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8
9 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 **SAN JOSE DIVISION**

11 COUNTY OF SANTA CRUZ, et al.,)
12 Plaintiffs,)
13 v.)
14 ALBERTO GONZALES, Attorney General)
of the United States; KAREN P. TANDY,)
15 Administrator of the Drug Enforcement)
Administration; JOHN P. WALTERS,)
16 Director of the Office of National Drug)
Control Policy; and 30 UNKNOWN)
17 DRUG ENFORCEMENT)
ADMINISTRATION AGENTS,)
18 Defendants.)
19 _____)

Nos. C 03-1802 JF **CONSOLIDATED**
MC 02-7012 JF

NOTICE OF MOTION AND
OFFICIAL-CAPACITY DEFENDANTS'
MOTION TO DISMISS

Date: May 12, 2006
Time: 9:00 a.m.
Courtroom 3, 5th Floor
The Hon. Jeremy Fogel

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 28 57 Fed. Reg. 10,499 (March, 26, 1992) 5
 51 Fed. Reg. 17,476 (May 13, 1986) 3 n.2

1 substances “have a useful and legitimate medical purpose and are necessary to maintain the health
2 and general welfare of the American people,” 21 U.S.C. §801(1), Congress found that “[t]he illegal
3 importation, manufacture, distribution, and possession and improper use of controlled substances
4 have a substantial and detrimental effect of the health and general welfare of the American people.”
5 21 U.S.C. §801(2).¹

6 Congress therefore established a comprehensive regulatory scheme in which controlled
7 substances are placed in one of five “schedules” depending on their potential for abuse, the extent
8 to which they may lead to psychological or physical dependence, and whether they have a currently
9 accepted medical use in treatment in the United States. See 21 U.S.C. §812(b). Since Congress
10 enacted the CSA in 1970, marijuana and tetrahydrocannabinols have been classified as Schedule I
11 controlled substances, the most restrictive of the five schedules. See 21 U.S.C. §812(c) (Schedule
12 I(c)(10) and (17)).

13 A drug is included in Schedule I if it (1) “has a high potential for abuse,” (2) “has no
14 currently accepted medical use in treatment in the United States,” and (3) has “a lack of accepted
15 safety for use * * * under medical supervision.” 21 U.S.C. §§812(b)(1)(A)-(C). Given these
16 characteristics, Congress mandated that substances in Schedule I be subject to the most stringent
17 regulation. In particular, it is unlawful under the CSA to manufacture, distribute, dispense, or
18 possess a Schedule I drug, except as part of a strictly controlled research project registered with the
19 DEA, and approved by the Secretary of Health and Human Services (“HHS”), acting through the
20 Food and Drug Administration (“FDA”). See 21 U.S.C. §§823(f), 841(a)(1), 844(a); United States
21 v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483, 492 (2001). By contrast, a drug is included
22 in Schedule II if it “has a high potential for abuse,” but “has a currently accepted medical use in
23 treatment in the United States” or “a currently accepted medical use with severe restrictions.” 21
24 U.S.C. §§812(b)(2)(A) & (B). Schedules III through V consist of drugs that similarly have “a
25 currently accepted medical use in treatment in the United States,” 21 U.S.C. §§812(b)(3)(B), (4)(B)

27 ¹ Congress defined a controlled substance as “a drug or other substance, or immediate
28 precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.” 21 U.S.C. §802(6).

1 & (5)(B), but for which the respective potential for abuse is lower, and the degree of potential
2 dependence more limited, than they are for drugs listed in the preceding schedule. See 21 U.S.C.
3 §§812(b)(3)-(5). Given their potential for abuse, the CSA requires that all persons involved in the
4 distribution of controlled substances be registered with the DEA, see 21 U.S.C. §822(a), and that
5 they keep records of all transfers of controlled substances, see 21 U.S.C. §827(a).

6 **2.** When it enacted the CSA, Congress also recognized that the schedules may sometimes
7 need to be modified to reflect changes in scientific knowledge and patterns of abuse of particular
8 drugs. Congress therefore established an exclusive set of statutory procedures under which
9 controlled substances that have been placed in Schedule I (or any other Schedule) may be transferred
10 to another Schedule or removed from the Schedules. See 21 U.S.C. §811(a).²

11 Pursuant to that process, “any interested party” who believes that medical, scientific, or other
12 relevant data warrant transferring marijuana to a less restrictive schedule may petition the Attorney
13 General to initiate a rulemaking proceeding to reschedule marijuana. See 21 U.S.C. §811(a). The
14 Administrator of the DEA, to whom the Attorney General has delegated his authority under the CSA
15 (see 28 C.F.R. §0.100(b)), must refer any such rescheduling petition to the Secretary of HHS for a
16 scientific and medical evaluation and a recommendation as to whether the substance should be
17 reclassified or decontrolled. The recommendation of the Secretary is binding on the Administrator
18 with respect to scientific and medical matters. See 21 U.S.C. §811(b). Any party aggrieved by a
19 final decision of the Administrator may seek review in the courts of appeals. See 21 U.S.C. §877.

