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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14
15 BRIAN JUSTIN PICKARD, et al.
16 Defendants.

Case No. 2:11-CR-00449-KJM

DEFENDANT'S REPLY TO UNITED STATES' POST-EVIDENTIARY HEARING BRIEF

[Excludable Time: 18 U.S.C. § 3161(h)(1)(D) through disposition]

Date: February 4, 2015
Time: 9:00 a.m.
Judge: Hon. Kimberly J. Mueller

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COMES NOW, Defendant BRIAN JUSTIN PICKARD, by and through counsel and respectfully submits the following in response to the United States' Post-Hearing Brief, hereinafter referred to as "U.S. Brief." (Doc. 374).

I. INTRODUCTION

The Government urges this Court to deny defendant's Motion to Dismiss, asserting: the evidence presented at hearing clears the rational basis test, as the classification of cannabis as a Schedule I controlled substance is rationally related to a legitimate government interest in public health and safety. (U.S. Brief, p. 1:5-6, 4-14.)

In addition, the Government again raises the claims that: (1) the defendants' lack standing to challenge marijuana's continued inclusion on Schedule I, (*Id*., pp. 14-15), and (2) this Court lacks jurisdiction to hear defendants' challenge, (*Id*., pp. 15-16).

Finally, the Government contends that this Court should deny the defendants' Equal Sovereignty challenge predicated on: (1) previous arguments; (2) statements made at a May 21, 2014, hearing, and (3) three District Court rulings. (*Id*., p. 14:7-13.)

As discussed below, the Government's position on each of these issues is not supported by the evidence presented at the hearing, and misinterprets the standard under which this Court is to evaluate the motion. Further, the referenced law provides no further binding or persuasive authority necessitating a revisiting of this Court's previous legal conclusions regarding the standing and jurisdictional issues.

Finally, the Government fails to address the importance of *Section 538* of "The Consolidated and Further Continuing Appropriations Act, 2015," which clearly demonstrates that the regulation of marijuana does, by statutory authority, impermissibly "invoke[] uniquely state concerns." (U.S. Brief, p. 14:9, referencing May 21, 2014, transcript.)[1]

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[1] *Section 538* is codified as *Public Law No. 113-235* (Dec. 16, 2014), 113th Congress (2013-2014); also submitted as Def. Exh. WW to defendant's Post-Evidentiary Hearing Brief (Doc. 378.) This Court may consider *all relevant evidence* appropriate for judicial notice, such as legislation passed since the filing of this motion, as FRE 201 explicitly authorizes that "[t]he court may take judicial notice *at any stage of the proceeding*."

II. ANALYSIS

A. Standard of Review

1. Rational Basis

In an attempt to deprive this Court of the constitutional duty imposed under the separation of powers doctrine, the prosecution reduces rational basis review into nothing more than a rubber stamp for legislative action. Rational basis is no imaginary, toothless standard, ungrounded in reality, as it has long been held that a challenged classification fails even the most deferential review *wherever* the logical conclusion is "that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97 (1979). It is this demand for rational government action which provides the checks and balances so important to our Nation's constitutional survival. And while the Government can pick out words such as "imaginary," the inquiry must always come back to the precedent set by the United States Supreme Court (i.e., a challenged statute "must find some footing in the realities of the subject addressed by the legislation."). Heller v. Doe, 509 U.S. 312, 321 (1993). The Government appears to advance a standard in which rationality is found so long as it abides in one person's imagination, this concept is not only frightening, but in conflict with the cautionary warning of the Ninth Circuit:

> Consistent with this admonition [in Heller], our [9th] circuit has allowed [the movant] to rebut the facts underlying [the] asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose.

Lazy Y Ranch LTD v. Behrens, 546 F.3d 580, 591 (2008), in a section of the opinion titled "*Supreme Court and Circuit Law Allows Some Inquiry Into the Rationale for the Classification*," relying on Lockary v. Kayfetz, 917 F.2d 1150, 1155-56 (9th Cir. 1990), and Parks v. Watson, 716 F.2d 646, 654-55 (9th Cir. 1983).

The Ninth Circuit cases relied upon by the Government to redefine the rational basis level of review, do not support a finding that a statute must be upheld if there is an "imaginable" basis. (U.S. Brief, p. 1-2.)[2]

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[2] The Government's use of the word "debate" is similarly unreasoned, as the prosecution applies the word to conflate disagreement among scientists and physicians about the use of cannabis as medicine, with whether the *reasoning* of the Government's classification of marijuana in Schedule I is debatable. Characterizing the concept of "debate" somewhat in context, the Government first states "the challenge law must be upheld if *the reasoning* for it is debatable." (U.S. Brief, 2:1, emphasis added.) Thereafter, however, the word is utilized in an attempt to convince this Court that any disagreement among scientists

First, Kahawaiolaa v. Norton, 386 F.3d 1271, 1280 (9th Cir. 2004), reiterates Heller, *supra*, and also relies on Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992), in which it was determined, "under rational basis review: 'the Equal Protection Clause is satisfied so long as there is a *plausible policy reason for the classification*, the legislative *facts* on which the classification is apparently *based rationally may have been considered to be true* by the decision maker, *and* the *relationship of the classification to its goal* is not so attenuated as to render the distinction arbitrary or irrational'.". *Id*., at 1280, emphasis added. This standard, thus, requires *fact-based objective reasoning*, not imagination.

Second, Nichols v. Dancer, 657 F.3d 929, 934 (9th Cir. 2011), is a case involving a workplace First Amendment challenge, where in *dicta* the Court cites to a Fifth Circuit decision in an effort to distinguish the claim at issue from one requiring rational basis review. The language there quoted provides that even under the lower standard, the Court must find an "imaginable *legitimate*" basis for the government action. Thus, whatever precedential value this reference holds still requires this Court to objectively examine the legitimacy of the government's rationale, and must do so in reference to the United State Supreme Court standard set forth in Nordlinger, *supra*.

Third, United States v. Harding, 971 F.2d 410, 413 (9th Cir. 1992), again emphasizes the need for a court to ascertain the legitimacy of the stated purpose. In fact, a "legislative body need not explicitly state its reasons for passing legislation so long *as a court* can divine some rational purpose." *Id.,* citing to United States v. Cyrus*,* 890 F.2d 1245, 1248 (D.C. Cir. 1989), emphasis added. Further, Harding states, while "[t]he burden falls on the party attempting to disprove the existence of a rational relationship between a statutory classification and a government objective, '[t]hose challenging the legislative judgment *must convince the court* that *the legislative facts* on

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regarding the therapeutic uses of marijuana defeats the defendant's challenge. Yet, the statute demands a finding that there is "*no* accepted medical use," not that there is no *universally* accepted medical use. Further, none of the cases relied upon stand for such a proposition, and to hold otherwise would eviscerate the rational basis standard all together, particularly for questions involving science. As Dr. Hart made clear "there are no absolutes" in science. (RT 171: 7-13; *see also*, RT 407:11-17, Dr. Denney: this is "the way of science.... [a]nd this is how findings are referred to." The presence of some scientific debate cannot be the cornerstone of rational basis review, lest the judiciary's role be negated and the legislative branch be subjected to *no checks or balances* for any scientific query.

which the classification is apparently based *could not reasonably be conceived to be true* by the governmental decision maker." *Id.,* citing to Vance v. Bradley, 440 U.S. 93 (1979). In the present case, any facts suggesting marijuana is one of the most dangerous drugs in the nation could not reasonably be conceived to be true by a Congress and President who have, by both policy and statute, facilitated the wide-spread distribution of what they even call "medical marijuana."[3]

In Immigrant Assistance Project et al. v. INS, 306 F.3d 842 (9th Cir. 2002), the Ninth Circuit affirmed the issuance of an order enjoining the INS from an impermissible interpretation of the Immigration Reform and Control Act because, while the "fit between means and ends" may be imperfect, "there [was] no discernable fit at all." *Id.* Due to the lack of correlation between the purpose and the statute, the Court found there did not "appear to be some footing for the classification in the realities of the subject addressed by the legislation."[4] *Id.*, internal citations omitted. Here too, no such fit exists, as the evidence demonstrated that cannabis does not fit into even one of the Schedule I factors and, as indicated above, the federal government agrees. As such, its classification is not discernible.

While it is true that the Government is free to present no justification and let the Court lay the Constitution against the evidence presented, where offered, as in the present case, the prosecution is bound to its stated rationale.[5] Once a justification has been set forth, as here, the

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[3] The Government also cites to National Paint & Coatings Association v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995) to conclude that rational basis may be born in the imagination. This case, even if carrying precedential weight, involved a challenge to a city ordinance regulating commerce. The Court there noted: "A person challenging the regulation of economic transactions must 'negative every conceivable basis which might support' the rule. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (citation omitted)." Nat'l Paint & Coatings Assn, *supra*, at 1127. Be that as it may, this case summarizes a standard for rational basis review which has never been embraced by the Ninth Circuit or the Supreme Court. In fact, such a proposition is in direct conflict with Heller and Vance v. Bradley, *supra*, which demand both that the reasoning be grounded in fact, and the facts reasonably justify the challenged law.

[4] See also, Perry v. Brown, 671 F.3d 1052, 1086 (9th Cir. 2012), vacated on unrelated grounds in Hollingsworth v. Perry, 570 U.S.___,133 S.Ct. 2652 (2013).

[5] Merrifield v. Lockyer, 547 F.3d 978, 991-992 (9th Cir. 2008).

relationship of the classification to its goal need not be perfect, but it must be *discernable*.[6] Immigrant Assistance Project, *supra*, at 872-873.

As set forth in the defendants' Post-Hearing Brief (Doc. 378, p. 41), the Government is precluded from offering controverting justifications by the *principle of non-contradiction* that underpins our very method of logical reasoning. Merrifield v. Lockyer, 547 F.3d 978, 991-992 (9th Cir. 2008). Defendants prevail on this ground alone, as it cannot be said that a substance so dangerous as to warrant Schedule I designation is, at the same time, not important enough to warrant spending to prevent its widespread distribution in over half of these United States. In fact, it is impossible to fathom even an *imaginary* reason for the fit between ends and means.[7] The evidence sufficiently established that the challenged statutes is "based upon an unjustifiable standard such as... arbitrary classification" (Oyler v. Boles, 368 U.S. 448, 456 (1962)), and it is clear that the equal dignity of the States is implicated where the Government, both by policy and legislative action, no longer enforces what Congress itself calls " medical marijuana" prohibition in specified states. Justifying this government conduct simply defies the imagination. As one Judge noted, "if a state were to legalize and regulate heroin - another Schedule I controlled substance - the Justice Department almost *certainly* would not respond with a policy of non-enforcement." United States v. Dayi, No. JKB-13-0012, JKB-13-0304, 2013 WL 5878922, *4 (D.M.D. Nov 1, 2013), emphasis added.

2. Active Rational Basis

Where the discrimination is the codified disparate treatment of the States, the Court must determine *first* whether the federal action violates the structure of our government itself. United States v.Windsor, 570 U.S. __,133 S. Ct. 2675, 2692 (2012), "is unnecessary to decide whether

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[6] Here, the relationship of the classification to its goal must be discernable in light of its *continued* enactment, as the "lineage of a legal concept does not give it immunity from attack for lacking a rational basis." Heller, *supra*, 509 U.S. at 326.

[7] Could it possibly be imagined that Congress and the President have a particular dislike for Americans residing in the states enumerated in *Section 538*, and therefore, the purpose is to allow the proliferation of the most dangerous drug in the nation in order to harm the citizens of these states? For this is the only "imaginary" conclusion and, if this were indeed the case, the role of the judiciary becomes all the more important.

this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance." This is so because "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928), *accord,* Windsor, *supra,* 133 S. Ct. at 2692, *accord,* Romer v. Evans, 517 U.S. 620, 633 (1996).[8]

When, as in the present case, impermissible burdens are doled out upon the people of this nation depending *only* upon the State in which the conduct occurred, a heightened level of rational basis review is mandated. As the prosecution did not address the heightened test which applies in cases alleging disparate treatment of the States, defendants incorporate previous

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[8] *Cf.* United States v. Wilde, 2014 WL 6469024, *5 (N.D. Cal. Nov. 18, 2014), declaring "active" rational basis is only applicable to statutes based on animus. This Circuit, however, has never limited heightened rational basis to statutes based on a desire to harm a group, as to do so negates Circuit and Supreme Court precedent. *See*, Lazy Y Ranch LTD v. Behrens, 546 F.3d 580, 591 (2008) (land use issue); Merrifield v. Lockyer, 547 F.3d 978, 991-992 (9th Cir. 2008) (pest control licensing); Lockary v. Kayfetz, 917 F.2d 1150, 1155-56 (9th Cir. 1990) (moratorium on new water hookups); Parks v. Watson, 716 F.2d 646, 654-55 (9th Cir. 1983) (land use dispute); *see also,* Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928) (tax exemption), "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision [of Equal Protection]." *See also*, Nat'l Federation of Independent Business v. Sebelius, 132 S.Ct. 2566; 181 L.Ed.2d 450 (2012), apparently applying a heightened rational basis analysis in the context of Affordable Health Care Act of 2010, J. Ginsburg, concurring opinion.

