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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRYAN SCHWEDER, et al., Defendants.	Case No. 2:11-CR-449-KJM NOTICE OF MOTION AND MOTION FOR RECONSIDERATION Date: April 16, 2014 Time: 9:00 am Hon. Kimberly J. Mueller

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.

DATED: March 27, 2014

BENJAMIN B. WAGNER
United States Attorney

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

By: /s/ Samuel Wong
SAMUEL WONG
Assistant U.S. Attorneys

MEMORANDUM OF POINTS AND AUTHORITIES

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. The government initially opposed the defendants' motion to dismiss the indictment on the grounds that the Court lacks jurisdiction to consider any challenge to the scheduling of marijuana. ECF No. 244. Now accepting the Court's jurisdiction to hear the defendants' challenging to the constitutionality of the statute itself, the government addresses the constitutional claims as clarified. The government respectfully requests that the Court reconsider its order granting an evidentiary hearing on the following three alternative grounds.

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

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

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

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

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

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

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

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

The defendant in *Miroyan* had argued that the Controlled Substances Act was unconstitutional on equal protection grounds. The Ninth Circuit held: "The essence of this familiar argument is that these statutes unreasonably and irrationally categorize marijuana as a Schedule I controlled substance." *Miroyan*, 577 F.2d at 495. Though nearly 40 years ago, the *Miroyan* defendant made many of the same 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

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

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

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

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

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

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

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

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[2] Although unpublished, and therefore not precedential under Ninth Cir. Rule 36-3(a), both *Oakland Cannabis Buyers* and *Sacramento Nonprofit Collective* are persuasive authority, and are 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).

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

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

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

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

Congress's scheduling of marijuana in the Controlled Substances Act involves no suspect classification and implicates no fundamental rights. Defendants argue that a fundamental right is at stake in this criminal proceeding: liberty. ECF No. 199-1 at 9-10. However, this argument is foreclosed by *Chapman v. United States*, where the Supreme Court considered the rationality of the choice of penalties for LSD distribution. 500 U.S. 453 (1991). The *Chapman* Court explained that the liberty interest is protected by other constitutional guarantees, and the statutory standard of review is still rational basis:

> [Defendants] argue preliminarily that the right to be free from deprivations of liberty as a result of arbitrary sentences is fundamental, and therefore the statutory provision at issue may be upheld only if the Government has a compelling interest in the classification in question. But we have never subjected the criminal process to this sort of truncated analysis, and we decline to do so now. Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. . . . But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual. . . . and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the 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

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

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

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

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

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

The Controlled Substances Act outlaws the use of marijuana based on Congress's judgment that

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[4] As the Seventh Circuit has explained, "Even in litigation about torts and contracts, a court holds evidentiary hearings only when necessary to resolve material disputes of fact. In 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.

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

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

[5] Defendants have attached three declarations in support of their motion to dismiss. ECF No. 199-2 (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).

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

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

> The provisions of the Act allowing periodic review of the control and classification of allegedly dangerous substances create a sensible mechanism for dealing with a field in which factual claims are conflicting and the state of scientific knowledge is still growing. . . The *very* existence 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.

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

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

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

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[6] An explanation for the continued scheduling of marijuana on Schedule I has also been set forth in the Federal Register. 76 Fed. Reg. 131 (July 8, 2011) (Attachment A). In denying a petition to the DEA to 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.

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

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

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

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

Defendants' argument is that under the Tenth Amendment, the federal government cannot apply its laws unevenly among the states, citing *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). ECF No. 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.

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

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

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

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

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

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

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

III. CONCLUSION

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

DATED: March 27, 2014

BENJAMIN B. WAGNER
United States Attorney

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

By: /s/ Samuel Wong
SAMUEL WONG
Assistant U.S. Attorneys

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Chapter II

[Docket No. DEA–352N]

Denial of Petition To Initiate Proceedings To Reschedule Marijuana

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Denial of petition to initiate proceedings to reschedule marijuana.

SUMMARY: By letter dated June 21, 2011, the Drug Enforcement Administration (DEA) denied a petition to initiate rulemaking proceedings to reschedule marijuana.[1] Because DEA believes that this matter is of particular interest to members of the public, the agency is publishing below the letter sent to the petitioner (denying the petition), along with the supporting documentation that was attached to the letter.

FOR FURTHER INFORMATION CONTACT: Imelda L. Paredes, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone (202) 307–7165.

SUPPLEMENTARY INFORMATION:

June 21, 2011.

Dear Mr. Kennedy:

On October 9, 2002, you petitioned the Drug Enforcement Administration (DEA) to initiate rulemaking proceedings under the rescheduling provisions of the Controlled Substances Act (CSA). Specifically, you petitioned DEA to have marijuana removed from schedule I of the CSA and rescheduled as cannabis in schedule III, IV or V.

