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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. CANNABIS CULTIVATOR'S CLUB, et al., Defendants. AND RELATED ACTIONS	Nos.	C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00089 CRB C 98-00245 CRB

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MEMBERS' MOTION FOR LEAVE TO INTERVENE

Date: August 31, 1998
Time: 2:30 PM
Room: 8
The Hon. Charles R. Breyer

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I. PRELIMINARY STATEMENT.

The Members have established that they meet all of the requirements for intervention as of right and, in the alternative, for permissive intervention. In its opposition, the Government advances *pro forma* arguments to defeat the motion to intervene that are devoid of evidentiary or legal support. The Government's principal argument, for example, is that the motion to intervene is untimely as a matter of law. None of the authorities on which the Government relies, however, supports this conclusion. Likewise, the Government makes exaggerated claims of "possible prejudice" related to the Members' intervention, but these too are make-weight. The Government's opposition offers no evidence of actual prejudice, and its claims of prejudice therefore are without substance.

Moreover, although the Government declined to serve the Members with its "Consolidated Replies" in support of the other pending motions set for hearing on August 31, it is transparent from a review of the entire record of this proceeding that in opposing the Members' motion for intervention, the Government is talking out of both sides of its mouth. On the one hand, the Government asserts in opposing their motion that the Members' interests are adequately represented by the existing parties. See Plaintiff's Opposition to Motion for Leave to Intervene, filed on or about August 24, 1998 ("Opp."), at 7-8. On the other hand, in its "Consolidated Replies," the Government begs the Court to refrain from presenting the contempt charge to a jury on the basis, among other things, that the "non-compliant defendants" assertedly have no standing to rely on the due process defense invoked by the Members in their motion to intervene. See Plaintiff's Consolidated Replies in Support of Motion to Show Cause, etc., filed on or about August 24, 1998 ("Consolidated Replies"), at 17-18. The Court therefore should reject the Government's cynical attempt to prevent the Members from participating in this case and thereby avoid judicial scrutiny of its attempted interdiction of their personal, self-funded medical choice, in consultation

with their personal physician, to alleviate their suffering through the only effective treatment available for them.

II. ARGUMENT.

A. The Government Has Failed to Rebut the Members' Showing that They Should be Permitted to Intervene as "of Right".

The Government agrees with the Members that under applicable Ninth Circuit authorities, intervention as of right is determined on the basis of a four-pronged test. See Fed. R. Civ. P. 24(a); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 572 (9th Cir. 1983) (setting forth requirements for intervention as a matter of right). The Government likewise concedes that the Members have satisfied the third element of the test: namely, that they are so situated that the disposition of this action may impair or impede the Members' ability to protect their interests. Finally, as just described, the Government makes no credible argument that the Members fail to satisfy the fourth prong of the test. It pays lip service to the notion that the Members' interests are adequately represented by the existing parties (see Opp. at 7-8), but this cannot be considered a serious position in light of the other arguments the Government is simultaneously advancing to support its summary judgment motion. See Consolidated Replies at 17-18.

Accordingly, the motion to intervene as of right turns on the first two prongs of the test. On these key points, the Government fails to rebut the Members' showing that they have made a timely application and claim a protectable interest relating to the transactions that are the subject of this litigation. The Government makes much of the asserted untimeliness of the motion but offers no palpable evidence whatever to support its claim of prejudice. Likewise, the Government refuses to address the substantive due process claim advanced by the Members, suggesting in its opposition only that the Members have no protectable interest under the Controlled Substances Act. Thus, the Court's granting the motion to intervene is the only way to permit

plenary consideration of the merits of the Members' constitutional claims and defenses.

1. The Members' motion is timely: there has been no delay and no prejudice.

As stated in the Members' opening memorandum (Mem. at 7), whether a motion to intervene is timely is determined by analyzing three factors: (1) the stage of the proceeding at which an applicant seeks to intervene, (2) the prejudice to other parties and (3) the reason for and length of the delay. See Officers for Justice v. Civil Service Com'n, 934 F.2d 1092, 1095 (9th Cir. 1991). The Government asserts that the Members' motion is untimely. However, as we show below, the Government's contentions in this regard are without merit. The motion for intervention satisfies all of the applicable factors for measuring timeliness.

a. None of the Government's authorities establish that the Members' motion is untimely as a matter of law.

