

2. The District Court Improperly Denied Appellants Their Right To Present Legal Defenses To The Contempt Charges.

The district court violated Appellants' due process rights when it precluded Appellants' defenses after receiving evidence sufficient to establish each element of these defenses. A district court may preclude a legal defense only where "the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985); *United States v. Aguilar*, 883 F.2d at 692-93; *United States v. Contento-Pachon*, 723 F.2d 691 (9th Cir. 1984) (reversing district court's decision to exclude evidence of duress defense where defendant had provided evidence sufficient to raise triable issue of fact).

The legal standard for excluding *in limine* a defense is the same as deciding whether to *instruct* a jury on a defense. *United States v. Chesney*, 10 F.3d 641, 644 n.2 (9th Cir. 1993). "In general, '[a] defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence.'" *United States v. Duran*, 59 F.3d 938, 941 (9th Cir. 1995) (quoting *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990)); see also *Guam v. Agualo*, 948 F.2d 1116, 1117 (9th Cir. 1991) (defendant entitled to jury instructions

on any legal defense which has some foundation in the evidence, even though the evidence may be weak, insufficient, or of doubtful credibility).

Appellants' evidence, which was unrefuted by the Government, was sufficient, as a matter of law, to establish each element of their defenses, and dispute the Government's contempt charges. At a minimum the district court was required to hold a hearing to permit Appellants to cross-examine the Government's witnesses, and to offer further evidence in their defense. *See International Union, UMW v. Bagwell*, 512 U.S. 821, 832 (1994).

(a) Specific Facts Established Each Element of Appellants' Necessity Defense

The district court erred in concluding that Appellants had not provided evidence sufficient to support their defense of necessity to the contempt charge. ER 1801-1802. Specifically, the district court erroneously concluded that Appellants failed to identify evidence demonstrating that each person to whom they allegedly distributed marijuana on May 21, 1998 was in danger of imminent harm. ER 1802. The district court itself acknowledged that as to four patients, Appellants' evidence was sufficient to raise a triable issue of fact as to necessity, however. ER 1801. On this basis alone, Appellants were entitled to proceed with their necessity defense. *See Contento-Pachon*, 723 F. 2d at 694-95 n.4 (defendant entitled to hearing on defense where triable issue of fact raised).

All of Appellants' evidence clearly met the legal standard established in this Circuit for the necessity defense. Appellants established that: (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a causal relationship between their conduct and the harm to be avoided; and (4) there were no other legal alternatives to violating the law. *Aguilar*, 883 F.2d at 693.

Neither the Government nor the district court seriously dispute that Appellants are faced with a choice of evils: They could either allow seriously ill patients to go untreated or they could engage in conduct which is authorized by state law and which the Government alleges violates federal law.

Contrary to the district court's conclusion, however, Appellants' evidence clearly established that they acted to prevent imminent harm to patients. Appellants presented detailed evidence concerning OCBC's stringent standards designed to permit membership only to those with specific medical conditions for which a physician has recommended cannabis. ER 1370, 1387-1398. Appellants also presented specific evidence regarding the medical necessity of four patient-members who may have been among those to whom cannabis allegedly was distributed at a press conference on May 21, 1998. For example, patient-member Yvonne

Westbrook suffers from spasticity and chronic pain brought on by multiple sclerosis. ER 1441-1442. Kenneth Estes is a quadriplegic who suffers from intense pain. ER 1176. Dr. Michael Alcalay suffers from AIDS and needs cannabis to avoid nausea and vomiting associated with his medications. ER 1640. Albert Dunham is also HIV-positive. ER 1173.

Because the Government failed to describe in any manner the persons to whom cannabis was allegedly distributed, Appellants also submitted detailed evidence about the other patient-members present at the OCBC on May 21. Appellants' evidence established that these patients suffer from debilitating and often deadly diseases, including HIV and/or AIDS, cancer, glaucoma, multiple sclerosis and arthritis, for which cannabis provides relief. ER 1648-1650. All of these patients clearly face imminent harm from these conditions.

