No. 05-16466

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Defendants-Appellants.

Appeal from Entry of Final Judgment by the United States District Court
for the Northern District of California
District Court No. CV-98-00088 CRB
The Honorable Charles R. Breyer

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Central to the issues at stake in this case is a fundamental disagreement over the appropriate separation of powers between the branches of government. The government premises most of its argument on the misconception that a district court does not have discretion to decline to enter an injunction where Congress has enacted a statute authorizing the government to request injunctive relief. However, acts of Congress do not relegate the judiciary to a mere rubber stamp for the government's requests. The Constitution and the decisions of the Supreme Court and this Circuit make it clear that a district court is vested with discretion regarding equitable remedies and defenses. The district court should have exercised its discretion to decline to enter summary judgment and the permanent injunction in light of the disadvantages of civil injunction as a method of enforcing the criminal statute in this case, the important public interests at stake, the irreparable harm to terminally and seriously ill Californians, and the affirmative defenses established by Appellants.

In defending the district court's orders, the government similarly ignores the compelling legal and factual basis for Appellants' immunity defense. The plain language of the CSA coupled with the ordinances authorizing OCBC to enforce the Compassionate Use Act requires recognition of the immunity defense in this case.

For this separate and independent reason, the district court's orders granting summary judgment and entering a permanent injunction should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT.

A. Appellants Established Defenses that Precluded Entry of Summary Judgment.

1. Appellants Are Engaged in the Enforcement of a Law or Municipal Ordinance Relating to Controlled Substances and Are Thus Immune Under 21 U.S.C. § 885(d).

The government argues that Appellants Oakland Cannabis Buyers' Cooperative ("OCBC") and Jeffrey Jones's (collectively "Appellants") claim of statutory immunity is precluded by this Court's decision in *United States v. Rosenthal*, 454 F.3d 943 (9th Cir. 2006), suggesting that *stare decisis* requires that *Rosenthal* be construed as foreclosing immunity. (Gov't Br., at 25-27.) The holding of *Rosenthal*, however, was simply "that cultivating marijuana for medical use does not constitute 'enforcement' within the meaning of § 885(d)." 454 F.3d at 948 (citation omitted). *Rosenthal* does not foreclose the possibility that other activities beyond mere cultivation do constitute "enforcement" within the meaning of Section 885(d).

For three separate reasons, Appellants' enforcement activity is readily distinguishable from the cultivation activity presented in *Rosenthal*. *First,* the

enforcement activity in which Appellants are engaged relates directly to compliance with State laws regulating the distribution of cannabis to patients for medical use. As officers of the City of Oakland, they *do* have the obligation "to compel compliance with the law." *Rosenthal*, 454 F.3d at 948. California law, and the Oakland ordinance that implements it, establish strict controls over which patients and primary caregivers may receive medical cannabis.

In 2003, California enacted a "Medical Marijuana Program" law to implement the Compassionate Use Act. Section 11362.775 of the California Health & Safety Code now provides:

> Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357 [Possession], 11358 [Cultivation], 11359 [Possession for Sale], 11360 [Transportation or Sale], 11366 [Maintaining a Place for Distribution], 11366.5 [Renting or Leasing a Place], or 11570 [Nuisance].

Thus, those deputized to enforce Oakland Municipal Ordinance No. 12077 are now charged with the responsibility to:

- Ascertain whether patients are "qualified" within the meaning of California Health & Safety Code section 11362.7(f);

- Ascertain whether persons have valid identification cards, within the meaning of California Health & Safety Code section 11362.7(g);
- Ascertain whether persons are designated primary caregivers of qualified patients or persons with identification cards, including residency and age requirements. Cal. Health & Safety Code section 11362.7(d), (e); and
- Enforce limitations on the quantity of medical cannabis a patient may possess, or verify a doctor's recommendation that a particular quantity does not exceed the patient's medical needs. Cal. Health & Safety Code section 11362.77(a), (b).

Oakland, Cal., Ordinance No. 12077 (July 28, 1998) (codified as amended at OAKLAND, CAL., MUN. CODE ch. 8.46). All of these responsibilities are clearly responsibilities to *enforce* a law or municipal ordinance relating to controlled substances. In contrast to Rosenthal, whose conduct involved doing nothing but cultivating cannabis, Appellants were directly interacting with actual patients and caregivers, thereby expressly enforcing the relevant laws.

