

71 F.Supp.3d 1044
United States District Court, N.D. California.

Mona **ALLEN**, et al., Plaintiffs,
v.
COUNTY OF **LAKE**, et al., Defendants.

Case No. 14-cv-03934-TEH
|
Signed October 14, 2014

Synopsis

Background: Medical marijuana patients brought action against county and certain law enforcement officials, alleging that warrantless summary abatement of their medical marijuana plants violated their constitutional rights. Patients moved for a preliminary injunction prohibiting summary abatement actions against them without notice or a warrant.

Holdings: The District Court, Thelton E. Henderson, J., held that:

[1] need to reduce water use during drought was not so urgent as to give rise to exigent circumstances justifying warrantless summary abatement of patients' plants;

[2] defendants failed to show that patients voluntarily consented to the warrantless summary abatement;

[3] open fields exception to warrant requirement did not justify the warrantless summary abatement;

[4] patients did not have substantial likelihood of success on merits of their claim under § 1983 against officials;

[5] patients had standing to bring the action;

[6] patients would likely suffer irreparable harm from future summary abatement actions within same marijuana plant growing season in absence of the preliminary injunction; and

[7] balance of hardships favored preliminary injunction.

Motion granted.

West Headnotes (34)

[1] **Injunction** 🔑 Grounds in general; multiple factors

A plaintiff seeking a preliminary injunction must establish: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.

1 Cases that cite this headnote

[2] **Injunction** 🔑 Serious or substantial question on merits

Injunction 🔑 Balancing or weighing hardship or injury

While a plaintiff is required to make a showing on all four prongs of the test for determining whether a preliminary injunction is warranted, there is nonetheless some interplay between them; for example, a plaintiff can show likely success on the merits by only raising serious questions going to the merits, so long as a balance of hardships tips sharply toward the plaintiff.

[3] **Injunction** 🔑 Persons entitled to apply; standing

When the alleged harm is the result of police misconduct, a plaintiff can show that such harm is likely to recur, as required to have standing to assert a claim for injunctive relief, by either identifying a written policy from which such injury would stem, or by demonstrating that the injury was part of a pattern of officially sanctioned behavior; however, the plaintiff must still show that he is likely to be subject to such policy or pattern in the future.

1 Cases that cite this headnote

[4] **Civil Rights** 🔑 Property and housing

Medical marijuana patients were not required to satisfy heightened burden applicable to

mandatory injunctions, on their motion for a preliminary injunction prohibiting county and certain law enforcement officials from bringing summary abatement actions against them without notice or a warrant, where injunction sought was negative not mandatory, it would not constitute substantially all of the relief sought, and it was required to prevent Fourth Amendment violations. U.S. Const. Amend. 4.

[5] **Searches and Seizures** ← **Necessity of and preference for warrant, and exceptions in general**

Seizure of personal property is per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause; however, a warrantless seizure of contraband can still be valid if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present. U.S. Const. Amend. 4.

[6] **Searches and Seizures** ← **Necessity of and preference for warrant, and exceptions in general**

Exceptions to the Fourth Amendment's warrant requirement are narrow and their boundaries are rigorously guarded. U.S. Const. Amend. 4.

[7] **Searches and Seizures** ← **Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant**

The exigent circumstances exception to the warrant requirement only applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment; that is, there is compelling need for official action and no time to secure a warrant. U.S. Const. Amend. 4.

[8] **Searches and Seizures** ← **Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant**

For purposes of the exigent circumstances exception to the Fourth Amendment's warrant requirement, exigent circumstances include those circumstances that would cause a reasonable person to believe that entry was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. U.S. Const. Amend. 4.

[9] **Searches and Seizures** ← **Circumstances Affecting Validity of Warrantless Search, in General**

Searches and Seizures ← **Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant**

While a state or local government has the authority to declare a certain activity to be an emergency or a nuisance, such declaration does not, by itself, justify a warrantless search or seizure under the Fourth Amendment. U.S. Const. Amend. 4.

2 Cases that cite this headnote

[10] **Searches and Seizures** ← **Fourth Amendment and reasonableness in general**

A state may not authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. U.S. Const. Amend. 4.

[11] **Searches and Seizures** ← **Constitutional and statutory provisions**

The question upon review of a state-approved search or seizure is not whether the search or seizure was authorized by state law; rather, the question is whether the search was reasonable under the Fourth Amendment. U.S. Const. Amend. 4.

[2 Cases that cite this headnote](#)

[12] **Searches and Seizures** ← [Constitutional and statutory provisions](#)

The same Fourth Amendment restrictions applicable to state-approved search or seizure apply to local government. U.S. Const. Amend. 4.

[13] **Municipal Corporations** ← [Abatement of Nuisances](#)

Under California law, a local government typically has statutory power, vested in its governing body, to declare and abate public nuisances, but neither at common law nor under such express power can it, by its mere declaration that specified property is a nuisance, make it one when in fact it is not.

[1 Cases that cite this headnote](#)

[14] **Municipal Corporations** ← [Abatement of Nuisances](#)

Under California law, even when a local government correctly identifies and classifies a nuisance, summary abatement may only be used in narrow circumstances.

