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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONEJO WELLNESS CENTER COOPERATIVE, INC. a mutual benefit non-profit cooperative; EXECUTIVE CENTER OF SIMI VALLEY, LLC, a limited liability company; and BILLIE JO MAISONET, an individual,

Plaintiffs/Petitioners,

vs.

ERIC HOLDER, Attorney General of the United States; MICHELLE LEONHART, Administrator of the Drug Enforcement Administration; ANDRÉ BIROTTE JR., U.S. Attorney for the Central District of California,

Defendants/Respondents.

Case No. CV11- 9200 DMG (PJWx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF FACTS

Plaintiff Mike Brown operates the Conejo Wellness Center Cooperative, Inc., (CWC) in Simi Valley, California, which serves medical cannabis patients, and is a medical cannabis patient himself. (Decl. of Mike Brown.) His landlord, the Executive Centers of Simi Valley, LLC, (ESCV) is also a plaintiff. (Declaration of Arnold Klein.) While ECSV has not received a letter indicating that the LLC's property will be forfeited, Klein, a managing member of the LLC has stated that he is aware that the US attorney for this District has been sending forfeiture letters to landlords in the Central District and that it is only a matter of time before his LLC receives one (Id., ¶ 's 4, 6). His tenant, CWC, is the only facility providing medical cannabis to medical cannabis patients a 15 mile radius and to the north, the nearest facility is 60 miles away. (Brown Decl., ¶12.) CWC operates in full compliance with state law, takes numerous steps to minimize diversion of cannabis to non-patients, and serves only those patients who have a doctor's recommendation to use medical cannabis. (Id., ¶3, 6, 9, 13). CWC also chose to continue operations after feeling reassured by the 2009 DOJ position regarding enforcement that is at issue in this case. (Brown Decl., ¶8.) Many of CWC's patients include accident victims in extreme pain who use cannabis (to replace traditional pain medicine like morphine that can kill appetite and ability to sleep), people with MS, HIV/AIDS, ADHD, all types of cancer, glaucoma, cataracts, the terminally ill and paraplegics. These conditions are alleviated by cannabis. (See Paul Armentano's declaration.) The threats to the Central District's landlord will have the federal government's intended result, stopping the supply of medical cannabis to qualified patients, unless this court issues a TRO/preliminary injunction. If CWC is forced to close, its members will no longer have access to their doctor-recommended medicine from the source they have relied upon for years. Patients of CWC will have to resort to black market sources to obtain cannabis if the federal government's actions are not enjoined. Ms. Billie Jo Maisonet, a patient member of CWC and Mike Brown both state that without a TRO issued, she, Mr. Brown and their fellow patients will suffer irreparable harm as they will no longer have access to medical cannabis.

WHY A TRO IS NECESSARY

The United States Attorney for this Federal District has sent letters to landlords notifying them that their properties are subject to forfeiture and that they are also subject to arrest and prosecution (see letters attached as Exhibits 1 and 2 to the Declaration of Matthew Kumin.) These letters are dated

October 6 and give NO DEADLINE for compliance. Thus, the US Attorney could take action at any moment.

The four USAs have developed a strategy to eviscerate and extinguish California's 16 year old medical marijuana program without filing a civil law suit or criminal charges against those participating or supporting the program. The strategy is to terrify commercial entities, without which no legitimate business can function, into withdrawing from legitimate commercial interaction with marijuana dispensaries. Thus, letters to banks have had the effect of banks closing out the accounts of dispensaries that are in clear and unambiguous compliance with state law. The letters to landlords have caused those dispensaries – even in clear and unambiguous compliance with state law -- to be sued for, or threatened with, eviction. The IRS has refused to grant legitimate business expenses of the dispensaries as deductions. In short, the USAs have (already successfully) attacked the commercial structure of California's Medical Marijuana program by threatening the use of awesome power to punish banks and landlords who work with medical marijuana entities that are in clear and unambiguous compliance with state law

Without the protection of a TRO and a Preliminary Injunction, California's medical marijuana program will collapse, and be driven underground, before this Court can examine the substantive merits of plaintiff's constitutional advocacy. Without the protection of a TRO and a Preliminary Injunction, banks will not risk that the USAs will not follow through on the threats contained in the letters, which were sent. Without the protection of a TRO and a Preliminary Injunction, landlords will choose to evict dispensaries rather than risk the forfeiture of their commercial entities and buildings to the government, as threatened by the USAs.

The simple truth is that only a TRO and a fully briefed hearing on Plaintiffs' Motion for Preliminary Injunction can give this Court the ability to adjudicate the issues raised by plaintiff before irreparable harm is visited across the board on California's Medical Marijuana program.

INTRODUCTION

After 15 years of medical marijuana laws in California protecting patients, doctors and caregivers from prosecution for using, recommending and obtaining marijuana, and two years after the federal government pledged, in a California federal district court, to allow medical use of cannabis by those in clear and unambiguous compliance with California state law, the four United States Attorneys

(USAs) in California have decided to shut down the supply chain of medical cannabis for patients by threatening criminal prosecutions and property forfeitures. For various constitutional and equitable reasons, plaintiffs, who are landlords, medical cannabis cooperatives, and patients, seek this Court's intervention to protect the rights of medical cannabis patients in California from federal prosecution and the businesses of those who serve those patients from destruction by federal forfeiture and criminal prosecution.

Since 1996, after passage of the Compassionate Use Act by California voters, patients in California who desire to use medical cannabis to alleviate the effects of a variety of illnesses have been free to do so if in compliance with California law.[1] Since January 1, 2004, patients under California law (pursuant to subsequent legislation passed by California's Assembly in 2003) have been able to associate together to cultivate and distribute medical cannabis to each other. In that legislation (the Medical Marijuana Program Act or MMPA), the Legislature made specific findings relating to safe and affordable access to cannabis. The California Attorney General, under a charge by

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[1] §11362.5. Use of marijuana for medical purposes.

(a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b)(l) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary care-givers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law: no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary care-giver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person. (Added by 1996 initiative Measure Prop 215 §1, eff.: 11/6/96.)

the Legislature, also promulgated Guidelines for patients who seek to collectively distribute cannabis to each other.[2]

Despite federal laws which continue to prohibit the possession, sale and distribution of cannabis and which do not officially recognize medical uses of cannabis, California now has an entrenched cultivation and distribution network of medical cannabis supplying an estimated 1,000,000 patients throughout the state.[3] California media outlets are filled with numerous revenue producing advertisements for medical cannabis, doctors routinely "recommend" medical cannabis to their patients, landlords house tenants which dispense medical cannabis, attorneys counsel clients involved in this field, architects design facilities for medical cannabis, sheriffs and other law enforcement have instituted programs to tax and regulate these activities[4], and business consultants provide a variety of services to patients who obtain cannabis at their "dispensaries," as do health care related professionals. The current estimated revenue generated by medical cannabis in California runs into the billions ($1.5-4.5 billion according to NORML.)

It is readily apparent, and there is no doubt that the lawful Medical Marijuana program is a stimulus in an otherwise bleak economic picture. Many sectors of the California economy have experienced an upswing economically due to secondary effects of the medical cannabis market. Moreover, according to the California Board of Equalization, it collected $50-100 million in sales taxes from medical cannabis operations within the past year. The State of California can ill afford the loss of revenue should the Medical Marijuana program be eradicated by federal intervention.

The California Medical Association recently announced its support for reform and an end to prohibition so that vital research on the medical uses of cannabis (currently prohibited by the federal government) could proceed.[5] Likewise, the Center for Medicinal Cannabis Research in San Diego published a study last year supporting medical use of cannabis.[6] Combined with scientific studies

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[2] CA AG Guidelines (attached as RJN Exhibit 1)

[3] California NORML (National Organization to Reform Marijuana Laws) estimates California's patient population at 750,000 to 1,125,000. See, http://www.canorml.org/news/cbcsurvey2011.html)

[4]For example, Mendocino county's Sheriff has instituted a program in which his office monitors cultivation, maximum of 99 per patient, and requires the purchase of a twist-tie for each plant. Numerous cities such as Oakland, Stockton, Los Angeles, San Francisco, to name a few of the entities, have zoning and other regulatory ordinances in place for medical cannabis facilities.

