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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF WASHINGTON
12

13 UNITED STATES OF AMERICA,) CR 13-00024-TOR
14)
15 Plaintiff,) United States' Response to
16) Defendant's Motion to Dismiss
17 v.) and/or Enjoin Prosecution or Other
18) Relief (ECF No. 541)
19 LARRY LESTER HARVEY,)
20)
21 Defendant.)
22)
23)

24 Plaintiff, United States of America, by and through Michael C. Ormsby, United
25 States Attorney for the Eastern District of Washington, and Earl A. Hicks and Caitlin A.
26 Baunsgard, Assistant United States Attorneys for the Eastern District of Washington,
27 submits the following Response to Defendant's Motion to Dismiss and/or Enjoin
28 Prosecution or Other Relief (ECF No. 541).

The Defendant has not provided the Court with a complete statement of the relevant and material facts in this case pertinent to the issues before this Court. The Defendant wants the Court to believe that this case only involves the growing of 74
United States' Response to Defendant's Motion to Dismiss and/or Enjoin Prosecution or Other Relief - 1

1 marijuana plants for medical purposes and that the reason why he and the other
2 defendants are being prosecuted inappropriately by the United States is their collective
3 misunderstanding of the Washington State law involving medical marijuana. *See* the
4 Washington State Medical Use of Cannabis Act, chapter RCW 69. 51A.(hereinafter
5 MUCA) *cf.* *State v. Reis*, No.69911-3-I, 2014 WL 1284863, at*2-* 4 (March 31, 2014)
6 (describing the State of Washington's Marijuana Laws). The Defendant then argues that
7 based upon the recent enactment by Congress that this case should be dismissed or the
8 United States should be enjoined (in effect a dismissal) from further prosecution of the
9 defendants because the United States is interfering with the implementation of the
10 Washington State medical marijuana laws. The Defendant further claims that in order to
11 avoid interference with the implementation of the Washington State medical marijuana
12 laws that the United States should not be allowed to prosecute cases in states where
13 medical marijuana is legal. The Defendant argues that it should be up to the state to
14 determine whether or not there has been a violation of the medical marijuana laws and
15 whether or not the defendants should be prosecuted. The defendant seems to imply that
16 all a person needs to do to avoid federal prosecution for manufacturing marijuana in the
17 state of Washington is to claim that he was manufacturing medical marijuana.
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23 Throughout all the pleadings filed by the defense on behalf of all the defendants
24 there is a perpetually false claim that the defendants were acting lawfully under MUCA.
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28 United States' Response to Defendant's Motion to Dismiss and/or Enjoin Prosecution or
Other Relief - 2

1 The United States contends that the defendants knowingly violated both state and
2 federal law.

3 The United States also submits that in order to be provided the protections of
4 MUCA they must comply with all the terms and conditions of the state law. As part of
5 the 2011 amendments to the medical marijuana statutes in the State of Washington, the
6 legislature created a new method for qualifying patients to manufacture and deliver
7 marijuana: the collective garden. The law provides that two to ten patients may
8 participate in the collective garden and a collective garden with 3 or more patients can
9 grow up to 45 marijuana plants and members may collectively possess up to 72 ounces
10 of marijuana. No marijuana from the collective garden may be delivered to anyone
11 other than one of the qualifying patients participating in the collective garden. Although
12 the section concerning collective gardens does not specifically provide for an
13 affirmative defense, it implies one would be available. Subsection (3) provides that “a
14 person who knowingly violates a provision of this subsection (1) of this section is not
15 entitled to the protections of this chapter.” *See* RCW 69.51A .085 attached as Exhibit A.
16 Possession of marijuana, even in small amounts, is still a crime in the state of
17 Washington. *See* RCW 69.50.4014. *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1, 2010
18 Wash.

