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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN JOSE DIVISION**

17 COUNTY OF SANTA CRUZ, CALIFORNIA;
CITY OF SANTA CRUZ, CALIFORNIA;
18 VALERIE CORRAL; ELADIO V. ACOSTA;
JENNIFER LEE HENTZ; HAROLD F.
19 MARGOLIN; LEVI CASTRO; DOROTHY
GIBBS; JAMES DANIEL BAEHR; MICHAEL
20 CHESLOSKY and WO/MEN’S ALLIANCE
FOR MEDICAL MARIJUANA,

21 Plaintiffs,

22 v.

23 ALBERTO R. GONZALES, Attorney General
24 of the United States; KAREN P. TANDY,
Administrator of the Drug Enforcement
25 Administration; JOHN P. WALTERS, Director of
the Office of National Drug Control Policy; and
26 30 UNKNOWN DRUG ENFORCEMENT
ADMINISTRATION AGENTS,

27 Defendants.
28

Case No.: 03-CV-1802 JF

**SUPPLEMENTAL BRIEF IN
SUPPORT OF PLAINTIFFS’
OPPOSITION TO OFFICIAL-
CAPACITY DEFENDANTS’
MOTION TO DISMISS**

1 **I. INTRODUCTION**

2 Currently before this court is the Official-Capacity Defendants' Motion To Dismiss. This
3 Court deferred its final decision on that motion until the Ninth Circuit issued its ruling in *Raich*
4 *v. Gonzales*, 2007 WL 754759 (9th Cir. Mar. 14, 2007) ("*Raich I*"). The Ninth Circuit rendered
5 its decision on March 14, 2007, and this court granted Plaintiffs leave to file supplemental
6 briefing regarding the impact of *Raich II* on the pending motion to dismiss.

7 While the Ninth Circuit denied all of Angel Raich's remaining claims, *Raich II* does not
8 foreclose Plaintiffs' claims here. Analysis of *Raich II* and comparison of Raich's claims to the
9 Plaintiffs' claims reveals important differences that distinguish this case. Plaintiffs' claims
10 remain meritorious, and the motion to dismiss should be denied.

11 Specifically:

- 12 • First and Second Causes of Action: While the Ninth Circuit in *Raich II* denied
13 Raich's due process claims, the court did not address at all the distinct claim
14 raised in Plaintiffs' Second Cause of Action here, the right to control the
15 circumstances of one's own death. Nor did the *Raich II* court address or foreclose
16 the argument Plaintiffs make here in support of their First Cause of Action, an as-
17 applied due process claim. *See Gonzales v. Carhart*, 550 U.S. --, slip op. at 37-38
18 (Apr. 18, 2007);
- 19 • Third Cause of Action: Plaintiffs' Tenth Amendment claims are both factually
20 and legally distinguishable from those rejected in *Raich II*. Here, Plaintiffs the
21 *City and County of Santa Cruz* raise Tenth Amendment anti-commandeering
22 claims untouched by the Ninth Circuit;
- 23 • Fourth Cause of Action: The decision in *Raich II* did not address Plaintiffs'
24 statutory immunity arguments under 21 U.S.C. §885(d); and,
- 25 • Sixth Cause of Action: While the Ninth Circuit in *Raich II* denied Raich's
26 necessity claim, Plaintiffs here present claims factually and legally distinguishable
27 under the Ninth Circuit's analysis. Unlike Raich, Plaintiffs here have been
28

1 arrested, their medicine has been seized, and they face the immediate prospect of
2 prosecution.

3 Plaintiffs' arguments in opposition to the government's Motion To Dismiss remain
4 meritorious after *Raich II*, and the court should deny the Motion.

5 **II. DISCUSSION**

6 **A. Patient-Plaintiffs May Still Invoke The Doctrine Of Medical Necessity** 7 **After *Raich II* Given The Unique Factual Circumstances Of The 2002** 8 **Raid And Arrests At WAMM's Facilities**

