VICTORIA L. FRANCIS
LEIF M. JOHNSON
Assistant U.S. Attorneys
U.S. Attorney's Office
2929 Third Ave. North, Suite 400
Billings, MT 59101
Tel.: (406) 247-4630
Fax: (406) 657-6989
E-Mail: Leif.Johnson@usdoj.gov

JOEL McELVAIN
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, D.C. 20001
Tel.: (202) 514-2988
Fax: (202) 616-8202
E-Mail: Joel.McElvain@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MONTANA CAREGIVERS ASSOCIATION, LLC, *et al.*, Plaintiffs, vs. UNITED STATES OF AMERICA, *et al.*, Defendants.	CV 11-74-M-DWM MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

INTRODUCTION

The defendants – the United States of America; the United States Department of Justice; Eric H. Holder, Jr., the Attorney General of the United States; Michael W. Cotter, United States Attorney for this district; and Wesley K. Smith, DEA Special Agent – respectfully move to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Alternatively, the defendants move to dismiss the complaint in part for insufficient service of process pursuant to Rule 12(b)(5) of those Rules. The plaintiffs – individuals and entities who, by their own admission, are engaged in the production and distribution of a controlled substance in violation of federal law – seek declaratory and injunctive relief, as well as damages, on the theory that the federal law, the Controlled Substances Act, must give way in the face of a supposed conflict with Montana state law. The plaintiffs are mistaken. Under the Supremacy Clause, state law may not override federal law. The Controlled Substances Act prohibits the plaintiffs from producing or distributing marijuana, even if those actions are not also illegal under state law.

The plaintiffs' Tenth Amendment claim that enforcement of the Controlled Substances Act exceeds the federal government's authority

under the Commerce Clause fails because the Supreme Court has clearly held that the Act is a valid exercise of federal power under the Commerce Clause even where state law permits the use or possession of marijuana for medical purposes. *Gonzales v. Raich*, 545 U.S. 1 (2005). The plaintiffs' Ninth Amendment claim must be dismissed because the Ninth Amendment does not independently secure any judicially enforceable constitutional rights, nor as a matter of substantive due process has any right to the use of marijuana for medical purposes ever been recognized. The plaintiffs' Fourth Amendment claim fails for the same reason as their Tenth Amendment claim: the Controlled Substances Act is a valid federal law. Therefore, search warrants issued pursuant to that law are valid and enforceable. Nor were the warrants deficient, as a matter of law, either in their objectivity or specificity. The plaintiffs have no Fifth Amendment claim because they are not entitled to a hearing to challenge a search warrant before its execution; hence, this claim, too, must be dismissed.

The claim for damages against defendants sued in their individual capacities must be dismissed for two reasons. First, the plaintiffs fail to allege any violation of a constitutional right that was clearly established at the time of the events in question. *See Robinson v. York*, 566 F.3d 817,

821 (9th Cir. 2009). Additionally, the plaintiffs have failed to effect proper service of process upon some of the defendants whom they seek to hold liable in their individual capacities within the time prescribed by the Federal Rules of Civil Procedure. Therefore, these individual claims must be dismissed.

BACKGROUND

I. Federal Law Prohibiting the Production and Distribution of Marijuana

The federal drug laws, and the penalties associated with their violation, are contained in the Controlled Substances Act, as amended, codified at 21 U.S.C. § 801 *et seq*. ("CSA"). Pursuant to 21 U.S.C. § 812(c), cannabis (also known as marijuana or marihuana), including any material, compound, mixture, or preparation containing tetrahydrocannabinols, the psychoactive substance found in the cannabis plant (collectively, "cannabis"), is a controlled substance listed on Schedule I of the Act. As a Schedule I controlled substance, Congress has found that cannabis "has a high potential for abuse," it "has no currently accepted medical use in treatment in the United States," and "[t]here is a lack of accepted safety for use of [cannabis] under medical supervision." 21 U.S.C. § 812(b).

21 U.S.C. § 844(a) makes it unlawful to "knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice." As noted above, marijuana is listed on Schedule I, and thus it is not possible to obtain a valid prescription for its possession or use. Additionally, 21 U.S.C. § 841(a) makes it unlawful for any person to "knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Under 21 U.S.C. § 856(a), it is unlawful to "knowingly . . . maintain any place . . . for the purpose of manufacturing, distributing, or using any controlled substance" or to "manage or control any building, room, or enclosure, . . . for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance."