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28 United States’ Response to Defendant’s Motion to Dismiss and/or Enjoin Prosecution or
Other Relief - 3

ADDITIONAL MATERIAL FACTS

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2 On August 9, 2012, state law enforcement officers and federal law enforcement
3 officers executed a state search warrant at Defendant's Rhonda Firestack-Harvey and
4 Larry Harvey's residence. During the search of the residence officers discovered
5 marijuana, a scale, packaging material, records of drug transactions and firearms in the
6 den area. They also found processed marijuana in other locations on the property well
7 as a 75 plant marijuana grow on the property. The state officers seized the records and
8 subsequently turned them over to DEA.
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11 When the records were examined law enforcement saw what they will testify is a
12 record of and expenses involving the sales of marijuana in 2011. *See* Exhibit #1 and #1a
13 (Exhibits marked with an A were also found on a computer seized from the Harvey
14 residence during a forensic search of the computer. Not all of the records found on the
15 computer or seized from the residence will be exhibits used in this pleading). Also
16 found was a record that summarized the amount of marijuana bud that was trimmed
17 from the marijuana plants grown in 2011. *See* Exhibits #2 and #2A. This record is not
18 dated although most of the other records are. All the records with dates are dated in the
19 year 2011. The record indicates the name of the trimmer and the amount of marijuana
20 bud he or she trimmed. There is a column indicating the ounces (labeled z) of bud
21 trimmed, a column headed "el" and a column with dollar amounts paid to the trimmers
22 and for some of them the amount of money paid. Based upon simple math it appears
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1 that “el” is shorthand for estimated pounds. The total for this column is over 162
2 pounds. This summary record appears to be a summary of numerous other trimming
3 records when looking at all the records in total. *See* Exhibits #3, 3A, 4, 5, 6, 6A, 7, 8,
4 9A, and 10A. There was also a record indicating that marijuana was sold to other
5 persons. *See* Exhibits #12 and 12A. It appears from a review of all these records that
6 that the defendants possessed more than 72 ounces at one time and that they sold some
7 of this marijuana to people who were not part of any collective garden. It also is
8 apparent that more than 10 people participated in the collective garden based upon the
9 number of identified trimmers. There appear to have been at least 10 trimmers based
10 upon this summary and all the marijuana records in this case. It should be noted that the
11 defense has argued that there are multiple conspiracies because the defendants were
12 required to renew their medical marijuana recommendations each year. This is an
13 indication that they had prior medical marijuana authorizations in effect during 2011.

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18 During the search of the computer numerous photographs were taken of the
19 marijuana grow and the drying of the marijuana. These pictures depict larger than
20 average marijuana plants and contain metadata indicating approximately when the
21 photographs were taken. The metadata indicates that these pictures were put in the
22 computer during 2011. Law enforcement officers familiar with the Harvey property will
23 testify that these are photographs of the Harvey property. *See* Exhibits #13a thru 17A.
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26 There are photographs of the processed marijuana drying in an outbuilding on the

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28 United States’ Response to Defendant’s Motion to Dismiss and/or Enjoin Prosecution or
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1 defendant's property. *See* Exhibits #18A thru 22A. It is clear by looking at the amount
2 of marijuana in the photographs that the defendants substantially exceeded the
3 maximum of 72 ounces for a collective garden.
4

5 Also found during the search warrant and located on the computer was a
6 document indicating “partners” and in an amount advanced to R/L and an amount owed
7 to J/H. *See* Exhibits #11 and 11A. The other 2 initials for the partners are M/R. The
8 United States has information that Defendant, Jason Zucker’s wife’s name begins with
9 the letter H. This document appears to indicate that this is a for profit marijuana illegal
10 business and not a mistaken attempt to follow MUCA. It is clear that the defendants are
11 hiding behind the medical marijuana laws in Washington in order to profit from their
12 manufacture of marijuana. It is clear that they have violated both state and federal law.
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15 **The Consolidated and Further Continuing Appropriations Act of 2015,**
16 **Pub. L. No. 113-235 (2014) is not intended to protect people who**
17 **violate state law.**

18 The FY2015 appropriations bill, called the Consolidated and Further Continuing
19 Appropriations Act of 2015, was signed by President Obama on December 16, 2014.
20 The legislation included a rider that states that no funding allocated under the bill to the
21 Department of Justice can be used to prevent states from implementing their own laws
22 related to medical marijuana. Consolidated and Further Continuing Appropriations Act
23 of 2015, Pub. L. No. 113-235 (2014).
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26 Section 538, Title V of Division B of the bill states the following:
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1 SEC. 538. None of the funds made available in this Act to the Department of
2 Justice may be used, with respect to the States of Alabama, Alaska, Arizona,
3 California, Colorado, Connecticut, Delaware, District of Columbia, Florida,
4 Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan,
5 Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New
6 Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah,
7 Vermont, Washington, and Wisconsin, to prevent such States from implementing
8 their own State laws that authorize the use, distribution, possession, or cultivation
9 of medical marijuana.

