No. 12-35110

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA CAREGIVERS ASSOCIATION, LLC, et. al.,
Plaintiffs/Appellants,

vs.

THE UNITED STATES OF AMERICA, et. al.
Defendant/Appellee.

On Appeal from the United States District Court
For the District Court of Montana, Missoula Division
The Hon. Donald W. Molloy, Presiding District Judge

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

The Applicants, Montana Cannabis Industry Association (hereinafter referred to as "MTCIA"), file this motion for leave to participate as amici curiae in

support of Appellants in this matter. The amici curiae counsel has the consent of Paul Livingston, attorney for Appellant, to file this amicus brief, but amici curiae does not know the position of the attorney for the United States. MTCIA respectfully prays the Court grants this Motion and allow it to appear as amici curiae.

INTEREST OF APPLICANTS

MTCIA is a Montana non-profit corporation and association dedicated to promoting professionalism, credibility, quality, and vitality in the Cannabis Industry and to benefit its members and the citizens of Montana. MTCIA does this by (a) serving as the voice of its members; (b) proactively influencing the legislative and regulatory process; (c) providing industry information and education to our membership and the public; (d) furthering the ethical and professional standards of our members; and (e) maintaining the positive image of marijuana industries and Association. MTCIA has a membership of people throughout Montana.

MTCIA's goal is to influence the quality growth of the cannabis industry in Montana by supporting the development and effectiveness of the Association and its members, thereby improving conditions in the Cannabis Industry and providing safe, quality, and affordable cannabis.

MTCIA has a vital and particular interest in the recognition and preservation of the rights reserved to the people of Montana under the United States Constitution, including those under Tenth Amendment, especially as it relates to its goals relative to cannabis. MTICA has a legitimate and continual interest in cases that undermine the States' (and thus the people of Montana's) ability to regulate cannabis within its own borders.

The case at hand involves the undermining of Montana's ability to regulate cannabis within its borders and involves the federal government's claim of power to criminally and civilly prosecute the people of Montana without regard to Montana's law on the matter. This case rests, in part, on the issue of whether or not the federal government's actions as alleged in the Plaintiff-Appellant's complaint were constitutional. The facts alleged by the Plaintiff-Appellant also include the fact that Montana had a state law in place which allowed for the lawful use of marijuana for medical purposes and that those individuals arrested by the federal government in Montana, as alleged in said complaint, were relying and acing upon Montana's laws.

ARGUMENT

Reasons Why A Brief of Amici Curiae Is Desirable

"The district court has broad discretion to appoint (9th amici curiae. *Hoptowit v. Ray*, 682 F.12d 127, 1260 Cir. 1982) (inmates moved for appointment of amici, which the Court granted). In *Montana Caregivers Association, LLC v. U.S.* (see district court case, No. 9:11-cv-00074-DWM, 2011 U.S. Dist., Westlaw 2012 WL 169771 (D. Mont. Jan. 20, 2012)), the Applicants would discuss the application of the Tenth Amendment relative to intrastate activities and regulations of marijuana, Congress' lack of rationale relation to prohibit the States from regulating marijuana, and the federal courts' obligation to check Congress' unconstitutional powers.

MTCIA's participation would assist this Court to determine the above-stated issues in this case, which are vital not only to Montana in this case but to all the States for future laws and cases. The amici curiae brief is filed contemporaneously with this motion.

CONCLUSION

For the foregoing reasons, MTCIA asks this Court to grant this Motion and permit it to appear as amici curiae in this case.

RESPECTFULLY SUBMITTED this 2nd day of June, 2012.

/s/ Timothy Baldwin
Timothy Baldwin

CERTIFICATE OF SERVICE

This is to verify that on this 2nd day of June, 2012, a copy of the foregoing was duly served on the following persons by the following means: CM/ECF and Mail.

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GENERAL FACTS

Plaintiffs are Montana businesses and individuals that were growing and supplying marijuana to registered patients under the provisions of Montana's Medical Marijuana law, passed directly by the citizens of Montana in 2004. Said businesses and individuals operated under the license and supervision of Montana's Department of Health and Human Services.

On March 14, 2011, agents of the Federal Government conducted criminal raids of the Plaintiffs' facilities and other targeted Montana Medical Marijuana Caregivers. The Federal Government seized, converted, or destroyed thousands of living marijuana plants, hundreds of pounds of medical marijuana intended for distribution to patients in Montana for state-qualified patients' medical care, and other equipment and property belonging to the Plaintiffs without notice and hearing.