9 The doctrine of medical necessity remains a viable basis for Patient-Plaintiffs' Sixth
10 Cause Of Action following the Ninth Circuit's decision in *Raich II* because of several
11 distinguishing facts. Unlike Plaintiff Angel Raich (who sought prospective injunctive relief pre-
12 arrest), Patient-Plaintiffs seek injunctive relief in the wake of actual arrests and seizures and with
13 the prospect of prosecutions. Plaintiff Valerie Corral was arrested in the September 5, 2002 raid
14 of the WAMM facilities. FAC ¶¶ 55, 57. The statute of limitations for prosecution under a
15 marijuana distribution conspiracy charge based upon this arrest is five years, thus she continues
16 to face prosecution through September of 2007. This fact provides a basis for medical necessity
17 claims. *See United States v. Arnold*, 117 F.3d 1308 (11th Cir. 1997). Moreover, if prosecutors
18 extended this conspiracy theory to severely ill patients participating in the WAMM collective,
19 such prosecution could include Plaintiffs Eladio Acosta, Jennifer Hentz, Harold Margolin, and
20 Levi Castro. This risk of prosecution also extends far beyond the end of the limitations period
21 for charges from the 2002 raid if prosecutors invoked a theory of ongoing conspiracy. *Id.* at
22 1313. Patient-Plaintiffs seek relief from indictment and prosecution under the CSA based upon
23 this arrest because their actions, as alleged, were justified under the doctrine of necessity.

24 *Raich II* is consistent with Patient-Plaintiffs' position in previous briefing that the defense
25 is not necessarily foreclosed to seriously ill patients. Opp'n to Mot. to Dismiss at 24. The
26 *Raich II* court addressed the necessity defense generally, explaining that "[w]e do not believe
27 that the *Oakland Cannabis* dicta abolishes more than a century of common law necessity
28 jurisprudence." *Raich II*, 2007 WL 754759 at *5 n.4. Although the court in *Raich II*
acknowledged that whether the Controlled Substances Act encompasses a legislative

1 “determination of values” is still an unanswered legal question, the holding does not prevent this
2 court from recognizing common law necessity under these factual circumstances, which differ
3 from those addressed by the Supreme Court in *Oakland Cannabis*. *See id.* at *7. The Ninth
4 Circuit rejected Raich's necessity claim because it was not in the “context of a concrete case,”
5 and, thus, it would be impractical to monitor patient status on an ongoing basis to determine
6 whether a prospectively-issued injunction still applied. *Id.* at *7-8.

7 In contrast, Patient-Plaintiffs’ necessity claim is made within the “context of a concrete
8 case.” Drug Enforcement Agency agents arrested Patient-Plaintiffs in a raid and seized
9 marijuana from them, and they continue to be under direct threat of conspiracy charges based
10 upon that raid. Raich, on the other hand, faced no specific threat of arrest, seizure or
11 prosecution. *See, e.g.,* FAC ¶¶ 55-57 (agents seized WAMM patients’ weekly medical
12 marijuana allotments which had been...placed in envelopes labeled with the patients’ names and
13 other private patient information). *Raich II* suggested that a sufficiently concrete action to
14 permit injunctive relief would involve a “criminal prosecution.” *See id.* at *7. As the Supreme
15 Court explained in the context of attachment of Sixth Amendment rights, “[a] criminal
16 prosecution has many stages” and the right may attach “between the time at which the
17 government decides to prosecute a man and has sufficient evidence to proceed against him and
18 the actual time of his arrest or indictment” or “between arrest and indictment, during trial, or
19 between trial and sentencing.” *Dickey v. Florida*, 398 U.S. 30, 43 (1970). Under this definition,
20 Patient-Plaintiffs are involved in a “criminal prosecution.”

21 Furthermore, the problems of oversight and enforcement of an ongoing injunction that
22 the *Raich II* court considered impracticable (*see* 2007 WL 754759 at *7) do not exist here.
23 Unlike Raich, who sought prospective injunctive relief *pre-arrest*, Plaintiffs seek injunctive
24 protection from prosecution following an actual arrest and seizure of marijuana that has already
25 occurred. A court reviewing the merits of Patient-Plaintiffs’ claim need only focus on whether
26 the defense of necessity was met at the time of the events in question, and not speculate about the
27 patients’ future status. The Ninth Circuit in *Raich II* recognized that under circumstances like
28 these, relief from preconviction harm based on common law necessity might indeed be available.

1 *Raich II*, 2007 WL 754759 at *8 n.9.

2 Patient-Plaintiffs’ factual circumstances fit within the Ninth Circuit’s definition of the
 3 “right circumstances” for relief from preconviction harm based on common law necessity. *Id.*
 4 As alleged in their First Amended Complaint, agents seized patients’ weekly allotments of
 5 medical marijuana in the 2002 raid, and Patient-Plaintiffs and other members of WAMM
 6 endured severe trauma after the raid stripped them of access to their medicine. FAC ¶¶ 24, 28,
 7 34, 56. The arrest of Valerie Corral and confiscation of WAMM’s 267 plants caused Patient-
 8 Plaintiffs physical distress and deteriorating health from confiscation of a necessary medicine
 9 and the fear of prosecution. FAC ¶¶ 10, 24, 28.

