IN THE 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.	)	Nos. 00-16411 98-16950 98-17044 98-17137

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

The defendants seek leave to file a brief addressing issues that this Court has no occasion to address at this juncture. As we explain below, their Motion for Leave to File Supplemental Brief should be denied. Instead, the appeals in Nos. 98-16950, 98-17044, and 98-17137 should be dismissed, and No. 00-16411 should be remanded to the district court for further proceedings consistent with the Supreme Court's decision in United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711 (2001).

1. Contrary to defendants' suggestion, Appeal Nos. 98-16950 and 17044 are no longer before this Court. This Court previously held that it lacked jurisdiction over those appeals, which challenged the denial of a motion to dismiss (No. 98-17044) and a contempt order that was subsequently purged (98-16950). United States v. Oakland Cannabis Buyers' Cooperative, 190 F.3d 1109, 1111-13 (9th Cir. 1999), rev'd and remanded on other grounds, 121

S. Ct. 1711 (2001). Defendants never sought rehearing or petitioned for certiorari from the Court's holding that it lacked jurisdiction of these appeals. Accordingly, those appeals are no longer before the Court and should be dismissed.

2. The Supreme Court reversed only this Court's decision *as* to appeal No. 98-17137, the only appeal over which the Court exercised jurisdiction. That appeal challenged the district court's denial of defendants' motion to modify the preliminary injunction, which prohibited them from manufacturing or distributing marijuana, to permit the distribution of marijuana in cases of "medical necessity." See United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 121 S. Ct. 1711 (2001). The Supreme Court held that there is no medical necessity exception to the Controlled Substances Act, and that it was error "to instruct the District Court on remand to consider 'the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order.[1]". Id. at 1722. The Supreme Court remanded the case "for further proceedings consistent with this opinion." Ibid.

3. Before the Supreme Court granted certiorari in Oakland Cannabis, the defendants successfully renewed their motion to modify the preliminary injunction in district court. The district court modified the injunction on July 17, 2000 to exempt from its prohibition the distribution of marijuana in cases of

medical necessity, relying upon this Court's previous instruction that medical necessity was a "legally cognizable defense." Oakland Cannabis, 190 F.3d at 1114. See also Oakland Cannabis, 121 S. Ct. at 1716-17 & n.2. The government appealed this amended preliminary injunction order (Appeal No. 00-16411), and the Supreme Court granted the government's motion to stay the district court's amended preliminary injunction order pending its disposition of the government's petition for certiorari. Oakland Cannabis, 121 S. Ct. at 1717 n.2; see also 530 U.S. 1298 (2000). On December 12, 2000, after the Supreme Court granted certiorari, this Court vacated oral argument in No. 00-16411 pending the Supreme Court's decision in Oakland Cannabis.

4. Thus, the only appeals pending before this Court are No. 98-17137 (appeal of district court's denial of motion to modify preliminary injunction) and No. 00-16411 (appeal of district court's modification of preliminary injunction). The issue that both of these appeals presented, whether defendants were entitled to a modification of the preliminary injunction on the basis of a potential "medical necessity" defense, has now been resolved. The Supreme Court has unanimously held that "medical necessity is not a defense to manufacturing and distributing marijuana." 121 S. Ct. at 1719, 1722.

5. The appeal in No. 98-17137 has been concluded. The Supreme Court has held that this Court erred in reversing the

district court's denial of defendants' original motion to modify the injunction. This Court therefore should dismiss No. 98-17137.

6. Appeal No. 00-16411 is still pending before this Court. The Court vacated oral argument pending the Supreme Court's decision. The Supreme Court's decision is in full accord with the United States' argument in No. 00-16411 that neither medical necessity nor equitable discretion justified the district court's modification of the injunction. We therefore respectfully suggest that this Court vacate the district court's July 17, 2000 order modifying its injunction, and remand to the district court for further proceedings consistent with the Supreme Court's decision.