According to the Government, too much time has passed since these actions were filed to permit intervention as of right. In support of its argument, the Government relies on League of United Latin American Citizens v. Wilson, 131 F.3d 1297 (9th Cir. 1997). That decision, however, in fact supports the Members' position that the motion is timely. In League of Latin American Citizens, the court denied the applicant's motion for leave to intervene as untimely because, among other things, the applicant "waited twenty-seven months after the plaintiffs filed their original complaints, and at least eighteen months after four other groups had successfully intervened in the case, to move the district court for intervention." Id. at 1304 (emphasis added).

The decision in League of United Latin American Citizens invalidates the Government's objections to the timeliness of the motion to intervene in several respects. First, in that case, the district court permitted four sets of applicants to intervene nine months after the litigation was filed. Id. at 1301. The Members are

seeking leave to intervene here only seven months after the litigation was filed. Thus, even by the Government's measure, the Members' motion is timely.

Second, League of United Latin American Citizens establishes that the measure of the timeliness of a motion to intervene is contrary to what the Government proposes. In its opposition, the Government proffers a mechanical test for assessing timeliness solely with reference to the lapse of time after the action is filed. This is erroneous. League of United Latin American Citizens holds that the proper focus should be on the date the person attempting to intervene "should have been aware his 'interest[s] would no longer be protected adequately by the parties,' rather than the date the person learned of the litigation." Id. at 1304 (quoting Officers for Justice, 934 F.2d at 1095).

Here, the Government's contempt proceedings made the Members aware that their interests might not be adequately protected by the parties. On July 6, 1998, the Government filed a motion for an order to show cause why certain of the defendant cooperatives should not be held in contempt. See Plaintiff's Motion for An Order to Show Cause, etc., filed on or about July 6, 1998 (hereinafter, "Contempt Mot."). In that motion, the Government sought to have the United States Marshal close certain of the defendant cooperatives, which will cause the Members' irreparable harm (see Brundridge Decl., ¶ 11; Carter Decl., ¶ 10; Nikkel Decl., ¶ 8; Vier Decl., ¶ 5). In its motion, the Government claimed, among other things, that only members of the defendant cooperatives might have standing to assert a medical necessity defense. Contempt Mot. at 20.

The Government's initiation of contempt proceedings created the risk of inadequate representation that resulted in the motion to intervene. The timeliness of the Members' motion is thus measured from July 1998 (when the Government initiated contempt proceedings), not January 1998 (when the action was filed). Because the Members filed their motion for leave to intervene approximately one

month after the Government initiated the contempt proceedings, the Government's claim of protracted delay is specious as a matter of law.

Finally, the League of United Latin American Citizens court found that the applicant's failure to explain the reason for its delay was even more damaging than the delay itself. Id. at 1304. Here, the Members have satisfactorily explained their reason for taking several weeks to file their motion, namely, to talk to potential intervenors whose involvement was complicated by secrecy concerns, fears of criminal prosecution and their physical conditions and disabilities. See Schroeder Decl., ¶ 6.

The Government's other authorities do not support the view that the motion is untimely. For example, in U.S. v. State of Wash., 86 F.3d 1499 (9th Cir. 1996), the court affirmed the district court's findings that two applicants' motions to intervene were untimely because (1) the applicants sought to intervene three months after the court issued its memorandum opinion (id. at 1503-04, 1506), (2) intervention would upset the delicate balance achieved by the district court after six years of litigation because the applicants sought to relitigate issues that had already been decided (id. at 1504, 1506), and (3) the applicants' reasons for delay were unsatisfactory (id.). In contrast, the Members are seeking leave to intervene in this litigation at an early stage in the proceedings. A trial date has not even been set. See, e.g. S.E.C. v. Navin, 166 F.R.D. 435, 439 (N.D. Cal. 1995) (granting motion to intervene after both preliminary and permanent injunction issued). In addition, the Members explained their reason for taking a month to prepare their intervention motion. Hence, the motion is timely, and none of the Government's authorities dictates a contrary conclusion.[1]

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1 For example, in Preston v. Thompson, 589 F.2d 300 (7th Cir. 1979), the court affirmed the denial of an intervention motion filed by prison guards on the grounds that the guards were previously aware of the litigation and in fact participated as witnesses. Id. at 304. Nevertheless, the guards waited three weeks after the court issued a preliminary injunction to file their motion. The preliminary injunction followed a three-month "lockdown" during which prisoners were not permitted to leave their six by ten feet two-man cells and were not permitted to shower. The preliminary injunction required, among other things, that prison officials provide the

(continued...)

b. The Government presents no evidence of actual prejudice.

The Government asserts that the Members' intervention "would prejudice the United States by possibly causing delay to the Court's consideration" of the contempt proceedings. Opp. at 5 (emphasis added). It is not a proper objection to intervention that it will delay the litigation. See League of United Latin American Citizens, 131 F.3d at 1304 ("additional delay is not alone decisive (otherwise *every* intervention motion would be denied out of hand because it carried with it, almost by definition, the prospect of prolonging the litigation)") (original emphasis). The Government also offers no evidence, in the form of an attorney declaration or otherwise, to support its claim of "possible" prejudice. In any event, the Government can hardly be said to be prejudiced by having to prove up claims it chose to initiate. See, e.g. Security Ins. Co. of Hartford v. Schipporeit, 69 F.3d 1377, 1381 (7th Cir. 1995) (holding intervention would avoid additional litigation and conflicting results and would enable court to address important issues in the case once, with fairness and finality). Moreover, the Members seek to intervene to litigate issues such as the medical necessity defense and their substantive due process claims that have not been decided. Under such circumstances, the Government's claims of prejudice are without evidentiary or legal support and should be rejected.

1(...continued)
inmates two hours of yard recreation and two showers a week. This case is hardly analogous to this litigation. See also Assoc. Gen. Contr. of Cal. v. Sec. of Com., Etc., 77 F.R.D. 31, 36, 39 (C.D. Cal. 1977), *vacated*, 438 U.S. 909 (1978) (intervention motion denied because court lacked jurisdiction since matter appealed to United States Supreme Court and motion filed post-judgment); United States v. Blue Chip Stamp Company, 272 F. Supp. 432, 436 (C.D. Cal. 1967) (applicant's motion for leave to intervene properly denied as untimely where applicants filed *amicus curiae* briefs in opposition to consent decree but filed intervention motion after consent decree entered, following two years of extensive negotiations); U.S. v. State of Or., 913 F.2d 576, 588 (9th Cir. 1990) (motion denied as untimely because filed after consent decree entered, beyond geographical limits of decree and offered no explanation for delay); NAACP v. New York, 413 U.S. 345, 366-69 (1973) (motion to intervene untimely when filed four months after applicants learned their interests might be inadequately protected and litigation was at "critical" stage).

c. The Members seek to intervene in the litigation, not the contempt proceeding.

The Government also claims that the Members should not be permitted to intervene in the contempt proceeding. Opp. at 3-5. But this is a red herring. The Members are not seeking leave to intervene in the contempt proceeding. They are seeking leave to intervene in the litigation.

In any event, contrary to the Government's erroneous arguments, there is no blanket prohibition against intervention in contempt proceedings. For example, in Wilder v. Bernstein, 1994 WL 30480, *2 (S.D. NY. 1994), the court granted the applicants' motion to intervene in a contempt proceeding brought seven years after a stipulation had been entered. The court found that the applicants "had no reason to be aware of their interest in the matter until July 1993, when plaintiffs sought a finding of contempt . . . ."

Likewise, in Sierra Club v. U.S. Army Corps of Engineers, 709 F.2d 175, 176 (2d Cir. 1983), the court denied a motion to intervene because the applicant's claimed interest in the contempt proceeding--that its reputation would be affected--was not cognizable. The contempt proceedings in Sierra Club concerned whether the parties had violated the district court's orders entered to ensure compliance with the National Environmental Policy Act and the Clean Water Act. Id. Moreover, unlike the instant litigation, the applicant was "not alleged itself to have engaged in the misconduct resulting in the contempt motion." Id. at 177. Here, the Members are part of the class of persons alleged to have participated in the asserted misconduct which is the subject of the contempt proceeding. See, e.g. Contempt Mot. at 11 (asserting defendant cooperatives continued "to engage in the distribution of marijuana").

All of the cases cited by the Government in which intervention in contempt proceedings was denied arose in a markedly different procedural context. In each of those cases, the underlying action had been reduced to final judgment, such as by

permanent injunction or consent decree.[2] Hence, intervention was denied to prevent relitigation of issues that have already been adjudicated. Here, the contempt proceedings are ancillary to ongoing litigation and raise issues not finally decided in the main action. Accordingly, intervention is proper.

2. The Government ignores that the Members have an interest in the transaction that is protected by the Constitution.

The Government contends that the Members do not have a protected interest in the transaction because they "have no right to obtain marijuana under the Controlled Substances Act, 21 U.S.C. § 844." Opp. at 7. Whether the Members have a right to obtain cannabis under the Controlled Substances Act, however, is irrelevant. The Members here have claimed a protectable interest under the medical necessity defense, the Fifth Amendment of the United States Constitution and California law (see Cal. Health & Safety Code § 11362.5(b)(1)(B)). The Government nowhere addresses these claims in its opposition, and the Court should refrain from deciding this important constitutional issue on the merits under the erroneous guise of a procedural ruling under Rule 24(a).[3]

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2 See, e.g. United States v. Fitch, 472 F.2d 548, 549-50 (9th Cir. 1973) (holding applicant, already under criminal indictment, had no standing to intervene in civil contempt proceeding); and N.L.R.B. v. Shurtenda Steaks, Inc., 424 F.2d 192, 194 (10th Cir. 1970) (denying motion to intervene in enforcement proceeding as untimely when filed after judgment entered).

3 When parties have previously requested that courts recognize a fundamental constitutional right, the right typically has been asserted in litigation in which the exercise of the claimed right is claimed to conflict with positive law. See, e.g. Roe v. Wade, 410 U.S. 113, 120 (1973) (action seeking declaratory judgment that Texas criminal abortion statutes were unconstitutional); Griswold v. Connecticut, 381 U.S. 479, 480 (1965) (action alleging unconstitutionality of Connecticut statutes prohibiting use of contraceptives). Hence, the fact that no reported decision has as yet declared the right that the Members invoke is not a ground for denial of the motion on the basis that no protectable interest exists.

3. The Government concedes that: (1) the disposition of these actions will impair the Members' rights and (2) the Members' interests may not be adequately represented by the parties.

The Government makes no credible argument that the Members have failed to meet either of the last two requirements for intervention. First, the Government offered no opposition whatever to the Members' showing that the disposition of these actions will impair or impede their ability to protect their interest. The Government therefore concedes this requirement has been met.

Second, contrary to its arguments in opposition to this motion, the Government has elsewhere argued that the Members' rights may be inadequately represented by existing parties. This satisfies the last requirement for intervention of right. (See Federal Sav. & Loan, 983 F.2d 211, 216 (11th Cir. 1993) ("The proposed intervenors' burden to show that their interests *may be* inadequately represented is minimal") (original emphasis); see also Sagebrush Rebellion, 713 F.2d at 528 (same).

For example, the Government argued that the defendant cooperatives do not have standing to raise their members' constitutional claims. In rejecting the defendant cooperatives' substantive due process claim, the Government stated that "it is doubtful that the non-compliant defendants have standing to raise any such defense on behalf of their customers." See Consolidated Replies at 17. See also Contempt Mot. at 20. The Government's inconsistent positions are also undermined by its repeated acknowledgements of the centrality of the Members' claims to the litigation and to the contempt proceeding. See, e.g. id. at 9-11 (arguing defendant cooperatives have not carried their burden of production because they failed to "identify a single person [to whom] they distributed marijuana after May 19, 1998; have failed to establish the medical condition which allegedly would have justified the sale of marijuana to that individual; and have failed to introduce any evidence regarding their alleged defenses").

B. In the Alternative, the Members Should be Granted Permissive Intervention.

The Government has failed to rebut the Members' showing that they should be granted permissive intervention if they are denied intervention as of right. The Government again contends that the Members' motion is not timely. For the reasons discussed above and in the Members' moving papers, the motion is plainly timely.

The Members have satisfied the requirements for permissive intervention, and the Government seeks to oppose the Members' request by inventing new requirements. For example, the Government contends the Members should not be granted permissive intervention because they will supposedly "add no new or unique arguments to the briefing already before the Court . . . ." Opp. at 10. There is no requirement that an applicant seeking permissive intervention add "new or unique arguments." See, e.g. Venegas v. Skaggs, 867 F.2d 527, 529 (9th Cir. 1989) (setting forth requirements for permissive intervention). See also Fed. R. Civ. P. 24(b) (same).

Moreover, the Government ignores that "judicial economy is a relevant consideration in deciding a motion for permissive intervention." Id. at 531. In Venegas, the court reversed an order denying permissive intervention. The court found that the "district court in this case is in the best position to decide these issues" because it was "well acquainted with the underlying litigation" and the parties. Id.

This Court is well acquainted with the parties and the issues. It makes sense to permit the Members to intervene in this action. They satisfy all the requirements for permissive intervention, and granting this motion is within the Court's discretion.

III. CONCLUSION.

For the foregoing reasons, the Court should permit the Members to intervene as of right. In the alternative, the Court should grant the Members' motion for permissive intervention.

Dated: August 27, 1998.

Respectfully submitted,

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