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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. EDWARD ROSENTHAL, *et al.*, Defendants.	Case No. CR-02-0053 CRB **NOTICE OF MOTION AND MOTION TO DISMISS ON GROUNDS OF OFFICIAL IMMUNITY** Date: January 6, 2002 Time: 2:30 p.m. Place: Courtroom of the Hon. Charles R. Breyer

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional and Statutory Provisions

NOTICE OF MOTION AND MOTION TO DISMISS ON GROUNDS OF OFFICIAL IMMUNITY

PLEASE TAKE NOTICE that on January 6, 1998, at 2:30 a.m., in the United States Courthouse at 450 Golden Gate Avenue, San Francisco, California, in the courtroom of the Honorable Charles R. Breyer, defendant Edward Rosenthal will hereby move this Court, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, to dismiss this criminal action on grounds of official immunity.

This motion is based on this Notice of Motion, Memorandum of Points and Authorities in Support of Motion to Dismiss on Due Process Grounds, U.S. Const. Amends X & XI, Defendant Rosenthal's Request for Judicial Notice in Support of Motions to Dismiss, the Declaration of Joe DeVries in Support of Defendant Rosenthal's Motions to Dismiss, the Declaration of Jeffrey Jones in Support of Defendant Rosenthal's Motions to Dismiss, the Declaration of Edward Rosenthal in Support of Defendant Rosenthal's Motions to Dismiss, this Court's inherent and supervisory powers, argument presented at the hearing on this motion, and all other statutory and constitutional provisions and case law precedent deemed relevant by this Court.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Demonstrating yet again that "no good deed goes unpunished," the federal government is prosecuting defendant Edward Rosenthal ("Rosenthal") for performing official, humanitarian duties for the City of Oakland without taking a profit. To alleviate what it perceived as a public health crisis, the City of Oakland deputized Rosenthal as a City official to cultivate medical marijuana for distribution to the seriously ill. Unfortunately for Rosenthal, however, upon agreeing to do this, he found himself in the midst of a bitter dispute between the State of California and the federal government over the efficacy of marijuana in reducing the suffering of persons afflicted with diseases ranging from cancer to AIDS. To express its disagreement with California's policy, the federal government has elected to prosecute Rosenthal, despite (or

perhaps because of) his status as a City of Oakland official. Both a federal statute and the Eleventh Amendment, as well as the doctrine of implied governmental immunity, shield Rosenthal from criminal prosecution for performing his official duties. This Court should accord local officials like Rosenthal the same immunity the federal government demands for its own officials and dismiss this prosecution on grounds of official immunity.

I. STATEMENT OF FACTS

In November of 1996, fifty-six percent of the California electorate approved Proposition 215, also known as the Compassionate Use Act, to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" without criminal penalty. Cal. Health & Safety Code § 11362.5(b)(1). To this end, the Act carves out a narrow exception to the criminal prohibitions on the cultivation and distribution of marijuana under specified medical circumstances. However, because many persons who need marijuana to alleviate their suffering are too sick or otherwise unable to grow their own medicine, there was a shortage of safe and reliable marijuana for the very ill. Declaration of Joe DeVries in Support of Defendant Rosenthal's Motions to Dismiss ("DeVries Decl."), filed herewith, at ¶5; Declaration of Jeffrey Jones in Support of Defendant Rosenthal's Motions to Dismiss ("Jones Decl."), filed herewith, at ¶6. Recognizing this, the Oakland City Council unanimously passed Oakland Ordinance No. 12076 on July 28, 1998, which created the City of Oakland's Medical Cannabis Distribution Program ("the Oakland Program") (A copy of the Ordinance is attached to Defendant Rosenthal's Request for Judicial Notice in Support of Motions to Dismiss as Exhibit 1). This Program lays the blueprint for the "criminal scheme" alleged here.

