U.S. Department of Justice

United States Attorney
Southern District of New York

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September 11, 2017

Via ECF
Honorable Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Washington et al. v. Sessions et al.*, 17 Civ. 5625 (AKH)

Dear Judge Hellerstein:

This Office represents the defendants, the United States of America, the Attorney General of the United States, the Administrator of the Drug Enforcement Administration, the U.S. Department of Justice, and the U.S. Drug Enforcement Administration (collectively, "Defendants"), in this challenge to the constitutionality of the scheduling of marijuana under the Controlled Substances Act ("CSA"). Defendants write respectfully to request that the Court reconsider its determinations concerning scheduling in this matter at the hearing held on September 8, 2017, in response to plaintiffs' motion for a temporary restraining order ("TRO"), which was served on this Office less than 24 hours before last Friday's hearing.

The complaint in this matter was filed on July 24, 2017. Dkt. No. 1. However, Plaintiffs took no steps to serve the complaint on Defendants until more than five weeks later, on September 1, when they assert they mailed copies of the complaint to Defendants. Dkt. No. 22. Then, on September 6, Plaintiffs filed an amended complaint, Dkt. No. 23, and two days later, on September 8, Plaintiff Alexis Bortell sought a TRO that, her counsel asserted, was necessary to permit her to take a lobbying trip on September 10. After a hearing on September 8, the Court denied Ms. Bortell's request for a TRO, concluding that she had not established entitlement to that relief because, *inter alia*, she had failed to demonstrate a likelihood of success on the merits. *See* Dkt. No. 26.[1]

After denying the TRO, the Court stated, over Defendants' objection, that Defendants' anticipated motion to dismiss would not be entertained, and instead, the Court would set an expedited schedule for discovery and a trial on the merits. Defendants respectfully seek the Court's reconsideration of these determinations, and request that the Court stay the parties' obligation to submit a joint discovery letter, Dkt. No. 26, until it has considered this application.[2]

[1] Defendants have ordered a transcript of the September 8 hearing, but have not yet received it.

[2] We have attempted to confer with Plaintiffs' counsel concerning this request. We understand that one of Plaintiffs' counsel is unavailable due to a family emergency. Defendants have no objection to permitting Plaintiffs any reasonable amount of time necessary to respond to this letter.

Defendants Should Be Permitted to Move to Dismiss

"Absent extraordinary circumstances, . . . a court has no power to prevent a party from filing pleadings, motions or appeals authorized by the Federal Rules of Civil Procedure." *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987); *accord, e.g.*, *Milltex Indus. Corp. v. Jacquard Lace Co.*, 55 F.3d 34, 39 (2d Cir. 1995). Defendants have not yet answered the amended complaint; under the Federal Rules, they have until early November to do so. *See* Fed. R. Civ. P. 12(a)(2). At the appropriate time, Defendants should be permitted to move to dismiss the complaint as permitted by Rule 12 of the Federal Rules of Civil Procedure.

Particularly in light of the Court's holding concerning the lack of likelihood of success for purposes of the TRO, Defendants' motion is likely to be fully dispositive of this action, or at the very least, narrow significantly any further proceedings before the Court. Moreover, the standard of review on the motion to dismiss will place Plaintiffs at no disadvantage. Rather, on the Court's consideration of the motion, they will have the benefit of the legal presumption that they will be able to establish all of the facts plausibly alleged in their pleadings. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Discovery Would Be Improper or, at Least, Premature

At the September 8 hearing, the Court contemplated discovery and, ultimately, a hearing with evidence from both sides to determine the merits of Plaintiffs' constitutional challenge. Defendants respectfully request that the Court reconsider that determination, which is inconsistent with governing law regarding procedures applicable to rational basis challenges to federal statutes. The ruling would expose the government to burdensome and unnecessary discovery and would, if it became generally accepted law, risk allowing any litigant dissatisfied with the potential application of any law to receive extensive discovery and a full evidentiary hearing at which the government would, potentially on an unlimited number of occasions, be required factually to prove the appropriateness of laws that Congress has duly enacted.

