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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN JOSE DIVISION**

17 COUNTY OF SANTA CRUZ, CALIFORNIA;
CITY OF SANTA CRUZ, CALIFORNIA;
18 VALERIE CORRAL; ELADIO V. ACOSTA;
JENNIFER LEE HENTZ; HAROLD F.
19 MARGOLIN; LEVI CASTRO; DOROTHY
GIBBS; JAMES DANIEL BAEHR; MICHAEL
20 CHESLOSKY and WO/MEN’S ALLIANCE
FOR MEDICAL MARIJUANA,

21 Plaintiffs,

22 v.

23 ALBERTO R. GONZALES, Attorney General of
24 the United States; KAREN P. TANDY,
Administrator of the Drug Enforcement
25 Administration; JOHN P. WALTERS, Director of
the Office of National Drug Control Policy; and
26 30 UNKNOWN DRUG ENFORCEMENT
ADMINISTRATION AGENTS,

27 Defendants.
28

Case No.: 03-CV-1802 JF

**PLAINTIFFS’ OPPOSITION TO
OFFICIAL-CAPACITY
DEFENDANTS’ MOTION TO
DISMISS**

Date: May 12, 2006
Time: 9:00 a.m.
Place: Courtroom 3, Fifth Floor
Judge: Honorable Jeremy Fogel

TABLE OF CONTENTS

1

2 Page

3 I. INTRODUCTION 1

4 II. LEGAL STANDARD 2

5 III. ARGUMENT 3

6 A. Defendants’ Policy and Practice of Seizing Medical Marijuana Violate

7 Plaintiffs’ Fundamental Rights 3

8 1. The Fundamental Rights Plaintiffs Assert Are Deeply Rooted in

9 this Nation’s History and Legal Precedent 4

10 a. Fundamental Right to Preserve Life 6

11 b. Fundamental Right to Control Circumstances of One’s

12 Own Death 8

13 c. Fundamental Right to Maintain Bodily Integrity And

14 Ameliorate Pain..... 10

15 2. The Court Must Analyze the Pleading of Fundamental Rights as

16 Described Above..... 13

17 B. Defendants Have Commandeered the State Legislative Process By

18 Seeking to Force States to Recriminalize Medical Use of Marijuana 15

19 1. Because Congress has Elected Not to Preempt State Controlled

20 Substance Laws, California May Opt Out of the Federal

21 Regulatory Scheme and Permit Medical Marijuana Use 16

22 2. Under the “Commandeering” Doctrine, the Federal Government

23 Cannot Compel States to Recriminalize Marijuana 17

24 3. Defendants’ Punitive Policies Are An Unconstitutional Attempt to

25 Coerce California and its Political Subdivisions to Recriminalize

26 Medical Marijuana 18

27 4. Defendants’ Policy Exceeds Legitimate Forms Of Federal

28 Persuasion And Effectively Commandeers California’s Law-

Making Function 21

C. Plaintiffs WAMM and the City of Santa Cruz Have Immunity Under the

CSA 23

D. Patient Plaintiffs May Invoke The Defense of Medical Necessity 24

IV. CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

<i>Anderson v. Clow</i> , 520 U.S. 1103 (1997)	3
<i>Cal. Cooler, Inc. v. Loretto Winery, Ltd.</i> , 774 F.2d 1451 (9th Cir. 1985)	3
<i>Carnohan v. United States</i> , 616 F.2d 1120 (9th Cir. 1980)	13
<i>Cervantes v. City of San Diego</i> , 5 F.3d 1273 (9th Cir. 1993)	3
<i>Conant v. Walters</i> , 309 F.3d 629 (9th Cir. 2002).....	12, 16, 19, 21, 22
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998)	4
<i>Cruzan v. Director, Mo. Dep’t of Health</i> , 497 U.S. 261 (1990)	6, 11, 14
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	6, 8
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976).....	11
<i>Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal</i> , 163 L. Ed. 2d 1017 (2006).....	5, 15
<i>Gonzales v. Oregon</i> , 126 S. Ct. 904 (2006)	8, 16, 17
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	8, 12
<i>Hishon v. King & Spalding</i> , 467 U.S. 69 (1984)	3
<i>In re Stac Elecs. Sec. Litig.</i> , 89 F. 3d 1399 (9th Cir. 1996)	3
<i>Kuromiya v. United States</i> , 37 F. Supp. 2d 717 (E.D. Pa. 1999).....	14
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	4, 8
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	6
<i>McConnell v. FEC</i> , 540 U.S. 93 (2003).....	22, 23
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	4, 6
<i>Michael H. v. Gerald D.</i> , 491 U.S. 110 (1989)	10
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	6
<i>National Ass’n for the Advancement of Psychoanalysis v. Cal. Board of Psychology</i> , 228 F.3d 1043 (9th Cir. 2000)	13, 14
<i>New York v. United States</i> , 505 US 144 (1992)	17

TABLE OF AUTHORITIES
(continued)

Page

1		
2		
3	<i>Pareto v. F.D.I.C.</i> , 139 F.3d 696 (9th Cir. 1998).....	2
4	<i>Pearson v. McCaffrey</i> , 139 F. Supp. 2d 113 (D.D.C. 2001).....	14
5	<i>Peloza v. Capistrano Unified School Dist.</i> , 37 F.3d 517 (9th Cir. 1994)	3
6	<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	4
7	<i>Planned Parenthood Fed'n of America, Inc. v. Gonzales</i> , 435 F.3d 1163 (9th Cir. 2006)	7
8	<i>Planned Parenthood of Southeastern Pa. v. Casey</i> , 505 U.S. 833 (1992).....	4, 7, 8, 12
9	<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	17, 18
10		
11	<i>Raich v. Ashcroft</i> , 248 F.Supp.2d 918 (N.D. Cal. 2003), <i>rev'd on other grounds</i> , 352 F.3d 1222 (9th Cir, 2003), <i>vacated and remanded</i> , 125 S.Ct. 2195 (2005)	22
12	<i>Reno v. Condon</i> , 528 U.S. 141 (2000)	17
13	<i>Roe v. Wade</i> , 410 U.S. 113	6, 12
14	<i>Rothman v. Vedder Park Mgmt.</i> , 912 F.2d 315 (9th Cir. 1990).....	3
15	<i>Rutherford v. United States</i> , 616 F.2d 455 (10th Cir. 1980).....	13, 14
16	<i>Scheur v. Rhodes</i> , 416 U.S. 232 (1974)	2
17	<i>Shafer v. South Carolina</i> , 532 U.S. 36 (2001)	7
18	<i>Stenberg v. Carhart</i> , 530 U.S. 914 (2000).....	7, 8
19	<i>Thornburgh v. American College of Obstetricians and Gynecologists</i> , 476 U.S. 747 (1986).....	4
20		
21	<i>U.S. v. Real Property Located at 7494 and 7501 Santa Monica Blvd., West Hollywood California (defendants), L.A. Cannabis Resource Center, Inc., Scott Imler; Wells Fargo Bank, N.A.; and West Hollywood Community Development Commission (claimants)</i> , Case No. 02-CV-04176-R-CT (C.D. Cal. 2004).....	20
22		
23	<i>United States v. Arellano-Rivera</i> , 244 F.3d 1119 (9th Cir. 2001)	24
24	<i>United States v. Guest</i> , 383 U.S. 745 (1966)	6
25	<i>United States v. Imler, et al.</i> , Case No. 03-CR-273-ALL (C.D. Cal. 2003)	20
26	<i>United States v. Jones</i> , 231 F. 3d 508 (9th Cir. 2000)	23
27		
28	<i>United States v. Oakland Cannabis Buyers' Coop.</i> , 2000 U.S. App. LEXIS 9963 (9th Cir. 2000).....	6

TABLE OF AUTHORITIES
(continued)

