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8
 9 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA

10
 11 MARIN ALLIANCE FOR MEDICAL
 MARIJUANA, a not-for-profit association; JOHN
 12 D'AMATO, an individual,
 13 Plaintiffs,
 14 v.

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

18 Defendants.
 19

CASE NO. 11-5349 (SBA)

**DEFENDANTS' COMBINED
 MEMORANDUM IN SUPPORT OF
 DEFENDANT'S MOTION TO
 DISMISS AND IN OPPOSITION TO
 PLAINTIFFS' SECOND MOTION
 FOR PRELIMINARY INJUNCTION**

Hearing Date: February 14, 2012
 Hearing Time: 1:00 pm
 Courtroom: 1

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INTRODUCTION

1
2 Plaintiffs in this case seek a permanent injunction against the United States that would
3 guarantee immunity to marijuana dispensaries in this District from federal drug enforcement
4 actions, allowing these operations to continue manufacturing and distributing marijuana,
5 ostensibly for medical purposes, notwithstanding the fact that such activities violate the
6 Controlled Substances Act (“CSA”). Plaintiffs contend that such enforcement actions against the
7 “medical marijuana” dispensaries or their landlords would exceed the federal government’s
8 authority under the Commerce Clause and Tenth Amendment; would violate Plaintiffs’ rights
9 under the Ninth Amendment; and should be preemptively barred under theories of estoppel and
10 selective prosecution. This Court has already denied Plaintiffs’ request for a temporary
11 restraining order (“TRO”), and two other federal courts in the Central and Southern Districts of
12 California have denied similar requests in nearly identical cases filed by Plaintiffs’ counsel.¹ In
13 its prior decision, this Court already has concluded that Plaintiffs are unlikely to succeed on the
14 merits of any of their claims, particularly given Supreme Court and Ninth Circuit precedent that
15 precludes most, if not all, of Plaintiffs’ arguments; and that Plaintiffs have failed to demonstrate
16 irreparable harm or that an injunction would serve the public interest. *See id.* Following the same
17 analysis, Plaintiffs’ motion for a preliminary injunction (“PI”) must similarly be denied, and this
18 action should be dismissed.

19 As this Court has recognized, the majority of Plaintiffs’ claims have been plainly rejected
20 by the Supreme Court and the Ninth Circuit. The Supreme Court has held that, given the CSA’s
21 unequivocal language, “marijuana has ‘no currently accepted medical use.’” *United States v.*
22

23 ¹ *See* Order of Nov. 28, 2011 [Doc. 34]; *see also* Order of Nov. 9, 2011, *Conejo Wellness Ctr., et*
24 *al. v. Holder, et al.*, No. 11-9200 (C.D. Cal.) (denying TRO); Order of Nov. 18, 2011,
25 *Alternative Community Health Care Coop., et al. v. Holder, et al.*, No. 11-02585, 2011 WL
26 5827200 (S.D. Cal.) (denying TRO); Order of Dec. 13, 2011, *id.*, 2011 WL 6216964 (denying
27 PI) (attached hereto as Exhibit A). The Central District plaintiffs withdrew their PI motion after
28 the government alerted Judge Gee that a state court had found the plaintiff dispensary in
violation of local zoning laws and had permanently enjoined it from distributing marijuana. *See*
Conejo Wellness Ctr., Docs. 33, 35, 37. Plaintiffs’ counsel also filed suit in the Eastern District
but have not sought preliminary injunctive relief in that District. *See Sacramento Nonprofit*
Collective, et al. v. Holder, No. 11-02939 (E.D. Cal.).

1 *Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 491 (2001). The Court has also held that
2 Congress's authority under the Commerce Clause empowers it to prohibit marijuana distribution
3 and possession, even if the prohibited activities are not also illegal under state law. *Gonzales v.*
4 *Raich* ("Raich I"), 545 U.S. 1 (2005). And the Ninth Circuit has held that violators of the CSA
5 are not shielded by the Tenth Amendment, nor do they have a fundamental right to distribute,
6 possess, or use marijuana for claimed medicinal or other purposes. *Raich v. Gonzales* ("Raich
7 *II*"), 500 F.3d 850 (9th Cir. 2007).

8 In an effort to escape from this established precedent, Plaintiffs rely on misguided
9 attempts to call into question the government's good faith. Plaintiffs first mischaracterize
10 proceedings that took place in another case in this district, *Santa Cruz v. Holder*, No. 03-1802
11 (N.D. Cal.), in which different plaintiffs had agreed to dismiss without prejudice their only
12 surviving claim, post-*Raich*, in light of a Department of Justice memorandum relating to the use
13 of federal prosecutorial resources. Contrary to Plaintiffs' assertion, the federal government made
14 no "pledge[] in [the *Santa Cruz* case] to allow medical use of cannabis in California," see Am.
15 Compl. ¶ 1. Rather, the stipulated dismissal in *Santa Cruz* simply described when and under
16 what circumstances the *Santa Cruz* plaintiffs might seek to reopen their case and did not purport
17 to affect any party's conduct outside the courtroom – much less federal enforcement policy
18 throughout the entire State of California. Similarly, the Department of Justice memorandum,
19 upon which Plaintiffs also rely for their equitable estoppel argument, provided no reasonable
20 basis to assume that the CSA would never be enforced against marijuana dispensaries such as
21 Plaintiffs – and could not possibly provide a safe harbor after the U.S. Attorney sent cease and
22 desist letters to dispensary landlords. Plaintiffs' arguments are based on "promises" that were
23 never made, and their misguided attempt to estop the government from enforcing federal law
24 must fail.

25 Plaintiffs' final contention – that their equal protection rights have been threatened by
26 alleged "selective prosecution" – is equally unavailing, as they have not actually been
27 prosecuted; they do not claim to be in a protected class; they have not shown disparate treatment
28 of similarly-situated entities in Colorado; and there is nothing inherently arbitrary – much less

1 legally actionable – in the fact that U.S. Attorneys in different states may differ in their
2 identification and implementation of law enforcement priorities. Plaintiffs identify no
3 conceivably improper motive on the part of the federal government for targeting California
4 dispensaries that are indisputably in violation of federal law. All told, Plaintiffs’ claims are
5 entirely lacking in merit, and this case should be dismissed.

6 **BACKGROUND**

7 **1. Federal Law Prohibiting the Production and Distribution of Marijuana**

8 The federal drug laws, and the penalties associated with their violation, are contained in
9 the CSA, as amended, codified at 21 U.S.C. §§ 801 *et seq.* Since the time of the CSA’s
10 enactment, marijuana (also known as cannabis) has been classified as a Schedule I drug. 21
11 U.S.C. § 812(c). That classification reflects express findings by Congress that marijuana “has a
12 high potential for abuse,” that it “has no currently accepted medical use in treatment in the
13 United States,” and that “[t]here is a lack of accepted safety for use of [marijuana] under medical
14 supervision.” *Id.* § 812(b).² The CSA makes it unlawful for any person to “knowingly or
15 intentionally . . . manufacture, distribute, or dispense, or possess” marijuana. *Id.* §§ 841(a),
16
17