Plaintiffs' principal challenge in this matter is their argument that Congress's legislative decision to include marijuana under Schedule I of the CSA is irrational and therefore unconstitutional.[3] As noted in Defendants' papers in opposition to the TRO, the relevant standard of review does not permit the type of trial that the Court was apparently envisioning at the hearing.

Rather, "in areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could

[3] While Plaintiffs made alternative constitutional arguments in their complaint—including on grounds of equal protection, the right to travel, and substantive due process—those challenges do not state a claim to relief, for reasons outlined in Defendants' opposition to the TRO. At a minimum, the Court's ruling on a motion to dismiss in this matter would clarify the standard of review and establish whether any discovery is appropriate.

provide a rational basis for the classification." *Graziano v. Pataki*, 689 F.3d 110, 117 (2d Cir. 2012) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). Rational basis review provides no "license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313.

On rational basis review, Congress's "legislative choice is not subject to courtroom fact-finding." *Id.* at 315. "[T]he Government 'has no obligation to produce evidence,' or 'empirical data' to 'sustain the rationality of a statutory classification.'" *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Rather, "[w]here there are plausible reasons for Congress' action, [the Court's] inquiry is at an end." *Yuen Jin v. Mukasey*, 538 F.3d 143, 158 (2d Cir. 2008) (quoting *Beach Commc'ns*, 508 U.S. at 314); *accord Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (where the relevant question is "at least debatable," a court "err[s] in substituting its judgment for that of the legislature." (internal quotation marks omitted)); *Beach Commc'ns*, 508 U.S. at 315 (rational basis scrutiny is satisfied as long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification").

Moreover, "[a] sufficient reason need not be one actually considered by Congress." *Jankowski-Burczyk v. INS*, 291 F.3d 172, 178 (2d Cir. 2002). Rather, Congress's policy choice "may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315. A legislature or governing decisionmaker "need not 'actually articulate at any time the purpose or rationale supporting its classification.'" *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2082 (2012) (quoting *Nordlinger v. Hahn*, 515 U.S. 1, 15 (1992)).

Because the decision to place marijuana in Schedule I of the CSA does not implicate a protected class or fundamental right, that decision "was for Congress," and as such, "neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it." *United States v. Carolene Prod. Co.*, 304 U.S. 144, 154 (1938). Thus, it would undermine the purpose of rational basis review to hold a hearing or permit any discovery, as no burden is placed on the government to support its classification with evidence and the government need not even articulate the purpose for its determination. Accordingly, it is often "appropriate to dismiss an equal protection challenge on the pleadings and prior to discovery" where rational basis review applies. *Connolly v. McCall*, 254 F.3d 36, 42 (2d Cir. 2001); *see also, e.g.*, *United States v. Wilde*, 74 F. Supp. 3d 1092, 1099 (N.D. Cal. 2014) (holding that "since traditional rational basis review does not warrant engaging in scrutiny of the factual merits of the scientific debate, no evidentiary hearing is warranted" on marijuana scheduling challenge); *United States v. Green*, 222 F. Supp. 3d 267, 279 (W.D.N.Y. 2016) (rejecting request for an evidentiary hearing on marijuana scheduling rational-basis challenge); *see also Mixon v. State of Ohio*, 193 F.3d 389, 400 n.9 (6th Cir. 1999) (rejecting argument that discovery was necessary before dismissal on rational basis review).[4]

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[4] Over the government's objection, the court in *United States v. Pickard*, 100 F. Supp. 3d 981 (E.D. Cal. 2015), held an evidentiary hearing on whether there was a rational basis for Congress's classification of marijuana, heard from expert witnesses, and ultimately held that "the facts relating to the three criteria as applied to marijuana, on which Congress initially relied in 1970, have not