20 **3.** In addition to the restrictions under the CSA, controlled substances in Schedule I are
21 subject to control under the Federal Food, Drug, and Cosmetic Act (“FDCA”), 21 U.S.C. §301 et
22 seq. The FDCA prohibits the “introduc[tion] or deliver[y] for introduction into interstate commerce”
23
24

25
26 ² For example, in 1986, the DEA Administrator rescheduled “Marinol,” a substance which
27 is the synthetic equivalent of the isomer of delta-9-tetrahydrocannabinol (“THC”), the principal
28 psychoactive substance in marijuana, from Schedule I to Schedule II. See 51 Fed. Reg. 17,476 (May
13, 1986). In 1999, DEA transferred Marinol from Schedule II to Schedule III, thereby lessening the
CSA regulatory requirements governing its use as medicine. See 64 Fed. Reg. 35,928 (July 2, 1999).

1 of Columbia Appropriations Act, 2004, Title IV, §423(b), 118 Stat. 3, 139 (2004); Pub. L. No. 108-
2 7, Division C–District of Columbia Appropriations, 2003, Title III, §126(b), 117 Stat. 11, 126
3 (2003); Pub. L. No. 107-96, District of Columbia Appropriations Act, 2002, §127(b), 115 Stat. 923,
4 953 (2001); Pub. L. No. 106-522, District of Columbia Appropriations Act, 2001, §143(b), 114 Stat.
5 2440, 2471 (2000); Pub. L. No. 106-113, Division A: District of Columbia Appropriations, Title I,
6 §167(b), 113 Stat. 1501, 1530 (1999).

7 The DEA and FDA also have consistently determined that marijuana should remain in
8 Schedule I because it has “no currently accepted medical use for treatment in the United States.” In
9 1992, the DEA Administrator declined to reschedule marijuana, finding that the record demonstrated
10 that marijuana “had no currently accepted medical use in treatment in the United States,” and thus
11 had to remain in Schedule I. See 57 Fed. Reg. 10,499 (March 26, 1992). This decision was upheld
12 by a unanimous panel of the D.C. Circuit. See Alliance for Cannabis Therapeutics v. DEA, 15 F.3d
13 1131, 1137 (D.C. Cir. 1994) (“[T]he Administrator’s findings are supported by substantial
14 evidence,” including “the testimony of numerous experts that marijuana’s medicinal value has never
15 been proven in sound scientific studies.”).

16 More recently, on March 20, 2001, the DEA Administrator again denied a petition to
17 reschedule marijuana, based, in part, on HHS’s scientific and medical analysis recommending that
18 marijuana remain in schedule I. See 66 Fed. Reg. 20,038 (April 18, 2001). In particular, based on
19 a comprehensive review by the FDA’s Controlled Substance Staff, then-Surgeon General David
20 Satcher recommended that marijuana “continue to be subject to control under Schedule I of the
21 CSA.” Id. at 20,039. The D.C. Circuit dismissed a petition for review challenging that
22 determination for lack of standing. See Gettman v. DEA, 290 F.3d 430, 432-35 (D.C. Cir. 2002).

23 **B. Facts and Proceedings**

24 On April 23, 2003, plaintiffs County of Santa Cruz, California; City of Santa Cruz,
25 California; Valerie Corral; Eladio V. Acosta; James Daniel Baehr; Michael Cheslosky; Jennifer Lee
26 Hentz; Dorothy Gibbs; Harold F. Margolin; and the Wo/Men's Alliance for Medical Marijuana,
27 filed the instant action against the Attorney General of the United States, the Administrator of the
28 Drug Enforcement (“DEA”), the Director of the Office of National Drug Control Policy, and 30

1 Unknown DEA Agents, and moved for a preliminary injunction that sought to enjoin defendants
2 from enforcing the provisions of the Controlled Substances Act against them.

3 On August 23, 2003, this Court denied plaintiff's motion for a preliminary injunction,
4 holding that it had "no alternative but to conclude that under existing law they cannot succeed on the
5 merits of their claims," and also granted the Official-Capacity Defendants motion to dismiss Counts
6 1-5 of their Complaint, which pled causes of action alleging violations of plaintiffs' fundamental
7 rights under the Fifth and Ninth Amendments (Counts 1-2); the unlawful exercise of Congressional
8 authority under the Commerce Clause (Count 3); violation of the Tenth Amendment (Count 4); and
9 seeking declaratory relief under 21 U.S.C. §885(d) (Count 5). See County of Santa Cruz, 279 F.
10 Supp.2d at 1211-12.

