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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO NONPROFIT COLLECTIVE,)	
dba EL CAMINO WELLNESS CENTER, a)	2:11-cv-02939-GEB-EFB
mutual benefit non-profit)	
collective; RYAN LANDERS, an)	
individual,)	<u>ORDER GRANTING DEFENDANTS'</u>
)	<u>DISMISSAL MOTION*</u>
Plaintiffs,)	
)	
v.)	
)	
ERIC HOLDER, Attorney General of)	
the United States; MICHELLE)	
LEONHART, Administrator of the)	
Drug Enforcement Administration;)	
BENJAMIN B. WAGNER, U.S.)	
Attorney for the Eastern)	
District of California,)	
)	
Defendants.)	
_____)	

The federal defendants, Attorney General of the United States Eric Holder, Administrator of the Drug Enforcement Administration Michelle Leonhart, and the United States Attorney for the Eastern District of California Benjamin Wagner ("Defendants") move for dismissal of Plaintiffs' Complaint under Federal Rule of Civil Procedure ("Rule") 12(b)(6). Defendants argue their motion should be granted since the majority of Plaintiffs' claims have already been rejected by the United

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 States Supreme Court and the Ninth Circuit, and the remaining claims are
2 not actionable. Plaintiffs oppose the motion.

3 **I. 12(b)(6) Standard**

4 Decision on Defendants' Rule 12(b)(6) motion requires
5 determination of "whether the complaint's factual allegations, together
6 with all reasonable inferences, state a plausible claim for relief."
7 Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1054 (9th
8 Cir. 2011) (citing Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937,
9 1949-50 (2009)). "A claim has facial plausibility when the plaintiff
10 pleads factual content that allows the court to draw the reasonable
11 inference that the defendant is liable for the misconduct alleged."
12 Iqbal, 129 S. Ct. at 1949 (citing Bell Atl. Corp. v. Twombly, 550 U.S.
13 544, 556 (2007)).

14 When determining the sufficiency of a claim, "[w]e accept
15 factual allegations in the complaint as true and construe the pleadings
16 in the light most favorable to the non-moving party[; however, this
17 tenet does not apply to] . . . legal conclusions . . . cast in the form
18 of factual allegations." Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir.
19 2011) (internal quotation marks and citations omitted). "Therefore,
20 conclusory allegations of law and unwarranted inferences are
21 insufficient to defeat a motion to dismiss." Id. (internal quotation
22 marks and citation omitted).

23 **II. Requests for Judicial Notice**

24 Defendants include in their motion a request that judicial
25 notice be taken of the criminal indictments and related court documents
26 filed in United States v. Bartkowicz, No. 1:10-cr-00118-PAB (D. Colo.
27 May 5, 2010), and United States v. Do, No. 1:11-cr-00422-REB (D. Colo.
28 Oct. 13, 2011), which are attached to the motion as Exhibits D and E.

1 Judicial notice may be taken "of court filings and other matters of
2 public record[;]" therefore, this request is granted. Reyn's Pasta
3 Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006).
4 Defendants also request that judicial notice be taken of three judicial
5 opinions from other district courts in California. (Defs.' Mot. to
6 Dismiss ("Mot.") Exs. A-C.) "The court does not need to judicially
7 notice the[se] opinion[s] to consider [them]." Thompson v. Residential
8 Credit Solutions, Inc., No. CIV. 2:11-2261 WBS DAD, 2012 WL 260357, at
9 *2 (E.D. Cal. Jan. 26, 2012).

10 Plaintiffs request that judicial notice be taken of a joint
11 stipulation of dismissal and an attachment thereto, which were filed in
12 an unrelated case, County of Santa Cruz v. Ashcroft, No. CV-09-2386-JF
13 (N.D. Cal. Jan. 25, 2010) ("Santa Cruz action"). (Pls.' Request for
14 Judicial Notice ("RJN") Ex. 1; Compl. Ex. 3.) The document attached to
15 the stipulation of dismissal is a memorandum issued by Deputy Attorney
16 General David W. Ogden ("the Ogden Memo") dated October 19, 2009, which
17 states that it "provides clarification and guidance to federal
18 prosecutors in States that have enacted laws authorizing the medical use
19 of marijuana." (Ogden Memo at 1, Pls.' RJN Ex. 1; Pls.' Compl. Ex. 3.)
20 Plaintiffs attached these documents to both their Complaint and their
21 request for judicial notice. Since "[a court] may . . . consider
22 materials that are submitted with and attached to the Complaint" in
23 reviewing a 12(b)(6) motion, these documents are considered. United
24 States v. Corinthian Colleges, 655 F.3d 984, 999 (9th Cir. 2011).