[5] http://www.cmanet.org/news/detail/?article=cma-urges-legalization-and-regulation-of

[6] In 2010, the results of a series of randomized, placebo-controlled FDA-approved clinical trials performed by regional

from Israel, Great Britain and elsewhere, the bottom line for the medical and scientific community is clear: there are important and significant benefits for the health of the human race to be derived from cannabis in this plant. In short, there is significant evidence that medical cannabis has had a profound impact on the medical and scientific community, with regard to patient health care in the State of California (and elsewhere).[7]

In late September and early October of 2011, the United States Attorneys (USAs) for each of the four federal districts in California wrote to numerous individuals and entities involved in California's Medical Marijuana program, alleging that the dispensaries, landlords who rent to the dispensaries, patients and other supporting commercial entities, even though they are fully in compliance with state law, are nonetheless in violation of federal law. Swift sanctions were threatened if those involved did not cease their lawful-under-California-state-law activities. The sanctions threatened are criminal prosecution, imprisonment, fines, the forfeiture of assets, including and money received as a result of the activity and real property where activity occurred.

The USAs emphasized that federal drug trafficking laws operate independently of California laws, and that a dispensary's operation involving sales and distribution of marijuana is illegal, subjecting even those in compliance with California state law to federal criminal prosecution as well as seizure by and forfeiture to the United States of property – both real and personal -- involved in

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branches of the University of California established that inhaled cannabis possessed therapeutic utility that is comparable to or better than conventional medications, particularly in the treatment of multiple sclerosis and neuropathic pain. These findings were publicly presented to the California legislature, and also appear online here: http://www.cmcr.ucsd.edu/images/pdfs/CMCR_REPORT_FEB17.pdf.

[7] California however, is not alone in experimenting with the use of cannabis as a medicine or palliative. In fact, presently 16 states plus the District of Columbia have laws allowing for the medical use of cannabis: [Alaska (Ballot Measure 8)(1998); Arizona, (Proposition 203)(2010); California (Proposition 215)(1996); Colorado (Ballot Amendment 20)(2000); District of Columbia (Amendment Act B18-622)(2010); Delaware (SB17, HB 17-4)(2011); Hawaii (SB 862, HB 13-12)(2000); Maine (Ballot Question 2)(1999); Michigan (Proposal 1)(2008); Montana (Initiative 148)(2004); Nevada (Ballot Question 9)(2000); New Jersey (SB 119, HB 25-13)(2010); New Mexico (SB 523, ,HB 32-3)(2007); Oregon (Ballot Measure 67)(1998); Rhode Island (SB 0710, HB 33-1)(2006); Vermont (SB 76, HB 645)(2004); Washington (Initiative 692)(1998)].

In addition, 6 states have pending legislation to legalize medical cannabis: [Illinois (HB 0030); Massachusets (SB 1161, HB 625); New Hampshire (HB 442); New York (SB 2774); Ohio (HB 214); Pennsylvania (SB 1003). Maryland has separately passed a law favorable to medical cannabis although not directly legalizing it (SB 308).
Source: http://medicalmarijuana.procon.org.

The total combined population of the above states is 160,000,000 citizens. **This represents 52% of the complete population of the United States as of 2010**.
Source: http://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population.

such activities. Notice of potential 40-year prison sentences for operation within a prohibited distance of a school and citation to 21 U.S.C. § 856 (a) and 21 U.S.C. § 881 (a) (7) bolstered the federal threat to those lawfully participating in California's 15 year old medical marijuana program.

It is the threatening actions of these 4 USA's in mounting a comprehensive attack – mainly on all the support systems that any legitimate business needs – that will eviscerate and likely eradicate California's Medical Marijuana program. The threats are to the banks (no business can function without bank accounts)[8], landlords, and even media outlets. For all practical purposes, the letters sent by the USA's are an attempt to eliminate the lawful program of medical marijuana production and distribution by intimidation. The practical effect of this effort has already been effective as numerous medical cannabis facilities have already shut down and landlords have started to evict the tenants. The threats will continue to drive the medical marijuana program underground, harming the landlords, businesses and professionals that support California's lawful (under State law) program and costing the state and local governments their fair share of what legitimate businesses pay to foster an orderly society. All this is being done in derogation of the Department of Justice (DOJ)'s promise to the United States District Court for the Northern District of California that those in compliance with California State law would be neither prosecuted nor subject to civil forfeiture. Injunctive relief is the only remedy to avert the impact that the illegal and unconstitutional threatening letters from the USAs is having and will inevitably have.

I. THE FEDERAL GOVERNMENT HAS ACKNOWLEDGED IN BINDING COURT PLEADINGS THAT GROWING AND DISTRIBUTING MARIJUANA FOR MEDICAL PURPOSES IN COMPLIANCE WITH STATE LAW MAY NOT BE PROSECUTED NOR SHALL ANY RELATED PROPERTY BE SEIZED UNDER THE CSA

A. THE SETTLEMENT IN SANTA CRUZ V. HOLDER

The government is judicially estopped from asserting its positions because of its actions in *Santa Cruz v. Holder*, (Civil Action No. 03 – 1802 JF) (N.D. Ca. 2009), where the government admitted and stipulated that a new federal policy had mooted out the plaintiffs' lawsuit challenging federal enforcement against medical marijuana providers working closely with local governments. Any government assertion to the contrary violates due process.

[8] http://abcnews.go.com/Business/justice-department-targets-banks-medical-marijuana-crackdown/story?id=14811540

Plaintiffs in *Santa Cruz* conducted a long litigation against the appropriate sitting United States Attorney General and others, raising numerous federal constitutional challenges, as well as a statutory immunity challenge, to the federal government's enforcement of the Controlled Substance Act (CSA) against a medical marijuana collective and its members, who were operating in full compliance with California's medical marijuana laws. On the same day, October 19, 2009, that the Department of Justice ("DOJ") announced the Medical Marijuana Guidance[9] to selected United States Attorneys, drug enforcement officials, the press and public, its lawyers, critically for this case, filed the Medical Marijuana Guidance in the Santa Cruz case as evidence of a new government policy[10]. That long litigation was eventually settled – predicated on the existence of that new government policy --with the filing of a Joint Stipulation of Dismissal without Prejudice (RJN Exhibit 2), which was signed by DOJ and plaintiff lawyers on January 21 and entered by the Court on January 25, 2010.

Significantly the Joint Stipulation provides: "As a result of the issuance of Medical Marijuana Guidance [and based on the government's argument that the Medical Marijuana Guidance "mooted" out the remaining issue in the litigation], plaintiffs agree to dismiss this case without prejudice." Tellingly, the following important component is incorporated in the Stipulation of Dismissal: "The parties further stipulate and agree that should the Defendants[11] withdraw, modify, or cease to follow Medical Marijuana Guidance, this case may be reinstituted in its present posture on any plaintiffs' motion…" (Emphasis supplied).

It is clear from the Government's reliance upon the Medical Marijuana Guidance in the settlement of the *Santa Cruz* case that the Government intended that the courts and the public view the Medical Marijuana Guidance as a new federal enforcement policy regarding medical marijuana patients and their providers. In fact, the law compels that conclusion, as set forth herein.

Thus, because the DOJ has given official notice to the courts that those who possess, grow and distribute medical marijuana in compliance with state law will not be prosecuted nor their property

[9] Announced as Deputy Attorney General David Ogden's Memorandum and called the Ogden Memo, but filed in the Santa Cruz litigation as the Medical Marijuana Guidance.

[10] The Medical Marijuana Guidance was filed as an attachment to a pleading called "Notice of Issuance of Department of Justice Clarification and Guidance with Medical Marijuana Guidance." (document 213 on the docket (RJN Exhibit 3)

[11] Eric H. Holder, Attorney General of the United States; Michele Leonhart, Acting Administrator of the Drug Enforcement Administration; and, R. Gil Kerlikowske, Director of the Office National Drug Control Policy.

seized, the Due Process Clause prohibits such prosecutions and/or seizures.