You requested that DEA remove marijuana from schedule I based on your assertion that:

(1) Cannabis has an accepted medical use in the United States;

(2) Cannabis is safe for use under medical supervision;

(3) Cannabis has an abuse potential lower than schedule I or II drugs; and

(4) Cannabis has a dependence liability that is lower than schedule I or II drugs.

In accordance with the CSA rescheduling provisions, after gathering the necessary data, DEA requested a scientific and medical evaluation and scheduling recommendation from the Department of Health and Human Services (DHHS). DHHS concluded that marijuana has a high potential for abuse, has no accepted medical use in the United States, and lacks an acceptable level of safety for use even under medical supervision. Therefore, DHHS recommended that marijuana remain in schedule I. The scientific and medical evaluation and scheduling recommendation that DHHS submitted to DEA is attached hereto.

Based on the DHHS evaluation and all other relevant data, DEA has concluded that there is no substantial evidence that marijuana should be removed from schedule I. A document prepared by DEA addressing these materials in detail also is attached hereto. In short, marijuana continues to meet the criteria for schedule I control under the CSA because:

(1) *Marijuana has a high potential for abuse.* The DHHS evaluation and the additional data gathered by DEA show that marijuana has a high potential for abuse.

(2) *Marijuana has no currently accepted medical use in treatment in the United States.* According to established case law, marijuana has no ''currently accepted medical use'' because: The drug's chemistry is not known and reproducible; there are no adequate safety studies; there are no adequate and well-controlled studies proving efficacy; the drug is not accepted by qualified experts; and the scientific evidence is not widely available.

(3) *Marijuana lacks accepted safety for use under medical supervision.* At present, there are no U.S. Food and Drug Administration (FDA)-approved marijuana products, nor is marijuana under a New Drug Application (NDA) evaluation at the FDA for any indication. Marijuana does not have a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions. At this time, the known risks of marijuana use have not been shown to be outweighed by specific benefits in well-controlled clinical trials that scientifically evaluate safety and efficacy.

You also argued that cannabis has a dependence liability that is lower than schedule I or II drugs. Findings as to the physical or psychological dependence of a drug are only one of eight factors to be considered. As discussed further in the attached documents, DHHS states that long-term, regular use of marijuana can lead to physical dependence and withdrawal following discontinuation as well as psychic addiction or dependence.

The statutory mandate of 21 U.S.C. 812(b) is dispositive. Congress established only one schedule, schedule I, for drugs of abuse with ''no currently accepted medical use in treatment in the United States'' and ''lack of accepted safety for use under medical supervision.'' 21 U.S.C. 812(b).

Accordingly, and as set forth in detail in the accompanying DHHS and DEA documents, there is no statutory basis under the CSA for DEA to grant your petition to initiate rulemaking proceedings to reschedule marijuana. Your petition is, therefore, hereby denied.

Sincerely,

Michele M. Leonhart,
Administrator.

Attachments:

Marijuana. Scheduling Review Document: Eight Factor Analysis

Basis for the recommendation for maintaining marijuana in schedule I of the Controlled Substances Act

Date: June 30, 2011

Michele M. Leonhart
Administrator

Department of Health and Human Services,
Office of the Secretary Assistant Secretary for Health, Office of Public Health and Science Washington, D.C. 20201.

December 6, 2006.
The Honorable Karen P. Tandy
Administrator, Drug Enforcement Administration, U.S. Department of Justice, Washington, D.C. 20537

Dear Ms. Tandy:

This is in response to your request of July 2004, and pursuant to the Controlled Substances Act (CSA), 21 U.S.C. 811(b), (c), and (f), the Department of Health and Human Services (DHHS) recommends that marijuana continue to be subject to control under Schedule I of the CSA.

Marijuana is currently controlled under Schedule I of the CSA. Marijuana continues to meet the three criteria for placing a substance in Schedule I of the CSA under 21 U.S.C. 812(b)(l). As discussed in the attached analysis, marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and has a lack of an accepted level of safety for use under medical supervision. Accordingly, HHS recommends that marijuana continue to be subject to control under Schedule I of the CSA. Enclosed is a document prepared by FDA's Controlled Substance Staff that is the basis for this recommendation.

Should you have any questions regarding this recommendation, please contact Corinne P. Moody, of the Controlled Substance Staff, Center for Drug Evaluation and Research. Ms. Moody can be reached at 301–827–1999.

Sincerely yours,
John O. Agwunobi,
Assistant Secretary for Health.

Enclosure:

[1] Note that ''marihuana'' is the spelling originally used in the Controlled Substances Act (CSA). This document uses the spelling that is more common in current usage, ''marijuana.''