TIMOTHY BALDWIN
P.O. Box 1520
Kalispell, Montana 59903
406-755-5616

and

CARL JENSEN
410 Central Ave., St. 303
Great Falls, Montana, 59401
406-899-6696

Attorneys for Plaintiffs

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 PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Plaintiffs are Montana businesses and individuals that were growing and supplying marijuana to registered patients under the provisions of Montana's Medical Marijuana law. On March 14, 2011, federal agents raided the facilities of

most of the Plaintiffs and other targeted Montana medical marijuana caregivers, seizing thousands of living marijuana plants and hundreds of pounds of medical marijuana intended for distribution to patients in Montana.

The Department of Justice in conjunction with various federal agencies ("Government") has reinstated its campaign against businesses that grow and sell marijuana, regardless of state laws that authorize such activities. Montana and California are the new "front lines" 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 uses 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 Ninth

and Tenth Amendments to the Constitution, in particular, stand in defense of the rights of the People and the states to autonomy and sovereignty in areas not expressly delegated to the Federal Government. That challenge is most directly presented by those most affected: the Plaintiffs in this case.

The Government moves to dismiss Plaintiffs' claims, citing the 2005 Supreme Court decision in *Raich v. Gonzales,* 545 U.S. 1 (2005), and the Ninth Circuit's ruling on remand, 500 F.3d 850 (9th Cir., 2007), for the conclusion that the issue is decided and closed. To the contrary, while the discussion is advancing on other federalist issues, especially concerning health care insurance and the "individual mandate," at least with respect to medical marijuana it is just beginning.

The allegations in Plaintiffs' Amended Complaint are directly responsive to the actions of an inconsistent Government attempting to reverse the predictable results of its own prior legal and policy decisions, statements, and actions.

I.

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). Moreover, in reviewing the dismissal motion, "the complaint must be construed in the light most favorable to the plaintiff, assuming its factual allegations to be true." *Virginia*, 702 F. Supp. 2d at 608.

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.

II.

PLAINTIFFS' CLAIMS

The coordinated federal "drug" raids and seizures of medical marijuana plants, equipment, facilities and bank accounts in Montana signaled a renewed offensive and a drastically revised strategy in the federal enforcement of the Controlled Substances Act against legitimate, State-licensed medical marijuana caregivers and their businesses. In the context of a serious national debate over

legalization of marijuana and the medical use of marijuana, the government's efforts to foreclose discussion and criminalize a wide-range of state-authorized business and personal activities pursuant to what the Government currently interprets as an absolute federal prohibition of marijuana warrants, at the very least, some level of judicial scrutiny appropriate to the specific state laws that the Government deliberately overrides.

Plaintiffs filed their First Amended Complaint [Doc. 5] on August 4, 2011, charging that the Government violated the Fourth, Fifth, Ninth and Tenth Amendments, effectively criminalizing by definition any use of marijuana, including beneficial medical uses. The Government's seizure and destruction of thousands of living medical marijuana plants and medical marijuana and the deliberate destruction of Plaintiffs' businesses was an unprecedented state-wide action conducted by Defendants and their agents.

The Montana raids, and the seizures, arrests, and prosecutions associated with them, represent a federal government attack on not only the targeted businesses and individuals, but also on the fundamental freedoms and associated interests of Plaintiffs and the People and State of Montana.

Defendants ask the Court to dismiss Plaintiffs' Amended Complaint, not because it fails to meet the Supreme Court's standard for "plausible" pleading, but

because they contend that Plaintiffs' issues and claims are foreclosed by legal precedent, on which Defendants claim they must prevail as a matter of law. Plaintiffs respond that there are important legal and constitutional issues at stake that must be resolved, that their Amended Complaint is reasonable, plausible, and supported by sufficient and specific allegations, that Defendants' reliance on certain case law is not correct, and that Defendants' Motion to Dismiss should be denied.

III.

ARGUMENT AND AUTHORITIES

In 1996, California's Proposition 215 created an immediate and obvious conflict between the State's Compassionate Use Act and the federal government's prohibition of marijuana for any purpose. It should be noted that the classification of marijuana as a Schedule I drug is premised on the existence of substantial danger in the absence of any beneficial medical application. Current medical evidence overwhelmingly contradicts both premises.

