DAVID BEAUVAIS
Attorney at Law
1840 Woolsey Street
Berkeley, CA 94703
Telephone: (510) 845-0504
Facsimile: (510) 540-4821

Counsel for Defendant
EDWARD ROSENTHAL

LAW OFFICES OF EPHRAIM MARGOLIN
Ephraim Margolin (SBN 032582)
Joseph D. Elford (SBN 189934)
240 Stockton Street, Fourth Floor
San Francisco, CA 94108
Telephone: (415) 421-4347
Facsimile: (415) 397-9801

Counsel for Defendant
EDWARD ROSENTHAL
(for purposes of three motions only)

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 DUE PROCESS GROUNDS (ENTRAPMENT-BY-ESTOPPEL)** Date: January 6, 2002 Time: 2:30 p.m. Place: Courtroom of the Hon. Charles R. Breyer

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NOTICE OF MOTION AND MOTION TO DISMISS ON DUE PROCESS GROUNDS (ENRTAPMENT-BY-ESTOPPEL)

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 due process.

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. Amend. V, 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 Fred Gardner in Support of Defendant Rosenthal's Motions to Dismiss, the Declaration of Mary Pat Jacobs 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

Defendant Edward Rosenthal ("Rosenthal") was given every indication by federal and state officials that he would not be prosecuted for cultivating medical marijuana as a City of Oakland official. He was recruited and deputized by the City of Oakland to perform this task and was assured by various officials and attorneys that a federal immunity statute would shield him from prosecution. The federal government even published an official "Response" to the passage of California's medical marijuana initiative which detailed an enforcement strategy

indicating that it would only arrest and prosecute medical marijuana offenses with an explicit nexus interstate commerce. Following the publication of this Response, however, a new federal administration took office, bringing with it an increased resolve to put an end to the California medical marijuana experiment. To send a clear message that it will not tolerate *any* deviation from its prohibitionist policy, this new administration has brought the full force of the extremely harsh federal criminal drug laws to bear upon high-profile medical marijuana cultivators like Rosenthal. Without any prior warning, the government raided Rosenthal's home, roused him from his bed and charged him with conspiracy to cultivate marijuana, in violation of 21 U.S.C. §§ 2 and 841. Due process demands that justice satisfy the appearance of justice and that government officials not mislead defendants to commit crimes while under the impression that their conduct is authorized. This prosecution satisfies neither requirement and should be dismissed.

I. STATEMENT OF FACTS

Following the passage of medical marijuana initiatives in California and Arizona, the Office of National Drug Control Policy ("ONDCP") issued an official "Administration Response," which was approved by the President and published in the Federal Register on February 11, 1997. 62 Fed. Reg. 6164 (Feb. 11, 1997) ("Response" or "Notice") (attached to Defendant Rosenthal's Request for Judicial Notice in Support of Motions to Dismiss as Exhibit 4). The Response recognized the conflict between "federal authority vis a vis that of the states" and sought to notify the public of the "administration['s] strategy to respond." *Id.* at 6164. It stated that "Federal drug control agencies will undertake the following coordinated courses of action" in (1) criminal law enforcement, (2) scientific research, (3) employment administration and (4) public education. *Id.*

In describing its strategy to enforce the federal Controlled Substances Act, 18 U.S.C. § 801 *et seq*, the government could have, but did not, simply declare that federal law is supreme

and that it would continue to enforce the federal drug laws in Arizona and California to their fullest extent. *See id.* Instead, the government stated that it gave "due consideration" to the "key principle[]" of "federal authority vis a vis that of the states" and it detailed an enforcement strategy that would continue the arrest and prosecution of federal marijuana offenses only where there was an explicit connection to interstate commerce. *See id.* For instance, the government made clear that the U.S. Postal Service "will continue to pursue aggressively the detection and seizure of Schedule I controlled substances mailed through the US mails, particularly in California and Arizona, and [arrest] those using the mail to distribute Schedule I controlled substances." *Id.* "The Department of Treasury (Treasury) and the Customs Service will continue to protect the nation's borders and take strong and appropriate enforcement action against imported or exported marijuana and other illegal drugs." *Id.* Treasury and the IRS "will continue the enforcement of existing Federal tax laws which discourage illegal drug activities." *Id.* For purely local activity, by contrast, the government stated only that it would "encourage" local law enforcement officials to enforce state law to the fullest extent and, when they seized medical marijuana, the DEA would adopt such seizures. *Id.* at 6164. The Response pointedly did not state that the government would continue to arrest and prosecute purely local medical marijuana activity. By all appearances, the government had indeed given "due consideration" to federalism.

