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

11 COUNTY OF SANTA CRUZ, et al.,)
12 Plaintiffs,)
13 v.)
14 MICHAEL B. MUKASEY,)
Attorney General of the United States;)
15 of the United States; MICHELE)
LEONHART, Acting Administrator of)
16 the Drug Enforcement Administration;)
JOHN P. WALTERS, Director of the)
17 Office of National Drug Control Policy,)
18 Defendants.)
19 _____)

No. C 03-1802 JF

**NOTICE OF MOTION AND
DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' THIRD AND FIFTH
CAUSES OF ACTION**

Date: April 25, 2008
Time: 9:00 a.m.
Courtroom 3, 5th Floor
Hon. Jeremy Fogel

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on April 25, 2008, at 9:00 a.m., in the United States
 3 Courthouse at 280 South First Street, San Jose, California, in the courtroom normally occupied by
 4 the Honorable Jeremy Fogel, defendants Michael B. Mukasey, Attorney General of the United
 5 States; Michelle Leonhart, Acting Administrator of the Drug Enforcement Administration; and John
 6 P. Walters, Director of the Office of National Drug Control Policy will move, pursuant to Rule
 7 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Third and Fifth Causes of Action in
 8 plaintiffs' Second Amended Complaint for Permanent Injunctive Relief, Declaratory Relief, and
 9 Damages ("Second Amended Complaint"), for failure to state a claim upon which relief can be
 10 granted.¹

11 **ARGUMENT**

12 **I. PLAINTIFFS' THIRD CAUSE OF ACTION SHOULD BE DISMISSED**
 13 **BECAUSE THEY HAVE FAILED TO ALLEGE A VIOLATION OF THE**
 14 **TENTH AMENDMENT**

15 In repleading their Third Cause of Action, which alleges that the federal government has
 16 violated rights reserved to plaintiffs County and City of Santa Cruz under the Tenth Amendment,
 17 plaintiffs offer a theory of state sovereignty which has never been accepted by any court and which
 18 is at odds with first principles of our Constitutional system. Although they allege that "[f]ederal
 19 officials have a plan to force states to repeal their medical-marijuana laws," and offer a litany of
 20 examples which, they assert, constitute a "sustained effort to persuade, and where persuasion failed,
 21 to coerce states into enacting legislation to criminalize all marijuana use," Second Amended
 22 Complaint ¶¶1, 3, plaintiffs cannot show, as they must, that federal officials have required them to
 23 enact laws or regulations or have required state officials to assist in the enforcement of the

24 ¹ On August 30, 2007, this Court dismissed plaintiffs' first, second, and fourth causes of
 25 action with prejudice, and dismissed plaintiffs' sixth cause of action without prejudice "to an
 26 appropriate motion for leave to amend should factual circumstances change such that Plaintiffs can
 27 allege that their treatment by Defendants falls within the exception described in Raich II and
 discussed above." Order Granting Motion to Dismiss with Leave to Amend in Part at 16.

1 Controlled Substances Act. To the contrary, plaintiffs merely cite instances in which federal officials
2 have sought to enforce the Controlled Substances Act in California and other states notwithstanding
3 state laws that decriminalize the use of marijuana for medicinal purposes. Those actions, to be sure,
4 might have the effect of displacing state law, but the Supreme Court “long ago rejected the
5 suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply
6 because it exercises its authority under the Commerce Clause in a manner that displaces the States’
7 exercise of their police powers.” Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc., 452
8 U.S. 264, 291 (1981).

9 This Court recognized this principle in granting plaintiffs leave to amend this count,
10 explaining that: “Plaintiffs must do more than simply characterize the displacement of California law
11 as commandeering; rather, they must explain factually how Defendants’ actions ‘require [them] to
12 enact laws or regulations’ or ‘require state officials to assist in the enforcement of federal statutes
13 regulating private individuals.” Order Granting Motion to Dismiss with Leave to Amend in Part
14 at 10 (emphasis in original) (quoting Raich v. Gonzales, 500 F.3d 850, 867 n.17 (9th Cir. 2007)
15 (“Raich II”). Because they have failed to do so, plaintiffs’ Third Cause of Action should be
16 dismissed with prejudice.

