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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MARIN ALLIANCE FOR MEDICAL MARIJUANA, a not-for-profit association; JOHN D'AMATO, an individual, MEDTHRIVE, INC., a not-for-profit cooperative corporation doing business as MedThrive Cooperative; THE JANE PLOTITSA SHELTER TRUST, a revocable living trust; THE FELM TRUST, an irrevocable living trust; and THE DIVINITY TREE PATIENTS' WELLNESS COOPERATIVE, INC., a not-for-profit cooperative corporation,

Plaintiffs/Petitioners,

vs.

ERIC HOLDER, Attorney General of the United States; MICHELLE LEONHART, Administrator of the Drug Enforcement Administration; HON. MELINDA HAAG, U.S. Attorney for the Northern District of California,

Defendants/Respondents.

Case No: C 11-05349 SBA

ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Dkts. 5, 23

Three medical marijuana dispensaries, one of their landlords and a medical marijuana patient bring the instant action to challenge recent threats by the United States Department of Justice ("DOJ") to take legal action against landlords of medical marijuana dispensaries in the Northern District of California. The parties are now before the Court on Plaintiffs' motion for a temporary restraining order ("TRO"), which seeks an immediate injunction to prevent the federal government from arresting, prosecuting, or otherwise

1 seeking sanctions or forfeitures against medical marijuana growers and providers who
2 operate under the auspices of California’s Compassionate Use Act of 1996. As will be set
3 forth below, binding Supreme Court and Ninth Circuit precedent foreclose Plaintiffs’
4 claims, and therefore, the Court DENIES Plaintiffs’ motion for a TRO.¹

5 **I. BACKGROUND**

6 **A. STATUTORY OVERVIEW**

7 The instant action arises from the tension that exists between federal and California
8 laws governing marijuana use. Before turning to the substantive issues presented in
9 Plaintiffs’ motion for TRO, it is useful to first review these distinct statutory frameworks.

10 **1. The Federal Controlled Substances Act**

11 After taking office in 1969, President Nixon declared a national “war on drugs.”
12 Gonzales v. Raich, 545 U.S. 1, 10 (2005) [hereinafter “Raich I”]. Shortly thereafter,
13 Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, also
14 known as the Controlled Substances Act (“the Act” or “CSA”). Pub. L. No. 91-513, 84
15 Stat. 1236. “Enacted in 1970 with the main objectives of combating drug abuse and
16 controlling the legitimate and illegitimate traffic in controlled substances, the CSA creates a
17 comprehensive, closed regulatory regime criminalizing the unauthorized manufacture,
18 distribution, dispensing, and possession of substances classified in any of the Act’s five
19 schedules.” Gonzales v. Oregon, 546 U.S. 243, 250 (2006). The CSA places substances in
20 one of five classifications or schedules, see 21 U.S.C. § 812, “based on their potential for
21 abuse or dependence, their accepted medical use, and their accepted safety for use under
22 medical supervision,” Gonzales, 546 U.S. at 250. Substances listed in Schedule I are the
23 most restricted in terms of access and use, while those in Schedule V are the least restricted.
24 Id. In enacting the CSA, “Congress was particularly concerned with the need to prevent the
25 diversion of drugs from legitimate to illicit channels.” Raich I, 545 U.S. at 12-13.

26
27
28 ¹ The Court adjudicates the instant motion without oral argument. See Fed. R. Civ. P. 78(b); Civ. L.R. 7-1(b).

1 Marijuana is classified as a Schedule I substance under the Act, and therefore, is
2 subject to the most restrictions. See 21 U.S.C. § 812(c). Although substances on Schedules
3 II through V may be dispensed and prescribed for medical use, “[S]chedule I drugs cannot
4 be dispensed under a prescription.” United States v. Oakland Cannabis Buyers’ Co-op.,
5 532 U.S. 483, 492 n.5 (2001) [hereinafter “Oakland Cannabis”]. The inclusion of
6 marijuana on Schedule I reflects the federal government’s determination that “marijuana
7 has ‘no currently accepted medical use’ at all.” Id. As such, the federal CSA makes it
8 illegal to manufacture, distribute, or possess marijuana. 21 U.S.C. §§ 841, 844. Further, it
9 is illegal under the CSA to open, use, lease or maintain any place for the purpose of
10 manufacturing, distributing, or using any controlled substance. Id. § 856(a)(1). The only
11 exception to these prohibitions is the possession and use of marijuana in federally-approved
12 research projects. Id. § 823(f).

13 **2. California’s Compassionate Use Act**

14 In contrast to the federal law, California law expressly authorizes the use of
15 marijuana for medical purposes. In 1996, California voters passed Proposition 215, known
16 as the Compassionate Use Act of 1996, which permits seriously ill patients to obtain
17 medical marijuana upon written or oral recommendation of a physician. See Cal. Health &
18 Safety Code § 11362.5. The Compassionate Use Act provides, in part:

19 (b)(1) The people of the State of California hereby find and
20 declare that the purposes of the Compassionate Use Act of 1996
are as follows:

21 (A) To ensure that seriously ill Californians have the right to
22 obtain and use marijuana for medical purposes where that
23 medical use is deemed appropriate and has been recommended
24 by a physician who has determined that the person’s health
would benefit from the use of marijuana in the treatment of
cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma,
arthritis, migraine, or any other illness for which marijuana
provides relief.

25 (B) To ensure that patients and their primary caregivers who
26 obtain and use marijuana for medical purposes upon the
27 recommendation of a physician are not subject to criminal
prosecution or sanction.

28 (C) To encourage the federal and state governments to
implement a plan to provide for the safe and affordable

1 distribution of marijuana to all patients in medical need of
2 marijuana.

3 Cal. Health & Safety Code § 11362.5(b)(1)(A)-(C). In 2003, the California legislature
4 added the Medical Marijuana Program, *id.* §§ 11362.7-11362.83, to “address issues not
5 included in the CUA [i.e., Compassionate Use Act] so as to promote the fair and orderly
6 implementation of the CUA.” *People v. Wright*, 40 Cal. 4th 81, 85 (2006).

7 **B. LEGAL DEVELOPMENTS**

8 The conflict between the federal CSA and California’s Compassionate Use Act with
9 respect to the issue of medical marijuana has spawned several Supreme Court and Ninth
10 Circuit decisions, as well as other litigation. These decisions are controlling with respect to
11 most of the claims alleged in the Amended Complaint filed in this action and otherwise
12 animate the Court’s analysis of the issues presented in Plaintiffs’ motion for TRO. These
13 cases are summarized below.

