BENJAMIN B. WAGNER
United States Attorney
AUDREY B. HEMESATH
GREGORY T. BRODERICK
Assistant U.S. Attorneys
501 I Street, Suite 10-100
Sacramento, CA 95814
(916) 554-2700

Attorneys for Plaintiff
United States of America

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 GOVERNMENT'S SUPPLEMENTAL BRIEF Date: May 21, 2014 Time: 9:00 am Hon. Kimberly J. Mueller

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. Introduction....1

II. Defendants Lack Standing to Challenge Marijuana's Status as A Schedule I Substance....1

III. This Court Lacks Subject Matter Jurisdiction to Determine Whether Marijuana May Continue to Be Included On Schedule I....3

A. Section 877 Deprives this Court of Subject Matter Jurisdiction to Determine Whether Marijuana May Remain A Schedule I Controlled Substance....4

B. Defendants Are Challenging the Scheduling Decision....7

C. Holding An Evidentiary Hearing On An Issue Over Which the Court Lacks Subject Matter Jurisdiction is An Abuse of Discretion....9

IV. Supplemental Questions....10

A. The Standard of Review Must Be Decided Before Any Evidentiary Hearing....10

1a. What authority requires or counsels that the court decide before the evidentiary hearing the standard of review it will apply in resolving the merits of defendants' motion?....11

B. The Standard of Review is Rational Basis....12

2a. Assuming the court articulates a standard of review before the hearing, what precisely should that standard be?....13

2b. How do defendants' fundamental rights, if any, affect the identification of the appropriate standard?....14

2c. Even if the court articulates a standard prior to hearing, could the evidence elicited at the hearing cause the court to reconsider the appropriate standard prior to turning to the merits of the defendants' motion?....15

C. There Is No Racial Classification In The Controlled Substances Act....17

3a. Are defendants Juan Madrigal Olivera, Manuel Madrigal Olivera, Rodriguez, Camacho-Reyes, Betancourt-Meraz and Tapia entitled to a higher standard of review based on suspect classification?....18

3b. If yes, what are the implications for the standard of review applicable to other defendants?....18

D. The Equal Sovereignty Argument Should Be Rejected On The Pleadings....19

4a. Is the taking of live testimony warranted with respect to the equal sovereignty question raised by defendants' motion?....19

4b. If so, what precisely is the testimony a party proffers on the question and what is the appropriate scope of any such hearing?....19

V. Conclusion....19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

FEDERAL CASES

Alternative Community Health Care Coop. v. Holder,
2012 WL 707154 (S.D. Cal. March 5, 2012)....13

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006)....6

Babbitt v. United Farm Workers Nat'l Union,
442 U.S. 289 [99 S.Ct. 2301] (1979)....2

Castaneda v. Partida,
430 U.S. 482 (1977)....18

Chang v. United States,
327 F.3d 911 (9th Cir. 2003)....9

Chapman v. United States,
500 U.S. 453 (1991)....14, 15

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985)....12

Connelly v. Steel Valley Sch. Dist.,
706 F.3d 209 (3d Cir. 2013)....10

Consejo de Desarrollo Economico de Mexicali, A.C. v. United States,
482 F.3d 1157 (9th Cir. 2007)....18

Dept. of Labor v. Triplett,
494 U.S. 715 (1990)....19

Elgin v. Dep't of the Treasury,,
132 S. Ct. 2126, 183 L. Ed. 2d 1 (2012)....6

FCC v. Beach Comm.,
508 U.S. 307 (1993)....11

Fry v. D.E.A.,
353 F.3d 1041 (9th Cir. 2003)....4

Gonzales v. Raich,
545 U.S. 1 (2005)....13, 19

Heller v. Doe,
509 U.S. 312 (1993)....10, 14

1 *John Doe, Inc. v. Drug Enforcement Admin.*,
2 484 F.3d 561 (D.C. Cir. 2007) 4, 8
3 *Kahawaiolaa v. A. Norton*,
4 386 F.3d 1271 (9th Cir. 2004) 11, 13
5 *Kline v. Burke Const. Co.*,
260 U.S. 226 (1922) 5
6 *Kuromiya v. United States*,
7 37 F. Supp. 2d 717 (E.D. Pa. 1999) 14
8 *Latif v. Holder*,
686 F.3d 1122 (9th Cir. 2012) 5
9
10 *Lewis v. Casey*,
518 U.S. 343 (1996) 6
11
12 *Marin Alliance for Medical Marijuana v. Holder*,
2012 WL 2862608 (N.D. Cal. July 11, 2012) 13
13 *In re Martinez*,
14 721 F.2d 262 (9th Cir. 1983) 1
15 *McClesky v. Kemp*,
481 U.S. 279 (1987) 16
16
17 *Natural Resources Defense Council v. Jewell*,
--- F.3d ----, 2014 WL 1465695, *4 (9th Cir. April 16, 2014) 2
18
19 *NORML v. Bell*,
488 F. Supp. 123 (D.D.C. 1980) 17
20 *Oregon v. Ashcroft*,
21 368 F.3d 1118 (9th Cir. 2004) 4
22 *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*,
725 F.2d 537 (9th Cir. 1984) 1
23
24 *Personal Admin. of Massachusetts v. Feeney*,
442 U.S. 256 (1979) 11, 17, 18
25
26 *Pickup v. Brown*,
740 F.3d 1208 (9th Cir. 2014) 7
27 *Raich v. Gonzales*,
28 500 F.3d 850 (9th Cir. 2007) 19

Sacramento Nonprofit Collective v. Holder,
855 F. Supp. 2d 1100 (E.D. Cal. 2012)....................2, 13

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973)....................10, 11, 15

Singleton v. Wulff,
428 U.S. 106 (1976)....................19

Skinner v. Oklahoma,
316 U.S. 535 (1942)....................15

Torres-Aguilar v. I.N.S.,
246 F.3d 1267 (9th Cir. 2001)....................9

United States ex rel. Joseph v. Cannon,
642 F.2d 1373 (1982)....................3

United States v. Burton,
894 F.2d 188 (6th Cir. 1990)....................13

United States v. Canori,
737 F.3d 181 (2d Cir. 2013)....................13

United States v. Carlson,
87 F.3d 440 (11th Cir. 1996)....................5

United States v. Carolene Products Co.,
304 U.S. 144 (1938)....................14