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

25 The Supreme Court reaffirmed this principle most recently in McConnell v. FEC, 540 U.S.
26 93 (2003), in which the Court upheld the constitutionality of the Bipartisan Campaign Reform Act

1 of 2002 (“BCRA”). The McConnell Court noted that, “[i]n examining congressional enactments for
2 infirmity under the Tenth Amendment, this Court has focused its attention on laws that commandeer
3 the States and state officials in carrying out the federal regulatory schemes,” and held that Title I of
4 BCRA did not run afoul of this standard inasmuch as the statute “imposes no requirements
5 whatsoever upon States or state officials, and, because it does not expressly pre-empt state
6 legislation, it leaves the States free to enforce their own restrictions on the financing of state electoral
7 campaigns.” Id. at 186.

8 2. In Gonzales v. Raich, 544 U.S. 1 (2005), the Supreme Court held that the Controlled
9 Substances Act’s prohibition on the use of marijuana, even for asserted medicinal purposes, is a valid
10 exercise of Congressional power under the Commerce Clause. Thus, as the Ninth Circuit
11 subsequently explained in Raich II, “after Gonzales v. Raich, it would seem that there can be no
12 Tenth Amendment violation in this case.” 500 F.3d at 867. Indeed, although the plaintiffs in Raich
13 did not contest the point, the Ninth Circuit expressly noted that enforcement of the Controlled
14 Substances Act did not involve federal commandeering:

15 The commandeering cases involve attempts by Congress to direct
16 states to perform certain functions, command state officers to
17 administer federal regulatory programs, or to compel states to adopt
18 specific legislation. See, e.g., Printz v. United States, 521 U.S. 898,
19 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); New York v. United
20 States, 505 U.S. 144, 166, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).
The Controlled Substances Act, by contrast, “does not require the
[state legislature] to enact any laws or regulations, and it does not
require state officials to assist in the enforcement of federal statutes
regulating private individuals.” Reno v. Condon, 528 U.S. 141, 151,
120 S.Ct. 666, 145 L.Ed.2d 587 (2000).

21 Id. at 867 n.17.

22 Similarly, in this case, plaintiffs do not allege (nor could they) that federal officials have
23 required them to enact any laws or regulations or required state officials to enforce the Controlled
24 Substances Act. The provision of the Low-Level Radioactive Waste Policy Act which the Supreme
25 Court found to be inconsistent with the Tenth Amendment, for example, by its very terms required
26 states to accept ownership of waste or regulate according to Congressional instructions, see New

1 York, 505 U.S. at 175-77, while the provision of the Brady Act which the Court found to be
2 inconsistent with the Tenth Amendment required state officers to perform background checks, see
3 Printz, 521 U.S. at 933. Here, by contrast, the Controlled Substances Act by its terms does not
4 require state municipalities or state officials to do anything, nor have federal officials required state
5 municipalities or state officials to do anything. As Judge Jenkins has rightly analyzed, federal
6 commandeering is “not at issue in this case, for the federal government is not forcing California, or
7 any other State, to take any action. The CSA regulates individual behavior, and plaintiffs are asking
8 the Court to prevent the government from applying those regulations to their conduct.” Raich v.
9 Ashcroft, 248 F. Supp.2d 918, 927 (N.D. Cal. 2003) (emphasis supplied), rev’d on other grounds,
10 352 F.3d 1222 (9th Cir. 2003), vacated and remanded, 544 U.S. 1 (2005), aff’d on remand, 500 F.3d
11 850 (9th Cir. 2007); accord McConnell, 540 U.S. at 186 (Title I of Bipartisan Campaign Reform Act
12 did not run afoul of Tenth Amendment because it “only regulates the conduct of private parties” and
13 “imposes no requirements whatsoever upon States or state officials”); United States v. Jones, 231
14 F.3d 508, 515 (9th Cir. 2000) (federal statute regulating possession of firearms did not violate Tenth
15 Amendment because it is “a federal criminal statute to be implemented by federal authorities; it does
16 not attempt to force the states or state officers to enact or enforce any federal regulation.”).

17 Plaintiffs’ theory thus appears to be that merely by enforcing the Controlled Substances Act
18 in California and other states, the federal government has made it more difficult for the State of
19 California and its cities and municipalities to implement the Compassionate Use Act. But that
20 proposition does not state a claim under the Tenth Amendment. As the Supreme Court held in
21 McConnell, “[i]t is not uncommon for federal law to prohibit private conduct that is legal in some
22 States. Indeed, such conflict is inevitable in areas of law that involve both state and federal concerns.
23 It is not in and of itself a marker of constitutional infirmity.” 540 U.S. at 186-87 (citing United
24 States v. Oakland Cannabis, 532 U.S. 483 (2001)). That holding, and the Supreme Court’s express
25 citation to its decision in Oakland Cannabis, a case involving this very issue, forecloses the
26 plaintiffs’ Tenth Amendment argument in this case.