10 The *Raich II* court also held that an injunction is appropriate in situations such as these
 11 where, in light of the injustice that would otherwise result, the government’s position “would
 12 allow the state to criminalize a protected behavior or condition and cite, arrest, jail, and even
 13 prosecute individuals for violations, so long as no conviction resulted.” *Raich II*, 2007 WL
 14 754759 at *8 n.9 (quoting *Jones v. County of Los Angeles*, 444 F.3d 1118, 1129-31 (9th Cir.
 15 2006)). If Patient-Plaintiffs cannot seek injunctive relief after arrest and seizure, raids such as
 16 the 2002 raid of the WAMM facilities, which created the acute pre-conviction harms discussed
 17 above, could continue unchallenged so long as no subsequent prosecution occurred. These acute
 18 harms would proceed without allowing Patient-Plaintiffs an opportunity to bring their necessity
 19 claims before the court.

20 Patient-Plaintiffs seek the opportunity to demonstrate to the court the compelling factual
 21 basis to apply the necessity doctrine to their claim for injunctive relief. Taking the facts alleged
 22 in the amended complaint as true, Patient-Plaintiffs can satisfy the traditional requirements of the
 23 necessity doctrine. Defendants’ Motion to Dismiss Plaintiff’s Sixth Claim should be denied.

24 **B. The Ninth Circuit’s Tenth Amendment Analysis In *Raich II***
 25 **Should Have Little Bearing On This Court’s Analysis of**
 26 **Plaintiffs’ Distinguishable Tenth Amendment Claims**

27 The City of Santa Cruz, not an individual, brings Plaintiffs’ Third Cause of Action
 28 alleging violations of the Tenth Amendment. Plaintiffs here allege that the federal
 government’s targeted enforcement actions breach the anti-commandeering principles the

1 Supreme Court established in *Printz v. United States*, 521 U.S. 898 (1997) and *New York v.*
2 *United States*, 505 U.S. 144 (1992). In marked contrast, “Raich concedes that . . . [her] case does
3 not implicate the ‘commandeering’ line of cases.” *Raich II*, 2007 WL 754759 at *13. Therefore,
4 the Tenth Amendment claims brought by Plaintiffs -- and, in particular, the City of Santa Cruz --
5 remain meritorious after *Raich II*.

6 California and the City of Santa Cruz have chosen not to criminalize medical marijuana.
7 To implement this policy, the State and local governments use a variety of mechanisms (such as
8 doctors’ recommendations, identification cards, and officially established buyers’ cooperatives)
9 to separate what is legal and illegal under state law. Plaintiffs allege that the federal government
10 has selectively targeted its enforcement efforts to “undermine[] the state by incapacitating the
11 mechanism the state has chosen for separating what is legal from what is illegal under state law.”
12 *Conant v. Walters*, 309 F.3d 629, 645 (9th Cir. 2002) (Kozinski, J. (concurring)). These actions,
13 aimed at preventing the State from distinguishing medical and non-medical marijuana, cross “the
14 line distinguishing encouragement from coercion” and effectively force the state to
15 re-criminalize medical marijuana. *See New York*, 505 U.S. at 175. This is exactly what the
16 Tenth Amendment prohibits. *See id.* at 174-77.

17 This Tenth Amendment claim was not raised or addressed in *Raich II*. Moreover, this
18 claim is fully consistent with the discussion of the Tenth Amendment in *Raich II*. Plaintiffs
19 acknowledge that the CSA itself directly ““does not require the [state legislature] to enact any
20 laws or regulations, and it does not require state officials to assist in the enforcement of federal
21 statutes regulating private individuals.”” *Raich II*, 2007 WL 754759 at *13 n.17 (quoting *Reno v.*
22 *Condon*, 528 U.S. 141 (2000)). Rather than attack the CSA, Plaintiffs bring a Tenth Amendment
23 claim that arises out of the federal government’s targeted -- and improperly coercive --
24 enforcement efforts. This is a fact-intensive claim that should not be dismissed without further
25 opportunity for factual development. *See No. 84 Employer-Teamster Joint Council Pension*
26 *Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 931 (9th Cir. 2003) (“A complaint
27 should not be dismissed unless it appears beyond a doubt that the plaintiff cannot prove any set
28 of facts in support of the claim that would entitle him or her to relief.”).

