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**RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

Nos. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0245 CRB

**ORDER RE: MOTION TO DISMISS IN
CASE NO. 98-0088 CRB**

AND RELATED ACTIONS

By this lawsuit plaintiff the United States of America seeks a permanent injunction enjoining defendants from distributing marijuana for use by seriously ill persons upon a physician's recommendation. By order dated May 19, 1998, the Court issued a preliminary injunction pursuant to 21 U.S.C. § 882(a) enjoining defendants from violating 21 U.S.C. § 841 of the Controlled Substances Act. Now before the Court is the motion to dismiss of defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones in Case No. 98-00088. Defendants contend that the complaint should be dismissed on substantive due process grounds and because they are entitled to immunity under 21 U.S.C. § 885(d). After carefully considering the papers submitted by the parties, including the memorandum of amicus curiae City of Oakland, and having had the benefit of oral argument on August 31, 1998, the motion to dismiss is DENIED.

United States District Court
For the Northern District of California

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1 **A. Substantive Due Process.**

2 The Court declines to dismiss the complaint on substantive due process grounds for
3 the reasons stated in the Court's Memorandum and Order of May 14, 1998.

4 **B. 21 U.S.C. § 885(d) Immunity.**

5 The Court takes judicial notice of the fact that on July 28, 1998, the Oakland City
6 Council adopted Ordinance No. 12076 which added Chapter 8.42 to the Oakland Municipal
7 Code. Chapter 8.42 establishes a "Medical Cannabis Distribution Program" and provides
8 that the City Manager shall designate one or more entities as a medical cannabis provider
9 association which shall "enforce the provisions of this Chapter, including enforcing its
10 purpose of insuring that seriously ill Californians have the right to obtain and use marijuana
11 for medical purposes." Chapter 8.42, section 3. The Ordinance deems the agents, employees
12 and directors of a designated medical cannabis provider association to be officers of the City
13 of Oakland. The Court also takes judicial notice of the fact that the City of Oakland
14 designated defendant Oakland Cannabis Buyers' Cooperative as a Chapter 8.42 medical
15 cannabis provider association.

16 The Oakland Cannabis Buyers' Cooperative and Jones contend that in light of the
17 adoption of Chapter 8.42, and their subsequent status as City of Oakland officials, they are
18 entitled to immunity from this lawsuit under 21 U.S.C. § 885(d). That section provides in
19 relevant part as follows:

20 no civil or criminal liability shall be imposed by virtue of this subchapter . . .
21 upon any duly authorized officer of any State, territory, political subdivision
22 thereof, . . . , who shall be lawfully engaged in the enforcement of any law or
23 municipal ordinance relating to controlled substances.

24 Defendants contend that they distribute marijuana to enforce Chapter 8.42 -- a law relating to
25 controlled substances -- and therefore, under 21 U.S.C. § 885(d), they are entitled to
26 immunity. Accordingly, they contend that the federal government's complaint against them
27 must be dismissed. In other words, defendants argue that since they are violating the federal
28 Controlled Substances Act while enforcing a municipal ordinance relating to controlled
substances, they are entitled to section 885(d) immunity.

 The Court is not persuaded that section 885(d) applies to defendants' conduct for two

1 reasons. First, to be entitled to section 885(d) immunity, defendants must be “lawfully
2 engaged in the enforcement of any law or municipal ordinance relating to controlled
3 substances.” Defendants correctly observe that “lawfully” does not mean that their conduct
4 cannot violate the federal Controlled Substances Act since section 885(d), by its nature,
5 provides immunity for violations of that Act. For example, a state agent who participates in
6 a drug purchase as part of an undercover operation in order to enforce state controlled
7 substances laws would be immune from civil and criminal liability under the federal
8 Controlled Substances Act even though his conduct -- participation in the drug sale --
9 literally violates the federal law. —