14 **1. Oakland Cannabis**

15 In January 1998, the United States brought an action under the CSA in the Northern
16 District of California against the Oakland Cannabis Cultivators Club (“the cooperative”)
17 and its executive director seeking to enjoin them from distributing and manufacturing
18 marijuana. *Oakland Cannabis*, 532 U.S. at 487. Judge Charles Breyer granted the
19 Government’s motion for preliminary injunction, and later denied the cooperative’s motion
20 to modify the injunction to allow for the distribution of “medically necessary” marijuana.
21 *Id.* The cooperative appealed, and the Ninth Circuit reversed and remanded the ruling on
22 the motion to modify the injunction. *Id.* at 488. The Ninth Circuit held that medical
23 necessity was a legally cognizable defense and the district court had mistakenly believed it
24 possessed no discretion to issue an injunction more limited in scope than the CSA. *Id.* In
25 addition, the Ninth Circuit found that the district court should have weighed the public
26 interest and considered factors such as the serious harm in depriving patients of marijuana
27 in deciding whether to modify the injunction. *Id.*

28

1 The Supreme Court reversed the decision of the Ninth Circuit, holding that there is
2 no medical necessity exception to the CSA’s prohibitions on manufacturing and
3 distributing marijuana. Id. at 490. In reaching its decision, the Court explained that a
4 necessity defense is inapt where the legislature has made a “determination of values.” Id.
5 With respect to the value of medical marijuana, the Court explained that Congress, in
6 enacting the CSA, had made a legislative determination that “marijuana has no medical
7 benefits worthy of an exception (outside the confines of a Government-approved research
8 project).” Id. at 491. While some drugs may be dispensed for medical use, the same is not
9 true for marijuana, which, for purposes of the CSA, has “no currently accepted medical use
10 at all.” Id. (internal quotations omitted). Additionally, the Court held that the Ninth Circuit
11 erred in instructing the district court to consider “any and all factors that might relate to the
12 public interest or the conveniences of the parties, including the medical needs of the
13 cooperative’s patients” because “[c]ourts of equity cannot, in their discretion, reject the
14 balance that Congress has struck in the [CSA].” Id. at 497-98.

15 2. **Raich I**

16 Four years after rendering its decision in Oakland Cannabis, the Supreme Court
17 again addressed the interplay between the Compassionate Use Act and the CSA in
18 Gonzales v. Raich, another case originating from this District. In that case, plaintiffs-
19 respondents—two California residents who, in accordance with their physician’s
20 recommendations used marijuana for serious medical conditions—sought injunctive and
21 declaratory relief prohibiting enforcement of the CSA to the extent that it prevented them
22 from possessing, obtaining, or manufacturing marijuana for their personal medical use.
23 Raich I, 545 U.S. at 7-8. They alleged that the CSA’s categorical prohibition against the
24 manufacture and possession of marijuana as applied to the intrastate manufacture and
25 possession of marijuana for medical purposes under California law exceeded Congress’
26 authority under the Commerce Clause. Id. at 8. Judge Martin Jenkins denied the
27 respondents’ motion for preliminary injunction. Id. On appeal, the Ninth Circuit reversed
28 and ordered the district court to enter the requested injunction on the grounds that

1 respondents had demonstrated a strong likelihood of success on their claim that, as applied
2 to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority.

3 Id.

4 The Supreme Court reversed the Ninth Circuit and held that the legislature's
5 authority under the Commerce Clause includes the power to prohibit local cultivation and
6 use of marijuana. Id. at 9. The Court reasoned that the CSA was within Congress'
7 Commerce Clause power because production of marijuana, even if limited to home
8 consumption, "has a substantial effect on the supply and demand in the national market for
9 that commodity." Id. at 19. In the Supreme Court's view, the exemptions permitting
10 marijuana use under the Compassionate Use Act "will have a significant impact on both the
11 supply and demand sides of the market for marijuana," since they provide physicians with
12 an economic incentive to grant their patients permission to use the drug which, in turn, "can
13 only increase the supply of marijuana in the California market." Id. at 31. The Court
14 remanded the case to the Ninth Circuit for further proceedings consistent with its opinion.

15 Id. at 33.

16 3. Raich II

17 Following remand from the Supreme Court, plaintiff Raich ("Raich") renewed her
18 claims based on common law necessity, fundamental rights protected by the Fifth and
19 Ninth Amendments, and rights reserved to the states under the Tenth Amendment. Raich v.
20 Gonzales, 500 F.3d. 850, 857 (9th Cir. 2007) [hereinafter "Raich II"].² The court
21 concluded that Raich had failed to meet her burden of establishing a likelihood of success
22 on these claims, and affirmed the district court's denial of her motion for preliminary
23 injunction. Id.

24 In her common law necessity claim, Raich argued that the federal government was
25 precluded from enforcing the CSA against her because she faced a Hobson's choice of
26

27 ² In its initial decision, the Ninth Circuit did not reach any issues beyond the
28 Commerce Clause. Raich II, 500 F.3d at 856. On remand, the court considered the
remaining arguments relating to the motion for preliminary injunction. Id.

1 either complying with the CSA and enduring excruciating pain and possibly death—or
2 violating its provisions by using marijuana. Id. at 858. While acknowledging that Raich
3 had understandably chosen “the lesser evil” of using marijuana and had otherwise satisfied
4 the factual predicate for a necessity defense, the court questioned whether such a defense
5 remained legally viable after the Supreme Court’s decision in Oakland Cannabis. Raich II,
6 500 F.3d at 859-60. Consequently, the court concluded that Raich’s necessity claim “is
7 best resolved within the context of a specific prosecution under the [CSA],” as opposed to a
8 civil action seeking to enjoin enforcement of the CSA. Id. at 860.

9 Next, the court considered Raich’s claim for substantive due process under the Fifth
10 Amendment, which states that “[n]o person shall . . . be deprived of life, liberty, or
11 property, without due process of law[.]” U.S. Const. amend. V. Citing the two-step
12 approach enunciated in Washington v. Glucksberg, 521 U.S. 702, 719 (1997), the Raich II
13 court considered (1) whether the “right is deeply rooted in this nation’s history and
14 traditions implicit in the concept of ordered liberty,” and (2) “the description of the asserted
15 fundamental right.” Raich II, 500 F.3d at 862-63. Considering the second step first, the
16 court found that it was constrained under Supreme Court precedent to “narrowly” identify
17 the right at stake. Id. at 864. Though Raich broadly described her right as one to “make
18 life-shaping medical decisions that are necessary to preserve the integrity of her body,
19 avoid intolerable physical pain, and preserve her life,” the court concluded that Raich’s
20 asserted right was more accurately characterized as “the right to use marijuana to preserve
21 bodily integrity, avoid pain and preserve her life.” Id. at 864 (emphasis in original).

22 The court then considered the question of whether Raich’s asserted right was one
23 that was deeply rooted in United States’ history and tradition and implicit in the concept of
24 ordered liberty. Id. To answer that question, the court looked to the Supreme Court’s
25 landmark decision in Lawrence v. Texas, 539 U.S. 558 (2003), which involved a challenge
26 to a Texas state law that criminalized sodomy between consenting, adult homosexuals. Id.
27 at 562-63; Raich II, 530 F.3d at 865-66. Prior to Lawrence, the Supreme Court had upheld
28 Georgia’s then-applicable sodomy statute, holding that there was no constitutionally

1 protected right for “homosexuals to engage in acts of consensual sodomy.” Bowers v.
2 Hardwick, 478 U.S. 186, 192 (1986). The Lawrence court, however, observed that even if
3 a particular interest has not been deemed as fundamental in the past, “an emerging
4 awareness” of a liberty interest in modern times may require protection of an asserted right.
5 Lawrence, 539 U.S. at 572. The Court then pointed out that of the twenty-five states that
6 had laws criminalizing sodomy when it decided Bowers, only thirteen still had such laws
7 and a mere four enforced their laws only against homosexual conduct. Id. at 573. In those
8 states that maintained sodomy laws, “there [was] a pattern of nonenforcement with respect
9 to consenting adults acting in private.” Id.