II. Factual Background

Plaintiffs characterize themselves as "State-authorized individuals and businesses" who are "growers and distributors of medical marijuana to qualified patients within the State of Montana." First Am. Compl., ¶ 1 (ECF 5). They allege that, on March 14, 2011, federal agents executed

search warrants on banks and at multiple "medical marijuana business locations" in Montana, and during the execution of those warrants the agents seized live plants, dried marijuana, "money, equipment, and other business and personal property." *Id.*, ¶ 26. They also allege that, on May 20, 2011, federal agents executed another warrant upon another medical marijuana production facility, plaintiff Sleeping Giant Caregivers, Inc., again seizing marijuana 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." *Id.*, ¶ 32.

The warrants that federal agents executed on these dates listed the items to be searched and seized. First Am. Compl., Ex. E (ECF 9). The warrants authorized agents to seize, for example, "[c]ellular phones, which drug traffickers utilize as a means of communication to facilitate drug transactions with their customers and/or suppliers." *Id.*, ¶ 28. The plaintiffs contend that this description is insufficiently particular, and that the agents therefore illegally executed "general warrants." *Id.* They further contend that the search warrants were invalid because the magistrate judge who issued the warrants "failed to acknowledge or

consider" that the plaintiffs purportedly were acting legally under state law. *Id.*, ¶ 29.

The complaint asserts four claims. First, it contends that the defendants have violated the Tenth Amendment by seeking to enforce federal law against persons who are engaged in activity that is purportedly legal under state law. First Am. Compl., ¶¶ 34-40. Second, for the same reason, they contend that the defendants have violated the plaintiffs' right under the Ninth Amendment to "conduct their lives and businesses" and the right of third parties to "use medical marijuana." *Id.*, ¶¶ 41-45. Third, because, in their view, the federal law prohibiting the production and distribution of marijuana is invalid, the plaintiffs contend that federal agents acted unreasonably in seeking to enforce that law, thereby violating the Fourth Amendment. *Id.*, ¶¶ 46-53. Fourth, they contend that the defendants violated the Fifth Amendment by seeking to enforce a federal law that is "the subject of intense national debate" without providing the plaintiffs with notice and an opportunity to be heard before the search warrants were executed. *Id.*, ¶¶ 54-59.

The complaint seeks the return of, or compensation for, the property that federal agents seized in the execution of the search warrants, as well

as an injunction against any prosecution against them under federal law. First Am. Compl., ¶¶ 66, 73. The complaint also seeks damages, and purports to name three defendants – Attorney General Eric Holder, United States Attorney Michael Cotter, and DEA Agent Wesley K. Smith, along with several John Does – in their individual capacities. *Id.*, ¶¶ 60-68. The complaint, however, fails to allege any facts connecting any of these persons to any of the actions that the plaintiffs contend were unconstitutional.

ARGUMENT

I. The Tenth Amendment Does Not Shield the Plaintiffs from the Application of Federal Law

The plaintiffs allege that they produce and distribute marijuana for medical purposes as permitted under state law, and that the "[a]pplication of federal criminal drug laws" against them therefore "exceeds the federal government's constitutional authority under the Commerce Clause." First Am. Compl., ¶ 39.[1] Binding precedent holds to the contrary. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that the Controlled

[1] Defendants take no position as to whether the plaintiffs' conduct, as alleged in the complaint, would be legal under state law. For the reasons discussed in this brief, that question is irrelevant here.

Substances Act "is a valid exercise of federal power" under the Commerce Clause, even as applied to prohibit the possession or use of marijuana "produced and consumed locally" for medical purposes. *Id.* at 9. The Court thus upheld the federal statute even as applied to activity that was legal under state law, reasoning that "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Id.* at 29.

Because the Controlled Substances Act is a valid exercise of Congress's commerce power, the Tenth Amendment claim necessarily fails. "[I]f Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment." *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000). The Ninth Circuit accordingly has held on remand from the Supreme Court's decision in *Raich* that the Controlled Substances Act does not violate the Tenth Amendment, even in the face of a claim that the Act regulates actions relating to medical marijuana that would be legal under state law. *Raich v. Gonzales*, 500 F.3d 850, 867 (9th Cir. 2007).

The plaintiffs also contend that the Controlled Substances Act violates the Tenth Amendment because it "commandeers the State's

legislative process and authority." First Am. Compl., ¶ 39. The Act, however, "'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." *Raich*, 500 F.3d at 867 n.17 (brackets in original; quoting *Reno v. Condon*, 528 U.S. 141, 151 (2000)). It accordingly poses no commandeering issue.

II. The Plaintiffs Do Not Have a Ninth Amendment Right to Manufacture or Distribute Marijuana

Plaintiffs assert that their manufacture and distribution of marijuana is protected by the Ninth Amendment, either because that amendment protects their right to "conduct their lives and businesses" or because it protects the rights of third parties to use medical marijuana. First Am. Compl., ¶ 44. This claim is also foreclosed by the Ninth Circuit's decision on remand in *Raich*.

