No. 12-35110

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA CAREGIVERS ASSOCIATION, LLC, *et al.*,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
For the District of Montana, Missoula Division
Hon. Donald W. Molloy, District Judge
District Court Case No. 9:11-cv-00074-DWM

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

Plaintiffs are individuals and businesses that were operating lawfully as caregivers under Montana medical marijuana laws until March, 2011, when the federal government began a series of raids that put them out of business and subjected them to criminal prosecutions. Plaintiffs' Amended Complaint was filed in the district court on August 4, 2011. [Doc. 5]. The government filed a Motion to Dismiss on October 28, 2011, [Doc. 18]; Plaintiffs filed a Response on December 28, 2011. [Doc. 27]. The government filed its Reply on January 11, 2012. [Doc. 29]. The Court ruled less than two weeks later, on January 20, 2012, dismissing the case. [Doc. 32]. Plaintiffs filed a Notice of Appeal on February 10, 2012. [Doc. 34].

STATEMENT OF ISSUES

Did Plaintiffs' Amended Complaint plausibly state Plaintiffs' claims so as to preclude dismissal under Rule 12(b)(6)?

Did the Supreme Court and Ninth Circuit rulings in *Gonzales v. Raich* and *Raich v. Gonzales* preclude Plaintiffs' right to trial?

Do the principles of federalism and the Tenth Amendment preclude the Controlled Substances Act's prohibition of marijuana with respect to individuals, associations, and businesses operating lawfully under Montana's medical marijuana laws?

STATEMENT OF FACTS

Plaintiffs filed their First Amended Complaint in the district court on August 4, 2011. In the Complaint they charged the United States, the Department of Justice, and other federal officials and agents with violations of Plaintiffs' constitutional rights under the Fourth, Fifth, Ninth, and Tenth Amendments to the U.S. Constitution. The facts are set out in the Amended Complaint:

Plaintiffs were State-authorized individuals and businesses employed as caregivers: growers and distributers of medical marijuana to qualified patients within the State of Montana. (ER-019, ¶ 1). On March 14, 2011, DEA, FBI, ATF, and other federal agents and officials executed search and seizure warrants on banks and at multiple marijuana business locations in the State of Montana, cutting and taking away living plants and seizing and removing medical marijuana, money, equipment, and other business and personal property. (ER-024., ¶ 26)

On April 20, 2011, the U.S. Attorney for Montana wrote to the President of the Montana Senate and the Speaker of the House of Representatives to provide "guidance concerning a proposed regulatory scheme by the Montana Legislature for the use of marijuana and marijuana infused products for therapeutic purposes." The letter reiterated the government policy:

> growing, distributing, and possessing marijuana in any capacity. . . . Is a violation of federal law regardless of state laws that purport to permit such activities.

(ER-023, at ¶¶ 22 and 23)

On May 20, 2011, Defendants conducted an additional raid and seizures from Sleeping Giant Caregivers, Inc., in Helena. Again, the federal agents and officials seized plants, dried marijuana, supplies, growing equipment, and a variety of other items intended and used for the purpose of supplying medical marijuana to qualified patients. (ER-024, at ¶ 32).

After describing the Montana law (ER-022, 023, at ¶¶ 5-11) and the Federal law (¶¶ 12-15) pertaining to medical marijuana, Plaintiffs' Amended Complaint describes the conflict of laws (¶¶ 16-24) and concludes that:

> 25. It is impossible for Plaintiffs and others to act within both State and local law allowing possession, growing, and selling of medical marijuana and federal law prohibiting the same acts and activities.

STATEMENT OF THE CASE

Prior to the raids, Plaintiff caregivers were operating openly, honestly, and directly under State law and regulation. Plaintiffs were engaged in what they fully believed to be lawful businesses; yet without prior warning or opportunity to be heard the federal government seized their inventories, equipment, and effectively put them out of business. See, e.g., ER-052 & 053.