[1 Cases that cite this headnote](#)

[15] **Municipal Corporations** ← [Abatement of Nuisances](#)

Under California law, in emergency situations a city may act summarily to abate a nuisance, but in such case the city must be prepared to establish by a preponderance of evidence that an emergency actually existed.

[16] **Controlled Substances** ← [Exigent circumstances](#)

Need to reduce water use during drought in California was not so urgent as to give rise to exigent circumstances justifying county and law enforcement officials' warrantless summary

abatement of medical marijuana patients' plants, although marijuana plants allegedly used a large amount of water, where county could have easily obtained a warrant or followed five-day waiting period for non-summary abatement procedures under ordinance regulating marijuana cultivation to stop water usage, and it offered no explanation for why water use in permissible situations was not problematic, but water used for medical marijuana cultivation was an immediate threat to health, safety, and welfare of public. U.S. Const. Amend. 4.

[17] **Searches and Seizures** ← [Waiver and Consent](#)

Searches and Seizures ← [Consent, and validity thereof](#)

Consent is an exception to the Fourth Amendment protection against unreasonable search and seizure; however, the existence of consent to search is not lightly inferred, and the government always has the burden of proving effective consent. U.S. Const. Amend. 4.

[18] **Searches and Seizures** ← [Consent in general](#)
Searches and Seizures ← [Validity of consent](#)

County and law enforcement officials failed to show that medical marijuana patients voluntarily consented to warrantless summary abatement of their medical marijuana plants, as required for consent exception to Fourth Amendment's warrant requirement to apply; rather, patients showed that four of nine named patients were not even home when searches and seizures occurred, officials cut chain lock to enter patients' private property, and officials made show of force during the raids. U.S. Const. Amend. 4.

[19] **Searches and Seizures** ← [Curtilage or open fields; yards and outbuildings](#)

In general, the police do not need a warrant to search the open fields of a private property, because an individual does not have a significant privacy interest in such open spaces; however, within the curtilage of a home, an

individual's privacy interest is sufficient for Fourth Amendment protections to apply. U.S. Const. Amend. 4.

[20] **Searches and Seizures** ➔ Curtilage or open fields; yards and outbuildings

Four factors determine the extent of a home's curtilage entitled to Fourth Amendment protection in search and seizure context: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. U.S. Const. Amend. 4.

[21] **Controlled Substances** ➔ Open fields; curtilage or yard; growing plants

Open fields exception to the Fourth Amendment's warrant requirement did not apply so as to justify county and law enforcement officials' warrantless summary abatement of medical marijuana patients' plants, where patients' plants appeared to have been within curtilage of their homes; each patient resided on properties that were one acre or smaller, their plants were generally between zero and thirty feet from their houses, each marijuana growing area was surrounded by at least one fence, and often entire property was also surrounded by a fence. U.S. Const. Amend. 4.

[22] **Civil Rights** ➔ Persons Liable in General
Civil Rights ➔ Vicarious or respondeat superior liability in general

To state a claim under § 1983, a plaintiff must allege an actual connection between the actions of the named defendants and the alleged deprivations, either in the form of personal participation, vicarious liability, if permitted by state law, or by causing the deprivation by setting in motion a series of acts by others which the actor knows or reasonably should know would

cause others to inflict the constitutional injury. 42 U.S.C.A. § 1983.

[23] **Civil Rights** ➔ Complaint in general

Vague and conclusory allegations of an official's involvement in civil rights violations are insufficient to state a claim under § 1983; instead, the complaint must allege enough facts to state a claim to relief that is plausible on its face. 42 U.S.C.A. § 1983.

[24] **Civil Rights** ➔ Complaint in general

A complaint in a § 1983 case against multiple defendants must set forth specific facts as to each defendant's role in the alleged violation. 42 U.S.C.A. § 1983.

[25] **Civil Rights** ➔ Property and housing

Medical marijuana patients seeking preliminary injunction prohibiting law enforcement officials from engaging in summary abatement actions against them without notice or a warrant did not have substantial likelihood of success on merits of claim in § 1983 action that officials' warrantless summary abatement of their marijuana plants violated their Fourth Amendment right against unreasonable search and seizure, where patients' vague and conclusory factual allegations regarding personal participation of individual officials were insufficient to establish actual connection between officials' actions and alleged deprivations. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

[26] **Controlled Substances** ➔ Medical necessity or assistance

Medical marijuana patients had standing to bring action against county and certain law enforcement officials, alleging that warrantless summary abatement of their medical marijuana plants violated their Fourth Amendment right to be free from unreasonable searches and seizures, and seeking a preliminary injunction

prohibiting summary abatement actions against them without notice or a warrant, where patients primarily resided at properties at issue, and they had a privacy interest in those properties. U.S. Const. Amend. 4.

[27] **Civil Rights** ➡ Property and housing

Constitutional Law ➡ Search, Seizure, and Confiscation

Controlled Substances ➡ Medical necessity or assistance

Absent any evidence otherwise, it was reasonable to infer that medical marijuana patients who cultivated plants on land just outside their homes also owned those plants, and, thus, the plants were therefore presumed to be patients' personal property, to which both the Fourth and Fourteenth Amendments applied, as would support patients' action against county and certain law enforcement officials, alleging that warrantless summary abatement of their medical marijuana plants violated their rights to be free from unreasonable searches and seizures, and to due process, and seeking a preliminary injunction prohibiting summary abatement actions against them without notice or a warrant. U.S. Const. Amends. 4, 14.