B. PROCEDURAL HISTORY OF THE SANTA CRUZ LITIGATION

In 2002, the federal government instituted a series of searches, seizures and arrests of medical marijuana patients belonging to a collective operating in full compliance with state laws in Santa Cruz County, California. Lawsuits were filed by the aggrieved parties, including motions for the return of the seized property. The initial complaint in *Santa Cruz et al v. Holder (CV-03-01802 JF)* was filed in April of 2003. A Second Amended Complaint was filed on November 28, 2007.[12] (RJN Exhibit 4)

The gist of the central claim in the Second Amended Complaint was that the federal government was selectively and intentionally using its enforcement powers to undermine California's legitimate and valid state medical marijuana laws, effectively commandeering the state's governmental machinery to force California (and by intimidation other states) to recriminalize medical marijuana. The plaintiffs sought injunctive relief barring the federal government from interfering with the cultivation, possession, distribution, and use of medical marijuana (Prayer for Relief 1), and a return of the marijuana seized in the 2002 raids (Prayer for Relief 9) — as well as declaratory relief — declaring that the federal government unconstitutionally intended to subvert or interfere with the implementation of California medical marijuana law (Prayer for Relief 4), declaring that the plaintiffs who engage in medical marijuana activities in compliance with California law or Santa Cruz municipal code "are immune from criminal and civil liability under 21 U.S.C. § 885(d) of the Controlled Substances Act" (Prayer for Relief 5), and a declaration that the Controlled Substances Act does not prohibit [plaintiffs] from following the advice of their physicians and using medical marijuana in connection with a valid physician recommendation in accordance with state and local law (Prayer for Relief 8).

The Medical Marijuana Guidance provides in relevant part (relevant both for that litigation and the one at bar) that "[a]s a general matter, pursuit of these priorities [prosecution of significant traffickers of illegal drugs] should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical

[12] There was a long and tortuous procedural history that does not appear relevant for the issue addressed here. At the point at which the case settled, one of the plaintiffs' claims had not been dismissed and the discovery process, including deposing high ranking former and current government officials, was about to commence.

use of marijuana." (RJN Exhibit 3 at pp. 1-2). For the government, the significance of the Medical Marijuana Guidance was to render moot the plaintiffs' contention that the federal government was unconstitutionally "commandeering" the State's governmental machinery in violation of the Tenth Amendment. The government argued that because the new Medical Marijuana Guidance constituted a change of government policy it negated, as a matter of law, the contention that the government was usurping the rights of the State.

In reliance upon the government's commitment that it was going to abide by its representations[13] in the Medical Marijuana Guidance -- that the CSA would not be enforced against medical marijuana users and caregivers, who are in compliance with State law -- the parties agreed to dismiss the law suit without prejudice, reserving the right to reinstitute the case in the very same posture, (with discovery to recommence) should the government withdraw, modify or cease to follow the Medical Marijuana Guidance.

In a case conference just after the government filed the Medical Marijuana Guidance with the court in *Santa Cruz v. Holder*, (10/30/2009 Transcript attached at RJN Exhibit 5), Judge Fogel stated: "I guess what I don't know is where you want to go now given the government's guidance in terms of this law suit." (T3:17-19).

The government, represented by AUSA Mark Quinlivan[14] and Joel McElvain, a counsel at the U.S. Department of Justice, Civil Division, Federal Programs Branch in Washington D.C., responded that with respect to the plaintiffs' claims of selective enforcement (commandeering),

> we are now in a completely different posture now given the guidance issued by the Attorney General . . . .Typically, the kind of guidance that is just given internally to the United States Attorneys and yet this was publicly released, it's on the Department's website…so the plaintiffs would be seeking to enjoin, basically, a policy that is in the past.
>
> (Exhibit 5: T4:7-19) (Emphasis supplied)

As to the nature of a joint stipulation to dismiss, Judge Fogel ruminated: "It would have to be conditioned upon the government following [T]he [G]uidance or something like that." (Exhibit 5: 5:5-

[13] While the relevant statement in the Medical Marijuana Guidance could arguably not be described as a representation in the document itself, it is elevated to the status of a representation by the government's argument that it "mooted out" plaintiffs' claim and by the terms of the Joint Dismissal itself.

[14] Mr. Quinlivan, whose office is in Boston, has been the government counsel in many of the medical marijuana cases around the country.

7) AUSA Quinlivan agreed, adding "we would be willing to brief the question about whether or not this is moot. And . . . whether the voluntary cessation doctrine would apply given this is a change, a policy-based change in administration." (Exhibit 5: 5:8-16) (Emphasis supplied) The plaintiffs stated, ". . . there's no need to litigate this case as long as the federal government follows the policy that has recently been announced." (Exhibit 5 5:22-25; T6:1-5).

Judge Fogel concluded, "What we are really talking about, I think, is wordsmithing a dismissal. . .(Exhibit 5**:** 7:22-23) . . .technically it would be a dismissal, I suppose . . .and it would not be unabated unless and until the government didn't follow its policy . . . ." (Exhibit 5: 8:14-18).

The government had represented to the Court that it could meet the barrier of the "voluntary cessation doctrine"[15] (Exhibit 5: 5:15-16). Thus, the government's position in *Santa Cruz v. Holder* was that the reversal of government policy was sufficiently "overt and visible" and therefore had "every appearance of being permanent" so as to moot the matter. *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 334 (1952). The government well understood that courts are sensitive to "efforts to defeat injunctive relief . . . [that] seem timed to anticipate suit" and will not rely on a mere promise of future compliance. *Id.*; *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

Thus, in *Santa Cruz v. Holder*, the government entered a stipulation predicated on an announced change in policy by the new administration and promised to abide by this new policy enunciated in the Medical Marijuana Guidance.

C. JUDICIAL ESTOPPEL PROHIBITS THE ACTIONS THREATENED IN THE USAS LETTERS

The threats contained in the recent letters sent by the USAs are in direct contradiction to the government's position in *Santa Cruz v. Holder*, and this requires the invocation of the doctrine of judicial estoppel. That doctrine prohibits the government from taking the position threatened in the

[15] *United States v. W.T. Grant Co.*, 345 U.S. 629, 632- 33 (1953) (internal citations omitted):

> [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i. e., does not make the case moot. [ ] A controversy may remain to be settled in such circumstances, [ ] e. g., a dispute over the legality of the challenged practices. [ ] The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. [ ] For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. [ ] The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement. . . .**The case may nevertheless be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated**. (Emphasis supplied)

letters. *New Hampshire v. Maine*, (2001) 532 U.S. 742, 749. There, the United States Supreme Court explained:

> The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding; 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").
>
> [O]ther courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," . . .*See In re Cassidy*, (C.A.7 1990) 892 F.2d 637, 641 ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Allen v. Zurich Ins. Co.*, (C.A.4 1982) 667 F.2d 1162, 1166 (judicial estoppel "protect [s] the essential integrity of the judicial process"); *Scarano v. Central R. Co.*, (C.A.3 1953) 203 F.2d 510, 513 (judicial estoppel prevents parties from "playing 'fast and loose with the courts' " (quoting *Stretch v. Watson* (1949) 6 N.J. Super. 456, 469, 69 A.2d 596, 603)). Because the rule is intended to prevent "improper use of judicial machinery," *Konstantinidis v. Chen*, 626 F.2d 933, 938 (C.A.D.C. 1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," *Russell v. Rolfs*, 893 F.2d 1033, 1037 (C.A.9 1990) (internal quotation marks and citation omitted).
>
> Courts have observed that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *Allen*, 667 F.2d, at 1166; *accord*, *Lowery v. Stovall*, 92 F.3d 219, 223 (C.A.4 1996); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (C.A.1 1987).

Accord, Eastman v. Union Pacific R.R. Co., 493 F.3d 1151, 1156-57 (10th Cir. 2007); *United States* . *v. Liquidators of European Federal Credit Bank*, 630 F.3d 1139, 1148-1149 (9th Cir. 2011).

Judicial estoppel requires neither privity nor detrimental reliance. *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 399 (5th Cir. 2003) ("[Plaintiff] claims that the district court failed to require a showing of additional 'elements' such as detrimental reliance, privity, and intent. None of these 'elements' are required under Fifth Circuit law."); *accord, Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996).