18 ² Congress also established a specific procedure for reclassifying a controlled substance,
19 whereby “any interested party” may petition the Attorney General to amend the schedules. *See*
20 21 U.S.C. § 811(a). If the petition is denied, the petitioner may seek judicial review in the Court
21 of Appeals. 21 U.S.C. § 877. Pursuant to § 811, several petitions to reschedule marijuana have
22 been submitted since the enactment of the CSA, which have resulted in repeated reevaluations by
23 the Department of Health and Human Services (“HHS”) and the Department of Justice (“DOJ”),
24 through the Drug Enforcement Administration (“DEA”), as to whether marijuana continues to
25 meet the criteria for placement in Schedule I. On each such occasion, HHS and DOJ have
26 concluded, based on an evaluation of the medical, scientific, and other relevant evidence in
27 accordance with 21 U.S.C. § 811(b) and (c), that marijuana has no currently accepted medical
28 use in treatment in the United States and otherwise continues to meet the criteria for placement in
Schedule I. *See* DEA, Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76
Fed. Reg. 40552 (July 8, 2011), *petition for review filed sub nom Americans for Safe Access, et*
al., v. DEA, No. 11-1265 (D.C. Cir. filed July 22, 2011); DEA, Notice of Denial of Petition, 66
Fed. Reg. 20038 (April 18, 2001), *petition for review denied by Gettman v. DEA*, 290 F.3d 430
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review denied by Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131 (D.C. Cir. 1994).

1 844(a).³ In addition, it is unlawful for any person to “knowingly open, lease, rent, use, or
2 maintain any place, whether permanently or temporarily, for the purpose of manufacturing,
3 distributing, or using” marijuana, or to “manage or control any building, room, or enclosure, . . .
4 for the purpose of unlawfully manufacturing, storing, distributing, or using” marijuana. *Id.* §
5 856(a).

6 **2. California’s Compassionate Use Act of 1996**

7 Separate and apart from federal law, the State of California also criminalizes the
8 possession, sale, cultivation, and transport of marijuana. *See* Cal. Health & Safety Code Ann. §§
9 11357-11361, 23222. In 1996, California created an exemption from state criminal prosecution
10 for physicians, patients, and primary caregivers who possess or cultivate marijuana for medicinal
11 purposes with a physician’s recommendation. *See id.* § 11362.5 (“Compassionate Use Act”).
12 Subsequently, California enacted additional legislation relating to the Compassionate Use Act,
13 *see id.* §§ 11362.7-11362.83, and issued “Guidelines for the Security and Non-Diversion of
14 Marijuana Grown for Medical Use” (2008), Am. Compl. ex.4 [Doc. 21-4]. In its Guidelines, the
15 State explained that “the manufacture, distribution, or possession of marijuana is a federal
16 criminal offense,” and that “California did not ‘legalize’ medical marijuana, but instead
17 exercised the state’s reserved powers to not punish certain marijuana offenses under state law
18 when a physician has recommended its use to treat a serious medical condition.” *Id.* at 3.

19 **3. Factual and Procedural History**

20 After California enacted the Compassionate Use Act, a number of marijuana
21 manufacturers, distributors, and users in the state whose marijuana plants had been seized by the
22 DEA sought to enjoin the federal government from enforcing the CSA against them, claiming
23 that such enforcement would violate the Commerce Clause, the Due Process Clause, and the
24 Ninth and Tenth Amendments, as well as the doctrine of medical necessity. *Raich I*, 545 U.S. 1.
25

26 ³ 21 U.S.C. § 844(a) prohibits possession of a controlled substance “unless such substance was
27 obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in
28 the course of his professional practice.” Because marijuana is a Schedule I drug, it is not possible
to obtain a valid prescription for its possession or use. The CSA contains an express exception
for government-approved research projects. 21 U.S.C. § 823(f).

1 As explained in more detail below, the Supreme Court unequivocally held that the CSA's
2 application to those who claimed to manufacture or possess marijuana in accord with California
3 law was consistent with Congress's authority under the Commerce Clause. *Id.* at 15-33. On
4 remand, the Ninth Circuit affirmed the district court's original denial of a preliminary injunction,
5 specifically rejecting the plaintiffs' remaining arguments under the Fifth, Ninth, and Tenth
6 Amendments, as well as their attempt to invoke medical necessity as a basis for prospective
7 injunctive relief. *Raich II*, 500 F.3d at 869.

8 While proceedings were underway in *Raich*, a group which admittedly manufactured,
9 distributed, or used marijuana (the Wo/Men's Alliance for Medical Marijuana, or "WAMM")
10 raised similar claims in *County of Santa Cruz, et al. v. Holder, et al.*, No. 03-01802 (N.D. Cal.).
11 Ultimately, most of the claims asserted by the WAMM plaintiffs were dismissed in light of the
12 Supreme Court and Ninth Circuit's decisions in *Raich*, leaving only a revised Tenth Amendment
13 claim pending.

14 Meanwhile, on October 19, 2009, U.S. Deputy Attorney General David Ogden sent a
15 memorandum to certain U.S. Attorneys' Offices, advising federal prosecutors on making
16 "efficient and rational use of [the Department's] limited investigative and prosecutorial
17 resources" in states such as California, which had enacted legislation exempting certain
18 marijuana activities from state criminal sanctions. Am. Compl. ex.5, at 3 [Doc. 21-5, at 4]
19 ("Ogden memo"). The memo emphasized that marijuana remains an illegal drug, that the
20 distribution and sale of marijuana is a serious crime, and that the "prosecution of significant
21 traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing
22 and trafficking networks continues to be a core priority." *Id.* at 1. Given limited federal
23 resources, the memo noted that:

24 [a]s a general matter, pursuit of these priorities should not focus federal resources . . . on
25 individuals whose actions are in clear and unambiguous compliance with existing state
26 laws providing for the medical use of marijuana. For example, prosecution of individuals
27 with cancer or other serious illnesses who use marijuana as part of a recommended
28 treatment regimen . . . or [their] caregivers . . . is unlikely to be an efficient use of
limited federal resources. On the other hand, prosecution of commercial enterprises that
unlawfully market and sell marijuana for profit continues to be an enforcement priority of

1 the Department.

2 *Id.* at 1-2. While offering this general guidance regarding resource allocation and enforcement
3 priorities, the memo explicitly stated that it did not “‘legalize’ marijuana or provide a legal
4 defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights
5 . . . in any administrative, civil, or criminal matter.” *Id.* at 2. The memo reiterated that “clear and
6 unambiguous compliance with state law” would not “create a legal defense to a violation of the
7 Controlled Substances Act,” and that the memo was “intended solely as a guide to the exercise of
8 investigative and prosecutorial discretion” and would not preclude investigation or prosecution
9 where it serves important federal interests. *Id.* at 2-3.

10 After the Ogden memo was issued, on January 25, 2010, the parties in *Santa Cruz* filed a
11 joint stipulation of dismissal, stating that “[a]s a result of the [Department of Justice’s] issuance
12 of [the Ogden memo], plaintiffs agree to dismiss this case without prejudice.” Am. Compl. ex.5,
13 at 1 [Doc. 21-5, at 2]. The stipulation did not characterize the Ogden memo but attached it as an
14 exhibit. The stipulation further provided that:

15 [I]f Defendants withdraw, modify, or cease to follow the [Ogden memo], this case may
16 be reinstated in its present posture on any Plaintiffs’ motion, although if any Plaintiff
17 seeks to reinstate this case, Defendants reserve the right to argue that they have not
18 withdrawn, modified, or ceased to follow the [Ogden memo], and that this case is moot.

18 *Id.* at 2. The *Santa Cruz* plaintiffs have not sought to reinstate their case.