10 Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235
11 (2014); available at, <http://www.gpo.gov/fdsys/pkg/BILLS-113hr83enr/html/BILLS-113hr83enr.htm>

12 The provision is the only place in the appropriations bill that mentions the word
13 marijuana. Lawmakers introduced the provision as an amendment in the House in May
14 2014. It passed the House in May 2014. The House amendment was included in the
15 final spending bill in December 2014.

16 Floor statements made by lawmakers in support of the amendment before the law
17 was passed focus on three main issues: (1) preventing federal prosecutions of
18 physicians that prescribe medical marijuana, patients that are prescribed medical
19 marijuana, and distributors of medical marijuana in states that allow medical marijuana;
20 (2) preserving states' rights; and (3) enabling research related to medical marijuana.

21 On December 9, 2014, Rep. Sam Farr (D-Calif.), a co-sponsor of the House
22 amendment, said in a statement on his website that the amendment "prevents the federal
23 government from using funds to arrest and prosecute medical marijuana patients or
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1 distributors who are in compliance with their state’s laws.” Medical Marijuana
2 Amendment Included in Spending Bill, Congressman Sam Farr (Dec. 9, 2014),
3 <http://www.farr.house.gov/index.php/newsroom/press-releases/1122-medical->
4 [marijuana-amendment-included-in-spending-bill](http://www.farr.house.gov/index.php/newsroom/press-releases/1122-medical-) Farr also said the amendment
5
6 “prevents the unnecessary prosecution of patients” *Ibid.* Farr said the amendment
7 was designed to focus federal dollars on “prosecuting criminals and not patients.”
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9 Rohrabacher, Farr Hail Medical Marijuana Amendment in Funding Bill, Congressman
10 Dana Rohrabacher (Dec. 16, 2014), <http://rohrabacher.house.gov/media-center/press->
11 [releases/rohrabacher-farr-hail-medical-marijuana-amendment-in-funding-bill](http://rohrabacher.house.gov/media-center/press-)
12

13 In a statement on the House floor on May 29, 2014, Farr said:

14 This doesn’t affect one law, just lists the States that have already legalized it only
15 for medical purposes, only medical purposes, and says, Federal Government, in
16 those States, in those places, you can’t bust people.

17 160 Cong. Rec. H4914, H4984 (daily ed. May 29, 2014) (statement of Rep. Sam Farr),
18 <http://www.gpo.gov/fdsys/pkg/CREC-2014-05-29/pdf/CREC-2014-05-29.pdf> (p. 72 of
19 pdf)

20 Rep. Dana Titus (D-Nev.), a co-sponsor of the amendment, said on the House
21 floor on May 29, 2014, that the amendment “simply ensures that patients do not have to
22 live in fear when following the laws of their States and the recommendations of their
23 doctors. Physicians in those States will not be prosecuted for prescribing the substance,
24 and local businesses will not be shut down for dispensing the same. 160 Cong. Rec.

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1 H4914, H4984 (daily ed. May 29, 2014) (statement of Rep. Dana Titus),
2 <http://www.gpo.gov/fdsys/pkg/CREC-2014-05-29/pdf/CREC-2014-05-29.pdf> (p. 72 of
3 pdf).

4
5 Rep. Barbara Lee (D-Calif.), another co-sponsor of the amendment, said the
6 purpose of the amendment was to provide “clarity to patients and businesses” in states
7 that “provide safe and legal access to medicine.” 160 Cong. Rec. H4914, H4984 (daily
8 ed. May 29, 2014) (statement of Rep. Barbara Lee),
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10 <http://www.gpo.gov/fdsys/pkg/CREC-2014-05-29/pdf/CREC-2014-05-29.pdf> (p. 72 of
11 pdf).

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13 Lawmakers’ statements about the amendment focus on enabling doctors to
14 prescribe medical marijuana and patients to obtain medical marijuana in compliance
15 with state law. They also mention medical marijuana dispensaries and distributors.
16 They do not focus on medical marijuana growers, and they do not mention the
17 Controlled Substances Act.
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19
20 Rep. Barbara Lee (D-Calif.), a co-sponsor of the amendment, said in a House
21 floor statement on May 29, 2014:

22
23 This amendment will provide much needed clarity to patients and
24 businesses in my home State of California and 31 other jurisdictions that
25 provide safe and legal access to medicine. We should allow for the
26 implementation of the will of the voters to comply with State laws rather
27 than undermining our democracy.