Even under the Wilde restriction, however, defendants have proffered sufficient evidence to establish that the federal prohibition of cannabis was based on racial animus, first in the Marihuana Tax Act of 1937, though such animus flowed directly into marijuana's inclusion in the Controlled Substance Act in 1970 *immediately* after the 1937 Tax Act was declared unconstitutional in 1969 in Leary v. United States, 395 U.S. 6 (1969).

In this regard, defendants ask this Court to consider the proffered Direct Examination of James J. Nolan III, Ph.D. (Doc. 314), who attested that the term *marihuana*, as current used in the challenged United States Code in the instant case (*See, U.S.C. § 812 Schedule I(c)(10),* LEXIS 2015) is a stark reminder of the racist origins of this statute as, prior to 1937, this substance was referred to as cannabis but *marihuana* sounded more Mexican and objectionable to people who didn't like Hispanics." (Doc. 314, ¶ 4.) Congress, in enacting the Controlled Substance Act, failed to rectify the use of the racist word "*marihuana*," nor have they take such action to correct the racist terminology even today, despite a clear understanding of the racist origins of term. Unfortunately, such animus resulted in the desired impact, as "*more than half* of all federal criminal convictions for marijuana related offenses for the past five years were of Hispanic persons, though Hispanics make up just 17% of the U.S. population." (Doc. 314, ¶ 9.) The defendant respectfully requests the evidence presented in support of applying strict scrutiny be considered sufficient to meet the Wilde standard for a heightened rational basis review.

In addition, the current scheduling could easily be considered to be based upon a similar, or indeed greater "desire to harm a politically unpopular group" as was at issue in United States v. Moreno, 413 U.S. 528 (1973), in which the exclusion of benefits for unmarried house-mates was said to be targeted at "so-called 'hippies' and 'hippie communities.'" Here, with the racist undertones of the Controlled Substance Act, and of federal cannabis prohibition in the first instance, cannabis users have long been politically unpopular and the political about-face regarding the popularity of cannabis in light of such a history serves only to here further the defense position.

arguments herein by reference, based, *inter alia*, on the established Supreme Court precedent in Shelby County v. Holder, 133 S. Ct. 2612 (2013) and United States v. Windsor, 133 S. Ct. 2675, 2693 (2012).[9]

B. Treating Marijuana as a Schedule I Controlled Substance Is Not Rationally Related to the Legitimate Government Interest in Public Safety.

1. The Court Must Evaluate Whether Marijuana Meets the Statutory Schedule I Factors Without Considering the Potential of Rescheduling.

In an effort to rationalize what is clearly an irrational statute, the Government now claims the question before this Court is not whether the challenged law is unconstitutional, but rather whether such law would be unconstitutional if it were written differently (i.e., if marijuana was placed in a different schedule). The fact is *21 U.S.C. § 812, Schedule I(c)(10)* and *(17)*, dictates that marijuana and THC are classified as a Schedule I controlled substance, and *21 U.S.C. § 812(b)(1)* provides the statutory definition for this classification. Thus, in this constitutional challenge to *Section 812, Schedule I (c)(10), (17)*, reference must be made to the statute which defines it (i.e., *Section 812(b)(1)*). The defendant did not present evidence with the intention of proving marijuana fit one of the other Schedules, as the only evidence solicited by the defense regarding other Scheduling options was in the context of the irrationality of placing synthetic THC (dronabinol) on Schedule III, when botanical THC and the non-psychoactive CBD are Schedule I.[10] (RT 658-661.)[11]

The Government further tries to justify marijuana's controlled substance status by reference to what is described as the "safety valve" provision provided in *21 U.S.C. § 811(a)*.

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[9] *See*, Defendant's Reply to Government's Opposition to Motion to Dismiss Indictment (Doc. 233, p. 5-6), Defendant's Opposition to Government's Motion for Reconsideration (Doc. 266, p. 11 -12), Defendant's Focused Brief (Doc. 280, p. 5-6), and in Defendant's Amended Post-Hearing Brief (Doc. 378, p. 40-41).

[10] The irrationality of this fact is particularly apparent as the Government's own witness testified that it is the THC which is the problem. (RT 660:1-2.)

[11] The Government asked Dr. Carter about the report he and others prepared at the behest of the then Washington State Governor, and he affirmed he was asked to prepare the medical and scientific information for the purpose of rescheduling marijuana to Schedule II. (RT 33-34, and 72.) This issue is further discussed in Section (II)(B)(3)(a), *infra*, but does little to support the Government's attempt to reshape the constitutional challenge here at issue.

1 (U.S. Brief, 3:20-4:13.) This does nothing to save the law, as the Supreme Court found in Shelby
2 County, *supra*, statutorily provided recourse to the enforcement of a law does not render that law
3 reasonable. Under Section 5 of the Voting Rights Act of 1965, certain "covered" jurisdictions
4 could petition the Attorney General or seek clearance from a three-judge panel. *Id*. at 2620. This
5 was not deemed sufficient to save the statute because the Attorney General had the authority to
6 object to a jurisdiction's request to a change affecting voting, and thus effectively blocking or
7 extending the application process, and forcing petitioners to seek clearance through the three-
8 judge panel, a "process [which] can take years." *Id*. at 2624.

9 Likewise, the ability to petition the DOJ to remove marijuana from Schedule I has been
10 effectively blocked. (*See*, Americans for Safe Access (ASA) v. DEA, 706 F.3d 438, 440 (D.C.
11 Cir. 2013), in which the Court specifically articulated the question before it as follows: "On the
12 merits, the question before the court is not whether marijuana could have some benefits. Rather
13 the *limited question* that we address is whether the DEA's decision declining to initiate
14 proceedings to reschedule marijuana under the CSA was arbitrary and capricious," and finding it
15 did not have the authority to force the DEA to act; Craker v. Drug Enforcement Agency, 714
16 F.3d 17 (1st Cir. 2013), the Court could not compel the DEA to grant an application made by a
17 professor at University of Massachusetts to cultivate marijuana for medical research pursuant to
18 *21 U.S.C. § 823*, despite a ruling to do so from the Administrative Law Judge, and Opinion of the
19 Drug Enforcement Agency [DEA] Administrative Judge Francis Young, the DEA's disregarded
20 the Administrative Law Judge's findings that marijuana did not fit the Schedule I criteria). And,
21 if not blocked, the petition process has been extended for years, as is evident from the nearly 10
22 years the DEA took before rejecting that filed in 2002 (ASA v. DEA, *supra*, and Govt. Exh. 11;
23 *see also*, Dr. Carter's testimony regarding the Petition he was involved in filing in 2011, to which
24 there has yet been any response, RT 33-34.) While in 1972, the "periodic review" may have been
25 considered "a sensible mechanism for dealing with a field in which factual claims are conflicting
26 and the state of scientific knowledge is still growing..." (U.S. Brief, 4:5-7, citing to United States
27 v. Kiffer, 477 F.2d 349 (2nd Cir. 1972)), some 43 years later, it has become apparent that this
28 mechanism disregards scientific knowledge and the plain findings of the DEA's own

administrative courts.[12] In fact, it is precisely this mechanism which has allowed Congress to pass the buck to the Administration and, until the passage of *Section 538*, keep Congress from acting.[13]

In effect, there is no merit to the Government's argument that this Court should disregard the facts provided through the declarations, testimony and exhibits presented in support of this motion, and conclude that, because marijuana could be moved to Schedule II, the defense has, as a matter of law, failed to satisfy their burden.

2. Treating Marijuana as a Schedule I Controlled Substance Does Not Pass Constitutional Muster.

a. Legal Basis

The Government reiterates the arguments presented in their Opposition to the Motion to Dismiss Indictment (Doc. 224, at pp. 10 - 12; U.S. Brief, Section II.B.2, p. 4:15-5:8), and Motion for Reconsideration (Doc. 264 at pp. 4-6), relying on nearly all the same Circuit Court cases, including United States v. Rogers, 549 F.2d 107 (9th Cir. 1976), United States v. Miroyan, 577 F.2d 489 (9th Cir. 1978), United States v. Kiffer, 477 F.2d 349 (2nd Cir. 1972), United States v. Fogarty, 692 F.2d 542 (8th Cir. 1982), as well as the unpublished cases of United States v. Oakland Cannabis Buyer's Cooperative, and Sacramento Nonprofit Collective v. Holder. In fact, the only case not previously cited is United States v. Rodriquez Camacho, 468 F.2d 1220 (9th Cir. 1972), which involved a claim that Congress did not have the authority to regulate *intra*state distribution of controlled substances, including marijuana. While the prosecution is correct in asserting Congress may regulate not only interstate commerce, but also wholly intrastate activities which it concludes have an effect upon interstate commerce, the regulations must still be rational. If predicated, as the Rodriquez-Comacho Court notes, on Congress'

[12] *See*, In the Matter of Marijuana Rescheduling Petition, Docket 86-22, (Dept. of Justice, September 6, 1988) Opinion of the Drug Enforcement Agency [DEA] Administrative Judge Francis Young, and Craker v. Drug Enforcement Agency, *supra*, 714 F.3d 17.

[13] Also of significance is the holding in Wickard v. Fiburn, 317 U.S. 111 (1942), in which the court found "[t]hat the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, *nor did that fact play any role in the Court's analysis*." Gonzales v. Raich, 545 U.S. 1, 20 (2005) emphasis added.

conclusion that "controlled substances have a substantial and detrimental effect on the health and general welfare of the American people," (*Id*. at p. 1222), then there must be a factual basis for determining that it is a "detriment" and, importantly, it must be a detriment to the American people, not simply to those Americans in states in which medical cannabis has not been made legal.

As discussed in the defense previous filings, United States v. Rogers, 549 F.2d 107 (9th Cir. 1976), lends little to the present motion, as it is appears to have been a summary affirmation of marijuana related convictions in which the "appellants challenged as irrational and therefore unconstitutional the laws and regulations denouncing the importation and related possessory offenses and conspiracies to commit those offenses in respect to marijuana." *Id*. at 108. Relying on Rodriquez-Comacho, the Court found that the constitutionality of the marijuana laws has been settled adversely to the appellant's claim in the Ninth Circuit, although the basis for the constitutional challenge is never articulated nor identified. Further, the case is nearly 40 years old, and therefore any evidence - if such was presented - would certainly leave the "central holding obsolete." (*See*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 (1992), where the court was asked to decide "whether the law's growth in the intervening years has left Roe's central rule a doctrinal anachronism discounted by society; and whether Roe's premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addresses." *Id*., at 855.)

The Government also again relies on the unpublished opinion of United States v. Oakland Cannabis Buyers' Coop., 259 Fed. Appx. 936, 938 (9th Cir. 2007), where the Ninth Circuit upheld a District Court's grant of injunction sought by the government restraining the Oakland Cannabis Buyers' Co-op from distributing marijuana. Citing to United States v. Miroyan, 577 F.2d 489, 495 (9th Cir. 1978), the Court noted that "new information has been developed concerning the use of marijuana since 1978, "which may be properly considered if such "developments... left [a previous case's] central holding obsolete." *Id*., citing Planned Parenthood v. Casey, *supra*.

Likewise, in Sacramento Nonprofit Collective v. Holder, 2014 U.S. App. LEXIS 803 (9th Cir. 2014), the Court noted that "the passage of time coupled with changing social views may alter the fundamental rights analysis." *Id*.[14]

Here, in the "approximately thirty-five years" since Miroyan was decided, the facts regarding the irrationality of the current scheduling of cannabis are "so far changed" as to render the holding "irrelevant or unjustifiable in dealing with the issue addressed." Planned Parenthood v, Casey, *supra*, at 855.

The precedential value of these cases is no more dispositive now than it was prior to the evidentiary hearing, as the proposition for which they are presented remains that the Ninth Circuit has upheld the constitutionality of treating marijuana as a controlled substance on numerous occasions over the past four decades. (U.S. Brief 4:15-17.) This has been the position of the Government through numerous prior briefings which attempted to urge this Court to deny the Motion to Dismiss without a hearing. As the evidence has now been presented, these cases have limited application, for none of the cited decisions had the record now before this Court, which renders them not only legally, but factually, distinguishable.[15]

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[14] As no evidentiary hearing was held in support of the complaint in Sacramento Nonprofit Collective, *supra*, the Ninth Circuit was not presented with any evidence on which to base the opinion.

[15] The Government also cites to District Court cases, asserting that "the Courts in this District agree [marijuana as a controlled substance is rationally related to a legitimate government interest]" and "every other Court to have addressed the issue is in accord." (U.S. Brief p. 4:22-26.) These decisions are not binding on this Court, and as outlined below, nor are they relevant to the issues presented in the instant case:

United States v. Smith, 2:11-cr-00428-GEB is a 2011 is a case in which the defendant asserted a shopping list of constitutional challenges, none of which involve the legal theories and factual basis here presented; United States v. Albright, 2:11-cr-2266 GEB, text order only; United States v. Chavez, 1:07-cr-192 AWI, text order only; United States v. Trujillo, 2014 WL 3728481 (E.D. Wash., July 25, 2014), defendant claimed: the CSA does not preempt Washington States Medical Use of Cannabis Act; the CSA does not regulate the medical use of cannabis, and the CSA should not be interpreted to prohibit a medical treatment that has been approved by one of the States; and United States v. Wilde, 2014 WL 6469024 (Cal. 2014), denying a motion to dismiss premised on the Fifth Amendment based on precedent, and without consideration of the disparate application of the law or the equal sovereignty claim which was found to have been waived, also discussed in *Section II(C)* of this brief.