In the months that followed, California courts further harmonized the state and federal positions by curtailing the scope of the Compassionate Use Act, Cal. Health & Safety Code § 11362.5 ("the Act"). In *People v. Trippet*, 56 Cal.App.4th 1532, 66 Cal.Rptr.2d 559 (1997), the California Court of Appeal for the First District held that the Act provides a defense only to cultivation and possession of marijuana; it does not legalize transportation, unless the "quantity transported and the method, timing and distance of transportation are reasonably related to the patient's current medical needs." 56 Cal.App.4th at 1546-47 & 1550-51, 66 Cal.Rptr.2d at 567-69 & 571. Four months later, this same court held that the Act does not provide a defense to the sale of marijuana, except for bona fide reimbursement of costs. *People ex rel. Lungren v. Peron*,

59 Cal.App.4th 1383, 1399, 70 Cal.Rptr.2d 20, 31 (1997). The court noted that an implied exception for sales was necessary to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes." *Id.* (quoting § 11362.5(b)(1)(A)). Justice Kline observed that local government agencies may elect to provide medical marijuana to the sick and dying under a municipal program. *See* 59 Cal.App.4th at 1402, 70 Cal.Rptr.2d at 32 (Kline, J., concurring).

Meanwhile, the federal government eliminated other sources of safe and reliable medical marijuana, thereby compelling local government agencies to become involved in its distribution. *First*, the government threatened to revoke the licenses of California doctors who recommend marijuana to their patients. When this proved unsuccessful, *Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997); *see Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002), the government sought and obtained an order from this Court enjoining several California cooperatives from distributing medical marijuana to the seriously ill, *United States v. Cannabis Cultivators Club*, 5 F.Supp.2d 1086, 1091-92 & 1105-06 (N.D.Cal. 1998). In granting this injunction, this Court did not discount the possibility of distribution by local government agencies. To the contrary, this Court expressly distinguished the situation where "the federal government seek[s] to enjoin a *local governmental agency* from carrying out the humanitarian mandate envisioned by the citizens of this State when they voted to approve this law." *Id.* at 1091 (emphasis added). This Court also observed that "it is uncertain whether the federal government would even seek to enjoin such conduct by a local government entity under strictly controlled conditions." *Id.* at 1105.

Local California agencies then took up the cause. Recognizing a shortage of safe and reliable marijuana for its seriously ill, 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); *see also* San Francisco Measure S (authorizing San Francisco government to explore

programs to distribute medical marijuana). To encourage persons to cultivate marijuana for distribution to the seriously ill under this Program, the City of Oakland recruited and deputized persons to grow marijuana as City officials and the City assured them that, in doing this, they would be immune from state and federal prosecution. *See* Declaration of Joe DeVries in Support of Defendant Rosenthal's Motions to Dismiss ("DeVries Decl."), filed herewith, at ¶6; Declaration of Jeffrey Jones in Support of Defendant Rosenthal's Motions to Dismiss ("Jones Decl."), filed herewith, at ¶6. On July 28, 1998**,** Rosenthal attended an Oakland City Council meeting wherein Oakland Assistant City Attorney Barbara Parker stated that 21 U.S.C. § 885(d) would immunize deputized persons from federal criminal penalties under the federal narcotics laws. DeVries Decl. ¶¶3 & 4; Jones Decl. ¶¶4 & 5; Declaration of Edward Rosenthal in Support of Defendant Rosenthal's Motions to Dismiss ("Rosenthal Decl."), filed herewith, at ¶6. Indeed, the Oakland Ordinance, on its face, provides for immunity under the federal immunity provision. Ordinance No. 12076, Section 1.D (citing 21 U.S.C § 885(d)). In addition, Rosenthal attended meetings of an Oakland subcommittee, which were attended by Lt. Rick Hart of the Oakland Police Department, wherein medical marijuana was discussed without a single mention by anyone, including Lt. Hart, of possible exposure to federal law. *See* DeVries Decl. ¶¶7 & 8; Rosenthal Decl. ¶3.

