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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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JON-CORY SCHMIDT

NO. 2:10-CV-3022 FCD/EFB

Plaintiff,

v.

MEMORANDUM AND ORDER

COUNTY OF NEVADA; NEVADA
COUNTY SHERIFF'S OFFICE; JAMES
BENNETT; and DOES 1-20
inclusive,

Defendants.

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This matter is before the court on the motion of defendants County of Nevada ("Nevada County"), Nevada County Sheriff's Office (the "Sheriff's Office"), and James Bennet ("Bennett") (collectively, "defendants") to dismiss plaintiff's first amended complaint pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). Plaintiff Jon-Cory Schmidt ("plaintiff") opposes the motion. For the reasons set forth below, defendants' motion to dismiss is GRANTED.¹

¹ Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 230(g).

BACKGROUND

1
2 Plaintiff is the owner of a parcel of land located in Nevada
3 County. According to plaintiff, he "and nine other interested
4 parties were in lawful possession of medical cannabis
5 recommendations issued by licensed California Physicians."
6 (First Am. Compl. ("Am. Compl.") [Docket #25], filed Apr. 13,
7 2011, ¶ 14.) "Pursuant to those recommendations, they cultivated
8 a community or collaborative garden" consisting of eighty
9 immature marijuana plants on plaintiff's property. (Id.)
10 Plaintiff alleges that the marijuana plants were legally
11 cultivated in compliance with California Health & Safety Code §
12 11362.5 *et seq.*. (Id.)

13 In September 2009, defendant Bennet, a Nevada County Deputy
14 Sheriff, filed an affidavit with Nevada County Magistrate Judge
15 Catherine Heidelberger for purposes of obtaining a warrant to
16 search the premises of plaintiff's home. (Id. ¶ 15.) Judge
17 Heidelberger reviewed the affidavit, determined probable cause
18 existed, and issued the requested warrant. (Id.) On September
19 22, 2009, defendants executed the warrant, seizing at least
20 eighty immature marijuana plants growing on plaintiff's property.
21 (Id. ¶ 16.) Defendants also seized various other marijuana-
22 related contraband, including ten pounds of already cultivated
23 marijuana. (Id.)

24 Plaintiff then filed a motion for return of the marijuana
25 and other items seized pursuant to California Penal Code §§ 1539
26 and 1540 in California Superior Court for the County of Nevada.
27 (Order [Docket #24], filed Mar. 30, 2011, at 3.) On December 1,
28 2009, plaintiff and his attorney appeared before Judge

1 Heidelberg for oral argument on the motion. (Id.) After the
2 hearing, Judge Heidelberg issued a written order,² denying the
3 motion for return of the marijuana. (Id.) The order explained
4 that return of the marijuana was not warranted because plaintiff
5 did not have legal possession. (Id.)

6 Plaintiff then petitioned for a writ of mandate, requesting
7 that the appellate division of the Nevada County Superior Court
8 vacate Judge Heidelberg's order. (Id.) On April 26, 2010,
9 Superior Court Judge C. Anders Holmer issued a written tentative
10 order on the writ. (Id.) According to the court, "the central
11 issue [raised by the writ] was whether or not petitioner was in
12 lawful possession of the marijuana seized." (Id.) The court
13 denied the writ, holding that pursuant to relevant statutory and
14 case law, plaintiff was not in legal possession of the marijuana.
15 (Id.) The court adopted the tentative ruling on May 26, 2010.
16 (Id.)

17 Plaintiff then filed his original complaint in this court,
18 asserting four claims for relief: (1) unlawful detention of
19 personal property; (2) declaratory relief; (3) damages for
20 violation of equal protection rights under 42 U.S.C. § 1983; and
21 (4) conversion of personal property against defendants.

22 (Original Compl., filed Oct. 12, 2010 [Docket #1], ¶¶ 19-37.)