In addition, the Government cites to District Court cases in an effort to urge this Court to find that *Section 877* deprives district courts of jurisdiction. United States v. Firestack-Harvey, 2014 WL 2862831 (E.D. Wa. June 24, 2014), unclear how this case is relevant in that it involved a Motion to Dismiss predicated on the claim that the Government would be unable to prove a single conspiracy, and/or the defendant's connection to firearms.

Similarly, Gonzales v. Raich, 545 U.S. 1, *supra*, does not preclude the present inquiry. As the Supreme Court made clear it was not deciding the wisdom of marijuana's classification:

> The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is *not whether it is wise to enforce the statute* in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. *Id*., at p. 9, emphasis added.

And again the Court defined the scope of its holding:

> Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Brief for Respondents 22, 38. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' *challenge is actually quite limited*; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the *Commerce Clause*. *Id*., at p. 15, emphasis added.

Just as the questions before this Court are distinct from that raised in Raich, the government interests implicated are also distinct. As the Raich Court identified the government's interest as one to regulate the interstate market among the several States (*Id*., at 22), presently it is apparent that the government can raise no such interest since Congress has decided to facilitate distribution within some states, while upholding the most strict prohibition within others.

In United States v. Heying, 2014 WL 5286155 *4 (D.Minn. Oct. 15, 2014), the Magistrate specifically rejected the Government's lack of jurisdiction argument which was premised on *Section 877* and the cases here cited. (*Id*. 14-crr-30 District of Minnesota; Report and Recommendation Doc. 133 pp. 4-5), and the Judge adopted this finding; and United States v. Taylor (W.D. Mich. Case No. 1:14-cr-67, Sept. 8, 2014), the court specifically rejected the government's *Section 877* jurisdictional argument page 5, *fn.* 2, In addition, the decision relies in significant part on the lack of statutory basis for the disparate treatment among the states. Regarding the Equal Protection challenge the Court determined the "defendants over read the Department of Justice policy statements." Finding that because there are "no hard and fast set of rules. . and prosecutors ultimately retain discretion on how to proceed." *Id*., p. 6. In response to the Equal Sovereignty claim, the court again stated that the defendants "over read the Cole memo. . which simply advises US attorneys on how to respond in light of the changing relationship between the states and the federal government on marijuana." *Id*., p. 7. Yet, the government action is no longer restricted to the policy statements of the Administration, but rather a Congressional Act which defunds the DOJ, and thus statutorily precludes prosecutions involving the manufacturing and distribution of medical marijuana in specifically identified states. Accordingly, the very premise of much of Judge Jonker's decision has now altered, thus diminishing any persuasive authority it once might have held. (See, James v. City of Costa Mesa, 700 F.3d 394 (9th Cir.2012), where the Ninth Circuit concludes that the uniform application of the CSA is what avoids an infringement on Equal Protection rights.)

As the Government points out, the interest is in protecting the health and welfare of the general public is served by prohibiting the use of Schedule I controlled substances. (Treasury Employees v. Van Raab, 489 U.S. 656 (1989) and Employment Div., Oregon Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).) This argument, however, ignores the central issue before this Court: is marijuana rationally classified as a Schedule I controlled substance? The Government, is therefore, incorrect in relying on Raich, Von Raab, and Smith, *supra*, to conclude "every level of the federal courts has held that treating marijuana as a controlled substance is rationally related to a legitimate government interest." (U.S. Brief 5:9-25.) For in each of these cases, the classification of the drug in question was not in dispute.

b. Factual Basis

Having once again urged this Court to deny the motion as a matter of law, the Government proceeds to assert that "[b]ased on the testimony of defendants' own experts, there is easily a 'conceivable basis" for treating marijuana as a controlled substance." (U.S. Brief 6:3-4.)[16] As discussed below the evidence identified by the Government fails to support a conceivable, or even an imaginable, basis for such a classification.

First, the fact that marijuana has psychoactive properties and induces some level of intoxication does not render it a Schedule I controlled substance. (U.S. Brief 6:5-7.) Indeed, as the overwhelming and undisputed evidence established that many controlled and non-controlled substances, such as alcohol, have these same properties and are far more harmful than cannabis.[17] Further, and of great significance, the only component of the cannabis plant known to induce intoxication is the cannabinoid THC, which in its chemically identical synthetic form is classified

[16] It must be noted that this is not the question raised by the defense, as it has been repeatedly made clear the issue is whether cannabis is constitutionally classified as a Schedule *I* controlled substance.

[17] *See*, Denney Decl. ¶ 7-23 (and related testimony at RT 384:19-25; 385: 11-24; 385:8-10; 442: 11-15; 448:17-22; 483: 14-19, "[a]lcohol, actually, in excess, can destroy parts of the central nervous system";), Hart Decl. ¶ 6-7, 9-10 (related testimony at RT 151: 1-8; 213: 1-8; 272:12-273:1); Carter Decl. ¶ 7, 8 (related testimony at RT 14:5-8; 67:1-22; 85:17-86: 3; 97:22-98:2); *see also*, Def. Exh. G-102 (Madras), at p.19 (RT 825:18-826:7; 765:19).

in Schedule III.[18] The rationale for which was never explained, and indeed, an explanation cannot even be imagined.

Second, the evidence did not make "clear" that smoking marijuana has adverse health consequences, as the Government contends. (U.S. Brief 6:7-16.) Rather, the evidence cited establishes that, while there is an assumption that smoking is never a heathy choice, the studies in this regard do not support the hypothesis that smoking marijuana increases the risk of cancer.[19] The testimony relied upon by the Government reflects the general idea that smoking is not the ideal form of ingesting a medicine.

Dr. Carter:

Q. You said you do not recommend smoking for your patients?

A. I'm not an advocate for smoking anything. (RT 98: 24-99:1.)

Dr. Hart:

Q. Certainly it's bad to smoke some of it, right?

A. So, when we think about smoking marijuana, we could think about smoking a number of things, yeah, it's - - but there are ways to decrease that sort of bad things, as you said. For example, if you have a vaporizer, that issue, that concern is no longer a concern about these things that are bad. Right. So what you are describing –

Q. Tar is bad, right?

A. Yeah, tar is certainly bad, absolutely. But when you use a vaporizer, you decrease that concern.

Q. There is a lot of the same things in marijuana smoke that are in cigarette smoke, right?

A. There are some. Cigarette smoke, for example, contains more than 4000 chemicals. Marijuana contains 400. So . .

Q. Depends on which chemicals they are though, right?

A. I guess. But like I said, you can decrease the concern that you are just raising by simply using a vaporizer. (RT 180: 24- 181: 10.)

Christopher Conrad:

Q. So marijuana smoke has been listed as one of those carcinogens under Proposition 65 in the State of California, is that true?

A. There are a couple of compounds in the smoke, like any other smoke, that would fall into that category, yes. (RT 559:9-13.)[20]

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[18] *See*, RT 660:9-11, where Dr. Madras affirms that the molecular structure of dronabinol, or Marinol, is identical to botanical THC.

[19] *See*, Def. Exh. H-44, (Armentano) Vol. II, Tashkin, (2013) Effects of Marijuana Smoking on the Lung; Def. Exh. H-45, (Armentano) Vol. II, Zhang (2014) Cannabis Smoking and lung cancer risk: Pooled analysis in the International Lung Cancer Consortium, and Govt Exh. 11 76 FRE 40558.

[20] It should be noted that Proposition 65 requires warning for marijuana *smoke*, but not marijuana itself, which is the substance here at issue. California's Proposition 65, by including cannabis

While testifying that the vast majority of his patients smoked the marijuana when they first started to see him, and that he recommended against smoking, Dr. Denney also testified that 20+ percent of these patients changed from smoking to another form of use. (RT 338-339: 4-6.)

As the experts, including Dr. Madras, pointed out, alternatives to smoking marijuana such as vaporizing are available and are commonly utilized. (RT 199:2-8, "vaporizing is probably [the] most" common method of ingesting cannabis today.) Further, the effects of cannabis smoke are far from certain. But most importantly, it is not the cannabis *smoke* which is listed on Schedule I, but rather the plant itself, which the evidence did not suggest has even one carcinogenic property, but rather that it is being used in the treatment of cancer.[21]

Third, the Government asserts that Dr. Hart's text book admits that marijuana use can cause heart problems, lung problems, and anxiety, can harm reproductive and immune systems, and that "data from laboratory studies of computer-controlled driving simulators indicates that marijuana produces significant impairments. (U.S. Brief, 6:12-21.) As detailed below this text book reaches no such conclusions.

Initially it should be made clear that the pages referenced by the Government are included in a section entitled "Causes for Concern." Such issues were discussed at the evidentiary hearing and in the text book each determined to be insignificant and/or unsupported in science.

> Heart problems: The acute physiological effects of marijuana, primarily increase heart rate, have not been thought to be a threat to health. (Govt. Exh. 314, p. 362.)
>
> Lung problems: Experiments have shown that chronic, daily smoking of marijuana

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smoke, but not cannabis, is evidence that the substance itself is not toxic, as Proposition 65 requires warning for *both* tobacco and tobacco smoke.
See, list of Proposition 65 warning list online at:
http://oehha.ca.gov/prop65/prop65_list/files/p65single122614.pdf, last accessed on January 17, 2015. Additionally, Proposition 65 requires warnings for "acrylamide," a substance in common coffee and, as such, these warnings are given in every Starbucks coffee shop in the State of California. (*See*, http://www.oehha.org/prop65/acrylamideqa.html.) It simply cannot be said that these warnings have any applicability to the instant litigation.

[21] *See*, *inter alia,* Govt. Exh 11, 76 FRE, 40558, "Recent data suggest that cannabinoid agonists may have therapeutic value in the treatment of prostate cancer, type of carcinoma in which growth is stimulated by androgens." Def. Exh. H-26, (Armentano) Vol. I, Waissengrin study; Def. Exh. H 36, (Armentano) Vol. II, U.S. Patent titled "Cannabinoids as anti-oxidants and neuroprotecants"; Def. Exh. H-88, (Armentano) Vol. II, Earlywine study; Def. Exh.JJ, U.S. Patent titled "Phytocannabinoids in the treatment of cancer"; and Govt. Exh. 320, Rocha study; Govt. Exh. 321, Musty study.

impairs air flow in and out of the lungs. It is hard to tell yet whether years of such an effect results in permanent and major obstructive lung diseases in the same way that smoking tobacco cigarettes does. A recent study investigated the association between lung function and marijuana smoking in about 1000 adults aged 40 and older. Marijuana was not associated with increased risk of respiratory symptoms or lung disease." (*Id*. P. 362.)

Anxiety: . . . the best treatment is probably "talking down," or reminding the person of who and where they are, that the reaction is temporary, and that everything will be all right." (*Ibid*.)

Reproductive effects: Heavy marijuana smoking can decrease testosterone levels in men, although the levels are still within the normal range and the significance of those decreases in not known. Diminished sperm counts and abnormal sperm structure in heavy marijuana users has been reported, perhaps because anandamide [a chemical isolated from brain tissue that has marijuana-like properties] plays a role in normal sperm function. A growing number of studies have shown that marijuana use by pregnant mothers does not appear to be associated with low birth weight or premature birth. (*Id*. 362-363.)

Immune system: Animal studies have found that THC injections can reduce immunity to infection, but at doses well above those obtainable by smoking marijuana. Some studies have suggested reduced immunity, but most have not. If the effect were real, it could result in marijuana smokers' being more susceptible to infections, cancer and other diseases, such as genital herpes. One might suspect that such problems would eventually be reflected in the overall death rate of marijuana users. However, a report examining 10 years of mortality data for more than 65,000 people found no relationship between marijuana use and overall death rates." (*Id*., p. 363.)

Impaired Driving: A large number of studies have investigated the effects of marijuana on driving performance, but the findings have been inconsistent. . . .Findings from the majority of epidemiological studies [i.e., evaluation of actual drivers involved in accidents] show little evidence that drivers who use marijuana alone are more likely to be involved in an accident than non-drug-using drivers. But data from laboratory studies of computer-controlled driving simulators indicate that marijuana produces significant impairments. (*Ibid*.)

In the context of cognitive performance, the text clearly points out that the problem with reaching a consensus is that the studies fail to distinguish the direct and long-term effects of marijuana use, and fail to account for the history of the user. (Govt. Exh. 314, p. 357.) This is the context in which the statement, "[i]t is also difficult to make definitive statements about long-term cognitive effects of marijuana use because of divergent findings and interpretations" was made. More importantly, however, is the fact that the text goes on to assert that there are indeed conclusions which can be gleaned from the studies: "More general conclusions, however, are possible." *Id*.