United States v. Chacon-Palomares,
208 F.3d 1157 (9th Cir. 2000)....................9

United States v. Chan,
2006 WL 734395 (N.D. Cal. March 20, 2006)....................14

United States v. Clary,
34 F.3d 709 (8th Cir. 1994)....................12

United States v. Coleman,
24 F.3d 37 (9th Cir. 1994)....................16, 17

United States v. Dellas,
267 Fed. Appx. 573 (9th Cir. 2008)....................12, 13

United States v. Dumas,
64 F.3d 1427 (9th Cir. 1995)....................17

United States v. Ernst,
857 F. Supp. 2d 1098 (D. Or. 2012) 13

United States v. Erwin,
602 F.2d 1183 (5th Cir. 1979) 13

United States v. Forrester,
616 F.3d 929 (9th Cir. 2010) 4, 5, 8

United States v. Fry,
787 F.2d 903 (4th Cir. 1986) 13

United States v. Harding,
971 F.2d 410 (9th Cir. 1992) 10, 11, 12, 14, 15

United States v. Johnson,
40 F.3d 436 (D.C. Cir. 1994) 15, 16

United States v. Lepp,
2013 WL 1435144 (N.D. Cal. April 9, 2013) 13

United States v. Kiffer,
477 F.2d 349 (2d Cir. 1973) 6

United States v. Mandel,
914 F.2d 1215 (9th Cir. 1990) 3, 9

United States v. McFarland,
2012 WL 5864008 (D.S.D. Nov. 19, 2012) 13

United States v. McWilliams,
138 F. App'x 1, 2 (9th Cir. 2005) 2

United States v. Middleton,
690 F.2d 820 (11th Cir.1982) 13

United States v. Miroyan,
577 F.2d 489 (9th Cir, 1978) 6, 12, 13

United States v. Osburn,
175 Fed. Appx 789, 790 (9th Cir. 2006) 2

United States v. Ruiz-Chairez,
493 F.3d 1089 (9th Cir. 2007) 14

United States v. Smith,
2012 WL 2620526 (E.D. Cal. July 5, 2012) 13

United States v. Tat,
2014 WL 1646943 (W.D. Penn. April 24, 2014)....2

United States v. Washington,
887 F. Supp. 2d 1077 (D. Mont. 2012)....13

United States v. White Plume,
447 F.3d 1067 (8th Cir.2006)....13

United States v. Young,
2009 WL 899671 (N.D. Ind. 2009)....4

Warth v. Seldin,
422 U.S. 490, 95 S. Ct. 2197 (1975)....3

Washington v. Davis,
426 U.S. 229 (1976)....11, 18

Washington v. Glucksberg,
521 U.S. 702 (1997), *argued by Defendants* 15

Yakus v. United States,
321 U.S. 414 [64 S.Ct. 660] (1944)....5, 6

Yniguez v. State of Ariz.,
939 F.2d 727 (9th Cir. 1991)....7

Zank v. Landon,
205 F.2d 615 (9th Cir. 1953)....7, 9

FEDERAL STATUTES

7 U.S.C. § 13a....6

7 U.S.C. § 194-195....6

8 U.S.C. § 812(c), Schedule I (c)(10)....14

15 U.S.C. § 45(g)-(l)....6

21 U.S.C. § 811(a)....7

21 U.S.C. § 812(b)....8

21 U.S.C. § 841(a)....1

21 U.S.C. §§ 841(b)(1)(A)(vii)....2

21 U.S.C. §§ 841(b)(1)(B)(vii) 2
21 U.S.C. §§ 841(D) 2
21 U.S.C. § 877....................3, 4, 6, 8
28 U.S.C. § 1491(a) 5
49 U.S.C. § 6, *et seq*....................6
50 U.S.C. § 901 *et seq*....................5

OTHER AUTHORITIES

H.R. 499 3
H.R. 689 3
76 Fed. Reg. 40552 (July 8, 2011)....................3

I. Introduction

As set forth below, this Court should not hold an evidentiary hearing to determine "whether the continued inclusion of marijuana as a Schedule I controlled substance in Title 21 of the federal statutes passes constitutional muster." (Dkt. No. 271 at 3:9-13.) First, Defendants lack standing to raise any such argument, because neither their criminal liability nor their eventual criminal sentence depend on marijuana's status as a Schedule I substance. Second, this Court lacks jurisdiction to consider marijuana's status as a Schedule I controlled substance. In the absence of either standing or subject matter jurisdiction, it is an abuse of discretion to proceed with an evidentiary hearing.

While the United States is mindful that the Court's April 22 Order states that this brief "should not repeat arguments made in the parties' briefing to date" (Dkt. No. 271 at 4:13), these arguments do not do so because the Court has now clarified that it is considering a challenge to maintaining marijuana "as a Schedule I controlled substance." (*Id.* at 3:9-13.) Defendants have previously expressly disclaimed any attack on the Scheduling of marijuana. (*See* March 19, 2014, Transcript at 8:23-9:4 ("We are not challenging the Attorney General, the DEA's discretionary decision to classify -- or to keep marijuana classified as Schedule I….")) This brief thus presents new arguments based on the new question presented in the April 22 Order.[1]

Finally, should the Court proceed, the United States has answered the specific questions set forth in the April 22 Order in Section III, below.

II. Defendants Lack Standing to Challenge Marijuana's Status as A Schedule I Substance.

Defendants lack standing to challenge marijuana's status as a Schedule I controlled substance because they are criminally liable regardless of whether marijuana is on Schedule I. Defendants are charged with violating 21 U.S.C. § 841(a), which prohibits (among other things) the manufacturing of and distributing of any controlled substance. That is, their charges are not dependent upon marijuana's status as a Schedule I substance. So long as marijuana is treated as a controlled substance *at all*,

[1] Regardless, this Court is "duty bound" to consider and determine its subject matter jurisdiction any time it is in question, even where neither party raises the issue. *In re Martinez*, 721 F.2d 262, 264 (9th Cir. 1983). For this same reason, any prior concession regarding the Court's jurisdiction is irrelevant. The parties cannot confer subject matter jurisdiction on the Court by consent or waiver. *See Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir. 1984) (Parties may not "confer upon an Article III court a subject matter jurisdiction that Congress or the Constitution forbid.")