The Department of Justice in conjunction with many other federal agencies ("Government") reinstated its campaign against businesses that grow and provide marijuana to qualified patients. Evident by the facts which gave rise to this cause of action, Montana is a front line in the Government's renewed war on marijuana.

The Government's campaign is based on actual use and threats to use federal law enforcement authority against individuals and businesses known by the Government to have been operating lawfully under state and local laws. In this case, the Government's affidavits, warrants, and press releases all demonstrate the effort of the federal government to secure through coercion and intimidation what could not be secured legally. The Government used terms such as "money laundering," "drug trafficking," or "manufacturing dangerous drugs" to justify its actions against Plaintiffs and others known to be acting in compliance with the law.

Plaintiffs challenge the propriety and the legality of the Government's targeting medical marijuana businesses and the people who run them. The Government moved to dismiss Plaintiffs' claims based upon Congress' commerce power, which was granted by the District Court. The allegations in the Complaint (1) are directly responsive to the actions of an inconsistent Government reversing the predictable results of its own prior legal and policy decisions, statements, and actions; (2) challenge the District Court's presupposed conclusions regarding Congress' commerce power; and (3) give rise to causes of action under the Constitution of the United States of America.

INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), MTCIA appears as amici curiae in this action. MTCIA has a substantial interest in ensuring that the people of Montana are able to carry out activities deemed beneficial and lawful within Montana's borders and in the preservation of Montana's rights guaranteed in the constitution of the United States of America, including traditional police powers. The rights reserved to the States under the Tenth Amendment to the constitution are vitally important to the analysis of Congress' commerce power.

JURISDICTION STATEMENT

The District Court for the United States District of Montana had original jurisdiction of this civil action because it arises under the Constitution and laws of the United States. 28 U.S.C. § 1331. The Court of Appeals has jurisdiction because this is an appeal of a final judgment, disposing of all claims of all parties, entered by the district court for the United States District of Montana, on January 20, 2012. 28 U.S.C. § 1291. The appeal in this case was timely filed on February 10, 2012. 28 U.S.C. § 2107(b).

STANDARD OF REVIEW

The court below granted Appellee's motion to dismiss for failure to state a claim. The standard of review is therefore *de novo*, "accept[ing] all factual allegations in the complaint as true and constru[ing] the pleadings in the light most favorable to the nonmoving party." *Winn v. Arizona Christian Sch. Tuition Org.*, 562 F.3d 1002, 1007 (9th Cir. 2009).

SUMMARY OF ARGUMENT

The Plaintiffs sufficiently stated a cause of action in their Amended Complaint (Doc. 5, "Complaint"), and their response to the Defendants' motion to dismiss was sufficient to rebut the Defendants' motion to dismiss.

` The Constitution created a federal government of limited powers. The people and States respectively retained all other powers not granted to the Federal Government. Rights under the Fourth, Fifth Ninth, and Tenth amendment are fundamental to individuals, States, and to the preservation of the federal union. The Court must apply proper methods of interpretation to maintain the constitutional balance between State and federal power. Congress' power to regulate any and all commerce is not plenary but is considered in light of the States' retained powers. When rules of interpretation have an unconstitutional effect in whatever form,

whether immediately or over time, the Court has a duty to reevaluate, reform, or redefine the rules created by over the duration of constitutional analysis.

Violations of the Fourth and Fifth Amendment require a factual determination, and the District Court erroneously dismissed the Complaint where it premised its decision on an erroneous application of the Tenth Amendment.

ISSUE 1: SHOULD THE COURT REEXAMINE CONGRESS' COMMERCE POWER TO PROHIBIT MARIJUANA IN CONTRADICTION TO STATE LAW AND NORMS?

ANSWER 1: YES.

ISSUE 2: DID THE DISTRICT COURT ERRONEOUSLY DISMISS THE COMPLAINT?

ANSWER 2: YES.