1 In States with medical marijuana laws, patients face uncertainty regarding
2 their treatment, and small business owners who have invested millions
3 creating jobs and revenue have no assurances for the future. *It is past time*
4 *for the Justice Department to stop its unwarranted persecution of medical*
5 *marijuana and put its resources where they are needed.*

6 160 Cong. Rec. at H4984 (statement of Rep. Barbara Lee),
7 <http://www.gpo.gov/fdsys/pkg/CREC-2014-05-29/pdf/CREC-2014-05-29.pdf> (p. 72 of
8 pdf) (emphasis added).

9 Rep. Thomas Massie (R-Ky.), a supporter of the amendment, said on the House
10 floor on May 29, 2014, that the amendment would enable research about the potential
11 of using cannabidiol, an oil that comes from the cannabis plant, to treat epilepsy,
12 autism, and other neurological disorders. He said:

13 We need to remove the roadblocks to these potential medical
14 breakthroughs. This amendment would do that. The Federal Government
15 should not countermand State law. In this case, the absurd result of that is
16 that medical discoveries are being blocked.
17

18 160 Cong. Rec. H4914, H4983 (daily ed. May 29, 2014) (statement of Rep. Thomas
19 Massie), <http://www.gpo.gov/fdsys/pkg/CREC-2014-05-29/pdf/CREC-2014-05-29.pdf>
20 (p. 71 of pdf).

21 Rep. Earl Blumenauer (D-Ore.), another amendment supporter, said:

22 [T]here are a million Americans now with the legal right to medical
23 marijuana as prescribed by a physician. The problem is that the Federal
24 Government is getting in the way. The Federal Government makes it
25 harder for doctors and researchers to be able to do what I think my friend
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1 from Louisiana wants than it is for parents to self-medicate with buying
2 marijuana for a child with violent epilepsy.

3 This amendment is important to get the Federal Government out of the
4 way. Let this process work going forward where we can have respect for
5 states' rights and something that makes a huge difference to hundreds of
6 thousands of people around the country now and more in the future.

7 160 Cong. Rec. at H4984 (statement of Rep. Earl Blumenauer),
8 <http://www.gpo.gov/fdsys/pkg/CREC-2014-05-29/pdf/CREC-2014-05-29.pdf> pp. 72 of
9 pdf).

10 The statements show that amendment supporters were primarily interested in
11 preventing prosecutions of physicians who prescribe medical marijuana and
12 prosecutions of patients who are prescribed medical marijuana in states where such
13 actions are legal, as well as owners of licensed medical marijuana dispensaries. The
14 floor statements do not discuss marijuana growers. The statements briefly touch on
15 medical marijuana dispensaries and distributors, but mainly focus on doctors and
16 patients.
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19 On May 29, 2014, the House voted to approve the amendment. The amendment
20 passed 219-189. <http://clerk.house.gov/evs/2014/roll258.xml> Section 558 of H.R.
21 4660 uses identical language to Section 538 of the final appropriations bill:
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24 Sec. 558. None of the funds made available in this Act to the Department
25 of Justice may be used, with respect to the States of Alabama, Alaska,
26 Arizona, California, Colorado, Connecticut, Delaware, District of
27

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1 Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland,
2 Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana,
3 Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode
4 Island, South Carolina, Tennessee, Utah, Vermont, Washington, and
5 Wisconsin, to prevent such States from implementing their own State laws
6 that authorize the use, distribution, possession, or cultivation of medical
7 marijuana.

8 H.R. 4660, <http://www.gpo.gov/fdsys/pkg/BILLS-113hr4660pcs/pdf/BILLS-113hr4660pcs.pdf>

9 Farr Statement on Rohrabacher-Farr Medical Marijuana Amendment, Congressman
10 Sam Farr (May 30, 2014), <http://www.farr.house.gov/index.php/press-releases/1083-farr-statement-on-rohrabacher-farr-medical-marijuana-amendment> (emphasis added).
11

12 According to the May 30 press release from Farr's office, the amendment was
13 intended to "prevent the federal government from prosecuting medical marijuana
14 patients or distributors who are in compliance with the laws of their state." *Ibid.*
15