[28] **Civil Rights** ➡ Property and housing

Medical marijuana patients sufficiently alleged a theory of municipal liability against county in § 1983 action, although they did not identify a policy that amounted to deliberate indifference to their constitutional rights, where they alleged that warrantless summary abatement of their medical marijuana plants violated their rights to be free from unreasonable searches and seizures and to due process, and that the searches and seizures were conducted pursuant to county ordinance regulating medical marijuana cultivation. U.S. Const. Amends. 4, 14; 42 U.S.C.A. § 1983.

[29] **Civil Rights** ➡ Property and housing

Medical marijuana patients would likely suffer irreparable harm from future summary abatement actions within same marijuana plant growing season in absence of preliminary injunction prohibiting county and law enforcement officials from engaging in warrantless summary abatement of their medical marijuana plants. U.S. Const. Amend. 4.

[30] **Injunction** ➡ Clear, likely, threatened, anticipated, or intended injury

Plaintiffs seeking a preliminary injunction must use evidence to demonstrate a likelihood that they will be injured again.

[31] **Injunction** ➡ Irreparable injury

There are two ways a plaintiff seeking a preliminary injunction can demonstrate a likelihood of irreparable injury: (1) by identifying a written policy that the injury stems from, or (2) by demonstrating that the injury was part of a pattern of officially sanctioned behavior.

1 Cases that cite this headnote

[32] **Injunction** ➡ Equitable nature of remedy

Injunction ➡ Balancing or weighing equities

Injunction ➡ Public interest considerations

On a motion for injunctive relief, district courts must give serious consideration to the balance of equities and the public interest; however, an injunction is a matter of equitable discretion, and the appropriate analysis requires looking to the possible harm that could befall the various parties.

[33] **Civil Rights** ➡ Property and housing

Balance of hardships favored preliminary injunction prohibiting county and law enforcement officials from engaging in warrantless summary abatement of medical marijuana patients' marijuana plants, where denying preliminary injunction would leave numerous medical marijuana patients in the

county vulnerable to future warrantless seizures of their medicine, which could lead to significant pain and suffering, and, given that it was cultivation season for marijuana plants, allowing further warrantless seizures in the near-term would likely have lasting consequences for patients' medical marijuana supplies. U.S. Const. Amend. 4.

[34] Civil Rights 🔑 Property and housing

Public interest factor weighed in favor of granting preliminary injunction prohibiting county and law enforcement officials from engaging in warrantless summary abatement of medical marijuana patients' marijuana plants, although county had an interest in protection of ordinance enacted through the democratic process regulating marijuana cultivation, where California residents who were authorized to use and cultivate medical marijuana under California's Compassionate Use Act had a strong interest in being protected from warrantless seizure of their medicine, and public had strong interest in protection of constitutional rights. U.S. Const. Amend. 4; West's Ann.Cal.Health & Safety Code §§ 11362.5.

Attorneys and Law Firms

*1048 Joseph D. Elford, Americans for Safe Access, San Francisco, CA, for Plaintiffs.

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THELTON E. HENDERSON, United States District Judge

A group of medical marijuana patients (“Plaintiffs”) seek a preliminary injunction against Defendants, the County of Lake and certain law enforcement officials, prohibiting abatement actions against them without notice or a warrant. September 17, 2014 Supplemental Brief (Docket No. 34); September 1, 2014 Amended Ex Parte Application (Docket No. 5). In accordance with the Court's expedited briefing schedule, Defendants filed their opposition on September

29, 2014. (Docket No. 47). The Court heard oral argument on *1049 October 6, 2014. After carefully considering the parties' written and oral submissions, the Court now GRANTS Plaintiffs' Motion for Preliminary Injunction for the reasons set forth below.

BACKGROUND

On July 11, 2014, Lake County Ordinance No. 2997 went into effect, regulating medical marijuana cultivation within the County of Lake. Opp'n at 1. Among other things, the Ordinance prohibits: any marijuana growth on vacant parcels, any outdoor growth on parcels of one acre or less, growing more than six mature or twelve immature plants on parcels greater than one acre located outside of a Community Growth Boundary (except for qualifying marijuana collectives), and using more than 100 square feet to grow marijuana indoors. Lake County Ordinance No. 2997 §§ 72.5–72.6. In August of 2014, law enforcement officers from the County Sheriff's Department, occasionally accompanied by officials from the Lake County Community Development Department and the California Fish and Game Department, allegedly conducted at least seven warrantless searches of medical marijuana patients' residential properties without notice in Lake County. Allen, Harris, Holt, Jones, Outhout, Sikes, Van Schaick, and Warren Decls. (Docket Nos. 6, 9, 10, 12–17). Allegedly, during these searches, these individuals' marijuana plants were seized, also without warrants. *See id.*

According to the Plaintiffs, some residents were not home when the officers conducted these searches and seizures. Allen, Harris, Outhout, and Warren Decls. In one case, officers lifted a gate off of its hinges to gain access. Jones Decl. In other cases, officers apparently pried locks off of gates. Allen, Harris and Warren Decls. One Plaintiff claims that when her husband asked to see a warrant he was threatened with arrest. Van Schaick Decl. In at least four cases, the officers left “Summary Abatement” notices, indicating their plants had been seized pursuant to Ordinance No. 2997. Holt, Outhout, Sikes and Van Schaick Decls.