ARGUMENT - ISSUE 1

I. The Substantial Effects Doctrine (hereinafter "the doctrine") As Applied by the District Court is Unconstitutional

The doctrine has created an unconstitutional effect and violates the States' reserved powers under the Tenth Amendment of the Constitution, among other rights. Consequently, District Courts have reached this erroneous conclusion, "'Congress' power under the Commerce Clause is almost unlimited'". *Montana Shooting Sports Ass'n v. Holder*, 2010 WL 3926029 (D.Mont. 2010), 18, citing *United States v. Rothacher*, 442 F.Supp.2d 999, 1007 (D.Mont. 2006). Applying the commerce power with this view of the doctrine is unconstitutional, demonstrates that the doctrine has reached its outer limits of constitutionality and must be reexamined to induce a constitutionally-valid application of Congress' commerce power.

What puts the unconstitutional "teeth" into the doctrine's "bite" is the Court's deference to Congressional findings of fact relative to its own power and extent thereof and the determination that the thing or activity substantially effects interstate commerce. The United States Supreme Court once held,

> "[t]he task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a

> finding. * * * Thus, when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational." *Hodel v. Virginia Surface Mining & Reclamation Asso*., 452 U.S. 264, 276–77 (1981).

However, since then the United States Supreme Court has recognized this level of judicial scrutiny is really no limit on Congress' commerce power. *U.S. v. Lopez,* 514 U.S. 549 (1995); see also, *U.S. v. Wilson*, 880 F. Supp. 621, 625 (E.D. Wis., 1995) ("If this [rational basis test] alone was the test there would be no activity which Congress could not regulate under its Commerce power"). The rational basis test of using "pure logic" produces unconstitutional results. *U.S. v. Wilson*, at 626, footnote 8 ("While every reported District Court, and now the Fourth Circuit Court of Appeals, have upheld FACE as a permissible exercise of Congress' power under the Commerce Clause, the extent of review undertaken by these Courts *goes no further than concluding that Congress acted rationally in a purely logical sense*" (emphasis added)); "purely logical sense" meaning, "[the Courts defer to] Congress simply because it has acted rationally in a purely 'logical' sense[, as] there may always be a plausible rationale for Congressional action that meets the requirements of simple logic." *Id.* at 625.

Under such a "pure logic" standard, Congress determines both its own power and limits with virtually no check—the quintessential definition of tyranny according to James Madison who said, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." James Madison, Federalist Paper 47. Congress may intrude upon any matter by its own unilateral will; and people whose rights are consequently violated have no meaningful remedy to challenge Congress' findings of fact and exercise of power. Courts have recognized this unconstitutional dilemma:

> "The quick conclusion (citing *Hodel* at 276-77, see above) is that the foregoing defines an unlimited power, one that is unlimited both in its jurisdictional reach and in Congress' authority to set the limits of that reach. Indeed, because the Commerce power is extensive, and because the Supreme Court has rarely struck down legislation under the rational basis test, the continued expansion of that power has made it difficult for lower courts to perceive any articulable limits. However, the constant refrain in most, if not all, of the cases reviewing each new exercise of the Commerce power is that there are not only limits, but constitutionally required limits dictated by the

federalist structure embodied in the Constitution." *U.S. v. Wilson*, 880 F. Supp. 621, 624 (E.D. Wis., 1995).[1]

The Court should consider, when applying Congress' commerce power, the fundamental structure of the Constitution: a federal union composed of sovereign States with reserved powers expressed in the Tenth Amendment. To ignore this when applying the Constitution denies the people our consented-to form of government.

The Tenth Amendment was added to the Constitution's Bill of Rights for the expressed purpose that Congress not encroach the powers and rights retained by the States. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 571 (1985) ("The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective

[1] "Permitting Congress to proclaim the extent of its own power would violate the principle of judicial review set out in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). Therefore, courts will decide whether a rational basis exists for concluding that a regulated activity substantially affects interstate commerce. 514 U.S. at ----, 115 S.Ct. at 1629 (citing, inter alia, Hodel, 452 U.S. at 276-280, 101 S.Ct. at 2360-2361)." *U.S. v. Wilson*, 73 F.3d 675, 680 (C.A. 7, 1995) (holding that the Access Act "is constitutional as a regulation that substantially affects interstate commerce" and "the district court essentially converted the rational basis test into a less deferential standard", that is, increasing the standard from rational basis to a higher level of scrutiny.) But see, *Hoffman v. Hunt*, 923 F.Supp. 791 (W.D.N.C., 1996).

