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IN THE UNITED STATES DISTRICT COURT
IN THE DISTRICT OF OREGON
MEDFORD DIVISION

JOSEPHINE COUNTY,

Plaintiff,

vs.

**STATE OF OREGON; and ELLEN F.
ROSENBLUM, Attorney General for the State of
Oregon**

Defendants,

Case No. 1:18-cv-566

**ACTION FOR DECLARATORY AND
INJUNCTIVE RELIEF**

COMPLAINT

Plaintiff alleges as follows:

JURSDICTION AND VENUE

1.

The court has Federal Question jurisdiction over this action pursuant to 28 U.S.C. §1331, specifically as an issue arising under the Controlled Substances Act ("CSA"), 21 U.S.C. §801, supplemental jurisdiction pursuant to 28 U.S.C §1367, and jurisdiction based on 28 U.S.C §2201 (declaratory relief) and 28 U.S.C §2202 (injunctive relief).

2.

This court has personal jurisdiction over Defendant ELLEN F. ROSENBLUM because

Action for Declaratory and Injunctive Relief -1-

JOSEPHINE COUNTY LEGAL COUNSEL
500 N.W. Sixth St., Room 152
Grants Pass, OR 97526
(541) 474-5226 FAX: (541) 474-5223

1 Defendant resides, conducts business and practices law in the State of Oregon and within this district as
2 a public official operating under the laws of the State of Oregon.

3 3.

4 Venue is proper in this district under 28 U.S.C. §§ 1391(b) and 1391(c).

5 4.

6 An actual controversy has arisen between the parties. Defendants are requiring Plaintiff to allow,
7 facilitate and accommodate the production of marijuana. This action threatens and causes injury to
8 JOSEPHINE COUNTY and its ability to regulate lawful uses of land within its jurisdiction.
9

10 **PARTIES**

11 5.

12 Plaintiff JOSEPHINE COUNTY ("the county") is a home-rule local government entity
13 organized and existing under the constitution and laws of the State of Oregon.

14 6.

15 Defendant STATE OF OREGON is a state organized and existing under the Oregon and United
16 States' Constitutions.

17 7.

18 Defendant ELLEN F. ROSENBLUM is the Attorney General for the State of Oregon and has the
19 duty of enforcing state law.
20

21 **STATEMENT OF THE FACTS ESTABLISHING ENTITLEMENT TO RELIEF**

22 8.

23 On November 3, 1998 Oregon voters approved Ballot Measure 67 which purported to
24 decriminalize the use, possession and cultivation of medical marijuana. The Oregon Medical Marijuana
25 Program is administered and regulated by the Oregon Health Authority, which is a division of Defendant
26

1 STATE OF OREGON.

2 9.

3 On November 4, 2014, Oregon voters approved Ballot Measure 91 which purported to
4 decriminalize the use, possession and cultivation of recreational marijuana. The recreational marijuana
5 program is administered and regulated by the Oregon Liquor Control Commission (OLCC) which is a
6 division of Defendant STATE OF OREGON.

7 10.

8 On June 30, 2015, Defendant STATE OF OREGON's Governor signed HB 3400 into law,
9 giving local governments the authority to adopt reasonable "time, place, and manner" regulations for the
10 production, cultivation and use of recreational and medical marijuana. The "time, place, and manner"
11 regulations are codified as ORS 475B.486 and ORS 475B.928 for recreational and medical marijuana,
12 respectively.
13

14 11.

15 Defendant STATE OF OREGON requires Plaintiff's public officials to provide Defendant with a
16 completed Land Use Compatibility Statement for every application to produce recreational marijuana
17 within Plaintiff's jurisdiction.
18

19 12.

20 18 U.S.C §371 states in part: "If two or more persons conspire to commit any offense against the
21 United States...in any manner or for any purpose, and one or more of such persons do any act to effect
22 the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years,
23 or both."
24

25 13.

26 Defendant ELLEN F. ROSENBLUM is charged with enforcing ORS 162.405 which requires:

1 “A public servant commits the crime of official misconduct in the second degree if the person
2 knowingly violates any statute relating to the office of the person.”

3 14.

4 Plaintiff sent to the May 16, 2017 election ballot the following non-binding question: “In your
5 opinion, should Josephine County prohibit the production of commercial, recreational marijuana in all
6 Rural Residential zones?” Out of 28,262 returned ballots 17,240 (63.85%) were marked: “Yes”.

7 15.

8 In July, 2017 Plaintiff began the process of regulating marijuana production in rural residential
9 zones. At a public hearing on July 19, 2017 Plaintiff outlined and adopted Order No. 2017-034 which
10 authorized the Community Development Director to initiate the process for regulating the production of
11 marijuana in rural residential zones. Ordinance 2017-002 ultimately resulted from that Order.
12

13 16.

14 Ordinance 2017-002 was subject to four public hearings: September 20, 2017; November 1,
15 2017; November 29, 2017; and December 6, 2017. Public comments supporting and opposing the
16 Ordinance were entered at all hearings.
17

18 17.

