

Nos. 02-16335, 02-16534, 02-16715

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,
Defendants-Appellants.

Appeal from Final Judgment Entered by the United States District Court
for the Northern District of California
Case No. C 98-00086, C 98-00087, C 98-00088 CRB
entered on July 29, 2002, by Judge Charles R. Breyer.

**DECLARATION OF ANNETTE P. CARNEGIE IN SUPPORT OF
APPELLANTS' MOTION FOR LEAVE TO FILE A REPLY BRIEF
EXCEEDING THE TYPE-VOLUME LIMITATION OF
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)**

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

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

RANDY BARNETT
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
Telephone: (617) 353-3099

ANNETTE P. CARNEGIE (State Bar No. 118624)
HEATHER A. MOSER (State Bar No. 212686)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000

I, Annette P. Carnegie, declare:

1. I am an attorney duly admitted to practice in the State of California and before the United States Court of Appeals for the Ninth Circuit. I am a partner in the law firm of Morrison & Foerster LLP, one of counsel of record for Defendants and Appellants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (collectively "Appellants"). If called to testify, I would state the following based on my own personal knowledge:

2. Appellants' reply brief contains 18,430 words, counted in accordance with Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The brief is due March 6, 2003, pursuant to an order dated January 30, 2003.

3. Appellants' opening brief in this appeal consisted of 24,719 words. The government's opposition brief consisted of 22,894 words. Additional space is required in order to effectively respond to the government's extensive analysis.

4. Pursuant to an order dated December 20, 2002, the following three cases have been consolidated for the purposes of this appeal: (1) *United States v. Marin Alliance for Medical Marijuana*, No. 02-16335; (2) *United States v. Oakland Cannabis Buyer's Cooperative*, No. 02-16534; and (3) *United States v. Ukiah Cannabis Buyers' Club*, No. 02-16715. Per this Court's order, this reply brief will serve as the main brief with respect to the consolidated appeals.

5. This case presents important constitutional issues of first impression concerning the federal government's authority under the Controlled Substances Act to prohibit medical cannabis dispensaries, acting under state law, from distributing cannabis to seriously ill patients for whom physicians have recommended cannabis as an appropriate medical treatment. These issues are of concern to the State of California, to the United States government, and to States that have passed laws allowing the limited use of cannabis for medical purposes by their citizens. The constitutional issues raised in this case extend beyond the

narrow issue of medical cannabis and implicate the federal government's general authority to regulate in areas traditionally reserved to States. All of these issues require an extensive analysis of the jurisprudence of the United States Supreme Court and this Court concerning the scope and limits of that authority.

6. The significance and legal complexity of the constitutional issues raised by this case is confirmed by the fact that this case was appealed to this Court and to the Supreme Court. Both courts issued opinions and remanded the case for further proceedings in the district court. *See United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001). All of the constitutional issues raised by Appellants in their present brief were expressly left open by the United States Supreme Court for decision by this Court.

7. The importance of this case also has been confirmed by the participation of several noteworthy *amici curiae*, including the State of California, the City of Oakland, the County of Alameda, and the California Medical Association.

8. The case is procedurally complex. This appeal involves five separate dispositive motions raising legal and factual issues: (a) the district court's refusal to modify or dissolve the preliminary injunction; (b) the district court's grant of summary judgment in favor of the government; (c) the issuance of a permanent injunction enjoining Appellants from distributing medical cannabis to its patient-members; (d) the district court's denial of Appellants' motion to dismiss for failure to state a claim; and (e) the district court's denial of Appellants' motion to dismiss the action for lack of jurisdiction. Appellants also appeal the district court's rulings on their objections to the government's evidence on summary judgment, and the denial of Appellants' motion for further discovery pursuant to Federal Rule of Civil Procedure 56(f).

9. It is necessary to address the government's lengthy response concerning the significant constitutional arguments raised by Appellants, including: (a) an "as applied" challenge to the Controlled Substances Act under the Commerce Clause; (b) the constraints that the Necessary and Proper Clause imposes on Congressional power to enact federal legislation pursuant to its powers under the Commerce Clause; (c) state sovereignty and the breadth, scope, and applicability of the Tenth Amendment; and (d) unenumerated fundamental rights under the Fifth and Ninth Amendments. Appellants also must address the government's response to the legal defenses to the injunction raised and rejected below, including statutory immunity under 21 U.S.C. § 885(d). Finally, Appellants must address the government's lengthy response to Appellants' challenge to the procedural and evidentiary errors committed by the district court in granting summary judgment and issuing a permanent injunction. For each of the government's arguments, Appellants are required to set forth why the government's analysis is wrong, and address the new authorities upon which the government relies.

10. The government cites over 140 cases, only approximately 23 of which were cited in Appellants' opening brief. Appellants' Reply Brief devotes substantial analysis to the legal theories presented in those cases and their applicability to this case. The Opposition Brief also argues in detail issues that were mentioned in summary form in the Opening Brief, for example whether there is a rational basis for the application of the challenged statute and Appellants' evidentiary objections. Accordingly, Appellants have devoted a portion of their brief to addressing these issues in detail.

11. Counsel has diligently attempted to present the foregoing arguments within the word count allotted by the Court. However, counsel has not been able to do so. Because a compelling need exists to present fully the significant

constitutional issues raised in this case, counsel requests that Appellants be permitted to file a brief that exceeds the word count by 11,430 words.

12. Counsel has discussed this request with Mark Quinlivan, attorney for Appellees, and Mr. Quinlivan indicated that the government takes no position regarding this request.

13. Appellants have submitted a true and correct copy of their proposed reply brief with this motion.

I declare under penalty of perjury under the laws of the United States of America and the laws of the State of California that the foregoing is true and correct.

Executed this 6th day of March, 2003 at San Francisco, California.

By: 
Annette P. Carnegie