On September 1, Plaintiffs filed an amended complaint in this case along with an application for a temporary restraining order (“TRO”) and preliminary injunction. *See* Amended Complaint (Docket No. 4); Amended Ex Parte Application (Docket No. 5). The Court denied the TRO application because Plaintiffs had not demonstrated a likelihood of future irreparable harm after their plants had already been seized. September 4, 2014 Order at 2 (Docket No. 26). After the denial of Plaintiffs' TRO, Plaintiffs were permitted to

file supplemental briefing on the Motion for Preliminary Injunction, which they did. September 17, 2014 Supplemental Brief (Docket No. 34). Defendants subsequently filed their opposition, and the Court heard oral argument on October 6. As a separate matter, Defendants have also moved to dismiss Plaintiffs' Complaint on a number of legal grounds, including Plaintiffs' failure to state a claim against the individual defendants. Mots. to Dismiss (Docket Nos. 46 & 56).

LEGAL STANDARD

[1] [2] “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” Winter v. Natural Res. Def. Council, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). While a plaintiff is required to make “a showing on all four prongs,” there is nonetheless some interplay between them; for example, a plaintiff can show likely success on the merits by only raising “serious questions going to the merits,” so long as “a balance of hardships ... tips *1050 sharply towards the plaintiff...” Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir.2011). In this respect, the Ninth Circuit employs a sliding scale approach to these factors, wherein “the elements of the preliminary injunction test are balanced so that a stronger showing of one element may offset a weaker showing of another.” Id. at 1131.

[3] Where the alleged harm is the result of police misconduct, a plaintiff can show that such harm is likely to recur by either identifying a written policy from which such injury would stem, or by demonstrating that the injury was part of a pattern of officially sanctioned behavior. Melendres v. Arpaio, 695 F.3d 990, 997–98 (9th Cir.2012). However, the plaintiff must still show that he is likely to be subject to such policy or pattern in the future. See City of Los Angeles v. Lyons, 461 U.S. 95, 108–09, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

DISCUSSION

Plaintiffs Do Not Have a Heightened Standard for Obtaining a Preliminary Injunction

[4] Although the parties agree that Winter provides the governing four-prong test for a preliminary injunction, they dispute the weight of the Plaintiffs' burden in this case. Specifically, Defendants argue that Plaintiffs must show

that all four factors “weigh heavily and compellingly in [Plaintiffs'] favor,” because the injunctive relief sought will “disturb the status quo” and “provide the movant substantially all the relief he may recover after a full trial on the merits.” Opp'n at 3–4 (citing SCFC ILC, Inc. v. Visa, USA, Inc., 936 F.2d 1096, 1098 (10th Cir.1991); Dahl v. HEM Pharmaceuticals Corp., 7 F.3d 1399, 1403 (9th Cir.1993); Martin v. Int'l Olympic Comm., 740 F.2d 670, 675 (9th Cir.1984)). However, Defendants' argument for a heightened burden is unconvincing. First, the primary case cited for this heightened standard is from the Tenth Circuit; the only Ninth Circuit cases cited stand for the separate claim that “heightened scrutiny” applies to mandatory injunctions, not negative injunctions such as the one in this case. Compare SCFC ILC, 936 F.2d at 1098, with Dahl, 7 F.3d at 1403, and Martin, 740 F.2d at 675. Second, the argument that an injunction here would disturb the status quo carries little force where the status quo is the warrantless search and seizure of private property unjustified by a recognized exception to the warrant requirement. Finally, in addition to seeking injunctive relief, Plaintiffs seek declaratory relief and damages, so an injunction here will not constitute “substantially all” of the relief sought, as Defendants contend. Moreover, as discussed below, the injunction here is required to prevent Fourth Amendment violations, but Plaintiffs make several additional claims under theories of due process and state law.

For the foregoing reasons, Plaintiffs are not required to meet the heightened standard for obtaining a preliminary injunction as argued by Defendants. Accordingly, the Court now applies the traditional Winter test in determining whether to grant Plaintiffs' request for a preliminary injunction.

I. Prong One: Plaintiffs Are Likely to Succeed on the Merits

Given the evidence currently before the Court, Plaintiffs are likely to succeed on the merits of their claim that the warrantless summary abatement of their medical marijuana plants is unconstitutional.

[5] The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. “[A] seizure of personal property [is] *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a *1051 judicial warrant issued upon probable cause” United States v. Place, 462 U.S. 696, 701, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). However, a warrantless seizure of contraband can still be valid “if the exigencies of the

circumstances demand it or some other recognized exception to the warrant requirement is present.” *Id.*

[6] There are three exceptions to the warrant requirement that Defendants have raised in this case: exigent circumstances, consent, and open fields. *See, e.g., Oliver v. United States*, 466 U.S. 170, 178, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (seizure of contraband in open field not unreasonable); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (consensual search not unreasonable); *Warden v. Hayden*, 387 U.S. 294, 298, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (exigent circumstances justified warrantless search and seizure). These exceptions to the warrant requirement are “narrow and their boundaries are rigorously guarded.” *Hopkins v. Bonvicino*, 573 F.3d 752, 763 (9th Cir.2009) (internal quotation marks omitted). For the reasons discussed below, none of these exceptions apply to the warrantless seizures in this case.