1 Indeed, even a cursory examination of plaintiffs' allegations demonstrate their failure to state
2 a claim under the Tenth Amendment. Plaintiffs complain, for example, that "[t]he federal policy of
3 targeted raids, seizures, and forfeiture actions against medical marijuana providers who were
4 licensed, permitted, deputized or otherwise authorized by the local government" include such actions
5 as closing the Oakland Cannabis Buyers' Cooperative by way of a civil injunction action,
6 prosecuting Ed Rosenthal, raiding the Los Angeles Cannabis Resource Center, and issuing letters
7 to property owners regarding the sale of marijuana on their premises. See Second Amended
8 Complaint ¶¶100(a)-(c), (f). But plaintiffs nowhere allege that a single one of the complained of
9 actions was unlawful, nor could they. Not only did Judge Breyer grant the government's motions
10 for preliminary and permanent injunctions against the Oakland Cannabis Buyers' Cooperative and
11 other clubs, see, e.g., United States v. Cannabis Cultivator's Club, 5 F. Supp.2d 1086 (N.D. Cal.
12 1998), but the Ninth Circuit recently affirmed the issuance of the permanent injunctions. See United
13 States v. Oakland Cannabis Buyers' Cooperative, 2007 WL 4390325 (9th Cir. Dec. 13, 2007)
14 (attached). Mr. Rosenthal also was convicted by a jury in his retrial, and plaintiffs nowhere allege
15 that the execution of the search warrant at the Los Angeles Cannabis Resource Center or the issuance
16 of letters to property owners is in any way ultra vires.

17 Thus, stripped to its core, plaintiffs' argument is nothing more than the contention that the
18 enforcement of federal law by federal officials makes it more difficult for California and the County
19 and City of Santa Cruz to implement the Compassionate Use Act. But even if that is so, it does not
20 implicate the Tenth Amendment. As the Supreme Court explained in McConnell, "[i]t is not
21 uncommon for federal law to prohibit private conduct that is legal in some States. Indeed, such
22 conflict is inevitable in areas of law that involve both state and federal concerns. It is not in and of
23 itself a marker of constitutional infirmity." 540 U.S. at 186-87 (citing Oakland Cannabis, 532 U.S.
24 483). Plaintiffs Third Cause of Action, therefore, should be dismissed with prejudice.

II. PLAINTIFF'S FIFTH CAUSE OF ACTION SHOULD BE DISMISSED

In granting plaintiffs leave to amend their Fifth Cause of Action, which alleges, inter alia, a Fourth Amendment violation by the defendants, this Court allowed plaintiffs the opportunity “to request appropriate relief against these officials.” Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss Plaintiffs’ Fifth Cause of Action at 3. In its Order of August 30, 2007, this Court again instructed plaintiffs to include an amended Fifth Cause of Action in an amended complaint. See Order Granting Motion to Dismiss with Leave to Amend in Part at 16 n.10.

Plaintiffs have failed to meet this obligation. Although plaintiffs allege that they broadly seek declaratory and injunctive relief in their Fifth Cause of Action for violations of the Fourth, Fifth, Ninth, and Tenth Amendments, they specify that they “request the relief set forth in the Prayer for Relief,” Second Amended Complaint ¶115, but do not request relief for alleged violations of their Fourth Amendment rights in that Prayer for Relief. Id. Prayer for Relief ¶¶1-11. Defendants are thus left to speculate as to what relief plaintiffs are seeking in this action for any such violation of their Fourth Amendment rights. And this is not an idle speculation. If plaintiffs intend to seek declaratory and injunctive relief prohibiting defendants from broadly violating their Fourth Amendment rights in the future, and such request would run afoul of “general rule [that] courts are reluctant to issue injunctions against the commission of a crime * * *.” 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure §2942, at 70-71 (2d ed. 1995). If, on the other hand they are seeking declaratory and injunctive relief prohibiting defendants from conducting a search in the manner in which it was conducted in 2002, they fail to explain why they have standing to bring any such claim. See City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (“Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.”) (quoting O’Shea v. Littleton, 414 U.S. 488, 495-96 1974)).

1 In sum, plaintiffs were given ample opportunity to properly plead this cause of action, and
2 defendants should not be required to shadow box with phantoms. Plaintiffs' Fifth Cause of Action,
3 therefore, should also be dismissed with prejudice.

4 **CONCLUSION**

5 For the foregoing reasons, plaintiffs' Third and Fifth Causes of Action should be dismissed
6 with prejudice.

7 Respectfully submitted,

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18 Dated: January 25, 2008
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