25 Plaintiffs also request that judicial notice be taken of the
26 transcript of proceedings from the October 30, 2009 hearing in the Santa
27 Cruz action, since Plaintiffs' judicial estoppel claim relies on
28 statements made by the Department of Justice at that hearing. (Pls.'s

1 RJN Ex. 2.) "A court may consider evidence on which the complaint
2 necessarily relies if: (1) the complaint refers to the document; (2) the
3 document is central to [Plaintiffs'] claim; and (3) no party questions
4 the authenticity of the copy attached to the 12(b)(6) motion. The court
5 may treat such a document as part of the complaint, and thus may assume
6 that its contents are true for purposes of a motion to dismiss under
7 Rule 12(b)(6)." Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)
8 (internal quotation marks and citations omitted). Since the transcript
9 satisfies these criteria, it will be considered.

10 Plaintiffs also seek judicial notice of the following
11 documents attached to their request for judicial notice: Declaration of
12 Rick Doblin in Support of Plaintiffs' Petition for Temporary Restraining
13 Order/Preliminary Injunction in Conejo Wellness Center Cooperative, Inc.
14 v. Holder, No. CV11-9200 DMG (PJWx) (C.D. Cal. Nov. 8, 2011) (Exhibit
15 3); three online news articles discussing the use of marijuana for
16 medical purposes (Exhibits 4, 5 & 8); Declaration of Paul Armentano in
17 Support of Plaintiffs' Petition for Temporary Restraining
18 Order/Preliminary Injunction in Marin Alliance for Medical Marijuana v.
19 Holder, No. CV 11-5349 DMR (N.D. Cal. Nov. 8, 2011) (Exhibit 6);
20 Declaration of Lester Grinspoon, M.D. in Support of the Brief of the
21 Nat'l Org. for the Reform of Marijuana Laws, et al. as *Amici Curiae*
22 Supporting Respondents, at App. B, Gonzales v. Raich, 545 U.S. 1 (2005)
23 (No. 03-1454) (Exhibit 7); Cannabinoids as Antioxidants and
24 Neuroprotectants, U.S. Patent No. 6,630,507 (filed Oct. 7, 2003)
25 (Exhibit 9); and a print-out from the National Institute on Drug Abuse
26 website providing information on marijuana, printed January 5, 2012
27 (Exhibit 10). Plaintiffs do not refer to these documents in their
28 Complaint and do not explain how the evidence contained in these

1 documents is central to their claims. Marder, 450 F.3d at 448.
2 Therefore, “[these documents] cannot be considered in resolving whether
3 [Plaintiffs] state [claims] upon which relief can be granted without
4 converting the motion to one for summary judgment[.]” Am. Express Travel
5 Related Servs. Co., Inc. v. D & A Corp., No. CV-F-04-6737 OWW/TAG, 2007
6 WL 2462080, at *12 (E.D. Cal. Aug. 28, 2007). However, “[they] may be
7 considered in determining whether . . . amendment [of the Complaint]
8 should be allowed[.]” Id.

9 **III. Background**

10 Plaintiffs are the “Sacramento Nonprofit Collective, doing
11 business as El Camino Wellness Center” (“El Camino Wellness Center”),
12 which Plaintiffs allege “is a medical cannabis [dispensary] made up of
13 patients which operate pursuant to California Health and Safety Code
14 section 11362.775”; and Ryan Landers, “a medical cannabis patient with
15 a California doctor’s recommendation to use medical cannabis.” (Compl.
16 ¶¶ 7-8.) Plaintiffs allege that “in late September and early October
17 2011, the United States Attorneys . . . for each of the four federal
18 districts in California wrote to numerous individuals and entities
19 involved in California’s Medical Marijuana program, alleging that the
20 dispensaries, landlords who rent to the dispensaries, patients and other
21 supporting commercial entities, even though they are fully in compliance
22 with state law, are nonetheless in violation of federal law.” (Compl. ¶
23 17.) Plaintiffs allege that “[s]wift sanctions[, including criminal
24 prosecution, imprisonment, fines, and the forfeiture of assets,] were
25 threatened if those involved did not cease their . . . activities.”
26 (Compl. ¶ 17.) Plaintiffs allege that “[i]t is the threatening actions
27 of these . . . [United States Attorneys] in mounting a comprehensive
28 attack—mainly on all the support systems that any legitimate business

