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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; and JOHN P. WALTERS,)
16 Director of the Office of National Drug)
Control Policy,)
17 Defendants.)
18)
19 _____)
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Nos. C 03-1802 JF **CONSOLIDATED**
MC 02-7012 JF

SUPPLEMENTAL BRIEF
OF THE DEFENDANTS

Date: None scheduled
Time: None scheduled
Courtroom 3, 5th Floor
The Hon. Jeremy Fogel

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ARGUMENT**A. Raich Forecloses Plaintiffs' Substantive Due Process Claim**

Plaintiffs allege in their First and Second Causes of Action that the actions of the defendants violate their fundamental rights under the Fifth and Ninth Amendments. Specifically, plaintiffs allege that the actions of defendants infringe on their fundamental rights to “preserve life, control the circumstances of one’s own death, ameliorate pain, maintain bodily integrity, consult with physicians regarding treatment and act on the physician’s recommendations, and to make certain intimate decisions.” Plaintiffs’ Opposition to Official-Capacity Defendants’ Motion to Dismiss at 3; see First Amended Complaint ¶¶97-105.

In Raich, the Ninth Circuit rejected an identical claim. In that case, the lead plaintiff had asserted that she had “a fundamental right to ‘mak[e] life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life.’” Slip op. at 3047. The Ninth Circuit determined that that proposed formulation “does not narrowly and accurately reflect the right that she seeks to vindicate.” Slip op. at 3048. In particular, the court explained, “[c]onspicuously missing from Raich’s asserted fundamental right is its centerpiece: that she seeks the right to use *marijuana* to preserve bodily integrity, avoid pain, and preserve her life. As in [Washington v. Glucksberg, 521 U.S. 702 (1997), Reno v. Flores, 507 U.S. 292 (1993), and Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990)], the right must be carefully stated and narrowly identified before the ensuing analysis can proceed. Accordingly, we will add the centerpiece—the use of marijuana—to Raich’s proposed right.” Id. (emphasis added). The Ninth Circuit therefore defined the question before it as being “whether the liberty interest specially protected by the Due Process Clause embraces a right to make a life-shaping decision on a physician’s advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed.” Id.

After canvassing the history of marijuana regulation in the United States, the Ninth Circuit answered that question in the negative. Although noting that “the use of marijuana for medical purposes is gaining traction in the law,” the Ninth Circuit held that that legal recognition “has not

1 yet reached the point where a conclusion can be drawn that the right to use medical marijuana is
2 ‘fundamental’ and ‘implicit in the concept of ordered liberty.’ For the time being, this issue remains
3 in “the arena of public debate and legislative action.” Slip op. at 3051 (quoting Glucksberg, 521
4 U.S. at 720-21). The Ninth Circuit therefore concluded that “federal law does not recognize a
5 fundamental right to use medical marijuana prescribed by a licensed physician to alleviate
6 excruciating pain and human suffering.” Slip op. at 3051-52.

7 Raich disposes of plaintiffs’ contention that the Controlled Substances Act infringes on any
8 fundamental rights. Consequently, plaintiffs’ First and Second Causes of Action should be
9 dismissed.³