1 Defendants' conduct violates section 841(a), and their sentences are controlled by § 841(b). Thus, it
2 makes no difference whether "the continued inclusion of marijuana as a Schedule I controlled
3 substance in Title 21 of the federal statutes passes constitutional muster." (Dkt. No. 271 at 3:9-13.)
4 As the Supreme Court has explained, federal courts are restricted to disputes that are "definite
5 and concrete, not hypothetical or abstract." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S.
6 289, 297 [99 S.Ct. 2301] (1979). Article III's "case-or-controversy requirement bars federal courts
7 from deciding questions that cannot affect the rights of litigants in the case before them." *Natural*
8 *Resources Defense Council v. Jewell*, --- F.3d ----, 2014 WL 1465695, *4 (9th Cir. April 16, 2014)
9 (internal quotations omitted). Put plainly, a decision holding that it is unconstitutional for marijuana to
10 be treated as a Schedule I substance will have no impact on whether Defendants go to jail or for how
11 long. Congress clearly manifested an intent that marijuana be treated as a controlled substance by first
12 placing it on Schedule I, and then by imposing marijuana-specific penalties in § 841(b). The statute
13 provides a minimum 10-year sentence for any person manufacturing or distributing "1,000 or more
14 marihuana plants," a 5-year minimum "100 or more marihuana plants," and up to 5 years in prison for
15 "less than 50 kilograms of marihuana." *See* 21 U.S.C. §§ 841(b)(1)(A)(vii), 841(b)(1)(B)(vii), and
16 841(D). These sentences apply regardless of whether marijuana is on Schedule I.
17 It is clear that Congress wanted marijuana treated as a controlled substance (whether Schedule I or
18 otherwise), and it imposed specific penalties for specific quantities of marijuana, regardless of where it
19 was scheduled. To make any difference, therefore, Defendants must demonstrate that it is unconstitutional
20 to *treat marijuana as a controlled substance*, not merely that it is inappropriate to continue to *keep*
21 *marijuana on Schedule I*. Without such proof, marijuana's status as a Schedule I substance is academic,
22 there is no concrete "case or controversy" under Article III, and this Court has no power to proceed.[2]
23
24
25
26
27
28

[2] The Ninth Circuit has twice rejected challenges to the rationality of marijuana's scheduling on standing grounds. *See United States v. Osburn*, 175 Fed. Appx 789, 790 (9th Cir. 2006) (unpublished) ("Because a rescheduling of marijuana would not have affected defendants' criminal liability, defendants lack standing to bring an equal protection challenge to the indictment."); *United States v. McWilliams*, 138 F. App'x 1, 2 (9th Cir. 2005) (unpublished) ("Changing marijuana's classification would not, therefore, provide grounds to invalidate his indictment, so McWilliams does not have standing to challenge that classification."); *see also United States v. Tat*, 2014 WL 1646943, at *4 (W.D. Penn. April 24, 2014) (rejecting constitutional challenge to marijuana's Schedule I status and explaining that "a criminal defendant who has not sought authorization from the Attorney General prior to manufacturing or distributing a Schedule I controlled substance lacks standing to challenge a drug's classification in Schedule I.").

1 Even if Defendants could patch together a basis for standing, it would still be imprudent for this
2 Court to entertain the broad and complicated question of criminalization of marijuana. Such prudential
3 limits on standing ensure that courts do not "decide abstract questions of wide public significance even
4 though other governmental institutions may be more competent to address the questions and even though
5 judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. 490, 500
6 95 S.Ct. 2197 (1975). Congress assigned this thorny question to the expert agencies—DEA and FDA—
7 who have reviewed it in the past and are reviewing it at present. *See* Rulemaking Petition to Reclassify
8 Cannabis for Medical Use from a Schedule I Controlled Substance to a Schedule II[3]; *see also* 76 Fed.Reg.
9 40552 (July 8, 2011) (denying petition for rescheduling marijuana). Congress is likewise weighing the
10 wisdom of continued criminalization of marijuana in this legislative session. *See* H.R. 499 (Ending
11 Federal Marijuana Prohibition Act of 2013), *available at* http://thomas.loc.gov/cgi-bin/query; *see also*
12 H.R. 689 (providing for re-scheduling of marijuana), *available at* http://thomas.loc.gov/cgi-bin/query.
13 As other Courts have noted, such broad political or policy questions are best left to the legislature.
14 Under the "cases and controversies" requirement of Article III, courts "traditionally have refused to
15 undertake decisions on questions that are ill-suited to judicial resolution." *United States ex rel. Joseph v.*
16 *Cannon*, 642 F.2d 1373, 1379 (1982); *see also United States v. Mandel*, 914 F.2d 1215 (9th Cir. 1990)
17 (basis for Secretary of Commerce's decision prohibiting export of particular technologies to Soviet Union
18 not susceptible to judicial review in criminal case). Because the scheduling decision makes no difference
19 to Defendants' cases, the Court should decline to wade into a hotly contested political issue that is the
20 current subject of administrative, legislative, and political proceedings.

21 **III. <u>This Court Lacks Subject Matter Jurisdiction to Determine Whether Marijuana</u>**
22 **<u>May Continue to Be Included On Schedule I</u>.**

23 This Court's April 22, 2014, Order states, for the first time, that the purpose of the evidentiary
24 hearing is to determine "whether the continued inclusion of marijuana as a Schedule I controlled
25 substance in Title 21 of the federal statutes passes constitutional muster." (Dkt. No. 271 at 3:9-13.) But
26 21 U.S.C. § 877 deprives this Court of jurisdiction over that question, even though the question is phrased
27 in constitutional terms. Marijuana continues to be listed on Schedule I because the agencies assigned by
28

[3] www.digitalarchives.wa.gov/GovernorGregoire/priorities/healthcare/petition/combined_document.pdf

Congress to make such scheduling determinations have decided not to re-schedule or de-schedule it. While there may be some other permissible constitutional challenge to the Controlled Substances Act over which this Court would have jurisdiction, it does not have jurisdiction over this challenge. Because Congress provided that the exclusive forum for making such a challenge is in the Circuit Courts after the administrative process, this Court lacks subject matter jurisdiction to consider or decide the question in this criminal prosecution, and thus may not hold an evidentiary hearing into the facts surrounding it.