Appellants' evidence also established that there is a direct causal relationship between Appellants' supplying medical cannabis and the harms they sought to avert. Appellants' declarations demonstrated that medical cannabis in fact alleviates the often life-threatening symptoms of OCBC's patient-members. ER 1640-1646, 1339-1343, 1222-1236, 0796-0799, 1451-1555. For example, Appellants presented evidence from patient-member Yvonne Westbrook that, after medicating with cannabis, "the spasticity

[from multiple sclerosis] immediately subsides." ER 1441. For Kenneth Estes, "Cannabis makes it possible for [him] to function in society and to deal with other people because it alleviates the pain [he] experience[s]." ER 1176. Cannabis kept Mike Alcalay alive (ER 1640) and allowed Albert Dunham "to live a normal life" ER 1173.

Furthermore, Appellants provided declarations from medical experts confirming the effectiveness of cannabis in the treatment of cancer, AIDS, glaucoma and the muscle spasticity associated with the neurological disorders, multiple sclerosis and spinal chord injuries from which the patients present on May 21 suffer. ER 1451-1534, 1229, 1234, 1427. Thus, Appellants' evidence demonstrated that medical cannabis in fact alleviates the harmful and even life-threatening symptoms of its patient-members.

Appellants' evidence proved that there are no alternatives, legal under federal law, to the distribution of medical cannabis to the patient-members which is authorized by state and local law. Specifically, the evidence established that for these patients, other medications do not work, are not nearly as effective, or result in serious adverse side effects. *See, e.g.,* ER 1641, 1693, 1441, 1177, 0867-1868, 1171, 1230, 1232, 1234, 1427, 1641.

Finally, Appellants' evidence established that members have no legal or safe alternative to acquire medical cannabis from other sources. Without access to the OCBC, patients are forced to go to the streets or to forego their medicine altogether. ER 1342, 1183-1184, 1442, 1428.

In the face of this overwhelming showing establishing Appellants' necessity defense, the Government offered no evidence to the contrary. Thus, the district court acted erroneously when it completely precluded this defense, particularly after having acknowledged that the defense had been established as to some patients.

**(b) Appellants' Evidence Established A
Substantive Due Process Defense**

The district court erred in precluding Appellants' defense that denial of access to medical cannabis violates the fundamental constitutional rights of patient-members. The Supreme Court has established that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 2267 (1997) (citations omitted). In applying substantive due process analysis, where a fundamental liberty interest is involved, government action must be "narrowly tailored to serve a compelling [government] interest." *Id.* at 2268.

Due process analysis begins with an examination of our "Nation's history, legal traditions and practices." *Id.* at 2262. Unquestionably, individuals historically have had a liberty interest in being free from pain, and a well-established right to preserve their lives. *Id.* at 2288, 2303 (O'Connor, J., concurring). Historically, cannabis long has been accepted and used in society as a medicine. ER 1225. At least three other states now have laws similar to that of California's Compassionate Use Act.

Addendum To Opening Brief, Exhibit 1.

The district court erroneously found that the "defendants have failed to proffer evidence that each and every person to whom they distributed marijuana needed the marijuana to protect such a fundamental right." ER 1804. The district court's conclusion is contrary to the evidence, and impermissibly shifts the burden of proof from the Government to Appellants. As discussed in Section I.A.2.a, *supra*, Appellants presented specific and uncontroverted evidence regarding the compelling medical needs of those persons present at the Cooperative on May 21, some of which even the district court acknowledged established medical necessity. ER 1801, 1441-1442, 1640-1641, 1176, 0867-0868. The prohibition against the medical use of cannabis plainly infringes upon the liberty and life

interests of these patients to be free from pain and to preserve their lives.

The Government presented no evidence to the contrary.