10 To be entitled to immunity, however, the law “relating to controlled substances”
11 which the official is enforcing must itself be lawful under federal law, including the federal
12 Controlled Substances Act. Ordinance 12076 states that defendants, as a designated medical
13 cannabis provider association and its agents, are enforcing Chapter 8.42 by distributing
14 medical marijuana. Chapter 8.42, however, to the extent it provides for the distribution of
15 marijuana -- for any purpose -- violates the Controlled Substances Act. As the Court stated
16 in its Memorandum and Order of May 14, 1998, “[a] state law which purports to legalize the
17 distribution of marijuana for any purpose, even a laudable one, nonetheless directly conflicts
18 with federal law, 21 U.S.C. § 841(a).” Memorandum and Order at 17. Since Chapter 8.42
19 provides for the distribution of marijuana, it and the Controlled Substances Act are in
20 “positive conflict.” See 21 U.S.C. § 903. The Court, therefore, denies defendants’ motion to
21 dismiss, not because defendants’ violated the Controlled Substances Act while enforcing
22 Chapter 8.42, but because Chapter 8.42 itself violates the Controlled Substances Act.¹

23 Any other interpretation of section 885(d) would mean that a state or municipality
24 could exempt itself from the Controlled Substances Act. For example, a municipality could
25 enact a law which provides for municipal officials to distribute marijuana to persons over the
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27 ¹At oral argument, defendants’ counsel suggested that defendants are enforcing
28 Proposition 215, California Health & Safety Code § 11362.5. Proposition 215, however, does
not require any enforcement; it merely exempts certain conduct by certain persons from the
California drug laws.

1 age of 18 who request the drug. According to defendants' interpretation of section 885(d),
2 the municipal officials who distribute the drug would be immune from civil and criminal
3 liability (and even injunctive relief) because by distributing the drug they are enforcing a
4 municipal ordinance relating to controlled substances. The Court concludes that the phrase
5 "lawfully engaged in the enforcement of" cannot reasonably be interpreted to apply to such a
6 situation. It is undisputed that Congress never intended such a result. The fact that
7 defendants here are distributing marijuana for medical purposes is immaterial; if defendants'
8 interpretation of section 882(b) is correct all conduct enforcing any law related to a
9 controlled substance is entitled to immunity, regardless of the lawfulness, or even
10 reasonableness, of the law which the officials are purporting to enforce. The Court declines
11 to read section 882(d) so broadly, and the word "lawfully" so narrowly, as to permit such a
12 loophole in the Controlled Substances Act.

13 Defendants' motion to dismiss fails for a second, independent reason. Section 882(b),
14 by its plain terms, provides an official with immunity from civil and criminal liability. In
15 other words, it protects an official from paying compensation or being penalized for conduct
16 in the past which violated the federal Controlled Substances Act. It does not purport to
17 immunize officials from equitable relief enjoining their future conduct. For example,
18 prosecutors enjoy absolute immunity from being held civilly liable under 42 U.S.C. § 1983.
19 See Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976). That immunity, however, does not
20 extend to equitable relief. See Roe v. City and County of San Francisco, 109 F.3d 578, 586
21 (9th Cir. 1997); Fry v. Melaragno, 939 F.2d 832, 839 (9th Cir. 1991).

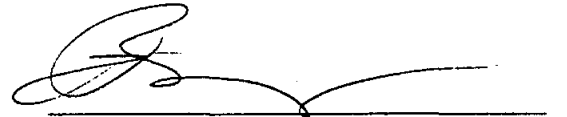
22 Section 885(d) similarly does not immunize officials from lawsuits arising from their
23 violation of the Controlled Substances Act, nor does it immunize officials from being
24 subjected to equitable relief enjoining future conduct. It merely immunizes them from civil
25 or criminal liability. As this lawsuit seeks a permanent injunction and does not seek civil or
26 criminal liability, section 885(d) would not require dismissal of this lawsuit even if that
27 section were to apply. Moreover, the immunity provided by section 885(d) does not extend
28 to relief arising from a finding of civil contempt since such relief is not a "liability," but

1 rather is designed to compel a defendants' compliance with an injunction. If that were not
2 the law, the fact that a prosecutor is not entitled to immunity from equitable actions under 42
3 U.S.C. § 1983 would be meaningless since a court could never enforce its injunctions.

4 **CONCLUSION**

5 For the foregoing reasons, defendants' motion to dismiss in 98-0088 is DENIED.
6 **IT IS SO ORDERED.**

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8 Dated: September 3, 1998


9 **CHARLES R. BREYER**
10 **UNITED STATES DISTRICT JUDGE**

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