A. Section 877 Deprives this Court of Subject Matter Jurisdiction to Determine Whether Marijuana May Remain A Schedule I Controlled Substance.

21 U.S.C. § 877 provides that the exclusive remedy for disputing the Scheduling of a drug under the Controlled Substances Act is in the appropriate circuit court:

> All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

The Ninth Circuit has held that § 877 is jurisdictional. *See Fry v. D.E.A.*, 353 F.3d 1041, 1044 (9th Cir. 2003) (failure to comply with § 877's requirements deprived court of jurisdiction); *see also Oregon v. Ashcroft*, 368 F.3d 1118, 1120 n.1 (9th Cir. 2004) (District Court lacked jurisdiction over action challenging Attorney General's determination that assisted suicide violated Controlled Substances Act because 21 U.S.C. § 877 vested exclusive jurisdiction over the question in circuit courts). Other federal courts are in accord. *John Doe, Inc. v. Drug Enforcement Admin.*, 484 F.3d 561, 568 (D.C. Cir. 2007) ("21 U.S.C. § 877 vests exclusive jurisdiction in the courts of appeals over '[a]ll final determinations, findings and conclusion' of the DEA applying the CSA."); *see also United States v. Young*, 2009 WL 899671 (N.D. Ind. 2009) (rejecting criminal defendants challenge to scheduling of drug because 21 U.S.C. § 877 provided exclusive jurisdiction for such challenges in the circuit courts).

In addition, the Ninth Circuit recently held that a criminal defendant was precluded from challenging the scheduling of a drug in his criminal case. *See United States v. Forrester*, 616 F.3d 929, 936 (9th Cir. 2010). After distinguishing a Supreme Court case permitting a constitutional challenge to a *temporary* scheduling order, the Court held that "substantive collateral attacks on permanent scheduling

1 orders are impermissible in criminal cases…." *Id.* Thus, *Forrester* concluded, the district court was right
2 to deny "an evidentiary hearing on the issue" when requested by a criminal defendant. The sole other
3 court to address this question is in accord. *See United States v. Carlson*, 87 F.3d 440, 446 (11th Cir.
4 1996).[4]

5 Defendants may not avoid § 877 or *Forrester* by re-framing the question in constitutional terms.
6 First, the Ninth Circuit has explained that plaintiffs may not craft constitutional claims "either as a means
7 of relitigating the merits of the previous administrative proceedings, or as a way of evading entirely
8 established administrative procedures." (internal quotations omitted). *Latif v. Holder*, 686 F.3d 1122,
9 1128 (9th Cir. 2012). That is what Defendants seek to do here. Nor is there anything untoward about
10 Congress providing an exclusive forum for challenging government action, even on constitutional
11 grounds. The Tucker Act, for example, provides that almost all claims for compensation brought under
12 the Constitution or federal statutes must be brought in the Court of Federal Claims. *See* 28 U.S.C. §
13 1491(a). It is a bedrock principal that Congress has plenary power over the jurisdiction of the lower
14 federal courts. *See Kline v. Burke Const. Co.*, 260 U.S. 226, 234 (1922) ("Only the jurisdiction of the
15 Supreme Court is derived directly from the Constitution. Every other court created by the general
16 government derives its jurisdiction wholly from the authority of Congress.") Congress may "withhold or
17 restrict such jurisdiction at its discretion." *Id.* This includes removing entire classes of cases from the
18 lower court's jurisdiction, as well as removing particular questions from a lower court's portfolio.

19 Although statutes depriving a district court of authority to hear constitutional challenges in a
20 criminal case are unusual, they are neither impermissible nor unprecedented. Congress did so in the
21 Emergency Price Control Act of 1942, 50 USC § 901 *et seq.*, which precluded a criminal defendant from
22 raising any challenge to a price set by the administrative agency. The Supreme Court upheld this provision
23 in *Yakus v. United States*, 321 U.S. 414, 444-46 [64 S.Ct. 660] (1944), explaining that "a constitutional
24 right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right
25 before a tribunal having jurisdiction to determine it." Rates set by the Interstate Commerce Commission
26 were also immune from collateral attack by criminal defendants, even on the grounds that the rate was
27
28 [4] Although these challenges do not appear to have been grounded in the Constitution, any distinction is immaterial. As set forth below, defendants' challenge here is statutory, not constitutional. And Congress deprived district courts over any "substantive" challenge to a Scheduling decision, whether constitutional, statutory, or otherwise. *Forrester*, 616 F.3d at 936.

1 irrational. *Id.* (citing 49 U.S.C. § 6, *et seq.*) Yet the Court explained that the "denial of the defense in such
2 a case does not violate any provision of the Constitution." *Id.* The Court cited the Packers and Stockyards
3 Act, 7 U.S.C. § 194-195, the Commodity Exchange Act, 7 U.S.C. § 13a, and the Federal Trade Commission
4 Act, 15 U.S.C. § 45(g)-(l) as other statutes imposing penal sanctions for violation of an administrative order
5 where the only remedy was to challenge the order in an exclusive forum. *Id.* at 445-46 & n.9.
6 Because it is clear that Congress may remove a district court's jurisdiction over constitutional
7 defenses by providing for exclusive jurisdiction in another forum, the real question is whether Congress
8 did so here. When determining whether Congress has "channel[led] judicial review of a constitutional
9 claim to a particular court," a court asks "only whether Congress' intent to preclude district court
10 jurisdiction was fairly discernible in the statutory scheme." *Elgin v. Dep't of the Treasury*, —— U.S. —
11 —, 132 S.Ct. 2126, 2132, 183 L.Ed.2d 1 (2012). Congress' intent to preclude re-litigation of the
12 Scheduling decisions is plain on the face of § 877, which provides that such decisions "shall be final
13 and conclusive" except for "review of the decision in the United States Court of Appeals for the
14 District of Columbia or for the circuit in which his principal place of business is located" within 30
15 days. 21 U.S.C. § 877. The statutory provisions the Supreme Court cited in *Yakus* contain virtually
16 identical language. For example, the Packers and Stockyards Act provides that an order of the
17 Secretary "shall be final and conclusive unless within thirty days after service the packer or swine
18 contractor appeals to the court of appeals for the circuit in which he has his principal place of
19 business…." Having used this language to preclude district court jurisdiction in other statutory
20 schemes, Congress' intent to preclude jurisdiction by using the same language in the Controlled
21 Substances Act is "fairly discernable."[5]
22 In addition, the structure of the Controlled Substances Act makes clear that Congress meant for
23 challenges to Scheduling—whatever their form or basis—should be made only in the Circuit Courts.
24 First, Congress permitted petitions for a change in Scheduling, and subjected those petitions to judicial
25
26 [5] The United States recognizes that other Courts have previously heard challenges to marijuana's Schedule I status in the context of a criminal case. *See, e.g.*, *United States v. Miroyan*, 577 F.2d
27 489 (9th Cir, 1978); *see also United States v. Kiffer*, 477 F.2d 349, 353 (2d Cir. 1973). The Supreme Court has cautioned that such "drive-by jurisdictional rulings" should "be accorded no
28 precedential effect," *Arbaugh v. Y&H Corp.*, 546 U.S 500, 511 (2006) (internal quotations omitted), and further held "that the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996).