The Ninth Amendment does not independently secure any judicially-enforceable constitutional rights. *See Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991). The court of appeals accordingly considered the Ninth Amendment together with the Fifth Amendment in addressing whether there is a substantive due process right to use medical marijuana,

and held that no such right exists. *Raich*, 500 F.3d at 861-62 & n.10. The court recognized that substantive due process protects only asserted rights if they are "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 864 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). The asserted right to use marijuana, even by persons who claim they need to use it to alleviate serious medical symptoms, does not meet this exacting standard; accordingly, the court of appeals held, "this issue remains 'in the arena of public debate and legislative action.'" *Id.* at 866 (quoting *Glucksberg*, 521 U.S. at 720). The court of appeals' holding is binding here, and is fatal to plaintiffs' attempt to assert a Ninth Amendment right to produce or to distribute marijuana for purported medical purposes.

III. The Defendants Have Not Violated the Fourth Amendment

The plaintiffs assert that the execution of the search warrants at medical marijuana facilities "were neither reasonable nor based on probable cause," and therefore violated the Fourth Amendment, "apart from the government's insistence that medical marijuana activities legal in the State of Montana and elsewhere are subject to federal criminal law

enforcement and prosecution." First Am. Compl., ¶ 48. But, as discussed above, the Controlled Substances Act is a valid federal law, and the plaintiffs are subject to that law even if their activities are not independently proscribed by state law. The plaintiffs' Fourth Amendment theory thus adds nothing to their Tenth Amendment theory, and it fails for the same reasons.

The plaintiffs also assert that federal agents violated the Fourth Amendment because they executed warrants that "were not complete, not specific, and not based on probable cause in that they failed to state or acknowledge that Plaintiffs were acting legally under Montana law." First Am. Compl., ¶ 49. It is not clear whether the plaintiffs intend also to challenge the particularity of the warrants in addition to their Tenth Amendment theory. Any such challenge, however, would fail. In addressing the particularity requirement for warrants under the Fourth Amendment, the court looks to "'(1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the government was able to describe the items more particularly

in light of the information available to it at the time the warrant was issued.'" *United States v. Vasquez*, 654 F.3d 880, 884 (9th Cir. 2011) (quoting *United States v. Stubbs*, 873 F.2d 210, 211 (9th Cir. 1989)). None of these factors weighs in the plaintiffs' favor. The plaintiffs acknowledge that they produce and distribute marijuana, and dispute probable cause only on the incorrect theory that their conduct is privileged under state law. There is no question that the passages of the warrants as quoted in the complaint set out objective standards describing the items to be seized. First Am. Compl., ¶ 28 & Ex. E. Finally, the plaintiffs do not contend that a more specific description was either possible or needed. The warrants thus were facially valid. *See also United States v. Giberson*, 527 F.3d 882, 886 (9th Cir. 2008).

IV. The Defendants Have Not Violated the Fifth Amendment

The Plaintiffs also assert that the defendants violated the Fifth Amendment by failing to afford them notice and an opportunity to be heard before their property was seized during the execution of the search warrants. But the Fifth Amendment imposes "no requirement of a prior hearing before the seizure of possessions under a search warrant." *Perkins v. City of West Covina*, 113 F.3d 1004, 1010 (9th Cir. 1997), *rev'd on other*

grounds by 525 U.S. 234 (1999), *reaffirmed in relevant part by* 167 F.3d 1286 (9th Cir. 1999). The court of appeals recognized that Supreme Court precedent dictates this result for three reasons. First, search warrants "'serve a highly important governmental need – *e.g.*, the apprehension and conviction of criminals.'" *Perkins*, 113 F.3d at 1010 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 93 n.30 (1972)). Second, "'a search warrant is generally used in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence of fruits of his crime if given any prior notice.'" *Id.* Third, "'the Fourth Amendment guarantees that . . . the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a showing of probable cause.'" *Id.* The plaintiffs thus have no right to a hearing to contest the validity of a search warrant before it is executed.

V. The Claims against the Defendants in their Individual Capacities Should Be Dismissed

The complaint seeks damages from the defendants in their individual capacities.[2] The damages claim fails in the first instance; for the reasons

[2] A *Bivens* claim for damages may not lie against the United States or its agencies. *See FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994). Although the plaintiffs do not identify from which defendants they seek

stated above, the complaint fails to allege any violation of the plaintiffs' constitutional rights, let alone one that would be compensable by damages. Under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a damages claim is available in some circumstances against federal officials who violate a plaintiff's constitutional rights. Even where such a claim is available, however,[3] the plaintiff may recover only if the defendant has violated a right that was "'clearly established in light of the specific context of the case'" at the time of the events in question. *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009) (internal quotation omitted).