Fourth, the Government cites to the New England Journal of Medicine written by

1 government scientist, Dr. Nora Volkow. (Govt. Exh 13.) To be clear, this is not a study, nor
2 even a meta-analysis, but rather a review attempting to justify the federal government's position
3 regarding the continued prohibition of marijuana. Not a single defense witness subscribed to the
4 notion that marijuana use impacts brain development, increases the risk of anxiety and
5 depression, and exacerbates . . schizophrenia, negatively effects school performance in
6 adolescents, or results in a myriad of other harms, as is suggested in the Government's brief, at
7 6:16-19. In fact, while Dr. Volkow makes clear that the *purpose* of the article is to refute "the
8 popular notion. . that marijuana is a harmless pleasure," and "access to which should not be
9 regulated or considered illegal" (Govt. Exh.13, p. 2219), this paper articulates numerous
10 potential medical uses of marijuana and other cannabinoids. (*Id., at* Table, p. 2224.). Further,
11 while Dr. Volkow opines there are negative effects associated with the use of marijuana, she in
12 fact is unable to substantiate any of these opinions. (*See*, e.g., the conclusion under the heading
13 "Relation to Mental Illness" provides: "[t]his makes it difficult to confidently attribute increased
14 risk of mental illness to marijuana use." (*Id*., *at* p. 2221.)

15 Fifth, the Government asserts Dr. Hart's testimony supports the notion that there will be
16 one million new people each year diagnosed with marijuana abuse disorder during their lives.
17 (U.S. Brief p. 6:20-26.) Dr. Hart's testimony did not indicate what the Government implies, but
18 just the opposite, as when asked if cannabis use disorder diagnoses are more prevalent today than
19 20 years ago, Dr. Hart answered:

20 Yes. It's absolutely - - cannabis use disorder diagnoses are - - I don't know if they're on
21 the rise, but there are certainly more today than there was, say, 20 years ago. . . But there are reasons for that. And the reasons for that is that people are looking for this now,
22 whereas previously they were not looking for it.

23 So it doesn't mean there are more people in our society who meet the criterial than have met criterial previously, it just means we're looking for it. . . (R.T. 210:3-14.)

24 In fact, Dr. Hart's observations are proven correct as the most reliable data demonstrates
25 that cannabis use disorder diagnoses are not on the rise. As the National Survey on Drug Use
26 and Health [NSDUH] 2013 Summary of National Findings reports the actual number of people
27 diagnosed with Cannabis Use Disorder has *not changed in 10 years* (2002-2012). (Def. Exh. G-
28 133, (Madras) Vol. II.) The Treatment and Episode Data Set [TEDS] Report found the number

1 of adolescent marijuana admission for treatment *decreased* by 9% in the years 2002 and 2012.
2 (Def. Exh. H-40, (Armentano) Vol. II.) Despite an increase in "looking for" cannabis use
3 disorders, the evidence simply does not support that one million new people will be diagnosed
4 with this disorder each year.

5 Sixth, reference to Government Exhibits 2a, 3, 18a and 18b, do not establish that "[m]ost
6 mainstream physicians agree that marijuana is a dangerous drug" (U.S. Brief 6:27.) Instead,
7 these documents each acknowledge the vast evidence that marijuana provides medical relief for
8 numerous medical conditions. For instance, the American Psychiatric Association "Position
9 Statement on Marijuana as Medicine," states: "Further research on the use of cannabis-derived
10 substances as medicine should be encouraged and facilitated by the federal government. The
11 adverse effects of marijuana, including but not limited to the likelihood of addiction, must be
12 simultaneously studied." (Govt. Exh. 2) Additionally, the American Medical Association writes:
13 "[o]ur AMA urges that marijuana's status as a federal schedule I controlled substance be
14 reviewed with the goal of facilitating the conduct of clinical research and development of
15 cannabinoid based medicines, and alternative delivery methods." (Govt. Exh. 3.) The Canadian
16 Medical Association's response to legislation allowing for the use and distribution of medical
17 marijuana is hardly relevant to the present inquiry. (Govt. Exh. 18a and 18b.) It should, however,
18 be noted that these documents do not contend that marijuana is a "dangerous drug," and in fact
19 state: "[e]vidence exists about pharmaceutically prepared, orally administered marijuana
20 alternatives. Commonly referred to as cannabinoids, these drugs utilize the active ingredient in
21 marijuana delta-9-tetra-hydrocannabional (THC), and are dispensed in pill or vaporized format."
22 (Govt Exh 18a, p. 2.)

23 There is simply no avoiding the fact that some organizations are reluctant to fully endorse
24 medical marijuana for reasons completely unrelated to its therapeutic benefits, a fact
25 acknowledged by the Institutes of Medicine (IOM) in a 1999 publication, entitled Marijuana and
26 Medicine. (Govt Exh. 14.) In the Executive Summary the IOM observes:

27 Controversies concerning the nonmedical use of marijuana spill over into the medical
marijuana debate and obscure the real state of scientific knowledge. In contrast with the
28 many disagreements bearing on social issues, the study team found substantial consensus

among experts in relevant disciplines on the scientific evidence about potential medical uses of marijuana.

Seventh, the Government references three studies to support the notion that marijuana is so dangerous that it is rational to classify it in Schedule I: (Meier, Govt. Exh 208; Gilman, Govt. Exh. 209; Radharkrishnan, Govt. Exh. 315.) The first two of these studies were the subject of a great deal of testimony, and have been extensively discussed in Defendants' Post-Hearing Brief at pages 12-13 (Meier), and 10-12 (Gilman). The Radharkrishnan paper, while not directly testified about by the witnesses, suggests that marijuana should be studied to determine if it is a potential component cause of schizophrenia, but also observes: "[h]owever, most people who use cannabis do not develop schizophrenia, and many people diagnosed with schizophrenia have never used cannabis." Moreover, as provided in Defendants' Post-Hearing Brief, any purported association between cannabis and psychotic disorders including schizophrenia, has increasingly been questioned, including in the text book edited by Dr. Madras. (*See*, Defendants' Post-hearing Brief p. 13-14.) It should also be noted that Dr. Hart did *not* testify that marijuana was the "most widely *abused* substance of any kind after alcohol and tobacco." (U.S. Brief 7:8-10.) Rather, he agreed with the prosecutor when asked if it was the third most widely *used* substance. (RT 227:17-23.)

Eighth, as discussed in further detail in Part II (B)(3)(a), *infra*, contrary to the Government's assertion, Dr. Carter simply did not "agree marijuana belongs on the Schedule of Controlled Substances." (U.S. Brief, p. 7:19-21.)

Ninth, the notion that Doctors Hart and Madras engaged in what the prosecution calls a "debate" about whether marijuana is medicine is not significant to the issues here presented. The Government contends that if there are experts who disagree on the value of cannabis as medicine, rational basis is established. Such a rule, however, is far too simplistic, for the law still requires the expert opinion to be founded on a sound factual basis, which cannot be said for much of the testimony of Dr. Madras.[22] In addition, if rational basis review is only satisfied where there is no

[22] *FRE 703*, "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed."

debate, it would be questionable whether Article III standing could ever be established, for there would be no "case or controversy" to adjudicate. (*See*, Windsor, *supra*, 133 S.Ct. at 2685-2686, a case recognizing the continuing "debate" over same-sex marriages. *Also see*, *fn* 2, *supra*.)

Finally, the Government concludes that Congress is not required to be "right," nor does it matter if the basis turns out to be "wrong," so long as "Congress could rationally have believed that its action – banning the production and distribution of marijuana - would advance its indisputably legitimate interest in promoting public health and welfare." (U.S. Brief, 8:10-13.) The defense agrees Congress may promulgate laws rationally believed to advance this legislative purpose, but challenges the Government to explain how Congress' present actions are at all rational, for, by insisting marijuana be classified as the most dangerous drug, but cutting off all funds for enforcing the law in states where this most dangerous drug is being distributed, Congress has abandoned any ostensible rational *belief* that the need to promote public heath and welfare mandates the outright ban on the production and distribution of this substance under Schedule I.

3. There Is Presently No Rational Basis for Marijuana's Schedule I Classification.

While the Government correctly points out that they had no obligation to produce evidence to sustain the rationality of the statutory classification, in the present case they chose to present the testimony of Dr. Madras who, despite her obvious personal disapproval of marijuana, provided testimony defeating the notion that marijuana is rationally classified in Schedule I. Further, contrary to the Government's position the testimony of defendants' experts along with the documentary evidence admitted also establish that there is *no* rational or even imaginable basis for finding that marijuana meets each of the three Schedule I criteria. (U.S. Brief, p. 9:12-14)[23]

[23] It should also be noted that the *21 U.S.C. 812(b)(1)* factors, have been interpreted by the Supreme Court to apply in the conjunctive. "Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, *and* absence of any accepted safety for use in medically supervised treatment. *§ 812(b)(1)*." (Raich, at p. 14, emphasis added.)

a. The Evidence Established That Marijuana Does Not Have a High Potential for Abuse.

The Government skillfully extracts snippets of testimony and, by placing them out of context, resolves that rational basis has been met. Each of these claims are discussed below.

First, the prosecution's assertion that "Dr. Carter advocates that marijuana be moved to Schedule II" (U.S. Brief p. 9:17-18) removes the testimony from the context. As referenced above, Dr. Carter was asked on cross-examination about the Petition he helped prepare at the request of the Washington State Governor, in which *the Governor's* purpose was to urge the DEA to reclassify marijuana onto Schedule II. Accordingly, the essence of his testimony was not that he believed marijuana belonged on Schedule II, but rather that the reclassification of marijuana on Schedule II was the objective with which he was tasked (RT 85:7-16), and that he was not doing research in order to ascertain whether it was more appropriately not scheduled. (RT 85:14-16.) Be that as it may, Dr. Carter unequivocally testified: he believed marijuana does not belong on Schedule I (RT 36:25-37:1); whole plant marijuana should be decriminalized all together (RT 30:13-15), and he was completely in favor of whole plant marijuana as a medicine. (RT 29:5-10.) Also, contrary to the conclusion drawn in the Government's Brief, Dr. Carter did not agree that marijuana met the "high potential for abuse" factor, but rather testified that while it "has a potential for abuse," (RT 73:8-10), he believed the potential was "moderate." (RT 85:25.) Further, while making clear he was "not an addictionologist," he pointed out, "[h]uman beings can abuse almost any substance, and they probably will continue to." (RT 85:25-86:5.)

Second, while the medical experts did agree that marijuana can be abused, each made clear that any potential or actual abuse was benign, particularly when compared to other controlled and *non-controlled* substances. As stated above, Dr. Carter indicated the abuse potential was moderate. (RT 85:25.) Dr. Denney testified that, "[v]ery few, if any, dependence abuse problems with this drug. Most patients are able to start and stop it easily. I think cannabis is actually safer than aspirin." (RT 311: 14-18.) Dr. Hart adamantly believes "science supports context is critically important when determining abuse potentials of a drug," but in any event, when any abuse potential for cannabis is compared "to other psychoactive drugs, it's *far lower*

than other psychoactive drugs." (RT 219: 17-20; 240: 5-10, emphasis added.) Even Dr. Madras could not testify that marijuana abuse was more harmful than alcohol or tobacco. (RT 732: 14-24; 739: 6-25; 821: 21-25.)

Further, reference to the DSM V only proves the defendant's point (i.e., marijuana does not have a high potential for abuse), although the Government asks this Court to find simply because the DSM V recognizes a Cannabis Use Disorder, there must be a high potential. This ignores the fact that the DSM V also recognizes a Caffeine Use Disorder, Eating and Feeding Disorders and, significant to the Equal Protection argument, *Other Substance-Related* Disorders which include some over-the-counter medications. (*See*, Discussion in Defendant's Post Hearing Brief, Doc. 378, pp. 3-5 and Govt. Exh. 119, DSM V, pp. 503-509: caffeine; 329-354: feeding and eating, 577-585: Other (or Unknown).)

Third, the Government reiterates the calculations utilized during the course of the hearing in order to surmise that there are one million new people each year abusing marijuana. (U.S. Brief, pp. 9-10.) While there appears to be nothing faulty with the mathematics, the data gathered and reported by the federal government agencies tasked with tracking information regarding abuse and treatment conclusively discredits the notion that one million new people meet the abuse criteria each year. In fact, the evidence established that the number of people diagnosed with Cannabis Use Disorder has not changed in 10 years, from 2002 to 2012. (*See*, Def. Exh. G-133, Madras Vol I National Survey on Drug Use and Health [NSDUH] 2013 Summary of National Findings.) And of great import is the fact that the number of adolescent marijuana admission for treatment actually *decreased* by 9% in the years 2002 through 2012. (RT 734; Def. Exh. H-40, (Armentano) Vol. II, Treatment and Episode Data Set [TEDS].)

Fourth, the Government's reliance on the July 8, 2011, DEA Denial of Petition to Initiate Proceedings to Reschedule Marijuana (Govt. Exh 11, 76 FR 40552, 40533), is surprising since many of the findings actually conflict with their witness' testimony. Some examples are listed below:

> **Central Nervous System Effects**
> Marijuana did not appear to have residual effects on performance of a comprehensive neuropsychological battery when monozygotic male twins (one of whom used marijuana,

one of whom did not) were compared 1-20 years after cessation of marijuana use. This conclusion is similar to results from an earlier study of marijuana's effects on cognition in 1,318 participants over a 15 year period where the was no evidence of long-term residual effects. 76 FR 40555.