16 On December 9, 2014, after Congress included the amendment in the final
17 appropriations bill, Farr's office released a statement. Medical Marijuana Amendment
18 Included in Spending Bill, Congressman Sam Farr (Dec. 9, 2014),
19 [http://www.farr.house.gov/index.php/newsroom/press-releases/1122-medical-](http://www.farr.house.gov/index.php/newsroom/press-releases/1122-medical-marijuana-amendment-included-in-spending-bill)
20 [marijuana-amendment-included-in-spending-bill](http://www.farr.house.gov/index.php/newsroom/press-releases/1122-medical-marijuana-amendment-included-in-spending-bill) Farr's office said that the amendment
21
22 "prevents the federal government from using funds to arrest and prosecute medical
23 marijuana patients or distributors who are in compliance with their state's laws." *Ibid.*
24

25 Farr stated:
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28 United States' Response to Defendant's Motion to Dismiss and/or Enjoin Prosecution or
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1 This is great news for medical marijuana patients all across the country.
2 The public has made it clear that they want common sense drug policies.
3 The majority of states have passed reasonable medical marijuana laws but
4 the federal government still lags behind. Our amendment prevents the
5 unnecessary prosecution of patients while the federal government catches
up with the views of the American people.

6 We need to rethink how we treat medical marijuana in this country and
7 today's announcement is a big step in the right direction. Patients can take
8 comfort knowing they will have safe access to the medical care they need
9 without fear of federal prosecution. And all of us can feel better knowing
our federal dollars will be spent more wisely fighting actual crimes and not
wasted going after patients.

10
11 Ibid.

12 The amendment would require the federal government to respect state
13 sovereignty over medical marijuana, depriving the Department of Justice
14 of taxpayers' dollars to prevent states from carrying out their medical
15 marijuana laws. Thirty-two states and the District of Columbia are listed
16 in the amendment as having legalized marijuana or its ingredients for
medical purposes.

17
18 Ibid.

19 It is clear that there is still a political debate regarding marijuana. This
20 amendment has said nothing about the Controlled Substances Act so it is clear that it is
21 still a violation of federal law to manufacture or distribute marijuana. The new law is
22 intended to help patients and doctors and promote research into the uses of marijuana. It
23 is not intended to protect or shield criminals from federal prosecution. The United
24 States submits that if you are in violation MUCA that you are subject to federal
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28 United States' Response to Defendant's Motion to Dismiss and/or Enjoin Prosecution or
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1 prosecution as well as state prosecution. There is no way that the manufacture of 74
2 marijuana large marijuana plants capable of producing pounds of marijuana bud per
3 plant is lawful under MUCA. There is also no way that the sales of marijuana in 2011
4 or the manufacture of approximately 162 pounds of marijuana or the payment of over
5 \$20,000 to people to trim your marijuana plants is lawful under MUCA. This is clearly
6 a for profit marijuana grow operation and a criminal act by people who are trying to set
7 up an affirmative defense to their crimes under state law.
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10 Washington State Medical Marijuana Law

11 The United States is attaching a copy of the Washington state law regarding
12 Medical Marijuana (now known as Medical Cannabis). This information is available on
13 a public internet site available to the public). *See* Attachment A. This law has
14 previously been implemented by the state and sets out the requirements and authorized
15 amounts of medical marijuana that can be grown and possessed. What is most relevant
16 to the facts of this case is that the defendants were not in compliance with MUCA when
17 they were allegedly growing medical marijuana under Washington State law. The state
18 law only provides them with an affirmative defense if they follow the law. Pursuant to
19 RCWA 69.51A.010 (4)(c) a qualifying patient must be a person who is a resident of the
20 state of Washington who pursuant to RCWA 69.51A.010 (4)(b) has been diagnosed by
21 a health care professional with a terminal or debilitating disease. A person meeting
22 these requirements and the other features of this definition section is then authorized to
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28 United States' Response to Defendant's Motion to Dismiss and/or Enjoin Prosecution or
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1 possess no more than 15 plants and /or 24 ounces of useable marijuana. RCWA
2 69.51A.040 (1)(a) and 1(a)(i). A designated provider can also possess the same amount
3 of marijuana if he meets the definition section. *See* RCWA 69.51A.010 (1). A person
4 who is both a designated provider and a qualifying patient can possess or manufacture
5 30 plants and 48 ounces of useable marijuana. *See* RCWA 69.51A.040 (1)(b).
6