10 Raich argued that over the course of the last decade, there has been an “emerging
11 awareness of marijuana’s medical value,” as evidenced by the growing number of states
12 that have passed laws permitting the use of marijuana for medical reasons. Id. at 865. The
13 Ninth Circuit recognized the potential viability of Raich’s argument, but ultimately found
14 that the right to use medical marijuana had not yet reached the point of being
15 “fundamental” and “implicit in the concept of ordered liberty.” Id. at 866. While
16 acknowledging that since 1996 medical marijuana has been legalized in eleven states, the
17 court concluded that medical marijuana use had not “obtained the degree of recognition
18 today that private sexual conduct had obtained by 2004 in Lawrence.” Id. at 865. The
19 Raich II court did note, however, that medical marijuana may attain similar status “sooner
20 than expected.” Id. at 866.

21 Finally, the court addressed Raich’s claim that the CSA infringes upon the State of
22 California’s police powers, as conferred by the Tenth Amendment. Id.³ The Ninth Circuit
23 agreed that the Compassionate Use Act is “aimed at providing for the health of the state’s
24 citizens [and] appears to fall squarely within the general rubric of the state’s police
25 powers”; nonetheless, the Court rejected Raich’s contention that the CSA contravened the
26

27 ³ The Tenth Amendment states in its entirety as follows: “The powers not delegated
28 to the United States by the Constitution, nor prohibited by it to the States, are reserved to
the States respectively, or to the people.” U.S. Const. amend. X.

1 Tenth Amendment. Id. at 867. The court found that “after Gonzales v. Raich, it would
2 seem that there can be no Tenth Amendment violation in this case,” and for that reason,
3 concluded that “Raich [had] failed to demonstrate a likelihood of success on her claim that
4 the [CSA] violates the Tenth Amendment.” Id.

5 **4. The Santa Cruz Lawsuit**

6 During the pendency of the district court proceedings in Raich v. Ashcroft, N.D. Cal.
7 No. C 02-4872 MJJ, the County of Santa Cruz and others filed suit in this Court seeking to
8 enjoin various federal government defendants from conducting further raids or seizures
9 against Plaintiff Wo/Men’s Alliance for Medical Marijuana (“WAMM”) and its member-
10 patients, and from conducting raids or seizures against patients using marijuana for
11 medicinal purposes in compliance with California’s Compassionate Use Act within the City
12 and County of Santa Cruz. County of Santa Cruz v. Aschcroft, No. C 03-1802 JF
13 [hereinafter “Santa Cruz”]. On January 25, 2010, the parties filed a Joint Stipulation of
14 Dismissal Without Prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii). Am.
15 Compl. Ex. 5 at 4-6, Dkt. 21-5. The stipulation states that “[a]s a result of the issuance of
16 the Medical Marijuana Guidance, plaintiffs agree to dismiss the case without prejudice.”
17 Id.

18 The “Medical Marijuana Guidance” attached to the stipulation is a memorandum
19 from the United States Department of Justice (“DOJ”), dated October 19, 2009, prepared by
20 then Deputy Attorney General David Ogden (the “Ogden memo”). The purpose of the
21 Ogden memo, which is addressed to “SELECTED UNITED STATES ATTORNEYS,” is
22 to provide “clarification and guidance to federal prosecutors in States that have enacted
23 laws authorizing the medical use of marijuana.” Id. In pertinent part, the DOJ advises that:

24 The prosecution of significant drug traffickers of illegal drugs,
25 including marijuana, and the disruption of illegal drug
26 manufacturing and trafficking networks, continues to be a core
27 priority of the Department’s efforts against narcotics and
28 dangerous drugs, and the Department’s investigative and
prosecutorial resources should be directed towards these
objectives. As a general matter, pursuit of these priorities
should not focus federal resources in your States on individuals
whose actions are in clear and unambiguous compliance with
existing state laws providing for the medical use of marijuana.

1 Id. at 2. The above notwithstanding, the DOJ explicitly states that: “This memorandum
2 does not alter in any way the Department’s authority to enforce federal law . . . [and] does
3 not ‘legalize’ marijuana or provide a legal defense to a violation of federal law
4 Rather, this memorandum is intended solely as a guide to the exercise of investigative and
5 prosecutorial discretion.” Id.

6 C. THE INSTANT LAWSUIT

7 In late September and early October 2011, the United States Attorneys for each of
8 the four federal districts in California contacted various entities involved in California’s
9 Medical Marijuana program, alleging that marijuana dispensaries, landlords who rent to
10 dispensaries, patients and other supporting commercial entities are in violation of federal
11 law. Am. Compl. ¶ 21. By letters dated September 28, 2011, Melinda Haag, the United
12 States Attorney for the Northern District of California, contacted landlords providing space
13 to MAMM, Medthrive Cooperative (“Medthrive”) and The Divinity Tree, notifying them
14 that medical marijuana dispensaries are illegal under federal law and that they may be
15 subject to “criminal prosecution, imprisonment, fines, and forfeiture of assets, including the
16 real property on which the dispensary is operating.” E.g., Am. Compl. Exs. 1-3. The
17 letters (hereinafter “Haag letters”) warn: “Please take necessary steps to discontinue the
18 sale and/or distribution of marijuana at the above-referenced location within 45 days of this
19 letter.” Id.

20 In response to the Haag letters, MAMM and John D’Amato, a medical marijuana
21 patient, filed suit in this Court on November 4, 2011 seeking to enjoin the Attorney
22 General, the Administrator of the Drug Enforcement Agency, and the U.S. Attorney for the
23 Northern District of California (collectively “Defendants”) from arresting, prosecuting, or
24 otherwise seeking sanctions or forfeitures against them and similarly situated medical
25 marijuana growers and providers who operate in compliance with California state law.
26 Compl., Dkt. 1. They also seek a declaration that enforcement of the CSA is
27 unconstitutional to the extent that it prevents Plaintiffs and similarly situated individuals
28 from obtaining medical marijuana with a doctor’s recommendation. Id. Four days later on

1 on November 8, 2011, Plaintiffs filed a Motion for a TRO and Preliminary Injunction. First
2 Mot. Prelim. Inj., Dkt. 5.⁴

3 On November 11, 2011, Plaintiffs filed an Amended Complaint adding four
4 plaintiffs—two additional dispensaries, Medthrive and The Divinity Tree, and Medthrive’s
5 landlords, the Jane Plotitsa Shelter Trust and the Felm Trust. Am. Compl. ¶¶ 9-12.⁵ Like
6 the original Complaint, the Amended Complaint alleges six claims for relief: (1) judicial
7 estoppel, (2) equitable estoppel, (3) violation of the Ninth Amendment, (4) violation of the
8 Tenth Amendment, (5) violation of the Equal Protection Clause of the Fourteenth
9 Amendment, and (6) violation of the Commerce Clause. Am. Compl. ¶¶ 24-52. Along
10 with their Amended Complaint, Plaintiffs filed an Amended Motion for a TRO and
11 Preliminary Injunction. Am. Mot. Prelim. Inj., Dkt. 23. Pursuant to an agreement among
12 the parties, Defendants filed their Opposition to the TRO application on November 15,
13 2011. Opp’n, Dkt. 31. The matter has been fully briefed, and it is now ripe for
14 adjudication. Dkt. 32.⁶

