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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,) Case No. 2:11-CR-449-KJM
12 Plaintiff,)
13 v.) NOTICE OF MOTION AND MOTION FOR
14 BRYAN SCHWEDER, et al.,) RECONSIDERATION
15 Defendants.) Date: April 16, 2014
16) Time: 9:00 am
17) Hon. Kimberly J. Mueller
18)
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28 **PLEASE TAKE NOTICE** that on April 16, 2014, at 9:00 am or as soon thereafter as the parties may be heard, the United States will bring a motion for reconsideration pursuant to Local Rule 430.1(i) (reconsideration). The hearing will take place before the Honorable Kimberly J. Mueller, in the United States Courthouse, 501 I Street, Sacramento, California.¹

The United States respectfully requests reconsideration of the Court’s March 19, 2014 order granting an evidentiary hearing on the issues of whether the Controlled Substances Act violates the equal protection clause of the Fifth Amendment and whether the statute also violates equal sovereignty under the Tenth Amendment. ECF No. 257, 258; Controlled Substances Act, 21 U.S.C. §§ 801-904.

¹ Opposing counsel has been contacted regarding the hearing date and has indicated her intent to file an opposition by April 9, 2014.

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DATED: March 27, 2014

BENJAMIN B. WAGNER
United States Attorney

By: /s/ Audrey B. Hemesath
AUDREY B. HEMESATH

By: /s/ Samuel Wong
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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 The United States respectfully requests reconsideration of the Court’s March 19, 2014 order
3 granting an evidentiary hearing on the issues of whether the Controlled Substances Act violates the
4 equal protection clause of the Fifth Amendment and whether the statute also violates equal sovereignty
5 under the Tenth Amendment. ECF No. 257, 258; Controlled Substances Act, 21 U.S.C. §§ 801-904.

6 The government initially opposed the defendants’ motion to dismiss the indictment on the grounds that
7 the Court lacks jurisdiction to consider any challenge to the scheduling of marijuana. ECF No. 244.

8 Now accepting the Court’s jurisdiction to hear the defendants’ challenging to the constitutionality of the
9 statute itself, the government addresses the constitutional claims as clarified. The government
10 respectfully requests that the Court reconsider its order granting an evidentiary hearing on the following
11 three alternative grounds.
12

13 First, as to equal protection, as recently as January of this year the Ninth Circuit has reaffirmed
14 the holding that the placement of marijuana in Schedule I of the Controlled Substances Act satisfies
15 rational basis review. There is no portion of defendants’ argument that is not foreclosed by existing
16 Ninth Circuit precedent. It would therefore be inappropriate to hold an evidentiary hearing on this issue
17 of settled law.
18

19 Second, it would be inappropriate to conduct an evidentiary hearing on the equal protection
20 claim because the Supreme Court has clarified that it is never appropriate to conduct a fact-finding
21 evidentiary hearing when the standard of review is rational basis. This is because a rational basis exists
22 so long as there is a *conceivable* basis for the legislative choice. Where there is a dispute of fact, even to
23 say that a dispute of fact exists, the government necessarily prevails in its equal protection argument, as
24 that dispute forms a rational basis for the legislature’s choice.
25

26 Third, it would be inappropriate to conduct an evidentiary hearing on the equal sovereignty claim
27 because defendants are not challenging the constitutionality of the statute, which treats all states equally.
28 Rather, defendants challenge the alleged disparate treatment in an executive memorandum. Defendants

1 do not have standing to challenge the Cole Memorandum of August 29, 2013. The Cole Memorandum
2 is inapplicable in this case, both because the memo was promulgated after defendants' indictment, and
3 because defendants do not fit the criteria for consideration under the memo.

4 **I. THE COURT SHOULD NOT GRANT AN EVIDENTIARY HEARING ON THE**
5 **EQUAL PROTECTION ISSUE; INSTEAD THE COURT SHOULD FIND THAT**
6 **THE NINTH CIRCUIT HAS SETTLED THE ISSUE AND THERE IS A RATIONAL**
7 **BASIS FOR THE STATUTE.**

8 Pickard, joined by all of his unresolved co-defendants, moves to dismiss the indictment,
9 challenging the constitutionality of the statutory classification of marijuana as a Schedule I controlled
10 substance under the equal protection clause of the Fifth Amendment. ECF No. 199-1 at 7-30; 21 U.S.C.
11 § 812(b), Schedule I(c)(10). The government opposes the motion; the government's initial argument
12 was that the Court lacks jurisdiction over the claim under 21 U.S.C. § 877. ECF No. 224 at 8-12.

