

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

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4
5 UNITED STATES OF AMERICA,
6 Plaintiff,

No. CR-13-24-FVS

7 v.

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS THE
INDICTMENT UNDER THE
TENTH AMENDMENT

8
9 RHONDA FIRESTACK-HARVEY, LARRY
10 HARVEY, MICHELLE GREGG, ROLLAND
11 GREGG, and JASON ZUCKER,
Defendants.

12
13 **THE DEFENDANTS** have filed a number of motions. The Court
14 considered their motions at a pretrial conference that was held on
15 April 22 and 23, 2014. This order addresses the defendants' motion to
16 dismiss the Indictment under the Tenth Amendment.

17 **BACKGROUND**

18 In 1971, the State of Washington adopted the Uniform Controlled
19 Substances Act, chapter 69.50 RCW. *State v. Reis*, No. 69911-3-I, 2014
20 WL 1284863, at *2 (March 31, 2014). Since then, marijuana has been a
21 Schedule I controlled substance as a matter of state law. *Reis*, 2014
22 WL 1284863, at *2 (citing RCW 69.50.204(c)(22)). In 1998, the
23 citizens of the state adopted the Washington State Medical Use of
24 Cannabis Act ("MUCA"), chapter RCW 69.51A, through the initiative
25 process. *Reis*, 2014 WL 1284863, at *2. As Division I of the
26 Washington Court of Appeals explained in *Reis*, the purpose of the MUCA

1 "was to allow certain individuals suffering from terminal or
2 debilitating medical conditions to use marijuana medicinally." 2014
3 WL 1284863, at *2 (citing RCW 69.51A.005). In 2011, the Washington
4 legislature passed amendments to the MUCA. *Id.* at *3. However, the
5 governor vetoed a number of provisions. *Id.* at *4. The Supreme Court
6 of the State of Washington has not interpreted the MUCA in light of
7 the governor's veto. Thus, it is not entirely clear to what extent
8 the MUCA limits prosecutions under the state Controlled Substances
9 Act.

10 On August 9, 2012, law enforcement officers executed a warrant
11 that had been issued by a state judicial officer authorizing them to
12 search 939 Clugston-Onion Creek Road, Colville, WA. A federal agent
13 participated in the search. The officers observed approximately 70
14 growing marijuana plants. According to the defendants, the persons
15 who were growing the plants were attempting to comply with the state
16 MUCA. The officers seized some of the marijuana plants they observed
17 on August 9th, but they left many of the plants just as they found
18 them. On August 16, 2012, federal agents executed a warrant that had
19 been issued by a federal judicial officer authorizing them to search
20 the same property. They seized all of the marijuana plants they
21 observed.

22 On February 6, 2013, a federal grand jury returned an indictment
23 charging the defendants with violations of federal law. The
24 defendants move to dismiss the indictment. They claim the instant
25 prosecution violates the Tenth Amendment. For one thing, they argue
26 the prosecution is a federal attempt to coerce state authorities into

1 enforcing the federal Controlled Substances Act ("CSA"), 21 U.S.C. §
2 801 *et seq.* For another thing, they argue the prosecution is a
3 federal attempt to discourage the State of Washington from legalizing
4 the possession of marijuana for medical purposes.

5 **RULING**

6 The Tenth Amendment states, "The powers not delegated to the
7 United States by the Constitution, nor prohibited by it to the States,
8 are reserved to the States respectively, or to the people." U.S.
9 Const. amend. X. "The Supreme Court has read this Amendment as a
10 'tautology': 'If a power is delegated to Congress in the
11 Constitution, the Tenth Amendment expressly disclaims any reservation
12 of that power to the States.'" *Gila River Indian Community v. United*
13 *States*, 729 F.3d 1139, 1153 (9th Cir. 2013) (quoting *New York v.*
14 *United States*, 505 U.S. 144, 156-57, 112 S.Ct. 2408, 120 L.Ed.2d 120
15 (1992)). However, "even where Congress has the authority under the
16 Constitution to pass laws requiring or prohibiting certain acts, it
17 lacks the power directly to compel the States to require or prohibit
18 those acts." *New York v. United States*, 505 U.S. 144, 166, 112 S.Ct.
19 2408, 120 L.Ed.2d 120 (1992). For example, Congress may not command
20 state officers to administer federal regulatory programs. *Raich v.*
21 *Gonzales*, 500 F.3d 850, 867 n.17 (9th Cir.2007) (citing *Printz v.*
22 *United States*, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914
23 (1997), and *New York v. United States*, 505 U.S. 144, 166, 112 S.Ct.
24 2408, 120 L.Ed.2d 120 (1992)). Nor may Congress compel states to
25 adopt specific legislation. *Id.* The defendants argue the instant
26 prosecution runs afoul of the Tenth Amendment.

