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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

GORDON WARREN EPPERLY, Petitioner, vs. STATE OF ALASKA and UNITED STATES OF AMERICA, Respondents.	)	Case No. 1:15-cv-00002-SLG **MOTION TO DISMISS**

Respondent, the United States of America, joins the State of Alaska in moving to dismiss Mr. Epperly's petition pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

The State's motion, at Docket 22, sets out very well the underlying facts of the case as well Mr. Epperly's lack of standing to bring his petition and his

failure to state a claim. Instead of restating and reiterating these points in a voluminous motion of its own, the United States joins in the State's motion to dismiss, with a few additional observations.

As the State notes, although Mr. Epperly raises the Supremacy Clause and argues that federal law preempts state law, it is not his argument to make.[1] Nor does the United States make that argument in the present case. Mr. Epperly also seems to make the converse argument, not as a cause of action but as his third prayer for relief, seeking a declaratory judgment that the "Marijuana Blanket Policies" of the Department of Justice be declared null and void.

Although Mr. Epperly is not clear exactly what "Marijuana Blanket Policies" he is referring to, presumably he is referring to the memorandum issued by Deputy Attorney General James Cole on Aug. 29, 2013.[2] ("Cole Memo"). Mr. Epperly's challenge is identical to a recent case, *West v. Holder*, 60 F.Supp.3d 197 (D.D.C., 2015), that also challenged the Cole Memo. After finding that West lacked standing, the Court held that

> . . . this decision is presumptively unreviewable in the federal courts. *See, e.g., Wayte v. United States,* 470 U.S. 598, 607, 105 S.Ct. 1524, 84

1 *See* Docket 22 at 16-17.
2 Available *at* http:// www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf

> L.Ed.2d 547 (1985) ("[The government's] broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review."); *In re Sealed Case,* 131 F.3d 208, 214 (D.C.Cir.1997) ("In the ordinary case, the exercise of prosecutorial discretion ... has long been held presumptively unreviewable."). The bulk of West's complaint—like others that challenge such unreviewable decisions—must therefore be dismissed for lack of subject-matter jurisdiction. *See, e.g., Sierra Club v. Whitman,* 268 F.3d 898, 905–06 (9th Cir. 2001); *INSLAW, Inc. v. Thornburgh,* 753 F.Supp. 1, 5–6 (D.D.C.1990).

60 F.Supp.3d at 203. Thus, Mr. Epperly's challenge to the Department of Justice's policy decisions should be dismissed.

A final point: if the Court denies the motions of the State and the United States to dismiss, then Mr. Epperly's petition violates Rule 8. Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of the short and plain statement is to "enable determination of the competence of the court, the appropriate procedures for the particular type of adjudication, the type of trial, and the remedies available." *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996).

A complaint's length, clarity, and inclusion of prolix or irrelevant allegations determine its compliance with Rule 8. *See, e.g.*, *Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058-59 (9th Cir. 2011) (citing cases and explaining that a pleading may not be of "unlimited length and opacity"); *McHenry*, 84 F.3d at 1180 (affirming dismissal of pleading that was "written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs"). The burden on both the defendant and the court are also relevant factors in determining whether a pleading violates Rule 8. *See Cafasso*, 637 F.3d at 1059 (criticizing plaintiff for "burden[ing] her adversary with the onerous task of combing through [the complaint] just to prepare an answer that admits or denies such allegations"); *McHenry*, 84 F.3d at 1179-80 (considering the "unfair burdens on litigants and judges").

Epperly's Complaint fails to comply with Rule 8. Containing 95 paragraphs that consume 48 pages, in terms of length it is comparable to, and in some cases longer than, those that courts have previously found to be in violation of Rule 8. *See McHenry*, 84 F.3d at 1174, 1177 (53-page amended complaint); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981) (23-page amended complaint with 24 pages of addenda); *Schmidt v. Hermann*, 614 F.2d 1221, 1224 (9th Cir. 1980) (30-page amended complaint).

While dismissal may be appropriate, if the Court were to decide against dismissal, it should address the pleading's "excessively detailed factual allegations" through "less drastic alternatives" and require Mr. Epperly to file a complaint that adheres to the rule. *See Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1127-32 (9th Cir. 2008).

For the reasons cited in the State's motion, as well as the points made in this document, Mr. Epperly's action should be dismissed.

DATED this 23rd day of June, 2015, at Anchorage, Alaska.

KAREN L. LOEFFLER
United States Attorney

s/Richard L. Pomeroy
RICHARD L. POMEROY
Assistant U. S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2015,
a copy of the foregoing **MOTION TO DISMISS**
was served electronically on:

Christopher D. Peloso
Gordon Warren Epperly

s/Richard L. Pomeroy
Office of the U.S. Attorney