Thus, when Jeffrey Jones, executive director of the Oakland Cannabis Buyers' Club ("OCBC"), approached Rosenthal in the summer of 1998 to request his assistance in cultivating marijuana for distribution to the seriously ill, Rosenthal agreed. *See* Jones Decl. ¶6. Rosenthal was deputized as a City of Oakland official shortly after August 12, 1998. Jones Decl. ¶6; Rosenthal Decl. ¶2. Based this deputization as a City official, Rosenthal could legally cultivate medical marijuana for distribution to approved entities, including the OCBC and San Francisco's Harm Reduction Center ("HRC"). *See* Rosenthal Decl. ¶4. Rosenthal then did what he was deputized to do.[1]

[1] Rosenthal did not grow marijuana to the point where it started to bud. Rosenthal Decl ¶4. Instead, Rosenthal developed starter plants, which he sold without profit to approved entities on

Less than a month later, on Sept. 3, 1998, this Court issued an Order in *United States v. Cannabis Cultivators' Club*, et al., Case No. 98-0088 CRB, denying defendants' motion to dismiss on grounds of the federal immunity provision of 21 U.S.C. § 885(d). *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 effectively stopped the OCBC from continuing to provide medical marijuana; however, it did continue to issue identity cards to qualified patients. Rosenthal Decl. ¶5. Because this Court enjoined only six cooperatives, while other approved entities continued (and still continue) to operate with local government authorization, and no one "undeputized" Rosenthal, he continued to believe that he was authorized to supply marijuana to approved entities other than the OCBC, such as the Harm Reduction Center. Rosenthal Decl. ¶¶5 & 9; *see* Jones Decl. ¶7.

Affirming this belief, several City of Oakland officials visited Rosenthal's medical marijuana cultivation facilities and they encouraged him to continue. DeVries Decl. ¶6; Rosenthal Decl. ¶7; *see also* Rosenthal Decl. ¶6 (noting that Oakland Fire Department thoroughly inspected his facilities) Declaration of Mary Pat Jacobs in Support of Defendant Rosenthal's Motions to Dismiss, filed herewith, at ¶4 (telling Rosenthal that DEA would not interfere with local policies). In addition, Rosenthal had several meetings with San Francisco District Attorney Terence Hallian wherein Rosenthal described his medical marijuana activities. Declaration of Fred Gardner in Support of Defendant Rosenthal's Motions to Dismiss ("Gardner Decl."), filed herewith, at ¶¶4 & 6; Rosenthal Decl. ¶8. Instead of warning Rosenthal that he was in violation of federal law, DA Hallinan told Rosenthal he supported him in his efforts. *See* Gardner Decl. ¶¶4 & 6; Rosenthal Decl. ¶8. Rosenthal dutifully performed his official functions under state and local law until he was arrested unexpectedly in the pre-dawn hours of February 12, 2002.

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his list. *Id.* This permitted seriously ill persons, or their primary caregivers, to cultivate their own marijuana in accordance with California law.

