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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 REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

INTRODUCTION

The plaintiffs in this action are individuals and entities who are engaged in the production and distribution of a controlled substance in violation of a federal law, the Controlled Substances Act ("CSA"). They have brought this suit on the theory that a supposedly contrary state law shields them from the enforcement of federal law. The plaintiffs are mistaken. The Supremacy Clause precludes state law from overriding federal law. The CSA thus prohibits the plaintiffs from producing or distributing marijuana, even if those actions are not also illegal under state law.

Given the absence of any legal authority for their theory, the plaintiffs devote the lion's share of their opposition brief to an extended policy argument against the application of the federal drug laws. *See* Pls.' Response to Defs.' Mot. to Dismiss the Complaint at 3-18 (ECF 27). Their argument is directed to the wrong forum. The plaintiffs are entitled, of course, to seek to change the federal law governing the use and distribution of marijuana. What they cannot do, however, is refuse to comply with the federal law as it exists now. Nor can they ask the Court to adopt their policy views in total disregard of the policy set by Congress

in the CSA.

This Court instead is limited to a review of the plaintiffs' legal claims, none of which has merit. The defendants have shown, and the plaintiffs have failed to meaningfully dispute, that the Tenth Amendment does not excuse the plaintiffs from their obligation to follow federal law; that the plaintiffs have no Ninth Amendment right to use or distribute marijuana; that there is no ground to believe that federal agents' execution of search warrants at the plaintiffs' property violated the Fourth or Fifth Amendments; and that, at all events, no claim for damages could lie against the individual defendants. The plaintiffs' complaint therefore should be dismissed.[1]

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[1] The plaintiffs' action is one of several that have been filed recently alleging that federal enforcement of the Controlled Substances Act violates the Ninth or Tenth Amendments. None of these actions has been successful. *See Alternative Community Health Care Co-op. v. Holder*, 2011 WL 6216964, at *1-*3 (S.D. Cal. Dec. 13, 2011) (denying preliminary injunction); *id.*, 2011 WL 5827200, at *3-*5 (S.D. Cal. Nov. 18, 2011) (denying temporary restraining order); *Marin Alliance for Med. Marijuana v. Holder*, — F. Supp. 2d —, 2011 WL 5914031, at *10-*12 (N.D. Cal. Nov. 28, 2011) (denying temporary restraining order). In addition, the plaintiffs have cited a complaint filed by the State of Arizona seeking a declaration whether a state law is preempted by the CSA. The district court has dismissed that complaint without prejudice on ripeness grounds. *State of Arizona v. United States*, No. 2:11-cv-01072-SRB, Order at 10 (D. Ariz. filed Jan. 4, 2012) (doc. no. 71).

ARGUMENT

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

The plaintiffs contend that they are permitted under state law to produce and distribute marijuana for medical purposes, and that accordingly it would violate the Tenth Amendment for federal authorities to enforce federal law against them. But the Supreme Court already has expressly held to the contrary, recognizing that the Controlled 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. *Gonzales v. Raich*, 545 U.S. 1, 9 (2005). And because the Controlled Substances Act is valid under the Commerce Clause, the plaintiffs have no Tenth Amendment claim: "[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); *see also Raich v. Gonzales*, 500 F.3d 850, 867 (9th Cir. 2007) (*Raich II*).

The plaintiffs respond by criticizing the Supreme Court's decision in *Raich* as "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." (ECF 27 at 8.) The plaintiffs' disagreement with the holding of *Raich*, however, in no way limits its effect as binding precedent here.

The plaintiffs also attempt to distinguish *Raich* on the ground that "[t]his case does not turn on the [C]ommerce [C]lause and a tiny amount of marijuana," but instead "[t]he 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." (ECF 27 at 19.) But this does not distinguish *Raich* at all. That case also involved a claim that state law permitted the plaintiffs to cultivate and use marijuana, and the Supreme Court considered whether Congress could use its commerce power "to prohibit the local cultivation and use of marijuana in compliance with California law." 545 U.S. at 5. The Court upheld the federal prohibition against cultivation and use of marijuana, and held that the extent of Congress's Commerce Clause power did not depend on whether the regulated conduct was also illegal under state law: "[L]imiting the activity to marijuana possession and cultivation 'in accordance with state law'

cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Id.* at 22. The Supreme Court thus has disposed of precisely the same claim as the one that the plaintiffs seek to advance here.