The Oakland Program requires the Oakland City Manager to designate "one or more entities as a medical cannabis provider association," which, in turn, may deputize persons as City officials to perform official duties in furtherance of the Program. Ordinance No. 12076, Section 3. On August 12, 1998, the Oakland City Manager designated the Oakland Cannabis Buyers' Cooperative ("OCBC") as a medical cannabis provider association pursuant to Ordinance No. 12076. Jones Decl. ¶6; Defendant Rosenthal's Request for Judicial Notice in Support of

Motions to Dismiss, Exhibit 2. Soon thereafter, Jeffrey Jones ("Jones"), the executive director of the OCBC, deputized Rosenthal as an Oakland City official to cultivate marijuana for distribution to the seriously ill. Jones Decl. ¶6; Declaration of Edward Rosenthal in Support of Defendant Rosenthal's Motions to Dismiss ("Rosenthal Decl."), filed herewith, at ¶2. Both an Oakland City Attorney and Section 1.D of the Ordinance on its face assured Rosenthal that the federal immunity provision of 21 U.S.C. § 885(d) would immunize him from any federal penalties for performing his official duties. *See* DeVries Decl. ¶¶3 & 4; Jones Decl. ¶¶4 & 5; Ordinance No. 12076, Section 1.D (citing 21 U.S.C. § 885(d)); *see also* DeVries Decl. ¶5.

This Court, however, did not necessarily share this interpretation of the federal immunity statute, at least not in the context of a civil action for declaratory and injunctive relief. By Order dated September 3, 1998, this Court found that 21 U.S.C. § 885(d), which immunizes municipal officers "lawfully engaged in the enforcement of any law or ordinance relating to controlled substances" from "civil or criminal liability," did not protect the OCBC itself from a civil injunction action. *See* Order Re: Motion to Dismiss in Case No. 98-0088 CRB, dated Sept. 3, 1998, *United States v. Cannabis Cultivators' Club*, et al. (hereinafter "Sept. 3,1998 Order") (attached to Defendant Rosenthal's Request for Judicial Notice in Support of Motions to Dismiss as Exhibit 3), at 4. This Court reasoned that interpreting the immunity statute to encompass such actions would effectively disable the federal government from enforcing federal law; however, it expressly distinguished the case where the government seeks to punish a state official for conduct in the past. *See id.* This is the latter case described by this Court.

II. ARGUMENT

A. This Prosecution Must Be Dismissed Because Congress Has Immunized Local Officials From Criminal Liability For Performing Their Official Duties Under A Municipal Ordinance Relating To Controlled Substances

21 U.S.C. § 885(d) ("§ 885(d)") provides:

> Except as provided in sections 2234 and 2235 of Title 18 [relating to the illegal procurement and execution of search warrants], no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly

> authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

(emphasis added). The Oakland City Council and its attorneys understood this provision to immunize municipal officials like Rosenthal from criminal penalty for "enforcing" Ordnance No. 12076, which indisputably "relates to" controlled substances. *See* DeVries Decl. ¶¶3 & 4; Jones Decl. ¶¶4 & 5; Ordinance No. 12076, Section 1.D; *cf. Black's Law Dictionary* 528 (6th ed. 1990) (defining "enforcement" as "[t]he act of putting something such as a law into effect"). Rosenthal quite reasonably believed them.

This Court ruled on September 3, 1998, that § 885(d) does not bar actions seeking to *enjoin* municipal officers from violating federal law. The very reasoning this Court employed to reach this result demonstrates the applicability of § 885(d) to this *criminal* action. This Court repeatedly stressed that its interpretation of the federal immunity provision was necessary to close a loophole, which would otherwise enable municipalities to nullify federal law any time they wished. *See* Sept. 3, 1998 Order at 3-4. Since this loophole no longer exists, different considerations apply to criminal actions like this one. As this Court expressly found, § 885(d) "provides an official with immunity from civil and criminal *liability*. In other words, it protects an official from paying compensation or being penalized for conduct in the past which violated the federal Controlled Substances Act. It does not purport to immunize officials from equitable relief enjoining their *future* conduct." Sept. 3, 1998 Order at 4 (emphasis in original). Anyone reading this Order would conclude that § 885(d) "protects an official from . . . being penalized for conduct in the past," even if this conduct was subsequently found to violate federal law.