Association with Psychosis
Extensive research has been conducted recently to investigate whether exposure to marijuana is associated with schizophrenia or other psychoses. While many studies are small and inferential, other studies in the literature utilize hundreds to thousands of subjects.
At present, the data do not suggest a causative link between marijuana use and the development of psychosis. Although some individuals who use marijuana have received a diagnosis of psychosis, most reports conclude that prodromal (early) symptoms of schizophrenia appear prior to marijuana use. *Ibid*.

Alteration in Brain Structure
Although evidence suggests that some drugs of abuse can lead to changes in the density or structure of the brain in humans, there are currently no data showing that exposure to marijuana can induce such alterations. A recent comparison of long-term marijuana smokers to non-smoking control subjects using magnetic resonance imaging (MRI) did not reveal any differences in the volume of grey or white matter, in the hippocampus, or cerebrospinal fluid volume between the two groups. 76 FRE 40556

Marijuana is a Gateway Drug
The Institute of Medicine (IOM) reported that the widely held belief that marijuana is a "gateway drug" leading to subsequent abuse of other illicit drugs lacks conclusive evidence. (IOM 1999). Recently Ferfusson et all. (2005) in a 25-year study of 1,256 New Zealand children concluded that use of marijuana correlates to an increased risk of abuse of other drugs including cocaine and heroin. Other sources, however, do not support a direct causal relationship between regular marijuana and other illicit drug use. In general, such studies are selective in recruiting individuals who, in addition to having extensive histories of marijuana use, are influenced by myriad social, biological, and economic factors that contribute to extensive drug abuse.

* * *

A recent longitudinal study of 708 adolescents demonstrated that early onset marijuana use did not lead to problematic drug use. . . Similarly, among 2,446 adolescents followed longitudinally, cannabis dependence was uncommon but when it did occur, it was predicted primarily by parental death, deprived social-economic status, and baseline use of illicit drugs other than marijuana. *Ibid*.

Respiratory Effects
However, in the largest study to date, with 1,650 subjects, no positive association was found between marijuana use and lung cancer. *Id*., at 40558.

Immune System
There were no changes in CD4+ and CD8+ cell counts or HIV RNA levels or protease inhibitor levels between groups, demonstrating no short-term adverse virologic effects from using cannabinoids in individuals with compromised immune systems. *Id*., 40558.

When considering these and other findings contained in the report, it is difficult to understand how it is that the DEA decided to deny the Petition to *Initiate* Proceedings to Reschedule Marijuana. Be that as it may, it is also important to note that it has been nearly four

years since the report was prepared, and it appears to rely on studies dating back to the 1980s. In fact, there are very few references to publications (whether data or research papers) occurring after 2005. As this Court has presided over the presentation of research conducted as late as 2014, it must be apparent that the conclusion reached by the DEA is not based on the current state of the scientific and medical evidence and, therefore, should hold little weight in the present analysis.[24]

Also, it should be noted that this report again demonstrates the insufficiency of *21 U.S.C. § 811(a)*, for the petitioners in that case were not asking the DEA to reschedule marijuana, but simply for the DEA to *initiate* proceedings in order to ascertain if marijuana should be rescheduled. It was this inquiry which was denied, and accordingly when appealed to the district court, it was this inquiry which was decided. It was determined that the Court did not have the authority to force the DEA to initiate proceedings and, therefore, the fact finding process has been foreclosed by the Administration - thus rather than a "safety valve," the law allows for a complete shut-off valve. (ASA v. DEA, *supra*, 706 F.3d 438, 440.

In complete disregard for the data generated by NSDUH (Def. Exh. G-133, (Madras) Vol I) and TEDS (Def. Exh. H-40, (Armentano) Vol. II, the Government continues to misinterpret the data contained in Government Exhibit 3a, and advance that one million new people are diagnosed with cannabis use disorder each year. Again, the data establishes that the number of people diagnosed with CUD has remained the same for 10 years, further, the number of adolescents so diagnosed has declined by 9% over this same period of time, this despite the undisputed fact that more people are using marijuana. Also, the notion that people are "checking themselves in for marijuana treatment" is inaccurate. As the evidence established, 0% of individuals received "in patient" treatment for marijuana use (RT 739-741), and of those who did, 49% were referred by the criminal justice system. Def. Exh. H-40, (Armentano) Vol. II, p.

[24] Interestingly, the factors described by the Government which are considered by the DEA (U.S. Brief p. 10:11-14), could be far better controlled if marijuana was removed from Schedule I and thus subject to regulation. For instance, the THC contents could be monitored, much like with alcohol content, the pecuniary incentive to divert marijuana would be greatly reduced if not eliminated (as there are few, if any, who presently engage in bootlegging alcohol).

40; RT 737-739. Finally, no one disputes that many Americans utilize cannabis, whether for medicinal or adult-use (i.e. recreational) purposes, percentage comparisons with other substances may be elevated for marijuana due to its proliferation. In fact, the numbers reflected in Government's Exhibit 3a demonstrate that there are far more people getting treatment for other controlled substances (marijuana: 29,506; *cf.* heroin: 31,176; amphetamines: 45,616) despite the fact that marijuana is so widely used, thus discrediting the notion cannabis has a "high potential for abuse." In addition, regardless of the percentage comparisons, the comparison of abuse liability, discussed *supra,* demonstrates that cannabis is far less harmful than every controlled substance, and many non-controlled substances.

Notably, NIDA scientist Dr. Nora Volkow (Govt. 13) and Dr. Hart in his Direct Examination and testimony, both rely on a study by Dr. Lopez-Quintero for the proposition that 9% of cannabis users may exhibit criteria for a cannabis use disorder. (Govt. Exh. 13, p. 2219, *fn 3*[25].) Based on this study, cannabis' dependance liability was *by far* the lowest of the four substances studied therein: nicotine (32%), alcohol (22.7%), and cocaine (20.9%), and cannabis (8.9%). (*See*, Govt. 13; Hart. Decl., ¶ 6, both relying on Dr. Lopez-Quintera's study.) Moreover, as Dr. Hart testified (RT 218:10-219:13), abuse potential cannot be viewed in a vacuum and outside social contexts that confound dependence liability, as even Dr. Lopez-Quintera found that a "[s]ignificant racial-ethnic differences were observed in the probability of transition to dependence across the four substances." (*Id.*; *see also*, Hart. Decl., ¶ 6.)

Finally, the Government's single-sheet graph regarding treatment admissions (Govt. Exh. 3a) is explicitly derived from the TEDS data discussed in detail at the evidentiary hearing. Most notable is Dr. Madras' selective understanding of the TEDS report, and her inability to reconcile

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[25] Lopez-Quintera et al. 2011. Probability and predictors of transition from first use to dependence on nicotine, alcohol, cannabis, and cocaine: results of the National Epidemiologic Survey on Alcohol and Related Conditions (NESARC). Drug Alcohol Depend. 2011 May1;115(1-2):120-30. doi: 10.1016/j.drugalcdep.2010.11.004. Epub 2010 Dec 8. This study, upon which both Dr. Volkow and Dr. Hart both rely, offers the following dependence liabilities: *Tobacco (67.5%), alcohol (22.7%), and cocaine (20.9%)*. (*See*, FRE 201(b)(2), appropriate for judicial notice as a fact that may be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, since both parties rely on this study regarding relative abuse liabilities. Located online in full at: http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3069146/pdf/nihms-258354.pdf.

her testimony with the actual findings when confronted.[26] Defendant introduced the full data in Def. Exh. H-40, H-41, (Armentano) Vol. II, and in Def. Exh. G-133, (Madras) Vol. II, which showed the complete picture: (1) the number of adults diagnosed with this disorder has remained the same for a decade, despite the increase in cannabis use, and (2) the number of adolescent diagnoses has declined.[27]

Thus, contrary to the Government's assertion, the minimal consequences of abuse are important to this inquiry for, it is not a question of whether marijuana has a high potential for *use*, but rather for *abuse*. The Government's attempts to conflate the two must not be used to confuse the issue, as the consequences of abuse must also be considered in this inquiry. Indeed, substance "abuse" as defined in medical dictionaries describes it as "long-term pathological use of alcohol or drugs, characterized by daily intoxication, inability to reduce consumption and impairment in social or occupational functioning."[28] Nowhere is the potential for abuse defined in terms of the number of people afflicted, and the plain language of *21 U.S.C. Section 812(b)(1)* does not vary from the accepted medical definition, nor imply otherwise.

b. Marijuana Has Numerous Currently Accepted Medical Uses in the United States.

There is no basis for the Government's conclusion "that evidence presented at the hearing demonstrated that whole plant marijuana has no accepted medical use in the United State." (U.S. Brief 11:2-3.) Physicians in 23 States and the District of Columbia have been recommending whole plant cannabis for treatment of a myriad of medical conditions. The United States, through SAMHSA, holds a patent which without distinguishing the component from the plant, proclaims:

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[26] Govt. Exh. 3a, a single-page graph, lists a website at the bottom of the page, which presumably is the source of the data, explicitly states all information therein was derived from the "Center for Behavioral Health Statistics and Quality, Substance Abuse and Mental Health Services Administration, Treatment Episode Data Set (TEDS)."
See, bottom of Govt. Exh. 3a, http://wwwdasis.samhsa.gov/webt/quicklink/CA13.htm.

[27] *See*, full discussion regarding Dr. Madras' inability to sustain her misinterpretation of the treatment data in defendants' Post-Evidentiary Hearing Brief [Doc. 378], in Section III(A)(1)(a)(iii), "Treatment."

[28] http://dictionary.reference.com/browse/substance%20abuse?s=t

> Cannabinoids have been found to have antioxidant properties, unrelated to NMDA receptor antagonism. This new found property makes cannabinoids useful in treating prophylaxis of wide variety of oxidation associated diseases, such as ischemic, age-related, inflammatory and autoimmune diseases. The cannabinoids are found to have particular application as neuroprotectants, for example in limiting neurological damage following ischemic insults, such as stroke and trauma, or in treatment of neurodegenerative diseases such as Alzheimer's disease, Parkinson's disease and HIV dementia... (Def. Exh. 26.)

In addition GW Pharmaceuticals also holds two patents for: (1) the "cannabinoid-containing plant extracts as neuroprotective agents in the prevention and treatment of neural degeneration. Def. Exh. JJ, U.S. Patent, "Phytocannabinoids in the treatment of cancer"; Def. Exh. KK, U.S. Patent, "Cannabinoids containing plant extracts as neuroprotective agents." Significant to the Government's argument regarding whole plant medications, the latter patent "relates to the use of phytocannabinoids, either in an isolated form or in the *form of botanical drug substance* (BDS) in the treatment of cancer." *Id*.

Numerous clinical trial have been conducted using whole plant marijuana and have concluded the evidence strongly suggests therapeutic value. In fact, Dr. Carter testified that he had learned from scientists at GW Pharmaceuticals in Britain that "they feel there are medically beneficial terpenoids, so non-cannabinoid compounds, that actually have medical benefit." (RT 52:8-13.) While Dr. Madras is opposed to whole plant medicine, she repeatedly opined that components of the marijuana plant show medical promise ("there is tantalizing evidence in the literature that [the components of marijuana] may have therapeutic benefits." (RT 689:6-8.) Doctors Carter, Hart and Denney each testified to the same, and touching on the absurdity of a finding otherwise.[29]

The Government suggests that because there is some debate regarding the therapeutic use of cannabis the defense burden has not been met. Yet, physicians and scientists debate the use of every medicine, modes of exercise, diet, and nearly all health related topics.[30] In fact, there is

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[29] *See*, discussion of testimony establishing cannabis' clear therapeutic value in defendant' Post-Evidentiary Hearing Brief (Doc. 378), in Section III(A)(2).

[30] Reference to Dr. Carter's testimony in this regard is not supportive of the Government's assertion. While he agreed there were other people whom he would consider qualified who did not share his views on marijuana as medicine, when asked if he was in the minority among qualified people, he

still debate regarding the theory of evolution, and even over whether the world is flat.[31] While the Government argues a determination that cannabis has medical utility requires that everyone, or at least the majority of experts, agree, this is not what the law mandates. Instead the statute requires a finding that marijuana "has *no* currently accepted medical use in the United States." (*21 U.S.C. § 812(b)(1)*.) And, in a rescheduling petition, the DEA regulation requires that "the drug is accepted by qualified experts." (U.S. Brief, 11:25.)

Further, the Government contention that a failure to meet the five factors adopted by the DEA for *rescheduling* a controlled substance is dispositive (U.S. Brief 11:27), ignores the fact that these factors are employed in *rescheduling proceedings*, which the instant matter is not and, as such, have questionable relevance to the present inquiry. Be that as it may, consideration of these factors again demonstrates the irrationality of marijuana's classification.

a. the drug's chemistry must be known and reproducible: All witnesses, including Dr. Madras agreed the chemistry of marijuana is or, with little effort, could be know and even she agreed that "consistent criteria in the drug approval process and standards for medications" have been meet by NIDA. (Madras Decl. P. 61 ¶ 23, Doc. 324, and RT 727: 11-728:13, Dr. Madras agrees cannabis "can be reproduced for a fixed dose" and that NIDA "manipulate[s] it precisely for clinical trials, because some people request different concentrations.")