II. LEGAL STANDARDS

Due process demands that "justice . . . must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1971); *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 469, 91 S.Ct. 499, 507 (1971) (Harlan, J., concurring) ("[T]he appearance of evenhanded justice . . . is at the core of due process"); *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 1698 (1988) ("Federal courts have an independent interest in ensuring that criminal trials . . . appear fair to all who observe them"). One manifestation of this principle is the defense of reasonable reliance on misleading government conduct, frequently referred to as "entrapment-by-estoppel," which is based on the recognition that it is fundamentally unfair to prosecute one who has been led by government conduct to believe that his actions are authorized. *See Raley v. Ohio*, 360 U.S. 423, 438-39, 79 S.Ct. 1257, 1266-67 (1959); *United States v. Brebner*, 951 F.2d 1017, 1025 (9th Cir. 1991); *United States v. Tallmadge*, 829 F.2d 767, 774 (9th Cir. 1987); *United States v. Abcaisis*, 45 F.3d 39, 44 (2d Cir. 1995); *United States v. Timmins*, 464 F.2d 385, 386-87 (9th Cir. 1972); *United States v. Lansing*, 424 F.2d 225, 226 (9th Cir. 1970); *United States v. Brady*, 710 F.Supp. 290, 295 (D. Colo. 1989). To establish the defense of misleading government conduct, a defendant must show, *first*, reliance on false information or misleading conduct by a federal official or agent authorized to render advice on the subject. *See Raley*, 360 U.S. at 430-31 & 437, 79 S.Ct. at 1262 & 1266; *Brebner*, 951 F.2d at 1027; *Timmins*, 464 F.2d at 387. *Second*, the defendant must show that his reliance was reasonable, and that he need not have made additional inquiries, in light of his interaction with law enforcement, state officials and attorneys. *See Abcasis*, 45 F.3d at 44-45; *Tallmadge*, 829 F.2d at 775; *Timmins*, 464 at 387. The defense is an exception to the usual rule that a mistake of law is not a defense to a crime. *Timmins*, 464 F.2d at 386-87; *Lansing*, 424 F.2d at 226. It is ordinarily resolved by the jury based on the facts presented at trial, *Matthews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 886 (1988); *Sherman v. United States*, 356 U.S. 369, 377, 78 S.Ct. 819, 823 (1958); *United States v. Thompson*, 25 F.3d 1558, 1564 (11th Cir. 1994), but it may provide grounds for dismissal before trial where the undisputed facts establish the defense as a matter of law, *see United States v. Griffin*, 434 F.2d 978, 981 (9th Cir. 1970). Broader due

process questions regarding the appearance of justice are generally resolved by the court before trial. *See United States v. Gainey*, 380 U.S. 63, 68, 85 S.Ct. 754, 758 (1965).

III. ARGUMENT

A. Rosenthal Acted In Reasonable Reliance On Government Conduct Misleading Him To Believe That He Would Not Be Prosecuted For Wholly Intrastate Activity Conducted In His Official Capacity In Accordance With The Strict Requirements Of California Law

This case does not live up to the promise of due process guaranteed by the Constitution. The City of Oakland recruited Rosenthal to cultivate and distribute marijuana to seriously ill Californians and it deputized him as a city official for this very purpose. *See* DeVries Decl. ¶6; Jones Decl. ¶6; Rosenthal Decl. ¶2. It did this, not because it was seeking to entrap him, but because it quite reasonably interpreted the statutory immunity provisions of 21 U.S.C. § 885(d) to confer immunity on municipal officers performing their officials duties. *See* DeVries Decl. ¶¶3 & 4; Jones Decl. ¶¶4 & 5; *see also* Defendant Rosenthal's Motion to Dismiss on Grounds of Official Immunity, filed herewith; *State v. Kama*, 178 Or.App. 561, 564-65, 39 P.3d 866, 868 (Ct. App. Ore. 2002) (holding that 21 U.S.C. § 885(d) immunizes local law enforcement officers from federal prosecution for delivering controlled substances, in violation of 21 U.S.C. § 841, when they return medical marijuana to its owner in accordance with state law). Several local officials, who may well have been acting at the time as federal agents,[2] assured Rosenthal that he