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16 ⁴ On the same date that Plaintiffs filed this action, their counsel filed three virtually
17 identical actions on behalf of different entities and individuals in the Eastern, Southern and
18 Central Districts of California. See Sacramento Non-Profit Collective v. Holder, E.D. Cal.
19 No. C 11-2939 GEB; Conejo Wellness Cntr. Coop. v. Holder, C.D. Cal. No. C 11-9200
20 DMG; Alternative Cmty. Health Care v. Holder, S.D. Cal. No. C 11-2585 DMS. TRO
motions were filed in the Central and Southern District actions. On November 18, 2011,
Judge Dana Sabraw of the Southern District issued an order denying plaintiffs’ application
for a TRO. Alternative Cmty. Health Care, No. C 11-2585 DMS, 2011 WL 5827200 (S.D.
Cal. Nov. 18, 2011).

21 ⁵ The Court also notes that at least one of the named Plaintiffs in this suit appears to
22 be foreclosed from obtaining the requested relief in light of a previous order from Judge
23 Breyer of this Court permanently enjoining the MAMM “from engaging in the distribution
24 of marijuana, the possession of marijuana with the intent to distribute, or the manufacture
25 of marijuana with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1).” See Opp’n
Ex. A, Dkt. 31-1; see also Wash. Mut. Inc. v. United States, 636 F.3d 1207, 1216 (9th Cir.
2011) (“Collateral estoppel, or issue preclusion, bars the relitigation of both issues of law
and issues of fact actually adjudicated in previous litigation between the same parties.”).

26 ⁶ The parties agreed that Defendants were to file an opposition only as to the TRO
27 motion, and that following resolution of such request, they would meet and confer
28 regarding a briefing schedule with respect to the request for preliminary injunction. See
11/10/11 Letter, Dkt. 20. Absent prior leave of Court, any further briefing in this matter
shall conform to the page limits set forth in the Civil Local Rules and this Court’s Standing
Orders.

1 **II. LEGAL STANDARD**

2 The same standard applies to a motion for a TRO and a motion for a preliminary
3 injunction. See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839 n.7
4 (9th Cir. 2001). To obtain a TRO or preliminary injunction, the moving party must show:
5 (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving
6 party in the absence of preliminary relief; (3) that the balance of equities tips in the moving
7 party's favor; and (4) that an injunction is in the public interest. Winter v. Natural Res.
8 Def. Council, Inc., 555 U.S. 7, 20 (2008). Under the Ninth Circuit's "sliding scale"
9 approach, the first and third elements are to be balanced such that "serious questions" going
10 to the merits and a balance of hardships that "tips sharply" in favor of the movant are
11 sufficient for relief so long as the other two elements are also met. Alliance for the Wild
12 Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Nevertheless, a preliminary
13 injunction is "an extraordinary remedy that may only be awarded upon a clear showing that
14 the plaintiff is entitled to such relief," Winter, 555 U.S. at 22, and the moving party bears
15 the burden of meeting all four Winter prongs, see Cottrell, 632 F.3d at 1135; DISH
16 Network Corp. v. FCC, 653 F.3d 771, 776-77 (9th Cir. 2011).

17 **III. DISCUSSION**

18 **A. LIKELIHOOD OF SUCCESS ON THE MERITS**

19 **1. Judicial Estoppel**

20 In their first claim for relief, Plaintiffs allege Defendants are judicially estopped
21 from instituting any legal proceedings against them under the CSA in light of the
22 stipulation of dismissal and attached Ogden memo filed in Santa Cruz. Am. Compl. ¶¶ 24-
23 27; Pls.' Am. Mem. Supp. Mot. Prelim. Inj. ("Pls.' Am. Mem.") at 12-13, Dkt. 27.
24 "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage
25 by asserting one position, and then later seeking an advantage by taking a clearly
26 inconsistent position." Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th
27 Cir. 2001). Application of the doctrine is made on a case-by-case basis and is entrusted to
28 the discretion of the Court. See Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). Id.

1 As a threshold matter, it is entirely questionable whether the doctrine applies to
2 Defendants in view of the inherent policy questions presented. “[I]t is well settled that the
3 Government may not be estopped on the same terms as any other litigant.” Heckler v.
4 Cnty. Health Servs., Inc., 467 U.S. 51, 60 (1984). “[B]road interests of public policy may
5 make it important to allow a change of positions that might seem inappropriate as a matter
6 of merely private interests.” New Hampshire v. Maine, 532 U.S. 742, 755 (2001) (internal
7 quotation marks omitted). This is particularly true where estoppel “would compromise a
8 governmental interest in enforcing the law.” Id. Here, Plaintiffs seek to estop Defendants
9 from taking further action to enforce the CSA as it applies to medical marijuana in
10 California. This is precisely the type of circumstance in which the Supreme Court has
11 counseled against applying the doctrine of judicial estoppel to the Government. See
12 Heckler, 467 U.S. at 60 (“When the Government is unable to enforce the law because the
13 conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in
14 obedience to the rule of law is undermined.”).

15 But even if Defendants were subject to judicial estoppel, Plaintiffs have failed to
16 establish that the relevant factors justify its application in this instance. Although the
17 doctrine has no precise bounds, certain clear prerequisites exist for its application in a
18 particular case. New Hampshire, 532 U.S. at 750-51. Specifically, in determining whether
19 a party is subject to judicial estoppel, the court considers: “(1) whether a party’s later
20 position is ‘clearly inconsistent’ with its original position; (2) whether the party has
21 successfully persuaded the court of the earlier position; and (3) whether allowing the
22 inconsistent position would allow the party to ‘derive an unfair advantage or impose an
23 unfair detriment on the opposing party.’” United States v. Liquidators of European Fed.
24 Credit Bank, 630 F.3d 1139, 1148 (9th Cir. 2011) (citations omitted). Plaintiffs have failed
25 to make a clear showing in support of these salient considerations.