23 Defendants moved to dismiss plaintiff's claims for unlawful
24 detention and conversion on the grounds that the Nevada County
25 Superior Court, in two separate proceedings and two written

26
27 ² While the order denied the motion for return of the
28 marijuana and other related illegal substances, it required that
certain items seized by Nevada County be returned to plaintiff.
(Order at 3.)

1 orders, determined that plaintiff was not in lawful possession of
2 the marijuana. (Order at 6.) The court found that the doctrine
3 of collateral estoppel barred the plaintiff from re-litigating
4 the issue of whether he was in lawful possession of the
5 marijuana; thus, because lawful possession was necessary to
6 prevail on plaintiff's claims for unlawful detention and
7 conversion, the court dismissed these claims without leave to
8 amend. (Id. at 15.) However, plaintiff was granted leave to
9 amend his claim under 42 U.S.C. § 1983. (Id. at 16.)

10 Plaintiff subsequently filed his first amended complaint,
11 alleging that defendants' actions violated his constitutional
12 rights by depriving him of due process of law. (Am. Compl. ¶¶
13 10-16.) Plaintiff also alleges that defendants "unfairly[] and
14 discriminatorily" applied statutes, laws, ordinances, and
15 regulations against him in violation of the equal protection
16 clause. (Id. ¶¶ 33-9-10).

17 STANDARD

18 A. Subject Matter Jurisdiction

19 Federal Rule of Civil Procedure 12(b)(1) allows a court to
20 dismiss a pleading for lack of subject matter jurisdiction. Fed.
21 R. Civ. P. 12(b)(1). The court has an independent obligation to
22 address *sua sponte* whether it has subject matter jurisdiction.
23 See Allstate Ins. Co. v. Hughes, 358 F.3d 1089, 1093 (9th Cir.
24 2004) (citing United States v. Ceja-Prado, 333 F.3d 1046, 1049
25 (9th Cir. 2003)) ("The court has a continuing obligation to
26 assess its own subject matter jurisdiction, even if the issues is
27 neglected by the parties."). The court presumes a lack of
28 subject matter jurisdiction until it is proved otherwise. See

1 Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377
2 (1994); Stock W., Inc. v. Confederated Tribes, 873 F.2d 1221,
3 1225 (9th Cir. 1989).

4 The plaintiff bears the burden of proof that subject matter
5 jurisdiction exists. See Stock W., Inc., 873 F.2d at 1225.

6 Where the subject matter jurisdiction analysis focuses only on
7 the allegations of the complaint, the factual allegations of the
8 complaint are presumed to be true, and the pleading is dismissed
9 only if the plaintiff fails to allege an element necessary for

10 subject matter jurisdiction. See Thornhill Publ'g Co. v. General
11 Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979). A
12 complaint will be dismissed for lack of subject matter
13 jurisdiction if there is no case or controversy within the
14 meaning of that constitutional term. Baker v. Carr, 369 U.S.
15 186, 198 (1962).

16 **B. Failure to State a Claim**

17 Under Federal Rule of Civil Procedure 8(a), a pleading must
18 contain "a short and plain statement of the claim showing that
19 the pleader is entitled to relief." See Ashcroft v. Iqbal, 129
20 S. Ct. 1937, 1949 (2009). Under notice pleading in federal
21 court, the complaint must "give the defendant fair notice of what
22 the claim is and the grounds upon which it rests." Bell Atlantic
23 v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations
24 omitted). "This simplified notice pleading standard relies on
25 liberal discovery rules and summary judgment motions to define
26 disputed facts and issues and to dispose of unmeritorious
27 claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

28

1 On a motion to dismiss, the factual allegations of the
2 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,
3 322 (1972). The court is bound to give plaintiff the benefit of
4 every reasonable inference to be drawn from the "well-pleaded"
5 allegations of the complaint. Retail Clerks Int'l Ass'n v.
6 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not
7 allege "'specific facts' beyond those necessary to state his
8 claim and the grounds showing entitlement to relief." Twombly,
9 550 U.S. at 570. "A claim has facial plausibility when the
10 plaintiff pleads factual content that allows the court to draw
11 the reasonable inference that the defendant is liable for the
12 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