As additional states passed medical marijuana legislation the conflict continued to grow and intensify, at the same time the number of people growing and using marijuana for medical purposes drastically increased. There were two federal responses to what was perceived as the uncontrolled expansion of medical

marijuana cultivation and use in California: first against physicians and their licenses; second, raids on dispensaries, growing facilities, and people connected with them.

The DEA threatened to revoke the licenses of physicians who recommended medical use of marijuana for patients. In *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), cert. denied, 124 S. Ct. 387 (2003), the Ninth Circuit held that the government could not infringe on doctors' rights to free speech just because they were recommending marijuana.

The second DEA response to the California CUA was to raid dispensaries, seize their plants, marijuana, growing equipment and supplies, and prevent them from operating, essentially closing them down and putting them out of business. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001). This approach was abruptly abandoned with the publication on October 19, 2009, of the conciliatory "Ogden Memo" and then reversed about sixteen months later. The Montana raids are the most dramatic demonstration of the Government's policy change that began early in 2011.

A. *Raich v. Gonzales* Does Not Support or Justify the Government's Raids on Montana Caregivers

The Government relies on the U.S. Supreme Court's decision in *Raich v. Gonzales, supra,* to support its contention that the Controlled Substances Act is

properly applied to prohibit all uses and activities involving marijuana, thereby justifying the March, 2011, raids and the resulting invasion of individual and business rights and interests.

As the DEA became more emboldened in California after *Raich*, it started raiding individuals as well as collectives, seizing their marijuana and often arresting them. In 2002, DEA agents seized and destroyed all six marijuana plants a California couple was growing for their personal medical use.

The Supreme Court held in *Raich* 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. This resulted in an anti-federalist, Supremacy Clause ruling that created a substantial amount of controversy centering around the possible demise of federalism in the face of uncontrolled expansion of the federal commerce clause powers. See, e.g., Justice O'Connor's vigorous dissent, where she explains that Congress' authority cannot be used "to contravene the principle of state sovereignty embodied in the Tenth Amendment." *Raich*, 545 U.S. at p. 52. Also, e.g., Ashley Dorn, *The Untimely Death of the Commerce Clause: Gonzales v. Raich's Threat to Federalism, the Democratic Process, and Individual Rights and Liberties*, 18 Temp. Pol. & Civ. Rts. L. Rev. 213 (Fall, 2008).

But *Raich* neither directly addressed or decided a Tenth Amendment claim. On remand, however, the Ninth Circuit Court addressed some of the issues in the context of an injunctive request by Raich. *Gonzales v. Raich*, 500 F.3d 850 (9th Cir. 2007). After denying a medical necessity argument supporting the injunctive request, the appellate 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. The Court agreed "that medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law as well."

> For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected.

Raich, 500 F. 3d at 866. 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 abuse and misuse of federal power.

B. The Ogden Memo and Settlement of *Santa Cruz v. Holder* Resulted in Apparent Consensus on Medical Marijuana Businesses

The one federal court case that did address the medical marijuana conflict between State and federal laws resulted from a DEA raid on a Santa Cruz, California cooperative. On September 5, 2002, "a task force including between 20 and 30 armed DEA agents raided the Wo/Men's Alliance for Medical Marijuana (WAMM):

> The DEA agents forcibly entered without knocking or announcing their authority and purpose for entry, seized WAMM patients' medical marijuana, and cut down and removed marijuana plants that WAMM members were collectively cultivating for their own medical use in complete compliance with California law and City and County ordinances.

The collective was supported by the City and County of Santa Cruz, and the resulting lawsuit, *County of Santa Cruz, et al., v. Holder, et al.,* Case No. 03-cv-1802 JF, (DC NDCA) 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 recriminalizing 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 California district court refused to dismiss the 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; Amended Complaint, Doc 5, Exhibit A.

C. After the Ogden Memo the Social and Business Climate Changed

What followed publication of the Ogden memo was the unprecedented but predictable growth of seemingly legitimate medical marijuana businesses, corpo-

rate and individual, in states that had legalized medical marijuana. In Washington, Oregon, Michigan, and some of the other states patients were allowed to use marijuana for medical purposes but the state laws made no provision for legally growing or dispensing marijuana. California, Colorado, and Montana legalized both the use and the production of marijuana and were the states that experienced the greatest growth of both individual patient use and legalized medical marijuana businesses.