In the *Santa Cruz v. Holder* proceedings, culminating in the government's assertions that the Medical Marijuana Guidance announced a new policy mooting the plaintiffs' claims, and the subsequent stipulation and resulting Order (entered and signed by US District Court Judge Jeremy Fogel), the government affirmatively agreed that it would abide by the Medical Marijuana Guidance issued by the United States' DOJ as the new federal policy with respect to the medical marijuana states. (Exhibit 2), See, also, fn. 7, infra. Moreover, the government argued that the public dissemination of the Medical Marijuana Guidance, including posting it on the DOJ website, invoked

the doctrine of voluntary cessation so as to "moot out" plaintiffs' claim. Voluntary cessation only moots out a plaintiff's claim if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant*, 345 U.S. at 633.

By invoking the doctrine of voluntary cessation as mooting out plaintiffs' claim, the government represented that the Medical Marijuana Guidance constituted a change in policy and that, in essence, there was "no reasonable expectation that the wrong" [prosecuting criminally and seizing assets of those in compliance with State Medical Marijuana laws] would be repeated. In reliance on that position, plaintiffs agreed to stipulate to the dismissal of their case and Judge Fogel signed the Order to dismiss. To make sure there was no mistake about the government's intention to adhere to the Medical Marijuana Guidance, the Stipulation of Dismissal contained a provision permitting any plaintiff to reinstitute the lawsuit in the same posture as when it was dismissed, if the government withdrew, modified or ceased to follow the policy enunciated in it.

Having achieved its objective in Santa Cruz by representing that the Medical Marijuana Guidance constitutes a new government policy that it will follow, the government is now estopped from threatening an enforcement policy in contravention of the new policy announced in the Medical Marijuana Guidance.

D. THE ACTIONS THREATENED IN THE USA'S LETTERS ARE CONTRARY TO THE SANTA CRUZ STIPULATION WHICH IS A JUDICIAL ADMISSION THAT IS BINDING ON THE GOVERNMENT

The position of the government in *Santa Cruz* constitutes a judicial admission of a fact: the federal government's policy had changed and henceforth users and dispensers of medical marijuana operating in accordance with their state laws would no longer be prosecuted by the federal government under the CSA.

A judicial admission binds the party that makes it and will conclusively preclude assertion of a contrary position. Federal district courts may find that statements made by a party in unrelated pleadings are judicial admissions. *See e.g.*, *Gradetech, Inc. v. Am. Employers Group*, 2006 WL 1806156, *3 (N.D.Cal. June 29, 2006) (holding that statements made by the defendant in complaints filed against unrelated third-parties constituted judicial admissions); *Longstreet Delicatessen, Fine Wines & Speciality Coffees, L.L.C. v. Jolly*, 2007 WL 2815022, ** 13-14 (E.D. Cal. Sept.25, 2007) (holding that a stipulation of facts entered into by the parties in separate litigation may be judicial

admissions); *accord American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226-27 (9th Cir.1988) (even "statements of fact contained in a brief may be considered admissions of the party in the discretion of the district court.")

Thus, the government is bound by its position in *Santa Cruz* and judicially estopped from taking the actions against those in compliance with California Medical Marijuana laws that are threatened in the letters sent by the USAs.[16]

II. PLAINTIFFS' FUNDAMENTAL CONSTITUTIONAL RIGHTS ARE PROTECTED BY THE FIFTH AND NINTH AMENDMENTS

The protection of un-enumerated liberties traditionally has been afforded against the federal government under the Due Process Clause of the Fifth Amendment. It is also both textually and historically warranted under the Ninth Amendment's express injunction that: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. Amend. IX.

The Ninth Amendment was intended to negate any inference that "those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." 1 Annals of Cong. 456 (1789). *Cf. Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992) (citing the Ninth Amendment in support of the proposition that the "substantive sphere of liberty" protected by Due Process extends beyond "the Bill of Rights [or] the

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[16] Under a separate estoppel-type theory, if a governmental agent affirmatively assures a party that its conduct is legal, it may not then initiate prosecution for violations of federal law. (US v. Howell, 37 F.3d 1197, 1203 (7th Cir. 1994), cert, denied, 514 US 1090 (1995)). The standard for this position does not rely on the mental state of the party, but rather, is based on principles of fairness (US v. Hedges, 912 F.2d 1397, 1405 (11th Cir. 1990)).

While typically used as a criminal defense, the theory is rationally related to the affirmative allegations in the complaint filed in this action.

Here, the government developed a new policy, the Medical Marijuana Guidance, which it widely distributed throughout the United States. It used that policy in a specific case involving an affirmative suit by California medical cannabis patients.

"To invoke the [defense], defendant must show that he relied on the official's statement and his reliance was reasonable in that a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries." U.S. v. Weitzenhoff, 1 F. 3d 1523, 1534 (9th Cir. 1993).

Clearly, the federal government's new policy announced through the WAMM litigation gave patients in the state of California a real and tangible sense that they could comply with California law, form cooperatives, follow the California Attorney General's Guidelines and cultivate and distribute cannabis to each other. Patients in California did exactly that. And while some groups may have taken advantage of those laws for personal benefit, their actions cannot be a basis for changing the reasonable expectations of millions of patients in the State for whom cannabis, safety obtained, provides a real benefit for daily living.

Patients in California understood that the federal government's new policy was true and real. It was announced publicly with much fanfare. There was no need to make further inquiry. Patients understood the message to be 'Follow state law, we will now leave you alone'. The government, inconsistently, then reversed this policy directly creating the chaos

specific practices of States at the time of the adoption of the Fourteenth Amendment").

The Ninth and Tenth Amendments perform distinct functions. The Tenth Amendment reads, "The 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." U.S. Const. Amend. X. Madison explained that, while the Tenth Amendment "exclude[s] every source of power not within the Constitution itself," the Ninth Amendment "guard[s] against a latitude of interpretation" of those enumerated powers. 2 Annals of Cong. 1951 (1791) (referring to the 11th and 12th articles proposed to the States for ratification). Thus, whereas the Tenth Amendment limits Congress to its delegated powers, the Ninth Amendment prohibits an unduly broad interpretation of these powers.

Infringements upon fundamental liberties call for heightened scrutiny of the means by which Congress exercises its enumerated powers. The Supreme Court recognized this in *United States v. Carolene Products*, 304 U.S. 144 (1938), which states that "[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *Id.* at 153, n.4. As the Supreme Court has long held, unenumerated liberties can be as fundamental as enumerated liberties. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (right of parents to educate their children in the German language); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to send their children to private Catholic school); *United States v. Troxel*, 530 U.S. 57 (2000) (right of parents to make decisions concerning care).

To receive constitutional protection, an un-enumerated liberty must be "'deeply rooted in this Nation's history and tradition,' [*Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)] . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed,' [*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)]." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). In Due Process cases, the Supreme Court has emphasized that a claimed right can have roots in "our Nation's history, legal traditions, and practices." *Id.* at 710. An analysis of the history and tradition of a right "tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Id.* at 722.

A. THE RIGHTS TO BODILY INTEGRITY, TO AMELIORATE PAIN, AND TO PROLONG LIFE ARE CONSTITUTIONALLY PROTECTED

The rights to bodily integrity, to ameliorate pain, and to prolong life are so closely related that

it is difficult to say if they are distinct rights or merely specific aspects of the famous trinity of "life, liberty, and the pursuit of happiness" in the Declaration of Independence. The substance of the Constitution's protection, however, should not turn on the particular linguistic formulation employed to express this most fundamental right.

This right has deep roots in our Nation's history, legal tradition and the practice of permitting decisions about one's body to be made free from governmental intervention. The right is concomitant with the established rights to bodily integrity, to be free of pain and suffering, and to prolong life.

The right to be free of government intrusion with respect to one's body has roots in natural rights' principles and the philosophy of individual autonomy.[17] American legal precedent in the past century has consistently upheld legal protection for this individual right. In fact, the origin of this precedent in the Anglo-American legal tradition pre-dates decisions in this country by at least two hundred years. Blackstone recognized a right to personal security that "consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." 1 Wm. Blackstone, *Commentaries* *128 (1765). Blackstone extended protection to the "preservation of a man's health from such practices as may prejudice or annoy it." *Id.* at *133.

