."

On October 13, 1998, the district court held Appellants in contempt of the preliminary injunction. The district court then modified the injunction to permit the U.S. Marshal to seize Appellants' offices. Appellants informed the district court that they would comply with the injunction. Appellants also requested that the injunction be modified to permit distribution of cannabis to the limited number of patients who could demonstrate necessity under the standard set forth in *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) and submitted numerous declarations in support of this request. The district court denied that motion.

On September 13, 1999, this Court reversed the district court's denial of the motion to modify and remanded the case to the district court, holding that (1) the court could take into account a legally cognizable defense of necessity in considering the proposed modification (*United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1114 (9th Cir. 1999)), (2) in exercising its equitable discretion, the court must expressly consider the public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of persons with serious or fatal illnesses, and (3) the record before the district court justified the proposed modification. *Id.* at 1114-15.

On remand to the district court on May 30, 2000, Appellants renewed their motion to modify the preliminary injunction, submitting more declarations to establish that patient-members could meet all of the *Aguilar* requirements for a claim of necessity.

On July 25, 2000, the government noticed an appeal from the district court's order modifying the injunction. On November 27, 2000, the Supreme Court granted the government's petition for writ of *certiorari* to review this Court's September 13, 1999 opinion. This Court suspended proceedings to await the Supreme Court's ruling. On May 14, 2001, the United States Supreme Court reversed this Court's decision and remanded the case for further proceedings. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

On December 4, 2001, this Court remanded the case to the district court for "proceedings consistent with [the Supreme Court's] opinion." On January 7, 2002, Appellants moved after remand to dissolve or modify the preliminary injunction order. On January 25, 2002, the government moved for summary judgment and permanent injunctive relief.

On May 3, 2002, the district court granted the government's motion for summary judgment and requested that Appellants file further submissions with the Court "concerning the likelihood of future violations of the Act, and in particular, whether there is a threat that defendants, or any of them, will resume their distribution activity if the Court does not enter a permanent injunction." On May 22, 2002, Appellants filed a submission objecting to the procedure on the grounds of invasion of the attorney-client privilege and the violation of Jeffery Jones's Fifth Amendment privilege against self-incrimination. On June 10, 2002, Judge Breyer permanently enjoined Appellants from possessing with intent to distribute, manufacturing or distributing cannabis and judgment was entered thereon. On July 29, 2002, the district court granted Appellants' Motion for Partial Judgment Pursuant to Federal Rule of Civil Procedure 54(b).

On August 1, 2002, Appellants appealed this final judgment under 28 U.S.C. § 1291, as well as all other interlocutory orders. The appeal raised the issues identified in Section III *infra* in addition to the issue of whether the injunction exceeded the powers of Congress under the Commerce Clause or Necessary and Proper Clause because the government failed to establish that Appellants' economic activities have a substantial effect on interstate commerce, and because the injunction improperly applied to entirely non-economic activities. After full briefing on the merits and oral argument, a three-judge panel of this Court took the case under submission.

During the pendency of this appeal, a related case entitled *Raich v. Ashcroft*, No. 03-15481, was fully briefed, argued, and taken under submission by a separate three-judge panel of this Court. On December 16, 2003, the panel issued an opinion in which it reversed the district court's denial of a preliminary injunction against the government precluding enforcement of the Controlled Substances Act ("CSA") "to prevent [individual patients] Raich and Monson from possessing, obtaining, or manufacturing cannabis for their personal medical use." *Raich v. Ashcroft*, 352 F.3d 1222, 1226 (9th Cir. 2003). The Court reasoned that the district court's denial of preliminary injunctive relief was reversible error, because the "CSA is an unconstitutional exercise of Congress'[s] Commerce Clause authority." *Id.* at 1227. The federal government petitioned the United States Supreme Court for a writ of *certiorari*.

Pursuant to an order of this Court dated March 24, 2004, submission of the case was vacated to permit the parties to submit supplemental briefing regarding the applicability of this Court's opinion in *Raich*. The case was resubmitted as of April 30, 2004. After the resubmission of the case and before the panel issued an opinion, on June 28, 2004, the United States Supreme Court granted the government's petition for a writ of certiorari in *Raich*. *Ashcroft v. Raich*, 124 S.Ct. 2909 (2004). As a result, this Court issued an order remanding the case to the district court, stating: "The issues in *Raich* may control the outcome in this case. Accordingly, this case is remanded for the district court to reconsider after the Supreme Court has completed its action in *Raich*." United States v. Marin Alliance for Medical Marijuana, 372 F.3d 1047, 1048 (9th Cir. 2004).