In an apparent attempt to bolster their Tenth Amendment argument, the plaintiffs refer to a purported "agreement" by the federal government not to prosecute growers of marijuana. (ECF 27 at 11.) No such "agreement" exists. In October 2009, U.S. Deputy Attorney General David Ogden sent a memorandum to certain U.S. Attorney's Offices, which noted that, in light of limited federal prosecutorial resources, "[a]s a general matter, pursuit of these priorities should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." *See* Amended Complaint, Ex. A (ECF 6-0 at 3-4.) The memorandum emphasized, however that marijuana remains an illegal drug, and that the "prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority." (*Id.* at 3.) The

memorandum reiterated that "clear and unambiguous compliance with state law" would not "create a legal defense to a violation of the Controlled Substances Act," and that it was "intended solely as a guide to the exercise of investigative and prosecutorial discretion," and would not preclude investigation or prosecution where it serves important federal interests. (*Id.* at 4-5.)

A Tenth Amendment challenge to federal enforcement of the CoSA was pending in district court in California at the time. *County of Santa Cruz v. Holder*, No. 5:03-cv-01802-JF (N.D. Cal.). After the Ogden memo was issued, the plaintiffs in that case elected not to proceed with their suit. The parties filed a joint stipulation of dismissal, stating that "[a]s a result of the [Department of Justice's] issuance of [the Ogden memo], plaintiffs agree to dismiss this case without prejudice." (ECF 6-0 at 1-2.) The *Santa Cruz* plaintiffs reserved the right to seek to re-open their suit if the Department of Justice "ceased to follow" the Ogden memo. (*Id.* at 2.) (The *Santa Cruz* plaintiffs have not sought to do so, and none of them are plaintiffs in this case.) As should be apparent from this discussion, neither the Ogden memo nor the stipulation of dismissal in *Santa Cruz* lends any support to the plaintiffs' Tenth Amendment theory here. The former

simply provides internal guidance on the allocation of prosecutorial resources, and the latter governs only the conditions on which plaintiffs in other litigation could seek to re-open that litigation. *See Marin Alliance for Med. Marijuana v. Holder*, — F. Supp. 2d —, 2011 WL 5914031, at *8-*10 (N.D. Cal. Nov. 28, 2011) (rejecting similar argument).

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

The plaintiffs also have asserted a claim that they have a right protected by the Ninth Amendment to manufacture and distribute marijuana. As the defendants have shown, the Ninth Circuit disposed of this claim in its decision on remand from the Supreme Court. *See Raich II*, 500 F.3d at 861-66. The court of appeals determined that the Ninth Amendment or substantive due process protects an asserted right only if it is "'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 court of appeals held that the asserted right to use marijuana did not meet this narrow standard. *Id.* at 866.

The plaintiffs respond only by quoting a law review article, which asserted that "'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.'" (ECF 27, at 20, quoting Andrew King, *What the Supreme Court Isn't Saying About Federalism, the Ninth Amendment, and Medical Marijuana*, 59 Ark. L. Rev. 755, 778-79 (2006)). The plaintiffs are correct to note that the Supreme Court's 2005 decision in *Raich* did not decide a Ninth Amendment claim; the Court decided the only issue that was before it, the Commerce Clause issue, and remanded to the court of appeals for further consideration of other theories. *Raich*, 545 U.S. at 33. But the Ninth Circuit *has* decided the Ninth Amendment claim, and has rejected it, in its 2007 decision on remand (which postdates the law review article that the plaintiffs cite). *Raich II*, 500 F.3d at 861-66. That decision is binding here.