Second, Rosenthal argued that the "law or municipal ordinance relating to controlled substances" that he was enforcing was the 1996 Compassionate Use Act and the 1998 Oakland ordinance permitting the designation of medical cannabis provider associations. 454 F.3d at 948. As the *Rosenthal* Court noted, California courts construed the 1996 Compassionate Use Act to limit distribution activity to

primary caregivers, and *Rosenthal* also held that cannabis-cultivating clubs are not "primary caregivers" within the meaning of the Compassionate Use Act. *Id.* at 946. *Rosenthal* was a criminal prosecution related to activity that *preceded* the 2003 enactment of the "Medical Marijuana Program" Act in California. This case, however, relates to enjoining future activity of those charged with enforcing the 2003 law.

Third, while this Court in *Rosenthal* expressed general agreement with the district court's conclusion that Rosenthal's interpretation of the immunity provision "contradicts" the purpose of the federal Controlled Substances Act, the purpose of the Act at issue in *Rosenthal, i.e.,* the prevention of the cultivation of marijuana, is significantly different from the purpose of the Act at issue here, the implementation of a State law to limit the distribution of cannabis to qualified patients. One purpose of the federal Controlled Substances Act was to confirm the autonomy and independence of States to authorize their officers to enforce "any law or municipal ordinance relating to controlled substances." 21 U.S.C. § 885(d). Unlike the immunity granted to *federal* officers, which requires they be lawfully engaged in enforcement of the federal Controlled Substances Act, the immunity for *State* officers includes enforcement activity that would otherwise *violate* the federal Controlled Substances Act. Any other reading renders the grant of immunity meaningless. Thus, there is no contradiction here. The grant of

immunity in Section 885(d) should be read as it is written, rather than giving the provision the tortured construction urged by the government to justify continuation of its war against the independence and autonomy of States envisioned by the Controlled Substances Act.

2. Appellants Are Entitled to the "Joint User" Defense Under *Swiderski.*

United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977), provides a defense to a charge of distribution to OCBC's members. *Swiderski* recognizes that the punishment for mere possession is all that the law demands when two or more users purchase drugs from another for their joint use, and then share the drugs between themselves. While the purchasers may be charged with possession, the sharing they previously agreed to does not escalate their offense to distribution.[1]

Swiderski's rationale is logical because it advances an underlying purpose of the CSA, which draws a significant line between mere possession by users and distribution by dealers. Distribution is a felony, while mere possession is a misdemeanor. *Compare* 21 U.S.C. § 841 (distribution) *with* 21 U.S.C. § 844 (possession). To allow alleged possession to be elevated to distribution merely

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[1] The government's contention that the infiltration of OCBC by federal agents posing as patients diminishes the validity of the joint user defense is meritless. The agents held themselves out as legitimate members of the Cooperative and presented identification to support their misrepresentation. Under these circumstances, OCBC cannot be held to have an intent to distribute which would vitiate the defense provided by *Swiderski.*

because users share possession would obliterate that distinction. In this case, the number of users who are sharing should make no difference in applying this principle.

The government's arguments against Appellants' joint user defense rely almost exclusively upon purported judicial resistance to the expansion of *Swiderski*. (Gov't Br., at 28-30 & n.6.) But that resistance is based on concerns not present here. In *Swiderski*, the court recognized that Congress's "reasoning in providing more severe penalties for commercial trafficking in and distribution of narcotics was that such conduct tends to have the dangerous, unwanted effect of drawing additional participants into the web of drug abuse." 548 F.2d at 450. This rationale has no application here. OCBC does not draw a single person into a "web of drug abuse." OCBC is a cooperative established under the laws of California. ER 733-36, 1589-1606. OCBC's patient-members are a unique group of people whose licensed physicians have recommended cannabis for legitimate medical conditions. ER 734. Extending the *Swiderski* rationale to this type of joint possession by cooperative members does not run afoul of the policy underlying distribution penalties.

The government's cited cases are inapposite. None of those cases involve the purchase and transfer of a drug for medical use pursuant to State and local law. Those cases involve the purchase and transfer of illicit recreational drugs such as

methamphetamine and heroin and clearly fall within Congress's rationale for stricter distribution penalties. *See United States v. Pearson*, 391 F.3d 1072 (9th Cir. 2004) (methamphetamine); *United States v. Wright*, 593 F.2d 105 (9th Cir. 1979) (heroin). In both cases, there was a risk that one party was drawing the other into the "web" of drug abuse. In contrast, at the Cooperative, any potential for abuse is minimized through various methods, such as strict per diem allocations of medical cannabis and monitoring by a staff physician. ER 1629-33, 1644, 1664. Recreational "street" drugs such as methamphetamine and heroin are not monitored or controlled in such a manner. Such recreational street drugs thus present a risk of abuse. In contrast, a State-sanctioned cooperative for patients who treat themselves with medical cannabis upon a licensed physician's recommendation presents no such risk.

