

The **Congressional Judiciary Committee** has provided medical cannabis patients support groups with this and other documents it has gathered in preparation for its **Oversight Hearings** into the Federal Drug Enforcement Agency's paramilitary raids against California's medical cannabis facilities and the DEA's systematic pattern of interference and intimidation designed to undermine California Medical Cannabis laws, in clear violation of the 10th Amendment of the US Constitution.

Oversight Hearings are expected to commence early-2009



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October 2, 2006

Ms. Karen Tandy
Administrator
Drug Enforcement Administration
2401 Jefferson Davis Highway
Arlington, VA 22301

Dear Ms. Tandy:

During the September meeting of the Board of Directors of the California Police Chiefs Association we had a presentation by Chief Scott Kirkland of the El Cerrito Police Department. This presentation consisted of the secondary impacts of the commercial sales of medical marijuana here in California. The complete text of the presentation can be found on the California Police Chiefs Association website at www.californiapolicechiefs.org the specific page is http://www.californiapolicechiefs.org/nav_files/research/ordinances.html, then click on Secondary Effects research under El Cerrito. This is an extensive document which is nearly 100 pages in length.

This document clearly points out the dangers and frustrations that law enforcement has experienced in California with trying to enforce marijuana laws. Some situations have reached the point where state judicial officers (local judges) are ordering our members to return marijuana which has been lawfully seized.

As you are aware this has become a political issue in California, and even though local police chiefs want to enforce the law, some cities have determined that California law is what they want to follow. As an aside there is nothing in current California statutes or Prop. 215 which allows for the commercial sale of marijuana but in an effort to appease constituents many City Councils and Boards of Supervisors have moved forward with allowing commercial sales.

What the California Police Chiefs Association is requesting is that DEA become more actively involved in working with local law enforcement to close these distribution centers, seize their profits and all marijuana which might be located and to take these cases into the federal judicial system.

We understand this is an issue of priorities with DEA, but it is the feeling of the California Police Chiefs Association, and our members, that a concentrated effort sustained over a period of time would send a strong message to local and county government that "medical marijuana" is not allowed and that those who profit from the sales and distribution of marijuana under the guise of "medicine" will face the consequences.

Karen Tandy
September 20, 2006
Page Two

We would request that you direct a member of your staff to review the material and research of Chief Kirkland and come to your own conclusions as to how prevalent and destructive the problem has become for California law enforcement.

We enjoy a collaborative, effective partnership with the DEA staff assigned here in California. This letter is in no way inferring that they are not continuing in those efforts. We have worked, and will continue to work, with all of our federal partners including the DEA. If you have future questions or need additional information, please don't hesitate to contact me at (925) 371-4710.

Sincerely,

A handwritten signature in cursive script that reads "Steve Krull".

Steve Krull
President

CALIFORNIA POLICE CHIEFS ASKED DEA TO CLOSE MEDICAL MARIJUANA CENTERS IN DISREGARD OF STATE LAW

California NORML Release - Dec 12, 2008

The California Police Chief Association urged the DEA to close medical marijuana distribution centers, seize their profits and prosecute them in federal court, according to a letter to DEA administrator Karen Tandy. The letter, dated Oct 2, 2006, appears in testimony to the House Judiciary Committee.

In the letter, CPCA President Steve Krull specifically called on the DEA to "send a message to local and county governments that medical marijuana is not allowed," in disregard of Prop 215, state law SB 420, and local ordinances that authorize licensed dispensaries and patient collectives.

"This smoking gun proves that the CPCA has sought to undermine state law rather than enforce it," says California NORML coordinator Dale Gieringer, a co-sponsor of Prop. 215, "The police chiefs have blatantly betrayed their public duty under the state constitution and the recent Kha decision." In the Kha decision, a state appellate court ruled that "it is not the job of the local police to enforce the federal drug laws." The decision stands as binding law, having been refused appeal by both the California and US Supreme Court.

The DEA has reported 130 enforcement actions and 365 arrests from 2004 to July, 2008. Targets have included dispensaries that were specifically authorized by local ordinances in Morro Bay, Kern County, Alameda County, Santa Barbara, and elsewhere. Local sheriffs and police have conspired with the DEA to circumvent local officials and raid licensed facilities.