Plaintiffs' expressed desire to present additional facts to the Court should be rejected as immaterial and contrary to the applicable standard and method of review: rationality review is not a weighing of the evidence.[5] "The determination of whether new evidence regarding either the medical use of marijuana or the drug's potential for abuse should result in a reclassification of marijuana is a matter for legislative or administrative, not judicial, judgment." *United States v. Middleton*, 690 F.2d 820, 823 (11th Cir. 1982); *accord United States v. Greene*, 892 F.2d 453, 456 (6th Cir. 1989) (holding that if a party seeking to present "new scientific evidence," the administrative rescheduling scheme, "and not the judiciary, is the appropriate means by which defendant should challenge Congress' classification of marijuana as a Schedule I drug").[6]

Plaintiffs' challenge is especially improper because they essentially are attempting to bring an Administrative Procedure Act-style challenge, using the statutory CSA scheduling factors, imported into the context of a constitutional challenge. But on rational basis review, that is not the appropriate framework. "[T]he issue is not whether it was rational for Congress or the DEA to conclude that there is no currently accepted medical use for marijuana—that would be the issue if a claim were brought in a circuit court challenging the DEA's administrative determination [on a rescheduling petition]." *Green*, 222 F. Supp. 3d at 278-79. Instead, under rational basis review, the issue "is, simply, whether there is any conceivable basis to support the placement of marijuana on the most stringent schedule under the CSA." *Id.* at 279.

The appropriateness of deferring discovery at least until full consideration of the government's Rule 12-based dismissal motion is underscored by the outcome of numerous similar cases. Courts considering similar challenges have recognized in each such case that "there are numerous conceivable public health and safety grounds that could justify Congress's

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been rendered obsolete however much they may be changed and changing." *Id.* at 1006. Given the rational basis standard of review, however, no such hearing is appropriate. Moreover, unlike the intrusive procedures contemplated here, in that case no discovery was taken on the marijuana scheduling issue.

[5] Notably, the same grounds that Plaintiffs use to support their constitutional claims have been considered and rejected by courts around the country. *See, e.g.*, *United States v. Heying*, No. 14 Cr. 30, 2014 WL 5286153, at *4 (D. Minn. Aug. 15, 2014) (rejecting constitutional claims against marijuana scheduling based on (1) DOJ prosecutorial discretion memos regarding marijuana and (2) statements by Nixon Administration officials), *report and rec. adopted*, 2014 WL 5286155 (D. Minn. Oct. 15, 2014); *Pickard*, 100 F. Supp. 3d at 1009-1010 (rejecting challenge based on DOJ prosecutorial discretion memos); *United States v. Gentile*, No. 12 Cr. 360, 2017 WL 1437532, at *2 (E.D. Cal. Apr. 24, 2017) (rejecting rational basis claim against marijuana scheduling based, in part, on congressional appropriations riders); *see also Schirripa v. United States*, No. 16-1073C, 2017 WL 2537370, at *1 (Fed. Cl. June 9, 2017) (rejecting suit seeking an injunction against enforcement of CSA as to cannabinoids, which claimed that "by acknowledging the medicinal use of cannabinoids in granting U.S. Patent No. 6630507, the government's classification of cannabinoids as a schedule one controlled substance is unconstitutional").

[6] In 2013, the D.C. Circuit upheld the DEA's denial of a petition seeking the rescheduling of marijuana, holding that the agency's factual findings in support of its determination "are supported by substantial evidence" and "reasonably support the agency's final decision not to reschedule marijuana." *Americans for Safe Access v. DEA*, 706 F.3d 438, 449-52 (D.C. Cir. 2013).

and the DEA's continued regulation of marijuana as a Schedule I controlled substance." *Id.* "For instance, Congress could rationally conclude that marijuana should be classified as a Schedule I substance because it might be abused by, or cause harm to, minors." *Wilde*, 74 F. Supp. 3d at 1099. As another court recognized, "[O]ne need only review the DEA's most recent denial of a petition to reschedule to recognize the continuing public health and safety issues associated with marijuana":

> [Marijuana] "induces various psychoactive effects that can lead to behavioral impairment," Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,767, 53,774 (Aug. 12, 2016); it can result in a "decrease in IQ and general neuropsychological performance" for those who commence using it as adolescents, *id.*; it may result in adverse impacts on children who were subjected to prenatal marijuana exposure, *id.* at 53,775; it "is the most commonly used illicit drug among Americans aged 12 years and older," *id.* at 53,770; and its use can cause recurrent problems related to family, school, and work, including repeated absences at work and neglect of family obligations, *id.* at 53,783-84.

