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6 NOT FOR CITATION
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9 SAN JOSE DIVISION
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11 COUNTY OF SANTA CRUZ, et al.,
12 Plaintiffs,
13 v.
14 ALBERTO GONZALES, Attorney General of the
15 United States, et al.,
16 Defendants.

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

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18 Plaintiffs allege that the federal government has a plan to force states to repeal laws
19 permitting medical use of marijuana.² The operative pleading in this action, Plaintiffs' Second
20 Amended Complaint ("SAC") asserts claims for: (1) violation of fundamental rights secured by
21 the Fifth and Ninth Amendments;³ (2) deprivation of the fundamental right to control the
22 circumstances of one's own death; (3) violation of the Tenth Amendment; (4) immunity of local
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24 ¹ This disposition is not designated for publication and may not be cited.

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

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

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

5 I. BACKGROUND⁴

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

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

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

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

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

3 II. LEGAL STANDARD

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

15 III. DISCUSSION

16 1. Third Claim

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

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

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

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

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

23 The state relies on the recommendation of a state-licensed physician to define the
24 line between legal and illegal marijuana use. The federal government’s policy
25 deliberately undermines the state by incapacitating the mechanism the state has
26 chosen for separating what is legal from what is illegal under state law. Normally,
27 of course, this would not be a problem, because where state and federal law
28 collide, federal law wins. . . .

. . . Applied to our situation, this means that, much as the federal government may
prefer that California keep medical marijuana illegal, it cannot force the state to
do so. Yet the effect of the federal government’s policy is precisely that: By
precluding doctors, on pain of losing their DEA registration, from making a
recommendation that would legalize the patients’ conduct under state law, the

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

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


17 **2. Fifth Claim**

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

20 **IV. ORDER**

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

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25 DATED: August 19, 2008

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27 
28 JEREMY FOGEL
United States District Judge

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