'counterpoise' to the power of the Federal Government"). This right is in effect fundamental. While arguably strict scrutiny should not be applied relative to an alleged violation of the Tenth Amendment (*U.S. v. Marzzarella*, 595 F.Supp. 2d 596, 604 (W.D. Pa., 2009) ("strict scrutiny is nowhere to be found in the jurisprudence of…the Tenth Amendment")); it is error to lower the level of scrutiny to a rational basis using "pure logic". *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 570 (1985) ("judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution"). United States Supreme Court Justice Benjamin Cardozo recognized the hazards where the Court uses "pure logic" in determining constitutional issues: "The misuse of logic…begins when its methods and its ends are treated as supreme and final." Cardoza, *The Nature of the Judicial Process*, 13.

Where the thing or activity to be regulated is purely internal to the State, the Court errs by deferring to Congress' determination that the thing or activity imposes a substantial effect on interstate commerce. The judicial system is necessary to discover and test the facts (through adversarial process) upon which Congress bases its laws and extends its power. Courts have attempted to more accurately define what a "rational basis" is relative to Congress' commerce power

in light of the Constitution's federal nature. This reexamination is required at this juncture of our constitutional jurisprudence:

> "The 'rational basis' test, therefore, must mean more. In order for Congress to justify its regulation of purely local, non-violent, non-commercial activity, there must be a connection between the activity and interstate commerce that is 'rational' both as a matter of simple logic and within the context of the Constitution and the structural limitations created therein.
>
> "[I]t is clear that Congress cannot interpret and exercise any one of its enumerated powers so expansively that it effectively subsumes other enumerated powers or those powers reserved to the States, or extends to all spheres of human activity. It necessarily follows that if the logic underlying the stated connection to interstate commerce would provide a basis for regulating any human activity, that logic is not rational within the context of the Constitution. Sustaining any legislation based upon such logic results in abdication of the Court's power of judicial review and places in Congress a

power limited only by the inclination and creativity of its members." *U.S. v. Wilson*, at 626 (reversed by *U.S. v. Wilson*, 73 F.3d 675 (7th Cir. 1995)).[2]

Just as free government and society require (based upon the *Social Compact*) the reservation of individual rights, a federal union requires Congress not to usurp the States' rights. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 237 (1897) ("There are limitations on such [legislative] power, which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.'"). If the Court does not raise the level of scrutiny or balance the rational basis test to protect the States' right under the Tenth Amendment, the doctrine will continually erode the federal nature and guarantee in the Constitution. *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235, 1365 (11th Cir. 2011) ("the Supreme Court has explained that the limits the Tenth Amendment imposes on Congress' power come not from the amendment's text, but rather from the principle of federalism, or dual sovereignty, that the Tenth Amendment embodies").

2. Court Has a Duty to Reexamine the Doctrine

[2] The U.S. 9th Circuit Court of Appeals has not yet ruled on the issues raised in *U.S. v. Wilson*.

The District Court reveals the danger of the doctrine's effect because it lays aside the its duty to apply correct methods of interpretation and rules of law, stating: "[w]e are all bound by federal law, like it or not." (Doc. 32, p. 10-11). The District Court seems to forget that the Courts are the "guardians of the Constitution" (Alexander Hamilton, Federalist Paper 78) and must check unconstitutional powers exercised by Congress and the President. This requires reasoned judgment given the circumstances and considerations and an evaluation and reevaluation of rules of law per case. It looks to the future as well as to the past for guidance.

U.S. Const., Article VI, Section 2 states, "[t]his Constitution…shall be the supreme Law of the Land." To apply the supreme law, Article VI, Section 3 states, "[the] judicial Officers…shall be bound by Oath or Affirmation, to support this Constitution". Both the laws and the methods of interpreting the Constitution must comply with proper Constitutional interpretation *and* application. Alexander Hamilton, Federalist Paper 78 ("No legislative act…contrary to the Constitution, can be valid"). The Court's constitutional duty extends beyond *stare decisis*, which is not an "inexorable command" and "certainly it is not such in every constitutional case." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992).