Whether the joint sharing of medical cannabis by Appellants' members would be *distribution* or *possession* is a critical distinction. The government never sought to enjoin mere possession and/or use of medical cannabis by Appellants in these proceedings. The district court enjoined Appellants from *distributing* cannabis or from possessing cannabis *for the purpose of distribution.* ER 1964-65. Under *Swiderski*, at worst Appellants' alleged conduct would be simple possession. Regardless of whether mere possession under these circumstances

would violate federal law, the fact remains that it is *not* a violation encompassed by the injunction issued by the district court.

II. THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS.

For the reasons stated in Section I *supra*, the government has failed to adequately defend the district court's errors in rejecting Appellants' motion to dismiss based on the claim of statutory immunity.

III. THE DISTRICT COURT ERRED IN GRANTING THE GOVERNMENT'S REQUEST FOR A PERMANENT INJUNCTION.

A. The Order Granting the Permanent Injunction Was Improper.

For the reasons stated in Section I *supra*, the government has failed to establish a likelihood of prevailing on Appellants' affirmative defenses. Therefore, the district court's entry of the permanent injunction was improper. Moreover, the government has failed to defend the district court's reversible error in issuing the permanent injunction.

B. The District Court Failed to Consider the Disadvantages of Issuing the Injunction.

1. The District Court Considered Only the Advantages of Civil Enforcement of a Criminal Statute But Did Not Weigh the Disadvantages, Including Deprivation of Numerous Procedural Safeguards.

The government erroneously contends that "the district court carefully weighed the government's choice of proceeding by way of civil injunctive actions

as opposed to criminal prosecutions, and concluded that the entry of permanent injunctive relief was an appropriate remedy in the circumstances of these cases." (Gov't Br., at 32.) While the district court did consider the *advantages* of injunctive relief over criminal prosecution, the court failed to consider the *disadvantages* of injunctive relief, as required by the Supreme Court's decision in this case. *See United States v. Oakland Cannabis Buyers' Cooperative* ("*OCBC*"), 532 U.S. 483, 497 (2001) (stating that a court in equity should consider "the advantages and disadvantages of 'employing the extraordinary remedy of injunction,' . . . over the other available methods of enforcement") (internal citation omitted).

The government, like the district court, fails to address *any* of the significant *disadvantages* of enforcement of a criminal statute via an injunction. Instead, citing the district court, the government sets forth the penalties from the federal sentencing guidelines for distribution and possession with intent to distribute, ominously intimating that Appellants were fortunate to have escaped federal criminal prosecution. (Gov't Br., at 33 & n.7.)[2] This is not the analysis required

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[2] In support of its "lucky" theory, the government cites an excerpt from oral argument on April 19, 2002, in which counsel for the Marin Alliance for Medical Marijuana expressed his client's gratitude for the government's decision to pursue injunctive relief in lieu of criminal prosecution. (Gov't Br., at 34.) Marin's position was not adopted by the OCBC or by the Ukiah Cannabis Buyer's Club.

(Footnote continues on following page.)

by the Supreme Court. Appellants clearly have been disadvantaged by the government's decision to seek a civil injunction.[3] The government does not and cannot defend the district court's reversible error in failing to weigh the deprivation of critical procedural protections, including Appellants' right to confront their accusers, the right to a trial by jury, and the advantage of a higher burden of proof in criminal cases.

2. The Government Improperly Defines the "Public Interest" as a Federal Interest, Exclusive of the Competing Interests of the Citizens of California.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of

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(Footnote continued from previous page)
ER 1894-1936. Moreover, on March 27, 2006, the government indicated during oral argument in a related case, *Raich v. Gonzales*, No. 03-15481, that it has not prosecuted any individual medical cannabis patients under the CSA and that future prosecution for individual possession is unlikely. Therefore, any implication that the government is doing Appellants' members a favor by proceeding civilly rather than criminally should be disregarded in light of the government's self-confessed lack of interest in criminal prosecution of these alleged offenses.