A. The exigent circumstances exception does not apply.

[7] [8] Defendants' primary argument is that exigent circumstances justified the search and seizure of Plaintiffs' marijuana plants. Opp'n at 8–9. It is well established that certain exigencies permit law enforcement officials to search and seize property without a warrant. *See, e.g., Hayden*, 387 U.S. at 298, 87 S.Ct. 1642. However, the exigent circumstances exception only applies “when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.... [That is,] there is compelling need for official action and no time to secure a warrant.” *Missouri v. McNeely*, — U.S. —, 133 S.Ct. 1552, 1558–59, 185 L.Ed.2d 696 (2013) (internal quotations omitted). “Exigent circumstances include those circumstances that would cause a reasonable person to believe that entry ... was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.” *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1221 (9th Cir.2014) (internal quotations omitted; ellipsis in original).

[9] [10] [11] [12] While a state or local government has the authority to declare a certain activity to be an “emergency” or a “nuisance,” such declaration does not, by itself, justify a warrantless search or seizure under the Fourth Amendment. *See Sibron v. New York*, 392 U.S. 40, 61, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). A state “may not ... authorize police conduct which trenches upon Fourth Amendment rights,

regardless of the labels which it attaches to such conduct.” *Id.* “The question ... upon review of a state-approved search or seizure [] is not whether the search (or seizure) was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment.” *Id.* The same restrictions apply to local government.

[13] [14] [15] California state law is in accord with this federal constitutional requirement. *Leppo v. City of Petaluma*, 20 Cal.App.3d 711, 718–19, 97 Cal.Rptr. 840 (1971). A local government typically “has statutory power, vested in its governing body, to declare and abate public nuisances. But neither at common law nor under such express power can it, by its mere declaration that specified property is a nuisance, make it one when in fact it is *1052 not.” *Id.* at 718, 97 Cal.Rptr. 840 (quoting 14 A.L.R.2d 82). Even where a local government correctly identifies and classifies a nuisance, summary abatement may only be used in narrow circumstances. “[I]n emergency situations the city may act summarily to abate a nuisance, but in such case the city must be prepared to establish by a preponderance of evidence that an emergency actually existed.” *Id.* at 719, 97 Cal.Rptr. 840.

[16] Here, Defendants make two arguments for why the exigent circumstances exception should apply. First, they point to the ongoing water crisis in California. Opp'n at 8–9. They argue that marijuana plants use a large amount of water (although they provide no comparison to other agricultural or garden plants), so law enforcement is authorized to enter private property to cut down such plants without a warrant. Defendants note that, for one reservoir in Lake County, the water is at 10% of capacity, putting it below the intake pump so that the public cannot use the reservoir, and that the County has adopted Urgency Conservation Ordinances. *Id.* Even under these conditions, Defendants' argument is unavailing. The need to reduce water use, even during a drought, falls below the level of urgency associated with the emergencies justifying a warrantless search in existing case law, such as the preservation of evidence, prevention of immediate physical harm, or stopping the escape of a suspect. Defendants could have easily obtained a warrant, or followed the five-day waiting period required under the Ordinance's non-summary abatement procedure, in order to stop the water usage here. The Court is utterly unpersuaded by Defendants' claim at oral argument that Lake County should not be required to get a warrant for these abatement actions because it has not fully developed the institutional process required to do so. The County's inexperience in obtaining warrants before conducting a search and seizure does not

excuse the requirements of the United States Constitution. Moreover, Defendants explained that, even with their lack of institutional capacity, it would take only about a day to obtain a warrant. Defendants give no reason for why they cannot wait one day to search the premises in these cases.

Defendants' second argument is that the Ordinance itself justifies the warrantless search and seizure. The Ordinance does declare that the violations at issue in this case “constitute[] an immediate threat or danger to the health, safety and welfare of the public and may, therefore, be summarily abated” County of Lake Ordinance No. 2997 § 72.8. But mere declaration of an immediate threat does not make it so. *See Sibron*, 392 U.S. at 61, 88 S.Ct. 1889. Further, the other provisions of the Ordinance belie the claim that any outdoor growth whatsoever constitutes an emergency. For example, the Ordinance allows a private resident to grow indoors as many plants as can fit in an area of 100 square feet. Ordinance No. 2997 § 72.6. It also allows up to six mature plants or twelve immature plants outdoors on parcels greater than one acre. *Id.* § 72.5. The County offers no explanation for why the water use in these permissible situations is not problematic, but water used for any outdoor growth on an acre or less is an “immediate threat” to public health and safety. Similarly, despite being asked by the Court during oral argument, Defendants are unable to explain why the cultivation of seven mature plants constitutes a danger to public health and safety, but the growth of six plants does not. The apparent arbitrariness of the Ordinance's razor-thin distinction between emergency violations and permissible growth delegitimizes the Ordinance's summary abatement provision, and, consequently, Defendants' argument that the exigency exception applies.