The United States Supreme Court recognizes that in cases of constitutional significance, stare decisis is given less weight. *Id*. The District Court ignores this constitutional view. Courts are more than appliers of rules; they are expounders of "justice, morals, and social welfare". Cardozo, *The Nature of the Judicial Process*, 8. The United States Supreme Court has recognized the Court's duty in this regard and provided guidance:

> "When this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask (1) whether the rule has proven to be intolerable simply in defying practical workability, [] (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, [] (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, [] or (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification". *Parenthood of*

Southeastern Pennsylvania v. Casey, 505 U.S. 833, 954-955 (1992) (numbers added).

The reason for this duty is to prevent incorrect decisions from perpetuating in our Constitutional system and to find the "outer limits" of a prior rule. See, *Id.*, 505 U.S. at 955-956 (emphasis added) ("outlandish decisions") ("The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit.")

3. Originalism Does Not Support Court's Dismissal

Considering an originalist view of the Constitution (a view in light of the Constitution's framers' and/or ratifiers' understanding, intent, and/or meaning[3]), the Constitution did not give Congress power to regulate the States' purely internal policing relative to agriculture and crimes. Alexander Hamilton shared this understanding with the States before the Constitution's ratification and in attempts to rally support for its ratification:

"The administration of *private justice between the citizens of the same State*, the *supervision of agriculture* and of other concerns of a similar nature…are

[3] See, Robert G. Natelson, *The Original Constitution*, (Los Angeles, CA, Tenth Amendment Center, 2010), Chapter 2, "Interpreting the Constitution", for discussion on "original understanding, meaning, and intent".

> proper to be provided for by local legislation, [and] can never be desirable cares of a general jurisdiction." Alexander Hamilton, Federalist Paper 17 (emphasis added).

With this similar understanding, the United States Supreme Court long held after the Constitution's ratification that the States retained the power to regulate their purely internal commercial affairs; and consequently, Congress did not have the power to interfere in such matters retained. In *Gibbons v. Ogden*, the United States Supreme Court reflected this rule of law, stating,

> "[The States] form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government…*[R]egulating the internal commerce of a State* [] are component parts of this mass." *Gibbons v. Ogden*, 22 U.S. 204 (1824) (emphasis added).

The District Court does not implement this rule, however. Instead, it perpetuates a rule that allows Congress not only to supervise purely internal agriculture but also to prohibit and criminalize a particular agricultural use (i.e. marijuana). Had the Court understood Congress' commerce power in originalist terms, it would not have dismissed the Complaint; would have allowed facts to be

discovered relative to the exercise of the commerce power; and would have allowed the case to proceed on its factual and legal merits. The District Court would have recognized that deferring to Congressional findings, using "pure logic", as to what substantial effects is and how far regulation extends undermines our federal constitutional system: "the scope of this [commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). The District Court perpetuates an unconstitutional standard and effect upon our States and violates our federalism principles.

4. Non-Originalism Does Not Support the Court's Dismissal

From a non-originalist view (where the Constitution's application and meaning may change over time, under similar methods as common law development[4]), the Court has a perhaps more expansive duty to ensure Congress

[4] "We reach the land of mystery when [the] constitution…[is] silent, and the judge must look to the common law[.]…[N]o system of living law can be evolved by such a process [of search, comparison, and little more], and no judge of a high

and the President do not abuse power and enforce laws irrationally and unconstitutionally because it requires the Court to consider many moving and changing factors relative to the issues raised. United States Supreme Court Justice Cardozo explained the Court's duty to correct misapplied or malformed rules this way:

> "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered…[I]f the rules derived from a principle do not work well, the principle itself must ultimately be reexamined." Cardozo, *The Nature of the Judicial Process*, 5-6.

In line with Justice Cardozo's description above, United States Supreme Court Justice Clarence Thomas determined that "the 'substantial effects' test should be reexamined" because of its unconstitutional effects, imbalance, and unjust results.

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court, worthy of his office, views the function of his place so narrowly…The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars" Cardozo, *The Nature of the Judicial Process*, 4-5.

U.S. v. Lopez, 514 U.S. 549, 589 (1995) (Thomas concurring) (emphasis added); This recognition is not surprising given "the Supreme Court's Tenth Amendment cases have grappled almost exclusively with the balance of power between the federal government and the states." *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235, 1364 (11th Cir. 2011). This grapple reflects that more than just a simple rule controls a case's outcome. The doctrine should particularly be examined as it relates to the States' legalization of marijuana for their internal general welfare and Congress' (in)ability to intrude upon the States' power in this regard.