[2] Rosenthal asserts, on information and belief, that the Oakland Police Department and/or the City of Oakland were members of one or more joint state/federal task forces to enforce the state *and federal* narcotics laws. Rosenthal is conducting discovery into this and intends to submit supporting documentation at the hearing on this matter. This connection, if proven, would establish the agents of the City of Oakland as federal agents for purposes of the due process misleading government conduct defense. *Cf. United States v. Tallmadge*, 829 F.2d 767, 774 (9th Cir. 1987) (holding that federally licensed firearm dealer is a federal agent for purposes of the misleading government conduct defense; noting that firearm purchasers have right to rely on legal representations made by federally-licensed firearms dealers, since "the United States Government has made [them] federal agents in connection with the gathering and dispensing of information on the purchase of firearms"); *United States v. Clegg*, 846 F.2d 1221, 1224 (9th Cir. 1988) (noting that licensed firearm dealers are private parties; "If Tallmadge was entitled to rely upon the representations of the gun dealer as a complete defense, we can hardly deny the same defense to Clegg [who dealt with high-ranking government officials"); *United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990) (although he could not authorize a violation of the statute,

enjoyed such immunity from federal prosecution. DeVries Decl. ¶¶3-8; Jones Decl. ¶¶4 & 5. Meanwhile, the federal government issued an official Notice which essentially left local medical marijuana activity to the states, stating only that it would continue to prosecute marijuana offenses having a direct connection to the U.S. mail, taxes or borders. *See* Response, 62 Fed. Reg. 6164, 6164 (Feb. 11, 1997). The government knew full well that Rosenthal believed he would not be prosecuted for performing his official duties, yet its first and only "notice" consisted of a pre-dawn raid of Rosenthal's home with the announcement that he was under arrest. This is not due process. *Cf. Martin v. OSHRC,* 499 U.S. 144, 158, 111 S.Ct. 1171, 1180 (1991) (warning that agency's "decision to use a citation [or other punishment] as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties ... and on other factors relevant to the reasonableness of the [agency's] exercise of delegated lawmaking powers.").

The case that pioneered the defense of misleading government conduct underscores the fundamental unfairness of this prosecution. In *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257 (1959), the Supreme Court reversed defendants' contempt convictions for refusing to answer questions put to them by Ohio's Un-American Activities Commission based on their assertion of the state privilege against self-incrimination. The commissioners told three of the defendants during their examinations that the privilege was available to them, and they led the forth defendant to believe this through their conduct and questioning. 360 U.S. at 430-31, 79 S.Ct. at 1262-63. Later, the State of Ohio determined that the privilege was unavailable and it convicted all four defendants for contempt for refusing to answer the questions put to them by the Commission. 360 U.S. at 431-33, 79 S.Ct. at 1263. The Supreme Court reversed all of the convictions for lack of due process, except one where the defendant was unequivocally directed

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Standards of Conduct officer "is as much a responsible public officer as . . . a licensed firearms dealer" for purposes of misleading government conduct defense); *see also United States v. Barker*, 546 F.2d 740, 957 (D.C. Cir. 1976) (Merhige, J., concurring) (defendants asserting entrapment-by-estoppel defense may rely on statements of persons acting as "go-betweens" for authorized federal officers, if such reliance in reasonable under the circumstances).

to answer by the Commission. 360 U.S. at 437 & 443-44, 79 S.Ct. at 1266 & 1269. The Court explained:

> This case involves more than [a lack of fair warning]; here the Chairman of the Commission, who clearly appeared to be the agent of the State in a position to give such assurances, apprised three of the appellants that the privilege in fact existed, and by his behavior toward the fourth obviously gave the same impression. . . . While there is no suggestion that the Commission had any intent to deceive the appellants, we repeat that to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State--convicting a citizen for exercising a privilege which the State clearly had told him was available to him. [Citation]. . . . We cannot hold that the Due Process clause permits convictions to be obtained under such circumstances.

360 U.S. at 437-39, 79 S.Ct. at 1266-67.

Thirteen years later, the Ninth Circuit applied *Raley* to overturn a conviction for refusing to submit to military induction. In *United States v. Timmins*, 464 F.2d 385 (9th Cir. 1972), defendant Timmins was a conscientious objector who twice wrote to the local draft board indicating his belief that he was a conscienscious objector and requesting the proper form to apply for this exemption. *Id.* at 386. The local draft board initially sent Timmons a Form 150, which he mistook as the improper form because it indicated that religious training was necessary for conscientious objector status. *Id.* When Timmons inquired a second time, the draft board simply reiterated that Form 150 was the only form for conscienscious objectors and it sent him another copy. *Id.* at 387. Significantly, the draft board did not notify Timmons that he could complete Form 150 without religious training. *Id.* at 387. The Ninth Circuit found that such conduct misled Timmons to believe that formal religious training was a prerequisite to filing for conscientious objector status and that this discouraged Timmons from fully developing a claim that might have provided him an exemption from military service. *Id*. at 387. The court reversed Timmons' conviction for the following reasons:

> [F]ully informed of appellant's mistaken impressions [from his repeated requests for the proper form], the board nevertheless failed in any way to assist him to correct his mistake and obtain the true facts regarding his conscientious objection. . . . Having thus failed to correct an important misimpression of appellant, of

> which it was fully aware, the board prevented or discouraged appellant from fully developing his claim. . . .
>
> . . . Having been denied that due process which the law requires, appellant's order to report for induction was invalid and his conviction is reversed.

Id. at 387 & 388.

The government's conduct here is far worse. Like the defendants in *Raley*, Rosenthal relied on an immunity statute which on its face applied to him when he engaged in the conduct at issue. *See* Rosenthal Decl. ¶3; Motion to Dismiss on Grounds of Official Immunity, filed herewith. Like Timmons, Rosenthal was misled by a combination of official publications and government conduct failing to cure a misleading impression it had created. Unlike either of these case, however, the government's misleading conduct was sustained over time and involved government officials at every level and branch. The government, as well as this Court, publicly recognized the uncertainty engendered by the federal/state conflict, and, to clarify the ambiguity, the government issued an official Response indicating that it would not prosecute wholly intrastate medical marijuana activity without an interstate nexus. *See* 62 Fed. Reg. 6164, 6164; *United States v. Cannabis Cultivators Club*, 5 F.Supp.2d 1086, 1105-06 (N.D.Cal. 1998); *see also id*. (describing federal government's implicit acceptance of San Francisco's needle exchange program, despite its illegality under federal law). Standing alone, any one of these assurances provides the basis for dismissal on grounds of misleading government conduct. *Cf. United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 675, 93 S.Ct. 1804, 1817 (1973) (reversing conviction for discharging refuse into navigable waters without a permit because regulations, although not purporting to define the statutory offense in question, misled defendant to believe it was acting in compliance with the law); *Abcasis*, 45 F.3d at 43-44 (reversing convictions for heroin distribution because DEA agent "effectively communicate[d] an assurance that the defendant [was] acting under authorization" by enlisting defendant to participate in drug transactions); *United States v. Clegg*, 846 F.2d 1221, 1223-24 (9th Cir. 1987) (holding that government's solicitation and encouragement of defendant's efforts to supply weapons to Afghan rebels would, if proven, constitute a valid defense to charges of exporting

firearms in violation of federal law); *United States v. Tallmadge*, 829 F.2d 767, 775 (9th Cir. 1987) (reversing conviction for felon-in-possession of firearm because federally-licensed gun dealer told him he could purchase firearms, and defendant confirmed this with his lawyer); *Barker*, 546 F.2d at 954 (reversing conviction for Watergate break-in because defendants were asked to conduct break-in by government official with apparent authority to issue directive); *see also Brady*, 710 F.Supp. at 295 (noting that "the doctrine [of due process reliance on misleading government conduct] is applied most often when an individual acts in reliance on a statute or an express decision by a competent court of general jurisdiction") (citing *United States v. Albertini*, 830 F.2d 985, 989 (9th Cir. 1987)). Taken together, the government's actions and statements form a pattern of grossly misleading government conduct, which requires dismissal. *Cf.United States v. Kelly*, 519 F.2d 794, 796 n.5 (8th Cir. 1975) ("There is a disquieting measure of unfairness when a state agency misleads an ex-offender into believing that he is exempt from a federal law").