***1053 B. Plaintiffs did not consent to these searches.**

[17] Consent is a recognized exception to the Fourth Amendment protection against unreasonable search and seizure. *United States v. Russell*, 664 F.3d 1279, 1281 (9th Cir.2012). However, the existence of consent to search “is not lightly inferred,” and the government always has the burden of proving effective consent. *United States v. Reid*, 226 F.3d 1020, 1025 (9th Cir.2000).

At the hearing held on September 2, 2014, Defendants responded to Plaintiffs' allegations of unconstitutional search and seizure by claiming that Plaintiffs' had consented to these searches. Sept. 2 Transcript at 11 (Docket No. 31). In fact, Defendants submitted that they would provide proof of

consent in this case by providing declarations “under penalty of perjury.” *Id.* To date, they have provided no such evidence.

[18] Despite Defendants' claims at the hearing, Plaintiffs have repeatedly asserted that they did not consent to Defendants' searches. In fact, Plaintiffs' declarations indicate that four of the nine named Plaintiffs were not even home when the searches and seizures occurred, and Plaintiffs have provided a video of what appears to be law enforcement officers cutting a chain lock to enter private property. Allen, Harris, Outhout and Warren Decls. (Docket Nos. 6, 9, 13, 17); Manually Filed Video (Docket No. 38–1). Those Plaintiffs who were present during the searches argue that the show of force made during the raids renders any consent that Plaintiffs did provide involuntary. Mot. at 11; *see also, e.g.*, Holt Decl. at 2; Outhout Decl. at 2. Given that it is the government's burden to establish voluntary consent, the Court finds that this exception does not apply to the warrantless searches and seizures in this case.

C. The open fields exception does not apply.

[19] [20] Defendants have also raised the open fields exception as a defense. Opp'n at 8. In general, the police do not need a warrant to search the “open fields” of a private property, because an individual does not have a significant privacy interest in such open spaces. *Oliver v. United States*, 466 U.S. 170, 179, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). However, within the curtilage of a home, an individual's privacy interest is sufficient for Fourth Amendment protections to apply. *Id.* at 180, 104 S.Ct. 1735; *United States v. Struckman*, 603 F.3d 731, 738 (9th Cir.2010). Four factors determine the extent of the curtilage: “the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.” *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987); *Struckman*, 603 F.3d at 739 (“[A] small, enclosed yard adjacent to a home in a residential neighborhood—is unquestionably such a ‘clearly marked’ area ‘to which the activity of home life extends,’ and so is ‘curtilage’ subject to Fourth Amendment protection.”).

[21] Here, Plaintiffs' marijuana plants appear to have been within the curtilage of their homes, precluding application of the open fields doctrine. Each of the named Plaintiffs reside on properties that are one acre or smaller. Plaintiffs' Decls. The marijuana plants were generally between zero and thirty

feet from the Plaintiffs' houses. *Id.* Each of the marijuana growing areas was surrounded by at least one fence, and often the entire property was also surrounded by a fence. *Id.* Although more facts may be necessary to conclude *1054 at trial that “the activity of home life extends” to these areas, the properties at issue are so small, and the plants so close to the houses, that it is likely that the areas are within the curtilage of Plaintiffs' homes. As a result, the Court determines that the open fields exception does not apply.

D. The Court is concerned that Plaintiffs fail to state a claim against the Individual Defendants, and constructs the Preliminary Injunction accordingly.

Defendants raise legitimate concerns about the sufficiency of the factual allegations as they relate to some of the individual Defendants in this case. *See* Opp'n at 5–6. Specifically, the Court is concerned that the Complaint does not allege sufficient facts regarding the individual Defendants' specific involvement in the alleged constitutional violations.

[22] [23] [24] To state a claim under 42 U.S.C. § 1983, a plaintiff must allege an actual connection between the actions of the named defendants and the alleged deprivations, either in the form of personal participation, vicarious liability (if permitted by state law), or by causing the deprivation by “setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.” *Johnson v. Duffy*, 588 F.2d 740, 743–44 (9th Cir.1978). Vague and conclusory allegations of an official's involvement in civil rights violations are insufficient. *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir.1982). Instead, the complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). For multiple defendants, a complaint must set forth specific facts as to each defendant's role in the alleged violation. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir.1988).

[25] In the Complaint, Plaintiffs' factual allegations regarding the Individual Defendants are vague and conclusory. The Complaint provides:

Each of the defendants caused and is responsible for the below-described unlawful conduct and resulting injuries by, among other things: personally participating in the unlawful conduct or acting jointly or conspiring with others who did so by authorizing, acquiescing or setting in motion policies, plans or actions that led to the unlawful conduct;

by failing to take action to prevent the unlawful conduct; and by ratifying the unlawful conduct that occurred by agents and officers under their discretion and control, including failing to take remedial steps or disciplinary action. In doing the acts alleged herein, defendants and each of them had a duty to protect the health and safety of the Plaintiff, and they failed to exercise due care in the enforcement of that duty.

Compl. ¶¶ 23–24. These factual and causal allegations are insufficient. Absent an amended Complaint, it is likely that the claims will be dismissed as they relate to these individual Defendants. Consequently, Plaintiffs are presently unlikely to succeed against these individual Defendants, and a preliminary injunction is granted only against the County of Lake, its employees and agents, and those acting in concert with it.