		<u>Page</u>
1		
2		
3	<i>United States v. Oakland Cannabis Buyers’ Coop.</i> , 5 F. Supp. 2d 1086 (N.D. Cal. 1998)	17
4	<i>United States v. Oakland Cannabis Buyers’ Coop.</i> , 532 U.S. 483 (2001).....	20, 24
5	<i>United States v. Rosenthal</i> , 266 F.Supp.2d 1091 (N.D. Cal. 2003).....	20
6	<i>United States v. Rutherford</i> , 442 U.S. 544 (1979)	14
7	<i>Unites States v. Bailey</i> , 44 U.S. 394 (1980).....	24
8	<i>Walters v. Conant</i> , 540 U.S. 946 (2003)	21
9	<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997).....	4, 5, 8, 9, 10
10	<i>Winston v. Lee</i> , 470 U.S. 753 (1985)	11
11		
12	<u>Statutes</u>	
13	21 U.S.C. § 885(d)	23, 24
14	21 U.S.C. § 903	16
15	Cal. Bus. & Prof. Code § 2241.5	12
16	Cal. Health & Safety Code § 11362.5.....	2
17	Cal. Health & Safety Code §§ 124960-124961	12
18	Model Penal Code, § 3.02(1)(c).....	24
19		
20	<u>Other Authorities</u>	
21	1 Wm. Blackstone, <i>Commentaries</i> (1765)	11
22	Br. for U.S. as Amicus Curiae, No. 96-110, 1996 WL 663185 at *8 (Nov. 12, 1996)	11
23	<i>Marijuana and Medicine, Assessing the Science Base</i> 3-4 (Institute of Medicine, Division of Neuroscience and Behavioral Health 1999).....	6
24	McMeens, <i>Report of the Ohio State Medical Committee on Cannabis Indica</i> (1860), <i>reprinted in Medical Marijuana Papers: 1839-1972</i> (Tod H. Mikuriya, ed., 1972).....	6
25		
26	Mitch Earleywine, <i>Understanding Marijuana</i> 13 (2002)	6
27		
28	Post et al., Pain: Ethics, Culture, and Informed Consent to Relief, 24 J. Law, Med. & Ethics 348 (1996).....	12

TABLE OF AUTHORITIES
(continued)

Page

1

2

3 Richard J. Bonnie & Charles Whitebread, *The Marijuana Conviction* 4 (The
Lindesmith Center 1999) (1974) 6

4

5 S. Wanzer, et al., *The Physician’s Responsibility Toward Hopelessly Ill Patients:*
A Second Look, 320 *New England J. Med.* 844 (1989) 12

Constitutional Provisions

6

7 U.S. Const. Amend. IX 4

8

9 U.S. Const. Amend. V 4, 6

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1 **I. INTRODUCTION**

2 Much has changed since Plaintiffs¹ filed this lawsuit almost three years ago. As we
 3 explain, the allegations of Plaintiffs' First Amended Complaint reflect these changes, and
 4 Plaintiffs' constitutional and other claims are largely based upon these new allegations. Because
 5 the Court must accept these and other allegations as true and because Plaintiffs' claims are
 6 supported by established judicial precedent, it must deny Defendants' Motion to Dismiss.

7 The Right To Prolong Life. Plaintiffs allege that "marijuana is the *only* medication that
 8 will allow them to endure the treatments *necessary to keep them alive*, and, in some cases, is *the*
 9 *only medication that keeps them alive.*" See First Amended Complaint for Injunctive Relief,
 10 Declaratory Relief, and Damages ("FAC") ¶ 2 (emphasis added); see also ¶¶ 23, 27. Simply put,
 11 if plaintiffs Eladio Acosta, Jennifer Lee Hentz and Harold Margolin -- among other WAMM
 12 patients -- do not have access to their medicine, they allege they will die sooner than if they do.
 13 Defendants do not address these allegations, and none of the cases they rely upon forecloses the
 14 right Plaintiffs assert. Accordingly, Plaintiffs' first cause of action must stand.

15 The Right To Die As One Chooses. Plaintiffs also assert a claim based upon the
 16 fundamental right of terminally-ill patients to control the circumstances of their deaths.
 17 Although the Court previously granted the Government's Motion to Dismiss this claim, the
 18 Court's ruling was based upon a far different set of allegations. Plaintiffs now allege that three
 19 of their number -- Dorothy Gibbs, James Daniel Baehr, and Michael Cheslosky -- have died
 20 since the Court dismissed the prior complaint; that Ms. Gibbs, Mr. Baehr and Mr. Cheslosky
 21 availed themselves of the protection afforded by the now-vacated injunction to use medical
 22 marijuana to control the circumstances of their deaths; and that medical marijuana alone enabled
 23 them to be conscious and lucid during their final moments of life so that they could face death as
 24 they chose. FAC ¶¶ 38, 40, 41, 44, 45, 46. There is more. Surviving Patient-Plaintiffs Eladio
 25 Acosta, Jennifer Lee Hentz and Harold Margolin, terminally-ill with cancer or leukemia, allege

26 _____
 27 ¹ Plaintiffs are Wo/Men's Alliance for Medical Marijuana ("WAMM") and various
 28 individual WAMM members ("Patient-Plaintiffs"), along with the City and County of Santa Cruz.

1 that, likewise, medical marijuana is the only medicine that allows them to be conscious, lucid,
 2 and aware of the presence of their loved ones in their final days. FAC ¶¶ 21, 24, 25, 29, 35.
 3 There can be no more private or intimate moment in life than passing over the threshold of death.
 4 For Mr. Acosta, Ms. Hentz and Mr. Margolin, medical marijuana will ensure that their lives can
 5 pass with dignity in the manner of their choosing. Plaintiffs' second cause of action must stand.

6 The Powers Reserved To The State And Its Political Subdivisions. Since the dismissal of
 7 the prior complaint, Plaintiff City of Santa Cruz has passed an ordinance (Santa Cruz Municipal
 8 Code §§ 6.92) that allows the City to obtain and provide medical marijuana directly to qualified
 9 patients, and to take additional steps to verify that only qualified patients receive it. FAC ¶¶ 5,
 10 68-75. The federal government so far has frustrated this effort -- and others alleged in the
 11 amended complaint -- to implement California's Compassionate Use Act (Cal. Health & Safety
 12 Code § 11362.5) through an intentional and concerted policy of threats, arrests, forfeitures,
 13 criminal prosecutions and other punitive measures to command State conformance to the federal
 14 regulatory scheme. FAC ¶¶ 6-10, 76-93. Thwarted from enacting measures that allow it to
 15 distinguish medical (legal) marijuana from ordinary (illegal) marijuana, California cannot, in fact
 16 or effect, exempt the use of medical marijuana from the operation of its own drug laws. FAC
 17 ¶¶ 6-7, 91. This commandeers California's law-making function and that of political
 18 subdivisions in violation of the Tenth Amendment. Plaintiffs' third cause of action must stand.

19 Defendants' other challenges to the Amended Complaint are wide of the mark as well.
 20 The allegations in the Amended Complaint are sufficient to state a claim for each cause of
 21 action. Defendants' motion to dismiss should be denied.

22 **II. LEGAL STANDARD**

23 When reviewing a motion to dismiss, the Court must accept as true all facts alleged in the
 24 complaint as well as reasonable inferences drawn from them. *Pareto v. F.D.I.C.*, 139 F.3d 696,
 25 699 (9th Cir. 1998). The issue before the Court is not whether Plaintiffs will ultimately prevail,
 26 but whether they are entitled to offer evidence to support their claims. *Scheur v. Rhodes*, 416
 27 U.S. 232, 236 (1974) ("Indeed it may appear on the face of the pleadings that recovery is very
 28 remote and unlikely but that is not the test."). For a complaint, or any of its causes of action, to

1 be subject to dismissal on a motion to dismiss, it “must appear to a certainty that the plaintiff
 2 would not be entitled to relief under any set of facts that could be proved.” *Rothman v. Vedder*
 3 *Park Mgmt.*, 912 F.2d 315, 316 (9th Cir. 1990). The Court must liberally construe the complaint
 4 in Plaintiffs’ favor, and it must presume that general allegations embrace the specific facts that
 5 are necessary to support a claim. *Pelozza v. Capistrano Unified School Dist.*, 37 F.3d 517, 521
 6 (9th Cir. 1994).

7 Unlike a motion for preliminary injunction, which this Court entertained the last time
 8 Defendants moved to dismiss, this motion does not invite the Court to make any evidentiary
 9 findings to determine a strong likelihood of success on the merits or the possibility of irreparable
 10 injury. *See Cal. Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1455 (9th Cir. 1985). The
 11 Court’s review here is limited to the face of the pleadings, documents referenced by the
 12 complaint (the authenticity of which is not contested), and matters of which the Court may take
 13 judicial notice. *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993); *In re Stac*
 14 *Elects. Sec. Litig.*, 89 F. 3d 1399, 1405 (9th Cir. 1996), *cert. denied*, *Anderson v. Clow*, 520 U.S.
 15 1103 (1997). Thus, “a court may dismiss a complaint only if it is clear that no relief could be
 16 granted under any set of facts that could be proved consistent with the allegations.” *Hishon v.*
 17 *King & Spalding*, 467 U.S. 69, 73 (1984).

18 Plaintiffs have satisfied this standard. Defendants’ Motion to Dismiss should be denied.

19 **III. ARGUMENT**

20 **A. Defendants’ Policy and Practice of Seizing Medical Marijuana** 21 **Violate Plaintiffs’ Fundamental Rights.**

22 Patient-Plaintiffs’ Due Process claim is grounded in the fundamental rights to preserve
 23 life, control the circumstances of one’s own death, ameliorate pain, maintain bodily integrity,
 24 consult with physicians regarding treatment and act on the physicians’ recommendations, and to
 25 make certain intimate decisions (the “Fundamental Rights”). *See* FAC ¶¶ 99, 104. The Court
 26 must accept as true the fact that medical marijuana is the only medication that keeps certain
 27 Patient-Plaintiffs alive and is the only medication that has allowed and will allow Patient-
 28 Plaintiffs to, among other things, remain lucid and converse with loved ones during their final

1 days. The facts as alleged in the Amended Complaint support Patient-Plaintiffs’ claims for relief
2 under these recognized Fundamental Rights.

