Ross C. Anderson (#0109)
Walter M. Mason (#16891)
LAW OFFICES OF ROCKY ANDERSON
The Judge Building
Eight East Broadway, Suite 450
Salt Lake City, Utah 84111
Telephone: (801) 349-1690
Fax: (801) 349-1682
rocky@andersonlawoffices.org
walter@andersonlawoffices.org
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

EPILEPSY ASSOCIATION OF UTAH, a Utah non-profit corporation; CHRISTINE STENQUIST; DOUGLAS ARTHUR RICE; TRUCE, a Utah non-profit corporation; NATHAN KIZERIAN; SHALYCE KIZERIAN; ANDREW TALBOTT, M.D.,

Plaintiffs,

v.

GARY R. HERBERT, Governor of the State of Utah, in his official capacity; JOSEPH K. MINER, M.D., MSPH, Executive Director, Utah Department of Health, in his official capacity,

Defendants.

PLAINTIFFS' MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CORRECTION OF MEMORANDUM DECISION AND ORDER GRANTING MOTION TO REMAND, DENYING MOTION FOR ATTORNEY FEES AND DENYING MOTION TO DISMISS AND SUPPORTING MEMORANDUM

Case No.: 2:19-cv-00360-DBP

Magistrate Judge Dustin B. Pead

Plaintiffs respectfully move the Court to reconsider and correct two aspects of its Memorandum Decision and Order Granting Motion to Remand, Denying Motion for Attorney Fees and Denying Motion to Dismiss [ECF 29] ("Order").

I. Contrary to the Court's Characterizations, Plaintiffs Have Never Argued They Lack Article III Standing.

The Court stated that *Plaintiffs* have conceded they lack Article III standing. Order, at pages 2–3 ("*Plaintiffs argue* in their Motion to Remand *that because they lack Article III standing*, this case should be remanded to state court." (emphasis added)); 5 ("Plaintiffs argue that although *they agree they lack standing*, it is still Defendants [sic] burden to establish standing because they removed this case to federal court." (emphasis added)); 7 (". . . Plaintiffs agree that they lack standing."). Those statements are erroneous and contradicted by the record.

Contrary to the statement in this Court's Order, Plaintiffs *never* asserted, and took special care to refrain from asserting, they lack Article III standing.[1] Plaintiffs argued solely that (1) since Defendants removed this case from state court to federal court, Defendants have the burden of establishing subject matter jurisdiction and (2) since Defendants failed to meet that burden, the Court must remand the case to state

[1] As quoted by Plaintiffs in their Motion to Remand [ECF 15], at 7: "Plaintiff does not have to take a position on the standing issue while Defendant does, because Defendant bears the burden of establishing jurisdiction in this Court." *Barnes v. ARYZTA, LLC*, 288 F. Supp. 3d 834, 914 (N.D. Ill 2017).

court. Specifically, Plaintiffs made clear that Defendants had engaged in the diametrically opposite, and objectively unreasonable, strategies of removing the case to federal court then arguing that the Court does not have subject matter jurisdiction.[2]

[2] The argument consistently presented by Plaintiffs—never based on Plaintiffs' contention that they lacked Article III standing—was concisely and clearly presented in Plaintiffs' Motion to Remand [ECF 15], at 1–2. Plaintiffs' sole argument was reiterated in Plaintiffs' Memorandum in Opposition to Defendants' Motion for Leave to File Over-Length Memorandum [ECF 19-1], at 5–6:

> The issue in a nutshell is as follows:
>
> 1. Defendants removed this case.
> 2. Defendants therefore have the burden to show that the case could originally have been filed in federal district court.
> 3. Instead of meeting that burden, Defendants filed a Rule 12(b)(1) motion to dismiss, arguing that this Court does *not* have subject matter jurisdiction.
> 4. Hence, this case *must* be remanded to state court and Plaintiffs should be awarded their attorney fees.
>
> . . . . Quite enough time, expense, and inconvenience to the Court and Plaintiffs has been occasioned by Defendants' facially unreasonable removal of this matter from state court.