1 needs—that will eviscerate and likely eradicate California’s Medical
2 Marijuana Program.” (Compl. ¶ 19.)

3 Plaintiffs allege that in early October 2011, United States
4 Attorney Benjamin Wagner sent one of these letters to El Camino Wellness
5 Center’s landlord, who is not a party in this case. (Compl. ¶ 7; Compl.
6 Ex. 1.) The letter, which is attached to Plaintiffs’ Complaint as
7 Exhibit 1, states in part:

8 This office has received information that [the
9 property occupied by El Camino Wellness Center] is
10 being used to cultivate and/or distribute marijuana
11 in violation of [the Controlled Substances Act],
12 and that you are an owner, or have management or
13 control, of the property. This letter is formal
14 notice that continued use of the property in
15 violation of federal law may result in forfeiture
16 and criminal or civil penalties. . . . Under
17 federal forfeiture law, the “innocent owner”
18 defense is unavailable to those who know or have
19 reason to know of the illegal use of their
20 property. This letter puts you on notice. It is not
21 a defense to claim the property is providing
22 so-called “medical marijuana.” Congress has
23 determined that marijuana is a dangerous drug, and
24 that the manufacture and distribution of marijuana
25 are serious crimes. . . . Those who allow their
26 property to be used for such activities do so at
27 their peril.

19 (Compl. Ex. 1.)

20 Plaintiffs seek declaratory relief and a permanent injunction
21 that would preclude the United States from enforcing the Controlled
22 Substances Act (“CSA”) against Plaintiffs and third parties in
23 California. (Compl. ¶¶ A-F.) Plaintiffs allege in their Complaint that
24 Defendants’ enforcement of the CSA “violate[s] the Ninth Amendment,”
25 since “[Defendants’] actions threaten” “[t]he plaintiff patients[’]
26 . . . fundamental right[] to bodily integrity” and “their right to
27 consult with their doctors about their bodies.” (Compl. ¶¶ 31-33.)
28 Plaintiffs allege that Defendants’ actions “violate the Tenth

1 Amendment," since Defendants' enforcement of the CSA against California
2 citizens "overturn[s]" California's "primary plenary power to protect
3 the health of its citizens." (Compl. ¶¶ 37-38.) Plaintiffs also allege
4 Defendants' enforcement of the CSA violates the Fourteenth Amendment
5 equal protection clause, since Defendants "unlawfully discriminate[]
6 against medical cannabis patients in California" and have failed to show
7 "a rational basis for [Defendants'] recent effort to end the supply of
8 medical cannabis to qualified patients in California." (Compl. ¶¶
9 41-42.) Finally, Plaintiffs allege the doctrines of judicial estoppel
10 and equitable estoppel preclude Defendants from enforcing the CSA, since
11 Defendants' actions are contrary to the enforcement policy Defendants
12 announced in the Ogden Memo. (Compl. ¶¶ 20-28.)

13 **IV. Discussion**

14 **A. Commerce Clause**

15 Defendants argue "Plaintiffs' Commerce Clause . . . claim[]
16 [is] plainly foreclosed by the binding precedent and reasoning of
17 [Gonzales v. Raich ('Raich I'), 545 U.S. 1 (2005)]." (Mot. 9:3-4.) In
18 Raich I, the United States Supreme Court held that the "CSA's
19 categorical prohibition of the manufacture and possession of marijuana
20 as applied to the intrastate manufacture and possession of marijuana for
21 medical purposes pursuant to California law [does not] exceed[]
22 Congress' authority under the Commerce Clause." 545 U.S. at 9, 15.
23 Therefore, Plaintiffs' Commerce Clause claim is foreclosed by United
24 States Supreme Court precedent and is dismissed.