Plaintiffs filed their First Amended Complaint [ER-018] on August 4, 2011, charging that the government defendants violated the Fourth, Fifth, Ninth and Tenth Amendments and were liable for damages under the *Bivens* doctrine. Plaintiffs also sought a declaratory judgment. In short order, the government filed a Motion to Dismiss, Plaintiffs responded and the government replied. Less than two weeks later the district judge dismissed the case and this appeal followed.

Plaintiffs' Amended Complaint addressed, in a straightforward manner, the conflict between the federal prohibition of marijuana and the production and use of marijuana in the states that have authorized the medical use of marijuana either by voter mandate or legislative action.

ARGUMENT AND AUTHORITIES

The coordinated federal drug raids and seizures of medical marijuana plants, equipment, facilities and bank accounts *from legitimate businesses* in Montana signaled a renewed federal offensive in the enforcement of the Controlled Substances Act's prohibition of marijuana in states that have approved the medical uses of marijuana. In the context of a vigorous national debate over the medical use of marijuana, the state-wide medical marijuana raids in Montana in the spring of 2011 had profound effects and caused serious harm. The district court erred when it dismissed Plaintiffs' claims for "failure to state a claim."

Furthermore, the district court ruled on the basis of an obvious and erroneous preconception about the law and the proper balance between federal and state interests. Although the district court holds that the Supreme Court and Ninth Circuit Court cases already decided all the issues advanced by Plaintiffs, that is far from correct.

I. THE COURT IMPROPERLY DISMISSED PLAINTIFFS' COMPLAINT

A. Standard for Dismissal

A Rule 12(b)(6) motion tests the sufficiency of the allegations in the complaint. The sufficiency of the complaint, and whether it can withstand a motion to dismiss, are questions of law. The complaint need not state detailed factual allegations, but Plaintiffs are obligated to set forth the grounds of entitlement to relief. To survive a Rule 12 motion, a complaint need only state a legally viable cause of action. *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 608 (USDC, EDVA 2010). "When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

Moreover, the court draws all reasonable inferences in favor of the plaintiff. *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043 n.2 (9th Cir.

2008). Dismissal is proper under Rule 12(b)(6) if it appears beyond doubt that the non-movant can prove no set of facts to support its claims. *Adams v. Johnson,* 355 F.3d 1179, 1183 (9th Cir. 2004).

The "factual allegations must be enough to raise a right to relief above the speculative level, assuming the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Supreme Court has prescribed a new standard to use in reviewing a dismissal: "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Bell Atlantic*, 550 U.S. at 570.

B. The Court's Decision to Dismiss Plaintiffs' Claims

In its ruling, the district court summarizes Plaintiffs' claims:

> The plaintiffs claim the raids were unlawful because (1) Montana law allowed them to grow and produce marijuana for medical consumption and (2) the United States Department of Justice represented that they would not actively prosecute medical marijuana caregivers. As a result, the plaintiffs argue, the raids violated their constitutional rights under the Tenth, Ninth, Fifth, and Fourth Amendments.

ER-005. Plaintiffs never made anything like the second allegation; the first is a fact. Nonetheless, the court rules: "The plaintiffs' claims fail on all counts." Id. This is so, the Court decides, because:

> Even if the plaintiffs' alleged conduct was legal under Montana law, it was still illegal under the federal Controlled Substances Act... So the plaintiffs were still subject to prosecution under the United States

> Constitution's Supremacy Clause. U.S. Const. Art. VI, cl. 2; Gonzales v. Raich, 545 U.S. 1, 28 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.")

Thus, the district court ruled on the basis of an erroneous view of the law, starting with a false premise ("plaintiffs claim. . . the United States Department of Justice represented that they would not actively prosecute medical marijuana caregivers") and concluding that:

> Even accepting the plaintiffs' allegations as true and construing them in the light most favorable to the plaintiffs, the plaintiffs have failed to state a claim that is plausible on its face. Iqbal, 129 S. Ct. At 1949 (quoting Bell A. Corp., 550 U.S. at 570). The plaintiffs have not pleaded any facts that allow the Court to draw a reasonable inference that the defendants violated the plaintiffs' rights under the Tenth, Ninth, Fourth, or Fifth Amendments. See id. We are all bound by federal law, like it or not.