Again, in Plaintiffs' Reply Memorandum in Support of Motion to Remand ("Plaintiffs' Reply Memorandum") [ECF 22], Plaintiffs never argued or conceded they did not have Article III standing, as indicated in this Court's Order. Rather, citing the dispositive Supreme Court and Tenth Circuit Court of Appeals cases, Plaintiffs' argument centered on *the failure of Defendants to meet their burden of establishing federal jurisdiction*—which burden they abdicated since they strenuously argued, in contradiction to their initial invocation of this Court's jurisdiction when removing the case, that the Court *lacks* subject matter jurisdiction. *See, e.g.*, Plaintiffs' Reply Memorandum, at 9 ("Because federal courts 'presume[ ] that a cause lies outside [the federal court's] limited jurisdiction,' and because Defendants have denied and

II. Under the Applicable Standard, Plaintiffs Are Entitled to the Award of Attorney Fees Because of the Objective Unreasonableness of Defendants' Removal of this Case.

If ever there were a case of an objectively unreasonable removal of a case to federal court, this is it. As this Court recognized, since Defendants removed this case from state to federal court, the burden was on Defendants to establish this Court's jurisdiction. *See, e.g.*, Order, at 6. Instead of doing *anything* to meet that burden, Defendants did just the opposite by moving for dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction.

"It was incumbent on Defendant[s]. . . to consider the Article III standing issue when [they] removed the action to this Court." *Barnes,* 288 F. Supp. 3d at 840 n.3. Instead of doing so, they wasted the time, the money, and other resources of Plaintiffs, their counsel, and the Court, and delayed the resolution of this matter by many months, by baselessly removing this case to federal court and then, contradictorily, moving to dismiss the case for lack of subject matter jurisdiction. Among the objectively unreasonable, baseless, and bad-faith maneuvers and positions by Defendants, along with the countervailing, uncontroverted law establishing the clear error of Defendants' positions, are the following:

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abdicated their burden of demonstrating this Court's jurisdiction, this matter must be remanded to state court." (alteration in original) (citation omitted)).

Defendants' Legally Unsupported Positions/Conduct	Uncontroverted Contrary Law or Defendants' Contradictions
"As the parties trying to invoke this Court's limited jurisdiction, Plaintiffs have the burden to establish standing." Defendants' Motion to Dismiss [ECF 14], 12.	Because the Defendants removed this case from state court, *they* are the parties who invoked federal jurisdiction and who have the burden of demonstrating this Court's jurisdiction. *Already, LLC v. Nike, Inc.*, 566 U.S. 85, 90 (2013) (holding that "those who invoke the power of a federal court [must] demonstrate standing."); *Daimlerchrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) ("Because defendants removed the case from state court to District Court, plaintiffs were not initially the parties that invoked federal jurisdiction."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these [Article III standing] elements." (alteration added)); *Collier v. SP Plus Corp.*, 889 F.3d 894, 896 (7th Cir. 2018) ("As the party invoking federal jurisdiction, [defendant] had to establish that all elements of jurisdiction—including Article III standing—existed at the time of removal." (alteration added) (citation omitted)); *Barnes v. ARYZTA, LLC*, 288 F. Supp. 3d 834, 838 (N.D. Ill. 2017) ("The burden of proving federal court jurisdiction is on Defendant, the party which removed this action to federal court." (citation omitted)); *Direct Mortg. Corp. v. Keirtec, Inc.*, 478 F. Supp. 2d 1339, 1341 (D. Utah 2007) ("[Defendant], as the removing party, had the burden to establish this court's jurisdiction.").
"[A] defendant properly removes a case and invokes a federal court's subject matter jurisdiction when plaintiff pleads a colorable claim arising under federal	The mere existence of a federal claim is insufficient to remove a case from state court to federal court. If the federal court does not have jurisdiction, removal to the federal court is improper. *See, e.g.*, *Collier*, 889 F.3d at 896 ("[R]eliance on the phrase 'original jurisdiction' is not enough, because federal courts