3 **1. The Fundamental Rights Plaintiffs Assert Are Deeply**
4 **Rooted in this Nation’s History and Legal Precedent.**

5 The Due Process Clause of the Fifth Amendment protects from federal interference
6 liberties not enumerated in the Constitution. U.S. Const. Amend. V. The Ninth Amendment
7 also protects such liberties by mandating that “the enumeration in the Constitution of certain
8 rights shall not be construed to deny or disparage others retained by the people.” U.S. Const.
9 Amend. IX. These unenumerated liberties share equal dignity with, and are as “fundamental” as
10 those set forth in the Bill of Rights. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 402 (1923);
11 *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Defining rights not expressly enumerated
12 in the Constitution, but guaranteed by the Fifth and Ninth Amendments, requires an

13 effort to identify some source of constitutional value that reflects
14 not the philosophical predilections of individual judges, but basic
15 choices made by the people themselves in constituting their system
16 of government . . . and [courts] seek to achieve this end through
locating fundamental rights either in the traditions and consensus
of our society as a whole or in the logical implications of a system
that recognizes both individual liberty and democratic order.

17 *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 791 (1986)
18 (White, J., dissenting) (overruled on other grounds, *Planned Parenthood of Southeastern Pa. v.*
19 *Casey*, 505 U.S. 833 (1992)). In other words, a right is fundamental if it is rooted in “our
20 Nation’s history, legal traditions, and practices.” *Washington v. Glucksberg*, 521 U.S. 702, 710
21 (1997). While “[h]istory and tradition are the starting point but not in all cases the ending point
22 of the substantive due process inquiry,” (*Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting
23 *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))), current
24 practices – particularly those authorized by an increasing number of States – are also essential to
25 the Court’s inquiry. *Id.*²

26 _____
27 ² Defendants incorrectly argue that the “fact that voters of California passed the
28 Compassionate Use Act . . . does not in any way alter [the fundamental rights] analysis.” Mot. to

(Footnote Continued on Next Page.)

1 Because Patient-Plaintiffs assert fundamental constitutional rights, the availability of a
 2 non-judicial process by which Patient-Plaintiffs may seek to establish the lawful use of
 3 marijuana for medicinal purposes (petitioning the legislature to reschedule marijuana) is of no
 4 moment. The very point of a fundamental right is that it protects individuals even when the
 5 political process fails -- it is the judiciary's obligation to "provide some degree of review over
 6 the substantive content of legislation under constitutional standards" *Glucksberg*, 521 U.S.
 7 at 765 (discussing the judiciary's two century-long tradition of substantive due process review).
 8 This Court previously emphasized this non-judicial process when it evaluated Plaintiffs'
 9 preliminary injunction motion under a different standard of review. Yet, it also noted that when
 10 the government impairs a fundamental right, courts must evaluate whether the government has
 11 demonstrated that the burden furthers a compelling government interest. *See* August 28, 2003
 12 Order Denying Plaintiffs' Motion for Preliminary Injunction and Granting Defendants' Motion
 13 to Dismiss ("8/28/03 Order") at 10, 13. Since this Court's previous Order, the Supreme Court
 14 has shed further light on the contours of such an evaluation. The Supreme Court held that an
 15 exception to the prohibition of a Controlled Substances Act Schedule I substance exists where
 16 individuals' fundamental rights are impinged, despite their ability to petition the government to
 17 reschedule that substance. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*,
 18 163 L. Ed. 2d 1017, 1033 (2006) ("UDV") (holding courts are the arbiters of whether the
 19 Constitution requires exceptions and exemptions to the Controlled Substances Act.). At this
 20 point in the proceedings, therefore, the Court need only determine whether Plaintiffs have
 21 *alleged* violation of a fundamental right.

22 The Fundamental Rights at issue here are deeply rooted in case law and historic
 23 precedent, and are recognized and affirmed by the actions of individual states.³ Contrary to

24 _____
 (Footnote Continued from Previous Page.)

25 Dismiss at 12:15-17. Other states' medical marijuana laws are similarly essential to the
 26 fundamental rights analysis. *See* Section, III.A.1.

27 ³ The Supreme Court has held that the Due Process Clause protects other fundamental
 28 rights in contexts that are surely not more vital than those asserted by Patient-Plaintiffs. *See, e.g.*

(Footnote Continued on Next Page.)

1 Defendants' framing of the allegations, Patient-Plaintiffs assert the Fundamental Rights
 2 explained herein, such as the right to control the circumstances of their own deaths, *not* the right
 3 to use medical marijuana. While Defendants argue that medical marijuana has been prohibited
 4 since 1970, *see* Mot. to Dismiss at 1-5, this is irrelevant to the fundamental rights analysis here.⁴
 5 Any doubts about whether a right alleged here is sufficiently rooted in the Nation's history must
 6 be resolved in Patient-Plaintiffs' favor at this stage. *See United States v. Oakland Cannabis*
 7 *Buyers' Coop.*, 2000 U.S. App. LEXIS 9963 (9th Cir. 2000) (Reinhardt, J., concurring) (citation
 8 omitted) (finding that upon a motion to dismiss, the court must wait to hear such historical
 9 evidence at the summary judgment stage).

10 **a. Fundamental Right to Preserve Life**

11 This case involves one of the most fundamental rights enumerated in the Due Process
 12 Clause – the right to life itself. *See* U.S. Const. Amend. V; FAC ¶¶ 61, 62, 99; *see, e.g., Cruzan*
 13 *v. Director, Mo. Dep't of Health*, 497 U.S. 261, 281 (1990) (holding that the Due Process Clause
 14 protects an interest in life as well as an interest in refusing life-sustaining medical treatment);
 15 *Roe v. Wade*, 410 U.S. 113, 164-65 (holding that a pregnant woman's rights are violated if,

16 _____
 17 (Footnote Continued from Previous Page.)

18 *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (recognizing right to keep extended family
 19 together); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (recognizing right to bear child); *Loving v.*
 20 *Virginia*, 388 U.S. 1 (1967) (recognizing right to marry); *United States v. Guest*, 383 U.S. 745
 21 (1966) (recognizing right to travel); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)
 22 (recognizing right to purchase contraceptives); *Meyer v. Nebraska*, 262 U.S. 390 (1923)
 23 (recognizing right to teach foreign languages).

24 ⁴ Even if the right to use medical marijuana were at issue, it has a long history as part of
 25 the American pharmacopoeia. The use of medical marijuana has been in conflict with federal
 26 law (with the exception of a small number of controlled studies) only for the last 33 of the 227
 27 years since the signing of the Declaration of Independence. *See, e.g., Marijuana and Medicine,*
 28 *Assessing the Science Base* 3-4 (Institute of Medicine, Division of Neuroscience and Behavioral
 Health 1999) (noting that medical use of marijuana was technically permitted until passage of the
 Comprehensive Drug Abuse Prevention and Control Act of 1970). Catalogues of pharmaceutical
 dispensaries in the late eighteenth century recommended the use of cannabis as a treatment for a
 wide variety of ailments. *See* Mitch Earleywine, *Understanding Marijuana* 13 (2002). Between
 1840 and 1900, more than one hundred articles espousing the benefits of marijuana were
 published in medical journals. *See* Richard J. Bonnie & Charles Whitebread, *The Marijuana*
Conviction 4 (The Lindesmith Center 1999) (1974); *see* McMeens, *Report of the Ohio State*
Medical Committee on Cannabis Indica (1860), *reprinted in Medical Marijuana Papers: 1839-*
1972 (Tod H. Mikuriya, ed., 1972), *available at* <http://www.mikuriya.com/mmp.html>.