While many witnesses described the complex nature of the plant, each explained that its complexity does not render its components to be a mystery, as even Dr. Madras affirmed that

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responded: "I guess it depends on your definition of qualified people, but I would say I'm in the minority." (RT 38:13-17.)

On re-direct examination, the Doctor explained: "So I've been involved in cannabis-related research for 15-plus years. And when I started out, most of my colleagues thought that I was crazy, off the wing of a plane. I would say now - - well, I mean I have funding from the Attorney General's Office in the state of Washington to educate physicians. And the tide is turning. I think physicians for the most part follow rules though. So as long as something is in Schedule I and they have a DEA license, they're not going to come out of the closet, if you will. So it's - - I think polls would show that the majority of physicians do feel cannabis has medical benefit. Does that mean they're willing to authorize it and potentially risk their license, what have you? No. I'm not really willing to do that either, but I feel ethically driven because I'm compelled by the science, and I want to see what's best for my patients. And you care for people with ALS, and you learn about compassion." (RT 95:4-20.)

[31] For instance, The Flat Earth Society is a organization who argues "[e]xperiment and experience has shown that the earth is decidedly flat." *See*, section entitled, "Flat Earth Wiki," online at: http://www.theflatearthsociety.org/cms.

each of the compounds in the plant cannabis could "of course" be identified if researchers desired, in this modern area of science analysis. (RT 721: 8-22.) While the Government claims Dr. Carter established this factor was not met, Dr. Carter did no such thing, as when he was asked, "[i]s it your opinion that whole plant marijuana has a known and reproducible chemistry," he answered unequivocally, "[y]es, it is." (RT 50:16-21.) Further, Dr. Carter testified that in his opinion "we know a lot more about how cannabis works than we do about a fair number of prescription medications." (RT 93:5-7.)[32]

The Government also asserts that because there is inherent variation in the marijuana plant, and no standard dosing is purportedly available, cannabis fails to meet the DEA criteria. (U.S. Brief 12:3-6.) This assertion is inconsistent with the evidence of their own witness who testified that NIDA is able to achieve consistent standards for whole plant cannabis. (RT 727:11 - 728:13; Madras Decl., ¶ 23.) Such a claim also ignores the undisputed and obvious fact that if marijuana's therapeutic value was recognized in the U.S., it would be simple to regulate dosages and eliminate variations in the plants. (*See*, RT 555:12 - 556: 1, there is no regulation of THC content in the United States "because it's in Schedule I.") Further, as Dr. Denney testified, there are many prescription medications which include directions to "take as needed." (RT 440: 5-441:12.) The "bottom line" is that as marijuana is being regulated and through state or industry self regulation standards are being set and met. (RT 545: 20- 547:9, Mr. Conrad discussing why standards are possible, but not available outside State medical cannabis programs, because of cannabis' current scheduling and, "[t]hat's why the regulation [of cannabis] is such an important aspect.") As noted elsewhere, not one witness contested that NIDA is able to meet the precise dosage standards requested by researchers for scientific study, for which NIDA is the sole source

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[32] It should also be noted that Dr. Carter was not the primary expert called to testify regarding the components of the marijuana plant. Instead, it was Christopher Conrad who provided the testimony, establishing that not only are the components known and reproducible (RT 586:14-20), the quality and cannabinoid ratio can be, and are being controlled and regulated, as chromatography provides a fairly precise ratio profile of the plant material. (RT 546.)

of cannabis.[33]

b. <u>there must be adequate safety studies</u>: As the witnesses testified, the safety profile of any potential new drug is studied in Phase II trials. (*See*, Dr. Carter RT 15:2-8; Madras Decl., ¶ 20.) Adequate safety studies have thus been performed, otherwise there could be no NIDA involved efficacy trials, such as those performed by Dr. Hart and the CMCR.[34] As Dr. Hart testified, cannabis' potential for harm is well known as the substance has been used throughout history. (RT 285:17-23.)

c. <u>there must be adequate and well-controlled studies proving efficacy</u>: The Government would like the Court to find that "adequate safety" and " medical efficacy" studies are synonymous with "Phase III type FDA trials." (U.S. Brief 12:15-18.) Citing to the testimony of Dr. Hart, it is claimed that "defendants' own experts admit that they do not know whether marijuana use is safe over the long term." (U.S. Brief 12:23-24.) This is simply an inaccurate representation of the defense witnesses' testimony. First, when Dr. Hart was asked about why there were no FDA trials, he responded:

> That's a good question. That's one of the questions that the senators or congressmen asked us. It has not because – in part because it's Schedule I, and it's difficult to study Schedule I for general researchers. That's the major sort of reason that it has not. RT 286:3-7.

The prosecution thereafter asked Dr. Hart why the FDA does not initiate these studies while knowing that the reason is in one of the cases the Government has long relied upon. As in <u>ASA v. DEA</u>, *supra*, 706 F.3d 438, the Court found that it could not compel the DEA to initiate such proceedings. Further, Dr. Hart testified that, despite the failure of the FDA to initiate clinical trials, research has proliferated, and the results overwhelmingly demonstrate that marijuana's medicinal value is accepted within the scientific community. (RT 168:24-171:1; *see also*, Defendant's Post-Hearing Brief, pp. 18:21-20:10.) In fact, Dr. Hart personally conducted

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[33] *See*, Dr. Hart's testimony that "the federal government, in Mississippi, breeds varying THC concentrations.. They breed different THC concentrations...." at RT 130: 14-24; *see also*, RT 727: 11-728:13 (Madras testimony on the same).

[34] *See*, <u>Def, Exh</u>. 1, discussing the randomized, placebo-controlled clinical trials sponsored by the State of California, which include but are not limited to <u>Def. Exh.</u> <u>10</u>, <u>13</u>, <u>15</u>.

1 randomized double-blind controlled trials on human subjects with positive results. (Hart Decl. ¶
2 1-4.) Similarly, Dr. Denney testified, "[t]t's clear from the medical literature that cannabis does
3 have medical use, and these studies, very high-quality studies... corroborate that completely. (RT
4 461:3-16; 512: 8-518:4; RT 515:11- 522: 5.)
5 In fact, well-controlled studies showing cannabis' efficacy far exceed the number of
6 studies conducted for most FDA approved medications, including the two deemed sufficient to
7 approve synthetic THC, which was approved for two indications based on only one trial for each
8 indication. (RT 461:8-13; 470:25; *see also,* Def. Exh. H-61, (Armentano) Vol. II, "FDA Printout
9 (Marinol).") Indeed, the majority of the novel therapeutics approved by the FDA during 2005-
10 2012 were based upon only two clinical trials, and a full third of those approvals were based on a
11 single clinical trial. (RT 471:13-474:18; Def. Exh. H-77, (Armentano) Vol. II, Downing. 2014.
12 Clinical Trial Evidence Supporting FDA Approval of Novel Therapeutic Agents (2005-2012).)
13 d. the drug must be accepted by qualified experts There is no question that the drug is
14 accepted by qualified experts, and as this factor does not require *all*, or even the *majority*, of
15 experts to hold the opinion that cannabis is a medicine, there can be no denying that an
16 overwhelming number of qualified experts "accept" the drug, and many embrace it. Further, as
17 Dr. Hart is the only witness who has engaged in the "gold standard" studies involving cannabis,
18 he is uniquely qualified to speak as one of those "[s]cientists who know the literature *and who*
19 *have done these studies*." (RT 170: 1-25.) And as Dr. Hart testified, he and a majority of his
20 colleague researchers do accept that cannabis has a medical value. *Id.*
21 e. the scientific evidence must be widely available: The science is clearly widely
22 available, as all the witnesses testified about the voluminous information, studies etc. The
23 Government's assertion that the evidence is insufficient because there is insufficient raw data
24 available ignores the testimony of their own witness, who stated that even she is not entitled to
25 view the raw data generated from every research study. (RT 801: 5- 18.)
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c. Marijuana Has Been Used Safely under Medical Supervision for Decades, and Even Centuries.

Not only has the use of marijuana under medical supervision proven to be safe, it is has also been shown to be less onerous than most prescription drugs. This conclusion is supported by the personal experience of the defense witnesses and, as is consistent with the theme of this litigation, the safe use of the substance under medical supervision is further evidenced by the government itself.

First, the three testifying defense witnesses collectively supervised thousands of people using cannabis as medicine, whereas the prosecution witness never supervised a single human's use of the substance.[35] Each of these witness were clear that they were able to supervise the use of cannabis, both in the laboratory and in practice, without issue. (Denney Decl., ¶ 36-43; Hart Decl. ¶ 13-21; Carter Decl. ¶ 1.)

Secondly, the federal government's IND program has been supervising patients for 30 years with no required physician supervision. (RT 503: 1-15; 504: 16-604: 14; Def. Exh. H-6, Armentano Vol. I (Russo, Study).) In addition, neither the policy memorandum issued by the Department of Justice (Def. Exh. J, "Cole Memo"), nor *Section 538* of the Continuing Appropriations Act 2015 (Def. Exh. WW, Doc. 378-1) provide any standards for medical supervision, or the standardization of the medical cannabis' quality, potency, origin and safety, nor controls on dosages and oversight.

The Government's attempt to establish a lack of accepted safety for use of marijuana under medical supervision by disparaging Dr. Denney's practice demonstrates the weakness in their position.[36] In resorting to such *ad hominem* attacks, the prosecution strings together several

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[35] Consistent with Washington State law, Dr. Carter testified that he has authorized 150 to 200 patients. (RT 11:8-15.) Consistent with California law, Dr. Denney testified that he recommended the use of cannabis to 12,000 patients. (RT 375: 7-23.) Dr. Hart testified that he personally administered *thousands* of doses of marijuana under medical supervision. (RT 165:16-166:2; Hart Decl., Doc. 313, ¶ 13-21.)

[36] To be clear, Dr. Denney has never been disciplined or admonished by any professional board or other government organization. He has never been denied hospital privileges or licenses. In fact, in his 30 years of practice, he never received a single complaint. (Denney Decl. p.1.) Further, while federal and state law enforcement agents utilized his services in an undercover capacity, there was never any

statements, most of which are taken out of context in a vain effort to conclude, “[i]n reality, there is no supervision.”[37] (U.S. Brief 13:22.)

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insinuation that Dr. Denney was out of compliance with state law, or Conant v. Walters, 309 F.3d. 629 (9th Cir. 2002).

The prosecution questioned Dr. Denney about a civil suit he filed against the DEA and other law enforcement agencies in 2006 under *42 U.S.C. § 1983* in relation to their investigation of an unrelated marijuana dispensary that consisted of sending undercover law enforcement agents disguised as patients seeking medical marijuana recommendations in order to gain access to the dispensary. (RT 303:18-306:14; 320: 22-25.) It is true the District Court granted summary judgement on defendants' second motion for summary judgement following the completion of discovery, because it found law enforcement had no reasonable alternative to gaining access to the dispensary (Denney v. DEA, 2008 U.S. Dist. LEXIS 33136, p.14 (E.D. Cal., April 22, 2008, Case No. CIV.S-06-1711 LKK/GGH, affirmed in Denney v. DEA, 2009 U.S. App. LEXIS 22583 (9th Cir., Oct. 14, 2009). The suit did produce a published opinion where in denying the first motion to dismiss and summary judgement, Judge Karlton found that, even where the physician is simply being used to further an unrelated investigation, the First Amendment protects physicians from unreasonable government interference. “Defendants' argument, if carried to its logical conclusion, would mean the injunction in Conant was unnecessary. Because a physician's recommendation of medical marijuana to a patient is not illegal, they should also have nothing to fear from an investigation. *The problem, however, is that a physician of ordinary firmness who was only engaging in lawful speech concerning medical marijuana could, in fact, be chilled by a federal investigation*.” Denney v. DEA, 508 F.Supp. 2d. 815, 830 (2007), emphasis added.