On June 6, 2005, the United States Supreme Court reversed this Court's decision in *Raich* and remanded for further proceedings consistent with the opinion. *Gonzales v. Raich*, ___ U.S. ___, 125 S. Ct. 2195, 2215 (2005). On June 6, 2005, the same day on which the Supreme Court issued its opinion in *Raich*, the district court issued and order declining to reconsider its prior rulings in light of the Supreme Court's opinion. Appellants now appeal this final judgment under 28 U.S.C. Section 1291, as well as all other interlocutory orders.

III. Issues Proposed to be Raised on Appeal:

1. Whether the district court erred in determining that there is a rational basis for classifying marijuana among the most dangerous drugs, with no accepted medical use.

a. Whether the district court abrogated its judicial responsibility by stating that the DEA, not the court, shall determine whether or not there is a rational basis for the classification of marijuana. **(<u>See</u> attachment no. 9, Page 9, May 3, 2002 Memorandum and Order).**

2. Whether the district court erred when, under the purported authority of the federal Controlled Substances Act, it enjoined Appellant's wholly intrastate distribution of medical cannabis, when that distribution was undertaken pursuant to state and local laws designed to protect the public health and welfare of California citizens, and

a. where the injunction improperly infringed upon the police powers of the State of California to protect the health and safety of its citizens; and

b. where the injunction improperly infringed upon fundamental rights, by depriving seriously ill patients of an effective means to ameliorate their debilitating pain, blindness, starvation and possible death, and the government failed to offer any legitimate justification for depriving these patients of this necessary medicine.

3. Whether the district court erred when it rejected the claim of Appellants, duly authorized authors of the City of Oakland, to statutory immunity when Appellants were lawfully engaged in enforcing laws related to controlled substances, as required by the statute granting such immunity.

4. Whether the district court abused its discretion when it granted the government's motions for summary judgment and permanent injunction when the government failed to meet its burden of proof and Appellants established legally valid defenses in both motions.

5. Whether the district court abused its discretion when it granted the government's motion for summary judgment and refused to permit Appellants to obtain discovery to be used in opposition to that motion.

IV. Other Legal Proceedings With a Bearing on This Case.

There are currently four related cases pending in this Court that may have a bearing on the outcome of this case. By order of this Court dated December 20, 2002, two of these cases, both related cases in the district court, were previously consolidated with this case: (1) *United States v. Oakland Cannibis Buyer's Cooperative and Jeffrey Brown*; No. 98-00088-CRB; and (2) *United States v. Ukiah Cannabis Buyer's Club et. al.*, No. 02-16715. A third pending case, *County of Santa Cruz v. Gonzales*, No. 04-16291, arises out of the same set of general facts as *Wo/Men's Alliance for Medical Marijuana v. United States*, No. 03-15062, which is currently on remand in the district court and was previously consolidated with this case for the limited purpose of oral argument by an order of this Court dated July 29, 2003. The fourth related case has not been consolidated with this case, *Raich v. Gonzales*, Nos. 03-15481 and 04-16296.

AFFIDAVIT OF SERVICE

I, KIMBERLY MERCIER, solemnly affirm as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at 50 Santa Rosa Avenue, Santa Rosa, California.

On **August 1, 2005**, I served the attached:

(DEFENDANT'S) UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CIVIL APPEALS DOCKETING STATEMENT

on the interested parties in said action, by placing a true copy thereof in a sealed envelope addressed as follows:

Mark T. Quinlivan
United States Attorneys' Office
John Joseph Moakley Courthouse
One Courthouse Way, Suite 9200
Boston, MA 02210
Telephone: (617) 748-3606
Facsimile: (617) 748-3953

Defendants/Appellants OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES.

Robert A. Raich
1970 Broadway, Suite 1200
Oakland, California 94612
Telephone: (510) 338-0700
Facsimile: (510) 338-0600
Counsel for Defendants/Appellants OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES.

Gerald F. Uelmen
Santa Clara University, School of Law
Santa Clara, California 95053
Telephone: (408) 554-5729

Counsel for Defendants/Appellants OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES.