Another significant but generally obscured factor in the medical marijuana debate is that the federal prohibition of marijuana has never actually been reconciled with *either* the widespread availability and use of marijuana throughout the country *or* the legislative approval of medical marijuana in Montana and fifteen other jurisdictions. To the extent that medical marijuana programs and their regulation attempt to separate the "legal" use of marijuana under state authorization from the "illegal" or unauthorized use, the broad federal prohibition and definition of both "legal" and "illegal" marijuana as a dangerous drug with no medical applications is counterproductive and likely to result in additional disregard of the law.

The success and survival of state medical marijuana laws in the face of the federal prohibition can be attributed to "the states' underappreciated power to

legalize activity that Congress bans." Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1422 (October, 2009). Professor Mikos has also cautioned that the Ogden Memo approach, a non-enforcement policy, has serious implications, and "federal law could still obstruct state medical marijuana programs." Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, Stanford Law & Policy Review (forthcoming).

The commercial implications of the Government's current prosecutorial focus on State-authorized medical marijuana growers and distributors are also problematic. The discussion about the need to regulate or limit medical marijuana, and of course, the need to prohibit it, commonly ignores the existence of a huge black market in marijuana throughout the United States, effectively immune from prosecution, characterized by easy access to marijuana by people of all ages and social status.

Nor has the role of the so-called gray market, encompassing many of the most visible forms of marijuana business and involving otherwise criminal activities that are apparently authorized by State law, been seriously considered or evaluated. Characteristic of medical marijuana businesses in each of the medical marijuana states, but especially in Montana, is the creation and allowance of such

"gray markets" or zones, where those involved operate without firm legal guidance or precedent and without express regulatory approval or disapproval. Ethan Ranis, *Stopping the Gray Market: Federalism and California's Medical Marijuana Laws*, Oberlin College Honors Paper, April 25, 2011.

Taxation by state and local governments of the proceeds of medical marijuana businesses is one such gray area. Similarly, taxation of medical marijuana businesses by the federal government continues to be uncertain and threatening. The Government has often turned a blind eye on such gray matters, and has done nothing to limit state and local taxation of medical marijuana businesses or clarify the status of medical marijuana businesses with respect to federal taxation. Nonetheless, the Government is now using the prospect of tax prosecution, as with money-laundering prosecution and asset seizures and forfeituress, as potent but illegitimate threats in support of prohibition. See, Carrie F. Keller, *The Implications of I.R.C. Sec. 280E in Denying Expense Deductions to Drug Traffickers*, 47 St. Louis L. J. 157 (Winter, 2003).

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 agreement to abstain from focusing law enforcement efforts on medical marijuana patients and businesses. 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).

There was still another result of the Ogden Memo: as the acceptance of medical marijuana uses grew, the disparity between the Government's insistence on marijuana as a Schedule I controlled substance with no accepted medical use and the perception that the Government's prohibition was unreasonable, irrational, or even corruptly motivated also grew. The medical use of marijuana was becoming commonly accepted.

D. The Government Reverses Its Course Again

The increased acceptance, use, and availability of medical marijuana presented obvious challenges to the federal authority that deems it dangerous and purports to ban it for all purposes. Faced with the choice whether to allow the operation and expansion of the medical marijuana businesses that were doing business under state laws, the Government chose to return with a vengeance to the pre-Ogden Memo approach.

On January 22, 2011, U.S. Attorney Melinda Haag wrote to the Oakland, California authorities warning them that their plans to allow large-scale marijuana growing would violate federal laws. Letters similarly giving "guidance" about the federal prohibition were sent by U.S. Attorneys in a number of states.

But the opening shots in the renewed national controversy over medical marijuana businesses were fired in Montana on March 13, 2011, with the issuance and execution of 26 search and seizure warrants for the plants, inventory, equipment, records, and receipts of Montana medical marijuana businesses and individuals. 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.

E. No Court has Reconciled Federal Law and State Law

While certain narrow issues were considered by the U.S. Supreme Court in *Raich vs. Gonzales*, neither that decision or the Ninth Circuit's decision on remand have reconciled federal law and state law. The discussion continues in a country that is both divided and conflicted about marijuana and its medical uses.