The right to be free of pain likewise finds its source in both legal precedent and important historical traditions of this Nation. Four concurring opinions in *Glucksberg* strongly suggest that the Due Process Clause protects an individual's right to obtain medical treatment to alleviate unnecessary pain. Justice O'Connor's opinion (with which Justice Ginsburg concurred, *Glucksberg*, 521 U.S. at 789) makes clear that suffering patients should have access to any palliative medication that would alleviate pain even where such medication might hasten death. "[A] patient who is suffering from a terminal illness and who is experiencing great pain has *no legal barriers* to obtaining medication, from qualified physicians." *Id.* at 736-37 (O'Conner, J., concurring) (emphasis added).

Similarly, Justice Breyer's concurrence suggests that a "right to die with dignity" includes a right to "the avoidance of unnecessary and severe physical suffering." *Id.* at 790 (Breyer, J., concurring).

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[17] *See* Locke, *Two Treatises of Government*, 328 (1698) (Cambridge Univ. Press 1960) ("[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself."); Mill, *On Liberty*, pp. 60-69 (1859) (Penguin Books 1985) (concluding that "[o]ver himself, over his own body and mind, the individual is sovereign").

Referring to the protected "substantive sphere of liberty," Justice Stephens wrote: Whatever the outer limits of the concept may be, it definitely includes protection for matters "central to personal dignity and autonomy." It includes the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. *Id.*, at 744 (Stevens, J., concurring) (citation omitted).

At the heart of this traditionally recognized liberty, Justice Stevens noted, was that of "[a]voiding intolerable pain and the indignity of living one's final days incapacitated and in agony." *Id.* at 745. Justice Souter likewise recognized that this "liberty interest in bodily integrity" includes a right to determine what shall be done with his own body in relation to his medical needs." *Id.* at 777 (Souter, J., concurring).

A majority of the Supreme Court in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. at 852; *Hudson v. McMillian,* 503 U.S. 1, 9-10 (1992); and *Ingraham v Wright,* 430 U.S. 651, 673-674 (1977), assumed the existence of a fundamental right of a seriously ill patient to be free from unnecessary pain and suffering.

Outside of the legal context, the right to ameliorate pain is embedded in the professional and ethical standards of physicians and other caregivers. Allowing a patient to experience unnecessary pain and suffering of any form is considered substandard medical practice, regardless of the nature of the patient's condition or the goals of medical intervention.[18] Likewise, physicians have a moral and ethical duty to provide relief from pain and suffering.[19] This standard has, in fact, been in place since the inception of medical ethics in western culture.[20] The right to ameliorate severe pain and suffering

[18] *See, e.g.*, Ben A. Rich, *A Prescription for the Pain: The Emerging Standard of Care for Pain Management*, 26 Wm. Mitchell L. Rev. 1, 4 (2000).

[19] *See, e.g.*, Post et al., *Pain: Ethics, Culture, and Informed Consent to Relief*, 24 J. Law, Med. & Ethics 348 (1996) ("[O]ne caregiver mandate remains as constant and compelling as it was for the earliest shaman - - the relief of pain. Even when cure is impossible, the physician's duty of care includes palliation."); Wanzer, et al., *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look*, 320 New England J. Med. 844 (1989) (concluding that "[t]o allow a patient to experience unbearable pain or suffering is unethical medical practice.")

[20] *See, e.g.*, Amundsen, *Medicine, Society, and Faith in the Ancient and Medieval Worlds*, 33 (Johns Hopkins Univ. Press 1996) ("The treatise entitled *The Art* in the Hippocratic Corpus defines medicine as having three roles: doing away with the sufferings of the sick, lessening the violence of their diseases, and refusing to treat those who are overmastered by their diseases, realizing that in such cases medicine is powerless"); Cassell, *The Nature of Suffering and the Goals of Medicine*, 306 New England J. Med. 639 (1982) ("[T]he obligation of physicians to relieve human suffering stretches back into antiquity").

and to prolong life is thus a fundamental liberty that is central to the Nation's history, legal traditions, and practices.[21]

For these reasons, in the absence of a compelling interest that would be furthered by such a proscription, the federal government cannot, consistent with the Due Process Clause, abridge the rights of seriously ill patients by preventing or deterring them from using medicine in a kind and quantity sufficient to relieve their pain or prolong their lives. In the face of an interest as powerful as the avoidance of physical suffering, the restoration of health, and the preservation of life, "a state may not rest on threshold rationality or presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted." *Glucksberg*, 521 U.S. at 766.

If any right is implicit in the concept of "ordered liberty," *Poe v. Ullman*, 367 U.S. 497, 549 (1961) (Harlan J., dissenting), it is the right to seek medical assistance and to protect one's health and life by reasonable means that do not harm others.

B. THE RIGHT TO CONSULT WITH AND ACT UPON A DOCTOR'S RECOMMENDATION IS A PROTECTED RIGHT ROOTED IN THE TRADITIONALLY SANCTIFIED PHYSICIAN-PATIENT RELATIONSHIP

The right to consult with one's doctor about one's medical condition is also a fundamental right deeply rooted in our history, legal traditions, and practices. The right asserted by Plaintiffs — to prevent governmental interference with their ability to act on doctors' treatment recommendations — is based in significant part on imperatives established by the physician-patient relationship. For this reason as well, Plaintiffs' rights must be accorded constitutional status.

The Supreme Court has acknowledged the sanctity of the physician-patient relationship in numerous substantive due process cases, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, doctors from Planned Parenthood violated a Connecticut law making it a crime to distribute contraceptives. *Id.* at 480. In finding that the criminalization of contraception violated a right guaranteed by the Due Process Clause, the Supreme Court relied on the fact that "[t]his law

[21] *Cf. Vacco v. Quill*, 521 U.S. 793, 808 n.11 (1997) ("[J]ust as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen . . . unintended '. . . effect' of hastening . . . death").

operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." *Id.* at 482.

The Supreme Court has also stressed the importance of the physician-patient relationship in reproductive rights cases. For example, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court emphasized that myriad and fundamental privacy and personal liberty interests, such as medical, physical, social, and spiritual choice, were impugned by the criminalization of abortion. *Id.* at 153. The *Roe* decision also stressed that such a violation of privacy interests, although personal to the woman, detrimentally affected the physician-patient relationship. *Id.* at 153, 156.

Likewise, in his concurrence in *Glucksberg*, Justice Souter relied upon the view that medical assistance falls within the scope of a cognizable liberty interest: "Without physician assistance in abortion, the woman's right would have too often amounted to nothing more than a right to self-mutilation." 521 U.S. at 778.

State legislation granting a statutory physician-patient privilege further demonstrates the importance of the physician-patient relationship. Many of the statutory privileges are a very old aspect of our Nation's history and legal traditions, with New York passing a physician-patient testimonial privilege in 1828. *See* 8 Wigmore on Evidence, § 2380 (rev. ed. 1961). Though physician-patient communication is "subject to reasonable licensing and regulation *by the State*" (*Casey*, 505 U.S. at 884) (emphasis added), when such regulation defeats the purpose of the physician-patient relationship by preventing the physician from fulfilling his or her duties, such regulation is impermissible. *See, e.g., Conant v. McCaffrey*, 172 F.R.D. 681, 694-95 (N.D. Cal. 1997) (holding that the federal government's statutory authority to regulate distribution and possession of drugs did not allow government to quash protected speech between physician and patient about cannabis).

Unless the Due Process Clause guarantees the unfettered communication and the freedom to act on physician advice concerning the treatment of serious illness, the related fundamental rights of bodily integrity, freedom from pain and suffering, and prolonging life will be rendered nugatory.