B. If This Court Finds That The Federal Government Has Properly Exercised Its Commerce Powers And That The Federal Immunity Statute Does Not Apply, It Should Not Apply These Decisions Retroactively To Rosenthal

Compounding these due process problems is the uncertainty created by the highly unusual conflict between state and federal law. *See* Defendant Rosenthal's Motion to Dismiss For Lack of Subject Matter Jurisdiction and on Tenth Amendment Grounds, filed herewith; Defendant Rosenthal's Motion to Dismiss on Grounds of Official Immunity, filed herewith. The federal government recognized this conflict in its official Response to the passage of Proposition 215 and seemingly devised an enforcement strategy respecting California law, absent an explicit connection to interstate commerce. 62 Fed. Reg. 6164, 6164 (Feb. 11, 1997); *cf.*, *e.g.*, *United States v. Kelly*, 519 F.2d 794, 796 (8th Cir. 1975) ("By specifically providing that it would recognize only certain pardons, Congress indicated that it did not wish to recognize other means which the states might employ to expunge felony convictions"). Likewise, this Court observed that "it is uncertain whether the federal government would even seek to enjoin [medical marijuana distribution] by a local government entity under strictly controlled conditions."

Cannabis Cultivators Club, 5 F.Supp.2d at 1105. Where questions over which law governs allegedly illegal conduct are not resolved until *after* the conduct has been completed, the court should not apply its resolution of this conflict retroactively to the defendant. *Cf. United States v. Lynch*, 282 F.3d 1049, 1054-55 (9th Cir. 2002) (expressing concern that defendants be provided "'some means of knowing which of the two governments' will have oversight over their actions;" "The simple robbery of an individual does not provide notice that the defendant may be held accountable before a federal tribunal") (quoting *Lopez*, 514 U.S. at 576-77, 115 S.Ct. 1624 (Kennedy, J., concurring)); *Clegg*, 846 F.2d at 1224 (noting that defendant asserting entrapment-by-estoppel defense was operating in foreign jurisdiction not obviously covered by American law); *see also Hanna v. Plumer*, 380 U.S. 460, 474, 85 S.Ct. 1136, 1145-46 (1965) ("*Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs"); *compare Bouie v. City of Columbia*, 378 U.S. 347, 352, 84 S.Ct. 1697, 1702 (1964) ("There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language") *with State v. Kama*, 178 Or.App. 561, 564-65, 39 P.3d 866, 868 (Ct. App. Ore. 2002) (holding that 21 U.S.C. § 885(d) immunizes local law enforcement officers from federal criminal liability for returning medical marijuana to its owner in accordance with state law).

In *United States v. Kelly*, 519 F.2d 794 (8th Cir. 1975), the court discussed the due process implications of applying its resolution of a federal/state law conflict retroactively to the defendant before it. The court held that a federal felon-in-possession statute, 18 U.S.C. § 1202(a), which prohibits the possession of a firearm by one who has previously been convicted of a felony, applies even to those "felons" whose convictions have been expunged under state law. *Id.* at 795. After resolving the conflict in this manner, the court expressed its concerns about the uncertainty engendered by the differential treatment of felons under state and federal

law, especially when state officials mislead the defendant to believe that state, rather than federal, law controls. The court observed:

> Although he does not properly present the issue [footnote], we are concerned about the danger that state authorities may affirmatively mislead an ex-offender into believing that his right to carry a firearm under federal law has been restored by state action. . . .*There is a disquieting measure of unfairness when a state agency misleads an ex-offender into believing that he is exempt from a federal law. This unfairness should be corrected.*

Id. at 796 & n.5 (emphasis added).

Similarly, in *United States v. Potts*, 528 F.2d 883 (1975), all eighteen members of an *en banc* panel of the Ninth Circuit refused to apply a similar holding retroactively to the defendant before it, since this holding reversed circuit precedent. *Id.* at 886 & 887. Judge Wright wrote separately to express his concerns about the legal uncertainty created by the federal/state law conflict, and he proposed a "fair warning system" to cure this uncertainty. *Id.* at 886-87 (Wright, J., concurring). Here, Rosenthal was repeatedly misled about which law applied; he had no fair warning. Resolution of this conflict should not be applied retroactively to him..