25 **B. Tenth Amendment**

26 Defendants argue Plaintiffs' Tenth Amendment claim is "plainly
27 foreclosed by the binding precedent and reasoning of . . . [Raich v.
28 Gonzales ('Raich II'), 500 F.3d 850 (9th Cir. 2007),]" (Mot. 9:3-5), in

1 which the Ninth Circuit stated that "after [Raich I], it would seem that
2 there can be no Tenth Amendment violation in this case." Raich II, 500
3 F.3d at 867. Plaintiffs counter that the language in Raich II on which
4 Defendants rely is dicta and the Ninth Circuit "never decided th[e]
5 ultimate issue." (Pls.' Opp'n ("Opp'n") 17:19-20.)

6 However, it is well-established under United States Supreme
7 Court authority that "[i]f a power is delegated to Congress in the
8 Constitution, the Tenth Amendment expressly disclaims any reservation of
9 that power to the States." New York v. United States, 505 U.S. 144, 156
10 (1992). Since the power to regulate the intrastate possession,
11 manufacturing, and distribution of marijuana "is delegated to Congress"
12 through the Commerce Clause, Raich I, 545 U.S. at 15, Plaintiffs'
13 allegation that the power to regulate marijuana in California was
14 reserved to California through the Tenth Amendment is foreclosed by
15 United States Supreme Court precedent. New York, 505 U.S. at 156.
16 Therefore, Plaintiffs' Tenth Amendment claim is dismissed.

17 **C. Ninth Amendment**

18 Defendants argue Plaintiffs' Ninth Amendment claim should be
19 dismissed since "the Ninth Amendment does not independently secure any
20 judicially-enforceable constitutional rights." (Mot. 9:16-17 (citing
21 Schwenkerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991)).)
22 Further, Defendants argue even if Plaintiffs' Ninth Amendment claim is
23 "construed as a substantive due process claim under the Ninth and Fifth
24 Amendments collectively," the claim is foreclosed by "this Circuit's
25 precedent" in Raich II. (Mot. 9:18-20.) Defendants argue in Raich II the
26 Ninth Circuit "considered the Ninth . . . Amendment[] in addressing
27 whether there is a [fundamental or] substantive due process right to use
28

1 marijuana for claimed medical purposes, and it held that no such right
2 exists.” (Mot. 9:21-23 (citing Raich II, 500 F.3d at 861-62).)

3 Plaintiffs counter that in Raich II, “the Ninth Circuit
4 invite[d] [the district courts] to . . . recognize [a fundamental right
5 to use cannabis to alleviate pain and suffering].” (Opp’n 16:8-9,
6 16:15.) Plaintiffs also argue in footnotes in their opposition brief
7 that seventeen states have enacted laws that legalize the medical use of
8 marijuana and six states have similar legislation pending. (Opp’n 15 n.8
9 & 16 n.9.)

10 In the Ninth Circuit’s 2007 Raich II decision:

11 Raich argue[d] that the last ten years have been
12 characterized by an emerging awareness of
13 marijuana’s medical value. [Raich] contend[ed] that
14 the rising number of states that have passed laws
15 that permit medical use of marijuana or recognize
16 its therapeutic value is additional evidence that
17 the right is fundamental. Raich aver[red] that the
18 asserted right in [Raich II] should be protected on
19 the emerging awareness model that the Supreme Court
20 used in Lawrence v. Texas, 539 U.S. [558, 571
21 (2003).]

22 500 F.3d at 865. The Ninth Circuit responded to Raich in pertinent part,
23 as follows:

24 We agree with Raich that medical and conventional
25 wisdom that recognizes the use of marijuana for
26 medical purposes is gaining traction in the law as
27 well. But that legal recognition has not yet
28 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.' For the time being, this issue
remains in 'the arena of public debate and
legislative action. . . . 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. Until that day arrives,
federal law does not recognize a fundamental right
to use medical marijuana prescribed by a licensed

1 physician to alleviate excruciating pain and human
2 suffering.