Remarkably, only a handful of federal court cases around the country are addressing medical marijuana issues. In Arizona, the State filed a Complaint for Declaratory Judgment seeking a determination of whether the State medical

marijuana law precludes federal enforcement of marijuana prohibition, or if the federal drug law forecloses the State's program and licensing process. *Brewer v. United States,* Case No. 11-cv-1072-SRB.

The Arizona Complaint lists both opponents and advocates of medical marijuana as defendants, and seeks a declaratory judgment. However, both the United States and the ACLU argue that the case should be dismissed because it is not ripe, as there is no real threat in Arizona to either the program or the people involved. Most recently, the Arizona federal court instructed the State to take a position, supporting or opposing the federal prohibition. In California, advocacy groups have filed several actions, at least one of which states a constitutional claim, but this *Montana Caregivers'* case is apparently the only direct constitutional challenge to the invasive federal medical marijuana policies now pending in the federal courts.

Here, Plaintiffs are businesses and individuals that have been seriously damaged as a result of the Government's actions. Thousands of plants, hundreds of pounds of cured marijuana, and the lights, equipment, and supplies to grow marijuana, as well as the bank accounts of the Plaintiffs' businesses have all been seized by a government intent on destroying those businesses.

Plaintiffs' Amended Complaint states the facts upon which they base their action for injunctive and declaratory relief concerning the federal actions taken in violation of constitutional imperatives limiting federal police and public health authority to the states. Plaintiffs are entitled to relief on the merits of their claims, and no good reason exists to dismiss those claims. The Government's arguments against Plaintiffs' claims are briefly summarized and addressed:

Tenth Amendment

The government of the United States is based on federalist principles. Power is not delegated exclusively to either the federal government or to the state governments. The Tenth Amendment to the United States' Constitution 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."

The Tenth Amendment is the basis of the Plaintiffs' claims because it protects the states and their people from illegitimate federal authority, deeming use of illegitimate authority unconstitutional. Now that it is being invoked in response to purportedly invasive health care legislation, gun control legislation, and medical marijuana legislation, the Tenth Amendment is taking on an unprecedented scope

and weight, such that it should be considered a major factor in the political balance that keeps the country operating "in accordance with law."

The government cites *Gonzales v. Raich*, 545 U.S. 1 (2005) as "(b)inding precedent" holding that "the Controlled Substances Act 'is a valid exercise of federal power' under the Commerce Clause." This is based on "reasoning that '[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." Doc. 18, at p. 8; citing *Gonzales v. Raich*.

Thus, for the federal Defendants the question is easily answered: "Because the Controlled Substances Act is a valid exercise of Congress's commerce power, the Tenth Amendment claim necessarily fails." Id. The United States also rejects any contention that the CSA "commandeers the state's legislative process and authority." Id., at p. 9; citing *Raich*, 500 F.3d at 867 fn. 17.

The facts in this case can easily be distinguished from Raich, however. This case does not turn on the commerce clause and a tiny amount of marijuana. The crux of the issue before this Court is the legitimate exercise by Montana voters and legislature of powers that are expressly reserved to the states. The enabling Montana legislation acknowledges the medical benefits of marijuana and limits its protection to in-state use for medical purposes. The Court can determine that *Raich* provides no binding precedent for the issues presented here.

Ninth Amendment

The federal defendants contend that Plaintiffs' Ninth Amendment claims are "also foreclosed by the Ninth Circuit's decision on remand in Raich." Deft's Memo at p. 9. The government cites a case, *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991), in which the appellate court:

> 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. However, "what *Raich* did not say is whether the use of marijuana by a seriously ill person, pursuant to a right recognized by state law, is an unenumerated right."Andrew King, *What the Supreme Court Isn't Saying About Federalism, the Ninth Amendment, and Medical Marijuana*, 59 Ark. L. Rev. 755, 778, 779 (2006). Also, Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 Iowa L. Rev. 801 (2008).

Fourth Amendment

Plaintiffs contend in their First Amended Complaint that the government failed to act reasonably or with probable cause when it secured and executed warrants on businesses that were legally producing and selling medical marijuana in compliance with Montana State laws and local laws permitting the production and sale of medical marijuana by licensed caregivers. Again, Defendants rely on their claim that "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."