III. The Defendants Have Not Violated the Fourth Amendment

The plaintiffs re-assert their Fourth Amendment challenge to the execution of search warrants at their facilities.[2] They contend that the

[2] Civil forfeiture actions are pending in this district regarding property that was the subject of the search warrants referenced in the

search warrants were prohibited "general warrants" because the warrants authorized the seizure of property that the plaintiffs were permitted to hold under state law, such as marijuana plants and growing equipment. (ECF 27 at 21.) But, as the defendants have shown, federal agents had probable cause to believe that the plaintiffs were engaged in conduct that violated federal law, and that the material cited in the affidavit constituted evidence of those violations. The plaintiffs do not dispute this; they contend only that the federal law is invalid. It is not, for the reasons discussed above. Federal agents accordingly were not powerless to investigate potential violations of the Controlled Substances Act.

IV. The Defendants Have Not Violated the Fifth Amendment

The Plaintiffs have asserted a claim 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*

Amended Complaint. *See United States v. $29,871.72 in U.S. Currency, et al.*, No. 6:11-cv-00046-DWM (D. Mont. filed Sept. 2, 2011); *United States v. $78,049.73 in U.S. Currency*, No. 9:11-cv-00110-DWM (D. Mont. filed Aug. 12, 2011).

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). In response, the plaintiffs ask only that this Court overrule the holding of *Perkins* because that case listed "three reasons for dispensing with prior notice and hearing, but none of them appear applicable in this case." (ECF at 22.)

Again, this Court may not overrule binding Ninth Circuit precedent. But the plaintiffs' argument would be difficult to understand even if this Court were writing on a blank slate. The "three reasons" cited by the court of appeals for its holding in *Perkins* were, first, search warrants serve the important purpose of "the apprehension and conviction of criminals"; second, if prior notice is given, "[t]he danger is all too obvious that a criminal will destroy or hide evidence of fruits of his crime"; and third, the Fourth Amendment guarantees that "no warrant will be issued without a showing of probable cause." *Perkins*, 113 F.3d at 1010 (internal quotation omitted). These points apply categorically to all search warrants; *Perkins* did not invite a case-by-case inquiry in which prior notice is required for some but not all search warrants. But in any event, each of these considerations applies here, as federal agents had probable cause to

believe that the subjects of the search warrants were violating the Controlled Substances Act. The plaintiffs' disagreement with Congress's rationale for prohibiting the manufacture or distribution of marijuana does not change this result.

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

The plaintiffs have sought damages from the defendants in their individual capacities. As the defendants have shown, the damages claim fails, not only because the plaintiff have failed to allege any violation of their constitutional rights, but for two additional reasons. First, a damages claim against individual officers (if it would be available at all, *see* Defs.' Mem. in Supp. of Mot. to Dismiss at 14 n.3 (ECF 17-1)) could lie only if the defendants have 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). Second, the plaintiffs have failed to effect proper service upon two of the individual defendants – Attorney General Eric Holder and United States Attorney Michael Cotter – within the 120 days that the Federal Rules afforded them to do so.

The plaintiffs do not respond at all to the first point, and they respond only inadequately to the second. They state only that they "do not agree" that the case law requires individual service upon the defendants in a *Bivens* action. (ECF 27 at 23.) But, "where 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). The plaintiffs have failed to effect service upon Mr. Holder and Mr. Cotter in their individual capacities, and so the claims against them should be dismissed under Fed. R. Civ. P. 12(b)(5). This dispute is beside the point, however, because the plaintiffs have not presented any argument at all that any of the individual defendants have violated any of their clearly-established constitutional rights, and so the individual-capacity claims against all of the individual defendants fail to state a claim under Fed. R. Civ. P. 12(b)(6).

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: January 11, 2012

Respectfully submitted,

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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 2,583 words, excluding the caption and certificates of service and compliance.

Dated: January 11, 2012

/s/ Joel McElvain
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CERTIFICATE OF SERVICE

I hereby certify that, on January 11, 2012, a copy of the foregoing document was served on the following persons by the following means:

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