19 Plaintiff’s Board of County Commissioners adopted Ordinance 2017-002 on December 6, 2017.
20 The ordinance would have allowed for continued marijuana production throughout Josephine County,
21 but would have limited the amount of marijuana that could be produced upon properties located in Rural
22 Residential zones.

23 18.

24 Pursuant to the Josephine County Home Rule Charter the Ordinance was to go into effect on
25 March 6, 2018. On December 7, 2017 a group of petitioners filed, through counsel, a Notice of Intent to
26

1 Appeal with the Oregon Land Use Board of Appeals (“LUBA”), which is a division of Defendant
2 STATE OF OREGON, alleging that the Ordinance eviscerated “nonconforming use rights” under ORS
3 215.130, that the County did not provide the proper notice of a land use change under ORS 215.503, and
4 that the Ordinance was an unreasonable exercise of Plaintiff’s authority to impose reasonable “time,
5 place and manner” regulations on marijuana production under ORS 475B.486 and ORS 475B.928.

6
7 19.

8 On January 24, 2018 the LUBA petitioners submitted a motion to stay Ordinance 2017-002
9 pending their appeal. Plaintiff timely responded to the Motion for Stay on January 31, 2018. The LUBA
10 petitioners submitted a Supplemental Memorandum in Support of their Motion for Stay on the afternoon
11 of Friday, February 2, 2018 to which Plaintiff was provided less than a full business day to respond.
12 Based the petitioners’ Supplemental Memorandum LUBA ordered the stay of Ordinance 2017-002 on
13 the following Monday, February 5, 2018. Plaintiff moved for Reconsideration of the Stay, but LUBA
14 ultimately decided the case without ruling on that motion.

15
16 20.

17 The LUBA petitioners timely filed their Petition for Review on February 7, 2018. Plaintiff timely
18 filed its Response Brief on February 28, 2018. Oral argument occurred on March 8, 2018.

19
20 21.

21 LUBA issued its final order and opinion on March 14, 2018. LUBA remanded Ordinance 2017-
22 002 to Plaintiff, ruling that the county had not substantially complied with the requirements of ORS
23 215.503 regarding notice of a potential land use change. The county has petitioned the Oregon Court of
24 Appeals for judicial review of LUBA’s final order.

25
26 22.

The Controlled Substances Act comprehensively regulates the manufacture, distribution,

1 dispensing and possession of controlled substances. See 21 U.S.C. §841(a)(1) and 844(a).

2 23.

3 Congress has classified marijuana as a Schedule I controlled substance and has thereby
4 prohibited its manufacture, transfer, dispensing, and possession. 21 USC §§812(c) and 841(a)(1).

5 24.

6 As a schedule I controlled substance, marijuana does not have any federally authorized or
7 recognized acceptable use other than as part of a Food and Drug Administration pre-approved
8 research project. 21 USC §823(f). Despite efforts to reclassify marijuana, it has remained a
9 Schedule I drug since the enactment of the CSA. See *Gonzales v. Raich*, 545 US 1, 14-15 and n. 23
10 (summarizing "considerable efforts," ultimately unsuccessful, to reschedule marijuana).

11 25.

12 The CSA addresses its own relationship with state law. Pursuant to the CSA's express terms,
13 states are free to pass laws "on the same subject matter" as the CSA unless there is a "positive conflict"
14 between state and federal law "so that the two cannot consistently stand together." 21 USC §903.
15

16 **FIRST CLAIM FOR RELIEF**

17 **(Declaratory Relief – The recognition of a “lawful nonconforming use” is inapplicable to**
18 **marijuana production under the CSA)**
19

20 26.

21 Plaintiff re-alleges and incorporates by reference the preceding paragraphs.

22 27.

23 ORS 215.130(5) states in part: “The lawful use of any building, structure or land at the time of
24 the enactment or amendment of any zoning ordinance or regulation may be continued.”

25 ////

28.

1
2 Defendant STATE OF OREGON asserts that established marijuana producers possess a right to
3 continue growing marijuana up to limits determined by the state in rural residential zones, despite any
4 regulations and limitations of Josephine County.

29.

5
6 The CSA expressly prohibits the manufacture, transfer, dispensing and possession of marijuana.

30.

7
8 Any person in any state who possesses, distributes, or manufactures marijuana for medical or
9 recreational purposes, or attempts or conspires to do so, is committing a federal crime.
10

31.

11
12 The Supremacy Clause of the United States Constitution states: "This Constitution, and the Laws
13 of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be
14 made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in
15 every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary
16 notwithstanding." U.S. Const., Art. VI, Cl. 2.
17

32.

18
19 The recognition of marijuana production as a "lawful nonconforming use" under ORS 215.130 is
20 inapplicable to Oregon's system of land use regulation under the Supremacy Clause and the CSA
21 because the manufacture, transfer, dispensing and possession of marijuana are unlawful.
22

33.

23 A justiciable controversy exists between the parties inasmuch as defendant STATE OF
24 OREGON purports to require Plaintiff to authorize, allow for and accommodate marijuana production
25 on rural residential land within Josephine County in direct conflict with federal law.
26

34.