11 On April 21, 2004, following the Ninth Circuit's decision in Raich v. Ashcroft, 352 F.3d
12 1222 (9th Cir. 2003), vacated and remanded sub nom. Gonzales v. Raich, 125 S. Ct. 2195 (2005),
13 this Court granted plaintiffs' motion for reconsideration, holding that, "[a]bsent intervention by the
14 Supreme Court, the change in the law of this circuit requires this Court to reconsider its decision
15 denying Plaintiffs' motion for a preliminary injunction. Plaintiffs have demonstrated * * * a
16 likelihood of success with respect to their argument that, on the facts of this case and the controlling
17 case law in this circuit, the [Controlled Substances Act] as applied to Plaintiffs is an unconstitutional
18 exercise of Congress's Commerce Clause power." County of Santa Cruz v. Ashcroft, 314 F.
19 Supp.2d 1000, 1007, 1009 (N.D. Cal. 2004). Thereafter, on June 21, 2004, this Court entered a
20 preliminary injunction barring the defendants from seizing the plaintiff "medical cannabis, forfeiting
21 their property, or seeking civil or administrative sanctions against them with respect to the intrastate
22 cultivation, possession, delivery, obtaining without charge, and/or use of cannabis for personal
23 medical purposes on the advice of a physician and in accordance with state law." Order for
24 Preliminary Injunctive Relief, County of Santa Cruz v. Ashcroft, No. 03-1802 JF, at 2 (N.D. Cal.
25 June 21, 2004).

26 On June 6, 2005, the Supreme Court vacated and remanded the Ninth Circuit's decision in
27 Raich, holding, in relevant part, that, "[t]he CSA is a valid exercise of federal power, even as applied
28 to the troubling facts of this case." 125 S. Ct. at 2201. On September 20, 2005, the Ninth Circuit,

1 in an unpublished memorandum, granted the government's unopposed motion for summary reversal
 2 and reversed the preliminary injunction entered on of the preliminary injunction entered on June 21,
 3 2004. See County of Santa Cruz v. Gonzales, No. 04-16291 (9th Cir. June 21, 2004).

4 On January 30, 2006, the plaintiffs filed their First Amended Complaint.

5 ARGUMENT

6 I. THERE IS NO FUNDAMENTAL RIGHT TO OBTAIN OR USE MARIJUANA OR 7 OTHER UNAPPROVED AND UNPROVEN MEDICAL TREATMENTS

8 Plaintiffs allege in their First and Second Causes of Action that the actions of the defendants
 9 violate their fundamental rights under the Fifth and Ninth Amendments. Specifically, plaintiffs
 10 allege that the actions of defendants infringe on their fundamental rights to preserve life, ameliorate
 11 pain, maintain bodily integrity, consult with their physicians regarding treatment and to act on their
 12 physician's recommendations, make intimate and personal decisions, and to control the
 13 circumstances of their death. See First Amended Complaint ¶¶ 97-105. As we now show, and as
 14 this Court has already determined, see County of Santa Cruz, 279 F. Supp.2d at 1201-05, that claim
 15 is foreclosed by binding Ninth Circuit authority.

16 1. In Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980), the Ninth Circuit affirmed
 17 the dismissal of a declaratory judgment action in which the plaintiff had sought to secure the right
 18 to obtain and use laetrile for the prevention of cancer. Among other claims, the plaintiff argued that
 19 the regulatory scheme established by the FDA was so burdensome as applied to individuals that it
 20 infringed upon his fundamental right to privacy. The Ninth Circuit rejected this claim, holding that,
 21 "[w]e need not decide whether Carnohan has a constitutional right to treat himself with home
 22 remedies of his own confection. Constitutional rights of privacy and personal liberty do not give
 23 individuals the right to obtain laetrile free of the lawful exercise of the government's police power."
 24 616 F.2d at 1122 (emphasis supplied).

25 In so ruling, the Ninth Circuit cited with approval the Tenth Circuit's decision in Rutherford
 26 v. United States, 616 F.2d 455 (10th Cir. 1980), and the California Supreme court's decision in
 27 People v. Privitera, 23 Cal.3d 697, 591 P.2d 919, 153 Cal.Rptr. 431 (1979). In Rutherford, the Tenth
 28 Circuit reversed an injunction entered on behalf of a class of terminally ill cancer patients who
 sought to obtain laetrile, holding that "the decision by the patient whether to have a treatment or not

1 is a protected right, but his selection of a particular treatment, or at least a medication, is within the
2 area of governmental interest in protecting public health." 616 F.2d at 457. Similarly, in Privitera,
3 the California Supreme Court rejected the contention that a terminally ill cancer patient had a
4 fundamental right to use laetrile, holding that, "the asserted right to obtain drugs of unproven efficacy
5 is not encompassed by the right of privacy embodied in either the federal or state Constitutions."
6 23 Cal.3d at 702, 591 P.2d at 921.