This Court's interpretation of § 885(d) and the reasoning upon which it is based mirrors that employed by the Supreme Court in carving out a limited exception to the immunity enjoyed by states from suit under the Eleventh Amendment for actions seeking *injunctive* relief -- an

exception which is necessary to harmonize the principles of the Eleventh Amendment with the federal government's interest in vindicating its supremacy under federal law. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 105, 104 S.Ct. 900, 910 (1984) (quotation omitted); *see also* Part II.C *infra*. Just as this limited exception to Eleventh Amendment immunity does not extend to actions seeking to punish past conduct, since the government may use an injunctive relief action to vindicate any legitimate federal interests it might have, *see Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426 (1985) (whereas prospective relief is necessary to ensure the supremacy of federal law, "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment"), the exception to § 885(d) immunity described by this Court in its September 3, 1998 Order should not be extended to this criminal proceeding. The absurd results described in this Court's Order can be avoided simply by effectuating the plain language of § 885(d).

On its face, § 885(d) immunizes municipal officials from "civil or criminal liability" when "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." Although this Court in the civil action interpreted this phrase to refer to the lawfulness of the municipal ordinance under federal law, Sept. 3, 1998 Order at 3-4, Rosenthal respectfully contends that the plain language of the immunity statute and established principles of statutory construction contradict this construction here. It is a fundamental cannon of statutory construction that modifiers are to be applied only to statutory words or phrases immediately preceding or following them, rather than to words, phrases or clauses that are more remote. *See Northwest Forest Resources Council v. Glockman*, 82 F.3d 825, 832 (9th Cir. 1996) (qualifying words refer to the last antecedent phrase); *Pacificorp v. Bonnevilee Power Admin.*, 856 F.2d 94, 97 (9th Cir. 1988) (same). Thus, the adverb "lawfully" modifies the verb "engaged," which immediately follows it, not the term "municipal ordinance" several words

later. If Congress had intended the phrase "lawfully" to refer to the lawfulness of the municipal ordinance under federal law, it would have used an adjective, not an adverb, and it would have placed this modifier closer to the term "municipal ordinance." Even better, Congress could have simply inserted the phrase "not conflicting with this subchapter" just after "municipal ordinance", so the statute would read "lawfully engaged in the enforcement of any law or municipal ordinance not conflicting with this subchapter relating to controlled substances." Congress did not do any of this, however, which counsels strongly against such construction. *Cf. United States v. Cruz*, 50 F.3d 714, 719 (9th Cir. 1995) ("where [Congress] could have written the statute without grammatical ambiguity, we resolve any doubt in favor of the defendant") (citing *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 663 (1994)).

Lest there be any doubt that Congress did not intend to limit § 885(d) in this manner, it expressly provided for exceptions to the immunity statute where law enforcement officers engage in illegal conduct in the procurement or execution of a search warrant. 21 U.S.C. § 885(d) (citing 18 U.S.C. §§ 2234 & 2235). "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson,* 529 U.S. 53, 58, 120 S.Ct. 1114 (2000); *see also Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616-17, 100 S.Ct. 1905 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied"); *In re Gerwer,* 898 F.2d 730, 732 (9th Cir.1990) (expressly enumerated exceptions "indicate that other exceptions should not be implied"); *United States v. Goldbaum,* 879 F.2d 811, 813 (10th Cir.1989) ("if a statute specifies exceptions to its general application, other exceptions not explicitly mentioned are excluded"). Indeed, if this Court's interpretation of § 885(d) were extended to this criminal proceeding, the immunity statute would be rendered

nugatory, since municipal officers would have no need to avail themselves of the immunity provided by § 885(d) if the municipal ordinances they are enforcing *already* complied with the federal narcotics law. "It is a well-established principle of statutory construction that 'legislative enactments should not be construed to render their provisions mere surplusage.'" *American Vantage Companies v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) (quoting *Dunn v. Commodity Futures Trading Comm'n,* 519 U.S. 465, 472, 117 S.Ct. 913 (1997)).