"The CPCA has been acting like a law unto itself," says Gieringer, "Instead of enforcing local law, they are seeking to undermine it."

In the letter to DEA, CPCA President Steve Krell wrote:

"What the California Police Chiefs Association is requesting is that DEA become more actively involved in working with local law enforcement to close these distribution centers, seize their profits and all marijuana which might be located and to take these cases into the federal judicial system.

"We understand this is an issue of priorities with DEA, but it is the feeling of the California Police Chiefs Association, and our members, that a concentrated effort sustained over a period of time would send a strong message to local and county government that 'medical marijuana' is not allowed and that those who profit from the sales and distribution of marijuana under the guise of 'medicine' will face the consequences."

U.S. Supreme Court: State Medical Marijuana Laws Not Preempted by Federal Law

Washington, DC -- The U.S. Supreme Court refused to review a landmark decision today in which California state courts found that its medical marijuana law was not preempted by federal law. The state appellate court decision from November 28, 2007, ruled that "it is not the job of the local police to enforce the federal drug laws." The case, involving Felix Kha, a medical marijuana patient from Garden Grove, was the result of a wrongful seizure of medical marijuana by local police in June 2005. Medical marijuana advocates hailed today's decision as a huge victory in clarifying law enforcement's obligation to uphold state law. Advocates assert that better adherence to state medical marijuana laws by local police will result in fewer needless arrests and seizures. In turn, this will allow for better implementation of medical marijuana laws not only in California, but in all states that have adopted such laws.

"It's now settled that state law enforcement officers cannot arrest medical marijuana patients or seize their medicine simply because they prefer the contrary federal law," said Joe Elford, Chief Counsel with Americans for Safe Access (ASA), the medical marijuana advocacy organization that represented the defendant Felix Kha in a case that the City of Garden Grove appealed to the U.S. Supreme Court. "Perhaps, in the future local government will think twice about expending significant time and resources to defy a law that is overwhelmingly supported by the people of our state."

California medical marijuana patient Felix Kha was pulled over by the Garden Grove Police Department and cited for possession of marijuana, despite Kha showing the officers proper documentation. The charge against Kha was subsequently dismissed, with the Superior Court of Orange County issuing an order to return Kha's wrongfully seized 8 grams of medical marijuana. The police, backed by the City of Garden Grove, refused to return Kha's medicine and the city appealed. Before the 41-page decision was issued a year ago by California's Fourth District Court of Appeal, the California Attorney General filed a "friend of the court" brief on behalf of Kha's right to possess his medicine. The California Supreme Court then denied review in March.

"The source of local law enforcement's resistance to upholding state law is an outdated, harmful federal policy with regard to medical marijuana," said ASA spokesperson Kris Hermes. "This should send a message to the federal government that it's time to establish a compassionate policy more consistent with the 13 states that have adopted medical marijuana laws."

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Federal Court Rules U.S. Government May Not Deliberately Subvert California's Medical Marijuana Laws (8/20/2008)

FOR IMMEDIATE RELEASE
CONTACT: media@aclu.org

SAN JOSE, CA - In a first-of-its-kind ruling, a federal court today held that the U.S. Constitution bars deliberate subversion by the federal government of state medical marijuana laws.

"Utilizing selective arrests and prosecutions, the federal government has sought to sabotage California's reasoned approach to medical marijuana use," said Graham Boyd, Director of the ACLU Drug Law Reform Project. "For the first time, a court has recognized that a calculated plan by the federal government to undercut state medical marijuana laws is patently unconstitutional. Today's decision forecasts an end to any organized federal effort to sabotage state medical marijuana laws."

While previous high-profile cases affirmed the federal government's power to enforce federal drug laws against individual medical marijuana patients and providers on a case-by-case basis, today's ruling clearly recognizes that a calculated pattern of federal enforcement can render state medical marijuana laws effectively inoperable, which would violate the Tenth Amendment of the U.S. Constitution.