[3] As discussed in Section III.B.4 *infra*, the government plainly recognized that Appellants would be severely disadvantaged in civil proceedings. For this reason, it used civil enforcement measures as a means to avoid both the risk of jury nullification and the procedural protections available to defendants in criminal cases. Such conduct by the government is at odds with the fundamental tenets of our system of justice, as the Supreme Court's Justices discussed at length at the oral argument in this case. *See* Section III.B.4 *infra*. When the government chooses to enforce a criminal law by bypassing a jury, it is all the more vital for chancellors in equity to adhere strictly to the procedural safeguards imposed by equity.

injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *OCBC*, 532 U.S. at 498 (noting that in considering the public interest, a court must "evaluat[e] how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms"). Conceding that the public interest must be weighed by a district court in issuing an injunction, the government then defines the "public interest" as exclusively expressed by Congress. (Gov't Br., at 37-38.) But, as the Supreme Court observed in this case, 532 U.S. at 497, "Congress' resolution of the policy issues [in the CSA] can be (and usually is) upheld without an injunction."

As Appellants noted in their opening brief, "the district court should have considered whether *Californians* are best served by a federal court permanently enjoining conduct expressly sanctioned by California law." (Opening Br., at 39 (emphasis added).) Tellingly, the government's brief did not even respond to that argument. The enactment of the Compassionate Use Act by a majority of California voters is a compelling expression of the public interest in permitting sick and dying patients safe access to medical cannabis. When considering the public interest, a district court must take into account both *the public interest that would be harmed by the entry of the injunction* and the public interest that would be furthered by the entry of the injunction. *See Yakus v. United States*, 321 U.S. 414, 440-41 (1944). Here, it is evident that the government's interests would not

be harmed without an injunction. The government's assertion of speculative harm to the federal drug approval process is not a surrogate for the district court's affirmative duty to consider the injunction's harm to the interests of Californians permanently enjoined from enforcing their own law.[4] Because the district court failed to consider the public interest in California, the district court abused its discretion by issuing the permanent injunction.

3. A Decision Not to Enforce a Criminal Statute by Injunction Would Not Violate the "Take Care" Clause of the Constitution.

The government intimates that the district court was obliged to issue an injunction for fear of "the substantial separation of powers concerns" that might arise if the court were to "declar[e] that the government may not pursue civil injunctions." (Gov't Br., at 40.) The government even goes so far as to state that this Court would be "nullifying an Act of Congress and removing from the Executive Branch an available means of enforcing the CSA" were it to reverse the injunction. (Gov't Br., at 40.) As even the district court recognized, it was not

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[4] The government in effect argues that there is a "slippery slope" preventing the Court from limiting this case to the context of medical cannabis, and posits that a favorable ruling would extend to other unapproved drugs, such as heroin or laetrile. (Gov't Br., at 38-39.) This "slippery slope" argument is meritless. There are no State laws, much less laws of one-fourth of the States in the Union, approving the use of either heroin or laetrile for medical use upon a licensed physician's recommendation. As a result, this case is easily limited to medical cannabis and does not extend to other drugs, absent State laws condoning their medical use.

obligated to issue an injunction, and this Court is not obligated to uphold the injunction on grounds of deference to other branches of government. ER 1957-58 ("If the government is correct, however, the government—not the district court—would ultimately exercise the discretion as to whether to issue the injunction; the government could limit the district court's discretion by simply not initiating criminal proceedings.").

The government confuses two important concepts: the executive power to prosecute and the judicial power to exercise equitable discretion. The Constitution confers the exclusive power of equity on the judiciary. U.S. CONST. art. III, § 2, cl. 1. Unquestionably, the Executive Branch has the "exclusive authority and absolute discretion to decide whether to prosecute." *United States v. Nixon*, 418 U.S. 683, 693-94 (1974). But the government's power to decide whether to prosecute ended with its decision to ask the district court for injunctive relief. What the district court decided to do with that request, and this Court's power to review the district court's decision, are squarely within the constitutionally conferred equitable powers of the Judicial Branch and cannot plausibly be construed to pose a separation-of-powers issue. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for

every violation of law."). The Executive Branch is not granted unlimited power beyond the reach of the Judicial Branch. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243 (2006) (affirming invalidation of Interpretive Rule by Attorney General avowing intent under the CSA to prosecute physicians acting in compliance with the Oregon Death With Dignity Act).

Nor does precluding the government's preferred legal strategy fall within the ambit of the "take care" clause. U.S. CONST. art. II, § 3 (the President shall "take Care that the Laws be faithfully executed"). Cases construing the clause only prohibit a court from directing the government's prosecution of a criminal case or dictating the government's choice of statutes under which to prosecute a 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 choice of statute under which it wishes to charge in criminal prosecution). Neither scenario exists here. An injunction was merely the government's preferred legal strategy and did not affect its power to prosecute. To hold otherwise would be to eliminate the judicial discretion expressly recognized by the Supreme Court in this case:

> 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.