The plain language of § 885(d) and these cannons of statutory construction explain why a unanimous court of appeal and the City of Oakland interpreted § 885(d) in the same manner as does Rosenthal. In *State v. Kama*, 178 Or. App. 561, 565, 39 P.3d 866, 867 (Or. Ct. App. 2002), the City of Portland refused to return medical marijuana the defendant was entitled to possess under Oregon's Medical Marijuana Act, ORS 475.300 *et seq.* because, in its view, its officers would be committing a federal crime in returning it. *See* 178 Or. App. at 563, 39 P.3d at 867; *cf.* 21 U.S.C. § 841(a) (prohibiting delivery of controlled substance by "any person"). Both the trial court and a unanimous court of appeals rejected this argument because: "Even assuming that returning the marijuana otherwise might constitute delivery of a controlled substance, the city does not explain--and we do not understand--why police officers would not be immune from any federal criminal liability that otherwise might arise from doing so [under § 885(d)]." 178 Or. App. at 564-65, 39 P.3d at 868 (citing § 885(d)). The City of Oakland was just as confident that § 885(d) would immunize Rosenthal for *his* medical marijuana activities. *See* Ordinance No. 12076, Section 1.D (citing 21 U.S.C. § 885(d)).

At the barest minimum, Rosenthal's interpretation is reasonable, so the rule of lenity mandates its adoption. Another important distinction between the civil action and this one is that the rule of lenity applies here and requires that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 347-50, 92

S.Ct. 515 (1971); *see Prussian v. United States*, 282 U.S. 675, 677, 51 S.Ct. 223, 224 (1931); *see also United States v. Wiltberger*, 5 Wheat 76, 95, 5 L.Ed. 37 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself"). This is a crucial distinction, as courts will not hesitate to depart from interpretations of statutory language in the civil context when they are discussing its criminal application. *See United States v. Giles,* 213 F.3d 1247, 1250 (10th Cir.2000) (refusing to apply civil interpretation of Lanham Act to criminal proceeding); *cf. Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) ("The government has also overlooked a crucial distinction between criminal and civil statutes. Judicial deference under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases"). "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. '[O]nly the most extraordinary showing of contrary intentions' *in the legislative history* will justify a departure from that language." *United States v. Albertini,* 472 U.S. 675, 680, 105 S.Ct. 2897, 2902 (1985) (emphasis added) (citations omitted) (quoting *Garcia v. United States,* 469 U.S. 70, 75, 105 S.Ct. 479, 482-483 (1984)); *see also Chappel v. United States*, 270 F.2d 274, 278 (9th Cir. 1959) ("[Penal statute] cannot be enlarged by analogy or expanded beyond the plain meaning of the words used"); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) ("A regulation should be construed to give effect to the natural and plain meaning of its words . . .If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express").

This Court, in the civil action, looked behind the plain language of the immunity statute to conclude that Congress' purpose in enacting the federal narcotics laws would be frustrated if § 885(d) were construed to bar actions for prospective injunctive relief. *See* Sept. 3, 1998 Order at 3-4. Nothing, however, in the language, structure, or the legislative history of § 885(d)

requires, much less unambiguously requires, such interpretation in this *criminal* context. By attempting to discern Congress' intent in the manner it did – using logical argument, rather than legislative history, to clarify the statutory language -- this Court essentially found that the is statute ambiguous. *Cf. United States v. Molinaro*, 11 F.3d 853, 859 n.13 (9th Cir. 1993) (holding that rule of lenity requires adoption of defendant's construction of statute where its legislative history renders the language, at best, ambiguous, even if the court agrees with government's construction). Faced with such ambiguity and a very reasonable construction of the statute by the defendant, this Court must adopt the defendant's construction. *See United States v. Granderson,* 511 U.S. 39, 54, 114 S.Ct. 1259, 1267 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct--we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor"); s*ee also People v. Materne*, 72 F.3d 103, 106 (9th Cir. 1995) ("only where the defendant's interpretation is unreasonable does the rule of lenity not apply").