[37] For instance, the Government's calculated attempt to make it appear that Dr. Denney was handing out recommendations indiscriminately by referring to his deposition testimony was taken out of context. (RT 325-326; RT 345:24-25) As the Doctor was explaining his office process of screening callers prior to making an appointment. Immediately preceding the sentence regarding his “goal” he stated: “so when I have to turn someone away, that means we did not do a good enough screening job and so – We try as a goal not to have to turn anyone away.” *See,* Govt. Exh. 102, p. 121:18-21. In addition, the statement that the doctor “tried to recommend marijuana to every one of them” (RT 325:25-326:2), is an inaccurate representation of the testimony cited which is, in fact, a question. Regardless, of this oversight, it should be noted that in the testimony preceding this citation Dr. Denney explains that he turned patients away at least daily because they had no medical records, no physical findings, and nothing to corroborate the story. (RT 325:14-24.) Again, the Government fails to complete the context of testimony when stating that Dr. Denney “never followed up or even ‘heard from’ 90% of the patients again - a least not until their one-year recommendation required renewing.” (U.S. Brief 13:20-21.) First, it must be emphasized that an annual follow-up is all that is suggested by the California Medical Board. (RT 502: 12-25.) Second, Dr. Denney testified: “I made it very clear to patients that I was available to them at any time. If they had any issues, problems, questions, concerns, that I made myself very available to help patients deal with issues related to their cannabis use. And in that regard, as I say, there was a full spectrum. Some patients took me up on that and called me regularly; to regularly, And some I never heard from.” (RT 331:6-12.) Also, the Government fails to include the very compelling reason Dr. Denney did not always inform a patient's other physician. “I had found, by experience, when I tried to [contact the treating physician to inform them about the patients' use of cannabis] the treating physician would discharge the patient from their practice and they had no source of medical care. I didn't think that was a good outcome.” (RT 322:13-21.) Defense witness Sgt. Ryan Begin testified to the horrifying experience of being denied general treatment for his medical use of cannabis. (Doc. 309, ¶ 8.) Sgt. Begin testified, after informing his treating doctors, his “physician stated, ‘you can have the pills or the pot.’ He then refused to treat me and, after two years, he instantly cut me off of the high dosages of controlled substances ‘cold turkey,’ without tapering the dosage off to reduce painful narcotics withdrawals.” *Id.*. As Dr. Denney opined, this is not a good outcome.

Finally, the “Wild West” statement Dr. Denney made was when asked about the medical

As Dr. Denney described, he only recommended cannabis to patients after first employing a vigorous screening process which at minimum, included: (1) a pre-appointment telephone interview; (2) the patient's reported history, and (3) the evaluation of medical records. (RT 321:21- 322:1-2; 323:10-13.) Due to the vigorous screening process, Dr. Denney felt comfortable recommending cannabis for therapeutic use to approximately 90% of the patients who made it to his in-office examination. (RT 325: 25-326:1-2; 345:1-25; 389:24-25; 390:1-4.) Through this process, Dr. Denney was able to save the potential patient the expense of a visit, and also free his time for those patients more likely to benefit from the medical use of cannabis. In addition, Dr. Denney continued to supervise the vast majority of his patients by, *inter alia*, requiring a yearly in-person meeting, noting his patients "always came back for follow-up." (RT 374:1-25; 328:14-329:16; 330:7-331:14.) Indeed, he supervised "many, many patients that [he] saw yearly, for many years" and, when asked to qualify a percentage of patients he followed up with, Dr. Denney answered "[i]t seemed like 110 percent," and later that he "was in continuous contact with the vast majority of them, some of which I spoke with frequently, and some I spoke very infrequently, and some I saw or only spoke to once a year. (RT 374: 25 - 375: 5.) Dr. Denney's supervision, therefore, went beyond that required by California's Medical Board.

While the prosecution insinuated that Dr. Denney's yearly supervision was insufficient because of "the implications of long-term use of marijuana," Dr. Denney testified that he did not feel he needed to supervise his patients as closely as, for instance, a physician recommending opiate use, in large part because physicians supervising cannabis use are in a unique position; unlike those who supervise the use of other substances such as opiates, death due to acute cannabis overdose is *physically impossible*. ((RT 390:18-391:10; RT 384:21; 501:6-7; 625:1-13.) In addition, as stated above, the facts undisputably demonstrate that Dr. Denney's supervision practices exceeded those suggested by the Medical Board through which he was licensed.

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marijuana industry relating to those who distribute, not as the Government implies to physician's who supervise medical cannabis patients. (RT 444:15-19.)

1 **4. Conclusion**

2 It is unimaginable to believe that if heroin, cocaine, methamphetamine, or even over-the-
3 counter medications were being distributed in 23 states and the District of Columbia, Congress
4 and the President would abdicate *all* regulatory authority to those jurisdictions, and then cut off
5 all funds (and therefore power) to intervene in related distribution activities. Yet, this is precisely
6 what the federal government has done in the case of the distribution of medical marijuana by
7 passing *Section 538* of the Continuing Appropriations Act. Even the most vivid imagination
8 would be hard pressed to reconcile such action with a "rational belief" that marijuana is one of
9 the most dangerous drugs in the Nation. In effect, under any standard the Government wants to
10 create, this motion must be granted.

11 **C. Equal Sovereignty**

12 In summarily dismissing defendant's Equal Sovereignty claim the Government contends
13 this Court has tentatively held against this constitutional challenge, and that nothing has changed
14 in the intervening months. Such a position ignores the passage of the 2015 Appropriations Act,
15 *Section 538*, which, as discussed below, speaks directly to the Government's prior arguments, as
16 well as this Court's previous articulated doubts regarding the Equal Sovereignty claim.[38]

17 **1. Commerce Power**

18 The constitutional analysis undertaken pursuant to the Commerce Clause is distinct from
19 that employed in an Equal Sovereignty challenge which is governed by the principles articulated
20 in Shelby County, *supra*, 133 S.Ct. 2612:[39]

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22 [38] *See*, transcript of hearing, May 21, 2014, at 9:24-25; *and also*, transcript of hearing,
23 September 4, 2014, (Doc. 341) at 25:21-26:2, noting that the evidentiary hearing was granted "only on a piece of what's [still] before the Court," and that there are "still defense arguments before the Court."
24 Additionally, as the Court tentatively noted this area of law did not invoke uniquely state concerns, defendant fully briefed this issue in the Post-Hearing Brief, establishing that issues involving medicine
25 and drug-related crimes are indeed primarily vested in the State in a manner far greater than the power to regulate elections explicitly vested to Congress by the Reconstruction Amendments, as in Shelby County,
26 133 S.Ct. 1612. (*See*, Doc. 378, *Section V*.)

27 [39] The interest involved in a Commerce Clause analysis is to regulate the interstate market among the several States (Raich., at 22) while the interest implicated in the present case is in protecting
28 the health and welfare of the general public (U.S. Brief p. 1:5.) Just as the interests are diverse, so are the facts relevant to the analysis when determining if the government action is reasonable.

> A departure from the fundamental principle of equal sovereignty *requires* a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.

Shelby County, *supra*, 133 S.Ct. at 2622, emphasis added, citing approvingly Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009).

This language is not limited to provisions of the Voting Rights Act, but rather announces a mandatory test to be applied when there is *any* departure from fundamental principle of equal sovereignty, where the equality of the State's "power, dignity and authority" is implicated. Coyle v. Smith, 221 U.S. 559, 567 (1911). After setting forth this mandatory test, the Court noted, "[t]hese *basic principles* guide our review of the question before us," repudiating the limited applicability of the Equal Sovereignty doctrine to the admission of new States. *See*, Shelby County, 133 S. Ct. at 2622, emphasis added; *cf.* South Carolina v. Katzenbach, 383 U. S. 301, 328-329 (1966), "[t]he doctrine of the equality of States... applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared." Justice Ginsburg, in her dissent in Shelby County, noted that Katzenbach's limitation was overruled in Shelby County, by "attributing breadth to the equal sovereignty principle in flat contradiction of Katzenbach." Shelby County, 133 S. Ct. at 2649. *See, inter alia,* Gregory v. Ashcroft, 501 U.S. 452, 468 (1991), the "principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant" to other powers.

As such, the rule discussed above and in the Motion to Dismiss (Doc. 199), declared without exception, must be the "basic principles [to] guide our review of the [Equal Sovereignty] question before us." Katzenbach, at 2622.

While it has been noted in the outdated contexts that "the power to regulate commerce does not require geographic uniformity" (Morgan v. Virginia, 328 U.S. 373, 388 (1946)), since Morgan, the Constitutional underpinning of the Equal Sovereignty doctrine has shifted from *U.S. Const. Art. IV, § 3*, to a clear grounding in *U.S. Amend. X.*[40] As discussed in defendant's Post-

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[40] *See, inter alia*, Pollard v. Hagan, 44 U.S. 212; Coyle v. Smith, 221 U.S. 559 (1911); United States v. Louisiana, 363 U.S. 1 (1960), each grounded in *U.S. Const. Art. IV, cl. 3*, rather than *U.S.*

Evidentiary Hearing Brief, the *Tenth Amendment* was intended to limit federal overreach into areas of State sovereignty.[41] Indeed, federalism concerns are *heightened* in Equal Sovereignty challenges arising out of the *Tenth Amendment* because this Constitutional Amendment is designed for the very purpose of protecting the dignity and equality of the States.

2. The Defense Has Proffered Sufficient Evidence of Disparate Geographic Enforcement.

As noted in defendants' Post-Hearing Brief, "The Consolidated and Further Continuing Appropriations Act, 2015," codified as *Public Law No. 113-235* (Dec. 16, 2014) gives statutory authority to the Executive branch facilitation policies articulated in Defense Exhibits J-L.[42] The explicit direction to apply the CSA differently among the states undeniably implicates Equal Sovereignty of the States.

The District Court cases cited by the Government were decided prior to the enactment of *Section 538*, and therefore, in addition to being irrelevant to the Equal Sovereignty claim, do not

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Const., Amend. X; *cf.* with Shelby County v. Holder, 133 S. Ct. 2612 (2013) and Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009), both based upon *U.S. Const. Amend. X,* rather than *U.S. Const. Art. IV, cl. 3*. Indeed, neither Shelby County, nor Northwest Austin even mention *cl. 3 of Article IV.*

[41] The anti-commandeering principle also arises under the 10th Amendment and applies to limit Congressional enactments authorized under the Commerce Clause authority. Printz v. United States, 521 U.S. 898, 923 (1997). Importantly, Printz held:

> When a Law...for carrying into Execution the Commerce Clause violates the principle of state sovereignty... it is not a Law...proper for carrying into Execution the Commerce Clause, and is thus, in the words of The Federalist, "merely [an] act of usurpation" which deserves to be treated as such.

Printz, *supra,* 521 U.S. at 923, some internal quotations omitted, citing to The Federalist No. 33, at 204 (A. Hamilton), and Lawson & Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 297-326, 330-333 (1993).

[42] The legislative history to *Section 538* of *H.R. 83* is relevant to the Equal Sovereignty challenge as, when this portion of the law was being debated on the House floor on May 30, 2014, one Congressman foretold its impact on the disparate the enforcement of the Controlled Substance Act as to cannabis, stating:

> What this amendment would do is, it wouldn't change the law, it would just make it difficult, if not impossible, for the DEA and the Department of Justice to enforce the law... So now we are going to start going down the road of selective enforcement for our drug policy."

(Legislative history located online at https://www.congress.gov/amendment/113th-congress/house-amendment/748/text, at p. H4985).

take into account the implications of the new law.[43] Based on this Congressional Act alone, defendants meet their burden of establishing a geographically disparate application of the CSA.

Yet, regardless of *Section 538*, the State-based *enforcement* of a generally applicable law on its own provides a basis for the present motion. Yick Wo v. Hopkins makes clear that even a lawfully enacted statute cannot be administered in a manner that offends the equality demanded by our Constitution, 118 U.S. 356, 370 (1886). Any other reading limits Yick Wo to its facts (a Fourteenth Amendment Due Process challenges to a state statute), as the holding has been consistently applied for the fundamental rule that a facially neutral law is unconstitutional *wherever* enforced in a manner that denies "equal justice,"[44] such as the denial of the equal power, dignity and authority of the States at issue herein.

To strictly limit application of Yick Wo to *Fourteenth Amendment* Due Process claims would be nonsensical, would topple pillars of Constitutional law, and set forth a new rule that State sovereignty can *never* be implicated by enforcement.

D. Defendants Have Standing to Challenge Cannabis' Continued Inclusion in Schedule I.

The Government's assertion that "the defendants lack standing to challenge marijuana's status as a Schedule I controlled substance because their criminal liability does not depend on

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[43] As previously noted, the Judge in United States v. Wilde, *supra*, 2014 U.S. Dist. LEXIS 161601, *17 (Nov. 18, 2014) deemed the Equal Sovereignty claim waived; United States v. Firestack-Harvey, 2014 WL 2862831 (E.D. Wa. April 29, 2014), involved a Motion to Dismiss predicated on the identical claim made in James v. City of Costa Mesa, 700 F.3d 394 (9th Cir.2012); "The defendants argue the United States Attorney's decision to prosecute them in the Eastern District of Washington violates their right to equal protection, as guaranteed by the *Fifth Amendment*, given Congress' decision to allow the medicinal use of cannabis in the District of Columbia. In United States v. Heying, 2014 U.S. Dist. LEXIS 147499, 2014 WL 5286153, *17, the District Court found that the Magistrate did not clearly err in recommending the Equal Sovereignty challenge be denied, finding in part that the Controlled Substances Act, "applies equally to all states." *Id*., p.4. Again, this can no longer be said, as *Section 538*, specifically limits the application of the CSA in specified states.

[44] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 466-467 (1996), applying the reasoning of Yick Wo to an Equal Protection challenge under the 14th Amendment; Washington v. Davis, 426 U.S. 229, 241 (1976), citing to Yick Wo in a 5th Amendment Equal Protection challenge; Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623, 1667 (2014), for its *dicta* that "political rights are fundamental because they are preservative of all rights"; Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Zadvydas v. Davis, 533 U.S. 678, 693 (2001), with regards to applicable standards of review, and for the proposition that the Constitution protects all persons within our national borders.

marijuana's placement on Schedule I" is directly contradicted in the United States Supreme Court's Raich opinion where it is explained:

> The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. *§§ 811*, *812*. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. *§§ 821-830*. *Id*., at 13-14.