19 None of the Plaintiffs here were plaintiffs in the *Santa Cruz* action. However, one of the
20 current Plaintiffs – MAMM – was a defendant in an enforcement action brought by the United
21 States in 1998. *See United States v. MAMM*, No. C 98-0086 CRB (N.D. Cal.). As a result of that
22 case, Judge Breyer issued an injunction “permanently enjoin[ing]” MAMM and its agents from
23 distributing marijuana and from manufacturing or possessing marijuana with the intent to
24 distribute. *See Exhibit A to Defendants’ Memorandum in Opposition to Plaintiffs’ Second*
25 *Motion for Temporary Restraining Order* [Doc. 31-1]. MAMM was also permanently enjoined
26 from using the premises of “Suite 210, School Street Plaza” for such purposes. *Id.*

27 By letter dated September 28, 2011, the U.S. Attorney for the Northern District of
28 California advised MAMM’s landlord – who is not a plaintiff to this action – that MAMM was

1 using his property at “6 School Street, #215” as a marijuana dispensary in violation of federal
2 law, and that the dispensary was also “operating within a prohibited distance of a park, Bolinas
3 Park,” which carries enhanced penalties. *See* Am. Compl. ex.1 [Doc. 21-1]. The letter formally
4 notified the landlord that such continued use of the property in violation of federal law may
5 result in forfeiture of the property as well as criminal and civil fines, and advised the landlord to
6 take necessary steps to discontinue the sale and/or distribution of marijuana from his property
7 within 45 days. *Id.* ⁴

8 Eight days before this 45-day period was set to expire, on November 4, 2011, Plaintiffs
9 MAMM and MAMM member D’Amato brought suit, and four days later filed a request for a
10 temporary restraining order (“TRO”) and preliminary injunction (“PI”) [Doc. 5], all without
11 mentioning Judge Breyer’s Order. Upon learning that Defendants were aware of the permanent
12 injunction against MAMM, Plaintiffs filed an Amended Complaint on November 11, 2011,
13 adding two other dispensaries and one dispensary’s landlords as Plaintiffs [Doc. 21]. These
14 dispensaries’ landlords had received similar letters from the U.S. Attorney. In particular, Plaintiff
15 The Felm Trust received a letter notifying it that its tenant Medithrive (also a plaintiff here) was
16 distributing marijuana in violation of federal law and was “operating within a prohibited distance
17 of a school, Marshall Elementary School.” Am Compl. ex. 2. Plaintiff The Divinity Tree’s
18 landlord, who is not a plaintiff to this action, received a letter notifying it that its tenant was
19 distributing marijuana in violation of federal law and was “operating within a prohibited distance
20 of a playground, Sgt. John Macaulay Park.” *Id.* ex. 3. Both landlords have now required their

21 ⁴ In an October 4, 2011, press conference, the U.S. Attorney for the Northern District stated that
22 her office was currently focused on targeting commercial marijuana distribution operations in
23 proximity to schools and parks. *See* <http://www.msnbc.msn.com/id/21134540/vp/44821454>; *see*
24 *also* Am. Compl. exs. 1-3 (indicating that plaintiff dispensaries are all within a prohibited
25 distance of a school, a park, or a playground). While the U.S. Attorney’s enforcement authority
26 is not limited to those specific criteria, Plaintiffs have not alleged that any individual user of
27 marijuana for purportedly medicinal purposes has been threatened with federal prosecution. *See*
28 October 7, 2011 DEA News Release, *available at* <http://www.justice.gov/dea/pubs/pressrel/pr100711.html> (describing current enforcement efforts as focused on “commercial marijuana activities” and noting that “[t]he department has maintained that we will not focus our investigative and prosecutorial resources on individual patients with serious illnesses like cancer or their immediate caregivers.”).

1 tenants to cease dispensary operations. Pl. Mem. 1-2 [Doc. 27] (citing declarations at Docs. 25,
2 28). News reports indicate that MAMM also ceased operation on or around December 19, 2011.
3 *E.g.*, http://www.marini.com/novato/ci_19581112.

4 In their Amended Complaint, and in their Motion for a TRO and PI, Plaintiffs allege that
5 by threatening to take action against dispensary landlords, Defendants have threatened Plaintiffs'
6 rights under the Ninth, Tenth, and Fourteenth Amendments; that the threatened actions would
7 exceed the government's authority under the Commerce Clause; and that Defendants should be
8 judicially and equitably estopped from taking such actions. Plaintiffs request, *inter alia*, that this
9 Court enjoin Defendants "from arresting or prosecuting Plaintiffs or those similarly situated,"⁵
10 seizing their medical cannabis, forfeiting their property or the property of their landlords or
11 threatening to seize property, or seeking civil or administrative sanctions against them or parties
12 whose property is used to assist them." Am. Compl. at 12.

13 On November 28, 2011, this Court issued an Order denying Plaintiffs' TRO motion.
14 Order of Nov. 28, 2011 [Doc. 34]. The Court held that Plaintiffs were unlikely to succeed on the
15 merits of their claims in light of controlling Supreme Court and Ninth Circuit precedent; that
16 Plaintiffs had failed to establish irreparable harm that could justify emergency injunctive relief;
17 and that the balance of equities and public interest did not weigh in Plaintiffs' favor. *See id.*

18 **STANDARD OF REVIEW**

19 Defendants move to dismiss this action under Federal Rule of Civil Procedure 12(b)(6).
20 Under Rule 12(b)(6), a pleading may be dismissed when it fails to "state a claim upon which
21 relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal for failure to state a claim "can be
22 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a
23 cognizable legal theory." *Balistreri v. Pac. Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990).

24 ⁵ Plaintiffs appear to seek relief that would extend to all marijuana dispensaries in the Northern
25 District, as well as their landlords and customers. However, Plaintiffs have not sought to bring a
26 class action. Any relief to which they might be entitled is therefore necessarily limited only to
27 them and should not extend beyond the harm that Plaintiffs identify. "[A]n injunction must be
28 narrowly tailored . . . to remedy only the specific harms shown by the plaintiffs rather than to
enjoin all possible breaches of the law." *Iconix, Inc. v. Tokuda*, 457 F. Supp. 2d 969, 998 (N.D.
Cal. 2006) (citing *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004)) (alteration by
court).

1 “Threadbare recitals of the elements of a cause of action” are insufficient; rather, the complaint’s
2 factual allegations, while taken as true, must “state[s] a plausible claim for relief [in order to]
3 survive[] a motion to dismiss.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009)
4 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

5 In reviewing a motion under Rule 12(b)(6), the Court may consider the facts alleged in
6 the complaint, documents attached to or relied upon in the complaint, and matters of which the
7 Court may take judicial notice. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).
8 Among other things, the Court “may take judicial notice of matters of public record.” *Id.* And
9 although, for purposes of a Rule 12(b)(6) motion, the Court should generally accept all
10 allegations of material fact in the Complaint as true, the “court need not [] accept as true
11 allegations that contradict matters properly subject to judicial notice or by exhibit. . . . Nor is the
12 court required to accept as true allegations that are merely conclusory, unwarranted deductions of
13 fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.
14 2001). The district court has broad discretion to dismiss claims under Rule 12(b)(6) when they
15 have no legal merit. *Wood v. McEwen*, 644 F.2d 797, 800 (9th Cir. 1981).