13 **A. Ninth Circuit Precedent Forecloses the Challenge to the Constitutionality of the Statute.**

14 To the extent defendants are challenging the constitutionality of the statute, the Court is correct
15 that jurisdiction is proper. *United States v. Moreno-Morillo*, 334 F.3d 819 (9th Cir. 2003). However,
16 there is no occasion for an evidentiary hearing or a fresh examination of the equal protection challenge,
17 as the Ninth Circuit has already decided the issue. In *United States v. Miroyan*, the Court held: "We
18 need not again engage in the task of passing judgment on Congress' legislative assessment of marijuana.
19 As we recently declared, 'the constitutionality of the marijuana laws has been settled adversely to
20 [defendant] in this circuit.'" *United States v. Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978) (overruled in
21 part on other grounds). *Miroyan* in turn cites *United States v. Rogers*, in which the Ninth Circuit held,
22 "The constitutionality of the marijuana laws has been settled adversely to the [defendants] in this
23 circuit." *United States v. Rogers*, 549 F.2d 107, 108 (9th Cir. 1976).

24 The defendant in *Miroyan* had argued that the Controlled Substances Act was unconstitutional
25 on equal protection grounds. The Ninth Circuit held: "The essence of this familiar argument is that
26 these statutes unreasonably and irrationally categorize marijuana as a Schedule I controlled substance."
27 *Miroyan*, 577 F.2d at 495. Though nearly 40 years ago, the *Miroyan* defendant made many of the same
28 arguments defendants in the instant case make today, specifically that marijuana "cannot rationally be
deemed to meet the criteria required for a Schedule I substance: high potential for abuse, no currently
accepted medical use, and lack of accepted safety under medical supervision." The Ninth Circuit

1 rejected this challenge, finding the Controlled Substance Act to have a rational basis, and therefore,
 2 constitutional. *See also United States v. Kiffer*, 477 F.2d 349, 356-57 (2d Cir. 1972) (same); *United*
 3 *States v. Fogarty*, 692 F.2d 542, 547-8 (8th Cir. 1982) (same).

4 Defendants in this case argue that theirs is a new constitutional challenge – that they seek to
 5 establish the irrationality of the statute as compared against the state of the evidence today. ECF No.
 6 199-1 at 2-3. However, the Ninth Circuit has confirmed that *Miroyan* precludes this renewed rational
 7 basis challenge as well. In *United States v. Oakland Cannabis Buyers' Cooperative*, the Ninth Circuit
 8 held that the placement of marijuana in Schedule I of the Controlled Substances Act still satisfies
 9 rational basis review:

10 Applying [the rational basis standard] we have previously concluded that the classification of
 11 marijuana in Schedule I of the Controlled Substances Act is constitutional. *United States v.*
 12 *Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978). Although, as the Defendants point out, new
 13 information has been developed concerning the use of marijuana since 1978, the developments
 14 have not ‘left its central holding obsolete.’ . . . Indeed, the Supreme Court recently reinforced
 15 this conclusion by upholding Congressional authority to regulate locally cultivated medical
 16 marijuana. *Gonzales v. Raich*, 545 U.S. 1, 9 (2005). . . . In sum, *Miroyan* controls the issue and
 17 precludes Defendants’ rational basis argument.

18 259 Fed. Appx. 936, 938 (9th Cir. 2007) (unpublished).²

19 Then again in January of 2014, the Ninth Circuit confirmed the continuing precedential weight
 20 of *Miroyan* in *Sacramento Nonprofit Collective v. Holder*:

21 Second, Appellants allege that federal enforcement of the CSA violates Equal Protection because
 22 the federal ban on medical marijuana, “while permitting prescription drugs[,] has no rational
 23 basis.” . . . [T]he argument is *foreclosed* by our prior precedent, *see, e.g., United States v.*
 24 *Miroyan*.”