OCBC, 532 U.S. at 496 (internal citations omitted). By choosing to proceed by civil injunction, the government willingly invoked the traditional equitable jurisdiction of the district court, including its equitable discretion not to issue an injunction.

4. The Risk of Jury Nullification Explains the Government's Selection of a Civil Enforcement Remedy, but Does Not Justify That Choice.

Although Appellants made no arguments in the district court (ER 1914) concerning jury nullification, the government states that this Court should reject any claim "that a jury might engage in nullification in a criminal prosecution." (Gov't Br., at 36.) The government's mention of this issue is instructive. It is abundantly clear that fear of jury nullification of the CSA motivated the government's selection of remedies in this case. This motive is improper, and the government should not be rewarded for manipulating these proceedings to the public's disadvantage. Indeed, in oral argument before the Supreme Court in this case, the Court was adamant that a fear of jury nullification is a wholly unacceptable reason for the government to have proceeded by way of injunctive action if doing so would prevent Appellants from presenting their case to a jury: "That would make a big difference to a jury who doesn't want to convict this person. I mean, at the end of the road there's a jury, which is going to let you off if

it wants to let you off . . . so that *if the U.S. attorney here were only trying to avoid a jury, he ought to be replaced.*" *United States v. Oakland Cannabis Buyers' Coop.*, No. 00-151, 2001 U.S. TRANS LEXIS 23, at *20 (Mar. 28, 2001) (emphasis added). The right to a trial by jury is, and for centuries has been, a central tenet of our legal system, and its attributes should not be lightly swept aside. *See United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor . . . .") (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

The prospect of jury nullification in this case is not illusory. In the criminal trial of Ed Rosenthal for cultivation of medical cannabis, this Court ordered a new trial based on juror misconduct. The misconduct was prompted by one juror's frustration and confusion regarding the lack of evidence at trial regarding medical marijuana and the district court's instruction to decide the case in accordance with federal law. *United States v. Rosenthal*, 445 F.3d 1239, 1245 (9th Cir. 2006), *amended at* 454 F.3d 943 (9th Cir. 2006). California juries—the same population that passed the Compassionate Use Act permitting medical cannabis use—may be disinclined to convict defendants for doctor-recommended cannabis to preserve patients' lives and health. *See Dougherty*, 473 F.2d at 1132 ("[T]he jury system operates in fact . . . so that the jury will not convict when . . . the offense is one

they . . . consider generally acceptable or condonable under the mores of the community."). Although the government is correct that a jury cannot be *instructed* to nullify operative law, that fact does nothing to justify the government's motivation to avoid California juries in criminal prosecutions by seeking a civil injunction. For this additional reason, the government's selection of a civil injunctive remedy as a means of enforcing the CSA was improper in this case.

C. The "Opportunity" to File Further Submissions Concerning Prospective Activity Deemed Criminal by the Government Presented Appellants with an Impermissible Hobson's Choice.

The government posits that the district court afforded Appellants an "opportunity" to file further submissions, which it claims is an acceptable method of satisfying its own burden of proof in a suit to enjoin a crime. (Gov't Br., at 40-42.) In support of its argument, the government cites a string of distinguishable cases. The cases from this Circuit all involved activity constituting non-compliance with federal regulatory laws that did not implicate criminal penalties. *See United States v. Laerdal Mfg. Corp.*, 73 F.3d 852 (9th Cir. 1995) (medical device recording regulations); *Fed. Election Comm'r v. Furgatch*, 869 F.2d 1256

(9th Cir. 1989) (Federal Election Campaign Act); *Brock v. Big Bear Mkt. No. 3*, 825 F.2d 1381 (9th Cir. 1987) (Fair Labor Standards Act).[5]

Injunctions of civil violations do not have the same implications as injunctions of a criminal act, rendering assurances against future violations an inappropriate criterion upon which to predicate an injunction of a criminal act. Applying the government's logic, any injunction of conduct involving criminal penalties would allow the judge to ask for future assurances of non-violation, with permissible inferences being drawn from a defendant's silence on Fifth Amendment grounds. This clearly implicates the sacred constitutional right against self-incrimination and demonstrates the fundamental unfairness of enforcing a criminal law via injunction. The Hobson's choice with which the district court's "opportunity" presented Appellants was impermissible.