1 subsequent to fetal viability, the state proscribes abortion where it is necessary, in appropriate
 2 medical judgment, for the preservation of the life or health of the mother) (affirmed in relevant
 3 part by *Planned Parenthood of Southeastern Pa.*, 505 U.S. at 871 (1992) (noting that a state has a
 4 legitimate interest in protecting the health of the pregnant woman and life of the fetus that may
 5 become a child); *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001) (“when the jury endeavors the
 6 moral judgment whether to impose the death penalty” due process requirements apply).⁵

7 Defendants rely upon inapposite cases for the proposition that there is no fundamental
 8 right “to any particular form of treatment” (*see* Section III.A.2, below), namely because here
 9 medical marijuana is the *only* medicine that allows certain Patient-Plaintiffs to preserve their
 10 lives. FAC ¶¶ 23, 27, 39, 61, 62. Patient-Plaintiffs are not claiming a right to use a preferred
 11 medical treatment, but rather a right to use the only medicine that allows certain Patient-
 12 Plaintiffs to forestall their death and preserve their lives. A number of Patient-Plaintiffs
 13 (including Eladio Acosta and Jennifer Hentz) and other WAMM members have used or currently
 14 use medical marijuana because it is the only medicine that allows them to stay alive by treating
 15 fatal symptoms of their disease or by permitting them to continue with treatments that prevent or
 16 forestall their death. *Id.* It was the only medicine that allowed Plaintiffs Michael Cheslosky and
 17 James Daniel Baehr to tolerate chemotherapy, radiation therapy, and other treatments necessary
 18 to prolong their lives. *Id.* at 39, 43. When Defendants last moved to dismiss Plaintiffs’ claims
 19 and Plaintiffs moved for injunctive relief, this Court noted that the “record does not support the
 20 conclusion” that marijuana was the only means for some Patient-Plaintiffs to avoid extreme pain.
 21 *See* 8/28/03 Order at 14. Now, the factual allegations are significantly different and the Court
 22 need not weigh any facts, as it might for a preliminary injunction analysis. Simply put, the
 23 federal government violates Patient-Plaintiffs’ Constitutional rights when it denies them the
 24 _____

25 ⁵ The courts have held that the government may not interfere with an individual’s medical
 26 treatment when the preservation of life is at stake. *See Planned Parenthood Fed’n of America,*
 27 *Inc. v. Gonzales*, 435 F.3d 1163, 1173 (9th Cir. 2006) (following *Stenberg v. Carhart*, 530 U.S.
 28 914 (2000), and holding that any regulation of an abortion method must contain a health
 exception for the health of the pregnant woman). Here, as in those cases, the federal government
 cannot interfere with Patient-Plaintiffs’ right to pursue life-sustaining medical treatment.

1 fundamental right to life by depriving them of their only effective medicine, and thereby
 2 condemning them to a hastened death.

3 **b. Fundamental Right to Control Circumstances of**
 4 **One's Own Death**

5 "Liberty protects the person from unwarranted government intrusions into [one's home]
 6 or other private places." *Lawrence*, 539 U.S. at 562 (2003). Thus, the Supreme Court has
 7 routinely upheld an individual's right to engage in private, intimate conduct in the exercise of
 8 liberty under the Due Process Clause. *See id.* (holding statute criminalizing certain consensual
 9 sexual behavior unconstitutional, as it sought to control a personal relationship that was within
 10 the liberty of persons to choose); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the
 11 right to make certain decisions regarding sexual conduct extends beyond the marital
 12 relationship); *Griswold*, 381 U.S. at 486 (1965) (recognizing right to purchase contraceptives).
 13 The Supreme Court has also affirmed the right to make decisions about one's body in cases
 14 addressing governmental barriers to abortion. *See Stenberg v. Carhart*, 530 U.S. at 921
 15 (affirming that the Constitution protects a pregnant "woman's right to choose"); *Planned*
 16 *Parenthood of Southeastern Pa.*, 505 U.S. at 849-52 (finding that a pregnant woman "is subject
 17 to anxieties, to physical constraints, to pain that only she must bear . . . Her suffering is too
 18 intimate and personal for the State to insist, without more, upon its own vision of the woman's
 19 role").

20 There is perhaps nothing more private and intimate than a person's choices about how
 21 and in what condition he or she will spend his or her final days with loved ones and family at
 22 home or in the hospital. The Supreme Court has continued to grapple with issues surrounding an
 23 individual's right to control the circumstances of his or her death and has protected a state's right
 24 to permit doctors to prescribe drugs for use in physician-assisted suicide. *See Gonzales v.*
 25 *Oregon*, 126 S. Ct. 904, 911 (2006). In *Glucksberg*, Justice Breyer affirmed that the "right to die
 26 with dignity" includes a right to "the avoidance of unnecessary and severe physical suffering."
 27 *Glucksberg*, 521 U.S. at 790 (Breyer, J., concurring) (also noting Due Process clause may protect
 28 right to "personal control over the manner of death [and] professional medical assistance").

1 Likewise, Justice Stevens declared that “[a]voiding intolerable pain and the indignity of living
2 one’s final days incapacitated and in agony” is a fundamental right. *Id.* at 745 (Stevens, J.,
3 concurring). And Justice Souter recognized that a person’s “liberty interest in bodily integrity
4 [includes] . . . a right to determine what shall be done with his own body in relation to his
5 medical needs.” *Id.* at 777 (Souter, J., concurring) (internal quotation marks omitted).

6 Justice O’Connor distinguished the government’s interests in protecting the rights of
7 those who “might seek to end life mistakenly or under pressure” through assisted suicide from
8 the rights of “terminally ill, mentally competent individuals who would seek to end their
9 suffering,” noting that a terminally ill patient “experiencing great pain” has a “constitutionally
10 cognizable interest” in “obtaining medication, from qualified physicians, to alleviate that
11 suffering.” *Id.* at 737 (O’Connor, J. concurring); *id.* at 789 (Ginsburg, J. agreeing with Justice
12 O’Connor). The distinction has particular force in this case: Patient-Plaintiffs here seek to “end
13 their suffering,” not by *ending* their lives but by *improving* them. They are chronically and
14 “terminally ill, mentally competent individuals” who have the fundamental right to “end their
15 suffering.” *Id.* Medical marijuana is the only means by which Patient-Plaintiffs can end their
16 suffering, which consists of intolerable pain, nausea, epileptic seizures, and debilitating stomach
17 cramping, among other severe symptoms of their illnesses and side effects from conventional
18 treatments of those illnesses. *See, e.g.,* FAC at ¶¶ 23, 27, 30, 33-34, 36-37, 39, 43, 45, 63-64.

19 This Court previously acknowledged that a majority of the Supreme Court has not
20 foreclosed recognition of a fundamental right to control the circumstances of one’s death and to
21 use physician-recommended medication to ease pain and suffering in one’s final days. *See*
22 8/28/03 Order at 12. Since Plaintiffs filed their original complaint, three Patient-Plaintiffs have
23 died. The Amended Complaint provides crucial detail about how medical marijuana was the
24 only medicine that allowed the deceased Patient-Plaintiffs’ to live their final days consciously
25 and free of severe pain. *See* FAC ¶ 65. For example, when Michael Cheslosky passed away,
26 medical marijuana allowed him to use almost no other opiates prior to death, allowing him to be
27 present, conscious, and lucid with his family during his final moments of life. FAC ¶ 40. It
28 similarly allowed Dan Baehr to cease taking morphine, enabling him to be aware of the presence

1 of his family and loved ones. FAC ¶ 44. With medical marijuana, Dorothy Gibbs was able to
 2 recognize and converse with her loved ones before she died. FAC ¶ 46.

3 Finally, in addition to legal precedent and historical tradition, courts also consider actions
 4 by individual states in deciding whether an asserted right is fundamental. *See, e.g., Michael H. v.*
 5 *Gerald D.*, 491 U.S. 110, 125-26 (1989) (surveying the policies of eight states in determining
 6 whether California’s paternity laws violated plaintiff’s fundamental rights); *see also* Section
 7 III.A.1, above. The fundamental right to control the circumstances of one’s own death also finds
 8 expression in California law: California’s Compassionate Use Act of 1996 is a “significant
 9 change[] in state law” reflecting “public concern . . . on how best to protect dignity and
 10 independence at the end of life.” *Glucksberg*, 521 U.S. at 716. And California does not stand
 11 alone in endorsing and protecting the medical use of marijuana for the ill and dying, as at least
 12 eleven other states have passed laws approving the use of medical marijuana. *See* FAC at 18 n.1.

13 By their terms and as applied, the Compassionate Use Act and Plaintiffs City and County
 14 of Santa Cruz ordinances promote Patient-Plaintiffs’ fundamental right to die with dignity. *See*
 15 FAC at ¶¶ 53-54, 66-75. In *Glucksberg*, the Court chose not to “strike down the considered
 16 policy choice” of the State of Washington, deferring instead to Washington and its voters’
 17 resolution of the debate. *Glucksberg*, 521 U.S. at 723. Here, Defendants’ confiscation of
 18 Patient-Plaintiffs’ marijuana subverts California’s “considered policy choice” that citizens like
 19 Plaintiff Michael Cheslosky should be allowed to spend his final days free of the complete loss
 20 of lucidity caused by strong opiates. *See* FAC at ¶ 40; *Glucksberg*, 521 U.S. at 735. Regardless,
 21 at this stage, the Court need not resolve the intricacies of Patient-Plaintiffs’ Fundamental Rights
 22 or determine whether those rights have in fact been violated; it need only accept Plaintiffs’
 23 allegations as true and determine if Plaintiffs have stated a claim for relief. *See* Section II,
 24 above; *Oakland Cannabis Buyers' Coop.*, 2000 U.S. App. LEXIS at 9963.