review. 21 U.S.C. § 811(a). Second, providing for such challenges in the Circuit Courts ensures regional consistency. Otherwise, district courts within the same state—or even within the same district—might reach opposite conclusions. *See, e.g.*, *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (resolving disagreement on same issue from two courts within Eastern District of California). Third, permitting such challenges to be raised in individual criminal prosecutions could grind the already-burdened federal district courts to a halt, as defendants could make motions, request evidentiary hearings, and put on expert opinions to challenge the Scheduling of every drug. Because district court decisions do not bind other district courts—or even "the same judge in a subsequent action"— such challenges could be raised by every defendant, creating chaos. *Yniguez v. State of Ariz.*, 939 F.2d 727, 736-37 (9th Cir. 1991). Instead, Congress created an administrative forum for such challenges (complete with judicial review), and mandated that any challenge of any kind be brought in that forum. Otherwise, the Scheduling decision—including whether to re-schedule, de-schedule, or take no action—is "final and conclusive" and not subject to attack in any forum on any basis. Given the statutory language, the need for efficient judicial administration, and the importance of uniformity of national drug laws, it is "fairly discernable" that Congress meant § 877 to preclude district courts from entertaining challenges in individual cases.

Lacking jurisdiction to consider the question, this Court likewise lacks jurisdiction to determine the facts relevant to answering it. It is hornbook law that a court lacking subject matter jurisdiction may not "take any action," and that any "findings of fact and conclusions of law" it would make will be treated "as if not rendered." *Zank v. Landon*, 205 F.2d 615, 616 (9th Cir. 1953).

B. Defendants Are Challenging the Scheduling Decision.

This Court's April 22 Order permits a challenge to the Scheduling of marijuana. The Court has asked "whether the continued inclusion of marijuana as a Schedule I controlled substance in Title 21 of the federal statutes passes constitutional muster." The sole reason that marijuana continues to be included as a Schedule I substance is because DEA (by delegation from the Attorney General) has not rescheduled it, and a challenge to marijuana's "continued inclusion" is simply a challenge to the refusal to reschedule (or de-schedule) marijuana, written in the passive voice. This is impermissible, and violates Congress' directive depriving district courts of jurisdiction to consider the question.

Moreover, Defendants' papers openly challenge the Scheduling of marijuana. Despite

counsel's assurance at argument that they were not challenging Scheduling, (*see* March 19, 2014, Transcript at 8:23-9:4), their moving papers reveal that this is exactly what they are doing. The only argument made in the motion is that marijuana does not meet the statutory criteria for a Schedule I controlled substance, and Defendants themselves embrace this description of their argument. (*See* Motion, Dkt. No. 199-1, at 12:23-24 ("Cannabis Does Not Meet the Requirements for Inclusion as a Schedule I Controlled Substance."); *see also id.* at 30:5-7 ("marijuana does not fit the criteria of a Schedule I controlled substance.") *Forrester* squarely bars Defendants from making this challenge in criminal cases because § 877 deprives this Court of subject matter jurisdiction over the question.

The balance of Defendants' brief is dedicated to addressing the *statutory* factors for scheduling a drug. Defense argument (1)(a) is that marijuana does not have a high potential for abuse. (*See id.* at 13:5-11.) Defense argument (1)(b) is that marijuana has an accepted medical use in treatment in the United States. (*See id.* at 16:25-25:4). Defense argument 1(c) is that there is accepted safety for use of the drug under medical supervision. (*See id.* at 25:5-28:8). These three factors quote the *statutory* standard for determining whether a drug belongs on Schedule I. *See* 21 U.S.C. § 812(b).[6] Defendants not only mirror the language of § 812(b), but expressly challenge DEA's alleged "refusal to rationally evaluate the wisdom of this classification." (*Id.* at 17:1-2.) Defendants even recite, and spend eight pages arguing, DEA's five part test for determining whether a drug has a medical use. (*See id.* at 17-25.)

Whatever gloss Defendants may put on it, this is not a challenge to the statute, but to the *application* of the statute. This is precisely the question Congress deprived the district courts of jurisdiction to determine or consider by providing for exclusive jurisdiction in the Circuit Courts. *See* 21 U.S.C. § 877; *see also Forrester*, 616 F.3d at 936; *John Doe, Inc.*, 484 F.3d at 568. Defendants cannot transform their statutory challenge into a constitutional challenge by substituting the words "rational basis" for "arbitrary and capricious." The Ninth Circuit has rejected this gambit, holding in

---

[6] 21 U.S.C. § 812(b) provides, in relevant part:

The findings required for each of the schedules are as follows:

(1) Schedule I—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

analogous circumstances that a party "may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb." *Torres-Aguilar v. I.N.S.*, 246 F.3d 1267, 1271 (9th Cir. 2001). Doing so would permit parties to "circumvent clear congressional intent to eliminate judicial review" through "the facile device of re-characterizing an alleged abuse of discretion as a 'due process' violation." *Id*. That is the sleight of hand the defense attempts here: arguing that keeping marijuana on Schedule I is unconstitutional because it does not meet the standard for Schedule I. This is a constitutional challenge in name only, and § 877 does not permit it.[7]

C. Holding An Evidentiary Hearing On An Issue Over Which the Court Lacks Subject Matter Jurisdiction is An Abuse of Discretion.

