

No. 00-16411

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

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

Appeal from Order Modifying Injunction by the United States District Court
for the Northern District of California
Case No. C 98-00088 CRB
entered on July 17, 2000, by Judge Charles R. Breyer.

APPELLEES' MOTION TO EXPEDITE APPEAL

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This is an appeal from an order modifying a preliminary injunction, entered by the district court on July 17, 2000. The merits panel that heard the first appeal in this case, Schroeder, Reinhardt, and Silverman, JJ., retained jurisdiction to decide this appeal. *See United States v. Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109, 1115 (9th Cir. 1999) (*OCBC I*), *petn. for cert. filed* July 28, 2000.

On August 11, 2000, the merits panel issued two orders that struck a balance between the interests of the Appellees, the Oakland Cannabis Buyer's Cooperative and Jeffrey Jones (collectively "OCBC"), and the Appellant, the United States. On the one hand, the panel denied the Government's request for a stay of the district court's July 17, 2000 Order. On the other hand, the panel ordered that briefing be expedited pursuant to Ninth Circuit Rule 3-3(b) (preliminary injunction appeals).

Despite the August 11, 2000 Order, the Government moved for a seven-day extension of time to file its reply brief, up to and including October 10, 2000. OCBC opposed the Government's motion. The motion was granted in an Order filed on October 10, 2000. The October 10, 2000 Order was signed by Manning Evans, Motions Attorney/Deputy Clerk. It does not state whether the Government's motion was referred to or considered by the merits panel.

The case is now fully briefed. Because the merits panel that decided *OCBC I* retained jurisdiction, this case, unlike most preliminary injunction appeals, will not be "referred to the next available motions/screening panel for disposition." Ninth Circuit Rule 3-3(d). Instead, it must be referred to the prior merits panel for disposition. *See id.*

OCBC respectfully requests that this case be placed before the merits panel for disposition as soon as possible and that all further proceedings be expedited. *See* Ninth Circuit Rule 3-3(e) ("If a party files a motion to expedite the appeal ..., the Court may order a ... procedure for disposition of the appeal that differs from the schedule and procedure set forth in subparagraphs (b) and (d)."); Ninth Circuit

Rule 27-12 (“Motions to expedite ... hearing may be filed and will be granted upon a showing of good cause.”); *see also* 28 U.S.C. § 1657(a) (“Notwithstanding any other provision of law, each court of the United States shall ... expedite consideration of any action ... for temporary or preliminary relief...”); *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 699 (9th Cir.) (noting the “priority and expedited decision that we must give appeals from preliminary injunctions under 28 U.S.C. § 1657 and Ninth Circuit Rule 3-3”), *cert. denied*; 522 U.S. 963 (1997); *Gregorio T. v. Wilson*, 54 F.3d 599, 600 (9th Cir. 1995) (“28 U.S.C. § 1657 and Ninth Circuit Rule 34-3 give priority to preliminary injunction appeals. In addition, recently adopted Ninth Circuit Rule 3-3 (effective July 1, 1995) automatically expedites briefing and decision in preliminary injunction appeals.”).

OCBC seeks expedited consideration because of the United States Supreme Court’s ruling in *United States v. Oakland Cannabis Buyers’ Club*, 530 U.S. ___, 69 U.S.L.W. 3165 (Aug. 29, 2000). After this Court issued its August 11, 2000 Order denying the Government’s motion to stay the district court’s July 17, 2000 Order, the Government requested a stay from Supreme Court Justice Sandra Day O’Connor, sitting as the Circuit Justice for the Ninth Circuit. Justice O’Connor referred the Government’s application to the full Court, which granted the Government’s application by a vote of 7 to 1, with Justice Breyer not participating. The Supreme Court stayed the July 17, 2000 Order the Government challenges in this appeal, “pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit and further order of this Court.” Justice Stevens dissented, stating:

Because the [Government] has failed in this case to demonstrate that the denial of necessary medicine to seriously ill and dying patients will advance the public interest or that the failure to enjoin the distribution of such medicine will impair the orderly enforcement of federal criminal statutes, whereas [OCBC has] demonstrated that the

entry of a stay will cause them irreparable harm, I am persuaded that a fair assessment of that balance favors a denial of the extraordinary relief that the government seeks.

OCBC's opposition to the Government's petition for certiorari review of *OCBC I* is due on and will be filed on Monday, October 30, 2000.

The Supreme Court's stay ruling effectively reinstated the broad preliminary injunction that this Court reversed in *OCBC I*. Thus, the Government now has all the relief it seeks, and OCBC is in the same position it occupied before this Court ruled in *OCBC I*: OCBC is enjoined from distributing medicinal cannabis to its seriously ill and dying patients, regardless of whether those patients satisfy the four-part test for medical necessity set forth in *OCBC I* and in the district court's July 17, 2000 Order.

This Court has recognized how critical it is that OCBC's patients receive the medicinal cannabis they so desperately need:

OCBC has identified a strong public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of a large group of persons with serious or fatal illnesses. Indeed, the City of Oakland has declared a public health emergency in response to the district court's refusal to grant the modification under appeal here. Materials submitted in support of OCBC's motion to modify the injunction show that the proposed amendment to the injunction clearly related to a matter affecting the public interest....

OCBC submitted the declarations of many seriously ill individuals and their doctors who, despite their very real fears of criminal prosecution, came forward and attested to the need for cannabis in order to treat the debilitating and life threatening conditions.

In short, OCBC presented evidence that there is a class of people with serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their

symptoms; who will suffer serious harm if they are denied cannabis; and for whom there is no legal alternative to cannabis for the effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects.

The government, by contrast, has yet to identify any interest it may have in blocking the distribution of cannabis to those with medical needs, relying exclusively on its general interest in enforcing its statutes. It has offered no evidence to rebut OCBC's evidence that cannabis is the only effective treatment for a large group of seriously ill individuals, and it confirmed at oral argument that it sees no need to offer any. It simply rests on the erroneous argument that the district judge was compelled as a matter of law to issue an injunction that is coextensive with the facial scope of the statute.

OCBC I, 190 F.3d at 1114-1115. This Court implicitly reconfirmed its conclusions by denying the Government's stay motion on August 11, 2000.

Because of the Supreme Court's August 29, 2000, stay order, every day that this appeal remains pending is another day that OCBC's patients will not receive the medicinal cannabis they so desperately need. Every day will also be another day on which the will of the People of the State of California, expressed in Proposition 215 and the ordinances passed by the City of Oakland, is frustrated.

OCBC respectfully requests that this Court expedite the disposition of this appeal to the fullest extent possible. If this Court concludes that oral argument would be beneficial, OCBC respectfully requests that it schedule oral argument as soon as possible.

Dated: October 26, 2000

JAMES J. BROSNAHAN
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By: _____

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PROOF OF SERVICE BY FACSIMILE TRANSMISSION

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen years; and that the document described below was transmitted by facsimile transmission to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number as last given by that person on any document which he or she has filed in the cause.

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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 26th day of October, 2000.

Margarita Colin
(typed)

Margarita Colin
(signature)

PROOF OF SERVICE BY MAIL
(FRAP 25(d))

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