26 First, there is no clear inconsistency between the Government’s position in Santa
27 Cruz and the actions threatened in the Haag letters. According to Plaintiffs, the
28 Government “entered a stipulation [in Santa Cruz] predicated on an announced change in

1 policy by the new administration and promised to abide by this new policy enunciated in
2 the Medical Marijuana Guidance” such that “users and dispensers of medical marijuana
3 operating in accordance with their state laws would no longer be prosecuted by the federal
4 government under the CSA.” Pls.’ Am. Mem. at 11, 13 (emphasis added). The
5 Government “promised” no such thing. To the contrary, in the Santa Cruz stipulation, the
6 parties explicitly agreed that the government reserved the right to “withdraw, modify, or
7 cease to follow the [Ogden memo],” and, on that occasion, the Santa Cruz action could be
8 reinstated. See Am. Compl. Ex. 5 at 3. Indeed, the Ogden memo itself does not promise
9 to forbear any future enforcement actions under the CSA and, in fact, explicitly states that
10 the DOJ “does not alter in any way [its] authority to enforce federal law[.]” Id. at 5.
11 Additionally, the memorandum makes clear that it was “intended solely as a guide to the
12 exercise of investigative and prosecutorial discretion.” Id.⁷

13 Second, Plaintiffs have failed to show that Defendants successfully persuaded the
14 district court in Santa Cruz to dismiss the action based upon any promise to indefinitely
15 forego enforcement of the CSA against persons or entities involved in the production, sale
16 or use of medical marijuana. As noted above, the stipulation for dismissal expressly recites
17 the possibility that Defendants could “withdraw, modify, or cease to follow the Medical
18 Marijuana Guidance [i.e., the Ogden memo]” in which case the plaintiffs could reinstate
19 their case. Am. Compl. Ex. 5 at 2. The parties filed their stipulation for dismissal under
20 Federal Rule of Civil Procedure 41(a)(1)(ii), which provides that “the plaintiff may dismiss
21 an action without a court order by filing: [¶] . . . a stipulation of dismissal signed by all
22 parties who have appeared.” Fed. R. Civ. P. 41(a)(1)(ii) (emphasis added). Although
23

24 ⁷ Notably, other federal courts reviewing the Ogden memo have rejected the
25 argument that the memo embodies a “promise” by the federal government not to prosecute
26 marijuana growers. See United States v. Stacy, 734 F. Supp. 2d 1074, 1080 (S.D. Cal.
27 2010) (“No promise was made [in the Ogden memo] that the DEA would never raid
28 medical marijuana dispensaries claiming to operate in compliance with state law or that
individuals operating such dispensaries would not be prosecuted.”); United States v. Hicks,
722 F. Supp. 2d 829, 833 (E.D. Mich. 2010) (“The Department of Justice’s discretionary
decision to direct its resources elsewhere [in the Ogden memo] does not mean that the
federal government now lacks the power to prosecute those who possess marijuana.”).

1 Judge Fogel countersigned the stipulation for dismissal, his approval was unnecessary for
2 the dismissal to become effective.

3 Finally, Plaintiffs have failed to establish that Defendants gained an unfair advantage
4 by virtue of submitting the Ogden memo as a basis for the stipulation for dismissal in Santa
5 Cruz. Since Plaintiffs were not parties to the Santa Cruz action, it is unclear how
6 Defendants could have obtained any advantage over Plaintiffs based on their decision to
7 send the Haag letters to their landlords. See State of Ariz. v. Shamrock Foods Co., 729
8 F.2d 1208, 1215 (9th Cir. 1984) (“A plaintiff who has obtained relief from an adversary by
9 asserting and offering proof to support one position may not be heard later in the same
10 court to contradict himself in an effort to establish against the same adversary a second
11 claim inconsistent with his earlier contention.”) (emphasis added and internal quotation
12 marks omitted). That aside, Plaintiffs overlook that the stipulation for dismissal filed in
13 Santa Cruz permitted the plaintiffs in that action to reinstitute their lawsuit in the event the
14 Government declined to follow the guidance set forth in the Ogden memo. Thus, even if
15 Plaintiffs herein had standing to assert any prejudice on behalf of the plaintiffs in Santa
16 Cruz, it is clear that any alleged change in the Defendants’ enforcement policy has not
17 conferred an unfair advantage upon them.

18 In sum, the Court finds that Plaintiffs have failed to show the requisite likelihood of
19 success on the merits of their judicial estoppel claim.

2. Equitable Estoppel

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2 Plaintiffs second claim is for equitable estoppel—specifically, estoppel by
3 entrapment—and avers that they reasonably relied on the Ogden memo as a basis for
4 leasing or continuing to lease their properties to medical marijuana operators. Am. Compl.
5 ¶¶ 28-32; Pls.’ Am. Mem. at 14 n.16. Estoppel by entrapment is a defense in criminal
6 actions wherein a government official or agent leads a defendant into criminal conduct by
7 affirmatively misrepresenting what is legal. See United States v. Tallmadge, 829 F.2d 767,
8 773 (9th Cir. 1987). To succeed under this theory, the defendant must show “that the
9 government affirmatively told him the proscribed conduct was permissible, and that he
10 reasonably relied on the government’s statement.” United States v. Ramirez-Valencia, 202
11 F.3d 1106, 1109 (9th Cir. 2000) (emphasis added).

12 Plaintiffs’ estoppel by entrapment theory fails for at least three reasons. First, the
13 doctrine has no application here because there is no allegation or evidence that any criminal
14 proceeding has been initiated against Plaintiffs. Second, nothing in the Ogden memo
15 affirmatively informs medical marijuana growers and distributors that their conduct is legal.
16 To the contrary, the Ogden memo plainly states that “[t]his guidance regarding resource
17 allocation does not ‘legalize’ marijuana or provide a defense to a violation of federal
18 law[.]” See Am. Compl. Ex. 5 at 5 (emphasis added). Third, even if the Government had
19 affirmatively informed Plaintiffs that their conduct was legal—which it clearly did not—
20 any reliance on the Ogden memo would be unreasonable. The memorandum was not
21 directed to landlords or the medical marijuana community in general; rather, it was directed
22 to various U.S. Attorneys, not as a statement of official policy, but “solely as a guide to the
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1 exercise of investigative and prosecutorial discretion.” Id.⁸ As such, Plaintiffs are hard
2 pressed to claim that it was reasonable to rely on a memorandum that was not even
3 addressed to them—and which unequivocally did not state that marijuana for medical
4 reasons was “legal.”

5 Plaintiffs have thus failed to show the requisite likelihood of success on the merits of
6 their equitable estoppel claim.

7 3. Due Process

8 Plaintiffs’ third claim alleges that Defendants have violated their right to substantive
9 due process by threatening to seize their property and pursue civil and criminal sanctions
10 against them. Am. Compl. ¶¶ 33-38. The Ninth Amendment, in tandem with the Fifth
11 Amendment, protects fundamental rights and liberties “which are, objectively, ‘deeply
12 rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered
13 liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” Raich II,
14 500 F.3d at 862 (quoting Glucksberg, 521 U.S. at 720-21).⁹ As discussed, the Court’s
15 evaluation of Plaintiffs’ due process claim requires an examination of (1) the fundamental
16 right being asserted and (2) whether the “right is deeply rooted in this nation’s history and
17 traditions implicit in the concept of ordered liberty[.]” Id.

18 Here, Plaintiffs describe the fundamental rights at issue as the “rights to bodily
19 integrity that may not be interfered with by the federal government” and “to consult with
20 their doctors about their bodies and health.” Am. Compl. ¶¶ 37. Plaintiffs’ articulation of
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22 ⁸ Moreover, once Plaintiffs received the Haag letters, which placed them on notice
23 that their actions may violate the CSA and afforded them forty-five days to cease any
24 medicinal marijuana-related activities, they were on notice to inquire further regarding the
25 legality of their conduct. As such, to the extent that Plaintiffs reasonably relied on the
26 Ogden memo, such reliance was no longer reasonable after their receipt of the Haag letters.
27 See United States v. Weitzenhoff, 35 F.3d 1275, 1290 (9th Cir. 1993) (noting that in order
28 to invoke a defense of estoppel by entrapment, “the defendant must show that he relied on
the official’s statement and that his reliance was reasonable in that a person sincerely
desirous of obeying the law would have accepted the information as true and would not
have been put on notice to make further inquiries.”).