The decision to hold an evidentiary hearing is reviewed for abuse of discretion. *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158-60 (9th Cir. 2000). A district court abuses its discretion when it rules in an irrational manner. *See Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003). Here, the order sets a hearing seeking evidence on a question over which the Court lacks jurisdiction. Because any "findings of fact and conclusions of law" will be treated "as if not rendered," *Zank*, 205 F.2d at 616, the entire hearing will be a nullity. It is irrational to collect evidence on a question that the Court is barred by Congress from answering, particularly where even factual findings resulting from the hearing will be disregarded. As the Ninth Circuit explained, "wasting judicial resources" by having a fact-finder do what it is precluded from doing "is irrational, even if well-motivated." *Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003). In addition, holding a hearing on a question over which the Court lacks jurisdiction does violence to Congress' express direction that the Court neither consider, nor decide the question.[8]

In an analogous case, the Ninth Circuit reversed a district judge's order permitting a criminal defendant to take discovery. *United States v. Mandel*, 914 F.2d 1215 (9th Cir. 1990). In *Mandel*, a federal law criminalized the export of sensitive technologies without an export license, but left the

---

[7] For the reasons set forth in Section I(A) above, the Court lacks jurisdiction to consider or decide the Scheduling challenge even if it is re-framed as a constitutional question.

[8] Based on counsel's repeated assertions that Defendants were not challenging the Scheduling, the United States did not argue the court would abuse its discretion by proceeding with a hearing. Now that the Court has clarified that the question for the hearing is "whether the continued inclusion of marijuana as a Schedule I controlled substance in Title 21 of the federal statutes passes constitutional muster," an evidentiary hearing is not within the Court's discretion.

decision of which technologies to prohibit to the Secretary of Commerce. *See id.* at 1216. When the defendant was charged with exporting listed technologies without a license, he sought discovery into the evidence for the Secretary's decision. *See id.* The district court permitted the discovery, but the Ninth Circuit reversed it as an "abuse of discretion," *id.* at 1219, citing controlling case law that the "Secretary's decision to place a commodity on the Controlled Commodities List is not subject to judicial review." *Id.* 1220 n.8. Likewise, the decision to keep marijuana as a Schedule I substance is not subject to judicial review in this forum. Therefore, this Court's order permitting inquiry into "whether the continued inclusion of marijuana as a Schedule I controlled substance in Title 21 of the federal statutes passes constitutional muster" is an abuse of discretion, for the Court lacks authority to answer the question on which the evidence is offered.

IV. Supplemental Questions.

The Court's order of April 22, 2014 poses four sets of specific questions, which the government now answers in turn.

A. The Standard of Review Must Be Decided Before Any Evidentiary Hearing.

The order contemplates an evidentiary hearing to probe the scientific and medical information relevant to the constitutionality of the categorization of marijuana as a Schedule I controlled substance. If the standard of review at the hearing is rational basis, then the government bears no burden of proof: Defendants must rebut every conceivable basis for the statutory classification, and the government is not obligated to introduce any evidence at all. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993); *United States v. Harding*, 971 F.2d 410, 412 (9th Cir. 1992). If, on the other hand, the standard of review is strict scrutiny, then the statute is not entitled to a presumption of validity, and government must demonstrate that the statute is narrowly tailored to serve a compelling governmental interest. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Rational basis scrutiny and strict scrutiny are at opposite ends of a spectrum, and often the selection of the standard of review is outcome-determinative. *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209 (3d Cir. 2013) (*quoting* Laurence H. Tribe, American Constitutional Law § 16–30, at 1089 (1st ed.1978) (strict scrutiny is a "virtual death-blow"); Laurence H. Tribe, American Constitutional Law § 16–2, at 1442–43 (2d ed. 1988) ("The traditional deference both to legislative purpose and to legislative selections among means continues ... to make the rationality

1 requirement largely equivalent to a strong presumption of constitutionality.”).)

2 Because of the extreme divergence between the two proposed standards of review, it is

3 imperative that the parties be apprised of the standard of review in advance of the hearing.

4 **1a. What authority requires or counsels that the court decide before the**
5 **evidentiary hearing the standard of review it will apply in resolving the merits of defendants' motion?**

6 Authority for this point is *Kahawaiolaa v. Norton*: “In determining whether the regulation

7 violates the Fifth Amendment, we must **first** determine the level of scrutiny to apply.” 386 F.3d 1271,

8 1277 (9th Cir. 2004) (emphasis added). *Kahawaiolaa* cites Supreme Court authority, which identifies

9 the same threshold requirement:

10 We must decide, **first**, whether the Texas system of financing public education operates to the
11 disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict scrutiny. If so, the judgment of the District
12 Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute
13 an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

14 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (emphasis added); *see also United*

15 *States v. Harding*, 971 F.2d 410, 412 (9th Cir. 1992) (“We **first** determine the relevant scrutiny standard,

16 and **then apply** it to the facts of this case.”) (emphasis added.)

17 If the Court does not announce the standard of review in advance of the evidentiary hearing, it is

18 unknown which party bears the burden of proof. Defendants bear the burden of proving the

19 unconstitutionality of the statute under rational basis review. *FCC v. Beach Comm.*, 508 U.S. 307, 315

20 (1993). The government bears the burden of proving the extraordinary justification for the statute under

21 strict scrutiny. *Personal Admin. of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). The

22 government would not be obligated to present evidence in rational basis review. *Beach Comm.*, 508

23 U.S. at 315. Defendants would not be obligated to produce evidence in strict scrutiny, because the

24 statute would be presumptively invalid. *Feeney*, 442 U.S. at 272. For this reason, “[t]he conclusion of

25 whether a governmental act is subject to strict scrutiny or rational basis examination is important, as it

26 often determines the outcome of the inquiry.” *Kahawaiolaa* , 386 F.3d at 1278.