13 Nevertheless, the court "need not assume the truth of legal
14 conclusions cast in the form of factual allegations." United
15 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
16 Cir. 1986). While Rule 8(a) does not require detailed factual
17 allegations, "it demands more than an unadorned, the defendant-
18 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A
19 pleading is insufficient if it offers mere "labels and
20 conclusions" or "a formulaic recitation of the elements of a
21 cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at
22 1950 ("Threadbare recitals of the elements of a cause of action,
23 supported by mere conclusory statements, do not suffice.").
24 Moreover, it is inappropriate to assume that the plaintiff "can
25 prove facts which it has not alleged or that the defendants have
26 violated the . . . laws in ways that have not been alleged."
27 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council
28 of Carpenters, 459 U.S. 519, 526 (1983).

1 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). In
2 order for a municipality to be held liable, it must have
3 committed the constitutional violation pursuant to governmental
4 custom or official municipal policy. Id.

5 In this case, plaintiff's complaint is wholly bereft of any
6 allegation that an official policy or custom was in place or that
7 defendants acted pursuant to such an official policy or custom.
8 Further, in the court's previous order on defendants' motion to
9 dismiss, the court noted plaintiffs' failure to identify any
10 particular policy or the application of that policy to defendant.
11 The court cautioned that such failures would prevent plaintiff
12 from withstanding a motion to dismiss for failure to state a
13 claim. Based upon plaintiffs failure to sufficiently allege
14 facts to state a claim against municipalities and the failure to
15 address this argument in his opposition, defendants' motion to
16 dismiss all claims against Nevada County and the Sheriff's Office
17 is GRANTED without leave to amend.³

18 **B. Due Process Claims**

19 Plaintiff's complaint alleges Section 1983 claims against
20 defendants, asserting that defendants violated plaintiff's
21 Fourth, Fifth, Sixth,⁴ and Fourteenth Amendment rights. (Am.
22

23 ³ Further, the reasons set forth *infra*, plaintiff has
24 failed to and cannot state viable claims under either the Due
25 Process or Equal Protection clause arising from the seizure of
marijuana plants in this case. Accordingly, amendment would be
futile.

26 ⁴ Both plaintiff's complaint and opposition fails to
27 delineate how defendants' allegedly violated these rights.
28 Accordingly, to the extent plaintiff was alleging § 1983 claims
based upon these constitutional rights, such claims are
dismissed.

1 Compl. ¶ 11). Specifically, plaintiff alleges due process
2 violations⁵ based on conduct by defendants relating to: (1)
3 preclusion of plaintiff's ability to challenge the search
4 warrant; (2) failure to file criminal charges; and (3)
5 destruction of the seized marijuana. (Id. ¶ 33-2.) Defendants
6 contend that plaintiff's complaint fails to allege facts
7 sufficient to state a claim for due process violations under
8 Section 1983.

9 **1. Challenge to the Search Warrant**

10 Plaintiff's first procedural due process claim asserts a
11 harm based on allegations that defendants' conduct precluded
12 "plaintiff's challenge to the search warrant application or
13 search warrant that has been issued." (Id. ¶ 33-2a.) It is well
14 settled that there is no constitutionally protected right to
15 challenge the application for a search warrant before it is
16 issued. See Perkins v. City of W. Covina, 113 F.3d 1004, 1010
17 (9th Cir. 1997). Further, plaintiff has alleged no facts that he
18 was precluded from pursuing a post-deprivation remedy. Rather,
19 the record reflects that plaintiff filed a motion for return of
20 the marijuana and other items seized pursuant to California Penal
21 Code §§ 1539 and 1540 in California Superior Court for the County
22 of Nevada and subsequently filed a writ of mandate to vacate that

23
24 ⁵ Plaintiff's complaint provides that he is alleging both
25 procedural and substantive due process violations. (Am. Compl. ¶
26 33-2.) However, plaintiff's factual allegations relating to his
27 due process claim raise purely procedural due process issues.
28 Moreover, plaintiff fails to raise any argument relating to
substantive due process violations in his opposition. Therefore,
the court interprets plaintiff's silence as a non-opposition to
defendants' motion to dismiss any potential substantive due
process claims.