Jordan C. Budd
American Civil Liberties Union Foundation of San Diego & Imperial
Counties, Inc.
110 West C Street, Ste. 901
San Diego, CA 92101
Telephone: (619) 232-2121
Facsimile: (619) 232-0036

Counsel for Amicus Curiae AMERICAN CIVIL LIBERTIES UNION

Peter Eliasberg
American Civil Liberties Union Foundation
of Southern California, Inc.
1616 Beverly Boulevard
Los Angeles, CA 90026
Telephone: (213) 977-9500
Facsimile: (213) 250-3919

Bill Lockyer, Attorney General of California
Peter Siggins, Chief Deputy Attorney General
Taylor S. Carey, Special Asst. Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 324-5362
Facsimile: (916) 322-0206

Counsel for *Amicus Curiae* STATE OF CALIFORNIA.

Alice P. Mead
California Medical Association
221 Main Street
San Francisco, CA 94120-7690
Telephone: (415) 541-0900
Facsimile: (415) 882-5143

Amicus Curiae CALIFORNIA MEDICAL ASSOCIATION

Julie M. Carpenter
Jenner & Block LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 639-6029
Facsimile: (202) 639-6066

Amicus Curiae CALIFORNIA MEDICAL ASSOCIATION

Randy E. Barnett
Boston University Law School
765 Commonwealth Avenue
Boston, Massachusetts 02215
Telephone: (617) 353-3099

Annette P. Carnegie
Heather A. Moser
Morrison & Foerster LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Susan B. Jordan
515 South School Street
Ukiah, CA 95482
Telephone: (707) 462-2151
Facsimile: (707) 462-2194

Counsel for Defendants UKIAH CANNABIS BUYER'S CLUB, CHERRIE LOVETT, MARVYN LEHRMAN, and MILDRED LEHRMAN.

Graham A. Boyd
American Civil Liberties Union Foundation
1101 Pacific Avenue, Suite 333
Santa Cruz, CA 95060
Telephone: (831) 471-9000
Facsimile: (831) 471-9676

Counsel for Amicus Curiae AMERICAN CIVIL LIBERTIES UNION.

Ann Brick
American Civil Liberties Union Foundation
of Northern California, Inc.
1663 Mission Street
San Francisco, Ca 94103
Telephone: (415) 621-2488
Facsimile: (415) 255-1478

Counsel for Amicus Curiae AMERICAN CIVIL LIBERTIES UNION

John Russo, City Attorney
Barbara J. Parker, Chief Asst. City Attorney
City Hall
One Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612
Telephone: (510) 238-3601
Facsimile: (510) 238-6500

Counsel for *Amicus Curiae* CITY OF OAKLAND.

Richard E. Winnie
Alameda County Counsel
1221 Oak Street #450
Oakland, CA 94612
Telephone: (510) 272-6700
Facsimile: (510) 272-5020

Counsel for Amicus Curiae COUNTY OF ALAMEDA.

_X___ **BY MAIL**: I caused true and correct copies of the above documents, to be placed and sealed in an envelope addressed to the addressee at the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal service that same day.

______ **BY FACSIMILE**: I caused true and correct copies of the above documents to be faxed to the above-cited party at the above-cited facsimile number.

I affirm under penalty of perjury that the foregoing is true and correct. Executed this 1st day of August, 2005, at Santa Rosa, California.

Kimberly Mercier
KIMBERLY MERCIER

EXHIBIT 1

FILED
MAY 13 1998
RICHARD W. WIEKING
CLERK US DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

17

67

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATORS CLUB; and DENNIS PERON, Defendants.	No. C 98-0085 CRB C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0089 CRB C 98-0245 CRB **MEMORANDUM AND ORDER**
AND RELATED ACTIONS	

ENTERED IN CIVIL DOCKET MAY 14 1998 19

INTRODUCTION

The issue presented by these related lawsuits is whether defendants' admitted distribution of marijuana for use by seriously ill persons upon a physician's recommendation violates federal law, 21 U.S.C. § 841(a), and if so, whether defendants' conduct in this regard should be enjoined pursuant to the injunctive relief provisions of the federal Controlled Substances Act. See 21 U.S.C. § 882(a). This is the only issue before the Court. These lawsuits, for example, do not challenge the constitutionality of Proposition 215, the medical marijuana initiative, as a whole. Nor do they reflect a decision on the part of the federal government to seek to enjoin a local governmental agency from carrying out the humanitarian mandate envisioned by the citizens of this State when they voted to approve this law.