"It is obvious to anyone paying attention that federal officials have gone to great lengths to sabotage state efforts to allow for appropriate medical marijuana use," said Boyd. "The court made clear that this deliberate interference - once proved - would be unequivocally unconstitutional."

The case, *County of Santa Cruz v. Mukasey*, originated in 2003 when Bingham McCutchen LLP and the Drug Policy Alliance, along with private attorneys Gerald F. Uelmen and Benjamin Rice, sued the federal government for raiding a Santa Cruz-area medical marijuana cooperative, the Wo/Men's Alliance for Medical Marijuana.

The ACLU and others argued, and the court agreed, that the U.S. Constitution permits states to determine for themselves what is legal and what is illegal under state law, and that the federal government may not deliberately undermine this process.

"The federal government has purposely set out to systematically subvert California's medical marijuana program," said Daniel Abrahamson, director of legal affairs for the Drug Policy Alliance. "Let us hope that this ruling leads to the merciful end of the federal government's cruel war on sick and dying medical marijuana patients."

In today's ruling, which rejected the federal government's motion to dismiss the case, Judge Jeremy Fogel of the U.S. District Court for the Northern District of California, San Jose Division, relied on U.S. Court of Appeals for the Ninth Circuit Chief Judge Alex Kozinski's opinion in *Conant v. Walters*, which stated, in part, "Applied to our situation, this means that, much as the federal government may prefer that California keep medical marijuana illegal, it cannot

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force the state to do so."

In addition to U.S. Attorney General Michael Mukasey, the lawsuit names as defendants U.S. Drug Enforcement Administration (DEA) agents involved in the raid of WAMM, and administrators of the DEA and Office of National Drug Control Policy.

The court's ruling is available online at:

www.aclu.org/drugpolicy/medmarijuana/364941gl20080820.html

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**E-Filed 8/19/2008 **

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6 NOT FOR CITATION
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9 SAN JOSE DIVISION
10

11 COUNTY OF SANTA CRUZ, et al.,
12 Plaintiffs,
13 v.
14 ALBERTO GONZALES, Attorney General of the
15 United States, et al.,
16 Defendants.

Case Number C 03-01802 JF
ORDER¹ GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS

17
18 Plaintiffs allege that the federal government has a plan to force states to repeal laws
19 permitting medical use of marijuana.² The operative pleading in this action, Plaintiffs' Second
20 Amended Complaint ("SAC") asserts claims for: (1) violation of fundamental rights secured by
21 the Fifth and Ninth Amendments;³ (2) deprivation of the fundamental right to control the
22 circumstances of one's own death; (3) violation of the Tenth Amendment; (4) immunity of local
23

24 ¹ This disposition is not designated for publication and may not be cited.

25 ² Twelve states currently have such laws: Alaska, California, Colorado, Hawaii, Maine,
26 Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington.

27 ³ Plaintiffs allege that the Government has violated their fundamental rights to preserve
28 life, ameliorate pain, maintain bodily integrity, consult with physicians and act in accordance
with the physicians' recommendations, and make personal decisions about their health.

1 officials pursuant to 21 U.S.C. § 885(d); (5) various other violations of the Fourth, Fifth and
 2 Ninth Amendments; and (6) relief pursuant to the medical necessity doctrine. Defendants move
 3 to dismiss the third and fifth claims pursuant to F.R. Civ. Pro. 12(b)(6). For the reasons set forth
 4 below, the motion will be granted in part and denied in part.

5 I. BACKGROUND⁴

6 In their First Amended Complaint (“FAC”), Plaintiffs asserted a Tenth Amendment claim
 7 based on the following allegations:

8 The federal government has pursued a policy of threatening and utilizing arrests,
 9 forfeitures, criminal prosecutions and other punitive means, all with the purpose
 10 of rendering California’s medical marijuana laws impossible to implement and
 11 with the intent of coercing California and its political subdivisions to enact
 12 legislation recriminalizing medical marijuana. This consistent and long-standing
 13 practice and policy of the federal government exceeds legitimate forms of
 14 persuasion and effectively commandeers the law-making function of California
 and its political subdivisions. As a part of that deliberate plan to force California
 to make medical marijuana illegal, the federal government selectively uses the
 enforcement and threat of enforcement of the Controlled Substances Act against
 the State and other entities as a mechanism to coerce the State into regulating
 through criminalization the behavior of private parties – namely seriously ill
 patients in need of medical marijuana – that the State wishes not to criminalize.