1 order. Accordingly, plaintiff cannot state a claim arising out
2 of any alleged preclusion to the challenge of the search warrant.
3 Therefore, defendants' motion to dismiss this claim is GRANTED
4 without leave to amend.

5 **2. Failure to File Criminal Charges**

6 Plaintiff further alleges that the failure to file criminal
7 charges against him is a violation of due process. (Am. Compl. ¶
8 33-2-b.) The county district attorney is the only county
9 official authorized to file criminal charges against an
10 individual. Cal. Govt. Code §§ 26500, 26502 (West 2008).
11 Moreover, the district attorney has absolute immunity in deciding
12 whether to file criminal charges. See Botello v. Gammick, 413
13 F.3d 971, 977 (9th Cir. 2005). Here, the absence of criminal
14 charges against plaintiff is not related to any action or
15 inaction by defendants.⁶ Further, plaintiff fails to allege that
16 he suffered harm as a result of the failure to file criminal
17 charges. Therefore, defendants' motion to dismiss this claim is
18 GRANTED without leave to amend.⁷

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22 ⁶ The court notes that plaintiff does not bring any
claims against the county district attorney.

23 ⁷ Plaintiff also alleges a due process violation arising
24 out of Bennett's "inducing the magistrate judge to deny the
25 motion for the return of the medical marijuana in the absence of
written opposition by the People." (Am. Compl. ¶ 33-2-f.)
26 Plaintiff's complaint provides neither factual allegations nor
27 legal support regarding how the lack of written opposition by the
People violated his due process rights; instead, plaintiff makes
28 mere conclusory allegations insufficient to state a claim.
Further, he fails to address these allegations in his opposition
to defendants' motion to dismiss. Therefore, defendants' motion
to dismiss this claim is GRANTED without leave to amend.

1 **3. Destruction of Marijuana and Filing of a False**
2 **Inventory Report**

3 Plaintiff also claims due process violations based on (1)
4 defendants' alleged destruction of the seized marijuana without a
5 hearing and without court order; and (2) the alleged filing of a
6 false inventory report that failed to note that the marijuana was
7 destroyed. (Am. Compl. ¶¶ 33-2c-d, 2h.) Specifically, plaintiff
8 alleges that defendants failed to comply with applicable
9 California Health and Safety Code and Penal Code sections.⁸

10 The issue of standing is a threshold determination of
11 "whether the litigant is entitled to have the court decide the
12 merits of the dispute or of particular issues." Warth v. Seldin,
13 422 U.S. 490, 498 (1975); Steel Co. v. Citizens For A Better
14 Env't, 523 U.S. 83 (1998). To establish the "irreducible
15 minimum" of Article III standing, plaintiffs must demonstrate the
16 following three elements: (1) injury-in-fact; (2) causal
17 connection; and (3) redressability. Barnum Timber Co. v. U.S.
18 EPA, 633 F.3d 894, 897-98 (9th Cir. 2011). To show injury-in-
19 fact, "plaintiffs must allege 'concrete and particularized' and
20 'actual or imminent' harm to a legally protected interest." Id.
21 (citations omitted).

22 The Supreme Court has held that no person can have a legally
23 protected interest in contraband per se. See United States v.