25 **c. Fundamental Right to Maintain Bodily Integrity**
 26 **And Ameliorate Pain**

27 The rights to maintain bodily integrity and to ameliorate pain are closely related to the
 28 right to control the circumstances of one’s death, but also are distinct rights. This Court noted

1 that the “fundamental right to maintain bodily integrity protects against unjustified invasions of
2 one’s body by the state.” 8/28/03 Order at 11. The right to be free of government intrusion with
3 respect to one’s body has roots in long-standing natural rights principles and the philosophy of
4 individual autonomy. 1 Wm. Blackstone, *Commentaries* *129 (1765) (recognizing a right to
5 personal autonomy that “consists in a person’s legal and uninterrupted enjoyment of his life, his
6 limbs, his body, his health, and his reputation”). This common law right extends to protect the
7 “preservation of [an individual’s] health from such practices as may prejudice or annoy it,” (*id.*
8 at *133). Thus, the Supreme Court has consistently upheld the fundamental right to maintain
9 bodily integrity. *See, e.g., Cruzan*, 497 U.S. at 281 (holding that Due Process Clause protects an
10 interest in life as well as an interest in refusing life-sustaining medical treatment); *Winston v.*
11 *Lee*, 470 U.S. 753, 766 (1985) (ruling that involuntary surgery to remove bullet from defendant’s
12 shoulder is unreasonable invasion of his body).

13 The Supreme Court also has consistently upheld the fundamental right to avoid
14 unnecessary pain and suffering. In *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976), the Supreme
15 Court held that because infliction of unnecessary suffering “is inconsistent with contemporary
16 standards of decency,” deliberate indifference to inmates’ medical needs violates the Eighth
17 Amendment. The federal government itself recognized the fundamental right to avoid pain. The
18 United States’ amicus brief in *Glucksberg* acknowledged that there is a constitutionally
19 cognizable liberty interest in avoiding the kind of suffering experienced by the plaintiffs in this
20 case. Br. for U.S. as Amicus Curiae, No. 96-110, 1996 WL 663185 at *8 (Nov. 12, 1996) (“A
21 competent, terminally ill adult has a constitutionally cognizable liberty interest in avoiding the
22 kind of suffering experienced by plaintiffs in this case. That liberty interest encompasses an
23 interest in avoiding not only severe physical pain, but also the despair and distress that comes
24 form physical deterioration and the inability to control basic bodily or mental functions in the
25 terminal stage of an illness.”). The government noted that a “liberty interest is implicated when
26 severe pain or suffering is caused by an illness, but the State compels a person to remain in that
27 condition by prohibiting access to medication that would relieve that pain or suffering.” *Id.*
28

1 (citing *Planned Parenthood v. Casey*, 505 U.S. at 852). This is exactly the fundamental right the
 2 government is violating in the present case.⁶

3 As discussed above, courts also consider actions by individual states in deciding whether
 4 an asserted right is fundamental. The fundamental rights to ameliorate pain are explicitly
 5 enumerated in the Compassionate Use Act and other California laws. *See* The Intractable Pain
 6 Law, Cal. Bus. & Prof. Code § 2241.5 (exempting from disciplinary action a physician or
 7 surgeon who prescribes or administers controlled substances for treatment of intractable pain);
 8 Pain Patient’s Bill of Rights, Cal. H&S Code §§ 124960-124961 (“[a] patient suffering from
 9 severe chronic intractable pain has the option to request or reject the use of any or all modalities
 10 in order to relieve his or her severe chronic intractable pain.”).

11 The federal government has violated Patient-Plaintiffs well-established fundamental
 12 rights to ameliorate pain and maintain bodily integrity. Patient-Plaintiffs have alleged that
 13 medical marijuana is the *only* medicine that alleviates otherwise unbearable or debilitating
 14 symptoms of their conditions and treats unbearable and unnecessary pain. FAC ¶¶ 23, 27, 34,
 15 37, 45, 63. Given the factual allegations of the First Amended Complaint and the fact that there
 16 is only a motion to dismiss now before the Court, it must accept Patient-Plaintiffs’ allegations as
 17 true.⁷

18 _____
 19 ⁶ This right is also deeply embedded in the professional and ethical standards of physicians
 20 and caregivers. *See, e.g.*, Post et al., Pain: Ethics, Culture, and Informed Consent to Relief, 24 J.
 21 Law, Med. & Ethics 348 (1996); S. Wanzer, et al., The Physician’s Responsibility Toward
 22 Hopelessly Ill Patients: A Second Look, 320 New England J. Med. 844 (1989) (“[t]o allow a
 23 patient to experience unbearable pain or suffering is unethical medical practice . . .”).

24 ⁷ Defendants’ actions also violate Patient-Plaintiffs’ fundamental right to follow their
 25 doctors’ recommendations in treating their illnesses. *See* FAC 47-48. Future federal
 26 interference with California’s medical marijuana law will erode further the relationships between
 27 the Patient-Plaintiffs and their physicians by preventing these patients from following their
 28 physicians’ recommendations. The Supreme Court and the Ninth Circuit have repeatedly
 acknowledged the importance of the physician-patient relationship. *See, e.g., Griswold*, 381 U.S.
 at 482 (striking down a law criminalizing distribution of contraceptives as violating Due Process
 because the “law operates directly on an intimate relation of husband and wife and their
 physician’s role in one aspect of that relation.”); *Roe v. Wade*, 410 U.S. 113, 153, 156 (1973)
 (stressing that criminalization of abortion detrimentally affected the physician-patient
 relationship); *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002), *cert. den.* 540 U.S. 946
 (2003) (holding that the government may not impede physician-patient communications
 regarding medical marijuana). Because a doctor’s ability to recommend a medical treatment is

(Footnote Continued on Next Page.)

1 **2. The Court Must Analyze the Pleading of Fundamental**
 2 **Rights as Described Above.**

3 Defendants rely on three readily distinguishable cases to oppose Plaintiffs’ fundamental
 4 rights claims: *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980), *Rutherford v. United*
 5 *States*, 616 F.2d 455, 457 (10th Cir. 1980), and *National Association for the Advancement of*
 6 *Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000).

7 First, Defendants contend that the two-page, 25-year old per curiam opinion in *Carnohan*
 8 forecloses Plaintiffs’ right to “obtain and use” marijuana. *Carnohan*, 616 F.2d at 1122 (holding
 9 that plaintiff did not have right to obtain commercially marketed “laetrile,” an alleged cancer
 10 cure); Mot. to Dismiss at 9. Defendants are wrong. Patient-Plaintiffs do not assert the right to
 11 “obtain” commercially-marketed medical marijuana, nor do they assert the right to market
 12 medical marijuana. In fact, *Carnohan* explicitly declined to address whether patients have a
 13 right to produce treatments in their own homes for their personal use, noting that “[w]e need not
 14 decide whether Carnohan has a constitutional right to treat himself with home remedies of his
 15 own confection.” *Carnohan*, 616 F.2d at 1122. *Carnohan* failed to discuss the history of any
 16 fundamental rights and, accepting the facts alleged here as true, does not support dismissal of
 17 Patient-Plaintiffs’ Fundamental Rights claims.

18 Second, Defendants rely upon *Rutherford* and *National Association for the Advancement*
 19 *of Psychoanalysis* to support their argument that Patient-Plaintiffs have no fundamental right to
 20 choose a *particular type* of treatment or medication. But Patient-Plaintiffs do not assert the
 21 fundamental right to “obtain the medication of their choice,” as the government claims. Mot. to
 22 Dismiss at 10:2. Patient-Plaintiffs assert the right to use the *only* medicine that will preserve
 23 their lives or ameliorate their pain. FAC ¶¶ 61-64. The general choice to either refuse or pursue
 24 medical treatment is the constitutionally protected choice at issue here – not the right to a

25 _____
 (Footnote Continued from Previous Page.)

26 meaningless without a patient’s ability to follow that recommendation, Patient-Plaintiffs must be
 27 free to follow the recommendations of their physicians pursuant to state law. Federal
 28 interference with California’s Compassionate Use Act makes it impossible for them to do so,
 violating this fundamental right.