This case, more than any other, cries out for the application of the rule of lenity. The rule is "a sort of 'junior version of the vagueness doctrine,'" which "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal" and "minimize[s] the risk of selective or arbitrary enforcement." *See United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 1225 (1997) (quoting H. Packer, The Limits of the Criminal Sanction 95 (1968)); *Liparota v. United States,* 471 U.S. 419, 427, 105 S.Ct. 2084, 2089 (1985); *United States v. Kozminski,* 487 U.S. 931, 952, 108 S.Ct. 2751, 2764 (1988). Both of these purposes are fully operative here. Rosenthal was deprived of fair warning by, among other things, assurances that he would not be prosecuted for his official conduct based on what appeared to be the plain meaning of § 885(d). *See* Defendant Rosenthal's Motion to Dismiss On Due Process Grounds, filed herewith. He, and not other Oakland officials, such as the Oakland City Council, was apparently targeted for this

prosecution because of his outspoken advocacy and renown. This Court's construction of § 885(d) may well make the difference between a normal life and Rosenthal spending the rest of his life in prison.

Other cannons of statutory construction compelling the adoption of Rosenthal's interpretation come into play for similar reasons. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." *Gilmore v. California*, 220 F.3d 987, 997 (9th Cir. 2000) (quoting *United States ex rel Attorney General v. Delaware & Hudson Co.*, 213 U.S. U.S. 366, 408, 29 S.Ct. 527 (1909)); *see also United States v. Clark*, 445 U.S. 23, 27, 100 S.Ct. 895, 899-900 (1980) ("It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided"); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). This is especially so where the government's proposed construction alters the federal-state balance by permitting the federal to encroach upon traditional state powers and, similarly, where Congress is legislating at the outer limits of its authority. *Solid Waste Agency v. United States Army Corps of Eng'rs,* 531 U.S. 159, 121 S.Ct. 675, 683 (2001); *see also United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). As is discussed in detail in Defendant Rosenthal's Motion to Dismiss For Lack of Subject Matter Jurisdiction and on Tenth Amendment Grounds, filed herewith, the government is intruding into areas of traditional state concern and it has exceeded the scope of its constitutionally-delegated

powers. *See Conant v McCaffrey*, 309 F3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) ("Federal efforts to regulate [medical marijuana] considerably blur the distinction between what is national and what is local. . . . the federal government [is] nearing the outer limits of its power"). This prosecution also violates Rosenthal's right to due process and California's Eleventh Amendment sovereignty from suit. *See* Defendant Rosenthal's Motion to Dismiss on Due Process Grounds, filed herewith; *infra* at Part II.C. This Court can avoid all of these many constitutional questions simply by adhering to the letter of § 885(d). Every tool of statutory construction – from the plain language of the statute to the rule of lenity – mandates defendant's construction.

B. The Doctrine Of Implied Governmental Immunity Shields Rosenthal From Criminal Prosecution For Performing His Official Duties

A contrary interpretation of § 885(d) in this context would lead to absurd results. For instance, all seven members of the Oakland City Council who voted for the Oakland Program, as well as all of the city officials who enforced it, could be indicted for conspiracy, since they were admittedly part of the "criminal scheme" to cultivate marijuana for distribution to the seriously ill. Even the federal government's own officers would not necessarily be immune. In its official response to the passage of Proposition 215, the government requested California officials to seize medical marijuana from patients and turn it over to federal officers. 62 Fed. Reg. 6164, 6164 (Feb. 11, 1997). All of these law enforcement officials would be part of the marijuana distribution conspiracy if the federal proscription on the delivery and possession of marijuana, 21 U.S.C. § 841, but not the immunity provisions of § 885(d), were found to apply to them. *Cf. Kama*, 178 Or. App. at 563, 39 P.3d at 867 (interpreting § 885(d) to immunize city police officers who return medical marijuana to their owners, which avoids this absurd result); *see also Kuromiya v. United States*, 78 F.Supp.2d 367, 368 (E.D. Pa. 1999) (noting that "[s]everal government agencies, including the FDA . . . and the Drug Enforcement agency were involved, directly or indirectly, in the process by which applicants [for the federal medical marijuana program] were approved and ultimately received shipments of marijuana cigarettes").