⁹ Raich II is discussed in detail in the Background section of this Order at Section
I.B.3

1 their asserted rights is virtually identical to rights which the plaintiff in Raich II sought to
2 vindicate. See 500 F.3d at 864 (“[The plaintiff] asserts that she has a fundamental right to
3 ‘make life-shaping medical decisions that are necessary to preserve the integrity of her
4 body, avoid intolerable physical pain, and preserve her life.’”). In Raich II, the Ninth
5 Circuit held that the plaintiff’s “careful statement” of her rights was flawed because
6 “[c]onspicuously missing from [her] asserted fundamental right is its centerpiece: that she
7 seeks the right to use marijuana to preserve bodily integrity, avoid pain, and preserve her
8 life.” Id. (emphasis in original). As in Raich II, Plaintiffs’ purported fundamental right
9 conspicuously omits any reference to “marijuana.” See Pls.’ Am. Mem. at 16-18. Thus,
10 Raich II compels the Court to construe Plaintiffs’ asserted right narrowly as the right to use
11 marijuana in order to preserve the bodily integrity of medical marijuana patients. Id.

12 The second part of the Glucksberg test requires the Court to consider whether the
13 right to use marijuana to preserve bodily integrity is a right which is deeply rooted in this
14 nation’s history and traditions implicit in the concept of ordered liberty. Raich II, 500 F.3d
15 at 862. Again, Raich II is directly on point:

16 We agree with Raich that medical and conventional
17 wisdom that recognizes the use of marijuana for medical
18 purposes is gaining traction in the law as well. But that legal
19 recognition has not yet reached the point where a conclusion
20 can be drawn that the right to use medical marijuana is
21 “fundamental” and “implicit in the concept of ordered
22 liberty.” . . . For the time being, this issue remains in “the arena
23 of public debate and legislative action.”

24 As stated above, Justice Anthony Kennedy told us that
25 “times can blind us to certain truths and later generations can
26 see that laws once thought necessary and proper in fact serve
27 only to oppress.” . . . For now, federal law is blind to the
28 wisdom of a future day when the right to use medical marijuana
to alleviate excruciating pain may be deemed fundamental.
Although that day has not yet dawned, considering that during
the last ten years eleven states have legalized the use of medical
marijuana, that day may be upon us sooner than expected. Until
that day arrives, federal law does not recognize a fundamental
right to use medical marijuana prescribed by a licensed
physician to alleviate excruciating pain and human suffering.

500 F.3d at 866 (emphasis added).

1 Plaintiffs argue that the “future day” envisioned in Raich II has arrived. Pls.’ Am.
2 Mem. at 23. They insist that, much like the gradual elimination of state anti-sodomy laws
3 paved the way for the Lawrence Court’s decision to overrule Bowers, five states and the
4 District of Columbia have enacted laws permitting the medical use of marijuana since the
5 Ninth Circuit rendered its decision in Raich II four years ago in 2007. Id. at 6 n.7. It is
6 quite clear, however, that the use of medical marijuana has not reached the “degree of
7 recognition . . . that private sexual conduct had obtained . . . in Lawrence.” Raich II, 500
8 F.3d at 865. In Lawrence, only thirteen states continued to maintain anti-sodomy laws, and
9 there was an overall “pattern of nonenforcement with respect to consenting adults acting in
10 private.” 539 U.S. at 573. Although the number of jurisdictions that have medical
11 marijuana laws has increased by six, the fact remains that the majority of states do not
12 recognize the right to use marijuana for medicinal purposes. Moreover, as to those states
13 that have not legalized medical marijuana, there is no allegation or evidence of a pattern of
14 non-enforcement of laws proscribing its use. Finally—and significantly—it is difficult to
15 reconcile the purported existence of a fundamental right to use marijuana for medical
16 reasons with Congress’ pronouncement that “for purposes of the [CSA], marijuana has no
17 currently accepted medical use at all.” Oakland Cannabis, 532 U.S. at 491; see also 21
18 U.S.C. § 812(b)(1) (classifying marijuana as a Schedule I drug with no approved medical or
19 other use).

20 In sum, the Court is bound by Raich II, which compels the conclusion that Plaintiffs
21 have failed to demonstrate a likelihood of success on their third claim for due process.

22 4. Tenth Amendment

23 Plaintiffs’ fourth claim alleges that Defendants’ “threatened actions to raid, arrest,
24 prosecute, punish, seize medical cannabis of, forfeit property of, or seek civil or
25 administrative sanctions against” them violates California’s state police powers in
26 contravention of the Tenth Amendment. This claim is legally indistinguishable from the
27 Tenth Amendment claim which the Ninth Circuit considered and rejected in Raich II. 500
28 F.3d at 867 (holding that “after [Raich I], it would seem that there can be no Tenth

1 Amendment violation in this case.”); see also United States v. Jones, 231 F.3d 508, 515
2 (9th Cir. 2000) (“We have held that if Congress acts under one of its enumerated powers,
3 there can be no violation of the Tenth Amendment.”). In a footnote, Plaintiffs attempt to
4 dismiss the Raich II court’s rejection of the plaintiff’s Tenth Amendment claim as mere
5 dicta. Pls.’ Am. Mem. at 25 n.24. Their attempt to do so is entirely specious, as this clearly
6 was a holding of the court—which is binding on this Court. See Zuniga v. United Can Co.,
7 812 F.2d 443, 450 (9th Cir. 1987) (“District courts are, of course, bound by the law of their
8 own circuit[.]”). Thus, as in Raich II, Plaintiffs have failed to show a likelihood of success
9 on the merits of their Tenth Amendment claim.

10 **5. Equal Protection**

11 Plaintiffs’ fifth claim alleges that the actions threatened by Defendants in the Haag
12 letters violate their right to equal protection. Am. Compl. ¶¶ 44-47. Specifically, they
13 complain that Defendants are discriminating against “medical cannabis patients in
14 California without a rational basis” because they (1) allow patients in the federal
15 government’s IND program¹⁰ to receive medical marijuana and (2) have permitted patients
16 in Colorado access to medical marijuana through state-licensed distributors. Id. ¶ 45.
17 Plaintiffs allege that Defendants have no rational basis for “enforcing federal laws
18 prohibiting cannabis possession and distribution” in California while simultaneously
19 allowing medical marijuana to be used in the IND program and by Colorado patients. Am.
20 Compl. ¶ 46; Pls.’ Am. Mem. at 26.

21 “[T]he Due Process Clause of the Fifth Amendment subjects the federal government
22 to constitutional limitations that are the equivalent of those imposed on the states by the
23 Equal Protection Clause of the Fourteenth Amendment.” Consejo De Desarrollo
24 Economico De Mexicali, A.C. v. United States, 482 F.3d 1157, 1170 n.4 (9th Cir. 2007).
25 “The Equal Protection Clause . . . is essentially a direction that all persons similarly situated
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27 ¹⁰ The patients to which Plaintiffs refer are participants in the federal investigational
28 new drug (IND) program who receive drugs under clinical investigation in a controlled
study. See 21 U.S.C. § 355(b)-(d).