1 The Ninth Circuit has considered and rejected similar arguments
2 on a number of occasions. The circuit court's decision in *Raich v.*
3 *Gonzales, supra*, is a useful place to begin. In that case, a
4 seriously ill woman whose symptoms were ameliorated by the use of
5 marijuana brought an action seeking, in effect, to enjoin federal law
6 enforcement agencies from enforcing the CSA against her. 500 F.3d at
7 855-56. She sought relief upon several grounds. Among other things,
8 she argued, "Congress impermissibly exercised a police power [through
9 the CSA] that is reserved to the State of California under the Tenth
10 Amendment." 500 F.3d at 856. On appeal, she conceded her Tenth
11 Amendment claim was largely foreclosed by recent decisions of the
12 Supreme Court. She also conceded her case did not implicate the
13 "commandeering" line of cases. 500 F.3d at 867. The Ninth Circuit
14 accepted her concessions. In a lengthy footnote, the circuit court
15 explained:

16 The commandeering cases involve attempts by Congress to
17 direct states to perform certain functions, command state
18 officers to administer federal regulatory programs, or to
19 compel states to adopt specific legislation. . . . The
20 Controlled Substances Act, by contrast, "does not require
21 the [state legislature] to enact any laws or regulations,
22 and it does not require state officials to assist in the
enforcement of federal statutes regulating private
individuals."

23 500 F.3d at 867 n.17 (quoting *Reno v. Condon*, 528 U.S. 141, 151, 120
24 S.Ct. 666, 145 L.Ed.2d 587 (2000)) (other citations omitted).

25 Advocates of medical marijuana have continued to present Tenth
26 Amendment claims to the Ninth Circuit. In two unpublished decisions

1 in the past 12 months, the Ninth Circuit has rejected Tenth Amendment
2 challenges to the federal regulation of marijuana. *United States v.*
3 *Sandusky*, No. 13-50025, 2014 WL 1004075, at *1 (9th Cir. March 17,
4 2014); *Montana Caregivers Association, LLC, v. United States*, No. 12-
5 35110, 2013 WL 1987385 (9th Cir. May 7, 2013). Both panels cited
6 *Raich v. Gonzales*, 500 F.3d 850 (9th Cir.2007). Both panels regarded
7 themselves as bound by *Raich*. Both panels ruled the appellants' Tenth
8 Amendment claims were foreclosed by *Raich*. In view of *Raich* and the
9 authorities cited therein, this Court clearly lacks authority to
10 dismiss the instant prosecution under the Tenth Amendment.

11 **IT IS HEREBY ORDERED:**

12 1. Defendant Jason Zucker's "Motion to Dismiss Indictment as
13 Barred by the Tenth Amendment" (**ECF No. 204**) is **denied**.

14 2. "[Defendant Michelle Gregg's] Motion . . . to . . . Dismiss
15 Indictment" (**ECF No. 213**) is **denied** to the extent she seeks relief
16 under the Tenth Amendment.

17 3. Rolland Mr. Gregg's motion to dismiss the indictment (**ECF No.**
18 **215**) is **denied**.

19 **IT IS SO ORDERED.** The District Court Executive is hereby
20 directed to enter this order and furnish copies to counsel.

21 **DATED** this 30th day of April, 2014.

22
23 s/ Fred Van Sickle
Fred Van Sickle
24 Senior United States District Judge
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