10 **B. Raich Forecloses Plaintiffs’ Tenth Amendment Claim**

11 Plaintiffs allege in their Third Cause of Action that defendants’ actions violate the rights of
12 plaintiffs County and City of Santa Cruz under the Tenth Amendment, alleging specifically that
13 defendants have attempted to “commandeer the State Legislative process and to force California to
14 abandon the laws its people have chosen.” Plaintiffs’ Opposition to Official-Capacity Defendants’
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17
18 ³ We note that, during the hearing on June 23, 2006, plaintiffs for the very first time raised
19 the argument that the “substantial medical authority” test in Stenberg v. Carhart, 530 U.S. 914, 938
20 (2000) -- which holds that “where substantial medical authority supports the proposition that banning
21 a particular abortion procedure could endanger women’s health, [Planned Parenthood v. Casey, 505
22 U.S. 833 (1992)] requires the statute to include a health exception when the procedure is ‘necessary,
23 in appropriate medical judgment, for the preservation of the life or health of the mother’”-- applies
24 to this case and not just to cases involving abortion regulations. That argument patently lacks merit.
25 The plaintiffs in Raich raised the very same argument, see Brief of Appellants, No. 03-15481, at 19-
26 20 & n.6, 34-35; Appellants’ Reply Brief, No. 03-15481, at 8, 9, 10, 15, 17, 22, and the fact that the
27 Ninth Circuit did not feel the need to address it in concluding that no fundamental rights were at
28 issue underscores its lack of substance. Moreover, the Supreme Court has never suggested that the
“substantial medical authority” test in Stenberg has application outside the specialized context of
abortion, nor for that matter has any other court. See Porcelli v. United States, 404 F.3d 157, 161
(2d Cir. 2005) (stating that “Supreme Court jurisprudence about abortion is *sui generis*.”). And,
finally, the Supreme Court just today reaffirmed that “[t]he Court has given state and federal
legislatures wide discretion to pass legislation in areas where there is medical and scientific
uncertainty.” Gonzales v. Carhart, Nos. 05-380, 05-382, slip op. at 33 (April 18, 2007).

1 Motion to Dismiss at 16; see First Amended Complaint ¶¶106-108. That claim also is foreclosed
2 by Raich.

3 In Raich, the plaintiffs alleged that “the Controlled Substances Act infringes upon the
4 sovereign powers of the State of California, most notably the police powers, as conferred by the
5 Tenth Amendment.” Slip op. at 3052. In rejecting that claim, the Ninth Circuit noted that,
6 “[g]enerally speaking * * * a power granted to Congress trumps a competing claim based on a state’s
7 police powers.” Slip op. at 3053 (citing Hodel v. Va. Surface Mining & Reclamation Ass’n, 452
8 U.S. 264, 291 (1981), and United States v. Jones, 231 F.3d 508, 515 (9th Cir.2000)). The Ninth
9 Circuit therefore held that, following the Supreme Court’s decision in Gonzales v. Raich, 545 U.S.
10 1 (2005), upholding the Controlled Substances Act as a lawful exercise of Congress’s Commerce
11 Clause authority, “it would seem that there can be no Tenth Amendment violation in this case.” Id.
12 The Ninth Circuit therefore held that the lead plaintiff had “failed to demonstrate a likelihood of
13 success on her claim that the Controlled Substances Act violates the Tenth Amendment.” Slip op.
14 at 3054.

15 To be sure, the plaintiffs in this case have raised a commandeering argument, while the lead
16 plaintiff in Raich had conceded that her case did not implicate the commandeering line of cases. The
17 Ninth Circuit nonetheless stated in Raich that “[t]he commandeering cases involve attempts by
18 Congress to direct states to perform certain functions, command state officers to administer federal
19 regulatory programs, or to compel states to adopt specific legislation. *The Controlled Substances*
20 *Act, by contrast, ‘does not require the [state legislature] to enact any laws or regulations, and it*
21 *does not require state officials to assist in the enforcement of federal statutes regulating private*
22 *individuals.’” Slip op. at 3053-54 n.17 (internal citations omitted, emphasis added) (quoting Reno
23 v. Condon, 528 U.S. 141, 151 (2000)). This language leaves no room for plaintiffs’ commandeering
24 argument. As the Supreme Court has repeatedly emphasized, “[i]t is not uncommon for federal law
25 to prohibit private conduct that is legal in some States. Indeed, such conflict is inevitable in areas
26 of law that involve both state and federal concerns. It is not in and of itself a marker of constitutional
27 infirmity.” McConnell v. FEC, 540 U.S. 93, 186-87 (2003) (citing Oakland Cannabis, 532 U.S.
28*

1 483); accord Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (“As long as it is acting within the
2 powers granted it under the Constitution, Congress may impose its will on the States [and] Congress
3 may legislate in areas traditionally regulated by the States.”); Hodel, 452 U.S. at 291 (“The Court
4 long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth
5 Amendment simply because it exercises its authority under the Commerce Clause in a manner that
6 displaces the States' exercise of their police powers.”).