7 The State of Washington authorizes Collective Gardens. *See* RCWA 69.51A.085.
8 Collective gardens can have no more than 10 qualifying patients participating who may
9 participate in a single collective garden at one time and the collective garden cannot
10 contain more than 45 plants and 72 ounces of useable marijuana. *See* RCWA
11 69.51A.085 (1)(a-c). No useable marijuana from the collective garden can be delivered
12 to anyone other than a member of the collective garden. (RCWA 69.51A.085 (1)(e)).
13 This clearly indicates that the distribution or sales of marijuana to persons who are not
14 members of the collective garden is a violation of MUCA. It is also clear that using
15 people in a collective garden who may or may not qualify as medical marijuana patients
16 under MUCA is not in compliance with state law. Nowhere in MUCA does it suggest
17 that people can hire other people and pay them to trim their marijuana plants.
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22 **No Tenth Amendment Violation**

23 The Defendant's motion seems to suggest that if a state has or is developing its
24 medical marijuana laws that the state is the only entity that should be allowed to
25 prosecute alleged violations of the state law involving medical marijuana. The first
26 United States' Response to Defendant's Motion to Dismiss and/or Enjoin Prosecution or
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1 problem with this claim or suggestion is that all anyone has to do is claim that he is
2 growing medical marijuana and then he is shielded from federal prosecution. The
3 second problem is that this suggestion raises Tenth Amendment issues that have already
4 been decided contrary to Defendants' suggestion.
5

6 Claims similar to this have already been presented and rejected by the Supreme
7 Court, the Ninth Circuit and several district judges in the Eastern District of
8 Washington. The Supreme Court has held that, given the Controlled Substance Act's
9 ("CSA's) unequivocal language, "marijuana has 'no currently accepted medical use.'" *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 491 (2001). The
10 Supreme Court has also held that Congress's authority under the Commerce Clause
11 empowers it to prohibit marijuana distribution and possession, even if the prohibited
12 activities are not also illegal under state law. *Gonzales v. Raich* ("Raich I"), 545 U.S. 1
13 (2005). The Ninth Circuit has held that violators of the CSA are not shielded by the
14 Tenth Amendment, nor do they have a fundamental right to use marijuana for claimed
15 medicinal or other purposes. *Raich v. Gonzales* ("Raich II"), 500 F.3d 850 (9th Cir.
16 2007). District court judges in the Eastern District of Washington, following Supreme
17 Court and Ninth Circuit precedent, have denied Motions to Dismiss based on claims of
18 a Tenth Amendment violation, holding that Congress had the power to regulate the
19 interstate market for marijuana and to enact the CSA provision prohibiting the
20 manufacture of marijuana, thus, there can be no violation of the Tenth Amendment. In
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1 addition, district court judges in the Eastern District of Washington have held that CSA
2 does not commandeer state legislatures or state officials. *See United States v. Paul E.*
3 *Ellis*, CR-13-039-JLQ, ECF No. 56 and *United States v. Even Gabriel Barajas-*
4 *Martinez*, CR-12-146-RMP, ECF No. 65. Defendants' baseless attempts to circumvent
5 well-settled law by challenging the government's charging of violations of federal law
6 are without merit and should be denied.
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9 The Tenth Amendment's reservation of powers "to the States, or to the people"
10 expressly excludes those powers "delegated to the United States," which include "those
11 specifically enumerated powers listed in Article I along with the implementation
12 authority granted by the Necessary and Proper Clause." *United States v. Comstock*, 130
13 S. Ct. 1949, 1962 (2010); *see also United States v. Jones*, 231 F.3d 508, 515 (9th Cir.
14 2000) ("[I]f Congress acts under one of its enumerated powers, there can be no
15 violation of the Tenth Amendment."); *New York v. United States*, 505 U.S. 144, 156
16 (1992) (explaining that Congress's authority under Article I and the powers reserved to
17 the states under the Tenth Amendment are "mirror images of each other"). The Ninth
18 Circuit accordingly held in *Raich II*, on remand from the Supreme Court's decision, that
19 the CSA does not violate the Tenth Amendment, even applied to actions relating to
20 "medical marijuana" that would be legal under state law. *Raich II*, 500 F.3d at 867.
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25 The Supreme Court long ago rejected the suggestion that Congress invades areas
26 reserved to the States by the Tenth Amendment simply because it exercises its authority
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1 under the Commerce Clause in a manner that displaces the States' exercise of their
2 police powers. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S.
3 264, 291 (1981); *see also United States v. Jones*, 231 F.3d 508, 515 (9th Cir.2000)
4 (“We have held that if Congress acts under one of its enumerated powers, there can be
5 no violation of the Tenth Amendment.”). Even though “such congressional enactments
6 obviously curtail or prohibit the States' prerogatives to make legislative choices
7 respecting subjects the States may consider important, the Supremacy Clause permits
8 no other result.” *Hodel*, 452 U.S. at 290. Thus, “[i]f a power is delegated to Congress
9 in the Constitution, the Tenth Amendment expressly disclaims any reservation of that
10 power to the States. . . .” *New York v. United States*, 505 U.S. 144, 156 (1992). The fact
11 that the activity may be legal under state law has no import because “[t]he Supremacy
12 Clause unambiguously provides that if there is any conflict between federal and state
13 law, federal law shall prevail.” *Raich I*, 545 at 29.