24
25 ⁸ Under California law, unlawfully possessed marijuana
26 shall be destroyed pursuant to a court order, even in a case in
27 which no criminal charges were filed. Cal. Health & Safety Code
28 § 11473.5 (West 2007). Further, under the California Penal Code,
after an officer obtains a search warrant, the officer must
return the warrant to the magistrate judge and deliver to him a
written inventory of the property seized. Cal. Penal Code § 1537
(West 2011).

1 Jeffers, 342 U.S. 48, 53 (1951); see also Cooper v. City of
2 Greenwood, Mississippi, 904 F.2d 302, 305 (5th Cir. 1990)
3 ("Courts will not entertain a claim contesting the confiscation
4 of contraband per se because one cannot have a property right in
5 that which is not subject to legal possession."). "An object is
6 contraband per se if its possession, without more, constitutes a
7 crime; or in other words, there is no legal purpose to which the
8 object could be put." United States v. Harrell, 530 F.3d 1051,
9 1057 (9th Cir. 2008). Under the federal Controlled Substances
10 Act ("CSA"), it is illegal for any private person to possess
11 marijuana. 21 U.S.C. §§ 812(c), 841(a)(1), 844(a). Thus, under
12 federal law, marijuana is contraband per se, which means no
13 person can have a cognizable legal interest in it. See Gonzales
14 v. Raich, 545 U.S. 1, 27 (2005) ("The CSA designates marijuana as
15 contraband for any purpose." (emphasis in original)).

16 "The Supremacy Clause unambiguously provides that if there
17 is any conflict between federal and state law, federal law shall
18 prevail." Id. at 29. While California's Compassionate Use Act
19 ("CUA") provides narrow exceptions for marijuana use involving
20 qualified patients and care givers, federal law dictates that
21 marijuana is illegal for any purpose. Id. at 27; see also County
22 of Butte v. Superior Court of Butte County, 175 Cal. App. 4th
23 729, 743 (Cal. Ct. App. 2009) (Morrison, J., dissenting) ("[T]he
24 CUA did not and could not vest a person with a true 'right' to
25 possess marijuana in derogation of the CSA as interpreted in
26 Raich."). Further, California courts have held that persons who
27 possess marijuana unlawfully, in violation of the CUA, retain no
28 /////

1 legal interest in the marijuana. See Chavez v. Superior Court,
2 123 Cal. App. 4th 104, 109-11 (Cal. Ct. App. 2004).

3 In this case, plaintiff cannot recover damages as a result
4 of the confiscation or destruction of marijuana because he had no
5 cognizable property interest in the marijuana. Plaintiff asserts
6 a due process claim under the federal Constitution in federal
7 court, where, under federal law, marijuana is undisputably
8 illegal and contraband per se. Furthermore, even under state
9 law, plaintiff was not in lawful possession of the marijuana at
10 issue; indeed, two California state courts in two written
11 opinions held that plaintiff was not in lawful possession of the
12 marijuana.⁹ Accordingly, plaintiff had no legally protected
13 interest in the marijuana under state or federal law at any time.
14 As such, the complaint fails to set forth any cognizable harm to
15 plaintiff from the alleged destruction of the marijuana¹⁰ or the
16 alleged failure to list it on the inventory report. Therefore,
17 defendants' motion to dismiss this claim is GRANTED without leave
18 to amend.¹¹

19
20 ⁹ As noted, *supra*, the court has previously held that the
21 determination of whether plaintiff was in lawful possession of
the marijuana under state law was actually litigated and
necessarily decided in a final judgment on the merits.

22 ¹⁰ Plaintiff also alleges that the destruction of the
23 marijuana "precluded plaintiff from demonstrating he was in
24 lawful possession of the marijuana." (Am. Compl. ¶ 33-2-e.) As
25 set forth herein, plaintiff could not be in lawful possession of
26 marijuana under federal law. Further, plaintiff fails to allege
any facts or raise any argument regarding how the destruction of
the marijuana precluded plaintiff from demonstrating he was in
lawful possession under state law. Therefore, defendants' motion
to dismiss this claim is GRANTED without leave to amend.