7 The Ninth Circuit again held that there is no fundamental right to any particular form of
8 treatment in National Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology,
9 228 F.3d 1043 (9th Cir. 2000). In that case, in upholding California's mental health licensing laws
10 against constitutional challenge, the Ninth Circuit stated: "We further conclude that substantive due
11 process rights do not extend to the choice of type of treatment or of a particular health care provider."
12 Id. at 1050 (emphasis added). The Ninth Circuit also quoted with approval and expressly "agree[d]"
13 with Mitchell v. Clayton, 995 F.2d 772, 775 (7th Cir. 1993), in which the Seventh Circuit, citing,
14 inter alia, Carnohan and Rutherford, stated that "'most federal courts have held that a patient does
15 not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a
16 particular provider if the government has reasonably prohibited that type of treatment or provider.'"
17 228 F.3d at 1050 (quoting Mitchell, 995 F.2d at 775).

18 These decisions are consistent with the overwhelming weight of authority. Every other court
19 of appeals to have considered the question has likewise held that individuals do not have a
20 fundamental right to obtain particular medical treatments free of the lawful exercise of the
21 government's police power. See Sammon v. New Jersey Bd. of Med. Examiners, 66 F.3d 639, 645
22 n.10 (3d Cir. 1995) ("In the absence of extraordinary circumstances, state restrictions on a patient's
23 choice of a particular treatment also have been found to warrant only rational basis review");
24 Mitchell, 995 F.2d at 775-76; United States v. Burzynski Cancer Research Inst., 819 F.2d 1301,
25 1313-14 (5th Cir. 1987) (rejecting cancer patients' claim of constitutional right to obtain
26 antineoplaston drugs); see also Smith v. Shalala, 954 F. Supp. 1, 3 (D.D.C. 1996) (quoting Carnohan
27 for proposition that there is no substantive due process right "'to obtain [unapproved drugs] free of
28 the lawful exercise of government police power'" (alteration in original)); United States v. Vital

1 Health Prods., Ltd., 786 F. Supp. 761, 777 (E.D. Wisc. 1992) (“[A] claim that American citizens
 2 have the freedom to choose whatever medication or treatment they desire is not grounded in the
 3 Fifth, Ninth or Fourteenth Amendments.”), aff’d, 985 F.2d 563 (7th Cir. 1993) (Mem.).⁴ Similarly,
 4 the California courts have held that, even following the passage of the Compassionate Use Act in
 5 that State, “[t]here is no fundamental state or federal constitutional right to use drugs of unproven
 6 efficacy.” People v. Bianco, 93 Cal.App.4th 748, 754, 113 Cal.Rptr.2d 392, 397-98 (Cal. Ct. App.
 7 2001), review denied (Jan. 16, 2002); accord Seeley v. State of Washington, 132 Wash. 2d 776, 782,
 8 794, 940 P.2d 604, 607, 612 (1997) (holding that plaintiff suffering from terminal bone cancer had
 9 no “fundamental right to have marijuana prescribed as his preferred treatment” notwithstanding his
 10 claim that “smoking marijuana has been more effective in relieving his symptoms than other
 11 antiemetics.”).

12 The Ninth Circuit’s decisions in Carnohan and National Ass’n for the Advancement of
 13 Psychoanalysis foreclose plaintiffs’ contention that they have a fundamental right to obtain and use
 14 marijuana. As in Carnohan, neither the Fifth nor Ninth Amendment gives plaintiffs the right to
 15 obtain and use marijuana “free of the lawful exercise of the government’s police power,” 616 F.2d
 16 at 1122, inasmuch as the decision to use a particular drug “is within the area of governmental interest
 17 in protecting public health.” Rutherford, 616 F.2d at 457. Indeed, in dismissing the identical claims
 18 pled in plaintiffs’ original complaint, this Court concluded that those causes of action incompatible
 19 with Carnohan. See County of Santa Cruz, 279 F. Supp.2d at 1204 (“Because it concludes that the
 20 fundamental right articulated by Plaintiffs--the right of terminally ill persons to use
 21 physician-recommended medication to alleviate their pain and suffering and to control the
 22 circumstances of their own deaths--is not ‘deeply rooted in this Nation’s history and tradition’ and
 23 that recognition of such a constitutionally-protected right under the circumstances of this case would
 24 be inconsistent with the holding of Carnohan, this Court concludes that Plaintiffs cannot demonstrate
 25 a likelihood of success on this aspect of their claim.”); accord United States v. Cannabis Cultivators

27 ⁴ We are aware of only one district court decision to the contrary, Andrews v. Ballard, 498
 28 F. Supp. 1038 (S.D. Tex. 1980) (finding decision to obtain acupuncture treatment encompassed by
 the right of privacy), a case that did not involve the use of any drug, and the continued viability of
 which is questionable after the Fifth Circuit’s decision in Burzynski.