5. Conclusion of Issue 1

The Complaint alleges facts that raise sufficient questions and issues relative to (1) the federal Controlled Substances Act relative to the irrational findings (for the lack of scientific evidence and proof in support) and prohibition against marijuana (increasing a huge, known "black market", thus increasing negative interstate commercial effects); (2) the Federal Government's treatment of individuals within the States who are acting in pursuance of State laws enacted for their general welfare and well-being; (3) the erroneous application of the doctrine as it relates to the States' power under the Tenth Amendment to regulate things

(i.e. purely internal agriculture) retained to their jurisdiction; and (4) the need for the Court to reexamine the doctrine.

Given (1) the United States Supreme Court's open instructions of the doctrine's reexamination, (2) the need to more accurately define the outer limits of the doctrine relative to the Federal Government's absolute prohibition of marijuana, (3) the irrational and unjust results of the Federal Government enforcing marijuana prohibition in spite of its commonly-known, accepted, and legalized use throughout the States; and (4) the need for the Court to expound upon the Constitutional rules and applications of justice pertaining thereto, the District Court should not have dismissed the Complaint.

ARGUMENT - ISSUE 2

A. The District Court Erred by Dismissing the Complaint Because the Factual Allegations Are Sufficient to Survive a 12(b)(6) Dismissal

The District Court based its dismissal of the Complaint on an overly simplistic and erroneous approach to Congress' commerce power and Montana's (in)ability to regulate itself regarding marijuana and its purely internal use. The seriousness of the Constitutional issues presented by the Complaint require a more thorough and reasoned approach. The District Court viewed the facts alleged from

a fogged lens: it predetermined the factual sufficiency through its legal conclusion that Congress has the absolute power to enforce federal laws in whatever manner it chooses regardless of any other constitutional considerations or factors. From that seed, the District Court grew a tree to cover all other claims, regardless of their required individual and independent analysis.

The District Court should have allowed for further factual and constitutional analysis (1) of the commerce power and the States' power under the Tenth amendment relative to State-legalized marijuana growth and use; (2) regarding the unconstitutional enactment and/or enforcement of the federal Controlled Substances Act and its increased and negative interstate effect on the States; and (3) "in determining the boundaries between the individual's liberty and the demands of organized society." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, at 834.

"Rule 12(b)(6)'s failure-to-state-a-claim standard [] is designed to streamline litigation by dispensing with needless discovery and factfinding". *Neitzke v. Williams*, 490 U.S. 319 (1989). Discovery is needed where the factual allegations sufficiently give rise to a cause of action and where the Court needs additional facts to test a constitutional rule of law. "A court must deny a motion to dismiss

under Rule 12(b)(6) unless, after accepting as true the well-pleaded facts in the complaint and viewing them in a light most favorable to the plaintiff, it appears beyond a doubt that the plaintiff can prove no set of facts that will entitle it to relief." *Harding v. Kellam*, 155 F. 3d 559, 5 (4th Cir., 1998). The District Court asserts that the Defendants could not have violated the Fourth, Fifth, Ninth, and Tenth amendment, regardless of the allegations that they did.

However, the Plaintiffs-Appellants can "prove [a] set of facts that will entitle it to relief". *Id.* The essence of the Fourth and Fifth Amendment claims demand factual determinations because they are required to determine whether the Defendants' actions against the Plaintiffs were authorized under Congress' commerce power and were "reasonable" or a violation of "due process". *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1177 (10th Cir., 2003) ("Whether a search is [reasonable] is a question of fact to be determined by the totality of the circumstances"); *Hilliard v. Walker's Party Store, Inc.*, 903 F.Supp. 1162, 1176 (E.D. Mich., 1995) ("Whether the police [violated the Fifth Amendment] is a factual issue that must be determined on a case by case basis").

1. The District Court Premised Its Conclusions for Dismissal of All Claims Upon Its Erroneous View of the Commerce Power and Tenth Amendment

In reaching its conclusion to dismiss each claim, the District Court starts with the Tenth Amendment discussion; that supposedly since Montana did not have the power to internally regulate marijuana, then the Defendants had the power to do anything it desired. The District Court rests its dismissal of every claim upon the conclusion that Congress has the power to prohibit marijuana regardless of any other constitutional issues, including the Tenth Amendment. The District Court concludes, using "bootstrap" legal reasoning, where there "is a valid exercise of federal power under the Commerce Clause" there is no reserved State right under the Tenth Amendment. (Doc. 32, page 6).