C. This Prosecution Appears Unjust To All Who Observe It

Nor does this prosecution satisfy the appearance of justice. *Cf. Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1971) ("justice must . . . satisfy the appearance of justice"). Rosenthal is not an attorney. Rosenthal Decl. ¶1. He did not make a profit from his official activity. Rosenthal Decl. ¶4. Instead, Rosenthal was recruited to cultivate marijuana for distribution to the seriously ill by the City of Oakland and he agreed to do this because he is a humanitarian who has seen dying persons benefit from marijuana. It is appalling that the federal government would seek to imprison a local official for decades simply for performing these humanitarian official duties. Even if it disagrees with California and Rosenthal about the efficacy of marijuana in treating serious illnesses, the government had less punitive means available to it to vindicate its federal interests, such as through an injunctive relief action or an action seeking a contempt citation based on an injunction already obtained. *See Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974); *Ex parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441,

454 (1908). The government has obviously selected the most punitive means available to it to send a message to the public that dissenting views on drug policy will not be tolerated. We are not a nation, however, that permits the federal government to imprison its political opponents. *Cf. United States v. Bishop*, 412 U.S. 346, 360-61, 93 S.Ct. 2008, 2017 (1973) ("It is not the purpose of the law to penalize frank difference of opinion") (quoting *Spies v. United States*, 317 U.S. 492, 496, 63 S.Ct. 364, 367 (1943)).

California's angry response to this and similar such prosecutions confirms the appearance of injustice. An overwhelming majority of the American public supports the legalized use of marijuana for medical purposes, according to recent polls. *See Time*/CNN Poll (Oct. 23-24, 2002) (reporting that 80% of Americans think adults should be able to use marijuana legally for medical purposes) (reported in Joel Stein, *The New Politics of Pot*, *Time* (Nov. 4, 2002), at 56-57); Pew Research Center Poll (Mar. 2001) (reporting that 73% of Americans support allowing doctors to prescribe marijuana); Gallup Poll (Mar. 1999) (reporting that 73% of Americans say they would vote for making marijuana legally available for doctors to prescribe); Family Research Council Poll (June 1997) (reporting that 73% of respondents agreed that "people who find that marijuana is effective for their medical condition should be able to use it legally"). This would explain why so many people were outraged by Rosenthal's arrest, *see, e.g.,* Ann Harrison, *San Francisco Resists Medical Marijuana Raids*, AltNet (Feb. 14, 2002) ("The U.S. [DEA] touched off a firestorm of protest in San Francisco this week when DEA agents raided a medical marijuana club and arrested three medical marijuana activists") (available at http://www.alternet.org/story.html?StoryID=12414), as well as the arrests of the directors of Santa Cruz's Wo/Men's Health Alliance. The latter arrests prompted the Santa Cruz mayor and its city council to condemn the federal actions and, in protest, they personally supervised the distribution of marijuana to seriously ill Californians from the stairs of city hall. *See* William Booth, *Santa Cruz Defies U.S. on Marijuana: City Officials Vow to Defend Medical Uses*, Wash. Post, Sept. 18, 2002); Claire Cooper, *Medical Pot Dispute Boiling Over*, Sacramento Bee, Sept. 18, 2002. The local police chief later yanked his officers off the DEA task force that raided the

cooperative. *See* Mark Simon, *San Jose Cops Off DEA Squad: Chief Doesn't Want Them Raiding Pot Clubs*, S.F. Chron. (Oct. 10, 2002). Such open and public defiance of federal authority is reminiscent of the civil rights era, only, this time, the local officials are on the side of the oppressed. To protect the integrity of our federal criminal system from this transparently political prosecution, this Court should dismiss it. *Cf. United States v. Gainey*, 380 U.S. 63, 68, 85 S.Ct. 754, 758 (1965) ("Our Constitution places in the hands of the trial judge the responsibility for safeguarding the integrity of the jury trial"); s*ee also Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 1698 (1988) ("Federal courts have an independent interest in ensuring that criminal trials . . . appear fair to all who observe them").

CONCLUSION

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

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Respectfully submitted,

By_____
David Beauvais

Counsel for Defendant
EDWARD ROSENTHAL

LAW OFFICES OF EPHRAIM MARGOLIN

By_____
Ephraim Margolin

By_____
Joseph D. Elford

Counsel for Defendant
EDWARD ROSENTHAL
(for purposes of three motions only)