7. Defendants suggest that this Court should address constitutional arguments that they presented in the Supreme Court to support their contention that the Controlled Substances Act should be construed to include a medical necessity defense. This argument is without merit.

a. The Supreme Court saw no need to reach these issues, because the constitutional avoidance doctrine "has no application in the absence of statutory ambiguity." 121 S. Ct. at 1719. The Supreme Court declined to otherwise opine on the constitutionality of the Controlled Substances Act because no constitutional challenge to the statute had been presented.

Ibid, (declining to address constitutional claims not addressed by the court of appeals "in the first instance").

b. There is likewise no challenge to the constitutionality of the Controlled Substances Act before this Court. Although defendants initially asserted in district court that Congress lacked the authority to regulate their intrastate distribution of marijuana under the Commerce Clause and that an injunction would violate their substantive due process rights, the district court rejected these arguments in issuing its initial preliminary injunction, which defendants never appealed. See United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086 (N.D. Cal. 1998). Defendants also did not raise these constitutional arguments in their appeal of the district court's initial refusal to modify the preliminary injunction. See Appellants' Opening Br. in Appeal No. 98-16950 (consolidated with No. 98-17137 for briefing) at 46-48.

c. Defendants did contend, in their Answering Brief in Appeal No. 00-16411 (the government's appeal of the district court's July 17, 2000 amended preliminary injunction order recognizing a medical necessity defense), that the district court's preliminary injunction would violate certain constitutional provisions if allowed to stand without an exception for medical necessity. To the extent that defendants were making a constitutional avoidance argument, of course, that

argument has been definitively rejected by the Supreme Court. Oakland Cannabis, 121 S. Ct. at 1719. To the extent defendants were raising a constitutional challenge to the unmodified injunction, that challenge was, and is, premature. Defendants do not contend that the district court order currently on appeal (the amended preliminary injunction recognizing a medical necessity defense) presents any constitutional issues. Rather, defendants anticipate that, once the district court has the opportunity to reconsider its order in light of the Supreme Court's decision in Oakland Cannabis, it will issue an order that will present asserted constitutional concerns. This Court should consider these issues if and when they are presented by an order of the district court that is appealed in the usual course. It need not reach out to decide those issues now.

d. In any event, defendants raised only one of their constitutional arguments, the substantive due process argument, before the district court in seeking to have the injunction modified on remand from this Court. See Dist. Ct. Docket No. 235. Most notably, they did not invoke the Commerce Clause, upon which they place such heavy reliance now. The district court, moreover, did not modify the injunction on constitutional grounds; it modified the injunction based on its reading of this Court's decision concerning medical necessity in Oakland Cannabis. See Excerpts of Record in No. 00-16411 at 41-42.

8. Finally, we note that the constitutional arguments raised by defendants are without merit and have already been rejected by this Court. See, e.g., United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996) (upholding Controlled Substances Act from challenge under the Commerce Clause), cert, denied, 519 U.S. 1140 (1997); Carnohan v. United States. 616 F.2d 1120 (9th Cir. 1980) ("[c]onstitutional rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of the lawful exercise of government police power"); Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991) (the Ninth Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation"), cert, denied. 503 U.S. 951 (1992).

9. In the event that the Court nevertheless concludes that briefing is appropriate, the United States respectfully requests that its answering brief be due thirty days from the date the Court rules on the pending motion.

CONCLUSION

For the reasons previously stated, this Court should deny defendants' Motion for Leave to File Supplemental Brief. It should also dismiss Appeal Nos. 98-16950, 98-17044, and 98-17137, and vacate the district court order at issue in Appeal No. 00-16411, and remand for further proceedings consistent with the Supreme Court's decision in Oakland Cannabis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2001, I served the foregoing OPPOSITION OF THE UNITED STATES TO DEFENDANTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON REMAND FROM THE UNITED STATES SUPREME COURT by causing the original and four copies to be sent to this Court by Federal Express and by causing one copy to be served upon the following counsel by Federal Express:

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