Additionally, the procedure adopted by the district court improperly required Appellants to reveal the contents of a court-ordered privileged communication in order to avoid adverse consequences. The district court made it clear that if Appellants wished to avoid an injunction, Appellants' attorneys would be required to ask whether Appellants intended to distribute cannabis in the future, and then to

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[5] The non-controlling cases from other jurisdictions are equally inapposite. *See N.Y. NOW v. Terry*, 159 F.3d 86 (2d Cir. 1998) (violations of civil rights laws); *Weigand v. Vill. of Tinley Park*, 129 F. Supp. 2d 1170 (N.D. Ill. 2001) (enjoining municipality from re-enacting repealed ordinance).

disclose this privileged conversation to the court. Appellants thus were forced to choose between their Fifth Amendment rights, their attorney-client privilege, and the injunction. The district court abused its discretion by basing the permanent injunction on Appellants' refusal to file a submission. ER 1957.

D. The Government Was Required to Demonstrate Irreparable Harm.

The government did not present any evidence of irreparable harm to the district court. Instead of offering evidence, it resorted to the argument that irreparable injury is not an independent requirement for entry of a permanent injunction but is only a basis for assessing the adequacy of the legal remedy. (Gov't Br., at 45.) This is a distinction without a difference. As the government's own authority recognizes, "[i]rreparable injury is, however, one basis, and probably the major one, for showing the inadequacy of any legal remedy," and "[o]ften times the concepts of 'irreparable injury' and 'no adequate remedy at law' are indistinguishable." *Lewis v. S.S. Baune*, 534 F.2d 1115, 1124 (5th Cir. 1976) (citation omitted); *see also Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir. 1994) (noting that irreparable injury is "one basis for showing the inadequacy of the legal remedy"). As this Circuit has made clear, irreparable injury remains a component of determining whether a permanent injunction has been properly entered. *See G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1108 (9th Cir. 2003) ("The requirements for the issuance of a permanent injunction are

(1) the likelihood of substantial and immediate irreparable injury, and (2) the inadequacy of remedies at law."). While Appellants do not advocate the use of criminal prosecution as a remedy, it is clear that such a remedy exists, and would constitute an adequate remedy at law.

The government contends, incorrectly, that the district court had no authority to balance the hardships, because "Congress has already balanced the equities and determined that enforcement of the Act is in the public interest." (Gov't Br., at 46.) In keeping with its theme, the government would eliminate a court's discretion to balance the equities and would have the court *ipso facto* enter any injunction the government requested. In support of this proposition, the government cites a string of cases granting injunctive relief in the context of a federal criminal statute. (Gov't Br., at 46-47.) But the government misses the point. The CSA does not *require* the court to grant injunctive relief merely because the statute authorizes the government to seek such relief. *See OCBC*, 532 U.S. at 496-98; *see, e.g., United States v. Mass. Water Resources Auth.*, 256 F.3d 36, 47-49 (1st Cir. 2001) (declining to issue injunction for violation of Safe Water Drinking Act); *see also, e.g., Amoco Production Co. v. Vill. of Gambell*, 480 U.S. 531, 544-46 (1987) (declining to issue injunction to bar exploratory drilling on Alaskan public lands under Alaska National Interest Lands Conservation Act); *Romero-Barcelo*, 456 U.S. at 314-18 (district court had

discretion not to issue injunction precluding the United States Navy from releasing ordnance into water); *Hecht Co. v. Bowles*, 321 U.S. 321, 328 (1944) (district court not required to issue an injunction to restrain violations of the Emergency Price Control Act).

The court retains its equitable discretion to deny injunctive relief where Congress has not *clearly* restricted the court's equity jurisdiction. *See Mass. Water Resources Auth.*, 256 F.3d at 48 ("[T]he Supreme Court has held that if Congress wishes to circumscribe these equitable powers, it must do so with clarity: 'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'") (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). The case extensively quoted by the government, *Burlington N. Ry. Co. v. Bair*, 957 F.2d 599 (8th Cir. 1992), falls into this category. In *Bair*, the Eighth Circuit enjoined the government of Iowa from collecting ad valorem taxes from a railroad. The *Bair* court noted that the particular federal statute fell "within the category of statutes that limit the traditional equitable discretion of the courts" but recognized *Romero-Barcelo*'s holding that "a statute that expressly provides for equitable relief does not automatically restrict a district court's traditional equitable discretion." *Id.* at 602.