COPIES MAILED TO PARTIES OF RECORD

them from violating federal law, the Court would have to find that the substantive due process right of each and every patient to whom the defendants will dispense marijuana in the future will be violated if the government prevents defendants from doing so. Such a defense may be available in a contempt proceeding where the trier of fact is presented with a particular transaction to a particular patient under a particular set of facts. See Washington v. Glucksberg, 117 S.Ct. at 2275 n.24 (holding that Washington State's ban on assisted suicide is not unconstitutional as applied to terminally ill patients generally, but that the Court's decision does not "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge"). It is not available, however, to exempt generally the distribution of medical marijuana from the federal drug laws.

D. Whether the Preliminary Injunction Should Be Granted.

For the foregoing reasons, the Court concludes that the federal government has established that it is likely to prevail on the merits of its claim that defendants are in violation of federal law. As set forth above, in a statutory enforcement action brought by the federal government, irreparable harm is presumed if the government establishes that it is likely to prevail on the merits. Nutri-cology, 982 F.2d at 398 ("further inquiry into irreparable injury is unnecessary"); see also id. ("the passage of the statute is itself an implied finding by Congress that violations will harm the public").

Defendants argue that injunctive relief is nonetheless unwarranted because this Court is sitting as a court of equity and must therefore consider the traditional defenses to the granting of equitable relief, including the unclean hands of the moving party. They contend that these principles, plus the fact that the federal government is seeking injunctive relief at all, require the denial of injunctive relief.

1. The Propriety of Seeking Injunctive Relief.

The government rarely seeks injunctions pursuant to 21 U.S.C. § 882(a). The Court has located only five published opinions in which the federal government sought relief based on the statute. See, e.g, United States v. Leasehold Interest in 121 Nostrand Avenue, 760

F.Supp. 1015, 1035 (E.D.N.Y. 1991); United States v. Williams, 416 F.Supp. 611, 614 (D.D.C. 1976). At oral argument, and in their supplemental memoranda, defendants insist that the federal government has chosen to bring a civil injunctive action rather than charge defendants with a violation of the criminal laws, in order to deprive defendants of the same right to a jury trial to which they would be entitled in a criminal action.

Defendants do not contend that the government is attempting to deprive them of a right to a jury in general. 21 U.S.C. § 882(b) provides that "[i]n 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." 21 U.S.C. § 882(b) (emphasis added). If the Court issues an injunction, defendants have a right to a jury in any proceeding in which it is alleged that they have violated the injunction. Defendants instead contend that a jury trial in accordance with the Federal Rules of Civil Procedure will provide them with fewer procedural protections than a criminal trial. For example, in civil proceedings a party may make a motion for summary judgment; no such procedure, however, is available in a criminal trial; and in a civil proceeding, under Federal Rule of Civil Procedure 48, a jury may be composed of six persons, whereas in a criminal trial a defendant is guaranteed a trial by a jury of twelve.

These procedural differences do not compel a conclusion that the federal government is acting in bad faith. First, in any contempt proceeding, the Court will determine the appropriate number of jurors, up to twelve, which still must return a unanimous verdict. See Fed.R.Civ.P. 48 ("[u]nless the parties otherwise stipulate, (1) the verdict shall be unanimous"). Second, even assuming that the federal government could bring a motion for summary judgment in a contempt proceeding -- and it is not clear from the plain language of section 882(b) that it could -- summary judgment may be granted, and a party denied the right to a jury, only if no reasonable jury could find for the nonmoving party. See Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

//

//

b. Unclean Hands

The "clean hands" doctrine

> insists that one who seeks equity must come to the court without blemish. . . . This maxim "is a self-imposed ordinance that closes the doors of a court of equity to one tainted with an inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." . . . This rule applies to the government as well as to private litigants. . .

Equal Employment Opportunity Comm'n v. Recruit U.S.A., 939 F.2d 746, 752 (9th Cir. 1991) (citations omitted). Defendants contend that the federal government comes before this Court with unclean hands because it refuses to acknowledge that marijuana has a medical use and reschedule it as a Schedule II controlled substance which would permit seriously ill patients to be treated with marijuana.