16 Defendants also oppose Plaintiffs’ motion for a preliminary injunction. A preliminary
17 injunction is an “extraordinary and drastic remedy” that “may only be awarded upon a clear
18 showing that the plaintiff is entitled to such relief.” *Munaf v. Geren*, 553 U.S. 674, 689-90
19 (2008); *Winter v. NRDC*, 555 U.S. 7, 22 (2008). A party seeking such relief “must demonstrate
20 (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the
21 absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an
22 injunction is in the public interest.” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir.
23 2010) (citing *Winter*, 555 U.S. at 19). Plaintiffs bear the burden of demonstrating that each of
24 these four factors is met. *DISH Network Corp. v. FCC*, 653 F.3d 771, 777 (9th Cir. 2011).

ARGUMENT

I. PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED⁶

A. Plaintiffs' Judicial and Equitable Estoppel Claims (Counts 1 & 2) Must Fail Because Neither the Ogden Memo Nor the *Santa Cruz* Stipulation Purported to Immunize From Enforcement Action Those Who Violate Federal Law

Plaintiffs attempt to invoke two separate equitable doctrines of estoppel. First, they claim that the federal government is judicially estopped from enforcing the CSA based on the Stipulation of Dismissal filed by the parties in *Santa Cruz* – a case that, as described above, involved plaintiffs that are not parties to this action. Am. Comp. ¶¶ 25-26. Second, they claim that the government is equitably estopped from enforcing the CSA because they and other lessors and operators of marijuana dispensaries relied on the Ogden memo as license for their activities. *Id.* ¶¶ 29-31. For the reasons that this Court has already articulated, and as explained below, neither doctrine has any application in this case.

As an initial matter, this Court has recognized that “the Government may not be estopped on the same terms as any other litigant,” Order of Nov. 28, 2011, at 13 (quoting *Heckler v. Cmty. Health Servs., Inc.*, 467 U.S. 51, 60 (1984)), particularly where estoppel ““would compromise a governmental interest in enforcing the law,”” *id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001)). Indeed, in the Ninth Circuit, a plaintiff seeking to estop the government must establish that “the government engaged in ‘affirmative misconduct,’ and that the government’s

⁶ As Defendants explained in opposition to Plaintiffs’ TRO Motion, the relief that Plaintiffs request through this suit would directly conflict with a permanent injunction that Judge Breyer has previously issued against plaintiff MAMM, permanently enjoining it “from engaging in the distribution of marijuana, the possession of marijuana with the intent to distribute, or the manufacture of marijuana with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1).” See Order of June 11, 2002, *aff’d by Oakland Cannabis Buyers’ Coop. et al.*, 2007 WL 4390325 (upholding district court’s issuance of permanent injunction), *cert. denied*, 129 S. Ct. 167 (2008). MAMM is collaterally barred from seeking such relief. *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.”). Thus, even if the other Plaintiffs’ claims were not subject to dismissal, MAMM – and its member Plaintiff John D’Amato – should be dismissed as parties to this case. As explained below, however, all claims should be dismissed in any event.

1 conduct has caused ‘a serious injustice.’” *United States v. Bell*, 602 F.3d 1074, 1082 (9th Cir.
2 2010) (quoting *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir.1989) (en banc)). Estoppel is
3 inappropriate where the government’s position has shifted due to “a change in public policy” or
4 in governing law. *New Hampshire*, 532 U.S. at 755 (internal quotation omitted). Thus, the court
5 in *Bell* soundly rejected an estoppel claim similar to the one Plaintiffs seek to raise here, based
6 on the plaintiff’s purported “reli[ance] on the government’s statements decades ago that it would
7 not enforce” a particular provision, holding that “simple non-enforcement,” or a statement in a
8 judicial proceeding indicating that implementation was “not imminent,” certainly did not rise” to
9 the level of “affirmative misrepresentation or affirmative concealment of a material fact” that
10 would be required. *Bell*, 602 F.3d at 1082 (internal quotation omitted). Plaintiffs in this case
11 similarly fail to state a claim that can succeed under this standard. Even accepting as true their
12 contention that the government has changed its position, such a change cannot properly be
13 characterized as misconduct or misrepresentation.

14 In the context of judicial estoppel, the “affirmative misconduct” requirement imposes an
15 additional burden that Plaintiffs cannot meet. However, Plaintiffs’ judicial estoppel claim cannot
16 succeed even if a heightened standard did not apply. Under the traditional analysis, a court may,
17 in its discretion, estop a party from taking a particular position in litigation where (1) “a party’s
18 later position [is] clearly inconsistent with its earlier position,” (2) a court has previously
19 “accept[ed] that party’s earlier position, so that judicial acceptance of an inconsistent position in
20 a later proceeding would create the perception that either the first or the second court was
21 misled,” and (3) “the party seeking to assert an inconsistent position would derive an unfair
22 advantage or impose an unfair detriment on the opposing party if not estopped.” *New Hampshire*,
23 532 U.S. at 749-51 (internal quotation omitted); accord *United States v. Liquidators of*
24 *European Fed. Credit Bank*, 630 F.3d 1139, 1148 (9th Cir. 2011). This Court has already
25 recognized that the *Santa Cruz* court did not dismiss that case in reliance on any promise by the
26 government “to indefinitely forego enforcement of the CSA against persons or entities involved
27 in the production, sale or use of medical marijuana.” Order of Nov. 28, 2011, at 14. Rather, the
28 dismissal occurred as a result of the parties’ joint Stipulation under Rule 41(a)(1)(ii), which

1 expressly provided for the possibility that the government might change its enforcement
2 priorities in the future by allowing the plaintiffs, in that event, “to reinstitute[] [the case] in its
3 present posture.” Stipulation, at 2. As this Court has already explained in detail, the terms of the
4 Stipulation make clear that the three requirements for judicial estoppel cannot be satisfied here.
5 *See* Order of Nov. 28, 2011, at 13-15; *see also* Order Denying Application for a TRO,
6 *Alternative Cmty. Health Care Coop.*, 2011 WL 5827200 [hereinafter, “TRO Denial, *Alternative*
7 *Cmty.*”], at *3. The stipulated dismissal of the only surviving claim in *Santa Cruz* was not
8 intended to benefit Plaintiffs here, and proceedings in this case are unaffected by that dismissal.

9 In regard to Plaintiffs’ equitable estoppel claim, Plaintiffs contend that they relied on the
10 Ogden memo to operate or lease property to marijuana dispensaries and would be “entrapped” if
11 the CSA were now to be enforced against them. Am Compl. ¶ 30. However, this Court has
12 recognized that the “estoppel by entrapment” doctrine serves as an affirmative defense in a
13 criminal proceeding and thus “has no application here,” where no criminal proceeding has been
14 initiated. Order of Nov. 28, 2011, at 16 (citing *United States v. Ramirez-Valencia*, 202 F.3d
15 1106, 1109 (9th Cir. 2000)). In addition, a defendant’s burden to establish the government’s
16 “affirmative misconduct” for an entrapment claim means that the defendant must establish that
17 an authorized representative of the government “affirmatively told” him that “the proscribed
18 conduct was permissible,” that he “relied on the false information,” and that the “reliance was
19 reasonable.” *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010) (rejecting entrapment-
20 by-estoppel defense where defendants “were aware that marijuana [possession] was illegal under
21 federal law”). Again, Plaintiffs cannot satisfy this standard. As this Court has observed, “nothing
22 in the Ogden memo affirmatively informs medical marijuana growers and distributors that their
23 conduct is legal.” Order of Nov. 28, 2011, at 16. To the contrary, the memo by its own terms
24 “d[id] not alter in any way the Department’s authority to enforce federal law,” “d[id] not
25 ‘legalize’ marijuana or provide a legal defense to a violation of federal law,” and did not “create
26 any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party
27 or witness in any administrative, civil, or criminal matter.” Ogden Mem., at 2. Far from the
28 affirmative statement that the entrapment-by-estoppel defense requires, the memo was directed