law . . . .” Defendants’ Memorandum in Opposition to Plaintiffs’ Motion to Remand [ECF 21], at 3. “[T]he only prerequisite to removing this lawsuit was the presence of a colorable claim based on federal law in Plaintiffs’ amended complaint.” *Id.* at 5.	have subject-matter jurisdiction only if constitutional standing requirements also are satisfied.”); *Polo v. Innoventions Int’l, LLC,* 833 F.3d 1193, 1197 (9th Cir. 2016) (“This case lacked a named plaintiff with Article III standing, and therefore was not properly removed.”).
Defendants removed this case from state to federal court, then inconsistently moved the Court, under Rule 12(b)(1), for dismissal on the ground that Plaintiffs lacked standing and the federal court therefore does not have subject matter jurisdiction. Notice of Removal of a Civil Action From State Court to Federal Court [ECF 2]; Defendants’ Motion to Dismiss Amended Complaint [ECF 14].	*Ayala v. Sixt Rent a Car, LLC*, No. CV 19-1514 FMO (MRWx), 2019 WL 2914063, *2 (C.D. Cal. July 8, 2019), which states: “Defendant removed the instant action on the ground that the court ‘has subject matter jurisdiction’ over the case. . . . However, a couple months after removing the action to this court, defendant filed a motion to dismiss arguing that plaintiff’s claims ‘should[ ] be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.’ . . . Specifically, defendant argues that plaintiff lacks Article III standing because he has not suffered an injury in fact. . . . Thus, ‘defendant [is trying] to have it both ways by asserting, then immediately disavowing, federal jurisdiction, apparently in hopes of achieving outright dismissal, with prejudice, rather than the remand required by § 1447(c).’ ” (Citations omitted). *See also Collier*, 889 F.3d at 895–97 (“[Defendant’s] justifications aside, *its dubious strategy* [of removing a case to federal court then arguing the court did not have jurisdiction because plaintiffs did not have Article III standing] *has resulted in a significant waste of federal judicial resources, most of which was avoidable*.” (emphasis added)); *Barnes*, 288 F. Supp. 3d at 839 (“[T]o say that a court is without jurisdiction to decide a case on its merits [yet] has jurisdiction merely to remove the

	case is to state a contradiction.' " (citation omitted) (first alteration added)).
"The question of whether this Court has subject matter jurisdiction under section 1331 is separate and distinct from the question of whether Plaintiffs have standing." Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand [ECF 21], at 3.	Defendants argued, contradictorily, in their Motion to Dismiss, at 11: "PLAINTIFFS LACK STANDING, SO THE COURT LACKS JURISDICTION." Also, every court addressing the matter has disagreed with Defendants' specious distinction. *See, e.g., Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1224 (10th Cir. 2012) ("Our court has repeatedly characterized standing as an element of subject matter jurisdiction."); *St. Louis Heart Ctr., Inc. v. Nomax, Inc.*, 899 F.3d 500, 503 (8th Cir. 2018); *Collier*, 889 F.3d at 895 ("[T]he case was not removable, because the plaintiffs lack Article III standing—negating federal subject-matter jurisdiction.").

This Court described Defendants' abusive and legally baseless strategy of removing this case to federal court then moving for dismissal of the case for lack of subject matter jurisdiction as "questionable." Order, at 9. However, in the face of blatant "objective unreasonableness" on the part of Defendants, this Court denied the award of attorney fees to Plaintiffs because, in the Court's opinion, Plaintiffs have presented "contrary positions" and the Controlled Substances Act ("CSA") "runs counter to Plaintiffs['] own objectives in the suit against the State of Utah." *Id.* The Court did not explain what those "contrary positions" are or how the CSA is "counter to Plaintiffs' own objectives in the suit." That reasoning is not only wholly

irrelevant to the applicable standard to be applied when a defendant has wrongfully removed a case to federal court, but it is factually and legally erroneous.

The question of whether fees are to be awarded to Plaintiffs, pursuant to 28 U.S.C. § 1447(c), is governed by a standard of "objective reasonableness." The Court is called upon to determine that the removal was objectively reasonable or that it was objectively unreasonable. No court could possibly find that Defendants' removal of this matter was objectively reasonable. Likewise, there cannot be any determination, in light of Defendants' disregard of the consistent and unambiguous law applicable to removal of lawsuits from state to federal court, other than that Defendants' removal of this case was objectively unreasonable.

> The fact that an award of fees under § 1447(c) is left to the district court's discretion, with no heavy congressional thumb on either side of the scales, does not mean that no legal standard governs that discretion. . . . . "[The Court's] judgment is to be guided by sound legal principles." Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.

Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005) (citations omitted).

The determination of whether Plaintiffs are entitled to an award of attorney fees under § 1447(c) is not to be based on (1) the Court's view of the merits of the lawsuit, regarding which this Court cannot exercise jurisdiction, (2) the Court's perception of Plaintiffs' "objectives" in the lawsuit, or (3) the Court's view of

whether Plaintiffs' objectives run counter to a federal statute (which, here, they clearly *do not*). Rather, the legal standard for whether attorney fees are to be awarded "turn[s] on the reasonableness of the removal." If the removal was objectively reasonable, fees should be denied. If the removal was objectively unreasonable, as is clearly the case here, fees *are* to be awarded. *Martin*, 546 U.S. at 141.

Even if the merits of Plaintiffs' claims were relevant to a determination of whether attorney fees should be granted for the Defendants' unreasonable removal of this case to federal court, the Court has erroneously assumed that a state medical cannabis law, eliminating *state* legal prohibitions against the distribution, possession, and use of cannabis, is somehow inconsistent with the CSA. That assumption is erroneous. Regardless of what the state of Utah does, the CSA remains in place and people who sell, possess, or use cannabis are in violation of that *federal* law. *See United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

However, at present, the reality is that people using medical cannabis in states that do not prohibit it likely will not be prosecuted under the CSA if they are not violating state laws. *See, e.g., United States v. Benjamin*, No. 2017-0010, 2018 WL 6840151, at *2 (D. Virgin Islands December 30, 2018) ("[T]he Rohrabacher-Farr Amendment is legislation which prohibits the use of DOJ funds 'to prevent [ ] states

from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.' " (citation omitted)).[3]

Medical cannabis laws in states other than Utah are not preempted because, in those other states, unlike Utah, no one is statutorily *compelled* to engage in acts that are in violation of the CSA. The dispositive difference is that, under Utah law, the prior statute, H.B. 3001, *compelled* people to engage in the purchase, sale, transportation, storage, and distribution of marijuana, in violation of the CSA, and the new statute, 2019 S.B. 1002, *requires state facilitation* of the distribution of marijuana through use of a "state central patient portal." Other states' medical cannabis laws simply provide that it will not be a violation of *state* law for people to purchase, sell, transport, and distribute cannabis under certain circumstances. The removal of state legal prohibitions has no impact on, and therefore is not preempted by, federal laws.

> The CSA criminalizes marijuana, making its manufacture, distribution, or possession a punishable offense under federal law. Section 4(a) of the MMMA [Michigan's medical marijuana statute] *does not require anyone to commit that offense*, however, nor does it prohibit punishment of that offense under federal law. Rather, the MMMA is clear that, if certain individuals choose to engage in MMMA-compliant medical marijuana use, § 4(a) provides them with a limited *state-law* immunity from "arrest, prosecution, or penalty in any manner"—an

[3] For a detailed description of the several bills passed by Congress enacting the equivalent of the Rohrabacher-Farr Amendment, *see* https://en.wikipedia.org/wiki/Rohrabacher%E2%80%93Farr_amendment.

> immunity that does not purport to prohibit federal criminalization of, or punishment for, that conduct.

Ter Beek v. City of Wyoming, 846 N.W.2d 531, 537 (Mich. 2014) (emphasis added). *See also Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 141 (Ariz. 2015); *Qualified Patients Assn. v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 107 (Cal. App. 2010) ("'[N]o conflict' arises 'based on the fact that Congress has chosen to prohibit the possession of medical marijuana, while California has chosen not to.' Simply put, 'California's statutory framework has no impact on the legality of medical marijuana under federal law. . . .' " (citations omitted)).

By advocating that Proposition 2 be honored, without the Utah Legislature statutorily undermining it, Plaintiffs are not pursuing any "objectives" that run counter to the CSA whatsoever. The perception by the Court that Plaintiffs' objectives run counter to the CSA, and basing the denial of attorney fees for Defendants' unreasonable removal of this case to federal court on that perception, are clearly erroneous. The Court is urged to modify its Order accordingly.

Dated this 19th day of October 2019:

LAW OFFICES OF ROCKY ANDERSON

/s/ Ross C. Anderson
Ross C. Anderson
Attorney for Plaintiffs