15 FAC ¶ 78. In their opposition to Defendants’ motion to dismiss the FAC, Plaintiffs alleged that
 16 the federal government has “selectively targeted its enforcement efforts to undermine the state
 17 by incapacitating the mechanism the state has chosen for separating what is legal from what is
 18 illegal under state law.” Plaintiffs’ Supp. Brief at 5. Plaintiffs argued that “actions aimed at
 19 preventing the State from distinguishing medical and non-medical marijuana, cross the line
 20 distinguishing encouragement from coercion and effectively force the state to re-criminalize
 21 medical marijuana in violation of the Tenth Amendment.” *Id.* The Court concluded that these
 22 allegations were insufficient to state a Tenth Amendment claim. In granting leave to amend, it
 23 noted that “[Plaintiffs] must explain factually how Defendants’ actions ‘*require* [them] to enact
 24 laws or regulations” or “*require* state officials to assist in the enforcement of federal statutes
 25 regulating private individuals.” Order dated August 30, 2007 at 11 (quoting *Raich v. Gonzales*,

26
 27
 28 ⁴ The factual and legal background of the instant case is set forth in the Order dated
 August 30, 2007 and will not be repeated here.

1 500 F.3d 850, 867 n.17 (9th Cir. 2007)).

3 II. LEGAL STANDARD

4 A complaint may be dismissed for failure to state a claim upon which relief can be
5 granted for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under
6 a cognizable legal theory. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Robertson v. Dean*
7 *Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984). For purposes of a motion to
8 dismiss, all allegations of material fact in the complaint are taken as true and construed in the
9 light most favorable to the nonmoving party. *Clegg v. Cult Awareness Network*, 18 F.3d 752,
10 754 (9th Cir. 1994). However, the Court “is not required to accept legal conclusions cast in the
11 form of factual allegations if those conclusions cannot reasonably be drawn from the facts
12 alleged.” *Id.* at 754-55. Motions to dismiss generally are viewed with disfavor under this liberal
13 standard and are granted rarely. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir.
14 1997).

15 III. DISCUSSION

16 1. Third Claim

17 Under the Tenth Amendment, “Congress may not simply commandeer the legislative
18 process of the States by directly compelling them to enact and enforce a federal regulatory
19 program.” *New York v. United States*, 505 U.S. 144, 161 (1992) (internal quotation omitted).
20 “The commandeering cases involve attempts by Congress to direct states to perform certain
21 functions, command state officers to administer federal regulatory programs, or to compel states
22 to adopt specific legislation.” *Raich*, 500 F.3d at 867 n.17. The Ninth Circuit has held that the
23 plain terms of the Controlled Substances Act (“CSA”) do not violate the Tenth Amendment by
24 directing state officers or legislatures in this manner. *Id.* (citing *Reno v. Condon*, 528 U.S. 141,
25 151 (2000)). Relying upon this authority, Defendants argue that Plaintiffs’ claim must be
26 dismissed because the CSA itself does not violate the Tenth Amendment, and thus selective
27 enforcement of the CSA may not serve as the basis of a commandeering claim.

28 In their SAC, Plaintiffs allege that federal officials have devised a strategic plan of

1 targeted enforcement that has had the intended effect of “rendering California’s medical
 2 marijuana laws impossible to implement and thereby forcing California and its political
 3 subdivisions to recriminalize medial marijuana.” SAC ¶ 4. Specifically, Plaintiffs allege that
 4 Defendants have: (1) threatened to punish California physicians who recommend marijuana, *Id.*
 5 at ¶¶ 85-91; (2) threatened government officials who issue medical marijuana identification
 6 cards, *Id.* at ¶¶ 94(a), 95-96; (3) interfered with municipal zoning plans, *Id.* at ¶94(c); and (4)
 7 targeted for arrest and prosecution those providers of medical marijuana who cooperate most
 8 closely with municipalities. *Id.* at ¶¶ 94(b), 94(d)-(e), 97. Plaintiffs assert that these actions
 9 violate the Tenth Amendment by making it impossible for the state to distinguish between
 10 authorized and recreational users of marijuana, a distinction that is necessary for the proper
 11 enforcement of California law.