1 specific type of treatment. *See, e.g. Cruzan*, 497 U.S. at 281 (“It cannot be disputed that the Due
 2 Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical
 3 treatment.”); *Rutherford*, 616 F.2d at 457 (“the decision by the patient whether to have a
 4 treatment or not is a protected right). There was no evidence in either *Carnohan* or *Rutherford*
 5 that laetrile was the *only* effective treatment for plaintiffs. There was certainly no such evidence
 6 in *National Association for the Advancement of Psychoanalysis* – plaintiffs were not patients, but
 7 rather psychoanalysts who alleged that California’s mental health licensing laws restricted their
 8 First and Fourteenth Amendment rights. *Id.* at 1046. Here, Patient-Plaintiffs’ only “choice” is to
 9 use medical marijuana and continue their necessary treatments or endure the unnecessary and
 10 unbearable pain and effects of their illnesses.

11 Third, in *Rutherford*, the court had before it the fact that no peer-reviewed medical study
 12 had ever found laetrile to have medical benefits, as well as evidence showing that it raised
 13 concern. Thus, in reaching its conclusion, the court worried that individuals may “reject
 14 conventional therapy in favor of a drug with no demonstrable curative properties.” *United States*
 15 *v. Rutherford*, 442 U.S. 544, 556 (1979). The federal government has not yet proffered such
 16 evidence here, for it cannot at this stage of the proceedings. Furthermore, the federal
 17 government’s interest here is one in a uniform policy of drug prohibition, and is not -- as it was
 18 in *Rutherford* -- to protect patients from using “ineffectual and unsafe drugs” in lieu of proven
 19 medical treatments. *Id.* at 555. Also, Plaintiffs will proffer evidence of marijuana’s widespread
 20 acceptance and its recognition not as a cure, but rather as a means for individuals suffering from
 21 serious illness to better respond to and tolerate potentially lifesaving conventional treatments.
 22 FAC ¶¶ 61-64; IOM Report at 154.⁸

23
 24
 25
 26 ⁸ Defendants also rely on *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 123 (D.D.C. 2001)
 27 (“fundamental right to sell, distribute or use marijuana”) and *Kuromiya v. United States*, 37 F.
 28 Supp. 2d 717, 725 (E.D. Pa. 1999) (“fundamental right to possess, use, grow, or sell marijuana”),
 but, again, these cases asserted different rights as fundamental and neither case analyzes the
 history and tradition of the Fundamental Rights at issue here.

1 Finally, Defendants appear to argue that the existence of the CSA and the federal
 2 interests it allegedly serves somehow diminish the fundamental nature of Patient-Plaintiffs'
 3 rights. Mot. to Dismiss at 10:2. But, the Supreme Court just this year held that the federal
 4 government's interest in the uniform application of the CSA and controlling drug abuse does not
 5 trump an individual's fundamental rights, even where use of a Schedule I drug is at issue. *See*
 6 *UDV*, 163 LL. Ed. 2d at 1034-36 (where CSA burdens religious exercise involving sacramental
 7 use of controlled substance). In *UDV*, the Supreme Court held that *even if a drug is classified as*
 8 *Schedule I*, the government must satisfy its heavy burden to show that infringement of a
 9 fundamental right both furthers a compelling government interest and is the least restrictive
 10 means of furthering that interest. *UDV* at 1036. This is not a determination that can be made on
 11 the pleadings. And while *UDV* involved a different fundamental right, the underlying premise is
 12 the same: The CSA cannot trump Patient-Plaintiffs' Fundamental Rights anymore than it can
 13 trump the rights of individuals to follow their religious practices.

14 Patient-Plaintiffs have alleged facts sufficient to state a claim for violation of any one of
 15 the Fundamental Rights to preserve life, control the circumstances of their deaths and remain
 16 lucid during their final moments with family and loved ones, ameliorate pain, maintain bodily
 17 integrity, and consult with physicians regarding treatment and act on the physicians'
 18 recommendations. *See* FAC ¶¶ 25, 29, 35, 40, 44, 46, 65. The Court must accept these facts as
 19 true, and Defendants' Motion to Dismiss Plaintiffs' First and Second Claims must be denied.

20 **B. Defendants Have Commandeered the State Legislative Process**
 21 **By Seeking to Force States to Recriminalize Medical Use of**
 22 **Marijuana.**

23 Plaintiffs' First Amended Complaint also pleads Tenth Amendment claims significantly
 24 different from those previously presented. Defendants ignore these new allegations, wrongly
 25 asserting that Plaintiffs' claims are "identical" to those already rejected by this Court. Mot. to
 26 Dismiss 14. Defendants' argument mischaracterizes Plaintiffs' claims as now pled. It also
 27 disregards significant factual developments that have occurred since the original complaint was
 28 filed, most notably Plaintiff City of Santa Cruz's enactment of a new ordinance pursuant to
 which the City itself will provide medical marijuana directly to qualified patients.

1 California has chosen to permit medical use of marijuana, while leaving all other
2 marijuana use illegal. The federal government has made no secret of its disagreement with this
3 decision. The Plaintiffs' new Tenth Amendment allegations plead that Defendants have
4 responded with a deliberate policy intended to incapacitate the mechanisms the State has
5 implemented for separating what is legal from what is illegal under State law. This is a backdoor
6 attempt to commandeer the State legislative process and to force California to abandon the laws
7 its people have chosen. It is beyond dispute that the federal government cannot directly order
8 California to recriminalize medical marijuana -- nor can it intentionally use selectively targeted
9 criminal prosecutions and related punitive sanctions to the same impermissible end.

10 **1. Because Congress has Elected Not to Preempt State**
11 **Controlled Substance Laws, California May Opt Out of**
12 **the Federal Regulatory Scheme and Permit Medical**
Marijuana Use.

13 While Congress has the authority to preempt state drug laws entirely by fully occupying
14 the field, it has expressly chosen not to do so. Rather, the CSA "explicitly contemplates a role
15 for the states in regulating controlled substances, as evidenced by its pre-emption provision."
16 *Gonzales*, 126 S.Ct. at 911 (citing 21 U.S.C. § 903). Across-the-board preemption would place
17 the responsibility for enforcement entirely upon federal agents. Instead, federal drug policies
18 historically "rely heavily on the states' enforcement of their own drug laws to achieve federal
19 objectives." *Conant*, 309 F.3d at 646 n.10 (Kozinski, J. (concurring)). Thus, marijuana crimes
20 not involving the cultivation of "at least 500 plants grown indoors, 1,000 plants grown outdoors,
21 or the possession of more than 1,000 pounds" have traditionally been left to State and local law
22 enforcement. *Id.* at 636 n.10. This federalist system of dual but complementary law
23 enforcement serves federal objectives economically and effectively, but apparently only so long
24 as the States conform their drug laws to federal law.

25 California has elected to chart a course different from the federal government concerning
26 *medical* marijuana. This difference of opinion between the federal government and California
27 does not mean, however, that California's laws are preempted. As Defendants acknowledge,
28 "[i]t is not uncommon for federal law to prohibit private conduct that is legal in some States.

1 Indeed, such conflict is inevitable in areas of law that involve both State and federal concerns.”
 2 Mot. to Dismiss 13 (citation omitted). Justice Scalia has explained that the CSA preempts a
 3 State drug law only when there is a “positive conflict” between State and federal law, such that
 4 the State law *requires* some action that specifically violates federal law. *Gonzales v. Oregon*,
 5 126 S.Ct. at 934 (Scalia, J. (dissenting)). The mere existence of federal law prohibiting “conduct
 6 that happens not to be forbidden under state law” does not create a positive conflict triggering
 7 preemption. *Id.* This is precisely the situation in California. Federal law prohibits uses of
 8 marijuana that are not prohibited under California law. Because California does not *require*
 9 anyone to violate federal law, there is no “positive conflict” and no preemption. *See United*
 10 *States v. Oakland Cannabis Buyers’ Coop.*, 5 F. Supp. 2d 1086, 1094 (N.D. Cal. 1998) (no
 11 preemption because “Proposition 215 does not conflict with federal law.”).

12 2. **Under the “Commandeering” Doctrine, the Federal**
 13 **Government Cannot Compel States to Recriminalize**
 Marijuana.

14 Faced with the futility of a frontal Supremacy Clause assault on California’s medical
 15 marijuana laws, Defendants are left only with the possibility of seeking to have California
 16 change its own laws and practices – and federal officials are highly motivated to do so. Yet, the
 17 Supreme Court has made clear that the federal government “cannot compel the States to enact or
 18 enforce a federal regulatory program” or to govern according to federal instructions. *Reno v.*
 19 *Condon*, 528 U.S. 141, 149 (2000).