Order, Doc. 32 at pp. 10, 11. The district court fails to consider that we are also bound by the Constitution, and that its Amendments, particularly its Bill of Rights provisions, may not be dismissed so easily or with so little justification.

Some of the contentions Plaintiffs included in their Amended Complaint were that:

> Federal enforcement of the [CSA] unconstitutionally interferes with the rights and powers reserved to the states by the Tenth Amendment…" *First Amended Complaint,* p. 1.

> "The Montana Constitution, Article II, provides that in Montana: 'All persons are born free and have certain inalienable rights…. [including] the right… of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways.'" *First Amended Complaint,* p. 3.

> "Both the police and public health powers and related authority properly reside in state and local governments, not the federal government." *First Amended Complaint,* p.8.

> "Plaintiffs' activities as growers and distributors of medical marijuana are not properly preempted or prohibited by the federal government." *First Amended Complaint,* p. 8.

> "Application of federal criminal drug laws against Plaintiffs and other Montana caregivers exceeds the federal government's constitutional authority under the Commerce Clause, violates State sovereignty and control over safety and health concerns and commandeers the State's legislative process and authority." *First Amended Complaint,* p. 9.

Plaintiffs' Amended Complaint should not have been dismissed, as it was more than sufficient under the standards established by the Supreme Court. The trial judge, however, had his own ideas of what constituted "plausible" claims or facts sufficient to support such claims.

II. PRIOR CASES DID NOT ADDRESS THE CONSTITUTIONAL ISSUES

In 2002, DEA agents seized and destroyed six marijuana plants two women were growing for their personal medical use. The Supreme Court held in *Gonzales v. Raich*, 545 U.S. 1 (2005) (henceforth "Gonzales") that despite the apparent lack of interstate commerce when two women grow six plants for their own medical use, even a seemingly insignificant amount put into or withheld from the national market was enough to invoke the commerce clause, thereby validating federal law enforcement jurisdiction.

In dismissing Plaintiffs' claims the district court relied entirely upon that Supreme Court case, *Gonzales*, and the ruling on remand from the Supreme Court to the Ninth Circuit court. *Raich v. Gonzalez,* 500 F.3d 850 (9th Cir. 2007) (hereinafter "*Raich*") But *Gonzales* never directly addressed or decided a Tenth Amendment claim. *Gonzales*, 545 U.S., at 10.

The Supreme Court acknowledged the "obvious importance of the case," but limited its consideration to:

> whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally.

The Court carefully circumscribed the claims at issue (and thus also carefully limited its own holdings in the matter) as follows:

> Respondents in this case do not dispute that passage of the CSA [Controlled Substances Act], as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, Respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana *as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law* exceeds Congress' authority under the Commerce Clause.

Gonzales, 545 U.S. at 15 (emphasis added.)

On remand however, the Ninth Circuit Court addressed some of the remaining issues. After stating that a necessity defense does not provide a proper basis for injunctive relief, the court continued:

> Second, although changes in state law reveal a clear trend towards the protection of medical marijuana use, we hold that the asserted right has not yet gained the traction on a national scale to be deemed fundamental. Third, we hold that the Controlled Substances Act, a valid exercise of Congress's commerce power, does not violate the Tenth Amendment.

Raich, 500 F. 3d at 869. That surely does not qualify as proper consideration of the constitutionality of the CSA, especially as "Raich concede(d) that recent Supreme Court decisions have largely foreclosed her Tenth Amendment claim, and she also concedes that this case does not implicate the 'commandeering' line of cases." *Raic*h, 500 F.3d at 867.

Thus, the District Court's dismissal of Plaintiff's Tenth Amendment and other constitutional claims depends upon the supposition that Plaintiffs were merely echoing the "very narrow" Tenth Amendment claim asserted by Raich, Raich's dismissal of *its* plaintiffs' Tenth Amendment claims was squarely premised upon the holding of the Supreme Court in *Gonzales.* And the Supreme Court's holding in *Gonzales* was explicitly premised upon the "quite limited" claims of the respondents in that case.