25 2014 WL 128998, *1 (9th Cir. Jan. 15, 2014) (unpublished) (emphasis added).³

26 ² Although unpublished, and therefore not precedential under Ninth Cir. Rule 36-3(a), both
 27 *Oakland Cannabis Buyers* and *Sacramento Nonprofit Collective* are persuasive authority, and are
 28 cited pursuant to Fed. R. App. P. 32.1. These cases confirm the government’s principal
 argument, that *Miroyan* precludes any challenge to the constitutionality of the Controlled
 Substances Act.

³ In at least three other cases, the district court has rejected – without an evidentiary hearing – a
 nearly identical set of arguments presented in motions to dismiss the indictments: *United States*
v. Smith, 2:11-CR-00428-GEB (Docs. 78-84, 109); *United States v. Albright*, 2:11-CR-2266
 GEB (Docs. 138, 149); *United States v. Chavez*, 1:07-CR-192 AWI (Docs. 168, 173).

1 *Miroyan* is the law of the circuit. There is no occasion to conduct an evidentiary hearing when
2 the Ninth Circuit has already decided the ultimate question.

3
4 **B. The Court Ought Not Conduct An Evidentiary Hearing Where All That Is Required Is
A Conceivable Basis For The Statute.**

5 Second, it would also be inappropriate to conduct an evidentiary hearing when the standard of
6 review is rational basis.

7
8 **1. The Challenge To The Constitutionality Of The Statute Implicates No
Fundamental Rights, So Rational Basis Review Is Required.**

9 Congress's scheduling of marijuana in the Controlled Substances Act involves no suspect
10 classification and implicates no fundamental rights. Defendants argue that a fundamental right is at
11 stake in this criminal proceeding: liberty. ECF No. 199-1 at 9-10. However, this argument is
12 foreclosed by *Chapman v. United States*, where the Supreme Court considered the rationality of the
13 choice of penalties for LSD distribution. 500 U.S. 453 (1991). The *Chapman* Court explained that the
14 liberty interest is protected by other constitutional guarantees, and the statutory standard of review is still
15 rational basis:
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18 [Defendants] argue preliminarily that the right to be free from deprivations of liberty as a result
19 of arbitrary sentences is fundamental, and therefore the statutory provision at issue may be
20 upheld only if the Government has a compelling interest in the classification in question. But we
21 have never subjected the criminal process to this sort of truncated analysis, and we decline to do
22 so now. Every person has a fundamental right to liberty in the sense that the Government may
23 not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial
24 conducted in accordance with the relevant constitutional guarantees. . . . But a person who *has*
25 been so convicted is eligible for, and the court may impose, whatever punishment is authorized
26 by statute for his offense, so long as that penalty is not cruel and unusual. . . . and so long as the
27 penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the
28 Fifth Amendment. In this context, . . . an argument based on equal protection essentially
duplicates an argument based on due process.

500 U.S. at 464-65 (internal citations omitted).

Rational basis is the correct standard of review in this case. There is no fundamental
constitutional right to import, sell, possess, or grow marijuana. *Cf. Sacramento Nonprofit Collective*,
2014 WL 128998 at *2, fn. 1 (“Although the use of medical marijuana is more accepted today than it

1 was in 2007, we are unwilling to declare that legal recognition of such a right has reached the point
2 where it should be removed from ‘the arena of public debate and legislative action’ and deemed
3 ‘implicit in the concept of ordered liberty.’”) (quoting *Raich v. Gonzalez*, 500 F.3d 850 (9th Cir. 2007)).

4 Because there are no fundamental rights implicated, the legislative classification must be
5 upheld unless it bears no rational relationship to a legitimate government purpose. *New Orleans v.*
6 *Dukes*, 427 U.S. 297, 303 (1976).

7 **2. The Court Does Not Engage In Fact-Finding In Rational Basis Review.**

8 Where the standard of review is rational basis, the court does not engage in fact-finding, but
9 rather questions whether there is a conceivable basis for the classification. *FCC v. Beach Comm.*
10 *Commission*, 508 U.S. 307, 315 (1993) (“[A] legislative choice is not subject to courtroom fact-finding
11 and may be based on rational speculation unsupported by evidence or empirical data.”). An evidentiary
12 hearing plays no part in this highly deferential standard of review. *Heller v. Doe*, 509 U.S. 312, 319
13 (1993) (“[R]ational-basis review in equal protection analysis ‘is not a license for courts to judge the
14 wisdom, fairness, or logic of legislative choices.’” (quoting *FCC*, 508 U.S. at 313)); *Nat’l Paint &*
15 *Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995) (district court erred in conducting
16 a trial on the issue of the rationality of an anti-graffiti ordinance)⁴.