To avoid such absurd results, the Supreme Court has established the doctrine of implied "governmental exception," which requires courts to construe statutes not expressly including government officials as excluding them. *Nardone v. United States*, 302 U.S. 379, 384, 58 S.Ct. 275, 277 (1937); *United States v. Mack*, 164 F.3d 467, 472 (9th Cir. 1999). In *Mack*, the Ninth Circuit construed a federal criminal statute prohibiting the possession of listed firearms by "any person," 18 U.S.C. § 922(k); 26 U.S.C. § 5861(d), as not applying to local law enforcement agencies and their employees. 164 F.3d at 472. The court reasoned as follows:

> The statutes at issue here would create an absurd situation if any duly authorized employee of a state or local law enforcement agency could be punished for possessing confiscated weapons in the scope and course of the employee's duty. Neither statute expressly includes the government within their prohibitions. Thus, we conclude that local law enforcement agencies and their employees are able, without running afoul of the statutes, to possess the prohibited weapons in order generally to enforce the law, to prosecute defendants, and to destroy the weapons.

164 F.2d at 472. The doctrine of implied governmental immunity applies to Rosenthal for these same reasons.

C. The Eleventh Amendment Bars This Prosecution Because The Federal Government Is Using It As A Means To Displace State Policy In The Administration Of Its Internal Affairs

There is also immunity for Rosenthal under the Constitution. The Eleventh Amendment is rooted in the same federalist principles as the Tenth Amendment and makes explicit the States' preexisting immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI; *see Alden v. Maine*, 527 U.S. 706, 713-14, 119 S.Ct. 2240, 2247 (1999). Like the Tenth Amendment, "[t]he primary purpose of the eleventh amendment is to assure that the federal courts do not interfere with a state's public policy and its administration of internal public affairs." *Blake v. Kline*, 612 F.2d 718, 725 (3d Cir. 1979) (citing *In re Ayers*, 123 U.S. 443, 505, 8 S.Ct. 164 (1887)); *accord Jacintoport Corp. v. Greater Baton Rouge Comm'n*, 762 F.2d 435, 442 (5th Cir. 1988); *Smith v. New Jersey Transit Corp.*, 691 F.Supp. 888, 891-92 (E.D. Pa. 1988). Because "the sovereign immunity of the States neither derives from, nor is limited by, the terms

of the Eleventh Amendment," "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 713 & 736, 119 S.Ct. at 2246 & 2257. "Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* Congress may not utilize its Article I powers to override the Eleventh Amendment sovereignty of the states. *See id.* at 732, 119 S.Ct. at 2255; *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 672 & 682, 119 S.Ct. 2219, 2224 & 2229 (1999) (*overruling Parden v. Terminal R. of Ala. Docks Dep't*, 377 U.S. 184, 84 S.Ct. 1207 (1964)); *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627, 636, 199 S.Ct. 2199, 2205 (1999); *Seminole Tribe of Fla. V. Florida*, 517 U.S. 44, 47, 116 S.Ct. 1114 (1996).

In determining the scope of the States' constitutional immunity from suit, the Supreme Court has "looked to 'history and experience, and the established order of things, rather than '[a]dhering to the mere letter' of the Eleventh Amendment." *Alden*, 527 U.S. at 727, 119 S.Ct. at 2253 (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 & 14, 10 S.Ct. 504, (1890)). "Following this approach, the Court has upheld States' assertions of sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment," *id.*, including suits brought by other sovereigns, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578 (1991) (Native American tribes); *Principality of Monoco v. Mississippi*, 292 U.S. 313, 328-29, 54 S.Ct. 745 (1934) (foreign nations); *see also Smith v. Reeves*, 178 U.S. 436, 20 S.Ct. 919 (1900) (federal corporations), and suits in admiralty, *Ex parte New York*, 256 U.S. 490, 41 S.Ct. 588 (1921). "When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." *Alden*, 527 U.S. at 732, 119 S.Ct. at 2255-56.