The issue in Gonzales was still the right to grow plants for personal medical use in the State of California free of criminal penalties. The Court held that right did not exist. But now Plaintiffs challenge precisely that which, as the Supreme Court observed, was not challenged in Gonzales.

The *Montana Caregivers'* case is therefore distinguished from both *Gonzales* and *Raich* in that the Plaintiffs in this case *are* contesting the constitutionality of the Controlled Substances Act, especially the section(s) of that Act relating to marijuana and its status as a "Schedule I drug." It is truly astonishing that so much weight is given, so many actions taken, and so much reliance placed on a demonstrably false notion: that marijuana has no known medical uses. Nor is there any reason to believe that marijuana, "medical" or not, is either especially unsafe or susceptible to abuse.

That the Plaintiffs in the case at bar do contest the constitutionality of the CSA (as the parties in both cases failed to do) is readily apparent from review of the allegations in the *Montana Caregivers'* Complaint.

After the Supreme Court's ruling in Gonzales v. Raich, one federal court case continued litigating issues involving the conflict between State and federal marijuana laws. Like *Montana Caregivers*, *County of Santa Cruz, et al., v. Holder, et al.,* Case No. 03-cv-1802 JF, (DC NDCA) involved an improper "drug" raid and included a strong Tenth Amendment claim against the federal government:

> The federal government has pursued a policy of threatening and utilizing arrests, forfeitures, criminal prosecutions and other punitive means, all with the purpose of rendering California's medical marijuana laws impossible to implement and with the intent of coercing California and its political subdivisions to enact legislation re-criminalizing medical marijuana. This consistent and long-standing practice and policy of the federal government exceeds legitimate forms of persuasion and effectively commandeers the law-making function of California and its political subdivisions

After the federal district court refused to dismiss the California Plaintiffs' Tenth Amendment claims, the government decided to settle the case. The parties discussed their potential agreement, in light of the publication of the Ogden Memo, at a conference with the Judge:

> Mr. Boyd: . . . we seem to have agreement, perhaps in principle, of the idea that there's no need to litigate this case so long as the federal government follows the policy that has recently been announced.
>
> So I think the trick here . . . is to come up with language that would, in effect, say this case goes away, to dismiss it without prejudice. But *if the government changes its mind, essentially goes back to its old ways, the litigation would recommence.*

Santa Cruz v. Holder, No. 03-cv-01802-JF, Doc. 226, at p. 6 (emphasis added).

> The parties stipulated that:
>
> As a result of the issuance of the Medical Marijuana Guidance, plaintiffs agree to dismiss this case without prejudice. The parties further stipulate and agree that if Defendants withdraw, modify, or cease to follow the Medical Marijuana Guidance (the Ogden Memo), this case may be reinstituted in its present posture on any Plaintiffs' motion, although if any Plaintiff seeks to reinstitute this case, Defendants reserve the right to argue that they have not withdrawn, modified, or ceased to follow the Medical Marijuana Guidance, and that this case is moot. . . .

Santa Cruz, Doc. 225; ER-034.

Regardless of their legality or propriety, the fact is that medical marijuana businesses boomed, especially after the DOJ's promulgation of the Ogden Memo, and are now a part of the national landscape. And whether deliberately or inadvertently, what happened was a result of the states' approval of medical uses of marijuana combined with the federal government's contrary prohibition tempered by an agreement to abstain from focusing law enforcement efforts on medical marijuana patients. Vijay Sekhon, *Highly Uncertain Times: An Analysis of the*

Executive Branch's Decision to Not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws, 37 Hastings Const. L. Q. 553 (Spring, 2010).