C. IN ASSESSING WHETHER A LIBERTY IS FUNDAMENTAL, COURTS SHOULD DEFER TO THE JUDGMENT OF THE PEOPLE

The Supreme Court has strongly affirmed the judiciary's power to identify "fundamental" un-enumerated liberties and protect them in the same manner as those that are enumerated. *See, e.g., Casey*, 505 U.S. at 848 (1992) (opinion of the Court relying in part on the Ninth Amendment). Others

have expressed doubts about entrusting judges with the task of identifying whether a particular liberty interest is or is not fundamental. *See, e.g., Troxel*, 530 U.S. at 91 (Scalia, J., dissenting) ("[T]he Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judge's list against laws duly enacted by the people"). In his dissent in *Troxel*, Justice Scalia observed that it is "entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has no power to interfere with parents' authority over the rearing of their children." 530 U.S. at 92. For the same reason, it is entirely compatible with the commitment to representative democracy for the People of a State, acting through the initiative process, to declare that a particular liberty — especially one that could not otherwise claim a long tradition of *judicial* protection — is fundamental and for this Court to acknowledge and defer to their judgment.[22]

The People of a State have no more power to violate the United States Constitution than has their legislature. But where the People, or their representatives in state legislatures, act to protect a particular liberty, this provides invaluable guidance to judges who must distinguish fundamental rights from mere liberty interests. Such popular action indicates that a particular liberty is fundamental just as surely as a judicial inquiry into its historical roots. Moreover, the People of California and the State of California expressly determined that "seriously ill Californians have *the right* to obtain and use marijuana for medical purposes . . . ." Cal. Health & Safety Code § 11362.5(b)(1)(A) (emphasis added).

D. THIS NINTH CIRCUIT HAS LAID THE GROUNDWORK FOR THE ACCEPTANCE OF THE TRUTH THAT THESE ASSERTED RIGHTS ARE NOW "DEEPLY ROOTED IN THIS NATION'S HISTORY AND TRADITION" AND "IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY"

This Ninth Circuit has recently grappled with the exact concerns expressed above in its recent decision in *Raich v. Gonzales, et al.*, 500 F.3d. 850, 861-866 (9th Cir. 2007)(on remand)("*Raich*"). Initially, the Court determined that, what was important, was to narrowly define the interest at stake in substantive due process cases:

[22] Indeed, four members of the Supreme Court concluded that the people of a State, amending their state constitution by popular vote, could impose additional qualifications on their Representatives to Congress. *See United States Term Limits v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting).

> *Glucksberg* instructs courts to adopt a narrow definition of the interest at stake. *See 521 U.S. at 722* ("[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases."); *see also Flores, 507 U.S. at 302* (noting that the asserted liberty interest must be construed narrowly to avoid unintended consequences). Substantive due process requires a "careful description of the asserted fundamental liberty interest." *Glucksberg, 521 U.S. at 721* (quotation and citations omitted).

Id at 863

The *Raich* court then went on to define that interest, a definition that applies here also:

> Accordingly, the question becomes whether the liberty interest specially protected by the *Due Process Clause* embraces a right to make a life-shaping decision on a physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed.

Id at 864

In reviewing the history of the use of medical cannabis, the Court showed that this nation's long history and tradition actually embraced the use of medical cannabis, a vital requirement for the recognition of a fundamental right:

> It is beyond dispute that marijuana has a long history of use -- medically and otherwise -- in this country. Marijuana was not regulated under federal law until Congress passed the Marihuana Tax Act of 1937, Pub. L. No. 75-348, 50 Stat. 551 (repealed 1970), and marijuana was not prohibited under federal law until Congress passed the Controlled Substances Act in 1970. *See Gonzales v. Raich, 125 S. Ct. at 2202*. There is considerable evidence that efforts to regulate marijuana use in the early-twentieth century targeted recreational use, but permitted medical use. *See* Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L. Rev. 971, 1010, 1027, 1167 (1970) (noting that all twenty-two states that had prohibited marijuana by the 1930s created exceptions for medical purposes). By 1965, although possession of marijuana was a crime in all fifty states, almost all states had created exceptions for "persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person." *Leary v. United States, 395 U.S. 6, 16-17, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969).*

Id. at 864-865

As the *Raich* court then recognized, it was only with the passage of the Controlled Substances Act in 1970, that Congress placed marijuana on Schedule I of the Controlled Substances Act, taking it outside of the realm of all uses, including medical, under federal law. Therefore, it was only from 1970 to 1996, that the possession or use of marijuana -- medically or otherwise -- was proscribed under state and federal law, a short period of only 26 years, which proscription ended with

California's passage of The Compassionate Use Act of 1996. *Raich*, at 865. [23] And, as this Court is aware, California was followed by 15 additional states with a combined population of approximately 45% of this country. *See, infra,* fn. 7.

The *Raich* court then analyzed the issue under the recent decision by the U.S. Supreme Court in *Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003),* acknowledging that:

> The *Lawrence* Court noted that, when the Court had decided *Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986),* "[twenty-four] States and the District of Columbia had sodomy laws." *Lawrence, 539 U.S. at 572*. By the time a similar challenge to sodomy laws arose in *Lawrence* in 2004, only thirteen states had maintained their sodomy laws, and there was a noted "pattern of nonenforcement." *Id. at 573*. The Court observed that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id. at 579*.

Raich, at 865

Therefore, when the *Raich* court felt that, "[t]hough the *Lawrence* framework might certainly apply to the instant case, the use of medical marijuana has not obtained the degree of recognition today that private sexual conduct had obtained by 2004 in *Lawrence*" (*Raich*, at 865), it left that door wide open for a resolution of that issue in this present case. In fact, the *Raich* court explicitly invited this issue to be revisited sooner than later:

> Since 1996, ten states other than California have passed laws decriminalizing in varying degrees the use, possession, manufacture, and distribution of marijuana for the seriously ill. *See Alaska Stat. § 11.71.090*; *Colo. Rev. Stat. § 18-18-406.3*; *Haw. Rev. Stat. § 329-125*; *Me. Rev. Stat. Ann. tit. 22, § 2383-B*; [*866] *Mont. Code Ann. § 50-46-201*; *Nev. Rev. Stat. § 453A.200*; *Or. Rev. Stat. § 475.319*; *R.I. Gen. Laws § 21-28.6-4*; *Vt. Stat. Ann. tit. 18, § 4474b*; *Wash. Rev. Code § 69.51A.040*. Other states have passed resolutions recognizing that marijuana may have therapeutic value, and yet others have permitted limited use through closely monitored experimental treatment programs. [15]
>
> > 15 While these lesser endorsements of medical marijuana are relevant, they cannot carry the same weight as legislative enactments that fully decriminalize the use of medical marijuana. As the *Lawrence* Court considered the number of states that retained laws that prohibited sodomy, so too must we consider the number of states that continue to prohibit medical marijuana.

[23] The *Raich* court made clear, though, that "[t]he mere enactment of a law, state or federal, that prohibits certain behavior does not necessarily mean that the behavior is not deeply rooted in this country's history and traditions. *Raich*, at 865. fn. 14.

> We agree with Raich that medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law as well. But that legal recognition has not yet reached the point where a conclusion can be drawn that the right to use medical marijuana is "fundamental" and "implicit in the concept of ordered liberty." *See Glucksberg, 521 U.S. at 720-21* (citations omitted). For the time being, this issue remains in "the arena of public debate and legislative action." *Id. at 720*; *see also Gonzales v. Raich, 125 S. Ct. at 2215*.
>
> As stated above, Justice Anthony Kennedy told us that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence, 539 U.S. at 579*. 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, at 866 (emphasis added)

Yet, that "future time" has now arrived. Since the decision in *Lawrence,* when only eleven states have legalized the use of medical marijuana (see, *Raich,* above), there are now 23 states that have authorized such use, or have pending legislation authorizing such use, with a combined population of about 53 % of the people in this country. *See, infra,* fn 7. That amount is staggering and surpasses even the changing demographics cited in *Lawrence*. Certainly such a major shift – where the citizens and legislatures of states that compromise 53% of the population of this country have accepted medical cannabis as a therapeutic substance - should compel this Court to, **at a minimum**, recognize now that past "times [blinded] us to certain truths and later generations can [now] see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence, 539 U.S. at 57*. Based on such realities today, it seems that it is the federal government which must now be compelled to pause with the issuance by this Court of a Temporary Restraining Order and then justify its recent threatened actions in an adversarial hearing on Plaintiffs' request for a preliminary injunction.