A justiciable controversy exists between the parties inasmuch as the state law is in conflict with the CSA to the extent the state law purports to require what the CSA prohibits. Plaintiff contends that it does not have to allow marijuana production as a "lawful nonconforming use" because such use is illegal under federal law.

SECOND CLAIM FOR RELIEF

(Declaratory Judgment - Ballot Measure 67, Ballot Measure 91, and HB 3400 preempted by CSA)

35.

Plaintiff re-alleges and incorporates by reference the preceding paragraphs.

36.

Ballot Measure 67 authorizes the use, possession and cultivation of medical marijuana to be administered and regulated by defendant STATE OF OREGON in direct contradiction of the CSA.

37.

Ballot Measure 91 authorizes the use, possession and cultivation of recreational marijuana to be administered and regulated by defendant STATE OF OREGON in direct contradiction of the CSA.

38.

HB 3400 assigns to local governments authority to adopt reasonable "time, place, and manner" regulations for the cultivation of recreational and medical marijuana.

39.

By enacting the CSA, Congress legislated within a particular field. When Congress legislates comprehensively, and within the scope of its constitutional authority, its enactments control. See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

////

40.

Ballot Measure 67, Ballot Measure 91, HB 3400 and other relevant legislation attempt to defy the CSA by legalizing the production, use, and regulation of recreational and medical marijuana.

41.

Plaintiff could not propose a full ban on marijuana production within all or part of its jurisdiction because defendant STATE OF OREGON, by employing Ballot Measures 67 & 91, HB 3400 and other relevant legislation, prevents Plaintiff from implementing the will of 63.85% of the voters who responded to the May 16, 2017 non-binding ballot question.

42.

A justiciable controversy exists inasmuch as Ballot Measure 67, Ballot Measure 91, HB 3400 and other relevant legislation authorize what federal law expressly prohibits, and purportedly preempt the authority of Plaintiff to place restrictions on federally illegal activities in rural residential zones within its jurisdiction.

THIRD CLAIM FOR RELIEF

(Declaratory Judgment – Police Powers authorize a local government to take measures to regulate or prohibit federally prohibited activities under the CSA)

43.

Plaintiff re-alleges and incorporates by reference the preceding paragraphs.

44.

The police power, delegated to the states through the Tenth Amendment, authorizes a state or local government to enact measures to preserve and protect the safety, health, welfare, and morals of the community, and extends to all appropriate ordinances for the protection of the same.

////

1 45.

2 Because Congress legislated regarding the manufacture, transfer, dispensing and possession of
3 marijuana through the CSA, the police power does not enable a state government to enact measures that
4 are inconsistent with the CSA.

5 46.

6 The STATE OF OREGON's imposition and enforcement of Measures 67 & 91, HB 3400 and
7 other relevant legislation relating to the production and regulation of marijuana restricts Plaintiff and its
8 officials from adopting measures regarding the manufacture, transfer, dispensing and possession of
9 marijuana that would be consistent with the CSA.

10 47.

11 A justiciable controversy exists between the parties inasmuch the STATE OF OREGON's
12 imposition of conflicting laws materially and unreasonably restricts a local government or jurisdiction
13 from exercising its police powers in a manner consistent with federal law regarding the production, use,
14 and regulation of marijuana.

15 48.

16 A justiciable controversy exists between the parties inasmuch as the STATE OF OREGON
17 limits the exercise of Plaintiff's police power to regulate the use of land in a manner that is consistent
18 with federal law.

19 **FOURTH CLAIM FOR RELIEF**

20 **(Injunctive Relief – Preemption of ORS 162.405 by the CSA)**

21 49.

22 Defendant STATE OF OREGON, through Defendant ELLEN F. ROSENBLUM and the District
23 Attorneys, is charged with enforcing ORS 162.405 which is the crime of Official Misconduct in the
24
25
26

1 Second Degree.

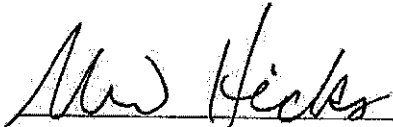
2 50.

3 Measures 67 & 91, HB 3400, ORS 215.130(5) and other relevant state legislation are preempted
4 by federal law. Therefore abiding the CSA, 18 U.S.C §371 (conspiracy) and other relevant federal laws
5 cannot constitute Official Misconduct.

6 WHEREFORE, Plaintiff prays for a judgment as follows:

- 7
- 8 1. Declaring the inapplicability of ORS 215.130(5) to the production and processing of
9 recreational or medical marijuana;
 - 10 2. Declaring that Ballot Measure 67, Ballot Measure 91, HB 3400 and other relevant legislation
11 are preempted by the CSA pursuant to the Supremacy Clause of the United States
12 Constitution;
 - 13 3. Declaring that a local government's police powers authorize the limitation and outright
14 prohibition of activities prohibited under the CSA irrespective of conflicting state law;
 - 15 4. Enjoining the STATE OF OREGON and ELLEN F. ROSENBLUM from charging violations
16 of ORS 162.405 and similar statutes based on actions by public servants that are consistent
17 with this judgment; and
 - 18 5. Grant Plaintiff such further relief as may be just, proper and equitable.
- 19

20 DATED this 3 day of April, 2018

21 
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