20 The contours of the Tenth Amendment’s “commandeering” proscription were set out by
 21 the Supreme Court in *New York v. United States*, 505 US 144 (1992) (invalidating part of a
 22 federal scheme seeking to induce states to provide for the disposal of nuclear waste) and *Printz v.*
 23 *United States*, 521 U.S. 898 (1997) (striking provisions of a federal gun control law requiring
 24 state law enforcement officers to help conduct background checks of gun purchasers). In *New*
 25 *York*, the Court explained that the determinative question was not whether Congress had the
 26 power to regulate the disposal of nuclear waste, which would have been well within Congress’
 27 authority under the Commerce Clause. *New York*, 505 U.S. at 159-160. Similarly, Congress
 28 could, if it wished, entirely preempt state nuclear waste regulation by occupying the field and

1 taking full responsibility for enforcing the regulatory framework. *Id.* at 160. The Tenth
 2 Amendment commandeering doctrine was violated, however, by a far more aggressive federal
 3 measure that “crossed the line distinguishing encouragement from coercion” by requiring states
 4 to either regulate nuclear waste disposal as the federal government desired or to take title to,
 5 possession of, and liability for, the waste generated within their borders. *Id.* at 174-178. The
 6 federal government commandeered the State regulatory process by effectively (though not
 7 directly) ordering the State to regulate nuclear waste. *Id.* at 159-160.

8 In *Printz*, the Court reiterated this prohibition:

9 The Federal Government may neither issue directives requiring the
 10 States to address particular problems, nor command the States’
 11 officers, or those of their political subdivisions, to administer or
 12 enforce a federal regulatory program. . . . [N]o case-by-case
 weighing of the burdens or benefits is necessary; such commands
 are fundamentally incompatible with our constitutional system of
 dual sovereignty.

13 521 U.S. at 935.

14 *New York* and *Printz* make clear that the federal government can neither order California
 15 to recriminalize medical marijuana nor utilize federal enforcement and regulatory mechanisms to
 16 give California no choice but to recriminalize marijuana.

17 **3. Defendants’ Punitive Policies Are An Unconstitutional**
 18 **Attempt to Coerce California and its Political**
Subdivisions to Recriminalize Medical Marijuana.

19 California’s passage of Proposition 215 in 1996, followed by ten additional states
 20 enacting similar provisions, disrupted the relationship of federal and state officials working in
 21 unison to enforce marijuana laws. By legalizing the limited medical use of marijuana, but
 22 leaving all other marijuana use illegal, these States have diverged sharply from federal policy,
 23 provoking federal responses that have recently moved from legitimate forms of persuasion to
 24 impermissible commandeering of the State’s regulatory processes.

25 Initially, federal officials argued forcefully and repeatedly that the State medical
 26 marijuana laws were simply a bad idea. FAC ¶ 77. When these arguments failed to persuade
 27 voters and state legislators, the federal government explored the possibility of a frontal assault
 28 legal challenge to Proposition 215. Justice Department lawyers advised, however, that no viable

1 legal argument could be made that federal law preempted Proposition 215. FAC ¶ 79. So the
2 federal government instead turned to a strategy of pitting the overwhelming power of federal law
3 enforcement against key components of California’s medical marijuana laws and forcing
4 California to recriminalize medical marijuana and revert to the previous system of State
5 cooperation with federal law enforcement objectives. Defendants have not merely increased
6 legitimate federal law enforcement activities in California. Instead, time and again the federal
7 government has specifically targeted the mechanisms California has put in place to distinguish
8 legal (medical) from non-legal (all other) marijuana use.

9 First, federal officials targeted State-licensed physicians, threatening to destroy their
10 careers by revoking their federal DEA licenses to prescribe medicine (and perhaps even
11 prosecute them criminally) if they recommend marijuana to patients pursuant to Proposition 215.
12 See FAC ¶¶ 80-81. This contravenes the finding in *Conant* that “[t]he state relies on the
13 recommendation of a state-licensed physician to define the line between legal and illegal
14 marijuana use. The federal government’s policy deliberately undermines the state by
15 incapacitating the mechanism the state has chosen for separating what is legal from what is
16 illegal under state law.” *Conant*, 309 F.3d at 645. (Kozinski, J. (concurring)). Second, the
17 federal government has repeatedly intimidated and coerced State officials in California and other
18 medical marijuana states into halting implementation and operation of identification card
19 programs – a key state law enforcement mechanism. See FAC ¶ 90. Third, federal officials have
20 targeted California citizens authorized by local governments to provide marijuana to qualified
21 patients, thwarting State efforts to distinguish between providers of legal (medical) marijuana
22 and distributors of illegal marijuana. See FAC ¶¶ 82-88. The Cities of Oakland, Santa Cruz and
23 West Hollywood implemented such a mechanism by deputizing specifically identified citizens
24 and entities to cultivate and provide medical marijuana to qualified patients, creating a readily
25 identifiable legal provider to which the City would not devote law enforcement resources.

- 26 • The Oakland Cannabis Buyers’ Cooperative (OCBC), officially established by an
27 Oakland ordinance as the legal provider of medical marijuana for Oakland patients, was
28 shut down by federal injunction. Ed Rosenthal, formally deputized by the City of

1 Oakland to cultivate marijuana for OCBC to provide to Oakland patients, was criminally
 2 prosecuted by federal authorities. *See United States v. Oakland Cannabis Buyers' Coop.*,
 3 532 U.S. 483 (2001) (“OCBC”); *United States v. Rosenthal*, 266 F.Supp.2d 1091, 1098
 4 (N.D. Cal. 2003).

- 5 • In West Hollywood, the federal government shut down the Los Angeles Cannabis
 6 Resource Center and criminally prosecuted its operators. They also seized all its
 7 property, including an ownership interest by the City of West Hollywood, which had
 8 authorized the club’s activities and provided funds for the purchase of the real property
 9 through a redevelopment grant. *See United States v. Imler, et al.*, Case No. 03-CR-273-
 10 ALL (C.D. Cal. 2003); *U.S. v. Real Property Located at 7494 and 7501 Santa Monica*
 11 *Blvd., West Hollywood California (defendants), L.A. Cannabis Resource Center, Inc.,*
 12 *Scott Imler; Wells Fargo Bank, N.A.; and West Hollywood Community Development*
 13 *Commission (claimants)*, Case No. 02-CV-04176-R-CT (C.D. Cal. 2004).
- 14 • In Santa Cruz, the City and County deputized Plaintiff WAMM. Federal agents armed
 15 with automatic weapons raided WAMM’s land, arrested several of its members
 16 (including one patient in a wheelchair), seized all the collective’s medical marijuana
 17 supplies, and threatened WAMM’s founders, Valerie and Mike Corral with seizure of
 18 their private land being used to cultivate medical marijuana for WAMM patients. FAC
 19 ¶¶ 8-9, 55-65.

20 In response to this federal policy and to the November 2003 DEA raid of WAMM, and in
 21 an effort to most effectively and safely implement California’s medical marijuana laws, Plaintiff
 22 City of Santa Cruz enacted in November 2005 Municipal Code § 6.92, pursuant to which the
 23 City will itself provide medical marijuana to qualified patients. FAC ¶¶ 5, 75. This represents
 24 the City’s legitimate effort to opt out of the federal regulatory scheme and to implement State
 25 law by providing a safe and reliable means to distinguish between medical marijuana users and
 26 other marijuana users. Santa Cruz has determined that a governmentally-run system is the best
 27 way (and, in the face of targeted federal enforcement against WAMM and others, the only way)
 28 to ensure that patients and their caregivers, but no others, have access to marijuana. Santa Cruz

1 reasonably fears, however, that Defendants will bring federal criminal charges, forfeiture
 2 proceedings, and other punitive measures against the City and its employees as part of the federal
 3 policy to disrupt and render unenforceable California's medical marijuana laws. FAC ¶¶ 76-93.

4 **4. Defendants' Policy Exceeds Legitimate Forms Of**
 5 **Federal Persuasion And Effectively Commandeers**
 6 **California's Law-Making Function.**

7 Under the commandeering doctrine articulated in *New York* and *Printz*, the federal
 8 government cannot directly compel California to recriminalize medical marijuana. Defendants
 9 cannot attain that same goal through its punitive actions against California citizens and
 10 government officials. This backdoor policy is more akin to the coercion prohibited in *New York*
 11 and in *Conant* than to the legitimate forms of persuasion the Supreme Court has permitted.

12 *Conant* is particularly instructive. The Ninth Circuit upheld an injunction prohibiting the
 13 federal government from acting against physicians who recommend the use of medical marijuana
 14 *Conant*, 309 F.3d at 639. The Supreme Court denied the federal government's petition for
 15 *certiorari*. *Walters v. Conant*, 540 U.S. 946 (2003). The Ninth Circuit primarily based its
 16 decision on the First Amendment, also noting that important federalism concerns were
 17 implicated and provided another basis for affirming the District Court. *Conant*, 309 F.3d at 639.
 18 In his concurring opinion in *Conant*, Judge Kozinski discussed the federalism concerns in more
 19 detail and pointed out that the federal policy constituted commandeering of the state legislative
 20 function:

21 The federal government's policy deliberately undermines the state by
 22 incapacitating the mechanism the state has chosen for separating what is legal
 23 from what is illegal under state law. Normally, of course, this would not be a
 24 problem, because where state and federal law collide, federal law prevails. In
 25 the circumstances of this case, however, I believe the federal government's
 26 policy runs afoul of the "commandeering" doctrine announced by the Supreme
 27 Court in *New York v. United States* and *Printz v. United States*.