E. Defendants' other arguments are not persuasive.

[26] Regarding the likelihood of success on the merits, Defendants make three additional arguments that fail to move the Court. First, Defendants claim that Plaintiffs have not sufficiently alleged a privacy interest in these properties, and therefore lack standing, because Plaintiffs have only stated that they are “residents” of Lake *1055 County. Opp'n at 4–5. However, both the Complaint and Plaintiffs' Declarations repeatedly allege that these properties are Plaintiffs' “homes,” which would clearly be within the Fourth Amendment's scope. Amended Complaint ¶¶ 6–14; *see also, e.g.*, Allen Decl. at 2. Additionally, Plaintiffs made clear at the October 6 hearing that all of the named Plaintiffs primarily reside at the properties at issue. Such alleged residence is sufficient for standing to challenge a search under the Fourth Amendment. *See, e.g., Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

[27] Second, Defendants argue that Plaintiffs have failed to allege a sufficient property interest, either in ownership of the real properties that were searched, or in the medical marijuana plants themselves. Opp'n at 5. Again, this argument defies the most reasonable interpretation of the Complaint and Declarations. Absent any evidence otherwise, it is reasonable to infer that medical marijuana patients who cultivate plants on land just outside their homes also own those plants. The plants are therefore presumed to be Plaintiffs' personal property, to which both the Fourth and Fourteenth Amendments apply. *United States v. Place*, 462 U.S. 696, 701, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1031 (9th Cir.2012) (regarding homeless persons' unattended belongings, “this case concerns

the most basic of property interests encompassed by the due process clause: Appellees' interest in the continued ownership of their personal possessions”).

[28] Third, Defendants argue that there is no municipal liability for Lake County here, because Plaintiffs have not identified a “policy [that] amounts to deliberate indifference to [a] plaintiff's constitutional rights.” Opp'n at 6. However, Defendants are conflating two separate theories of municipal liability. According to *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a municipality can be liable under § 1983 where the allegedly unconstitutional action implements an officially sanctioned policy, such as an ordinance. *Id.* at 691, 98 S.Ct. 2018. Alternatively, even where there is no such policy, a municipality can be liable where its officers demonstrate “deliberate indifference” to plaintiffs' constitutional rights. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388–89, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). However, Defendants have not identified any cases holding that, where there is an official policy at issue, that policy itself must “amount to” deliberate indifference. Here, although there are questions about whether all of the searches and seizures were conducted pursuant to Ordinance 2997, it is clear that some of them were, since Summary Abatement notices were at least occasionally left at Plaintiffs' residences. Because Plaintiffs have shown that Defendants were implementing an official policy, Plaintiffs have sufficiently alleged a theory of municipal liability.

Plaintiffs also raise claims related to due process, a conspiracy to violate civil rights, and violations of the privacy protections of the California Constitution. However, Plaintiffs have demonstrated a likelihood of success on their Fourth Amendment claim—specifically, that Defendants conducted warrantless searches and seizures of Plaintiffs' property, and no exception to the warrant requirement applies. Because such success is alone sufficient for the preliminary injunctive relief sought, the Court does not now address the merits of Plaintiffs' additional claims at this point.

II. Prong Two: Plaintiffs Are Likely to Suffer Irreparable Harm Absent an Injunction

[29] The second prong of the *Winter* test for a preliminary injunction is that the *1056 moving party would likely suffer irreparable injury in the absence of an injunction. Although there was insufficient evidence to satisfy this factor at the TRO stage, Plaintiffs have provided enough evidence to satisfy it now.

[30] [31] Under *Lyons*, plaintiffs seeking a preliminary injunction must use evidence to demonstrate a likelihood that they will be injured again. 461 U.S. at 108–09, 103 S.Ct. 1660. There are two ways a plaintiff can demonstrate such a likelihood: first, by identifying a written policy that the injury “stems from,” or second, by demonstrating that the injury was part of a “pattern of officially sanctioned behavior.” *Melendres*, 695 F.3d at 997–98 (internal quotations and ellipsis removed).

Previously, Plaintiffs argued that the mere loss of security following an unconstitutional raid was an ongoing injury amenable to injunctive relief. September 3, 2014 Supplemental Brief at 2 (Docket No. 24). The Court rejected this argument, as *Lyons* and its progeny clearly indicate that the mere loss of security following a constitutional violation, without more, does not demonstrate a likelihood of future irreparable harm. Order at 2–4. Plaintiffs also argued that the threat of irreparable harm arose from the risk that they would be raided again. Sept. 3 Supplemental Brief at 2–4. Because Plaintiffs put forward no evidence showing why law enforcement officials were likely to return to a previously abated Plaintiff within the same growing season, the Court rejected this argument when ruling upon Plaintiffs' request for a TRO. Order at 4–7.

Now, however, Plaintiffs have provided sufficient evidence to show that they are likely to suffer injury from future raids within this growing season. First, as already noted, at least some of the injuries stem from the enforcement of Ordinance 2997, as indicated by the Summary Abatement notices posted by law enforcement officials. Second, Plaintiffs have provided testimony in the form of a declaration from a similarly situated medical marijuana patient whose property was seized by the Lake County Sheriff's Department in July of 2013, March of 2014, and again in August of 2014—three times in slightly over one year. Robinson Decl. at 1–2 (Docket No. 37). The numerosity and repetitive nature of these searches suggests a pattern or practice on the part of the County to conduct repeat searches and seizures. Also, Plaintiffs put forward evidence, in the form of a declaration from the Director of the California Chapter of NORML, that it is common for California's medical marijuana patients who have lost marijuana plants to secure new “starter” plants, which could be a target of additional law enforcement seizures this year. Gieringer Supp. Decl. (Docket No. 36). Further, Gieringer claims to have received numerous complaints from medical marijuana patients in the County of Lake about

warrantless searches and seizures of their marijuana plants, as well as complaints from unabated patients in the County who fear seizure of their medical marijuana in the coming months.