27 Equal protection cases are often decided without an evidentiary hearing. *See, e.g., Washington v.*

28 *Davis*, 426 U.S. 229, 251-52 (1976) (decided at the district court level in summary judgment posture

1 based on record evidence; Supreme Court affirmed this approach and declined to remand for further fact-
2 finding); *United States v. Miroyan*, 577 F.2d 489 (9th Cir, 1978) (sustaining the rationality of the
3 categorization of marijuana as Schedule I without evidentiary hearing); *United States v. Dellas*, 267 Fed.
4 Appx. 573 (9th Cir. 2008) (unpublished) ("For the sake of argument we can stipulate: (1) that Dellas
5 accurately interprets the scientific evidence, and (2) that, in some circumstances, a law could be declared
6 violative of due process because the factual assumptions underlaying the law have been subsequently
7 disproved, and the legislature has failed to respond in any manner. Even with these stipulations, Dellas's
8 challenge [to the constitutionality of the categorization of marijuana as Schedule I] fails. . . .The district
9 court did not abuse its discretion in denying Della's request for an evidentiary hearing on this issue.").

10 To the extent that evidentiary hearings in equal protection cases do occur, they occur under a
11 known standard of review. *See, e.g.*, *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992) (affirming the
12 finding of the district court, after hearing, that the differential treatment of crack cocaine did not violate the
13 Equal Protection Clause); *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994) (reversing the district court's
14 finding, after four day evidentiary hearing, that the 100 to 1 ratio for crack cocaine was in violation of the
15 Equal Protection clause, finding that the issue could have been decided based on existing circuit precedent,
16 and also that the evidence before the district court was not enough to trigger strict scrutiny review).

17 This, in combination with the Supreme Court and Ninth Circuit precedent counseling that the
18 standard of review be identified first, should spur the Court to identify the level of scrutiny in advance
19 of the evidentiary hearing. Both parties will benefit from an articulation of which side bears the burden
20 of proof. Both parties will be able to identify witnesses, determine the scope of any cross-examination,
21 and create a record if the standard of review is clear.

22 For these reasons, it is both prudent and advisable under precedent to announce the standard of
23 review in advance of the evidentiary hearing.

24 **B. The Standard of Review is Rational Basis.**

25 The correct standard of review for a neutral law that implicates no fundamental rights and no
26 suspect class is rational basis. "The general rule is that legislation is presumed to be valid and will be
27 sustained if the classification drawn by the statute is rationally related to a legitimate [government]
28 interest." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

2a. Assuming the court articulates a standard of review before the hearing, what precisely should that standard be?

The standard should be rational basis. The Controlled Substances Act is race-neutral and burdens no fundamental right; the correct level of scrutiny is rational basis. *Kahawaiolaa*, 386 F.3d at 1277. Rational basis is the standard of review that the Ninth Circuit has already selected in resolving this question. *Miroyan*, 577 F.2d at 495.

Every Court of Appeals to consider the constitutionality of the scheduling of marijuana has applied rational basis standard of review and upheld the statute. *See, e.g.*, *Sacramento Nonprofit Collective v. Holder*, 2014 WL 128998 (9th Cir. Jan. 15, 2014) (unpublished) (citing *Miroyan*); *Dellas*, 267 Fed. Appx. at 574 (unpublished) (same); *Miroyan*, 577 F.2d at 495; *United States v. Canori*, 737 F.3d 181 (2d Cir. 2013); *United States v. White Plume*, 447 F.3d 1067, 1076 (8th Cir.2006); *United States v. Burton*, 894 F.2d 188, 192 (6th Cir. 1990); *United States v. Fry*, 787 F.2d 903, 905 (4th Cir. 1986); *United States v. Middleton*, 690 F.2d 820, 824 (11th Cir.1982); *United States v. Erwin*, 602 F.2d 1183, 1185 (5th Cir. 1979).

Every other district court asked to consider the questions presented in the Defendants' motion to dismiss has declined to engage. *United States v. Lepp*, 2013 WL 1435144 (N.D. Cal. April 9, 2013) (unpublished) (equal protection claims foreclosed by *Raich* and *Sacramento Nonprofit Collective*); *United States v. McFarland*, 2012 WL 5864008 (D.S.D. Nov. 19, 2012) (unpublished) (declining to revisit issue of rationality of statute based on new evidence); *United States v. Washington*, 887 F.Supp.2d 1077, 1102-03 (D. Mont. 2012) (declining to elevate standard of review above rational basis because defendant did not demonstrate fundamental right to use marijuana); *Alternative Community Health Care Coop. v. Holder*, 2012 WL 707154 (S.D. Cal. March 5, 2012) (unpublished) (equal protection and Tenth Amendment claims foreclosed by precedent); *Marin Alliance for Medical Marijuana v. Holder*, 2012 WL 2862608 (N.D. Cal. July 11, 2012) (unpublished) (*Miroyan* forecloses equal protection claim); *United States v. Smith*, 2012 WL 2620526 (E.D. Cal. July 5, 2012) (unpublished) (equal protection and Tenth Amendment claims foreclosed by Ninth Circuit precedent); *United States v. Ernst*, 857 F.Supp.2d 1098 (D. Or. 2012) (*Raich* forecloses Fifth, Ninth and Tenth Amendment challenges); *Sacramento Nonprofit Collective v. Holder,* 855 F.Supp.2d 1100 (E.D. Cal.

2012) (equal protection claim foreclosed by Ninth Circuit precedent); *United States v. Chan*, 2006 WL 734395 (N.D. Cal. March 20, 2006) (unpublished) ("Defendant has requested an evidentiary hearing on whether marijuana meets the criteria for classification in Schedule I. In light of the holding of *Miroyan*, this Court will not conduct such a hearing absent further guidance from the Ninth Circuit."); *Kuromiya v. United States*, 37 F.Supp.2d 717, 727 (E.D. Pa. 1999) ("Given the fact that there is an administrative procedure by which new evidence regarding marijuana can be submitted and by which the scheduling of the drug may be changed . . . the court cannot say that it was irrational of Congress to act as it did, either generally under the CSA or more specifically as to the prohibition of medical marijuana").