As explained in detail in Defendant Rosenthal's Motion to Dismiss For Lack of Subject Matter Jurisdiction and on Tenth Amendment Grounds, filed herewith, the federal government's actions here--attempting to thwart an internal public policy decision made by the voters of the State of California through a criminal prosecution of a City of Oakland official performing his authorized duties--is wholly inconsistent with the constitutional sovereignty of the states. Although Rosenthal will have to serve the time if convicted, this prosecution is clearly directed at the State of California and its citizens. The Supreme Court has held that the Eleventh Amendment's "reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the University of California v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900, 903 (1997); *accord In re Lazar*, 237 F.3d 967, 982 (9th Cir. 2001). Thus, a state may invoke its sovereign immunity, even though only individual officers are named as defendants, when "the state is the real, substantial party in interest." *Regents Of University of California*, 519 U.S. at 429, 117 S.Ct. at 903; *Strait v. County of Los Angeles*, 236 F.3d 552, 566 (9th Cir. 2000); *see also Pennhurst*, 465 U.S. at 121, 104 S.Ct. at 919 ("a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment"); *Louisiana ex rel. New York Guaranty & Indemnity Co. v. Steele*, 134 U.S. 230, 232, 10 S.Ct. 511 (1890) (suit against state official in state court is "clearly within the principle" of the Eleventh Amendment). A local entity and its officers are considered "arms of the state" for Eleventh Amendment purposes where "the essential nature and effect of the proceeding" and the "nature of the entity created by state law" compel this result. *Regents of University of California*, 519 U.S. at 429, 117 S.Ct. at 904 (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464, 65 S.Ct. 347, 350 (1945); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977).[1]

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[1] The Ninth Circuit ordinarily employs a five-part test to determine state agency for civil suits. *See Lazar*, 237 F.3d at 982 (citing *Darning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991). This test is largely inapplicable here, since it focuses almost exclusively on the economic effects of civil damage suits.

This action is clearly directed at the State of California, since it seeks to thwart the state's policy of "ensur[ing] that seriously ill Californians have the right to obtain and use marijuana for medical purposes." *See* Cal. Health & Safety Code § 11362.5(b)(1)(a). The federal government has publicly stated its disagreement with this policy, *see* House Joint Res. 117 (Sept. 15, 1998) ("sense of the Congress" resolution affirming Congress' opposition to states' efforts to legalize marijuana for medical use), and it has been involved in two other actions to abolish the California medical marijuana experiment, *Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997); *United States v. Cannabis Cultivators Club*, 5 F.Supp.2d 1086, 1091-92 & 1105-06 (N.D.Cal. 1998). This prosecution represents the latest in those efforts. Rosenthal was acting as an "arm of the state" in picking the marijuana promised by California Health & Safety Code § 11362.5(b)(1)(a). *Cf. Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 102 n.11, 104 S.Ct. 900, 908 n.11 (1984) (holding that state was real, substantial party in interest in action against state officials operating mental health institution, since state law governing care of mentally disabled gave them broad discretion to provide "adequate" mental health services and essence of claim against officials concerned alleged failure to provide such services adequately). "[A] State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the Eleventh Amendment of the Constitution of the United States, in the national tribunals." *Alden,* 527 U.S. at 748, 119 S.Ct. at 2263 (quoting *General Oil Co. v. Crain,* 209 U.S. 211, 28 S.Ct. 475 (1908)).

Nor is this just any suit, but it is a criminal prosecution with the possibility of very severe penalties In *Ex parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441, 454 (1908), the Supreme Court carved out an exception to Eleventh Amendment immunity for declaratory and injunctive relief actions seeking to enjoin state officials from acting contrary to federal law "to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 105, 104 S.Ct. 900, 910 (1984) (quoting *Perez v. Ledesma,* 401 U.S. 82, 106, 91 S.Ct.