12 Defendants contend that these allegations amount to nothing more than a claim of
 13 selective enforcement, that selective enforcement is not the same thing as commandeering and
 14 that Plaintiffs only may raise claims of selective enforcement in individual actions. While it is
 15 true that selective enforcement alone is insufficient to support a claim of commandeering,
 16 Defendants cite no controlling authority for the latter proposition. Moreover, ignoring Plaintiffs’
 17 allegations of selective enforcement, to the extent that such allegations provide factual context
 18 for Plaintiffs’ commandeering claim, would have the practical effect of preventing Plaintiffs
 19 from presenting the full breadth of their legal theory.

20 In his concurring opinion in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), Chief
 21 Judge Kozinski opined that Defendants’ manner of enforcing the CSA had commandeered
 22 California’s legislative process, at least as to the legal rights and obligations of physicians:

23 The state relies on the recommendation of a state-licensed physician to define the
 24 line between legal and illegal marijuana use. The federal government’s policy
 25 deliberately undermines the state by incapacitating the mechanism the state has
 26 chosen for separating what is legal from what is illegal under state law. Normally,
 27 of course, this would not be a problem, because where state and federal law
 28 collide, federal law wins. . . .
 . . . Applied to our situation, this means that, much as the federal government may
 prefer that California keep medical marijuana illegal, it cannot force the state to
 do so. Yet the effect of the federal government’s policy is precisely that: By
 precluding doctors, on pain of losing their DEA registration, from making a
 recommendation that would legalize the patients’ conduct under state law, the

1 federal policy makes it impossible for the state to exempt the use of medical
2 marijuana from the operation of its drug laws. In effect, the federal government is
3 forcing the state to keep medical marijuana illegal. But preventing the state from
repealing an existing law is no different from forcing it to pass a new one; in
either case the state is being forced to regulate conduct that it prefers unregulated.

4 *Id.* at 645-46 (Kozinski, concurring). While this authority is not controlling, it is the only
5 authority that addresses the precise issue at hand, and it suggests that at least at the pleading stage
6 Plaintiffs' claim may be cognizable. If Plaintiffs can prove that Defendants are enforcing the
7 CSA in the manner alleged, a question as to which the Court expresses no opinion, they may be
8 able to show that Defendants deliberately are seeking to frustrate the state's ability to determine
9 whether an individual's use of marijuana is permissible under California law. A working system
10 of recommendations, identification cards and medicinal providers is essential to the
11 administration of California's medical marijuana law. The effect of a concerted effort to disrupt
12 that system at least arguably would be to require state officials to enforce the terms of the CSA.
13 Because the Court must assume that Plaintiffs' allegations are true and resolve any doubt in
14 Plaintiffs' favor for the purposes of the instant motion, and because Plaintiffs have alleged their
15 claim with considerably greater factual specificity than they did in their First Amended
16 Complaint, the motion to dismiss will be denied as to Plaintiffs' third claim.


17 **2. Fifth Claim**

18 Defendants also move to dismiss Plaintiffs' fifth claim. Plaintiffs do not oppose this
19 portion of the motion. Accordingly, the fifth claim will be dismissed without leave to amend.

20 **IV. ORDER**

21 Good cause therefor appearing, IT IS HEREBY ORDERED that Defendant's motion to
22 dismiss is DENIED as to claim three and GRANTED without leave to amend as to claim five.
23 Defendants shall file their answer within thirty (30) days of the date of this order.

24
25 DATED: August 19, 2008

26
27 
28 JEREMY FOGEL
United States District Judge

1 Copies of this Order have been served upon the following persons:
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