7 Finally, the Ninth Circuit held that the Supreme Court’s recent decision in Gonzales v.
8 Oregon, 546 U.S. 243 (2006), was “not to the contrary.” Slip op. at 3054. That is so, the Ninth
9 Circuit explained, because the Supreme Court had “invalidated an Interpretive Rule issued by the
10 Attorney General on the basis of statutory construction, not on the basis of constitutional invalidity
11 under the Tenth Amendment.” Id. Thus, the Ninth Circuit concluded, “[a]lthough Gonzales v.
12 Oregon undoubtedly implicates federalism issues, its holding is inapposite to Raich’s Tenth
13 Amendment claim.” Id.

14 Raich therefore disposes of the plaintiff’s Tenth Amendment claim. Consequently, plaintiffs’
15 Third Cause of Action should also be dismissed.

16 **C. Raich Forecloses Plaintiffs’ Medical Necessity Claim**

17 Plaintiffs allege in their Sixth Cause of Action that they are entitled to declaratory and
18 injunctive relief under the doctrine of medical necessity, contending that “[t]aking the facts alleged
19 in the amended complaint as true, Patient-Plaintiffs satisfy the traditional requirements of the
20 necessity defense.” Plaintiffs’ Opposition to Official-Capacity Defendants’ Motion to Dismiss at
21 25; see First Amended Complaint ¶¶118-121. That claim, too, is foreclosed by Raich.

22 The Ninth Circuit began its analysis of the medical necessity claim in Raich by noting that
23 the lead plaintiff “appears to satisfy the threshold requirements for asserting a necessity defense
24 under our case law.” Slip op. at 3039. The Ninth Circuit cautioned, however, that even if that were
25 so, “it is not clear whether the Supreme Court’s decision in United States v. Oakland Cannabis
26 Buyers’ Cooperative forecloses a necessity defense to a prosecution of a seriously ill defendant under
27 the Controlled Substances Act Similarly, whether the Controlled Substances Act encompasses a
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1 legislative ‘determination of values,’ that would preclude a necessity defense is also an unanswered
2 question.” Slip op. at 3041 (citing and quoting Oakland Cannabis, 532 U.S. at 491, 494 n.7). “These
3 are difficult issues,” the Ninth Circuit explained, “and in light of our conclusion below that Raich’s
4 necessity claim is best resolved within the context of a specific prosecution under the Controlled
5 Substances Act, where the issue would be fully joined, we do not attempt to answer them here.” Id.

6 Specifically, the Ninth Circuit concluded that, “[t]hough a necessity defense may be available
7 in the context of a criminal prosecution, it does not follow that a court should prospectively enjoin
8 enforcement of a statute.” Slip op. at 3042. Noting that the lead plaintiff could conceivably
9 experience a miraculous recovery or her physician might find an alternative treatment that did not
10 run afoul of the Controlled Substances Act, the Ninth Circuit stated that she would not be entitled
11 to assert a necessity defense; “[i]ndeed, oversight and enforcement of a necessity defense-based
12 injunction would prove impracticable: the ongoing vitality of the injunction could hinge on factors
13 including Raich’s medical condition or advances in lawful medical technology.” Slip op. at 3043.
14 Thus, the court explained, “a necessity defense is best considered in the context of a concrete case
15 where a statute is allegedly violated, and a specific prosecution results from the violation. * * *
16 Nothing in the common law or our cases suggests that the existence of a necessity defense empowers
17 this court to enjoin the enforcement of the Controlled Substances Act as to one defendant.” Id. The
18 Ninth Circuit therefore concluded that, “[b]ecause common law necessity prevents criminal liability,
19 *but does not permit us to enjoin prosecution for what remains a legally recognized harm*, we hold
20 that Raich has not shown a likelihood of success on the merits on her medical necessity claim for
21 an injunction.” Id. (emphasis added).
22

23 Raich disposes of the plaintiffs’ medical necessity claim. As in that case, the common law
24 doctrine of necessity does not permit this Court to enjoin the enforcement of the Controlled
25 Substances Act as to the plaintiffs. Plaintiffs’ Sixth Cause of Action, therefore, should also be
26 dismissed.
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CONCLUSION

For the foregoing reasons, and for the reasons set forth in our earlier memoranda, plaintiffs' First, Second, Third, and Sixth Causes of Action should be dismissed.

Respectfully submitted,

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