674, 687 (1971) (Brennan, J., concurring in part and dissenting in part)). Since then, the Court has drawn a sharp distinction between actions for prospective injunctive relief, which "provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause," *see Alden*, 527 U.S. at 757, 119 S.Ct. at 2268 (citing *Green v. Mansour*, 474 U.S. at 68, 106 S.Ct 423), and actions for retrospective relief, which intrude impermissibly upon areas protected by the Eleventh Amendment, *see Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426 (1985) (whereas prospective relief is necessary to ensure the supremacy of federal law, "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment"); *see also Pennhurst,* 465 U.S. at 911, 91 S.Ct. at 106 ("*Edelman*'s distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States"); *id.* at 910, 91 S.Ct. at 105 ("the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States").[2]

The government has crossed this line and, in so doing, violated the Eleventh Amendment. The Supremacy Clause does not give the government license to run roughshod over the states in any manner it deems fit, such as imprisoning its officers for performing their official duties. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 520, 117 S.Ct. 2157 (1997) ("There must be a

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[2] The extremely punitive means employed by the government here distinguishes this case from those cases holding that the Eleventh Amendment does not absolutely bar suits brought against a state by the United States. *See Alden*, 527 U.S. at 755, 119 S.Ct. at 2267 (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29, 54 S.Ct. 745, 750 (1934)); *United States v. Texas*, 143 U.S. 621, 644-45, 12 S.Ct. 488, 493 (1892). This line of cases is based on the Supreme Court's recognition *in 1892* that "controversies capable of judicial solution might arise between the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law." *Texas*, 143 U.S. at 644-45, 12 S.Ct. at 493; *see also Principality of Monaco*, 292 U.S. at 329, 54 S.Ct. at 750 (suits by United States against a state are "inherent in the constitutional plan" because "without such a provision, as this Court said in *United States v. Texas*, *supra*, 'the permanence of the Union might be endangered'"). This concern has since been addressed more efficiently by the injunctive relief actions provided for by *Ex Parte Young* and its progeny. Although the Eleventh Amendment may not bar *all* suits by the United States against a state, it bars criminal prosecutions of local officials when the proper recourse is through injunctive relief.

congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"). Instead, "our federalism requires that [the federal government] treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden*, 527 U.S. at 748, 119 S.Ct. at 2263; *see also Alden*, 527 U.S. at 758, 119 S.Ct. at 2268 ("Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268, 117 S.Ct. 2028, 2033 (1997) (recognizing "the dignity and respect afforded a State, which the [Eleventh Amendment] immunity is designed to protect"); *see also Alden*, 527 U.S. at 715, 119 S.Ct. at 2247 (states "are not relegated to the role of mere provinces or political corporations, but retain the dignity . . . of sovereignty"). The government's unnecessarily punitive action here runs afoul of the principles expressed by the Eleventh Amendment and our federalist system.

That the federal government has failed to live up to its constitutional obligations is further evidenced by the immunities from suit it demands for its own officers when performing their official duties. Due to a fear that "state governments hostile to duly enacted federal laws would be able to frustrate the implementation of [federal] laws by bringing (or allowing to be brought) civil or criminal actions in state court against the federal officials responsible for their implementation," Congress enacted 28 U.S.C. § 1442(a)(1), which provides for the removal of all civil and criminal actions instituted against federal officials in state court to a federal court of competent jurisdiction. *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F.Supp. 530, 533 (W.D. Ky. 1996). Once in federal court, federal officials may avail themselves of the doctrine of federal protective immunity, which shields them from state prosecution from crimes arising out of their performance of official duties. *Morgan v. People of the State of California*, 743 F.2d 728, 731 (9th Cir. 1984); *see In re Neagle*, 135 U.S. 1, 75, 10 S.Ct. 658, 762 (1890) ("[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as [an officer] of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be

guilty of a crime under the law of the state of California") (emphasis in original); *see also Barr v. Matteo*, 360 U.S. 564, 571, 79 S.Ct. 1335, 1339 (1959) (official acts privilege shields government officers from civil liability because the "threat of [civil suits] might appreciably inhibit the fearless, vigorous, and effective administration of policies of government"). The Eleventh Amendment, § 885(d) and the doctrine of implied governmental immunity demand the same respect and protection for the officers of the states.

CONCLUSION

For the foregoing reasons, this Court should dismiss this prosecution.

DATED: December 13, 2002 Respectfully submitted,

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