The Court exclaims this legal reasoning: we determine what the States' reserved powers are (or are not) by determining what powers Congress has. The Court chooses one side of the legal reasoning coin and in so doing rejects the other side, which is: we determine what powers Congress has (where constitutional construction is necessary, e.g. "commerce among the several states") by determining what powers the States retained. By choosing one side over the other,

the Court's bias towards the alleged facts is apparent, preventing the Plaintiffs-Appellants' matter from being heard on the merits.

Looking beyond even what Justice Clarence Thomas declared about the need to reexamine the commerce power rule based upon its unconstitutional effects and destruction of the Tenth Amendment, the District Court uses an improper rule of law relative to determining the rights and powers reserved to the people and the States respectively. Where a Court uses a grant of Federal power subject to construction (i.e. "commerce among the States") to absolutely and unconditionally limit or prohibit the reserved powers of the people and the States respectively, the Court effectively eliminates the purpose of the Tenth Amendment. The Court does this despite that the Tenth Amendment was to ensure the States retained control over their internal affairs and to "bind the authorities" to this line of demarcation between State and Federal. "[T]he Ninth and Tenth amendments to the Constitution were designed to include the reserved rights of the States [and] to bind the authorities." *Scott v. Sanford*, 60 U.S. 393, 511 (1856). The District Court's rationale could as (il)logically concluded that individual rights guaranteed in the Bill of Rights are limited by Congress' power to regulate commerce. However, we know this is not a proper constitutional view: the individual right limits Congress. *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3033, FN 9 (2010) ("the

Constitution limits…the action of Congress"). That the Court may invade the States' rights under the Tenth Amendment is no more valid that Congress may invade an individual right. Indeed, States are moral persons with substantive rights. Vattel, *The Law of Nations*, 83 ("Every nation that governs itself…is a sovereign state. Its rights are naturally the same as those of any other state. Such are the moral persons…subject to the law of nations").

The District Court's reasoning to reduce the Tenth Amendment to non-effectual words without protection from the Court is a violation of the United States Supreme Court's holding that the Bill of Rights be protected by the Courts. *D.C. v. Heller*, 478 F. 3d 370 (2008) ("It is not the role of this Court to pronounce the Second Amendment extinct").

The Bill of Rights includes the Tenth Amendment. The Tenth Amendment is effectively more significant than the other Bill of Rights,[5] as it is the essential and primary Amendment assuring the Federal nature of the Constitution[6] and

[5] "The law of nations is, in point of importance, as much superior to the civil law, as the proceedings of nations and sovereigns are more momentous in their consequences than those of private persons." Emer de Vattel, *The Law of Nations*, (1797, Indianapolis, IN, Liberty Fund, reprinted 2008), 18.

[6] "The powers reserved to the several States will extend to all the objects which…concern the lives, liberties, and properties of the people, and the internal

protecting the sovereignty of the States from Federal intrusion.[7] "[A]ny doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment.***[O]ur federalism requires that Congress treat States in a manner consistent with their status as residuary sovereigns and joint participates in the governance of the Nation." *Alden v. Maine*, 119 S.Ct. 2240, 2247, 2263 (1999) (Justice Kennedy).

More than not harming the Bill of Rights, the Courts must protect the Tenth Amendment. *United States v. Butler*, 297 U.S. 1, 68 (1936) ("Wholly apart from that question [regarding the general welfare clause], another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states…[T]hose [powers] not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states...To forestall any suggestion to the contrary, the Tenth Amendment was adopted"); *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824) ("Congress is not empowered to [regulate] for those purposes which are within the exclusive province of the States"). The Court must ensure the Federal Government does not

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order, improvement, and prosperity of the State." James Madison, Federalist Paper 4.