1 to United States Attorneys “solely as a guide to the exercise of investigative and prosecutorial
2 discretion.” *Id.* This Court has held that, given that the memo was “not even addressed to
3 [Plaintiffs],” and that it “unequivocally did not state that marijuana for medical reasons was
4 ‘legal,’” “any reliance on the Ogden memo would be unreasonable.” Order of Nov. 28, 2011, at
5 16-17; *see also United States v. Stacy*, 734 F. Supp. 2d 1074, 1079-80 (S.D. Cal. 2010) (rejecting
6 entrapment-by-estoppel defense based on the Ogden memo); *United States v. Hicks*, 722 F.
7 Supp. 2d 829, 833 (E.D. Mich. 2010) (“The Department of Justice’s discretionary decision to
8 direct its resources elsewhere does not mean that the federal government now lacks the power to
9 prosecute those who possess marijuana.”). Moreover, continuing reliance would certainly be
10 unreasonable after Plaintiffs were put on notice, through cease-and-desist letters to dispensary
11 landlords, that the United States Attorney considered the dispensary operations illegal and was
12 considering initiating enforcement action against the landlords if the operations continued. *See*
13 *Am Compl. exs. 1-3*. Plaintiffs thus cannot prevail on either of their estoppel theories.

14 **B. Plaintiffs’ Allegations Under the Ninth Amendment (Count 3) Have Been Rejected**
15 **by this Circuit and Fail to State a Claim Because Plaintiffs Cannot Establish a**
16 **Fundamental Right to Distribute, Use, or Access Marijuana**

17 Plaintiffs fail to state a viable claim that the Ninth Amendment protects their ability to
18 distribute, use, or have access to marijuana. *See Am. Compl. ¶¶ 35-37*. As this Court has
19 explained, because the Ninth Amendment does not independently secure any judicially-
20 enforceable constitutional rights, the Court must evaluate Plaintiffs’ claim by reference to Fifth
21 Amendment substantive due process standards, which require a “‘careful statement’” of the
22 asserted fundamental right, and that the right be “‘deeply rooted in this nation’s history and
23 traditions’” and “‘implicit in the concept of ordered liberty.’” Order of Nov. 28, 2011, at 17, 18
24 (quoting *Raich II*, 500 F.3d at 862, 864). Judicial recognition of a fundamental right must be a
25 carefully circumscribed undertaking because the “‘guideposts for responsible decisionmaking in
26 this unchartered area are scarce and open-ended,” and the extension of constitutional protection
27 to an asserted right would “‘place the matter outside the arena of public debate and legislative
28 action.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal quotation and citation

1 omitted). In *Raich II*, the Ninth Circuit evaluated whether there was a fundamental right to use
2 marijuana for medical purposes, concluding that no such right is “deeply rooted in this Nation’s
3 history and tradition,” and that it could not be said that the use of marijuana is “implicit in the
4 concept of ordered liberty.” *Raich II*, 500 F.3d at 864.

5 Under *Raich II*’s controlling analysis, this Court has necessarily “construe[d] Plaintiffs’
6 asserted right narrowly as the right to use marijuana in order to preserve the bodily integrity of
7 medical marijuana patients.” Order of Nov. 28, 2011, at 18.⁷ The Court then held that, under
8 *Raich II*, it was bound to reject the notion that the right to use marijuana for purportedly medical
9 purposes was “implicit in the concept of ordered liberty,” particularly given Congress’s express
10 pronouncement in the CSA that “marijuana has no currently accepted medical use at all.” *Id.* at
11 18-19 (quoting *Oakland Cannabis*, 532 U.S. at 491; citing 21 U.S.C. § 812(b)(1)); *see also* TRO
12 Denial, *Alternative Cmty.*, 2011 WL 5827200, at *4; Order Denying Plaintiffs’ Motion for
13 Preliminary Injunction, *Alternative Cmty. Health Care Coop.*, 2011 WL 6216964 [hereinafter,
14 “PI Denial, *Alternative Cmty.*”], at *2-3 (rejecting same Ninth Amendment claim). The Court
15 therefore concluded that Plaintiffs’ invocation of the state law analysis in *Lawrence v. Texas*, 539
16 U.S. 558 (2003), was unavailing. Order of Nov. 28, 2011, at 19 (observing that “the fact remains
17 that the majority of states do not recognize the right to use marijuana for medicinal purposes”).

18 The Court’s conclusion is in line with the fact that this and every other circuit to have
19 considered the issue have consistently rejected a fundamental right to access the specific drug of
20 one’s choice based on its alleged medicinal qualities, even by those who are terminally ill. *See*,
21 *e.g.*, *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (“Constitutional rights of

22 ⁷ Plaintiffs’ Amended Complaint also references the “right to consult with their doctors about
23 their bodies and health,” Am. Compl. ¶ 37, without articulating how such a right could be
24 implicated in this case. To be sure, the Ninth Circuit has held that physicians have a First
25 Amendment right to communicate their professional recommendation regarding marijuana use.
26 *See Conant v. Walters*, 309 F.3d 629, 635 (9th Cir. 2002). In so holding, however, the Court
27 made clear that this right did not extend where a physician “intends for the patient to use [the
28 recommendation] as the means for obtaining marijuana.” *Id.* at 635. Indeed, the Court explicitly
distinguished the mere act of “recommending” marijuana from prescribing or actually dispensing
marijuana, which are illegal. *See id.* at 632, 35. Accordingly, Plaintiffs have failed to state a
Ninth Amendment claim on this basis.

1 privacy and personal liberty do not give individuals the right to obtain [the drug] laetrile free of
2 the lawful exercise of government police power.”); *United States v. Cannabis Cultivator's Club*,
3 No. C 98–00085, 1999 WL 111893, at *1 (N.D. Cal. Feb. 25, 1999) (holding that, under the
4 Ninth Circuit’s decision in *Carnohan*, members of a cannabis cooperative “do not have a
5 constitutional right to *obtain* marijuana from the medical cannabis cooperatives free of
6 government police power”), *aff’d, after intervening remand, by United States v. Oakland*
7 *Cannabis Buyers' Co-op.*, 259 Fed. Appx. 936, 2007 WL 4390325 (9th Cir. Dec. 13, 2007), *cert.*
8 *denied by MAMM v. United States*, 129 S. Ct. 167 (2008); *see also Abigail Alliance v. von*
9 *Eschenbach*, 495 F.3d 695, 703-11 n.18 (D.C. Cir. 2007) (en banc) (holding that terminally ill
10 patients had no fundamental right of access to investigational drugs, and citing cases for the
11 proposition that “[n]o circuit court has acceded to an affirmative access claim”) (collecting
12 cases); *Garlic v. FDA*, 783 F. Supp. 4, 5 (D.D.C. 1992) (holding that plaintiffs asserting
13 constitutional right of access to unapproved drug for treatment of Alzheimer’s Disease failed to
14 “state a valid claim under the Constitution”). Rather, courts have consistently upheld the role of
15 the federal government, through the Food and Drug Administration (“FDA”) and the DEA, in
16 deciding which substances are sufficiently safe and effective to be made publicly available for
17 medical use. *E.g., Abigail Alliance*, 495 F.3d at 703-11 (rejecting right of access to
18 investigational drugs outside the framework set forth in the Food, Drug, and Cosmetic Act
19 (“FDCA”)); *cf. United States v. Rutherford*, 442 U.S. 544, 554-58 & n. 10 (1979) (holding that
20 there is no implicit exemption in the FDCA for drugs used by the terminally ill, notwithstanding
21 that seventeen states had legalized the prescription use of a new drug for cancer treatment within
22 their borders).

