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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 REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION Date: April 16, 2014 Time: 9:00 am Hon. Kimberly J. Mueller

The United States respectfully replies in support of its motion for reconsideration of the Court's order granting an evidentiary hearing. Defendant Brian Pickard filed an opposition to the motion for reconsideration, arguing that reconsideration is inappropriate because of flaws in the motion itself and because of the alleged need for an evidentiary hearing to resolve factual issues. The Court has the inherent authority to reconsider its non-final order granting an evidentiary hearing. While the Court has jurisdiction to consider the constitutionality of the statute, there is no occasion for an evidentiary hearing on the statute's rational basis under the facts in this case. The Ninth Circuit has already held the statute to be rational. Rational basis review does not require the Court to undertake a fact-finding role every time a defendant alleges new evidence. A statute has a rational basis if the Court can conceive of a reasonable justification for the legislative classification. No hearing is needed to conceive of the justification here: the Ninth Circuit has already held that one exists. There are avenues to present the

new evidence defendants urge the Court to consider – to Congress to reconsider the classification or to appropriate Court of Appeals under 21 U.S.C. § 877. An evidentiary hearing under rational basis review in a circuit that has already decided the issue is not the right forum.

I. This Court Has Discretion To Reconsider Its Order Granting An Evidentiary Hearing.

The Court has the authority to reconsider its order granting an evidentiary hearing. Both the decision to reconsider and the decision to grant an evidentiary hearing are committed to the discretion of the district court. *United States v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986) ("Whether an evidentiary hearing is appropriate rests in the reasoned discretion of the district court."); *United States v. Tapia-Marquez*, 361 F.3d 535, 537 (9th Cir. 2004) (discretion to grant or deny motions for reconsideration).

"A district court's power to rescind, reconsider, or modify an interlocutory order is derived from the common law, not from the Federal Rules of [Criminal] Procedure." *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001); *Franklin v. Virga*, No. 2:05-CV-0304 KJM, 2013 WL 5597110 (E.D. Cal. Oct. 11, 2013) (citing *Santa Monica Baykeeper*); *McConnell v. Lassen Cnty.*, No. 2:05–cv–0909 FCD DAD, 2008 WL 4482853, at *2 (E.D. Cal. Oct.3, 2008) ("Where reconsideration of a non-final order is sought, the court has 'inherent jurisdiction to modify, alter, or revoke it.'" (quoting *United States v. Martin*, 226 F.3d 1042, 1048-49 (9th Cir. 2000)).

Here, the government acknowledges that there has been no intervening change in controlling law, nor any new evidence. The government acknowledges the Court's admonishment that "[a] party 'should not use a motion for reconsideration to raise arguments or present new evidence for the first time when it could reasonably have been raised earlier in the litigation," nor should the party 'ask the court to rethink matters already decided.'" *Franklin*, 2013 WL 5597110 at *1 (quoting *American Rivers v. NOAA Fisheries*, No. CV–04–00061–RE, 2006 WL 1983178, at *2 (D. Or. Jul.14, 2006)). Nevertheless, reconsideration is requested in this case because it is necessary to "correct clear error." *Franklin*, 2013 WL 5597110 at *1 (citing *Cachil Dehe Band of Wintun Indians v. California*, 649 F. Supp.2d 1063, 1069 (E.D. Cal. 2009)).

Under the local rule, the motion for reconsideration will succeed where the moving party has "set

forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Franklin*, 2013 WL 5597110 at *2 (quoting *Knight v. Rios*, No. 1:09-cv-00823-AWI-JLT HC, 2010 WL 5200906, at *2 (E.D. Cal. Dec. 15, 2010)); Local Rule 430.1(i). The Court's order of March 19, 2014, clarified the nature of the Defendants' challenge to the statute. The government submits that its arguments are strongly convincing that an evidentiary hearing toward the end of evaluating rational basis would be inappropriate. Accordingly, the government respectfully requests that the Court exercise its inherent authority to reconsider.

II. No Evidentiary Hearing Is Warranted When Ninth Circuit Has Already Found A Rational Basis.

The crux of Defendants' argument is that the Ninth Circuit law on this topic is stale. Defendants argue that the last evidentiary hearing that was held was in *United States v. Kiffer*, 477 F.2d 349 (2d. Cir. 1972), and that much new evidence is available since that date. But this argument ignores the unbroken line of Ninth Circuit precedent holding that there is a rational basis for Congress's inclusion of marijuana in Schedule I of Controlled Substances Act. *United States v. Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978) (overruled in part on other grounds); *United States v. Rogers*, 549 F.2d 107, 108 (9th Cir. 1976); *United States v. Oakland Cannabis Buyers' Cooperative*, 259 Fed. Appx. 936, 938 (9th Cir. 2007) (unpublished); *Sacramento Nonprofit Collective v. Holder*, 2014 WL 128998, *1 (9th Cir. Jan. 15, 2014) (unpublished).