[7] "The people will be disinclined to the exercise of federal authority in any matter of an internal nature." Alexander Hamilton, Federalist Paper 27.

overstep the States' reserved powers. *Kansas v. Colorado*, 206 U.S. 90-91 (1907) ("[The Tenth Amendment] is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning"). In light of this constitutional view, Justice Thomas' reasoning for reexamining the doctrine was to protect the Tenth Amendment and limit Congress from exercising plenary power against the States' purely internal affairs. Justice Thomas exclaims,

> "Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly prohibited by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the 'substantial effects' test should be reexamined." *U.S. v. Lopez*, 514 U.S. 549, 589 (1995)

Using proper legal reasoning, the District Court could as correctly apply this rule of law: where the States retained a power and right under the Tenth Amendment, it cannot be concluded that Congress has the power to absolutely and unconditionally regulate that thing. Thus, where Alexander Hamilton expressed in Federalist Paper 17 that "the administration of private justice between the citizens

of the same State [and] the supervision of agriculture [would] be provided for by local legislation, [and would] never be…cares of a general jurisdiction", this line of authority between the States and the federal government limits Congress' commerce power to prohibit and criminalize the plant (marijuana) where the State regulates and maintains its internal production, transport, and use. And where Congress' enactment and enforcement of the law in question worsens or increases the "evils" which the law was purportedly to remedy, the States and people respectively are protected from an erroneous rule and application of law and the Courts are able to determine the workability of the rule.

2. The District Court Erroneously Dismissed the Complaint's Claims of Violation of the Fourth, Fifth, and Ninth Amendments and thus the *Bivens* Claim

From the District Court's view that the Tenth Amendment fails to prevent Congress from prohibiting the use of marijuana regardless of State laws, the District Court denounced every other allegation under the Ninth, Fourth, and Fifth Amendments, and thus *Bivens* claim. However, the District Court fails to recognize the independent nature of each of those claims. Particularly, regarding the Fourth and Fifth Amendment claims, a factual determination is required to determine

whether the Defendants violated these guarantees against unreasonable searches and seizures and violations of due process. That the District Court feels Congress' may absolutely prohibit marijuana regardless of State law does not address the factual determinations required to answer these claims.

Given the summary and all-inclusive effect of the District Court's view of the Tenth Amendment, all other claims failed without sufficient reason. The District Court's dismissal of those claims was erroneous.

CONCLUSION

The District Court erred in dismissing the Complaint. The District Court so erred because it (1) failed to apply a proper constitutional rule of law concerning Congress' commerce power to absolutely prohibit marijuana; (2) incorrectly applied the doctrine at the expense of more accurate constitutional application and understanding relative to the Tenth Amendment; (3) viewed the alleged facts in a predetermined view given the Court's misapplication of Congress' commerce power and the States' (in)ability to regulate their purely internal affairs under the Tenth Amendment; and (4) presumed that the Fourth and Fifth Amendment claims could be denied as a matter of law even though the allegations require a factual

determination. Therefore, the District Court's order to dismiss should be reversed and remanded for further proceeding.

___/s/ Timothy Baldwin_____
Timothy Baldwin, amicus attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less.

___/s/ Timothy Baldwin_____
Timothy Baldwin, amici attorney

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae MTCIA, state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

CERTIFICATE OF SERVICE

This is to verify that on this 2nd day of June, 2011, a copy of the foregoing was duly served on the following persons by the following means: CM/ECF and Mail.

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No. 12-35110

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA CAREGIVERS ASSOCIATION, LLC, et. al.,
Plaintiffs/Appellants,

vs.

THE UNITED STATES OF AMERICA, et. al.
Defendant/Appellee.

ORDER ON MOTION FOR LEAVE TO FILE AMICUS BRIEF

The Montana Cannabis Industry Association, Inc. ("MTCIA") filed a Motion for leave to file an Amicus Curiae Brief in Support of Appellants on June 2, 2012, having attached their brief with said motion. Upon review, no objections having been filed thereto and for good cause showing,

IT IS HEREBY ORDERED that MTCIA's Motion for Leave to file is GRANTED. The proposed Amicus Brief submitted in support of its Motion is filed. Within _____ days of this order, MTCIA is ordered to file 7 copies of the brief in paper format, with a green cover, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted. A sample certificate is available on the Court's website at www.ca9.uscourts.gov,

at the Electronic Filing-ECF link. The paper copies shall be printed from the PDF version of the brief created from the word processing application.

SO ORDERED this ____ day of _____, 2012.

FOR THE COURT:

_____

Clerk of the Court

_____

Deputy Clerk
Ninth Cir. R. 27-7/Advisory Note
to Rule 27 and Ninth Circuit 27-10

cc: UNITED STATES DEPARTMENT OF JUSTICE
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