III. THE FEDERAL GOVERNMENT HAS LIMITED POWERS

The district court erred in ruling on the basis of the Supremacy Clause. If, as Montana Caregivers alleged, the federal government was acting without any enabling power at all, or if it exceeded its powers under the commerce clause, the local police action by federal forces must be deemed unconstitutional. The Constitution "established a federal government that is 'acknowledged by all to be one of enumerated powers.'" *Florida v. U.S. Department of Health and Human Services* (11th Cir., 2011).

The powers of the federal government are "few and defined." On the other hand, the powers that the states retain are many and undefined. *United States v. Lopez*, 514 U.S. 549, 552 (1995). In *Lopez* the Supreme Court held that a federal law that penalized possession of a gun in a school zone was unconstitutional because it was beyond the authority of Congress to legislate such a local issue. In *United States v. Morrison*, 529 U.S. the Court held that a federal statute providing a civil remedy for domestic violence victims exceeded Congress' power under the Commerce Clause. 529 U.S. at 598.

The government of the United States is based on federalist principles. The Tenth Amendment provides that "(t)he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." With respect to the facts of this case, the health and police powers are considered state, not federal, powers and obligations. The power of the states to legislate in the area of public health and safety is much broader than the power of Congress in those areas. *Compagnie Francaise v. Louisiana State Board of Health,* 186 U.S. 380, 393 (1902).

Police power is unquestionably an area within the traditional control of the state:

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically... matter(s) of local concern, the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.

Raich, 500 F.3d at 867, quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

The Supreme Court has stressed that it is important, in considering its authority under the Commerce Clause, to maintain "the Constitution's distinction between national and local authority." A second broad requirement for constitutional Commerce Clause litigation is that courts may not interpret the Clause in a way that would grant to Congress a general police power, "which the Founders

denied the National Government and reposed in the States." Morrison, 529 U.S. at 618; Lopez, 514 U.S. at 584.

Applied only in conjunction with the enumerated powers granted to the federal government, any law relying for its validity on the Necessary and Proper Clause "must itself be legitimately predicated on an enumerated power." *United States v. Comstock*, 560 U.S. __ (2010).

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch v. Maryland, 17 U.S. 316 (1819). The use of federal police forces to seize and destroy the Montana cannabis businesses was neither necessary or proper. Nor was it within the enumerated powers of the federal government.

In *Gonzales* the Court speculated that there could come a change of national priorities with respect to the medical uses of marijuana. In fact, the country *has* changed and there is a new awareness of the possibilities of freedom and the ability of the people and the states to resist the coercive use of federal power in matters that are important to the people. It is also important to understand what the Courts did not decide in *Raich*, to ascertain just what and to what extent the constitutional and practical questions remain to be decided.

IV. CONCLUSION

One of the most extreme efforts of the federal government in the renewed national controversy over medical marijuana businesses came with the issuance and execution of 26 search and seizure warrants in March, 2011. The Montana raids were a showcase effort, complete with Government press releases and a press conference lauding its own actions, to demonstrate the power of the federal government.

The district court's hasty dismissal of the Montana Caregivers' Amended Complaint disregarded the serious constitutional questions and the compelling facts in this case. Plaintiffs claim damages resulting from the raids, and their Amended Complaint in this case set out those claims and sought review under the jurisdiction of the federal court. The Order Dismissing Appellants' Complaint should be overruled.

Respectfully submitted,

s/ Paul Livingston

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STATEMENT OF RELATED CASES

Appellant is unaware of any prior or related cases.

s/ Paul Livingston

_____

Paul Livingston

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 32(A)(7)(C) AND CIRCUIT RULE 32-1

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief for appellants is proportionally spaced, has a typeface of 14 points, and contains 3750 words, exclusive of exempted portions. \

s/ Paul Livingston

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Paul Livingston

CORPORATE DISCLOSURE STATEMENT

Appellants state that none of the Plaintiffs have parent companies, subsidiaries or affiliates that have issued shares to the public.

s/ Paul Livingston

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Paul Livingston

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2012, I served a copy of the foregoing brief on opposing counsel by filing it through the Court's CM/ECF system.

s/ Paul Livingston

_____

Paul Livingston