In short, while Plaintiffs were denied a TRO based on their failure to adequately demonstrate a likelihood of irreparable injury absent the issuance of injunctive relief, they have successfully done so in the intervening weeks.

III. Prong Three: The Balance of Equities Favors Plaintiffs

[32] District courts must “give serious consideration to the balance of equities and the public interest.” *Winter*, 555 U.S. at 9, 129 S.Ct. 365. However, an injunction is a “matter of equitable discretion.” *Id.* at 32, 129 S.Ct. 365. The appropriate analysis requires looking “to the possible harm *1057 that could befall the various parties.” *Maxim Integrated Products, Inc. v. Quintana*, 654 F.Supp.2d 1024, 1036 (N.D.Cal.2009).

[33] In this case, the balance of equities tips sharply in Plaintiffs' favor. First, denying the preliminary injunction would leave numerous medical marijuana patients in Lake County vulnerable to future warrantless seizures of their medicine, which could lead to significant pain and suffering. While it is true that these patients could secure medical marijuana elsewhere should they need it immediately, California law explicitly allows for cultivation, so that patients are not required to do so. *Cal. Health & Safety Code § 11362.77*. Second, the protection of constitutional rights is a strong equitable argument in favor of issuing the injunction. Finally, the immediacy if the situation also weighs in favor of granting a preliminary injunction, as it is cultivation season for marijuana plants, and allowing further warrantless seizures in the near-term would likely have lasting consequences for Plaintiffs' medical marijuana supplies.

The Court recognizes that several of the patients were apparently out of compliance with the Ordinance. However, this fact alone does not move the Court to deny the injunction, given the equitable considerations discussed above.

The Court is not convinced by Defendants' argument that granting a preliminary injunction poses potential harm to the general public. Defendants point to concerns about inordinate water usage, water pollution, and safety hazards resulting from the conditions of cultivation used by alleged violators of the Ordinance. Opp'n at 8–9. At oral argument, Defendants described “electricity shacks” and water system failures.

However, absent a compelling argument to the contrary, there is little reason to believe that requiring a five-day notice period, or the time it takes to obtain a warrant, before abating noncompliant cultivation would exacerbate these harms to a level that outweighs the burden on Plaintiffs. Further, the Court's narrow injunction allows for responses to true emergencies that are in addition to mere violations of the Ordinance. For example, in the ordinary case where someone on .75 acres of land is cultivating marijuana, the County must obtain a warrant or provide five-day's notice before entering the property and abating the plants. However, if that cultivation includes the use of a dangerous electricity rig that the County reasonably believes could start a fire at any moment, and the County has knowledge of these dangerous conditions without violating the Fourth Amendment rights of the property owner, then the County can mediate the danger under the exigency exception to the warrant requirement. In other words, the Court prescribes injunctive relief that orders the County to comport with constitutional requirements; it does not disable the County from responding to real, supportable, reasonable threats to public safety.

IV. Prong Four: An Injunction is in the Public Interest

[34] The public interest is a largely neutral factor when weighed in this case. On the one hand, California residents who are authorized to use and cultivate medical marijuana under the state's Compassionate Use Act have a strong interest in being protected from warrantless seizure of their medicine. In the same vein, California has an interest in seeing that its laws are faithfully protected against municipal intrusion or overreach. Conversely, residents of Lake County passed Ordinance No. 2997 by 51.6%, and therefore have an interest in the protection of local laws enacted through the democratic process. Opp'n at 1. Further, where the cultivation of marijuana plants does tax public utilities, *1058 endanger the water supply, attract crime, and cause a nuisance (be it from noise, smell, etc.) to neighbors, there is a public interest in favor of enforcing reasonable municipal nuisance ordinances. Ultimately, however, the protection of constitutional rights and the guarantee of access to state-recognized medicine tilts the scales in favor of Plaintiffs. Moreover, Plaintiffs' strong showing on the other elements required for a preliminary injunction compensates for the close nature of this specific element.

CONCLUSION

Plaintiffs have met their burden in showing the need for a preliminary injunction stopping the warrantless summary

abatement actions against medical marijuana patients by the County of Lake, except in situations of true emergency, pending a full trial on the merits. For this reason, the Court GRANTS Plaintiffs' request for a preliminary injunction. IT IS HEREBY ORDERED that Defendant County of Lake, its officers, agents, and employees, and any other persons acting in active concert or participation therewith, are enjoined from enforcing Ordinance No. 2997 through warrantless searches or summary abatement actions without consent, unless doing

so is necessary to prevent immediate physical harm to persons or property, the destruction of evidence for a criminal case, or the escape of a criminal suspect.

IT IS SO ORDERED.

All Citations

71 F.Supp.3d 1044

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.