

Nos. 98-16950, 98-17044, 98-17137; 00-16411

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee/Appellant,

v.

OAKLAND CANNABIS BUYERS'
COOPERATIVE and JEFFREY JONES,
Defendants-Appellant/Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. C 98-00088 CRB
On Remand from the United States Supreme Court

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR
LEAVE TO FILE SUPPLEMENTAL BRIEF ON REMAND**

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The government's opposition offers no legitimate justification for opposing Defendants' Motion for Leave to File supplemental Brief on Remand. In ruling on the disposition of any of the currently pending appeals this Court must consider the constitutional issues presented in Defendants' Brief on Remand. Accordingly, the Court should permit the brief to be filed so that the Court may have the benefit of the parties' positions on these critical constitutional questions.

As the government concedes, this Court clearly has jurisdiction to consider the matters raised in Defendants' Brief on Remand. The Supreme Court has remanded the matter to this Court, and there are currently pending at least two appeals to which the constitutional issues directly pertain.

In *United States v. Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109 (9th Cir. 1999) ("OC5C7"), this Court ruled that the district court should exercise its discretion to determine whether to modify the injunction in this case to exempt distribution to patients with medical necessity. In accordance with this Court's instructions, the district court held further proceedings and determined that it would modify the preliminary injunction to permit distribution to patients with legal necessity. The government appealed that order. (No. 00-16411, "OCBC I") The Supreme Court has since reversed the Court's decision in *OCBC I* and remanded the case to this Court for further proceedings.

In remanding this case, the Supreme Court expressly declined to consider "in the first instance" the serious constitutional questions raised by construing the Controlled Substances Act to prohibit intrastate distribution of cannabis to seriously ill patients whose physicians recommend cannabis for medical treatment. The Supreme Court chose not to address those constitutional issues because this Court had not yet addressed them. *United States v. Oakland Cannabis Buyers' Coop.* 121 S.Ct. 1711, 1719 (2001). These constitutional issues are now squarely presented to this Court.

Contrary to the government's contention, the constitutional issues were raised in the consolidated appeals. (*See* Appellants' Opening Brief in 98-17044 at 23;

Appellants' Reply Brief in 98-16950, 98-17044,98-17137 at 8; Brief of Amicus Curiae in Support of Appellants in Support of Reversal, dated January 8, 1999 by the City of Oakland, California and joined by the County of Alameda). These constitutional issues are also raised in *OCBC II*, and require the Court to determine whether, without a modification for legal necessity, the injunction is constitutional. (*See* Appellees' Answering Brief on the Merits in 00-16411 at 41).

Contrary to the government's contention, this Court cannot simply avoid the constitutional issues by ordering the district court to vacate the modified injunction and by dismissing the pending appeals. Any decision to vacate the present modified injunction necessarily includes determining whether or not the unmodified injunction exceeds Congress's powers under the Commerce Clause, interferes with the powers reserved to the State and to the People under the Tenth Amendment, and violates the fundamental rights retained by the people and protected by the Ninth Amendment and the Due Process Clause of the Fifth Amendment. In making such a determination, this Court should consider the extensive analysis presented in Defendants' Brief on Remand.

Nor should the matter simply be remanded to the district court without further guidance from this Court. As set forth in in Defendants' Brief on Remand and in the other pleadings before this Court, this Court has not addressed whether a prohibition against the wholly intrastate distribution of cannabis for medical purposes, where that distribution is specifically authorized by the state, violates the Constitution. Thus, *United States v. Tisor*, 96 F. F. 3d (9th Cir. 1996) and the other cases upon which the government relies are inapposite. Judicial economy will not be served by mechanically remanding the case to the district court with no instructions regarding the

issues that the district court must consider in any subsequent proceedings. Given the seriousness of the constitutional questions raised in this case, the district court, and the parties, clearly will benefit from this Court's guidance on these issues.

Dated: October 31, 2001

MORRISON & FOERSTER, LLP

By: Annette Carnegie
Annette P. Carnegie

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**PROOF OF SERVICE BY OVERNIGHT DELIVERY
AND FACSIMILE TRANSMISSION**
(CCP 1013a, 2015.5) or (FRAP 25(d))

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**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 31st day of October, 2001.

Lisa Sangalang
(typed)


(signature)

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Executed at San Francisco, California, this 31st day of October, 2001.

Lisa Sangalang
(typed)


(signature)

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