27 ¹¹ Because the court finds that plaintiff has no
28 constitutional standing to sue, it does not reach the issue of
whether plaintiff would have statutory standing to sue under Cal.

1 **C. Equal Protection Claim**

2 Lastly, plaintiff alleges a Section 1983 claim under the
3 Equal Protection Clause. Specifically, plaintiff alleges that
4 defendants violated the Equal Protection Clause by "singl[ing]
5 out plaintiff as a potential criminal defendant" and selectively
6 enforcing Health and Safety Code sections against him and "others
7 similarly situated." (Id. ¶ 33-5-13.) Defendants contend that
8 plaintiff's complaint fails to allege facts sufficient to state a
9 claim for violation of the Equal Protection Clause under Section
10 1983.

11 The Equal Protection Clause of the Fourteenth Amendment
12 provides that no State shall "deny to any person within its
13 jurisdiction the equal protection of the laws." U.S. Const.
14 Amdt. 14, § 1. This is "essentially a direction that all
15 similarly situated persons should be treated alike." City of
16 Cleburne v. Cleburne Living Ctr., 437 U.S. 432, 439 (1985). "The
17 purpose of the equal protection clause of the Fourteenth
18 Amendment is to secure every person within the State's
19 jurisdiction against intentional and arbitrary discrimination,
20 whether occasioned by express terms of a statute or by its
21 improper execution through duly constituted agents." Sioux City
22 Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923); see
23 Williams v. Vidmar, 367 F. Supp. 2d 1265, 1270 (N.D. Cal. 2005)
24 (noting that the Equal Protection clause "is not a source of
25 substantive rights or liberties, but rather a right to be free
26

27 _____
28 Health & Safety Code § 11473.5 and Cal. Penal Code § 1537.

1 from discrimination in statutory classifications and other
2 governmental activity”).

3 **1. Destruction of the Marijuana**

4 Plaintiff alleges that defendants unreasonably applied
5 search and seizure statutes against him in violation of equal
6 protection of the law. Specifically, plaintiff asserts that
7 defendant Bennett treated plaintiff differently than other
8 members of the adult population by destroying the marijuana
9 without court order.

10 As set forth above, plaintiff had no legally protectable
11 interest in the marijuana under either state or federal law.
12 Based on the allegations in the complaint, defendants searched
13 plaintiff’s property and seized the marijuana pursuant to a valid
14 search warrant. Because plaintiff had no property interest in
15 the contraband, he suffered no injury as a result of any alleged
16 destruction of the marijuana. See Barnum Timber Co., 633 F.3d at
17 897-98 (stating that without harm to a legally protected interest
18 there is no injury-in-fact). Accordingly, defendants’ motion to
19 dismiss plaintiff’s Equal Protection claim arising out of the
20 destruction of marijuana is GRANTED without leave to amend. See
21 Owest Corp. v. City of Surprise, 434 F.3d 1176, 1180 (9th Cir.
22 2006) (finding that a plaintiff cannot sue in federal court when
23 there is no injury-in-fact).

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1 **2. Discriminatory Application: Class of One**¹²

2 Plaintiff also alleges that state laws "pertaining to
3 possession, cultivation, distribution, and trafficking of
4 controlled substances" were "discriminatorily applied to
5 plaintiff [while] other property owners [were] allowed to use and
6 enjoy their real property without Nevada County interference."
7 (Am. Compl. ¶ 33-10.)

8 When an equal protection claim is premised on unique
9 treatment, rather than on a classification, it is a class of one
10 claim. See N. Pacifica LLC v. City of Pacifica, 526 F.3d 478,
11 486 (9th Cir. 2008). "In order to claim a violation of equal
12 protection as a class of one case, the plaintiff must establish
13 that the City intentionally, and without rational basis, treated
14 the plaintiff differently from others similarly situated." Id.
15 Moreover, "[a] class of one plaintiff must show that the
16 discriminatory treatment 'was intentionally directed just at him,
17 as opposed . . . to being an accident or a random act.'" Id.
18 (internal quotations omitted).