Defendants contend that Plaintiffs' "Fourth Amendment theory thus adds nothing to their Tenth Amendment theory, and it fails for the same reasons." Deft's Memo at p. 11. The government also defends the warrants they used to seize Plaintiffs businesses and money as "facially valid."

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The constitutional concern is with the "general warrant," authoring the kind of intrusive activities conducted by the Government in Montana. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The warrants in this case sought and seized property common to any business, such as telephones and bank accounts, as well as property allowed by the State Medical Marijuana law, such as plants and growing equipment and supplies. The Government's Fourth Amendment defenses are based on its own self-serving interpretation of facts and law that are challenged by Plaintiffs.

Fifth Amendment

Defendants claim they have not violated the Fifth Amendment because there is "no requirement of a prior hearing before the seizure of possessions under a

search warrant." Deft's. Memo at p. 12; citing *Perkins v. City of West Covina*, 113 F.3d 1004, 1010 (9th cir. 1997). The government claims there are three reasons for dispensing with prior notice and hearing, but none of them appear applicable in this case.

More broadly, the Fifth Amendment protects against the taking of property without due process. As with the other constitutional claims in Plaintiffs' First Amended Complaint, these are not susceptible to dismissal as a matter of law, as there is ample room for interpretation and application of laws and principles that preclude summary dismissal and provide for trial on disputed facts and issues.

V.

Individual Capacity and Service of Process

The Government contends that Plaintiffs' Amended Complaint "fails to allege any violation of the plaintiffs' constitutional rights, let alone one that would be compensable by damages." Deft's. Memo at p. 14. Additionally, plaintiffs may recover only if the defendants have violated a clearly established right.

Here the Defendants suggest that the complaint must plead sufficient facts to allow a "reasonable inference that the defendant is liable for the misconduct alleged." Deft's Memo at p. 15; citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). The Government contends that it has not been "clearly established" that

its enforcement of the CSA violates the Fourth, Fifth, Ninth or Tenth Amendments, or that the warrants were invalid, "let alone that the federal agents could not have reasonably believed those warrants to be valid." Deft's Memo at p. 16; citing *United States v. Leon*, 468 U.S. 897, 921 (1984).

The claims against the United States Attorney General and the Montana U.S. Attorney "are even further afield," according to the Government. Deft's Memo, at p. 16. Defendants contend that Plaintiffs failed to plead that each defendant "through the official's own individual actions, has violated the Constitution." Id., citing *Iqbal*, 129 S. Ct. At 1948.

Finally, the United States defendants "do not dispute that the United States has been properly served." They claim, however, that plaintiffs "have not made individual service on Attorney General Holder or on United States Attorney Cotter." Defendants claim that personal service, at their homes, is required to join those defendants individually. Plaintiffs do not agree that the case law cited by Defendants is legal authority for the Government's contention that individual service is required at the parties' homes.

VI.

Conclusion

The Government asks the Court to rule that it must prevail on Plaintiffs constitutional claims, that Plaintiffs cannot state a *Bivens* claim, and that Plaintiffs may not be granted declaratory or injunctive relief, thereby dismissing Plaintiffs' case. The federal government's legal position is necessarily based on its insistence that marijuana, whether or not intended for medical use and whether or not its use is immunized under state law, is a dangerous drug with no acceptable medical use. That is still the basis of the government's prohibition and the enforcement and eradication effort against Plaintiffs and other medical marijuana caregivers in Montana.

The Government ignores the national debate, stubbornly insisting on asserting federal power even in the face of overwhelming evidence of the acceptance and approval of medical marijuana by a majority of the people in many of the states that have considered it. Plaintiffs state valid claims for relief and sufficient facts support Plaintiffs' plausible Complaint. The Government's Motion to Dismiss should be denied.

Respectfully submitted,

/s/ Carl Jensen

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Carl Jensen
Attorney for Plaintiffs
410 Central Ave., St. 303
Great Falls, Montana, 59401
406-899-6696

and

/s/ Timothy Baldwin

_____

Timothy Baldwin
Attorney for Plaintiffs
P.O. Box 1520
Kalispell, Montana, 59903
406-755-5616

I hereby certify that the foregoing response brief was filed electronically on December 28, 2011, and that the Court's CM/ECF system will cause copies to be sent electronically to opposing counsel.

/s/ Carl Jensen

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Carl Jensen