1 Club, 1999 WL 111893, at *3 (N.D. Cal. Feb. 25, 1999) (“Carnohan and Rutherford hold, however,
 2 that there is no fundamental right to obtain the medication of choice. Accordingly, the Intervenor’s
 3 claim that they do have such a right, and that the United States should be enjoined from interfering
 4 with that right, will be dismissed without leave to amend.”), vacated on other grounds, 221 F.3d
 5 1349 (9th Cir. 2000) (Mem.).⁵

6 2. The correctness of this Court’s decision dismissing plaintiffs’ Fifth and Ninth Amendment
 7 claims under Carnohan is underscored by the Supreme Court’s decision in Washington v.
 8 Glucksberg, 521 U.S. 702, 710 (1997), in which the Court held that there is no fundamental right to
 9 obtain medical treatment which would alleviate suffering by causing death. Of particular relevance
 10 here, the Court stressed that there must be a “careful description” of the asserted fundamental liberty
 11 interest in substantive due process cases, and that the assert interest must be viewed with reference
 12 to historical tradition. Id. at 720-21, 722-23. The Court therefore rejected the various descriptions
 13 of the interest at stake offered by the respondents in that case -- including the claimed right to
 14 “determin[e] the time and manner of one’s death,” “right to die,” “liberty to choose how to die,” right
 15 to “control of one’s final days,” “the right to choose a humane, dignified death,” and “the liberty to
 16 shape death” -- as running counter to this requirement. See id. at 721-22. Rather, the Court
 17 explained, because “[t]he Washington statute at issue in this case prohibits ‘aid[ing] another person
 18 to attempt suicide,’ * * * the question before us is whether the ‘liberty’ specially protected by the
 19 Due Process Clause includes a right to commit suicide which itself includes a right to assistance in
 20 doing so.” Id. at 723 (internal citation omitted).

21 As with the claimed liberty interests asserted in Glucksberg, plaintiffs’ assertion of various
 22 “fundamental rights”-- including the rights to preserve life, ameliorate pain, maintain bodily
 23 integrity,, make intimate and personal decisions, and to control the circumstances of their death --

24
 25 ⁵ Courts in other circuits are in accord. See Pearson v. McCaffrey, 139 F. Supp.2d 113, 123
 26 (D.D.C. 2001) (“[N]o court has recognized a fundamental right to sell, distribute, or use marijuana.
 27 Prescription, recommendation (in states that recognize recommendation as a quasi-prescription), and
 28 use of marijuana is illegal under the CSA. The Court declines to find that the federal policy, in
 upholding federal law, violates the Ninth Amendment.”); Kuromiya v. United States, 37 F. Supp.2d
 717, 726 (E.D. Pa. 1999) (citing, e.g., Carnohan and holding that, “there is no fundamental right of
 privacy to select one’s medical treatment without regard to criminal laws, and courts have
 consequently applied only rational review to regulations affecting these matters.”).

1 runs afoul of the Supreme Court’s admonition that there be a “careful description” of the asserted
 2 fundamental liberty interest at stake. Rather, following the methodology outlined by the Court in
 3 Glucksberg, because the CSA prohibits the distribution, manufacture, and possession of marijuana
 4 and other Schedule I controlled substances for any purpose (unless otherwise authorized by the
 5 CSA), the question must be whether the liberty protected by the Due Process Clause includes a right
 6 for the individual plaintiffs to use a particular unapproved and unproven drug, marijuana, for asserted
 7 medicinal purposes, which itself includes the right to obtain the drug from third parties who cultivate
 8 the drug for them, in this case the WAMM plaintiffs. This is precisely the asserted liberty interest
 9 which the Ninth Circuit rejected Carnohan. As Judge Breyer has persuasively analyzed in rejecting
 10 a like claim, “the Intervenor’s complaint seeks an order that they have a fundamental right to obtain
 11 a particular medication, marijuana, from a particular source, the medical cannabis cooperatives.
 12 Carnohan, however, holds that there is no constitutional right to obtain medication free from the
 13 lawful exercise of the government’s police powers.” Cannabis Cultivators Club, 1999 WL 111893,
 14 at *2.

15 **3.** Plaintiffs’ invocation of a fundamental right “to consult with their physicians regarding
 16 treatment and to act on their physician’s recommendations,” also is misplaced. As this Court ruled
 17 in dismissing this very same claim:

18 The Court is unaware of any authority that recognizes a fundamental right of patients
 19 to follow the recommendations of their physicians in treating their illnesses or to
 20 obtain and use physician-recommended medications in situations where the use of
 21 such medications is prohibited by law. Indeed, “if one does not have a right to obtain
 22 medication free from government regulation, there is no reason why one would have
 23 that right upon a physician's recommendation.”

24 County of Santa Cruz, 279 F. Supp.2d at 1205 (quoting Cannabis Cultivator’s Club, 1999 WL
 25 111893, *2 (N.D.Cal. Feb.25, 1999)). Consequently, “[p]laintiffs cannot demonstrate a likelihood
 26 of success on this claim under existing law.” Id.