23 These holdings foreclose a right of access claim here, particularly where the drug to
24 which Plaintiffs seek access is not simply non-federally approved, but is a Schedule I controlled
25 substance that has “no currently accepted medical use at all.” *Oakland Cannabis*, 532 U.S. at
26 491. The Ninth Circuit has repeatedly upheld this scheduling classification. *United States v.*
27 *Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978) (rejecting claim that marijuana’s categorization as a
28 Schedule I controlled substance was irrational); *Oakland Cannabis Buyers' Co-op.*, 2007 WL

1 4390325, at *1 (holding that *Miroyan* was still controlling in 2008). Moreover, the CSA’s
2 prohibition on marijuana distribution and possession is sufficient to distinguish this context from
3 that in *Lawrence*, where there was no federal law in place that expressly prohibited the conduct
4 at issue. *See* PI Denial, *Alternative Cmty.*, 2011 WL 6216964, at *3 (recognizing that the
5 existence of an express federal prohibition distinguishes this case from *Lawrence*). And to the
6 extent that Plaintiffs’ claim could be construed as an attempt to set forth evidence purporting to
7 show that marijuana should not be classified as a Schedule I controlled substance, their effort
8 would improperly seek to circumvent the established administrative rescheduling process. *See* 21
9 U.S.C. § 811; 21 C.F.R. § 1308.43.⁸

10 Even without the plain language of the CSA, the notion that there could be a
11 “fundamental right” to use a specific substance for medical purposes is, as explained above,
12 contrary to the weight of authority, and simply makes no sense, particularly given that medical
13 and scientific opinions about the safety and efficacy of a particular drug can change over time.
14 *Cf. Abigail Access*, 495 F.3d at 703 (“The Alliance’s claimed right depends on a regulatory
15 determination that the drug is safe for testing, prompting an obvious question: How can a
16

17 ⁸*See United States v. Burton*, 894 F.2d 188, 192 (6th Cir. 1990) (“[R]eclassification is clearly a
18 task for the legislature and the attorney general and not a judicial one”); *United States v.*
19 *Middleton*, 690 F.2d 820, 823 (11th Cir. 1982) (same); *Lepp v. Gonzales*, No. C-05-0566, 2005
20 WL 1867723, at *10 (N.D. Cal. Aug. 2, 2005) (same), *aff’d sub nom. Harris v. Mukasey*, 265
21 Fed. Appx. 461 (9th Cir. 2008). As noted above, the DEA recently rejected a petition to
22 reschedule marijuana, relying on a detailed evaluation by the Secretary of Health and Human
23 Services to reaffirm that marijuana has no currently accepted medical use and is thus properly
24 classified as a Schedule I drug. DEA, Denial of Petition to Initiate Proceedings to Reschedule
25 Marijuana, 76 Fed. Reg. 40552 (July 8, 2011). The existence of this administrative process
26 further distinguishes this context from *Lawrence*. Other courts have held that the federal
27 prohibition on distribution, possession, and use of marijuana in the CSA cannot be called into
28 question by the existence of state laws that purport to recognize a medical use for marijuana. *See*
Olsen v. Holder, 610 F. Supp. 2d 985, 994-95 (S.D. Iowa 2009) (rejecting notion that plaintiff
could “circumvent” the federal controlled substance scheduling process by relying on
determinations by “several states” that marijuana has an accepted medical use); *Krumm v.*
Holder, No. 08-1056, 2009 WL 1563381, at *10 (D.N.M. May 27, 2009) (recognizing that
“[w]hat states attempt to do with their medical marijuana laws may be helpful to the [relevant
federal agencies in making scheduling decisions], but the states’ actions do not eliminate the need
for the complex inquiry that Congress has required for drug scheduling changes”).

1 constitutional right be defined by an administrative regulation that is subject to change?”).
2 Plaintiffs’ assertion of a fundamental right to use or access marijuana for medical purposes
3 should therefore be rejected, and their Ninth Amendment claim should be dismissed.

4 **C. Plaintiffs’ Allegations Under the Commerce Clause (Count 6) and Tenth**
5 **Amendment (Count 4) Are Foreclosed by Binding Precedent and Fail to State a**
6 **Claim Upon Which Relief Can Be Granted**

7 Plaintiffs contend that federal regulation of their distribution, possession, and use of
8 marijuana for ostensibly medical purposes, allegedly in compliance with state law, would violate
9 the Commerce Clause and the Tenth Amendment. Am. Compl. ¶¶ 41-42, 51. As Plaintiffs
10 acknowledge, however, the Supreme Court in *Raich I* ruled on precisely this issue and
11 “categorically rejected” Plaintiffs’ Commerce Clause claim. Order of Nov. 28, 2011, at 22
12 (citing *Raich I*, 545 U.S. at 22); *see also* TRO Denial, *Alternative Cmty.*, 2011 WL 5827200, at
13 *4. That claim must therefore be dismissed.

14 This Court has also recognized that Plaintiffs’ Tenth Amendment claim “is legally
15 indistinguishable from the Tenth Amendment claim which the Ninth Circuit considered and
16 rejected in *Raich II*.” Order of Nov. 28, 2011, at 19 (citing *Raich II*, 500 F.3d at 867); *see also*
17 TRO Denial, *Alternative Cmty.*, 2011 WL 5827200, at *4. Indeed, because the CSA is a valid
18 exercise of Congress’s commerce power, Plaintiffs’ Tenth Amendment claim necessarily fails.
19 *New York v. United States*, 505 U.S. 144, 156 (1992) (explaining that Congress’s authority under
20 Article I and the powers reserved to the states under the Tenth Amendment are “mirror images of
21 each other”); *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000) (“[I]f Congress acts under
22 one of its enumerated powers, there can be no violation of the Tenth Amendment.”). Plaintiffs’
23 assertion that “states retain the primary plenary power to protect the health of its citizens,” Am.
24 Compl. ¶ 42, fails to differentiate their Tenth Amendment claim from that at issue in *Raich II*. To
25 the contrary, Plaintiffs’ description of their claim is identical to that which the *Raich* plaintiffs
26 asserted, and which the Ninth Circuit rejected. *See Raich v. Ashcroft*, 248 F. Supp. 2d 918, 926
27 (N.D. Cal. 2003), *aff’d by Raich II*, 500 F.3d at 866-67.

1 **D. Plaintiffs Have Failed to Make Out an Equal Protection Violation (Count 5)**

2 Plaintiffs also claim that their equal protection rights are violated because Defendants’
3 prosecutorial conduct toward medical marijuana cooperatives and landlords in California
4 irrationally differs from their prosecutorial conduct in Colorado. Am. Compl. ¶ 45. They cannot
5 prevail on this claim.