The damages claim against Agent Smith fails under this standard. As an initial matter, the complaint fails to allege any facts connecting

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damages, their *Bivens* theory could only possibly be asserted against the individually-named defendants: Attorney General Holder, United States Attorney Cotter, and Agent Smith.

[3] The Supreme Court has allowed *Bivens* claims to proceed for violations of clearly established rights under the Fourth, Fifth, or Eighth Amendments, where the plaintiff lacks other adequate remedies. Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). It is thus doubtful at best that the plaintiffs' Ninth and Tenth Amendment theories could support a *Bivens* claim.

Agent Smith personally to any of the allegedly unconstitutional actions of federal agents. "To survive a motion to dismiss, a complaint must . . . plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Absent the pleading of any facts supporting an inference that Agent Smith has personally violated the constitution, liability cannot be established against him.

But even if the plaintiffs had drawn that connection, the complaint would still fail to plead the violation of any clearly established rights. It has not been clearly established that enforcement of the CSA violates the Fifth, Ninth, or Tenth Amendments; to the contrary, binding case law explicitly rejects those theories. The same is true with respect to the plaintiffs' Fourth Amendment theory. Moreover, the federal agents here were executing a warrant issued by a magistrate judge. Even if that judge had somehow erred in issuing the warrant, as a general matter, "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *United States v. Leon*, 468 U.S. 897, 921 (1984). A claim for damages could lie only if the agents had "no reasonable grounds for

believing that the warrant was properly issued." *Id.* at 922-23 (citation omitted). The complaint fails to plead that the warrants were invalid in any way, let alone that the federal agents could not have reasonably believed those warrants to be valid.

The damages claims against the Attorney General and the United States Attorney are even further afield. As with Agent Smith, the complaint fails to allege any facts that connect these defendants to any alleged constitutional violations. "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 129 S. Ct. at 1948. The absence of any such allegation of individual actions by the Attorney General or the United States Attorney is fatal to the plaintiffs' claims against these defendants.[4]

[4] In addition to the claim for damages, the plaintiffs also seek declaratory or injunctive relief directing, for example, that the plaintiffs may not be prosecuted under federal law for marijuana-related offenses. First Am. Compl.,¶¶ 69-79. Because none of the plaintiffs' theories of constitutional violations has merit, they are entitled to no such relief.

VI. The Claims Against the Attorney General and the United States Attorney in Their Individual Capacities Should Be Dismissed

Federal Rule of Civil Procedure 4(i) provides that, if a federal officer or employee is sued "in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf," the plaintiff must serve the summons and the complaint on the United States, and must also serve the officer or employee individually. Fed. R. Civ. P. 4(i)(3). The defendants do not dispute that the United States has been properly served. The plaintiffs, however, have not shown that they have made individual service on Attorney General Holder or on United States Attorney Cotter. "[W]here money damages are sought through a *Bivens* claim, personal service, and not service at the place of employment, is necessary to obtain jurisdiction over a defendant in his capacity as an individual." *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987).

More than 120 days have passed since the plaintiffs filed their initial complaint in this action. ECF 1. (As in their amended complaint, the original complaint named the Attorney General and the United States Attorney as defendants and sought damages from these defendants. *Id.*,

¶¶ 6, 42, 46.) The plaintiffs cannot show "good cause" for their failure to serve these defendants within that time period, and the complaint should therefore be dismissed with respect to the individual capacity claims against them. Fed. R. Civ. P. 4(m); *see Oyama v. Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001) (discussing "good cause" standard under Rule 4(m)).

CONCLUSION

For the foregoing reasons, the defendants respectfully request that the Court dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In the alternative, the defendants respectfully request that the Court dismiss the complaint in part for insufficient service of process pursuant to Rule 12(b)(5) of those Rules.

Dated: October 28, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General

MICHAEL W. COTTER
United States Attorney

ARTHUR R. GOLDBERG
Assistant Branch Director

/s/ Joel McElvain
Senior Trial Counsel
U.S. Department of Justice
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Tel.: (202) 514-2988
Fax: (202) 616-8202
Joel.McElvain@usdoj.gov

Counsel for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(A), the attached brief is proportionately spaced, has a typeface of 14 points and contains 3,658 words, excluding the caption and certificates of service and compliance.

Dated: October 28, 2011

/s/ Joel McElvain
JOEL McELVAIN
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on October 28, 2011, a copy of the foregoing document was served on the following persons by the following means:

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_____	E-Mail

1. Clerk, U.S. District Court

2. Timothy N. Baldwin
Baldwin Law Offices
P.O. Box 1520
Kalispell, Montana 59903
tim@libertydefenseleague.com
Counsel for Plaintiffs

/s/ Joel McElvain
JOEL McELVAIN
Counsel for Defendants