3 Raich II, 500 F.3d at 866 (internal citations omitted).

4 Plaintiffs indicate in their argument that the day referenced
5 in Raich II on which a federal court recognizes their asserted
6 fundamental Ninth Amendment right to obtain and use medical marijuana
7 has emerged because the number of jurisdictions that have medical
8 marijuana laws has increased since Raich II was decided. (Opp'n 13:4-
9 17:6.)

10 Although the number of jurisdictions that have
11 medical marijuana laws has increased [since Raich
12 II was decided] . . . , the fact remains that the
13 majority of states do not recognize the right to
14 use marijuana for medicinal purposes. Moreover, as
15 to those states that have not legalized medical
16 marijuana, there is no allegation or evidence of a
17 pattern of non-enforcement of laws proscribing its
18 use. Finally—and significantly—it is difficult to
19 reconcile the purported existence of a fundamental
20 right to use marijuana for medical reasons with
21 Congress' pronouncement that "for purposes of the
22 [CSA], marijuana has no currently accepted medical
23 use at all."

24 Marin Alliance for Med. Marijuana v. Holder, --- F. Supp. 2d ----, 2011
25 WL 5914031, at *11 (N.D. Cal. Nov. 28, 2011) (quoting United States v.
26 Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001)); cf. United
27 States v. Fogarty, 692 F.2d 542, 548 (8th Cir. 1982) ("[I]t should be
28 noted that under Section 811 [of the CSA,] Congress has provided a
comprehensive reclassification scheme, authorizing the Attorney General
to reclassify marijuana in view of new scientific evidence."); Krumm v.
Holder, No. CIV 08-1056 JB/WDS, 2009 WL 1563381, at *10 (D.N.M. May 27,
2009) (stating that "a scheduling decision is not a legal determination
that an Article III court is qualified to make without an administrative
record to review[; and w]hat states attempt to do with their medical

1 marijuana laws may be helpful to the [Drug Enforcement Agency] in making
2 its decisions, but the states' actions do not eliminate the need for the
3 complex inquiry that Congress has required for drug scheduling
4 changes").

5 Defendants also argue that "given the posture of this
6 matter—where a marijuana dispensary is challenging a threatened
7 enforcement action against its landlord and not against any individual's
8 marijuana use—Plaintiffs' actual [argument] appears to be that
9 individuals have a right to access marijuana for medical purposes via
10 dispensaries such as the El Camino Wellness Center." (Mot. 12:12-15
11 (emphasis in original).) Defendants argue:

12 Such a right would extend well beyond the right
13 considered (only to be rejected) in Raich II, where
14 the court evaluated the right to use medical
15 marijuana. The two concepts are not synonymous.
16 Even if there were some narrow right to privately
17 use marijuana for medical purposes - and no court
18 has ever found one - the recognition of such a
19 right would not equate to the right of access to
20 marijuana through the Plaintiff dispensary or the
21 right to immunity from eviction or other measures.
22 Cf. Carey v. Population Servs., 431 U.S. 678, 687
23 (1977) (distinguishing the right to "use"
24 contraceptives identified in Griswold v.
25 Connecticut, 381 U.S. 479 (1965), from the right of
26 access, though recognizing that subsequent
27 jurisprudence had broadened the specific rights
28 related to childbearing).

21 (Mot. 12:15-23 (emphasis in original).) Essentially, as the Defendants
22 contend, the referenced right on which Plaintiffs rely is a "right of
23 availability" or "right of access" to a non-federally approved Schedule
24 I controlled substance. Neither Plaintiffs' allegations in their
25 Complaint nor arguments in their opposition brief support Plaintiffs'
26 conclusory contention that these rights exist under federal law.

27 As the United States Supreme Court stated in United Public
28 Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 95-96 (1947):

1 The powers granted by the Constitution to the
2 Federal Government are subtracted from the totality
3 of sovereignty originally in the states and the
4 people. Therefore, when objection is made that the
5 exercise of a federal power infringes upon rights
6 reserved by the Ninth . . . Amendment[], the
inquiry must be directed toward the granted power
under which the action . . . was taken. If granted
power is found, necessarily the objection of
invasion of . . . rights, reserved by the Ninth
. . . Amendment[], must fail.