17 Here the Court has already acknowledged that the parties dispute the material facts. ECF No.
18 257, 258. Under rational basis review, a dispute of material facts is enough to support the
19 constitutionality of the statute, for the court can *conceive of* facts that support the statutory classification.
20 Thus, even if the Court were to undertake a fresh examination of the rationality of the statute, no
21 evidentiary hearing is needed, and the Court need look no further than the dispute of material facts
22 between the parties.

23 The Controlled Substances Act outlaws the use of marijuana based on Congress’s judgment that
24

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26 ⁴ As the Seventh Circuit has explained, “Even in litigation about torts and contracts, a court
27 holds evidentiary hearings only when necessary to resolve material disputes of fact. In
28 constitutional law, to say that such a dispute exists – indeed, to say that one may be *imagined* – is
to require a decision for the [government]. Outside the realm of ‘heightened scrutiny’ there is
therefore never a role for evidentiary proceedings.” *Nat’l Paint & Coatings*, 45 F.3d at 1127.

1 marijuana has a high potential for abuse, no current accepted medical use, and a lack of accepted safety
2 for use under medical supervision. 21 U.S.C. § 812(b)(1)(A)-(C). Congress made that determination in
3 furtherance of its obvious and compelling interest in combatting drug abuse and protecting the public
4 from the physical dangers associated with the use of unsafe drugs that may be diverted for improper
5 purposes. *Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989) (observing that drug trafficking
6 is “one of the greatest problems affecting the health and welfare of our population” and that “drug abuse
7 is one of the most serious problems confronting our society today”); *see also Employment Div., Oregon*
8 *Dep’t of Human Res. v. Smith*, 494 U.S. 872, 905 (1990) (O’Connor, J., concurring) (the government has
9 a “compelling” and “overriding interest in preventing the physical harm caused by the use of a Schedule
10 I controlled substance.”).

11 Also, importantly and as discussed in the government’s opposition to the motion to dismiss,
12 Congress did recognize that the Schedules may sometimes need to be modified to reflect changes in
13 scientific knowledge and patterns of abuse of particular drugs. Congress therefore established an
14 exclusive set of statutory procedures under which controlled substances that have been placed in
15 Schedule I (or any other Schedule) may be transferred to another Schedule or entirely removed from the
16 Schedules. 21 U.S.C. § 811(a). Pursuant to that process, “any interested party” who believes that
17 medical, scientific, or other relevant data warrant transferring marijuana to a less restrictive schedule
18 may petition the Attorney General to initiate a rulemaking proceeding to reschedule marijuana.⁵ 21
19 U.S.C. § 811(a), (c)(1)-(8) (listing eight factors Attorney General must consider in classifying a drug,
20 including current pattern of abuse, risk to public health, and scope and significance of abuse). The
21 Administrator of the DEA, to whom the Attorney General has delegated his authority under the
22 Controlled Substances Act, must refer any such rescheduling petition to the Secretary of Health and
23 Human Services for a scientific and medical evaluation and a recommendation as to whether the
24 substance should be reclassified or decontrolled. The recommendation of the Secretary is binding on the
25

26
27 ⁵ Defendants have attached three declarations in support of their motion to dismiss. ECF No. 199-2
28 (Declaration of Philip A. Denney, M.D.); 199-3 (Declaration of James J. Nolan, Ph.D.); ECF
199-4 (Declaration of Christopher Conrad). Each of these declarations contains argument as to
why marijuana should be moved off Schedule I. These are precisely the types of arguments
appropriately directed to the DEA in accordance with 21 U.S.C. § 811(a).

1 Administrator with respect to scientific and medical matters. 21 U.S.C. § 811(b). Any party aggrieved
2 by a final decision of the Administrator may seek review in the appropriate courts of appeal. 21 U.S.C.
3 § 877.