6 As an initial matter, “it is axiomatic that to state a claim for selective prosecution one must in
7 fact be prosecuted for an offense.” *Crawford v. Miller*, No. 05-214, 2005 WL 3149499, at *2
8 (M.D. Pa. Nov. 23, 2005). Here, while certain dispensary landlords, including plaintiff The Felm
9 Trust, have received letters from the U.S. Attorney threatening enforcement action, the
10 dispensaries themselves have received no such letters. Thus, among the Plaintiffs here, only The
11 Felm Trust could conceivably have standing at this juncture to assert a selective prosecution
12 claim.⁹

13 To the extent Plaintiffs may raise such a claim, it is subject to dismissal under Rule 12(b)(6).
14 “The requirements for a selective-prosecution claim draw on ordinary equal protection
15 standards.” *United States v. Armstrong*, 517 U.S. 456, 465 (1996). However, because the federal
16 government retains “broad discretion to enforce the Nation’s criminal laws,” and is accorded a
17 “presumption of regularity” in connection with its prosecutorial decisions, Plaintiffs bear a heavy
18 burden to establish an equal protection violation on this basis. *Id.* Plaintiffs would have to
19 establish “(1) that similarly situated persons were not prosecuted, and (2) that the defendants
20 were motivated by a discriminatory purpose” when deciding to prosecute Plaintiffs but not the
21 similarly situated persons. Order of Nov. 28, 2011, at 21.

22 As this Court has recognized, Plaintiffs have not identified any Colorado dispensaries that are
23 similarly situated to plaintiffs Marin Alliance, Medithrive Cooperative, or the Divinity Tree

24 ⁹ Plaintiffs’ attempt to enjoin federal prosecutors from merely *threatening* to take action – let
25 alone actually initiating forfeiture proceedings or prosecutions – also highlights why it is
26 inappropriate to raise a selective prosecution claim in this posture. The factors that would be
27 relevant to the government’s preliminary determination to issue a cease-and-desist letter would
28 be even less “susceptible to the kind of analysis the courts are competent to undertake” than
would a decision to initiate enforcement action. *See Wayte v. United States*, 470 U.S. 598, 607-
08.

1 Patients' Wellness Cooperative.¹⁰ *Id.* Moreover, Plaintiffs' conclusory assertion that the federal
2 government "[a]ctively allows" patients in Colorado to access marijuana, Am. Compl. ¶ 45,
3 cannot survive a motion to dismiss, particularly as this Court is not required to "accept as true
4 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
5 inferences" that "contradict matters properly subject to judicial notice or by exhibit." *See*
6 *Sprewell*, 266 F.3d at 988. P public court records demonstrate that the U.S. Attorney's Office in
7 Colorado has initiated criminal prosecutions against individuals violating the CSA's prohibition
8 on marijuana distribution, even against those purporting to act under the State's "medical
9 marijuana" law. *See, e.g., United States v. Bartkowicz*, No. 10-cr-00118 (D. Colo.), ECF Nos. 19,
10 46, 69, 104, 145 (indictment returned against individual for marijuana distribution under the
11 CSA; motion to dismiss indictment denied, notwithstanding defendant's claims that he was in
12 compliance with Colorado marijuana law; judgment entered and defendant sentenced on or
13 before February 1, 2011) (together attached hereto as Exhibit B); *see also United States v. Do, et*
14 *al.*, No. 11-cf-00422 (D. Colo.), ECF Nos. 1, 19 (indictment returned against individuals for
15 marijuana distribution where government alleged in criminal complaint that defendants were
16 doing business as the "Earth's Medicine, Inc." dispensary) (together attached hereto as Exhibit
17 C). Federal prosecutors have taken similar enforcement steps in various other jurisdictions,¹¹ but
18 even if they had not, Plaintiffs have no special "right under the Constitution to have the law go
19 unenforced against [them], even if [they] are the first person[s] against whom it is enforced."

20
21 ¹⁰ For one thing, the letters from U.S. Attorney Melinda Haag to the landlords of the plaintiff
22 dispensaries, attached to Plaintiffs' Amended Complaint, identify all three dispensaries as
23 operating "within a prohibited distance of a playground," school, or park. Am. Compl. exs. 1-3.
24 For another, "licenses under Colorado's medical marijuana law have just begun to issue in or
25 about November 2011." PI Denial, *Alternative Cmty.*, 2011 WL 6216964, at *3 (also citing
26 description of Colorado as having "the most carefully regulated system of cultivation and
27 distribution of medical cannabis in the world").

28 ¹¹ For example, the U.S. Attorney in the Western District of Washington has recently initiated
raids of marijuana businesses that purported to operate under that state's "medical marijuana"
law but were believed to be engaged in criminal activity. *See* U.S. Attorney's Office (W.D.
Wash.), News Release, *Search Warrants Served in Investigation of Marijuana Trafficking and*
Money Laundering (Nov. 15, 2011), available at
<http://www.justice.gov/usao/waw/press/2011/nov/mjsearch.html>.

1 See *United States v. Hendrickson*, 664 F. Supp. 2d 793, 798 (E.D. Mich. 2009) (quoting
2 *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.1996)); PI Denial, *Alternative*
3 *Cmty.*, 2011 WL 6216964, at *4 (“Selective enforcement of valid laws, without more, does not
4 make Defendants’ action irrational.”). Plaintiffs’ equal protection claim can be rejected on this
5 basis alone.

6 Plaintiffs have also failed to make a cognizable allegation of discriminatory motive. Even if
7 Plaintiffs’ assertions regarding enforcement patterns were accurate, “the mere fact that
8 Defendants have sent letters threatening legal action under the CSA to persons in California, as
9 opposed to Colorado, does not give rise to an inference of improper motive.” Order of Nov. 28,
10 2011, at 22. Plaintiffs’ Amended Complaint fails even to assert that Defendants have an
11 improper motive, much less articulate what that improper motive might be. Instead, they simply
12 assert that “[i]n no instance has the federal government shown a rational basis” for their potential
13 enforcement of the CSA in California. Am. Compl. ¶ 46. But Plaintiffs cannot shift the burden
14 to Defendants to establish the basis for a prosecution that has not yet even occurred; rather,
15 Plaintiffs are required to articulate in their Amended Complaint how the alleged prosecutorial
16 conduct was “based upon an unjustifiable” factor, such as race or religion, which “may play no
17 part in [the prosecutor’s] charging decision.” See *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65
18 (1978). Geography alone is not an inherently improper factor. To the contrary, the characteristics
19 of a particular jurisdiction – such as its available resources and the extent of a problem, relative
20 to other jurisdictions and relative to other problems in that jurisdiction – could indeed provide
21 legitimate reasons for concentrating enforcement efforts in a particular way.¹² Prosecutors retain

22 _____
23 ¹² For example, in commenting on the cease and desist letters that were sent to certain marijuana
24 dispensaries and landlords in California, the U.S. Attorney for the Northern District explained
25 that “the huge profits generated by [marijuana] stores . . . present a danger that the stores will
26 become a magnet for crime, which jeopardizes the safety” of children when stores “operat[e] in
27 proximity to schools, parks, and other areas where children are present.” See DEA News
28 Release, *supra* note 4. The U.S. Attorney for the Southern District observed that California is
“the number one marijuana producing state in the country,” with “all the serious repercussions
that come with [that status], including significant public safety issues and perhaps irreparable
harm to our youth.” *Id.* In addition to numerous other legitimate reasons for taking prosecutorial
action that might apply in any given case, it is certainly not irrational or improper to select the
most established or “flagrant[]” violators, nor is it improper to select violators to prosecute

1 “broad discretion” as to whom to prosecute, and often must consider factors such as “the strength
2 of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities,
3 and the case’s relationship to the Government’s overall enforcement plan.” *Wayte*, 470 U.S. at
4 607. Consideration of such factors within a particular jurisdiction would by no means be
5 “unjustifiable” or improper such that they “may play no part in [the prosecutor’s] charging
6 decision.” *See Bordenkircher*, 434 U.S. at 364-65. Where there are a number of “obvious
7 alternative explanation[s],” improper motive cannot be inferred. *Iqbal*, 129 S. Ct. at 1949.
8 Plaintiffs’ “geography-based” selective prosecution claim should therefore be dismissed for
9 failure to state a claim.