7 Since the Supreme Court has held that the CSA's categorical prohibition
8 of the possession, manufacturing, and distribution of marijuana does not
9 exceed Congress' authority under the Commerce Clause, Plaintiffs do not
10 have a viable Ninth Amendment claim. See *Raich I*, 545 U.S. at 9, 15
11 (upholding Congress's authority under the Commerce Clause to regulate
12 intrastate possession, manufacturing, and distribution of marijuana).
13 Therefore, Plaintiffs' Ninth Amendment claim is dismissed.

14 **D. Equal Protection**

15 Defendants argue Plaintiffs' Fourteenth Amendment claim should
16 be dismissed, since "Plaintiffs have failed to . . . articulat[e] a
17 prima facie equal protection claim." (Mot. 20:10-11.) For purposes of
18 this motion, Plaintiffs' Fourteenth Amendment claim is construed as a
19 Fifth Amendment equal protection claim, since "[t]he Fourteenth
20 Amendment applies to actions by a State." *San Francisco Arts &*
21 *Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987).
22 "The Fifth Amendment, however, does apply to the Federal Government and
23 contains an equal protection component. Equal protection analysis in the
24 Fifth Amendment area is the same as that under the Fourteenth
25 Amendment." *Cecelia Packing Corp. v. U.S. Dep't of Agric.*, 10 F.3d 616,
26 623 (9th Cir. 1993) (internal quotation marks and citations omitted).

27 "Equal protection under the Fifth Amendment . . . entrenches
28 a right to be free from discrimination based on impermissible statutory

1 classifications and other governmental action." Doe v. United States,
2 419 F.3d 1058, 1062 (9th Cir. 2005) (internal citation omitted). "The
3 first step in equal protection analysis is to identify the [Defendants']
4 classification of groups. To accomplish this, [Plaintiffs] can show that
5 the law is applied in a discriminatory manner or imposes different
6 burdens on different classes of people." Freeman v. City of Santa Ana,
7 68 F.3d 1180, 1187 (9th Cir. 1995) (internal quotation marks and
8 citations omitted). To establish selective prosecution based on the
9 classification, Plaintiffs "must show that others similarly situated
10 have not been prosecuted and that the prosecution is based on an
11 impermissible motive." Id. (internal quotation marks and citation
12 omitted). Further, "'the conscious exercise of some selectivity in
13 enforcement is not in itself a federal constitutional violation' so long
14 as 'the selection was [not] deliberately based upon an unjustifiable
15 standard such as race, religion, or other arbitrary classification.'" Bordenkircher v. Hayes,
16 434 U.S. 357, 364 (1978) (quoting Oyler v.
17 Boles, 368 U.S. 448, 456 (1962)).

18 Here, Plaintiffs allege that Defendants enforce the CSA
19 against medical marijuana patients and dispensaries in California, but
20 do not enforce it against individuals who receive medical marijuana
21 through federally approved "investigational new drug" ("IND") programs
22 or against medical marijuana patients or dispensaries in Colorado.
23 (Compl. ¶ 41.) Defendants argue that individuals who participate in IND
24 programs are not "similarly situated" to Plaintiffs, since "[t]he CSA
25 expressly allows marijuana use in connection with research projects
26 funded by the federal government." (Mot. 20:13-16 (citing 21 U.S.C. §
27 823(f).)

1 "A similarly situated offender is one outside the protected
2 class who has committed roughly the same crime under roughly the same
3 circumstances but against whom the law has not been enforced." United
4 States v. Lewis, 517 F.3d 20, 27 (1st Cir. 2008) (citing United States
5 v. Armstrong, 517 U.S. 456, 469 (1996)). Since the possession and
6 distribution of marijuana in conjunction with IND programs does not
7 violate the CSA, participants in IND programs are not similarly situated
8 to Plaintiffs.

9 Defendants also argue Plaintiffs do not have a viable equal
10 protection claim "based on the alleged level of enforcement in
11 [Colorado]." (Mot. 21:1-2.) The judicially noticed documents evince that
12 Defendants have prosecuted medical marijuana patients and dispensaries
13 in Colorado under the CSA, even though the medical marijuana patients
14 and dispensaries claimed to be in compliance with Colorado's medical
15 marijuana law. (United States v. Bartkowicz, No. 1:10-cr-00118-PAB (D.
16 Colo. May 5, 2010), attached as Ex. D to Defs.' Mot.; United States v.
17 Do, No. 1:11-cr-00422-REB (D. Colo. Oct. 13, 2011), attached as Ex. E to
18 Defs.' Mot.) Therefore, Plaintiffs' allegation that Defendants prosecute
19 medical marijuana patients and dispensaries in California but not those
20 in Colorado is belied by evidence showing that Defendants have enforced
21 the CSA against similarly situated individuals in Colorado.