In responding to Appellants' argument in the district court, the Government relied upon decisions concerning restrictions on access to a particular provider or treatment. ER 1684-1685. Even where the government has chosen to restrict access to a particular treatment, however, courts have recognized that such restrictions violate constitutional rights if the Government's restrictions are irrational or arbitrary. *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980).³ The Government offered no evidence, scientific or otherwise, to justify its infringement on the substantive due process rights of these patients, instead suggesting that the court defer to the findings of Congress. ER 1575. Where, as in this case, legislation infringes upon fundamental rights, courts have a duty to look beyond legislative findings to determine independently whether the infringement is justified under the Constitution. "A legislature appropriately

³ In a related case argued simultaneously with this case, the district court ruled that it lacked jurisdiction to hear a rational basis challenge to the Congressional ban on the medical use of cannabis. ER 1591-1593. To the extent this reasoning informed the district court's decision, the court plainly erred. See, e.g., *United States v. Alexander*, 673 F.2d 287 (9th Cir. 1982) (reviewing classification of cocaine under rational basis test); *United States v. Fogarty*, 692 F.2d 542 (8th Cir. 1982) (reviewing scheduling of marijuana).

inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether . . . the legislation is consonant with the Constitution.” *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978), *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282, 1299 C.E.D. Cal. 1998) (deference to a legislative finding cannot limit judicial inquiry when constitutional rights are at stake). Furthermore, “courts are obligated to assure that, in formulating its judgments, Congress has drawn reasonable inferences, based on substantial evidence.” *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. at 1299 (quotations and citations omitted).

The record is devoid of any evidence supporting any legitimate, much less compelling, reason for the Government’s blanket prohibition against the medical use of cannabis in this case. Accordingly, the district court erred in prohibiting Appellants from putting forth this defense.

(c) Appellants’ Evidence Established A Joint User Defense

Appellants submitted evidence that, as to the transactions alleged, the patient-members were joint users within the meaning of *United States v. Swiderski*, 548 F.2d 445 (2nd Cir. 1977). There, the Second Circuit held that defendants who jointly purchase drugs and share them among

themselves are not engaged in "distribution" within the meaning of the Controlled Substances Act. *Id.* at 450 (applying the defense to the simultaneous purchase and immediate consumption by a husband and wife); *see also United States v. Wright*, 593 F.2d 105, 107 (9th Cir. 1979).

The *Swiderski* rationale applies with equal force to the use of medical cannabis in compliance with state and local laws. Judicial resistance to expansion of the *Swiderski* doctrine has been based on concerns about its possible use as a "cover" for illicit drugs. Those concerns are not present in the context of the OCBC, however. Just as in *Swiderski*, the evidence established that no one other than the co-purchasers were involved in the use of the medical cannabis. The members were not drawn into drug use through Appellants; rather, they sought the cannabis to alleviate their serious medical conditions, after they received a doctor's approval to do so. ER 1171, 1173, 1176, 1431, 1438, 1442. These individuals were not using cannabis for recreational purposes. *Id.* and ER 1181, 1340, 1441. They merely attempted to alleviate their painful ailments. No "distribution" took place because OCBC and its patient-members jointly acquired cannabis for medical purposes to be shared among themselves and not with anyone else. ER 1645, 1342. Appellants also established that when the use of medical cannabis is shared by members of OCBC, the participants agree to a

Statement of Conditions which specifies they are joint participants "in a cooperative effort to obtain and share medical cannabis. . . ." ER 1342-1343.

Thus, all of the circumstances that led the *Swiderski* court to recognize the joint user defense were established by the evidence submitted below, and all elements of the defense existed. The district court's failure to allow Appellants to present this defense to a jury was reversible error.

B. The District Court Violated Appellants' Due Process Rights By Denying Them A Full And Fair Hearing.

1. Appellants Were Entitled to a Hearing Because the District Court Was Presented with Controverted Evidence on Whether Appellants Had Violated the Injunction.

The summary procedure employed by the district court violated Appellants' procedural due process rights in that the district court improperly denied Appellants a full hearing on the contempt charges in the face of clearly disputed evidence. In this Circuit, a full hearing is required in a civil contempt proceeding where the evidence is in dispute. A summary proceeding is allowed *only* where the defendant presents no admissible evidence to dispute the contempt claim. *Peterson v. Highland Music, Inc.*, 140 F.3d 133, 1324 (9th Cir. 1998). Where, as in this case, defendants present evidence to dispute the allegations of contempt, they are