10 In addition to their geography-based claim, Plaintiffs allege that the federal government
11 “[a]ctively provides cannabis for medical purposes to individuals through its own IND program”
12 and “[a]ctively restricts scientific research into the medical value and use of cannabis to alleviate
13 human suffering and pain.” Am. Compl. ¶ 45. In regard to the former, this Court has already
14 recognized that participants in a federal investigational new drug (“IND”) program “have
15 committed no crime” and are therefore not “similarly situated” to Plaintiffs. Order of Nov. 28,
16 2011.¹³ In regard to the latter, Plaintiffs lack standing to challenge the federal government’s
17 support for particular forms of medical or scientific research because – as far as can be told from
18 the Amended Complaint – none of them has attempted to conduct scientific research into the
19 medical value or use of cannabis, nor have they been prevented from conducting such research,
20 nor is there any apparent connection between the conduct of such research and federal

21 “based in part upon the potential deterrent effect on others.” *United States v. Rice*, 659 F.2d 524,
22 527 (5th Cir. 1981).

23 ¹³ While Plaintiffs fail to articulate their IND claim in any detail, they presumably refer to a
24 specific program, run by the FDA, that ceased operating in 1992 but allowed the remaining
25 research subjects to continue receiving marijuana. *See Kuromiya v. United States*, 78 F. Supp. 2d
26 367, 369-70 (E.D. Pa. 1999). Another court has already easily dispensed with an equal protection
27 claim that relied on these facts, holding that the government had a rational basis for its decision
28 to stop accepting new program subjects while allowing the very few individuals already in the
program to continue their participation. *See id.* at 372 (“[T]he fact that some individuals
continued to receive marijuana after the termination of the program as a whole does not
constitute an equal protection violation.”).

1 enforcement action under the CSA. To the extent that these allegations qualify as separate
2 claims, therefore, they must also be dismissed.¹⁴

3 **II. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION**

4 As explained above, all of Plaintiffs' claims are subject to dismissal for failure to state a
5 claim upon which relief can be granted. For the same reasons, Plaintiffs also fail to meet the first
6 prong of the preliminary injunction analysis – likelihood of success on the merits. But even if
7 any of Plaintiffs' claims could survive Defendants' Motion to Dismiss, a preliminary injunction
8 would still be inappropriate under the circumstances of this case.

9 First, Plaintiffs have failed to demonstrate irreparable harm. As this Court has
10 recognized, Plaintiffs' assertions of constitutional injury do not establish irreparable harm
11 because Plaintiffs have failed to “demonstrate ‘a sufficient likelihood of success on the merits of
12 [their] constitutional claims.’” Order of Nov. 28, 2011 (quoting *Assoc'd Gen. Contractors of*
13 *Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)); *see also Goldie's*
14 *Bookstore v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) (constitutional claim may be “too
15 tenuous” to support finding of irreparable harm). In addition, Plaintiffs' claims of medical
16 necessity cannot properly support injunctive relief, given the “insurmountable challenge” posed
17 by the Supreme Court's decision in *Oakland Cannabis*, 532 U.S. at 491. *See* Order of Nov. 28,
18 2011, at 24. As stated in that decision, “‘a court sitting in equity cannot ignore the judgment of
19 Congress, deliberately expressed in legislation,’” and this Court is therefore “bound by ‘the
20 balance that Congress has struck in the [CSA].’” *Id.* (quoting *Oakland Cannabis*, 532 U.S. at
21 497-98). This Court thus concluded that Supreme Court precedent “legally nullif[ies] Plaintiffs'
22 claim of irreparable harm. *Id.* at 25.”¹⁵

23
24 ¹⁴ Even if Plaintiffs could establish selective prosecution, the prospective blanket immunity that
25 they seek is certainly not appropriate. *See United States v. Redondo-Lemos*, 955 F.2d 1296,
26 1303 (9th Cir. 1992) (rejecting “[s]ystemic relief in this area”), *overruled on other grounds by*
27 *Armstrong*, 48 F.3d 1508.

28 ¹⁵ It should also be noted that, as explained above, none of the three dispensary plaintiffs are still
in operation. There is no plausible basis to conclude that dispensary landlords would allow
dispensaries to resume operations at this point, particularly when Plaintiffs are unlikely to prevail
on the merits. The PI that Plaintiffs request would therefore have no practical effect.

1 In regard to the balance of equities, this Court has already observed, when denying
 2 Plaintiffs' request for a TRO, that "the only hardship articulated by Plaintiffs" – which again
 3 relates to the asserted medical need of dispensary customers for marijuana – "is one that federal
 4 courts may not consider." Order of Nov. 28, 2011, at 25 (citing *Oakland Cannabis*, 532 U.S. at
 5 99). On the other side of the equation, the Court has recognized "the federal Government's
 6 interest in ensuring enforcement of its laws." *Id.* (citing *Heckler*, 467 U.S. at 60). Immunizing
 7 individuals and businesses in advance from criminal prosecution for acts that indisputably violate
 8 federal law would severely impair that interest. *Cf. Trainor v. Hernandez*, 431 U.S. 434, 441
 9 (1977) (noting "the accepted rule that equity ordinarily will not enjoin the prosecution of a
 10 crime"). The same analysis applies to Plaintiffs' request for a preliminary injunction, and
 11 Plaintiffs therefore fail to establish that the balance of equities tips in their favor.

12 In regard to public interest, this Court has acknowledged that "the public has a general
 13 interest in having access to doctor-recommended treatments," but has recognized that "the public
 14 also has a corresponding interest in being protected from treatments that either have not been
 15 sanctioned by the requisite authorities or are explicitly proscribed because of any number of
 16 harms." Order of Nov. 28, 2011, at 26. Significantly, "[t]he public interest may be declared in the
 17 form of a statute." *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112,
 18 1127 (9th Cir. 2008) (internal quotation omitted). Because Congress, through the CSA, has
 19 "clearly and unequivocally concluded . . . that there is no public interest in the use of marijuana
 20 for medical reasons," the Court concluded that it could not independently reach a contrary
 21 conclusion. *See* Order of Nov. 28, 2011, at 26 (citing *Oakland Cannabis*, 532 U.S. at 497).

CONCLUSION

23 For the foregoing reasons, Defendants respectfully request that the Court grant
 24 Defendants' Motion to Dismiss and deny Plaintiffs' Motion for a Preliminary Injunction.

25 Dated: January 10, 2012

Respectfully submitted,

26
 27 TONY WEST
 Assistant Attorney General
 28 ARTHUR R. GOLDBERG

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