27 **4.** Nor can plaintiffs find any additional support in the Ninth Amendment. The Ninth Circuit
 28 has repeatedly observed that the Ninth Amendment ““has not been interpreted as independently
 securing any constitutional rights for purposes of making out a constitutional violation.””
Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991); accord San Diego County Gun
 Rights Comm. v. Reno, 98 F.3d 1121, 1125 (9th Cir. 1996) (holding that “the Ninth Amendment

1 does not encompass an unenumerated, fundamental, individual right to bear firearms”).
 2 Consequently, `so long as Congress does not exceed a “specific limitation” on a grant of power, it
 3 does not violate the Ninth Amendment. See Barton v. CIR, 737 F.2d 822, 823 (9th Cir. 1984)
 4 (rejecting Ninth Amendment challenge to federal tax laws because Congress had acted within its
 5 Article I authority in enacting such laws). As the Supreme Court long ago explained:

6 The powers granted by the Constitution to the Federal Government are subtracted
 7 from the totality of sovereignty in the states and the people. Therefore, when
 8 objection is made that the exercise of a federal power infringes upon rights reserved
 9 by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted
power under which the action of the Union was taken. If granted power is found, the
objection of invasion of those rights, reserved by the Ninth and Tenth Amendments,
must fail.

10 United Public Workers v. Mitchell, 330 U.S. 75, 95-96 (1947) (emphasis supplied), overruled in part
 11 on other grounds by Adler v. Board of Education, 342 U.S. 485 (1952).

12 Hence, because the CSA does not exceed Congress’ power to regulate interstate commerce,
 13 see Raich, 125 S. Ct. at 2207, plaintiffs have no Ninth Amendment right to obtain and use marijuana
 14 even for medicinal purposes.

15 5. Finally, plaintiffs’ reliance on the fact that voters of California passed the Compassionate
 16 Use Act, which decriminalized the use of marijuana for medical purposes, does not in any way alter
 17 this analysis. To the contrary, the fact that California and other States have decriminalized the use
 18 of marijuana for specified medical purposes under state law does not support the altogether different
 19 question whether plaintiffs have a fundamental, constitutional right to obtain and use unapproved
 20 and unproven drugs such as marijuana free from government regulation. As the California Court
 21 of Appeal, Third District has explained, “the Compassionate Use Act created a limited defense to
 22 crimes, not a constitutional right to obtain marijuana.” People v. Urziceanu, 132 Cal.App.4th 747,
 23 774, 33 Cal. Rptr.3d 859, 874 (Cal. Ct. App. 2005) (emphasis added).

24 **II. THE CSA DOES NOT RUN AFOUL OF THE TENTH AMENDMENT**

25 Plaintiffs allege in their Third Cause of Action that defendants’ actions violate the rights of
 26 plaintiffs County and City of Santa Cruz under the Tenth Amendment. See First Amended
 27 Complaint ¶¶ 106-108. As we now show, and as this Court has already determined, see County of
 28 Santa Cruz, 279 F. Supp.2d at 1210-11, that claim, too, lacks merit.

1 1. The Tenth Amendment provides: “The powers not delegated to the United States by the
2 Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the
3 people.” U.S. Const. amend. X. As the language of the Tenth Amendment evinces, “[i]f a power
4 is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any
5 reservation of that power to the States * * *.” New York v. United States, 505 U.S. 144, 156 (1992).
6 In other words, “[a]s long as it is acting within the powers granted it under the Constitution,
7 Congress may impose its will on the States [and] Congress may legislate in areas traditionally
8 regulated by the States.” Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

9 The Supreme Court therefore “long ago rejected the suggestion that Congress invades areas
10 reserved to the States by the Tenth Amendment simply because it exercises its authority under the
11 Commerce Clause in a manner that displaces the States' exercise of their police powers.” Hodel v.
12 Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 291 (1981). As the Court
13 recently stated in McConnell v. FEC, 540 U.S. 93 (2003), “[i]t is not uncommon for federal law to
14 prohibit private conduct that is legal in some States. Indeed, such conflict is inevitable in areas of
15 law that involve both state and federal concerns. It is not in and of itself a marker of constitutional
16 infirmity.” 540 U.S. at 186-87 (citing Oakland Cannabis, 532 U.S. 483); accord Hodel, 452 U.S.
17 at 290 (“Although such congressional enactments obviously curtail or prohibit the States’
18 prerogatives to make legislative choices respecting subjects the States may consider important, the
19 Supremacy Clause permits no other result.”).

20 Nor is this a case in which the federal government has “commandeer[ed] the States and state
21 officials in carrying out federal regulatory schemes.” McConnell, 540 U.S. at 186. As Judge Jenkins
22 has correctly analyzed, federal commandeering is “not at issue in this case, for the federal
23 government is not forcing California, or any other State, to take any action. The CSA regulates
24 individual behavior, and plaintiffs are asking the Court to prevent the government from applying
25 those regulations to their conduct.” Raich v. Ashcroft, 248 F. Supp.2d 918, 927 (N.D. Cal. 2003)
26 (emphasis supplied), rev'd on other grounds, 352 F.3d 1222 (9th Cir. 2003), vacated and remanded,
27 125 S. Ct. 2195 (2005); accord McConnell, 540 U.S. at 186 (Title I of Bipartisan Campaign Reform
28 Act did not run afoul of Tenth Amendment because it “only regulates the conduct of private parties”

1 and “imposes no requirements whatsoever upon States or state officials”); United States v. Jones,
2 231 F.3d 508, 515 (9th Cir. 2000) (federal statute regulating possession of firearms did not violate
3 Tenth Amendment because it is “a federal criminal statute to be implemented by federal authorities;
4 it does not attempt to force the states or state officers to enact or enforce any federal regulation.”).