22 Plaintiffs argue in their opposition that Defendants'
23 "briefing regarding equal protection focuses primarily on one component
24 identified in the complaint, relating to selective prosecution[;]"
25 however, "[e]qual protection is a broader concept." (Opp'n at 18 n.10.)
26 Plaintiffs further argue in their opposition that "there is no rational
27 basis to classify cannabis as having no medical value" and "the CSA's
28 prohibition against medical use in compliance with State law is

1 invidious discrimination as applied to patients generally that use
2 cannabis to resolve illnesses and health problems versus patients who
3 use other drugs to do the same thing.” (Opp’n 20:24-21:2.) However,
4 Plaintiffs’ equal protection challenge to the classification of
5 marijuana as a Schedule I drug under the CSA is foreclosed by Ninth
6 Circuit precedent, since “[t]he constitutionality of marijuana laws has
7 been settled adversely to [Plaintiffs] in this circuit.” United States
8 v. Miroyan, 577 F.2d 489, 495 (9th Cir. 1978) (internal quotation marks
9 and citation omitted); see Raich I, 454 U.S. at 9 (upholding federal
10 regulation of intrastate medical marijuana); Fogarty, 692 F.2d at 547
11 (“[W]e conclude that [defendant] has not met his heavy burden of proving
12 the irrationality of the Schedule I classification of marijuana.”). For
13 the stated reasons, Plaintiffs do not have a viable equal protection
14 claim, and this claim is dismissed.

15 **E. Judicial Estoppel and Equitable Estoppel**

16 Defendants argue Plaintiffs cannot state viable judicial
17 estoppel and equitable estoppel claims, since these claims rely on the
18 Ogden Memo, which supports neither claim. (Mot. 15:16-18:11.) Both
19 claims are premised on allegations that the Ogden Memo contains the
20 Department of Justice’s “pledge[] not to use federal resources against
21 [medical marijuana] patients [who] [are] in compliance with state law”
22 and that Defendants’ enforcement of the CSA violates that pledge.
23 (Compl. ¶ 21.) Plaintiffs allege in their judicial estoppel claim that
24 Defendants’ “recent crackdown . . . against medical cannabis patients
25 flouts the representations made on the record by the Department of
26 Justice” in the Santa Cruz action about Defendants’ non-enforcement
27 policy of the CSA. (Compl. ¶ 22.) Plaintiffs allege in their equitable
28 estoppel claim that “patients[,] their cooperatives[,] and the landlords

1 of these cooperatives . . . reasonably relied on [the Ogden Memo] to
2 operate or continue to operate medical cannabis facilities or, in the
3 case of landlords, to lease their properties . . . to patient
4 cooperatives which were in compliance with California state law," but
5 now Defendants threaten to prosecute them under the CSA. (Compl. ¶ 26.)

6 Defendants counter: "Plaintiffs are simply incorrect in
7 asserting that the Department has ever issued a promise or guarantee in
8 any prior judicial proceeding that the CSA would never be enforced
9 against marijuana distributors or their landlords simply because they
10 claim to comply with state law." (Mot. 16:17-19; Defs.' Reply 6:20-23.)

11 In the . . . Ogden Memo, the Department of Justice
12 communicated to its attorneys that certain
13 marijuana users and providers would be a lower
14 priority for prosecution than others. For example,
15 "[I]ndividuals with cancer or other serious
16 illnesses who use marijuana as part of a
17 recommended treatment regimen consistent with
18 applicable state law, or those caregivers in clear
19 and unambiguous compliance with existing state law
20 who provide such individuals with marijuana," would
21 be a lower priority than "large-scale criminal
22 enterprises, gangs, and cartels." But the
23 Department also made clear that it did not intend
24 to "legalize" marijuana (nor could it). The Ogden
25 Memo states, for instance:

19 The Department of Justice is committed to the
20 enforcement of the Controlled Substances Act
21 in all states. This guidance regarding
22 resource allocation does not "legalize"
23 marijuana or provide a legal defense to a
24 violation of federal law, nor is it intended
25 to create any privileges, benefits, or rights,
26 substantive or procedural, enforceable by any
27 individual, party or witness in any
28 administrative, civil, or criminal matter. Nor
does clear and unambiguous compliance with
state law . . . create a legal defense to a
violation of the Controlled Substances Act.