4 The availability of this statutory and regulatory process for reclassifying marijuana, should
5 scientific or medical evidence warrant such a change, with review in the court of appeals, sufficiently
6 guards against unlawful or irrational government action. As the Second Circuit observed:

7
8 The provisions of the Act allowing periodic review of the control and classification of allegedly
9 dangerous substances create a sensible mechanism for dealing with a field in which factual
10 claims are conflicting and the state of scientific knowledge is still growing. . . The *very* existence
11 of the statutory scheme indicates that, in dealing with this aspect of the “drug” problem,
Congress intended flexibility and receptivity to the latest scientific information to be the
hallmarks of its approach. This, while not necessary to the decision here, is the very antithesis of
the irrationality [defendants] attribute to Congress.

12 *Kiffer*, 477 F.2d at 357; *see also Fogarty*, 692 F.2d at 548.

13 Just last year, the D.C. Circuit Court of Appeals decided the question of whether marijuana
14 should be moved off Schedule I. The court reviewed whether the DEA arbitrarily and capriciously
15 declined to initiate proceedings to reschedule marijuana under the Controlled Substances Act.
16 *Americans for Safe Access v. Drug Enforcement Admin.*, 706 F.3d 438 (D.C. Cir. 2013). The court
17 found “nothing in the record that could move us to conclude that the agency failed to prove by
18 substantial evidence that such studies confirming marijuana’s medical efficacy do not exist.”⁶ *Id.* at
19 452. This is a higher standard of review than rational basis. It necessarily follows, then, that if the DEA
20 was not arbitrary and capricious in declining to reschedule marijuana, the agency was also rational.

21 As a prudential matter, it is for good reason that the statute tasked the agencies with review of
22 the drug schedules, rather than the courts. The agencies can decide when enough time has passed to
23 warrant another look at the science and medicine. The district courts can only consider what the parties
24

25 _____
26 ⁶ An explanation for the continued scheduling of marijuana on Schedule I has also been set forth in the
27 Federal Register. 76 Fed. Reg. 131 (July 8, 2011) (Attachment A). In denying a petition to the DEA to
28 reschedule marijuana, the DEA opted to publish the letter it wrote denying the petition, along with
documentation in support of its denial. This articulation is far more than is required to survive rational
basis review.

1 bring before them: what is to stop defendants from renewing the motion for an evidentiary hearing
2 multiple times, based on each new report or study published in journals or popular media? If the
3 rationality of the statute is indeed a moving target, as defendants suggest, defendants across the county
4 would seek repeated evidentiary hearings, undoubtedly with inconsistent results, delays in prosecutions,
5 and a significant drain on resources. The Ninth Circuit identified this concern in *United States v.*
6 *Forrester*, affirming the denial of the defendant's request for an evidentiary hearing in conjunction with
7 a collateral attack on the classification of ecstasy as a Schedule I controlled substance. "[T]o allow all
8 criminal defendants to collaterally attack a permanent scheduling order based on their view that a
9 particular drug has been mis-scheduled would potentially place a continuing, onerous burden on district
10 courts to constantly re-litigate the same issue." 616 F.3d 929, 936 (9th Cir. 2010) (citing *United States v.*
11 *Carlson*, 87 F.3d 440 (11th Cir. 1996)). It is for this reason that the statute created the review
12 mechanism of 21 U.S.C. § 877.
13

14 In sum, a conceivable basis exists for Congress's classification of marijuana on Schedule I.
15 Congress perceived marijuana as either susceptible to abuse, not accepted for medical use, or not safe
16 even under medical supervision. Defendants argue that the evolution of scientific and medical
17 understanding since that classification undercuts these concerns. However, these concerns remain a
18 *conceivable* rational basis for the statute, and as such, no further inquiry is needed, and the Court should
19 dispense with defendants' motion without first holding an evidentiary hearing.
20

21 **II. THE COURT SHOULD NOT GRANT AN EVIDENTIARY HEARING ON THE**
22 **EQUAL SOVEREIGNTY ISSUE BECAUSE THE COLE MEMORANDUM IS**
23 **INAPPLICABLE TO THIS CASE.**

24 The Court also ordered an evidentiary hearing on the equal sovereignty issue, and the
25 government requests reconsideration of the order on that basis as well.