5 Accordingly, because Congress’ regulation of the manufacture and possession of marijuana
6 “is squarely within Congress’ commerce power,” Raich, 125 S. Ct. at 2207, it does not violate the
7 Tenth Amendment. As this Court correctly reasoned in dismissing an identical claim brought in
8 plaintiffs’ original complaint, “[b]ecause Plaintiffs cannot prevail on their Commerce Clause
9 challenge and have not established that Defendants commandeered the state legislative process or
10 conscripted state officers, the Court concludes that they cannot demonstrate a likelihood of success
11 on their Tenth Amendment claim.” County of Santa Cruz, 279 F. Supp.2d at 1210-11.

12 2. Nothing in Gonzales v. Oregon, 126 S. Ct. 904 (2006), suggests a contrary result. In that
13 case, the Supreme Court held that a November 9, 2001 Interpretive Rule issued by the Attorney
14 General, which addressed the implementation and enforcement of the CSA with respect to the use
15 of controlled substances by Oregon physicians acting in compliance with the Oregon Death With
16 Dignity Act, was invalid under the CSA as a matter of statutory construction under the CSA. See
17 id. at 911 (stating that resolution of this case “requires an inquiry familiar to the courts; interpreting
18 a federal statute to determine whether Executive action is authorized by, or otherwise consistent
19 with, the enactment.”). Specifically, the Court held that the Interpretive Rule could not be justified
20 on the basis of 21 U.S.C. §§823(f) & 824(a)(4), which authorize the Attorney General to revoke or
21 suspend a physician’s registration upon consideration of five enumerated factors. See id. At 911-26.

22 In contrast to the instant case, at issue in Gonzales v. Oregon was the use of Schedule II
23 controlled substances, see id. at 912 (“The present dispute involves controlled substances listed in
24 Schedule II, substances generally available only pursuant to a written, nonrefillable prescription by
25 a physician.”), and the Court’s statutory analysis consequently has no bearing on Schedule I
26 controlled substances such as marijuana. As the Court made clear, “Congress’ express determination
27 that marijuana had no accepted medical use foreclosed any argument about statutory coverage of
28 drugs available by a doctor’s prescription.” Id. at 922 (citing Oakland Cannabis, 532 U.S. 483).

1 Moreover, the Court did not hold that the Interpretive Rule ran afoul of the Tenth
2 Amendment or any other provision of the Constitution. To the contrary, the Court expressly
3 reaffirmed that, “[e]ven though regulation of health and safety is primarily, and historically, a matter
4 of local concern, there is no question that the Federal Government can set uniform national standards
5 in these areas.” *Id.* at 923 (internal quotation omitted) (citing *Raich*, 125 S. Ct. 2195). *Gonzales v.*
6 *Oregon*, therefore, provides no support to plaintiffs’ Tenth Amendment claim.

7 **III. PLAINTIFFS DO NOT HAVE IMMUNITY UNDER THE CSA**

8 Plaintiffs allege in their Fourth Cause of Action that the actions of defendants violate the
9 rights of plaintiffs WAMM and County of Santa Cruz under 21 U.S.C. §885(d). *See* First Amended
10 Complaint ¶¶ 109-112. As we now demonstrate, and as this Court has already determined, *see*
11 *County of Santa Cruz*, 279 F. Supp.2d at 1211-12, that claim also is insubstantial.

12 **1. 21 U.S.C. §885(d) provides:**

13 No civil or criminal liability shall be imposed by virtue of this subchapter upon any
14 duly authorized Federal officer lawfully engaged in the enforcement of this
15 subchapter, or upon any duly authorized officer of any State, territory, political
16 subdivision thereof, the District of Columbia, or any possession of the United States,
17 who shall be lawfully engaged in the enforcement of any law or municipal ordinance
18 relating to controlled substances.

19 Contrary to plaintiffs’ allegations, that statute does not vest the WAMM plaintiffs with immunity
20 by virtue of action taken by the County of Santa Cruz. A state or local officer who is engaged in the
21 enforcement of a municipal ordinance that is in positive conflict with the CSA is not “lawfully
22 engaged” in the enforcement of a law relating to controlled substances. That conclusion is
23 compelled by the preemption provision of the CSA, which provides:

24 No provision of this subchapter shall be construed as indicating an intent on the part
25 of Congress to occupy the field in which that provision operates, including criminal
26 penalties, to the exclusion of any State law on the same subject matter which would
27 otherwise be within the authority of the State, unless there is a positive conflict
28 between that provision of this subchapter and that State law so that the two cannot
consistently stand together.