Because Congress has not expressly restricted the court's equitable powers under the CSA, the district court clearly retained discretion to decline to enter an injunction. *See OCBC*, 532 U.S. at 496 ("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."); *see also Romero-Barcelo*, 456 U.S. at 313 ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."). The CSA does not reduce the judiciary to an automatic seal of approval for the government's requests for injunctive relief.

As recognized by the Supreme Court in this case, the government's interest in enforcing the CSA can be satisfied without an injunction. *OCBC*, 532 U.S. at 497. In contrast, Appellants suffer significant procedural disadvantages, and their patient-members suffer profound medical hardships. First, the permanent injunction deprived Appellants of the constitutional protections of the criminal justice system. Second, patient-members face pain, suffering, and agonizing deaths when deprived of medical cannabis. In fact, at least twenty-five patient-members passed away during the four years following the preliminary injunction and that number has continued to climb in the following years. ER 1444-45. These demonstrable and irreparable injuries to Appellants and to their patient-

members far outweigh any interest the government may have in civilly enjoining conduct the State of California expressly determined to be in the best interest of its citizens.

E. The Government Fails to Refute Appellants' Evidence that the Government Acted with Unclean Hands.

The government's primary argument with respect to unclean hands is that the defense does not apply. The government cites a string of non-binding authorities in support of its assertion that the government is "not [] subject to the unclean hands defense." (Gov't Br., at 48.) As the controlling law in this Circuit makes clear,[6] however, the maxim that "one who seeks equity must come to the court without blemish . . . . *applies to the government* as well as to private litigants." *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 752 (9th Cir. 1991) (emphasis added; internal citations omitted); *see also United States v. Hughes Ranch, Inc.*, 33 F. Supp. 2d 1157, 1171 (D. Neb. 1999) ("[T]he government is normally not entitled to equitable relief if the government has acted inequitably or

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[6] The only other Ninth Circuit case cited by the government is factually inapposite. In *Henderson on behalf of NLRB v. Int'l Union of Operating Engineers, Local 701*, 420 F.2d 802, 808 (9th Cir. 1969), this Court held that the engineering union could not assert an "unclean hands" defense with respect to the longshoreman's union's conduct insofar as the NLRB sought the injunction, not the longshoreman's union. There was no allegation that the NLRB acted with unclean hands; therefore the issue of the application of unclean hands to the government for its own conduct was not before the court.

in bad faith relative to the matter in which the government seeks equitable relief.") (following *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991)).

This Court has recognized that the "clean hands doctrine should not be strictly enforced when to do so would frustrate a substantial public interest." *EEOC*, 939 F.2d at 753. Ignoring the interests of terminally and seriously ill Californians, and the interests of California in enforcing its own laws, the government summarily concludes that it is "vindicat[ing] statutory violations in the public interest." (Gov't Br., at 48.) It is not the law that any suit brought by the government automatically strips litigants of an unclean-hands defense, effectively excusing any behavior, no matter how egregious, by the government. If that were the law, the requirement would be meaningless. Consistent with its argument regarding other equitable considerations, the government once again overlooks the court's *discretion* to consider the application of unclean hands. *See Kincaid v. City of Fresno*, No. 1:06-CV-1445-OWW-SMS, 2007 U.S. Dist. LEXIS 19197, at *13 (E.D. Cal. Mar. 19, 2007) ("The unclean hands doctrine is not a doctrine that is applied strictly, but rather a formula left to the discretion of the court.") (citing *EEOC*, 939 F.2d at 753); *see also United States v. Sutton*, 795 F.2d 1040, 1062 (Temp. Emer. Ct. App. 1986) ("Whether an equitable defense is available to a

party is a question addressed to the discretion of the trial court.") (citation omitted).[7]

The government further argues that Appellants' unclean-hands defense fails because Appellants did not exhaust administrative remedies via the rescheduling procedures. (Gov't Br., at 50-51.) This remedy is not a viable option for the patient-members who suffer on a daily basis because the government has chosen to deny them access to necessary medicine. A petition to reschedule cannabis was first brought in 1972, resulting in an Administrative Law Judge recommending, *over sixteen years later*, that the DEA reschedule cannabis. ER 1170-1192; *see also Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1133 (D.C. Cir. 1994). Despite the Administrative Law Judge's finding that "marijuana has been accepted as capable of relieving the distress of great numbers of very ill people," the DEA Administrator rejected the recommendation. ER 1191. The D.C. Circuit

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[7] The government argues that Appellants "fail to offer any explanation as to why" the undercover agents' actions were "in any way improper." (Gov't Br., at 50.) But the government does not dispute that its agents stole an actual California physician's license number, forged recommendations using that number, and set up a fake phone number for the "phony" physician's office in order to gain access to the OCBC and to enable the agents to impersonate patient-members. ER 1749-74. The unclean-hands doctrine requires the government to have "acted fairly and without fraud or deceit as to the controversy in issue." *Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 877 (9th Cir. 2000) (internal quotation marks omitted). Because government agents fraudulently impersonated patients and a licensed physician in order to gain access to medical cannabis to which they would not otherwise be entitled (ER 729), their actions constituted unclean hands.

upheld the DEA Administrator's decision. *See Alliance for Cannabis Therapeutics*, 15 F.3d at 1137.