Not only has the initial question of the rationality of the scheduling been decided, the validity of *Miroyan* as precedent on this issue has also been confirmed as recently as January of this year. Nothing in these cases suggests that the question of the rational basis for a statute has an expiration date. The approach requested by Defendants, in which new evidence is constantly coming available, would mean that the rationality of a statute would never be settled, and would be amenable to challenge via an evidentiary hearing any time a defendant found something new to cite. This is not workable and is not consistent with the rational basis standard of review. A statute is rational if the court can conceive of a reasonable justification for the legislative choice. *McDonald v. Board of Election Com'rs of Chicago*, 394 U.S. 802, 809 (1969). *Miroyan* recognized that there is a conceivable justification for the statute,

and that decision forecloses any conclusion to the contrary in this case.

Defendants do not discuss or dispute the applicability of *United States v. Forrester*, 616 F.3d 929, 935-36 (9th Cir.2010) and *United States v. Carlson*, 87 F.3d 440, 446 (11th Cir. 1996), cited by the United States in its motion for reconsideration, which both held that a criminal defendant may not collaterally attack in a criminal case the Drug Enforcement Administrator's final regulatory decision to schedule a Controlled Substance. While both *Forrester* and *Carlson* involved challenges by criminal defendants of the DEA Administrator's listing of 3,4-Methylenedioxymethamphetamine (MDMA or ecstasy) as a Schedule I Controlled Substance, the holding and rationale of both cases apply and control the instant case.

Here, Defendants seek to collaterally attack under the guise of challenges under equal protection and equal sovereignty of states the DEA Administrator's refusal to re-schedule marijuana as a Schedule I Controlled Substance. However, common sense and logic compel the conclusion that in the event that the Administrator's scheduling decision of marijuana is legally and rationally sound, there can be no successful constitutional challenge. The Court in *Carlson* cautioned district courts from engaging in Controlled Substances scheduling disputes and explained:

> [T]he decision to schedule a substance like MDMA is a complex matter, as the instant case illustrates. Here the ALJ heard thirty-three witnesses and admitted ninety-five exhibits, and the decision went through at least one layer of administrative review. To retry the agency decision in a criminal case like that before us would introduce a great deal of confusion. Second, and more importantly, the agency itself is not a party in the case; hence, it has no opportunity to defend its scheduling order. The agency record is not before us. . . . Substantive reconsideration cannot be permitted in a criminal prosecution in which the authority that made the classification decision is not a party. . . . There is an avenue available to seek to overturn the scheduling decision: "[P]roceedings for . . . amendment, or repeal of such [classification] rules may be initiated by the Attorney General . . . on the petition of any interested party." 21 U.S.C. § 811(a).

Id., at 446.

The Ninth Circuit in *Forrester* favorably quoted the Eleventh Circuit's reasoning in *Carlson* when the Ninth Circuit rejected a criminal defendant's request for an evidentiary hearing in support of his claim that ecstasy should not have been listed as a Schedule I Controlled Substance and added, "[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." *United States v. Forrester*, 616 F.3d at 936.

The reasoning set forth in *Carlson* and *Forrester* applies equally to the present case and bars Defendants' attempt to introduce evidence that the scheduling of marijuana in 21 U.S.C. § 812, Schedule I(c)(10) and (17) is unenforceable and may not be prosecuted under 21 U.S.C. §§ 841(a)(1) and 846. Applying *Carlson* and *Forrester* here, the Court should reverse its ruling granting defendants an evidentiary hearing in support of their motion challenging those statutes.

III. Rational Basis is the Correct Standard of Review.

Defendants argue in favor of a standard of review higher than rational basis, arguing that criminal cases implicate the fundamental right of liberty, and also the marijuana laws adversely affect a suspect class. The *Chapman* case cited by both parties is not limited to sentencing issues. *Chapman v. United States*, 500 U.S. 453 (1991). *Chapman* confirms that because other constitutional guarantees of due process protect the liberty rights of defendants, the standard of review for an equal protection challenge to a statute is rational basis. 500 U.S. at 464-65. There being no fundamental right to grow marijuana, as alleged in the indictment in this case, presumably for profit, the standard of review is rational basis.

Defendants secondarily argue in favor of a higher standard of review based on suspect class, but do not actually allege that Defendant Pickard is a member of that class (i.e., African American), and as such lack standing to raise the argument. *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1171 (9th Cir. 2007). The government requests reconsideration and/or clarification of this threshold question of whether Defendants are entitled to a higher standard of review based on suspect class.

IV. No Standing to Challenge Cole Memorandum

Defendants similarly lack standing to challenge the Cole Memorandum of August 29, 2013, having been indicted before its issuance date. Defendants do not allege a basis for standing now, but rather suggest that this Court already decided the issue in ordering the evidentiary hearing. The

government respectfully asserts that the issue was not actually decided one way or the other at the March 14, 2014, hearing. Because this is also an important threshold issue that should precede any evidentiary hearing, the government asks for clarification, and reconsideration to the extent appropriate, of the Court's order on this basis.

V. Conclusion

The government asks the Court reconsider in its discretion its order granting an evidentiary hearing, vacate the hearing, and to deny the defendants' motion to dismiss the indictment.

DATED: April 11, 2014

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