26 Defendants' argument is that under the Tenth Amendment, the federal government cannot apply
27 its laws unevenly among the states, citing *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). ECF No.
28 199-1 at 30-34. There are two flaws in this argument, both of which doom any chance of success on the
merits, such that it would be error to hold an evidentiary hearing.

1 First, unlike *Shelby County*, defendants here are not alleging an inequality in a statute. There is
2 no dispute that the Controlled Substances Act criminalizes marijuana use, possession, cultivation, and
3 sale equally in all states. *James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir. 2012) (rejecting
4 plaintiff's equal protection argument that implementation of D.C. medical marijuana initiative resulted
5 in unequal treatment of D.C. and California residents by broadly noting that "[l]ocal decriminalization
6 notwithstanding, the unambiguous federal prohibitions on medical marijuana use set forth in the CSA
7 continue to apply in [all] jurisdictions"). The Controlled Substances Act treats all states equally, and is
8 not susceptible to a Tenth Amendment challenge on this basis.

9 Defendants argue that an uneven application of the statute is evidenced in the Cole Memorandum
10 of August 29, 2013, in which the Deputy Attorney General provided guidance to federal prosecutors in
11 their exercise of discretion regarding conditions under which they could decline prosecution in those
12 states where individuals were distributing marijuana in compliance with state law and were not engaged
13 in conduct that implicated federal enforcement priorities. ECF No. 199-1 at 31; ECF No. 224 at 20-23
14 (Cole Memorandum). But the constitutionality of the statute cannot be attacked via a challenge on an
15 executive branch policy memorandum. *United States v. Caceres*, 440 U.S. 741, 749-55 (1979) (no
16 constitutional rights implicated where agency failed to follow its own procedures).

17 The Cole Memorandum represents an exercise of prosecutorial discretion, a permissible exercise
18 of executive branch power. The memorandum "is intended solely as a guide to the exercise of
19 investigative and prosecutorial discretion." ECF No. 224 at 23 (Cole Memorandum at 4). "In our
20 criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." *Wayte v.*
21 *United States*, 470 U.S. 598, 607 (1985). "[S]o long as the prosecutor has probable cause to believe that
22 the accused committed an offense defined by statute, the decision whether or not to prosecute, and what
23 charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.* (internal
24 quotation marks omitted).

25 A second flaw in defendants' equal sovereignty argument is that all defendants in this case were
26 indicted before the Cole Memorandum was issued on August 29, 2013. ECF No. 30 (indictment on
27 October 20, 2011). Temporally, the Cole Memorandum does not apply to these defendants. The
28 memorandum by its terms "applies prospectively to the exercise of prosecutorial discretion in future

1 cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration
2 of any pending civil action or criminal prosecution.” ECF No. 224 at 23 (Cole Memorandum at 4).

3 It also does not apply to these defendants as a matter of substance. As discussed in the
4 government’s opposition to the motion to dismiss, the Cole Memorandum clarifies that the government
5 will prosecute significant threats, including preventing revenue from marijuana sales from going to
6 criminal enterprises, preventing violence and the use of firearms in the cultivation and distribution of
7 marijuana, and preventing the growing of marijuana on public lands. ECF No. 224 at 13-15 (argument);
8 25-29 (Cole Memorandum). The indictment in this case describes a conspiracy in which sixteen
9 defendants worked together to manufacture at least 1,000 marijuana plants using a garden drop point on
10 national forest land, protected by firearms, destined for sale for profit. ECF No. 30 (indictment); ECF
11 No. 224 at 2-8 (factual background). Defendants cannot establish that they are in the class of potential
12 defendants identified in the Cole Memorandum which might be the subject of prospective restraint under
13 the guidance contained therein.

14 It is inappropriate to conduct an evidentiary hearing on the Tenth Amendment equal sovereignty
15 challenge when defendants cannot establish standing to challenge their prosecution under the Cole
16 Memorandum.

17 **III. CONCLUSION**

18 For the reasons stated above, the government asks the Court reconsider its order granting an
19 evidentiary hearing, vacate the hearing, and deny the defendants’ motion to dismiss the indictment.

20
21 DATED: March 27, 2014

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United States Attorney

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25 By: /s/ Samuel Wong
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