Although the administrative option exists in theory, awaiting the rescheduling of cannabis is not a viable option in practice.[8] It is certainly no option for Appellants' patient-members, as even the district court has recognized. ER 51 ("[I]t hardly seems reasonable to require an AIDS, glaucoma, or cancer patient to wait twenty years if the patient requires marijuana to alleviate a current medical problem."). Additionally, as Appellants demonstrated in the district court, the government has blocked scientific research regarding medical uses for cannabis, thus making use of the administrative procedures an exercise in futility. ER 1673-74. Because only the government has access to cannabis for the purposes of conducting research, and that research has been stymied, rescheduling by the DEA is unlikely at best. Exhaustion of administrative remedies is not required where pursuit of the administrative remedy would be futile. *See SEC v. G.C. George Sec., Inc.*, 637 F.2d 685, 688 n.4 (9th Cir. 1981) ("[T]here are a number of exceptions to the general rule requiring exhaustion, covering situations such as

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[8] There is a pending petition to reschedule cannabis. *Petition to Reschedule Cannabis (Marijuana)*, filed with the Drug Enforcement Administration (Oct. 9, 2002), http://www.drugscience.org/PDF/Petition_Final_2002.pdf. The DEA accepted the filing of that petition on April 3, 2003. In July 2004, the DEA referred the petition to the Department of Health and Human Services for scientific and medical review. No public action has been taken since that time.

where administrative remedies are inadequate or not efficacious[] [or] pursuit of administrative remedies would be a futile gesture . . . .").

The government also fails to address substantial, uncontroverted evidence in the record of the government's unclean hands during the enactment and implementation of the CSA. ER 119-22, 904-51, 952-1436, 1453-1570, 1670-75, 1860-91. The government does not deny that it prevented medical studies designed to evaluate cannabis as a cure for various illnesses. ER 904-951, 1698-1845. The government fails to address the voluminous, non-government-sponsored studies of the medical efficacy of cannabis.[9] ER 119-22, 952-1436, 1453-1570. Tellingly, the government has never refuted the fact that every objective, independent study—including the government-commissioned Institute of Medicine study—for over a century has recommended permitting patients access to medical cannabis. Instead, the government suggests that Congress (not medical science) is the sole judge of whether cannabis has any medical efficacy. As the Supreme Court noted in a related case, the "evidence proffered by

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[9] The government also accuses Appellants of making the "somewhat contradictor[y]" statements that the government has placed obstacles in the path of medical research yet Appellants provided the district court with voluminous studies concerning the efficacy of medical cannabis. (Gov't Br., at 50.) There is no contradiction. The studies presented by Appellants to the district court either were sponsored by entities other than the United States government or predate the enactment of the CSA. ER 119-22, 952-1436, 1453-1570. After the enactment of the CSA, placing cannabis in Schedule I, the government blocked further studies.

respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I." *Gonzales v. Raich*, 545 U.S. 1, 27 n.37 (2005); *see also Conant v. Walters*, 309 F.3d 629, 640-43 (9th Cir. 2002) (Kozinski, J., concurring) ("[T]he record in this case, as well as the public record, reflect a legitimate and growing division of informed opinion on this issue. A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs."). Because the government is aware of the scientific evidence supporting the medical efficacy of cannabis yet continues to suppress research that might be used for rescheduling purposes, its unclean hands should have prevented entry of the injunction. The district court abused its discretion in failing to consider the evidence presented in support of Appellants' defense of unclean hands.

IV. CONCLUSION

For all of the foregoing reasons, Appellants respectfully request that the district court's orders granting the government summary judgment and a permanent injunction and denying their motion to dismiss be reversed.

Dated: September 25, 2007

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, Appellants hereby certify that the attached Reply Brief is proportionately spaced and has a typeface of 14 points. The brief, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, and the Proof of Service, contains 6,945 words based on a count by the word processing system at Morrison & Foerster LLP.

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