29 21 U.S.C. §903. This provision makes clear that a state or local law that allows for the distribution
30 or cultivation of marijuana for any purpose, unless expressly authorized by the CSA, is preempted
31 by that statute.

1 Thus, as this Court correctly reasoned in dismissing this identical claim:

2 Plaintiffs' claim that their actions are protected from civil or criminal liability under
 3 21 U.S.C. §885(d), a statute intended to provide immunity for acts committed by law
 4 enforcement officers in the course of legitimate drug enforcement operations
 5 operations, is fatally defective. Judge Charles Breyer of this district rejected the same
 6 argument in [Cannabis Cultivator's Club], finding that any other result "would mean
 that a state or municipality could exempt itself from the Controlled Substances Act."
 The Court finds the reasoning set forth by Judge Breyer applicable to the present
 case because the City's medicinal marijuana ordinance is in positive conflict with the
 CSA. Accordingly, Claim 5 will be dismissed.

7 County of Santa Cruz, 279 F. Supp.2d at 1210-11 (internal citations omitted). This same analysis
 8 compels the dismissal of plaintiffs' Fourth Cause of Action.

9 **IV. THE SUPREME COURT'S DECISION IN OAKLAND CANNABIS**
 10 **FORECLOSES ANY DEFENSE OF MEDICAL NECESSITY**

11 Plaintiffs allege in their Sixth Cause of Action that they are entitled to declaratory and
 12 injunctive relief under the doctrine of medical necessity. As we now show, that contention also must
 13 be dismissed.

14 In Oakland Cannabis, the Supreme Court held that "a medical necessity exception for
 15 marijuana is at odds with the terms of the Controlled Substances Act" because "its provisions leave
 16 no doubt that the defense is unavailable." 532 U.S. at 491. In particular, the Court reasoned that:

17 In the case of the Controlled Substances Act, the statute reflects a determination that
 18 marijuana has no medical benefits worthy of an exception (outside the confines of a
 19 Government-approved research project). Whereas some other drugs can be dispensed
 and prescribed for medical use, see 21 U.S.C. § 829, the same is not true for
 marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has "no
 currently accepted medical use" at all.

20 Id. The Court therefore concluded that, "[b]ecause the statutory prohibitions cover even those who
 21 have what could be termed a medical necessity, the Act precludes consideration of this evidence."
 22 Id. at 499 (emphasis supplied).

23 Moreover, the Supreme Court specifically rejected the distinction between a claimed medical
 24 necessity to manufacture and distribute marijuana and a claimed medical necessity to possess
 25 marijuana, declaring that, "[l]est there be any confusion, we clarify that nothing in our analysis, or
 26 the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing
 27 and distributing and the other prohibitions in the Controlled Substances Act." Id. at 494 n.7. This
 28 is so, the Court explained, because, "the very point of our holding is that there is no medical

1 necessity exception to the prohibitions at issue, even when the patient is ‘seriously ill’ and lacks
2 alternative avenues for relief. Indeed, it is the Cooperative’s argument that its patients are ‘seriously
3 ill,’ and lacking ‘alternatives.’ We reject the argument that these factors warrant a medical necessity
4 exception.” Id. (emphasis added, internal citations omitted). This language leaves no room for
5 plaintiffs’ contention that they are entitled to injunctive relief to protect a “medical necessity”
6 defense to the CSA’s prohibitions on the manufacture or possession of marijuana.

7 Plaintiffs have previously alleged that the foregoing language is merely dicta and is not
8 controlling, but that cannot be squared with the Court’s unambiguous rejection of any distinction
9 “between the prohibitions on manufacturing and distributing and the other prohibitions in the
10 Controlled Substances Act,” and the Court’s equally unambiguous rejection of the Cooperative’s
11 argument that a medical necessity exception was warranted because its patients “are ‘seriously ill’
12 and lack[] ‘alternatives.’” Id. Indeed, even if this language were considered a dictum, “that would
13 be of little significance because our precedent requires that we give great weight to dicta of the
14 Supreme Court.” Coeur d’Alene Tribe of Idaho v. Hammond, 384 F.3d 674, 683 (9th Cir. 2004),
15 cert. denied, 125 S. Ct. 1397 (2005); see United States v. Montero-Camargo, 208 F.3d 1122, 1132
16 n.17 (9th Cir. 2000) (en banc) (“Supreme Court dicta have a weight that is greater than ordinary
17 judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them
18 off because they were not a holding.”) (internal quotation marks and citations omitted). Here, given
19 the clarity of the Court’s command that, “the very point of our holding is that there is no medical
20 necessity exemption to the prohibitions at issue, even when the patient is ‘seriously ill’ and lacks
21 alternative avenues for relief,” id. (emphasis added), plaintiff’s invocation of the medical necessity
22 defense must fail.

CONCLUSION

For the foregoing reasons, plaintiffs' First, Second, Third, Fourth, and Sixth Causes of Action should be dismissed.

Respectfully submitted,

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