> The Court then concluded:

> *By classifying marijuana as a Schedule I drug*, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study. *§§ 823(f)*, *841(a)(1)*, *844(a)*. *Id*., at 14.

Accordingly, there can be no escaping the direct impact the challenged statute has on the charges laid before the defendants in this case under *21 U.S.C. § 841(a)(1)*, and any prosecution based upon the current designation within the controls is impermissible while it remains so (irrationally) scheduled.

In addition, Title 21of the United States Code prohibits certain enumerated conduct relating to *"a controlled substance."* (*21 U.S.C. § 841(a).*) As noted in the Motion to Dismiss[45], Title 21 defines a "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this title [*21 USCS § 812*]."[46] (*21 U.S.C. § 802(6*), emphasis added.) The defendants' challenge, arguably articulated *ad infinitum* at this late stage of the proceedings, is not that this Court should move cannabis to Schedule II, III, IV, or V, but rather, at least as to the first of defendants' two distinct Equal Protection challenges, that cannabis' current placement within that Title is no longer footed in reality at this moment in time.[47] (Doc. 199.) If successful, the striking of the challenged statute negates the defendants' criminal liability as to Count I of the Indictment. (Doc. 30)

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[45] At Doc. 199, p. 4, lines 13-20.

[46] It is notable that this statute explicitly excludes alcohol and tobacco as controlled substances, declaring "[t]he term ["controlled substance"] does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1954 [*26 USCS §§ 5001* et seq.]."

[47] Even the Government concedes elsewhere in its Post-Hearing Brief, "defendants have repeatedly disavowed any challenge to whether marijuana is properly scheduled" (Doc. 374, p. 3, lines 1-2), negating their argument on the standing issue at the outset.

1 Further, although Congress is authorized to reschedule cannabis within *21 U.S.C. § 812,*
2 it also may choose not to, or to create an entirely new schedule for this substance, as is
3 recommended by the American Medical Association.[48] Presently, the defendant makes no
4 comparison, advisement, nor request, as to where or how cannabis should be scheduled, as such a
5 determination should not be made in a courtroom. It has, however, become painfully obvious to
6 the people of this Nation (as evidenced by percipient defense witnesses Jennie Stormes and Sgt.
7 Ryan Begin), to our leading scientific researchers and physicians (as evidenced by Dr. Hart, Dr.
8 Carter, and Dr. Denney), to Congress (in Section 538), to our own President (in public statements
9 appropriate for judicial notice, *FRE 201*), that the Schedule I status has no footing in reality. As
10 neither the Government, nor the Court, can secondguess Congress' future action, any statute that
11 inherently relies on the manner in which cannabis is controlled *today* must fail.[49]

12 The cases cited by the Government are unavailing, as each appear to involve a Due
13 Process challenge in which the defendant asked to *reschedule* cannabis. (Doc. 373, p. 15, lines
14 8-17.) In United States v. Osburn, 175 Fed.Appx. 789, 790 (9th Cir. 2006) the basis of the
15 constitutional challenge is unclear; however, the defendants were specifically requesting the
16 Court make a determination as to the appropriate schedule for marijuana: a challenge not here
17 made.[50]

18 Similarly, in United States v. McWilliams, 138 F.Appx. 1, 3 (9th Cir. 2005)[51], the
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20 [48] *See*, Govt. Exh. 3, American Medical Association H 95.952, Cannabis for Medical Use, which states in *subsection (3),* "Our AMA encourages the National Institutes of Health (NIH), the Drug
21 Enforcement Administration (DEA) and the Food and Drug Administration (FDA) to develop a special schedule and implement administrative procedures to facilitate grant applications and the conduct of
22 well-designed clinical research involving cannabis and its potential medical utility." Bolding emphasis added.
23

24 [49] Any argument that Dr. Carter's work in preparing the medical and scientific data for a former Governor's filing of a petition to reschedule cannabis, *at her behest,* in 2011, is an admission that the
25 defendants here are moving to do the same, is inappropriate in light of defendants' repeated refusal to acquiesce to the Government's repeated attempts to re-frame defendants' challenge.

26 [50] Moreover, the defendants in Osburn, *supra*, challenged their conviction under *21 U.S.C. § 856*, a statute not alleged against the accused in the instant case, nor challenged in this motion.
27

28 [51] The opinion of United States v. McWilliams, 138 F.Appx. 1, 3 (9th Cir. 2005), which the Government cites as "unpublished" has actually been *withdrawn* in United States v. McWilliams, 2005

defendant explicitly argued that "the classification of marijuana as a 'Schedule I' controlled substance, *rather than in a less restrictive classification*" was "irrational and [an] undue burden on the rights of patients." First, McWilliams appears to be another Due Process violation claim, rather than Equal Protection, for which a distinct analysis is required.[52] Second, the Court found the current scheduling of cannabis was inapplicable to the defendant's challenge because he was not convicted of unlawful use of marijuana as a patient, and had not registered to manufacture a controlled substance before asking the Court to reschedule it. Thus, McWilliams is again not a direct attack on cannabis' classification, as is here occurring.

The same is true of the Western District of Pennsylvania opinion in United States v. Tat, 2014 U.S. Dist. LEXIS 56859 (W.D. Penn. April 24, 2014), which is also a Due Process challenge, and relies on McWilliams, *supra*,[53] for the same rule of law not applicable here, that one must seek licensing to manufacture a controlled substance prior to asking the Court to reschedule it. Where the defendant does not ask this court to reclassify the substance in issue, McWilliams and Tat, *supra*, are simply inapposite.

Not surprisingly, the Government's standing argument fails to address defendants' other two constitutional challenges relating to the State-based enforcement of the CSA as to cannabis, since codified by Congress in December, 2014.[54] Neither of these challenges are grounded in the irrational scheduling, but rather in the unconstitutional application of federal law among the

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U.S. App. LEXIS 16527 (9th Cir. Cal., Aug. 5, 2005). Its precedential value, or any case relying on it, is questionable at best. In addition, both McWilliams and Osburn, having been decided prior to 2007, are subject to citation restrictions imposed by *Federal Rule of Appellate Procedure 32.1*, which provides: a "court may not prohibit or restrict the citation of federal judicial opinions . . . that have been (1) designated as "unpublished," "not for publication, "non-precedential," "not precedent," or the like, and (ii) issued on or after January 1, 2007."

[52] *See*, Merrifield v. Lockyer, 547 F.3d 978, 985-986 (9th Cir. 2008), noting "the equal protection analytical framework requiring a rational connection between a legitimate interest and different classifications was inapplicable to these [Due Process] cases," and as such, "these [Due Process] cases are not directly applicable" to the plaintiff's Equal Protection challenge.

[53] *See, fn* 6, *supra*.

[54] *See*, Motion to Dismiss, Doc. 199, *Section IV (C)*, regarding the Selective State-Based Prosecution Policy; *see also, Section V*, regarding the Equal Sovereignty of the States; *see also,* Defendant's Amended Post-Evidentiary Hearing Brief, Doc. 378, p. 35-36, regarding *Section 538* of the Consolidated and Further Continuing Appropriations Act, 2015.

States, similar to the Voting Rights Act of 1965 at issue in Shelby County (Alabama) v. Holder, 133 S.Ct. 2612 (2013), or the Defense of Marriage Act addressed in United States v. Windsor, 133 S.Ct. 2675 (2013).

In Bond v. United States, 564 U.S.__, 131 S.Ct. 2355, 2364-2365 (2011), the Supreme Court made clear that an individual charged by criminal indictment may seek redress of violations to the very structure of our government:

> An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate. *Id.*

As such, the standing argument must be disregarded also to the distinct arguments regarding the now codified State-based enforcement of *21 U.S.C. § 812, Schedule I (c)(10)* and *(17)* through *21 U.S.C. § 841.*[55]

Finally, to the extent the Government's position that the sentencing provisions of *21 U.S.C. Section 841(b)* somehow prohibits an Equal Protection challenge to the substantive portion of the statute, set forth in *subsection (a),* their argument must fail. For as the Supreme Court noted in Raich, *supra*, the punishment is directly associated with the substance's placement on the schedule. "By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, . . . *Id.*, at 14.

Accordingly, while the sentencing provisions may be set forth by substance, rather than by schedule, it is of no consequence to *any* of defendants' allegations to the constitutionality of the underlying conduct. The Government's argument related to the punishment section must be viewed for what it is, another repeated attempt to redefine defendants' challenge in order to lessen their burden. As such, it should be disregarded.

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[55] It is fundamental that a criminal defendant may challenge the constitutionality of their own impermissibly selective prosecution. *See*, *inter alia,* Bond v. United States, 131 S. Ct. 2355, the defendant's "challenge to her conviction and sentence satisfies the case-or-controversy requirement, because the incarceration . . . constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Id.*, citing to Spencer v. Kemna, 523 U.S. 1, 7 (1998), internal citations omitted. As such, defendants' standing to challenge the selective State-based enforcement of the CSA.

E. Exclusive Jurisdiction over the Instant Challenge Is Not Vested in the D.C. Circuit.

The Government is correct that it is has previously and *repeatedly* argued the judiciary may not analyze the Constitutionality of the Controlled Substance Act. The issue has been addressed by this Court and is thus *res judicata* in this case. Understanding the Government's desire to also preserve this issue, there is nothing in their present brief which should alter this Court's previous holding. In an abundance of caution, however, defendants briefly address the argument below.

Defendants here challenge the statutory scheme currently defining marijuana as a Schedule I controlled substance. As such, the Government's reliance on United States v. Forrester, 616 F.3d 929 (9th Cir. 2010) is misplaced, and in fact Forrester confirms this Court's jurisdiction over the instant constitutional challenge. Forrester involved a collateral attack of the DEA's decision to place MDMA on schedule I. The defendant was convicted of manufacturing and distributing ecstacy and he appealed his conviction on the basis that the *court* should force the Attorney General to reschedule ecstacy from Schedule I to Schedule III, thereby reducing his sentence. *Id*. at 933-937. The defendant did not contest the Constitutionality of the statutory scheme, but instead attempted to challenge the Attorney General's decision that ecstasy is a Schedule I controlled substance by collateral attack. *Id.* The Ninth Circuit did not hold that a criminal defendant can never challenge the constitutionality of the statute, but rather held a criminal defendant cannot circumvent *21 U.S.C. § 877* through a motion which asks for the Court to reschedule a controlled substance in order to reduce his or her sentence.

Importantly, the Forrester court relied heavily on the decision in United States v. Carlson, 87 F.3d 440 (11th Cir. 1996), which involved *both* a constitutional and scheduling challenge, and did not question the judicial authority to decide the former. The distinction between a challenge to the constitutionality of a statute and to an administrative decision is made most apparent in Carlson, where the criminal defendants brought two separate claims challenging their convictions for MDMA related offenses. First, the defendants contended that *21 U.S.C. §§ 802(32)* and *813* were unconstitutionally vague and that MDMA was neither validly scheduled as a controlled

substance nor as a controlled substance analog during the time charged in the indictment. Second, the defendant argued that the district court improperly denied his collateral attack on the DEA order scheduling MDMA. *Id*., at p. 442. The Eleventh Circuit placed no restriction on the constitutional claims, and in fact ruled on the merits of the assertions raised. *Section 877* was implicated only to the second argument in which the defendant collaterally attacked the DEA's administrative decisions. *Id*. at p. 446-447.

Reference to Latif v. Holder, 686 F.3d 1122, 1128 (9th Cir. 2012), provides the Government with no new legal authority to raise this jurisdictional issue, and in fact, supports this Court's previous ruling. The plaintiffs in Latif sought judicial review of a TSA "no-fly" list, and the Ninth Circuit *remanded* the case, holding that the District Court *did* have jurisdiction to consider the substantive challenge. *Id.* Indeed, Latif makes clear a District Court has jurisdiction wherever the claim "constitutes a broad challenge to the allegedly unconstitutional actions," rather than the merits of a particular administrative action. *Id.*[56]

As previously stated, the cases relied on by both the defense and the Government demonstrate that a constitutional challenge to the CSA may brought in the District Courts, and that *21 U.S.C. Section 877*, limited by its terms to review of DEA decisions, does not divest the Court of the duty it has held for a bicentennial, since Marbury v. Madison, 5 U.S. 137 (1803).

III. CONCLUSION

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, -- to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

United States v. Butler, 297 U.S. 1, 62-63 (1936), Justice Owen Roberts.

Based on the foregoing, and in the interests of justice, the defendants ask this Court to

[56] United States v. Szabo, 760 F.3d 997, 1005 (9th Cir. 2014) is similarly inapposite, as it involved judicial review of a particular administrative action and offers nothing further to this analysis, where, as here, the defendants do not challenge any particular administrative decision.

find the current Schedule I classification untenable when laid against the Constitution and perform its great and Constitutionally-delineated duty to declare *21 U.S.C. § 812, Schedule I(c)(10), (17)*, to be void as applied to these defendants through *21 U.S.C. § 841(a)*.

Dated: January 21, 2015

Respectfully submitted,

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