1 should be treated alike.” City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432,
2 439 (1985); Philips v. Perry, 106 F.3d 1420, 1424-25 (9th Cir. 1997). “The requirements
3 for a selective-prosecution claim draw on ordinary equal protection standards.” United
4 States v. Armstrong, 517 U.S. 456, 465 (1996). “To make a claim for selective
5 prosecution, Plaintiffs must establish (1) that similarly situated persons were not
6 prosecuted, and (2) that the defendants were motivated by a discriminatory purpose.”
7 Lacey v. Maricopa Cty., 649 F.3d 1118, 1142 (9th Cir. 2011). Where no suspect class or
8 fundamental right is involved, plaintiff must demonstrate that “there is no rational basis for
9 the difference in treatment.” Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th
10 Cir. 2004) (internal quotations omitted).

11 “A similarly situated offender is one outside the protected class who has committed
12 roughly the same crime under roughly the same circumstances but against whom the law
13 has not been enforced.” United States v Lewis, 517 F.3d 20, 27 (1st Cir. 2008) (citing
14 United States v. Armstrong, 517 U.S. 456, 465 (1996)). Plaintiffs cannot make this
15 showing. Unlike Plaintiffs, the IND participants have committed no crime because the
16 CSA expressly allows marijuana use in connection with research projects funded by the
17 Government. 21 U.S.C. § 823(f); Oakland Cannabis, 532 U.S. at 490 (noting that the CSA
18 contains “but one express exception, and it is available . . . for Government-approved
19 research projects.”). Hence, IND participants are not “similarly situated” because, unlike
20 Plaintiffs, their use of marijuana is expressly permitted by the CSA. See United States v.
21 Wilson, 639 F.2d 500, 503 (9th Cir. 1981).

22 Likewise, Plaintiffs have not shown that they are similarly situated to medical
23 marijuana users in Colorado. Plaintiffs aver that they are in the same position as medical
24 marijuana dispensaries in Colorado, which, like those in California, are required to obtain
25 licenses to operate. Pls.’ Am. Mem. at 27. However, Plaintiffs fail to support these
26 conclusory assertions with any evidence. But even if they had, Plaintiffs have not
27 demonstrated that any alleged disparity in enforcement of the CSA by Defendants is
28 attributable to any impermissible motive.

1 There is a “presumption that a prosecutor has acted lawfully.” Reno v. Am.-Arab
2 Anti-Discrimination Comm., 525 U.S. 471, 489 (1999). To overcome that presumption, a
3 criminal defendant must present “clear evidence” to the contrary. Id. Here, Plaintiffs assert
4 that the motivation to pursue landlords in California but not in Colorado must be illicit
5 because “there is no plausible basis for this disparity other than geography.” Pls.’ Am.
6 Mem. at 28. But the mere fact that Defendants have sent letters threatening legal action
7 under the CSA to persons in California, as opposed to Colorado, does not give rise to an
8 inference of improper motive. See Futernick v. Sumpter Township, 78 F.3d 1051, 1056
9 (6th Cir. 1996) (“There is no right under the Constitution to have a law go unenforced
10 against you, even if you are the first person against whom it is enforced, and even if you
11 think (or can prove) you are not as culpable as some others who have gone unpunished.
12 The law does not need to be enforced everywhere to be legitimately enforced
13 somewhere[.]”), overruled on other grounds by Village of Willowbrook v. Olech, 528 U.S.
14 562 (2000).

15 Based on the record presented, the Court finds that Plaintiffs have failed to
16 demonstrate a likelihood of success on their claim for selective prosecution in violation of
17 the Fifth Amendment.

18 **6. Commerce Clause**

19 In their final claim for relief, Plaintiffs allege that Defendants’ attempt to regulate
20 the intrastate medical marijuana business violates the Commerce Clause. Am. Compl.
21 ¶¶ 48-52. This claim was categorically rejected by the Supreme Court in Raich I, which
22 held that Congress has a rational basis to regulate the purely intrastate manufacture and
23 possession of marijuana. 545 U.S. at 22. For their part, Plaintiffs “acknowledge” the
24 “binding precedent” of Raich I, but insist that they find it “difficult to imagine that
25 marijuana grown only in California, pursuant to California State law, and distributed only
26 within California, only to California residents holding state-issued cards, and only for
27 medical purposes” could be subject to federal regulation under the Commerce Clause. Id.
28 ¶ 51. Irrespective of Plaintiffs’ views on Raich I, this Court is bound by the Supreme

1 Court's decision.

2 Accordingly, the Court finds that Plaintiffs have failed to show a likelihood of
3 success on their claim under the Commerce Clause.

4 **B. IRREPARABLE HARM**

5 The second prong of the Winter test for a TRO or preliminary injunction requires
6 that a party seeking immediate injunctive relief establish the likelihood, not merely the
7 possibility, of irreparable injury. Winter, 555 U.S. at 22. Injunctive relief is an
8 “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is
9 entitled to such relief.” Id. (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per
10 curiam)). Put differently, plaintiffs must demonstrate that “there exists a significant threat
11 of irreparable injury.” Oakland Tribune, Inc. v. Chronicle Publ’g Co., 762 F.2d 1374, 1376
12 (9th Cir. 1985) (emphasis added). “Speculative injury does not constitute irreparable
13 injury.” Goldie’s Bookstore v. Superior Court, 739 F.2d 466, 472 (9th Cir. 1984).

14 As an initial matter, Plaintiffs suggest that they are entitled to a presumption of
15 irreparable harm based on their purported showing that Defendants violated their
16 constitutional rights. Pls.’ Am. Mem. at 30. This argument is unavailing. While the Ninth
17 Circuit has recognized that “[a]n alleged constitutional infringement will often alone
18 constitute irreparable harm,” see Goldie’s Bookstore, 739 F.2d at 472, such a presumption
19 is inapposite where, as here, the plaintiffs fail to demonstrate “a sufficient likelihood of
20 success on the merits of [their] constitutional claims to warrant the grant of a preliminary
21 injunction,” Assoc’d. Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity, 950 F.2d
22 1401, 1412 (9th Cir. 1991); see also Beal v. Stem, 184 F.3d 117, 123-24 (2d Cir. 1999)
23 (“the presence of irreparable injury turns on whether the plaintiff has shown a clear
24 likelihood of success on the merits.”). As discussed above, Plaintiffs’ constitutional claims
25 are too tenuous to support a presumption of irreparable harm. See Goldie’s Bookstore, 739
26 F.2d at 472 (noting that while “[a]n alleged constitutional infringement will often alone
27 constitute irreparable harm . . . the constitutional claim is too tenuous to support our
28 affirmance on that basis.”).