III. UNDER THE TENTH AMENDMENT, THE STATE HAS THE SOVEREIGN RESPONSIBILITY FOR THE HEALTH AND SAFETY OF ITS CITIZENS

As the Supreme Court observed in *New York v. United States,* 505 U.S. 144, 157 (1977), "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." While the Constitution delegates to Congress the power over interstate commerce and other national concerns, the States are primarily responsible for the health and safety of their citizens, a power known as the police power. Traditionally, no power is

more central to the sovereignty of the States; and the Supreme Court has always acknowledged that Congress lacks such a power. *See United States v. Lopez*, 514 U.S. 549, 566 (1995).

The power of Congress over interstate commerce is plenary. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat) at 197. As noted by St. George Tucker, learned jurist and author of the earliest treatise on the Constitution: "The congress of the United States possesses no power to regulate, or interfere with the domestic concerns, or police of any state." Tucker, 1 Appendix to *Blackstone's Commentaries* 315-6 (1803).

These propositions are not inconsistent. As stated in *Printz v. United States*, 521 U.S. 898, 924 (1997), the power over interstate commerce, while plenary, cannot be exercised in a manner that improperly "violates the principle of state sovereignty" by intruding into the traditional sovereign powers of States. Moreover, Congress cannot properly claim an *incidental* power to reach wholly *intrastate* activity under the Necessary and Proper Clause when doing so would interfere with the exercise of State sovereign powers. *Id.* at 937.

On issues of public health, the United States Supreme Court has long recognized the authority of State and local governments to enact measures reasonably necessary to protect such public health. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court rejected a constitutional challenge to a Massachusetts law requiring compulsory vaccinations. *See Id.* At 48-49. The Court confirmed that States may enact wholly intrastate measures to protect public health.

> The authority of the state to enact this statute is . . . commonly called the police power – a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this Court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not *by their necessary operation* affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.

Id. at 24-25 (emphasis added).

Similarly, the Court has upheld State regulations of professions that "closely concern" public health. *See, e.g., Watson v. Maryland*, 218 U.S. 173, 176 (1910). In *Watson*, the Supreme Court noted: "It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which

embraces the practitioners of medicine." *See Id.*. *See also Williams v. Arkansas*, 217 U.S. 79 (1910) (regulation of businesses or professions, essential to the public health or safety, falls within the police power of the State so long as such regulations are reasonable and necessary).

As most recently observed by the Ninth Circuit in *Conant:*

> Our decision is consistent with principles of federalism that have left states as the primary regulators of professional conduct. *See Whalen v. Roe*, 429 U.S. 589, 603 n. 30 (1977) (recognizing states' broad police powers to regulate the administration of drugs by health professionals); *Linder v. United States*, 268 U.S. 5, 18 (1925) ("direct control of medical practice in the states is beyond the power of the federal government"). We must "show[] respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 501 (2001) (Stevens, J., concurring) (internal quotation marks omitted).

2002 U.S. App. LEXIS 22492, at *24-*25

Thus, under the Tenth Amendment, the wholly intrastate activity of possessing and cultivating medical cannabis pursuant to State law, is an exercise of the police power reserved to the State of California, primarily responsible for the health and safety of its citizens, a power central to the sovereignty of the States.[24]

IV. THE SELECTIVE PROSECUTION OF CALIFORNIA MEDICAL CANNABIS COOPERATIVES AND THEIR LANDLORDS IS ARBITRARY AND IRRATIONAL IN VIOLATION OF THE EQUAL PROTECTION REQUIREMENTS OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court should consider the following facts:

1. The federal government cultivates and distributes cannabis to 4 patients throughout the United States through a federally-operated and funded program[25];
2. The federal government has allowed the state of Colorado to establish and operate a state-licensing program for the for-profit distribution of medical cannabis without any federal prosecutions of those complying with Colorado state law;

[24] *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). was based solely on the power of Congress under the Commerce Clause, not on the Tenth Amendment. *See 125 S. Ct. at 2215*. But, see also, dicta in *Raich v. Gonzales, et al.*, 500 F.3d. 850, 867 (9th Cir. 2007)(on remand).

[25] The court is requested to take Judicial Notice of the existence of the IND Program.

3. The federal government stifles research into the medical use of cannabis[26].

The 5th Amendment to the Constitution states that "No person shall...be deprived of life, liberty or property without due process of law..." While the 5th amendment does not employ the phrase "equal protection of the laws," equal protection analysis is the same under both the 14th Amendment and the 5th Amendment. *Buckley v. Valeo* (1976) 424 U.S. 1, 93. "In order to state an equal protection claim for unequal or discriminatory enforcement, the party claiming such discrimination must show that persons similarly situated have not been treated same and that decisions were made on basis of unjustifiable standard such as race, religion, or other arbitrary classification...". *Knepp v. Lane* (E.D.Pa.1994) 848 F.Supp. 1217, 1221. These two prongs have also been described as requiring a showing of both discriminatory effect and discriminatory intent. See, e.g., *U.S. v. Olvis* (4th Cir. 1996) 97 F.3d 739.

"A similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced." *United States v. Lewis* (1st Cir.2008) 517 F.3d 20, 27. In considering whether persons are similarly situated for equal protection purposes, a court must examine all relevant factors, including relative culpability, the strength of the case against particular defendants, willingness to cooperate, and the potential impact of a prosecution on related investigations. *United States v. Olvis* (4th Cir.1996) 97 F.3d 739, 744. "[D]efendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors which might justify making different prosecutorial decisions with respect to them." *Id.*

The fact that the federal government seemingly violates its own laws by distributing cannabis to people who it recognizes as patients belies their entire hostile approach to medical cannabis. At some point, the rope holding together the federal government's two positions cannot withstand the strain. The latest move breaks that rope.

[26] The U.S. National Institute on Drug Abuse (NIDA), the agency that oversees 85 percent of the world's research on controlled substances, reaffirmed its longstanding "no medi-pot" policy to The New York Times. "As the National Institute on Drug Abuse, our focus is primarily on the negative consequences of marijuana use," a spokesperson told the paper in 2010. http://www.nytimes.com/2010/01/19/health/policy/19marijuana.html? "We generally do not fund research focused on the potential beneficial medical effects of marijuana." Presently, there are only 14 clinicians licensed by the federal government to work with plant cannabis in FDA-approved clinical trials. That means, that even when/if a protocol is approved by NIDA, one of these 14 licensed entities must also approve else the study could not go forward. See Declaration of Dr. Rick Doblin.

Consider Colorado and the federal position towards that State's medical cannabis laws. Medical cannabis patients in those two states are the same. One the one hand, there are the Plaintiffs, a group of California medical cannabis cooperatives/collectives and their landlords, who have each been threatened with federal law enforcement action. On the other hand, we have every single Medical Marijuana Center (MMC), Optional Premises Cultivator (OPC), Infused Product Manufacturer (IPM) and laboratory in the state of Colorado - not one of which has been individually or collectively threatened by the Department of Justice ("DOJ") or the Colorado US Attorney. Casting aside those Colorado purveyors who are operating outside the bounds of Colorado law, the two groups could not be more similarly situated. The Plaintiff cooperatives in California and the state-licensed facilities Colorado are operating in full compliance with the medical cannabis laws or Attorney General guidelines of their respective states. Both groups provide medical-grade cannabis to patients who have been recommended such medicine by their doctors. Yet inexplicably, only the California cooperatives have been targeted for federal law enforcement action.

Given the great disparity in prosecutorial conduct with regard to California and Colorado medical cannabis cooperatives, it is clear that the actions threatened by the DOJ have treated similar groups differently resulting in a discriminatory effect based on nothing more than geography.

Plaintiffs recognize that "disparate impact alone is not sufficient to establish a violation of [equal protection]." *Adams v. Wainwright* (11th Cir. 1983) 709 F.2d 1443, 1449. "There must also be a showing of intent to discriminate." *Id.* While prosecutorial discretion is broad, "the decision to prosecute may not be deliberately based on an unjustifiable standard such as race, religion, *or other arbitrary classification*." *Wayte v. U.S.* (1985) 470 U.S. 598, 608 (emphasis added). Not only do the DOJ's threats have a clear discriminatory effect by allowing medical cannabis operations to continue unfettered operations in one state while instituting a crackdown on another, there is no plausible basis for this disparity other than mere geography.

