SUPREME COURT OF THE UNITED STATES

No. 00–151

UNITED STATES, PETITIONER *v.* OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 14, 2001]

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, concurring in the judgment.

Lest the Court's narrow holding be lost in its broad dicta, let me restate it here: "[W]e hold that medical necessity is not a defense to *manufacturing* and *distributing* marijuana." *Ante*, at 10 (emphasis added). This confined holding is consistent with our grant of certiorari, which was limited to the question "[w]hether the Controlled Substances Act, 21 U. S. C. 801 *et seq.*, forecloses a medical necessity defense to the Act's prohibition against *manufacturing* and *distributing* marijuana, a Schedule I controlled substance." Pet. for Cert. (I) (emphasis added). And, at least with respect to distribution, this holding is consistent with how the issue was raised and litigated below. As stated by the District Court, the question before it was "whether [respondents'] admitted *distribution* of marijuana for use by seriously ill persons upon a physician's recommendation violates federal law," and if so, whether such distribution "should be enjoined pursuant to the injunctive relief provisions of the federal Controlled Substances Act." *United States* v. *Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1091 (ND Cal. 1998) (emphasis added).

Accordingly, in the lower courts as well as here, respon-

dents have raised the medical necessity defense as a justification for distributing marijuana to cooperative members, and it was in that context that the Ninth Circuit determined that respondents had "a legally cognizable defense." 190 F. 3d 1109, 1114 (1999). The Court is surely correct to reverse that determination. Congress' classification of marijuana as a schedule I controlled substance—that is, one that cannot be distributed outside of approved research projects, see 21 U. S. C. §§812, 823(f), 829—makes it clear that "the Controlled Substances Act cannot bear a medical necessity defense to *distributions* of marijuana," *ante*, at 10 (emphasis added)).[1]

Apart from its limited holding, the Court takes two unwarranted and unfortunate excursions that prevent me from joining its opinion. First, the Court reaches beyond its holding, and beyond the facts of the case, by suggesting that the defense of necessity is unavailable for anyone under the Controlled Substances Act. *Ante*, at 6–9, 10, n. 7, 15. Because necessity was raised in this case as a defense to distribution, the Court need not venture an opinion on whether the defense is available to anyone other than distributors. Most notably, whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or

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[1]In any event, respondents do not fit the paradigm of a defendant who may assert necessity. The defense "traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *United States* v. *Bailey*, 444 U. S. 394, 410 (1980); see generally 1 W. LaFave & A. Scott, Substantive Criminal Law §5.4, pp. 627–640 (1986). Respondents, on the other hand, have not been forced to confront a choice of evils—violating federal law by distributing marijuana to seriously ill patients or letting those individuals suffer—but have thrust that choice upon themselves by electing to become distributors for such patients. Of course, respondents also cannot claim necessity based upon the choice of evils facing seriously ill patients, as that is not the same choice respondents face.

extraordinary suffering is a difficult issue that is not presented here.[2]

Second, the Court gratuitously casts doubt on "whether necessity can ever be a defense" to *any* federal statute that does not explicitly provide for it, calling such a defense into question by a misleading reference to its existence as an "open question." *Ante*, at 5, 6. By contrast, our precedent has expressed no doubt about the viability of the common-law defense, even in the context of federal criminal statutes that do not provide for it in so many words. See, *e.g.*, *United States* v. *Bailey,* 444 U. S. 394, 415 (1980) ("We therefore hold that, where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force"); *id.*, at 415, n. 11 ("Our principal difference with the dissent, therefore, is not as to the *existence* of such a defense but as to the importance of surrender as an element of it" (emphasis added)). Indeed, the Court's comment on the general availability of the necessity defense is completely unnecessary because the Government has made no such suggestion. Cf. Brief for Petitioner 17–18 (narrowly arguing that necessity defense cannot succeed if legislature has already "canvassed the issue" and precluded it for a particular statute (internal quotation marks omitted)). The Court's opinion on this point is pure dictum.

The overbroad language of the Court's opinion is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union.

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[2] As a result, perhaps the most glaring example of the Court's dicta is its footnote 7, where it opines that "nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act." *Ante*, at 10, n. 7.

That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to "serve as a laboratory" in the trial of "novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). In my view, this is such a case.[3] By passing Proposition 215, California voters have decided that seriously ill patients and their primary caregivers should be exempt from prosecution under state laws for cultivating and possessing marijuana if the patient's physician recommends using the drug for treatment.[4] This case does not call upon the Court to deprive *all* such patients of the benefit of the necessity defense to federal prosecution, when the case itself does not involve *any* such patients.

An additional point deserves emphasis. This case does not require us to rule on the scope of the District Court's discretion to enjoin, or to refuse to enjoin, the possession of marijuana or other potential violations of the Controlled Substances Act by a seriously ill patient for whom the drug may be a necessity. Whether it would be an abuse of discretion for the District Court to refuse to enjoin those sorts of violations, and whether the District Court may

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[3] Cf. Feeney, Bush Backs States' Rights on Marijuana: He Opposes Medical Use But Favors Local Control, Dallas Morning News, Oct. 20, 1999, p. 6A, 1999 WL 28018944 (then-Governor Bush supporting state self-determination on medical marijuana use).

[4] Since 1996, six other States—Alaska, Colorado, Maine, Nevada, Oregon, and Washington—have passed medical marijuana initiatives, and Hawaii has enacted a similar measure through its legislature. See Alaska Stat. Ann. §§11.71.090, 17.37.010 to 17.37.080 (2000); Colo. Const., Art. XVIII, §14; Haw. Rev. Stat. §§329–121 to 329–128 (Supp. 2000); Me. Rev. Stat. Ann., Tit. 22, §2383–B(5) (2000); Nev. Const., Art. 4, §38; Ore. Rev. Stat. §§475.300 to 475.346 (1999); Wash. Rev. Code §§69.51A.005 to 69.51A.902 (1997 and Supp. 2000–2001).

consider the availability of the necessity defense for that sort of violator, are questions that should be decided on the authority of cases such as *Hecht Co.* v. *Bowles,* 321 U. S. 321 (1944), and *Weinberger* v. *Romero-Barcelo,* 456 U. S. 305 (1982), and that properly should be left "open" by this case.

I join the Court's judgment of reversal because I agree that a distributor of marijuana does not have a medical necessity defense under the Controlled Substances Act. I do not, however, join the dicta in the Court's opinion.