Green, 222 F. Supp. 3d at 279. Thus, "[u]nder no reasonable view of the facts could it be concluded that it is irrational for Congress to continue to regulate marijuana in the manner which it has, and for the DEA to continue to adhere to a Schedule I classification for marijuana." *Id.*

Additionally, and importantly, a contrary conclusion on the rationality of the scheduling scheme remains foreclosed by Second Circuit precedent. *See United States v. Canori*, 737 F.3d 181, 183 (2d Cir. 2013) (the Second Circuit has "upheld the constitutionality of Congress's classification of marijuana as a Schedule I drug." (citing *United States v. Kiffer*, 477 F.2d 349, 355-57 (2d Cir. 1973))). In recent years, courts have uniformly reached the same conclusion, and explicitly rejected the conclusion that any changes in marijuana's "legal status" or its "standing in the medical and scientific communities" since the 1970s has rendered the "central holding obsolete" of prior precedents upholding the constitutionality of the scheme. *United States v. Christie*, 825 F.3d 1048, 1066 (9th Cir. 2016) ("[W]hile it may be true that marijuana's legal status continues to evolve, as does its standing in the medical and scientific communities, those developments do not come close to demonstrating that changes since 1978 have left *Miroyan*'s central holding obsolete." (citing *United States v. Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978)) (internal quotation marks omitted)); *accord United States v. Oakland Cannabis Buyers' Co-op*, 259 F. App'x 936, 938 (9th Cir. 2007) (mem.) ("Although, as the Defendants point out, new information has been developed concerning the use of marijuana since 1978, the developments have not 'left [*Miroyan*'s] central holding obsolete.'").

For all these reasons, the Court should stay any discovery and permit Defendants to move to dismiss before it allows discovery or any further proceedings.

<u>Defendants' Proposed Case Management Plan</u>

Plaintiff Bortell brought a request for a TRO on the basis of her assertion that she sought an order from the Court temporarily suspending the application of the Controlled Substances Act to her use of medical marijuana while she traveled interstate by air to Washington, D.C., for purposes of a lobbying trip. Now that the Court has denied the TRO, and Plaintiff's stated objective of flying on September 10 cannot be met, there is no specific urgent matter before the

Court.[7] While Ms. Bortell's papers stated that she also sought a separate preliminary injunction, the scope of that request was all but undefined and appears to merge with Plaintiffs' claims on the merits of the action.

Accordingly, this case should follow the usual course: as set out above, Defendants should be permitted the time allowed to them to respond to the complaint under the Federal Rules of Civil Procedure, and then should be permitted to file a motion to dismiss, as Rule 12 contemplates. We acknowledge Plaintiffs' expressed sense of urgency to permit Ms. Bortell to travel with her marijuana at the earliest possible date even if her preferred September 10 trip is impossible, but her likelihood of success will not increase at any time, and the perceived importance of Ms. Bortell's ability to travel with marijuana cannot override the proper application of governing law. To the extent the Court wishes to consider Defendants' anticipated Rule 12 motion on an expedited basis, the government may consent to some shortening of the ordinary 60 days from service permitted for its response. However, given the importance of the issues presented, we note that the government will require sufficient time to permit intragovernmental coordination to prepare its motion to dismiss.

Thank you for your consideration of this request.

Respectfully submitted,

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[7] Only in circumstances where a TRO is "issued without notice" to the other party do the rules provide that "the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters." Fed. R. Civ. P. 65(b)(4).