"Because direct evidence of discrimination is rarely available, a defendant may use statistical disparities and other indirect evidence to show bias or discriminatory motive." *U.S. v.* Khanu (D.C. Cir. 2009) 664 F.Supp.2d 28, 33. "However, 'statistical proof must present a stark pattern to be accepted as the sole proof of discriminatory intent under the Constitution.' " *Id.*, quoting *McCleskey v. Kemp*, 481 U.S. 279, 293. It is difficult to imagine a more "stark" disparity than zero threats of

prosecution in one state and dozens in another. Plaintiffs are operating in full compliance with California law and the guidelines for medical cannabis set forth by then California Attorney General Jerry Brown in 2008. The State of Colorado received nearly 2000 applications from potential licensees to operate medical cannabis businesses and even though 40% are expected to fail the standards and not receive a license, at least 1000 or more will be able to obtain a license.[27] The US Attorneys in California, however, have arbitrarily decided to impose draconian justice only on the California cannabis cooperatives. This illogical and irrational action is in direct violation of the 5th and 14th Amendments' guarantee of equal protection under the laws.

The DOJ will likely argue that there can be no inference of discrimination against Plaintiffs because the US Attorneys in California acted of their own accord. But the fact is the decision to send out the threatening letters to Plaintiffs and others like them was not merely the choice of the individual US Attorneys in California. This action was coordinated with and ratified and approved by their superiors in Washington, D.C.[28] The DOJ cannot simply claim that the California US Attorneys were acting sua sponte. Rather, this was a coordinated effort by the DOJ to arbitrarily deprive one group of their rights and freedoms under their state's laws, while completely ignoring identical actions in another state.

V. UNDER THE COMMERCE CLAUSE, THE FEDERAL GOVERNMENT CANNOT INTERFERE WITH CALIFORNIA'S MEDICAL CANNABIS PROGRAM

While Plaintiffs acknowledge the binding precedent of *Gonzales v. Raich*, 545 US 1 (2005), it is still difficult to imagine that marijuana grown only in California, pursuant to California state law, and distributed only within California, only to California residents holding state issued licenses, and only for medical purposes, can be subject to federal regulation pursuant to the Commerce Clause. For that reason, Plaintiffs preserve the issue for further Supreme Court review, if necessary and deemed appropriate.

VI. UNDER THE FACTS OF THIS CASE, A PRELIMINARY INJUNCTION IS APPROPRIATE

[27] Moreover, Colorado law, unlike California, allows for cannabis facilities to operate on a *for-profit* basis, which further demonstrates the irrational nature of the US Attorneys' actions.

[28] See http://www.huffingtonpost.com/2011/10/26/obama-administration-medical-marijuana-crackdown-california_n_1033482.html, wherein the spokesperson for Eastern District of California US Attorney Benjamin Wagner stated that their efforts were coordinated with Deputy Attorney General James Cole, who was only not present at the press conference held by the 4 California US Attorneys solely because "California is a long way to travel."

Plaintiffs have demonstrated that they meet each and every standard justifying the issuance of a preliminary injunction. *American Motorcyclist Ass'n v. Watt*, (1983) 714 F.2d 962, 965, *Idaho Sporting Congress v. Alexander*, (2000) 222 F.3d 562, 565; *Topanga Press v. City of Los Angeles*,(1993) 989 F.2d 1524, 1528; *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422. First, based on the numerous arguments presented here, there exists a significant probability of success on the merits by Plaintiffs. The federal government's position as stated publicly in their court filing in the WAMM case, their hypocritical positions towards patients and different states and their irrational failure to acknowledge medical use means that the plaintiffs will prevail in this action. Plaintiffs' conduct is expressly authorized by the sovereign State of California pursuant to powers retained by the State and the People. Plaintiffs are exercising their personal rights and liberties protected and guaranteed under the Fifth, Ninth, Tenth and Fourteenth Amendments. The legal recognition of the use of marijuana for medical purposes has now reached the point where a conclusion can be drawn that the right to use medical marijuana is "fundamental" and "implicit in the concept of ordered liberty." Plaintiffs' conduct, additionally, is the only alternative available to them to avert imminent harm, including, in the case of the patients, starvation or extraordinary suffering.[29]

Second, from any perspective, the balance of hardships tilts sharply in Plaintiffs' favor. A preliminary injunction merely preserving the status quo during the pendency of this matter presents absolutely *no hardship* to Defendants, who would remain perfectly free, at their unfettered discretion, to engage in all other operations, including the deployment of resources toward vigorous prosecution of illicit drug traffickers. In contrast, without the protection of a preliminary injunction, Plaintiff patients are subject to enduring extreme suffering and pain without their medication, ultimately including starvation and death. It is difficult to imagine a more *grievous hardship*.

Third, Plaintiffs have made a strong showing that there is a significant threat of irreparable injury unless the Defendants are enjoined. Unless enjoined by this Court, at Defendants' hands or by

[29] As noted earlier, Plaintiffs' likelihood of success is to be examined in the context of the relative injuries to the parties and the public. The lower the risk of injury to the defendant if the injunction is granted, the lower showing the party must make of likely success on the merits. Moreover, when the moving party has raised a "substantial question" and the equities are otherwise strongly in his or her favor, the showing of success on the merits can be less. *Dataphase Systems. Inc. v. C L Systems, Inc*., 640 F.2d 109, 113 (8th Cir. 1981). Here, the risk to Defendants is low or even non-existent and the constitutional questions raised and the harm to Plaintiffs are substantial. For purposes of the granting of a preliminary injunction, Plaintiffs, thus, need only make a low showing of success on the merits.

their actions, individual plaintiffs who are served by their cooperatives will endure severe pain, spasms, and suffering and, nightmares, flashbacks, overwhelming anxiety, panic, seizures, nausea, life-threatening weight loss, malnutrition, cachexia, and starvation, and possibly other life-threatening problems such as tumors and paralysis -- all constituting irreparably injuries. Furthermore, Defendants' conduct demonstrates a violation of constitutionally protected rights, requiring no further showing of irreparable injury. *Associated Gen. Contractors of Calif.*, 950 F.2d 1401, 1410 (1991); *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Topanga Press*, 989 F.2d at 1528-1529.

Fourth, the public interest strongly favors granting the injunction. There is an undeniable public interest in the availability of a doctor-recommended treatment to ameliorate the medical conditions of the seriously ill Plaintiffs in this action and the federal government's threats toward landlords and cooperatives will directly interfere with the supply chain of this critical medicine. The People and the State of California have, by statute, expressly identified the dominant public interests involved in maintaining and promoting good public health of citizens. Moreover, as noted above, authority to enact public health legislation is a power reserved to the States. See, *e.g Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This is the exact same position taken in litigation by Defendant Ashcroft, himself, as then-Governor of the State of Missouri, and confirmed by the U.S. Supreme Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). "The Constitution created a Federal Government of limited powers. . . . U.S. Const., Amdt. 10. . . . This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society . . . . " *Id.* at 457-8. "Perhaps the principal benefit of the federalist system is a check on abuses of government power. 'The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties."'" *Id.* at 458. Due to the gravity of the consequences here, it is even more important in this case for the Court to enter a preliminary injunction against Defendants in order to "ensure the protection of" Plaintiffs' "fundamental liberties."

CONCLUSION

This Court should preliminarily enjoin Defendants' unconstitutional intrusions, directly and indirectly, into Plaintiffs rights to use cannabis for medical purposes under California's Compassionate Use Act for the relief of pain and suffering pending resolution of the important legal

and constitutional issues presented in this case. Every day that Defendants remain un-enjoined, Plaintiffs face the very real likelihood of reprisal by Defendants with serious and disastrous consequences for Plaintiff patients', landlords and other entities that allows Plaintiffs' to implement the Compassionate Use Act. Furthermore, the legal recognition of the use of marijuana for medical purposes has now reached the constitutional point where a conclusion can be drawn that the right to use medical marijuana is "fundamental" and "implicit in the concept of ordered liberty." Accordingly, this Court should issue its Temporary Restraining Order and, ultimately, grant Plaintiffs' motion for a preliminary injunction.

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