19 In this case, plaintiff fails to allege any facts to support
20 intentional, discriminatory treatment by defendants that lacked a
21 rational basis. First, defendant fails to allege facts
22 supporting intentional conduct directed solely at him. Indeed,
23 while at one point in the complaint he conclusorily alleges that
24 defendants unlawfully singled him out, he later alleges that

25
26 ¹² Equal protection claims can be divided into two
27 categories: "protected class" claims and "class of one" claims.
28 Based on plaintiff's complaint, it is unclear which type of claim
plaintiff is asserting. For the sake of completeness, the court
analyzes plaintiff's claims under both theories.

1 defendants violated the rights of him "and others similarly
2 situated." (Compare Am. Compl. ¶¶ 33-8, 33-10, with Am. Compl. ¶
3 33-11.)¹³ Second, plaintiff fails to allege any facts to support
4 that any such conduct was intentional, not the result of accident
5 or random act. Finally, plaintiff fails to allege any facts to
6 support that any such disparate treatment lacked a rational
7 basis. Rather, defendants proffer a legitimate government
8 interest rationally related to the disparate treatment of
9 marijuana growers - namely, that marijuana is illegal under
10 federal law and only legal under state law if possession comports
11 with narrow statutory requirements. Such an interest is
12 magnified with the amount of marijuana involved in this case.

13 Accordingly, plaintiff fails to allege an Equal Protection
14 claim as a class of one. Further, because defendants have
15 proffered a rational basis for any differential treatment,
16 amendment would be futile. Thus, defendant's motion to dismiss
17 plaintiff's class of one Equal Protection claim is GRANTED
18 without leave to amend.

19 **3. Selective Enforcement: Protected Class**

20 Finally, plaintiff asserts that defendant's conduct violate
21 the rights of plaintiff's and "others similarly situated." (Am.
22 Compl. ¶ 33-11.) In his opposition, plaintiff clarifies that
23 "others similarly situated" includes marijuana growers. (Pl.'s
24 Opp'n [Docket #30], filed June 24, 2011, at 7) ("In short,
25 [Bennett's] conduct deprived the plaintiff with the equal
26

27
28 ¹³ As set forth, *infra*, such claims on behalf of similarly
situated marijuana growers also fail as a matter of law.

1 protection of the laws treating pot farmers differently from the
2 remainder of the adult population")

3 A plaintiff asserting a protected class claim "must show
4 that actions of the defendants had a discriminatory impact, and
5 that defendants acted with an intent or purpose to discriminate
6 based upon plaintiff's membership in a protected class." Comm.
7 Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690,
8 702-03 (2009) (citing Lee v. City of Los Angeles, 250 F.3d 668,
9 686-87 (2001)). Because marijuana growers are not a protected
10 class, defendants need only show that their actions were
11 rationally related to a legitimate government interest. See
12 Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 907
13 (9th Cir. 2007).

14 In this case, plaintiff has failed to state a claim based
15 upon the alleged differential treatment of marijuana growers. To
16 the extent that plaintiff represents persons who unlawfully
17 possess marijuana under both federal and state law, such a class
18 is defined by its illegal activities; thus, a rational basis
19 exists for treating this class differently than others.
20 Alternatively, to the extent plaintiff purports to represent a
21 class of marijuana growers who lawfully possess marijuana under
22 state law, plaintiff has been held by two California courts in
23 two written orders to be excluded from such a class. Finally, to
24 the extent such a class was treated differently, defendants have
25 proffered a legitimate government interest to which such
26 treatment was rationally related - namely, the narrow exception
27 to the general illegality of the possession of marijuana under
28 California law.