1 Next, Plaintiffs allege that absent an immediate injunction, individual patients “who
2 are served by their cooperatives will endure severe pain, spasms, and suffering and,
3 nightmares, flashbacks, overwhelming anxiety, panic, seizures, nausea, life-threatening
4 weight loss, malnutrition, cachexia, and starvation, and possibly other life-threatening
5 problems such as tumors and paralysis—all constituting irreparabl[e] injury.” Pls.’ Am.
6 Mem. at 30.¹¹ Though conceding that any use of marijuana is illegal under federal law,
7 Plaintiffs assert that marijuana is medically necessary for dispensary patients. See
8 D’Amato Decl. ¶ 6, Dkt. 13; Shaw Decl. ¶ 14, Dkt. 10; M. Breyburg Decl. ¶ 11, Dkt. 25;
9 Pappas Decl. ¶ 11, Dkt. 28. The insurmountable challenge for Plaintiffs, however, is that
10 the Supreme Court has expressly held that courts may not consider the efficacy of medical
11 marijuana as a basis for challenging the Government’s enforcement of the CSA. Oakland
12 Cannabis, 532 U.S. at 491 (internal quotation marks and citations omitted).

13 In Oakland Cannabis, federal authorities sought to enjoin a Bay Area non-profit
14 medical marijuana cooperative from distributing marijuana with a physician’s authorization
15 under the Compassionate Use Act. The Supreme Court held that the cooperative’s medical
16 necessity defense was legally unavailable because Congress, in enacting the CSA, had
17 made a legislative determination that marijuana has no medical benefits worthy of an
18 exception outside the confines of a federal government-approved research project. Oakland
19 Cannabis, 532 U.S. at 491. In the Supreme Court’s view, “for purposes of the Controlled
20 Substances Act, marijuana has ‘no currently accepted medical use’ at all.” Id. (citing 21
21 U.S.C. § 812). Notably, the Court went on to hold that “a court sitting in equity cannot
22 ignore the judgment of Congress, deliberately expressed in legislation,” and thus, is bound
23 by “the balance that Congress has struck in the [CSA].” Id. at 497-98.

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26 ¹¹ Plaintiffs’ assertion that immediate injunctive relief is necessary to avoid
27 irreparable harm is contravened by the fact that they filed their request for emergency relief
28 over a month after receiving the Haag letters. E.g., Dahl v. Swift Distrib. Inc., 2010 WL
1458957, at *4 (C.D.Cal. Apr. 1, 2010) (finding that eighteen-day delay in filing TRO
application “implies a lack of urgency and irreparable harm.”).

1 Subsequently in Raich I, the Supreme Court found that a patient’s reliance on a
2 physician’s recommendation, even if sanctioned under the Compassionate Use Act, does
3 not alter Congress’ finding that marijuana has no medical value. 545 U.S. at 27. “The
4 CSA designates marijuana as contraband for any purpose; in fact, by characterizing
5 marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable
6 medical uses.” Id. (emphasis in original). Thus, this Court expresses no view as to whether
7 medical marijuana is effective in ameliorating pain or discomfort for some patients. As
8 discussed, this Court is bound by the foregoing Supreme Court decisions which legally
9 nullify Plaintiffs’ claim of irreparable harm.

10 **C. BALANCE OF EQUITIES**

11 With regard to the third requirement under the Winter test for preliminary injunctive
12 relief, Plaintiffs argue that the balance of equities, sometimes referred to as the balance of
13 hardships, “tilts sharply” in their favor because patients will experience “extreme suffering
14 and pain” without access to medical marijuana. Pls.’ Am. Mem. at 30. This argument fails
15 for the same reasons expressed above; to wit, Congress has concluded—rightly or
16 wrongly—that marijuana provides no medical benefit. See Oakland Cannabis, 532 U.S. at
17 491 (“for purposes of the [CSA], marijuana has no currently accepted medical use at all.”)
18 (internal quotation and citation omitted)); Raich I, 545 U.S. at 27 (finding that marijuana
19 has no legally cognizable uses even when used under direct medical supervision). In other
20 words, the only hardship articulated by Plaintiffs is one that federal courts may not
21 consider. See Oakland Cannabis, 532 U.S. at 499 (holding that the court cannot consider
22 evidence of medical necessity where enforcement of the CSA is challenged). As for
23 Plaintiffs’ contention that Defendants will suffer “absolutely no hardship” if a TRO were
24 granted, see Pls.’ Am. Mem. at 30, it ignores the federal Government’s interest in ensuring
25 enforcement of its laws. See Heckler, 467 U.S. at 60. Thus, the Court finds that Plaintiffs
26 have not established that the balance of equities tip in their favor.

27 **D. PUBLIC INTEREST**

28 The final step in the Winter analysis requires the Court to consider whether a TRO

1 or preliminary injunction is in the public interest. 555 U.S. at 20. Plaintiffs maintain that
2 “[t]here is an undeniable public interest in the availability of a doctor-recommended
3 treatment” Pls.’ Am. Mem. at 30. As a general proposition, Plaintiffs are correct—
4 but not all treatments are legally available. Although the public has a general interest in
5 having access to doctor-recommended treatments, the public also has a corresponding
6 interest in being protected from treatments that either have not been sanctioned by the
7 requisite authorities or are explicitly proscribed because of any number of harms.

8 The question here is whether there is a public interest in the availability of medical
9 marijuana as a doctor-recommended treatment. “The public interest may be declared in the
10 form of a statute.” Golden Gate Rest. Ass’n v. City & Cnty. of San Francisco, 512 F.3d
11 1112, 1127 (9th Cir. 2008) (internal quotation marks omitted). Where the elected branches
12 have enacted a statute based on their understanding of what the public interest requires, this
13 Court’s “consideration of the public interest is constrained[,] for the responsible public
14 officials . . . have already considered that interest.” Id. at 1126-27. Thus, as set forth above,
15 Congress clearly and unequivocally concluded in enacting the CSA that there is no public
16 interest in the use marijuana for medical reasons. See 21 U.S.C. § 812(b)(1). To that end,
17 the Supreme Court in Oakland Cannabis has forbidden courts from considering the whether
18 the public’s interest will be furthered by access to marijuana for medical purposes, since
19 Congress has already made that determination. 532 U.S. at 497.

20 **IV. CONCLUSION**

21 The Court finds that Plaintiffs have neither demonstrated a likelihood of success on
22 the merits of any of their claims nor have they demonstrated that they will suffer
23 immediate, irreparable harm in the absence of a TRO. The Court is sensitive to the desires
24 of individuals to use medical marijuana with a doctor’s recommendation, as permitted by
25 California law. Nonetheless, marijuana remains illegal under federal law, and in Congress’
26 view, it has no medicinal value. The claims which Plaintiffs seek to advance in this lawsuit
27 are foreclosed by Supreme Court and Ninth Circuit Court of Appeals precedent, which bind
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1 this Court and constrain its discretion to grant the immediate injunctive relief they request.

2 Accordingly,

3 IT IS HEREBY ORDERED THAT:

4 1. Plaintiffs' motion for a TRO is DENIED.

5 2. The parties shall meet and confer regarding the submission of further briefing
6 in connection with Plaintiffs' motion for preliminary injunction and submit their proposed
7 schedule to the Court in the form of a stipulation and proposed order (or administrative
8 motion, if no stipulation is reached) within five (5) days of the date this Order is filed.

9 3. This Order terminates Docket 5.

10 IT IS SO ORDERED.

11 Dated: November 28, 2011


SAUNDRA BROWN ARMSTRONG
United States District Judge

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