1 **C. Due Process**

2 In their Second Cause of Action, Plaintiffs allege that Defendants violated their
3 fundamental right to control the circumstances of their own deaths. As Raich did not raise such a
4 claim, the Ninth Circuit did not address its validity in *Raich II*. See 2007 WL 754759 at *10
5 (outlining Raich’s asserted fundamental interest). Plaintiffs, relying on their previously filed
6 briefs, assert that the right to control the circumstances of one’s own death is well established
7 and that this claim should not be dismissed.

8 Further, Defendants’ Motion to Dismiss should be denied as to Patient-Plaintiffs’ First
9 Cause of Action (concerning the right to preserve life, maintain bodily integrity and ameliorate
10 pain). Although the court in *Raich II* denied Angel Raich’s due process claim for injunctive
11 relief, the court focused on the existence of a narrowly defined fundamental right under a
12 *Lawrence v. Texas*, 539 U.S. 558 (2003) or *Washington v. Glucksberg*, 521 U.S. 702 (1997)
13 analysis. However, Plaintiffs do not assert a narrowly defined right to use medical marijuana.
14 See *Raich II*, 2007 WL 754759 at *10 (considering and rejecting such a narrowly defined right).
15 Rather, Plaintiffs rely on the well-established principle that Congress is limited in its authority to
16 interfere with an individual’s general right to protect his or her life and bodily integrity. See,
17 e.g., *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 281 (1990) (“It cannot
18 be disputed that the Due Process Clause protects an interest in life.”); *Planned Parenthood of*
19 *Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992) (noting the importance of protecting
20 “bodily integrity”). Where a patient has no other option for protecting his or her life, he or she
21 may bring an *as applied* challenge to a law prohibiting the necessary treatment. See *Gonzales v.*
22 *Carhart*, 550 U.S. --, slip op. at 37-38 (Apr. 18, 2007)¹; *Stenberg v. Carhart*, 530 U.S. 914, 921
23 (2000). This is exactly what Plaintiffs have done in this case.

24 _____
25
26 ¹ The *Gonzales* majority rejected a *facial* challenge to the Partial-Birth Abortion Ban Act of 2003
27 which prohibited a certain type of post-viability abortion procedure. However, the Court
28 explicitly acknowledged the appropriateness of *as-applied* challenges to such laws, on a case-by-
case basis, by women whose life is threatened by denying them access to the prohibited
procedure. See slip op. at 38.

1 Rather than focusing, as the Ninth Circuit did in *Raich II*, on whether patients have a
 2 narrowly-defined *affirmative fundamental right* to access marijuana for medical purposes,
 3 *Gonzales* and *Stenberg* require an analysis of whether the *government's power to forbid access*
 4 to medical treatment (whether abortion or use of marijuana) must be limited when a patient's life
 5 is at stake. Such a claim is not limited to the abortion context. Importantly, in the abortion
 6 cases, the restriction on government regulation of life saving treatment applies even *after* fetal
 7 viability. *See Stenberg*, 530 U.S. at 930. This means that the restriction is not based on a
 8 woman's privacy right to choose an abortion. *See Planned Parenthood of Southeastern Pa. v.*
 9 *Casey*, 505 U.S. 833, 846 (1992) (plurality opinion) (holding that the right to choose ends at
 10 viability). Instead, the restriction must be based on the separate fundamental right to protect
 11 one's life and bodily integrity. *See id.* This is common sense; other medical patients, no less
 12 than abortion patients, have a fundamental right protect their lives. In other words, the
 13 government cannot prohibit a procedure or treatment when it is *the only alternative* for saving a
 14 persons life. Because the Ninth Circuit did not address this argument in *Raich II*, it is not
 15 foreclosed here. The government's motion to dismiss Plaintiffs' First Cause of Action should
 16 therefore be denied.

17 III. CONCLUSION

18 The Ninth Circuit's decision in *Raich II* was based on a case with critically different
 19 factual circumstances. Unlike *Raich II*, this case arises from an actual raid, which led to actual
 20 arrests and seizures of medicine; it presents the distinct possibility that further arrests, seizures,
 21 and indictments could be forthcoming; and the case is brought, in part, by two municipalities that
 22 allege violations of the Tenth Amendment that were not addressed at all in *Raich II*. Plaintiffs
 23 urge the court to consider these differences and deny the pending Motion to Dismiss.

24
 25 DATED: April 18, 2007

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26
 27 By: /s/

28 Frank Kennamer
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