28 *New York* and *Printz* stand for the proposition that the Federal Government may
 neither issue directives requiring the States to address particular problems, nor
 command the States' officers, or those of their political subdivisions, to
 administer or enforce a federal regulatory program. Applied to our situation, this
 means that, much as the federal government may prefer that California keep
 medical marijuana illegal, it cannot force the state to do so. Yet, the effect of the
 federal government's policy is precisely that: By precluding doctors, on pain of

1 losing their DEA registration, from making a recommendation that would
2 legalize the patients' conduct under state law, the federal policy makes it
3 impossible for the state to exempt the use of medical marijuana from the
4 operation of its drug laws. In effect, the federal government is forcing the state to
5 keep medical marijuana illegal.

6 309 F.3d at 645-646 (Kozinski, J., concurring) (internal citations and quotations omitted).

7 The California Attorney General came to a similar conclusion in responding to inquiries
8 from the California Department of Health Services ("CDHS") regarding CDHS's statutory
9 obligation to maintain a medical marijuana patient identification card program. In response to
10 CDHS' question of whether implementation of the identification card program would violate any
11 federal criminal statute, the Attorney General stated:

12 The logical extension of the Supreme Court's holding in *Printz* is that if the
13 federal government cannot affirmatively force state officials to implement federal
14 regulatory programs, then the federal government cannot criminalize the non-
15 enforcement of a federal program. A conclusion to the contrary would obliterate
16 the Supreme Court's holding in *Printz* and allow the federal government to
17 accomplish, through criminal prosecution, that which it cannot do through
18 legislation. For this reason, we believe the federal government cannot enforce
19 federal criminal laws against state officials who merely implement valid state law
20 — or choose not to enforce federal law.⁹

21 Defendants dismiss the applicability of the commandeering analysis to this case in a few
22 sentences (Mot. to Dismiss 13-14), citing the District Court's comments in *Raich v. Ashcroft*,
23 248 F.Supp.2d 918 (N.D. Cal. 2003), *rev'd on other grounds*, 352 F.3d 1222 (9th Cir, 2003),
24 *vacated and remanded*, 125 S.Ct. 2195 (2005). However, the District Court in *Raich* did not
25 have before it facts showing that the federal government is, through intimidating and selective
26 use of its overwhelming criminal law enforcement powers, attempting to force California and its
27 political subdivisions to abandon its legislative decision to chart a course different from the
28 federal government when it comes to medical marijuana.

29 The other cases cited by Defendants (Mot. to Dismiss 13) are likewise inapposite. In
30 *McConnell v. FEC*, 540 U.S. 93 (2003), the Court expressly noted that the federal campaign

31 _____
32 ⁹ See July 15, 2005 Letter from Attorney General Bill Lockyer at 3-4, *available at*
33 www.drugpolicy.org/docUploads/CA_Attorney_General_Letter.pdf.

1 financing legislation at issue “imposes no requirements whatsoever upon States or state officials,
 2 and . . . leaves the States free to enforce their own restrictions on the financing of state electoral
 3 campaigns.” 540 U.S. at 186. There was no allegation in *McConnell* that the federal
 4 government was attempting to coerce the States to enact or repeal State legislation — the
 5 gravamen of Plaintiffs’ Tenth Amendment claim here. Similarly, in *United States v. Jones*, 231
 6 F. 3d 508 (9th Cir. 2000), the Court specifically noted that, “The statute at issue here is a federal
 7 criminal statute to be implemented by federal authorities; *it does not attempt to force the state or*
 8 *state officers to enact or enforce any federal regulation.*” 231 F. 3d at 515 (emphasis added).
 9 Moreover, in neither *Jones* nor *McConnell* was a State or political subdivision of a State
 10 asserting a Tenth Amendment claim.

11 Given the factual allegations of a federal policy designed to force California to
 12 recriminalize the medical use of marijuana, Plaintiffs state a valid Tenth Amendment claim.

13 **C. Plaintiffs WAMM and the City of Santa Cruz Have Immunity**
 14 **Under the CSA.**

15 Plaintiff City of Santa Cruz, which has passed an ordinance that allows it to distribute
 16 medical marijuana directly to qualified patients (FAC ¶ 75), and Plaintiffs WAMM and Valerie
 17 and Michael Corral, who have been deputized by the City of Santa Cruz to provide this medicine
 18 (FAC ¶ 73), are immune from civil and criminal liability under the CSA. The plain language of
 19 21 U.S.C. § 885(d) confers immunity “upon any duly authorized officer of any State, territory
 20 [or] political subdivision thereof” who is “lawfully engaged in the enforcement of *any law or*
 21 *municipal ordinance relating to controlled substances*” (emphasis added).

22 As discussed above, neither California’s Compassionate Use Act nor the Medicinal
 23 Marijuana Ordinance of the City of Santa Cruz is in “positive conflict” with federal law and is
 24 not, therefore, preempted. Immunity is simply a congressional recognition that the law is not
 25 intended to limit the lawful activities of states and municipalities relating to controlled
 26 substances. Thus, the alleged “conflict” between state and federal law is illusory. The fact that
 27 the state activity might otherwise “violate” the federal law is assumed and accepted; that is the
 28 very purpose of the grant of immunity. The federal government seeks to “nullify” its own

1 provision by rendering the grant of immunity contained in § 885(d) completely meaningless,
 2 limiting it to those whose activity would not violate federal law in the first place.

3 We respectfully suggest that the reasoning of Judge Breyer in *Cannabis Cultivator's Club*
 4 is not persuasive. *See* Mot. to Dismiss at 16. Congress clearly intended that immunity from civil
 5 or criminal liability under the CSA would apply to any state or local officer engaged in the
 6 enforcement of any law or municipal ordinance relating to controlled substances. 21 U.S.C. §
 7 885(d). Immunity for individual officers does not exempt the state or municipality as a whole,
 8 nor does it exempt any private citizens. It simply protects state or local officials from federal
 9 prosecution for activity that does, in fact, violate federal law. The violation of federal law is
 10 assumed by the grant of immunity. Defendants' Motion to Dismiss Plaintiffs' Fourth Claim
 11 must be denied.

12 **D. Patient Plaintiffs May Invoke The Defense of Medical**
 13 **Necessity**

14 Contrary to Defendants' assertion (*see* Mot. to Dismiss at 16-17), the Supreme Court's
 15 decision in *OCBC* does not foreclose the necessity defense here. This long-recognized doctrine
 16 precludes imposition of criminal liability on an individual who was faced with a choice of evils,
 17 chose the lesser evil, acted to prevent imminent harm, and had no legal alternative to prevent the
 18 harm. *See, e.g., United States v. Bailey*, 44 U.S. 394, 410 (1980); *United States v. Arellano-*
 19 *Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001). For courts to find that the legislature has
 20 foreclosed a necessity defense, the legislative purpose to exclude the justification must "plainly
 21 appear" in the statute at issue. Model Penal Code, § 3.02(1)(c).

22 In *OCBC*, the Court held that "medical necessity is not a defense to manufacturing and
 23 distributing marijuana." 532 U.S. at 494. Unlike the present case, the *OCBC* respondents were a
 24 medical marijuana cooperative and its director, who sought to justify their violations of the CSA
 25 based on the medical needs of third-party patients not before the court. *See* 532 U.S. at 487. As
 26 Justice Stevens, joined by Justices Souter and Ginsburg, explained in concurrence, the
 27 cooperative did not qualify for the necessity defense because it had not itself been confronted
 28 with an unavoidable "choice of evils." 532 U.S. at 500 n.1. This case, in contrast, presents the

1 “difficult issue” of whether the defense is available to Patient-Plaintiffs who personally face this
2 “choice of evils.” *Id.* at 501. Some, like Eladio Acosta and Jennifer Lee Hentz face the choice
3 between: 1) taking medicine which allows them to endure life-sustaining treatments and
4 violating the CSA; or 2) dying sooner without it. FAC ¶¶ 2, 19, 21-23.

5 Taking the facts alleged in the amended complaint as true, Patient-Plaintiffs satisfy the
6 traditional requirements of the necessity doctrine. FAC ¶¶ 61-64. Defendants’ Motion to
7 Dismiss Plaintiffs’ Sixth Claim must be denied.

8 **IV. CONCLUSION**

9 For the reasons stated, the Official-Capacity Defendants’ Motion to Dismiss Plaintiffs’
10 First Amended Complaint for Injunctive Relief, Declaratory Relief, and Damages should be
11 denied.

12 DATED: March 27, 2006

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