The federal government's conduct is "unclean," defendants assert, because the federal government itself has commissioned studies which have established marijuana's medical efficacy and then ignored these studies. Defendants highlight the fact that while the federal government continues to maintain that there are no medically accepted uses for marijuana, the DEA is simultaneously distributing marijuana to eight people under the Investigative New Drug program for medical purposes. Those eight people were enrolled years ago, defendants submit, before the "war on drugs," and the DEA has refused to enroll any more patients, not because of concerns as to the safety of marijuana, but for political reasons. Defendants also point out that in 1970, Congress appropriated a million dollars for a commission to recommend appropriate marijuana legislation. Public Law 91-513, § 601(e)(Oct. 27, 1970). The commission, known as the "Shafer Commission," recommended decriminalizing possession and casual distribution of small amounts of marijuana. See Marihuana: A Signal of Misunderstanding; First Report of the National Commission on Marihuana and Drug Abuse, 152 (1972). Congress, however, refused to reschedule marijuana. Finally, defendants argue that the DEA ignored the recommendation of its own Administrative Law Judge that marijuana be changed to a Schedule II controlled substance See Defendants' Supplemental Opposition Memorandum at 23.

The federal government disputes that the Shafer Commission recommended decriminalizing marijuana. Rather, it contends the Commission merely recommended increased support for studies to evaluate the efficacy of medical marijuana. See First Report, supra, at 176.

The fact remains, however, that medical marijuana advocates have been unsuccessful in convincing the federal government decision makers that marijuana should be reclassified as a Schedule II controlled substance and thus made available to seriously ill patients upon a physician's recommendation. That does not mean that the federal government has acted with unclean hands. Indeed, as late as 1994, a federal court of appeal affirmed the Drug Enforcement Agency Administrator's decision not to reschedule. See Alliance for Cannabis Therapeutics v. Drug Enforcement Administrator, 15 F.3d 1131 (D.C. Cir. 1994).

The federal government has advised the Court that a petition for reclassification has been filed and that on December 17, 1997, the DEA referred the petition to the Secretary of Health and Human Services ("HHS") upon determining that the petition raised scientific and medical issues that had not previously been evaluated by HHS as part of any prior scheduling action. See Federal Government's Post-Hearing Memorandum at 13. One would expect the Secretary to act expeditiously on the petition in light of the expressed concerns of the citizens of California.

CONCLUSION

Because of the Supremacy Clause of the United States Constitution, the only issue before the Court is whether defendants' conduct violates federal law. The Court concludes that the federal government has established that it is likely that it does. As these lawsuits are brought to enforce a statute, namely, the Controlled Substances Act, irreparable harm is presumed and the injunction must be granted.

Once again, however, the Court must caution as to what this decision does not do. The Court has not declared Proposition 215 unconstitutional. Nor has it enjoined the possession of marijuana by a seriously ill patient for the patient's personal medical use upon a physician's recommendation. Nor has the Court foreclosed the possibility of a medical necessity or constitutional defense in any proceeding in which it is alleged a defendant has violated the injunction issued herein.

Finally, the San Francisco District Attorney has raised the issue of possible local governmental distribution of medical marijuana. Such a question is not before the Court and, in any event, is purely speculative as it is uncertain whether the federal government would even seek to enjoin such conduct by a local government entity under strictly controlled conditions. For example, as the San Francisco District Attorney mentioned at oral argument, the distribution of clean needles to heroin addicts violates federal law, see 21 U.S.C. § 863, yet the federal government has not filed suit to enjoin the City and County of San Francisco's distribution of such needles. Indeed, HHS recently stated that community programs promoting the distribution of clean needles reduces the spread of AIDS and does not encourage drug use. See Health and Human Services Press Release, "Research Shows Needle Exchange Programs Reduce HIV Infections Without Increasing Drug Use" (April 20, 1998). From this publicly stated position, one could conclude that the federal government will not enforce the drug paraphernalia statute in light of local community efforts to prevent the spread of AIDS. The Court recognizes that local governmental distribution of medical marijuana to seriously ill patients raises political issues which may not require judicial intervention.

Attached to this Memorandum and Order is a proposed form of preliminary injunction in 98-00085. The injunction in each case will be identical except for the name of the defendants and the location of the dispensary. The parties are directed to file a written submission with this Court by 5:00 pm on Monday, May 18, 1998 as to the form of the order. The Court will issue the preliminary injunction shortly thereafter.

IT IS SO ORDERED.

Dated: May 13, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE