

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' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF
ON REMAND FROM THE UNITED STATES SUPREME COURT**

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Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones ("Defendants") submit this motion requesting leave to file a supplemental Brief on Remand (a copy of which is submitted with this motion). The purpose of the Brief on Remand is to address issues remaining after the United States Supreme Court's decision and remand order in this case. Good Cause exist for this Motion for the following reasons:

On January 9, 1998, the United States sued in the United States District Court for the Northern District of California, seeking to enjoin Defendants from distributing cannabis to patient-members. On May 19, 1998, the district court issued a preliminary injunction enjoining Defendants from "engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1)."

On October 13, 1998, the district court summarily held Defendants in contempt of the preliminary injunction without an evidentiary hearing or a jury trial. The court rejected a necessity defense, finding that only four patients to whom cannabis was allegedly distributed on the day covered by the Order to Show Cause submitted evidence sufficient to determine legal necessity. The district court then modified the injunction to permit the U.S. Marshal to seize Defendants' offices. Defendants informed the district court that they would comply with the injunction. Defendants also requested that the injunction be modified to permit distribution of cannabis to the limited number of patients who could demonstrate necessity under the standard set forth in *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) and submitted numerous declarations in support of this request. The district court denied that motion. *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1113-14 (9th Cir. 1999), *rev'd and remanded*, *United States v. Oakland Cannabis Coop.*, 121 S.Ct. 1711 (2001).

On October 27, 1998, the Oakland City Council adopted a resolution declaring a public health emergency, finding that the closure of the Cooperative "impairs public safety by encouraging a market for street narcotic peddlers to prey upon Oakland's ill residents" and that the closure will cause pain and suffering to thousands of seriously ill persons. The resolution urged the federal government to desist from actions that pose obstacles to access to cannabis for Oakland residents whose physicians have determined that their health will benefit from the use of cannabis. The City Council renews that resolution every two weeks.

On September 13, 1999, this Court reversed the district court's denial of the motion to modify and remanded the case to the district court, holding that (1) the district court could take into account a legally cognizable defense of necessity in considering the proposed modification (*Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1114), (2) in exercising its equitable discretion, the district court must expressly consider the public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of persons with serious or fatal illnesses, and (3) the record before the district court justified the proposed modification. *Id.* at 1114-15.

On remand to the district court on May 30, 2000, Defendants renewed their motion to modify the preliminary injunction, submitting more declarations to establish that patient-members could meet all of the *Aguilar* requirements for a claim of necessity.

The government submitted no evidence in opposition, nor did it challenge Defendants' evidentiary showing. Instead the government relied upon its legal argument that a necessity defense was not available under the Controlled Substances Act (the "CSA"). On July 17, 2000, the district court modified the preliminary injunction to exempt the distribution of cannabis to patient-members who (1) suffer from a serious medical condition, (2) will suffer imminent harm if denied access to

cannabis, (3) need cannabis to treat or alleviate the medical condition or its associated symptoms, and (4) have no reasonable legal alternative to cannabis for effective treatment or alleviation of symptoms, because all other legal alternatives have been tried and were ineffective or intolerable.

On July 25, 2000, the government noticed an appeal (No. 00-16411) from the district court's order modifying the injunction. On November 27, 2000, the Supreme Court granted the government's petition for writ of certiorari to review this Court's September 13, 1999, opinion. This Court suspended proceedings in the government's appeal to await the Supreme Court's ruling. On May 14, 2001, the United States Supreme Court reversed this Court's September 13, 1999 decision and remanded the case for further proceedings. In so doing the Supreme Court expressly left open constitutional issues raised by Defendants both in this Court and in the Supreme Court, stating that "[b]ecause the Court of Appeals did not address these claims, we decline to do so in the first instance." *United States v. Oakland Cannabis Buyers' Coop.* ("OCBC"), 121 S.Ct. 1711, 1719 (2001).

In light of the Supreme Court's ruling, Defendants wish to submit a supplemental brief to address the serious constitutional issues raised in this case that were not previously addressed in earlier rulings by this Court, and that the Supreme Court has declined to address until they have been ruled upon by this Court. These issues include whether, without a modification for medical necessity, the injunction issued pursuant to the CSA exceeds the powers of Congress under the Commerce Clause, interferes with the sovereign power of the States and violates the fundamental rights of seriously ill patients .

Defendants also request that this Court instruct the district court to modify the injunction : (1) to exclude from the injunction's reach any noneconomic activity such as the cultivation, possession, and use of medical cannabis, and (2) to hold a hearing (a) to determine if the wholly intrastate distribution of medical cannabis substantially

affects interstate commerce and, if not, to dissolve the injunction completely or (b) if it finds that the wholly intrastate distribution does substantially affect interstate commerce, to determine whether the government may properly interfere with State sovereignty or has a compelling interest to restrict the exercise of fundamental rights. The legal bases for the relief requested is set forth in the Brief on Remand that Defendants propose to file with this Court.

For all of the foregoing reasons, Defendants respectfully request that they be given leave to file a supplemental brief, addressing the issues left open by the Supreme Court in this case.

Dated: October 18, 2001

MORRISON & FOERSTER, LLP

By: 
Annette P. Carnegie

Attorneys for Defendants
OAKLAND CANNABIS
BUYERS' COOPERATIVE and
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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' MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF ON REMAND FROM THE UNITED
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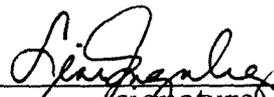
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 18th day of October, 2001.

Lisa Sangalang
(typed)


(signature)

**PROOF OF SERVICE MAIL AND BY FACSIMILE
(FRCIVP 5(B))**

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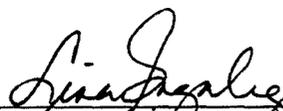
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 18th day of October, 2001.

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