26 A reasonable person, having read the entirety of
27 the Ogden Memo, could not conclude that the federal
28 government was somehow authorizing the production
and consumption of marijuana for medical purposes.
Any suggestion to the contrary defies the plain
language of the Memo.

1 Mont. Caregivers Ass'n, LLC v. United States, --- F. Supp. 2d ----, 2012
2 WL 169771, at *1-2 (D. Mont. Jan. 20, 2012) (internal citations
3 omitted.)

4 Since judicial estoppel does not apply unless "a party's later
5 position [is] 'clearly inconsistent' with its earlier position," and the
6 Ogden Memo does not contain a promise not to enforce the CSA,
7 Defendants' enforcement of the CSA is not inconsistent with the
8 enforcement policy stated in the Ogden Memo. *New Hampshire v. Maine*, 532
9 U.S. 742, 750 (2001) (citations omitted). Therefore, Plaintiffs fail to
10 state a viable judicial estoppel claim based on the Ogden Memo.

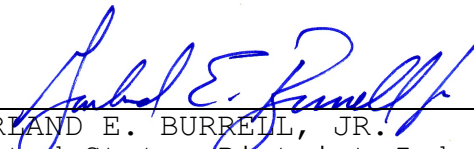
11 Plaintiffs argue in their opposition that their judicial
12 estoppel claim is also based on representations that Department of
13 Justice attorneys made at the October 30, 2009 hearing in the Santa Cruz
14 action, which Plaintiffs argue "are far stronger than the actual
15 language in the [Ogden Memo]." (Opp'n 8:25-27.) However, the transcript
16 of that hearing demonstrates that the Department of Justice did not make
17 representations about non-enforcement of the CSA beyond what is stated
18 in the Ogden Memo. (Pls.' RJN Ex. 2.) Therefore, Plaintiffs do not state
19 a viable judicial estoppel claim based on the Ogden Memo or the
20 Department of Justice's representations at the hearing in the Santa Cruz
21 action, and this claim is dismissed.

22 Nor have Plaintiffs supported any other equitable estoppel
23 contention they assert with factual allegations sufficient to preclude
24 Defendants from enforcing the CSA. Before the government may be
25 equitably estopped, the movant for estoppel "must establish that the
26 government engaged in affirmative misconduct, and that the government's
27 conduct has caused a serious injustice." United States v. Bell, 602 F.3d
28 1074, 1082 (9th Cir. 2010) (internal quotation marks and citation

1 omitted). Further, "affirmative misconduct requires an affirmative
2 misrepresentation[.]" Id. (internal quotation marks and citation
3 omitted). Plaintiffs have not made this showing. Therefore, Plaintiffs'
4 equitable estoppel claim is not actionable and is dismissed.

5 For the stated reasons, all of Plaintiffs' claims have been
6 dismissed. However, Plaintiffs request leave to file an amended
7 Complaint. (Opp'n 21:16.) This request is denied, since it is evident
8 that Plaintiffs' claims are foreclosed by United States Supreme Court or
9 Ninth Circuit precedent, or other authority cited in this Order.
10 Further, neither Plaintiffs' arguments nor the documents they submitted
11 in support of their claims evince that Plaintiffs could allege an
12 actionable claim even if they were given opportunity to amend their
13 Complaint. Since "any amendment would be futile, there [i]s no need to
14 prolong the litigation by permitting . . . amendment." Lipton v.
15 Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir. 2002). Therefore,
16 Plaintiffs' Complaint is dismissed with prejudice, and judgment shall be
17 entered in favor of Defendants.

18 Dated: February 28, 2012

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22 GARLAND E. BURRELL, JR.
23 United States District Judge
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