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18 Not only has Defendant’s Tenth Amendment claim been rejected by the Supreme
19 Court, similar Tenth Amendment arguments have been rejected in other district courts.
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21 *See Turner v. United States*, 2012 WL 3848653 (N.D. Ala. Aug. 30, 2012)
22 reconsideration denied, 2012 WL 6186067 (N.D. Ala. Dec. 7, 2012) (the defendant’s
23 “reliance on Bond to establish a Tenth Amendment claim is misplaced, because in *Bond*
24 the Supreme Court decided that individuals had standing to challenge statutes under the
25 Tenth Amendment, not that any statute at issue in the case was a violation of the Tenth
26

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1 Amendment. No decision of the Supreme Court or [the Eleventh Circuit] supports [the]
2 argument that [Title 18 or 21] violate [] the Tenth Amendment”); *United States v.*
3 *Sanderson*, 2011 WL 6042394 (E.D. Cal. Dec. 5, 2011) (“[e]ven disregarding the
4 procedural bars, defendant's argument lacks merit. Generally speaking, Congress has
5 the power to regulate those purely intrastate activities that, in aggregate, substantially
6 affect interstate commerce”).
7

8
9 Here the United States has not assumed any unenumerated powers by this
10 federal prosecution. In *Gonzales v. Raich*, 545 U.S. 1, 5 (2005), the Supreme Court
11 held that the Commerce Clause grants the federal government authority to regulate,
12 prohibit, and prosecute the production or use of even locally grown marijuana used
13 exclusively for medical purposes. *Raich*, 545 U.S. at 5, 9. Because *Raich* holds that the
14 Constitution affirmatively gives the federal government the power to prosecute the
15 cultivation of marijuana that would otherwise be legal under state law, *Raich* also holds,
16 a fortiori, that this power is not reserved to the states under the Tenth Amendment.
17
18

19 It is well-established under United States Supreme Court authority that “[i]f a
20 power is delegated to Congress in the Constitution, the Tenth Amendment expressly
21 disclaims any reservation of that power to the states.” *New York v. United States*, 505
22 U.S. 144, 156 (1992). Since the power to regulate the interstate possession,
23 manufacturing, and distribution of marijuana “is delegated to Congress” through the
24 Commerce Clause, *Raich I*, 545 U.S. at 15, Defendant’s allegation that the power to
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1 regulate marijuana in Washington was reserved to Washington through the Tenth
2 Amendment is foreclosed by United States Supreme Court precedent. *New York* at
3 156. Thus, what amounts to Defendants' Tenth Amendment challenge should not be
4 considered as a valid basis for the dismissal or injunction of further action on this case.
5

6 **Conclusion**

7 Based upon the above the United States submits that the Defendants' joint motion
8 should be denied.
9

10 DATED January 29, 2015.

11 MICHAEL C. ORMSBY
12 UNITED STATES ATTORNEY

13 *s/Earl A. Hicks* _____
14 Earl A. Hicks
15 Assistant United States Attorney

16 **CERTIFICATION**

17 I hereby certify that on January 29, 2015, I electronically filed the foregoing with
18 the Clerk of the Court and counsel of record using the CM/ECF System.

19 Robert R. Fischer
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23 *s/Earl A. Hicks* _____
24 Earl A. Hicks
25 Assistant United States Attorney
26
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