The government bears no burden of proof under the rational basis standard. The government is not obligated to produce evidence to support the legislative classification. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993); *United States v. Harding*, 971 F.2d 410, 412 (9th Cir. 1992). Defendants will have to prove that the inclusion of marijuana on Schedule I is not even debatable. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (a statutory classification based on a question which is at least debatable is valid); *Harding*, 971 F.2d at 413 ("To challenge the Sentencing Guidelines successfully, the defendant in this case must be able to demonstrate that the relevance of the distinction between crack and powder cocaine is not even debatable."); *United States v. Ruiz-Chairez*, 493 F.3d 1089 (9th Cir. 2007) "[T]he government shoulders no burden to proffer a basis for a distinction that Congress and the Sentencing Commission have made.").

2b. How do defendants' fundamental rights, if any, affect the identification of the appropriate standard?

Defendants enjoy a fundamental right to liberty. The statute, 8 U.S.C. § 812(c), Schedule I (c)(10), does not encroach on that liberty interest. The only way it could would be if there were a constitutional right to manufacture marijuana, which of course there is not. If there were a constitutional right to manufacture marijuana, then the government would have to concede that the statute encroaches on that right, and the statute could only be sustained via proof that the law was narrowly tailored in support of a compelling governmental interest (strict scrutiny).

Defendants suggest that because they are being criminally prosecuted, the law implicates their fundamental right to liberty, but this argument is mistaken, and the mistake is explained in *Chapman v.*

1 *United States*, 500 U.S. 453 (1991). *Chapman* confirms that because other constitutional guarantees of
2 due process protect the liberty rights of defendants, the standard of review for an equal protection
3 challenge to a statute is rational basis. 500 U.S. at 464-65; *see also United States v. Johnson*, 40 F.3d 436,
4 439 n. 1 (D.C. Cir. 1994) (declining to apply strict scrutiny based on the fundamental right of "liberty" in a
5 crack cocaine equal protection challenge: "Appellants' asserted 'liberty interests' bear no relation to the
6 fundamental 'rights' at stake in cases such as *Rodriguez* (education) and *Skinner v. Oklahoma*, 316 U.S.
7 535, 541 (1942) (marriage and procreation), interests which represented more than just the manufactured
8 'right' to be free from the very punishment at issue in the core equal protection challenge.").

9 The Ninth Circuit has already held that section 841(b) of Title 21, the penalty portion of the
10 Controlled Substances Act, does not implicate a fundamental right. *United States v. Harding*, 971 F.2d
11 410, 412 (9th Cir. 1992). It follows that the Scheduling portion of the Act is similarly susceptible only to
12 rational basis review, if at all.

13 *Washington v. Glucksberg*, 521 U.S. 702 (1997), argued by Defendants, does not establish that
14 the courts must apply strict scrutiny to all criminal statutes. *Glucksberg* is about assisted suicide. The
15 liberty interest asserted in that case was related to suicide, not to the broad freedom from incarceration
16 as alleged here. The Supreme Court held that there was no Equal Protection violation in Washington
17 state's criminalization of causing or aiding suicide. 521 U.S. at 706. Furthermore, *Glucksberg* declined
18 to expand the list of fundamental rights enumerated in that case. 521 U.S. at 719-20. *Glucksberg*
19 upheld the criminal statute under rational basis review. 521 U.S. at 735.

20 Accordingly, the standard of review here, as for all equal protection challenges to criminal
21 statutes that do not implicate fundamental rights, is rational basis. In this case, the issue of "fundamental
22 right" is purely legal, and ought to be decided on the pleadings in advance of the hearing.

23 **2c. Even if the court articulates a standard prior to hearing, could the evidence**
24 **elicited at the hearing cause the court to reconsider the appropriate standard prior to turning to the merits of the defendants' motion?**

25 No. There are only two ways the standard of review could be elevated from rational basis to
26 strict scrutiny: through the assertion of a fundamental right, or through proof that the law is not race-
27 neutral. The fundamental right issue is a purely legal question in this case and will not be impacted by
28 any testimony at the hearing.

As to the issue of race-neutrality, per this Court's order of April 22, 2014, only four defense witnesses will testify at the hearing: Philip Denney, M.D., James J. Nolan, III, Ph.D., Christopher Conrad, and Sergeant Ryan Begin. None of these witnesses will be able to testify on the issue of invidious intent, which is a prerequisite to a finding that a law must be evaluated under strict scrutiny. At most, James Nolan will testify on the issue of disparate impact. *See* Declaration of James Nolan, ECF No. 199-3, pg. 3 (allegation that African Americans are 3.73 times more likely to be arrested for marijuana-related crimes)[9]. Evidence of disparate impact alone is not enough to raise the standard of review. Defendants must also prove invidious intent. *United States v. Coleman*, 24 F.3d 37, 39 (9th Cir. 1994) ("[E]ven if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.") (internal quotation and citation omitted).

Without testimony or evidence on invidious intent, it is impossible for the standard to be raised above rational basis. Because the scope of the evidentiary hearing is now limited to scientific and medical evidence on marijuana, there is no chance the Court will hear evidence at that hearing that would cause the Court to elevate the standard of review.

To the extent Defendants will now proffer evidence of invidious intent, it may be proper for the Court to consider that evidence first, in conjunction with any proffered evidence of disparate impact. Defendants bear the burden of proving both. *Coleman*, 24 F.3d at 39 ("Because Coleman has not established discriminatory intent, we must sustain the sentencing scheme as long as it is rationally based."). Defendants gave an "example" of this evidence in the opposition to the government's motion for reconsideration. ECF No. 266 at pg. 12 (statement of Congressman Steve Cohen). If this is the only "example" of invidious intent evidence, it is insufficient. The allegation is that President Nixon made a statement that the drug war "is really about the blacks," and that his White House Counsel stated similar

[9] The Nolan Declaration also contains reference to a statement by the Commissioner of the Federal Bureau of Narcotics in conjunction with the Marijuana Tax Act of 1937. ECF No. 199-3 at pg. 3. However, this statement has no bearing on the Congressional intent in enacting the Controlled Substances Act in 1970. *McClesky v. Kemp*, 481 U.S. 279, 298 n. 20 (1987) ("unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value."). Nor is it enough to ascribe a racist intent to the whole of that 1970 Congress. "Appellants urge us to ascribe a discriminatory intent to Congress based on rather sketchy and unpersuasive bits of information." *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994).

1 in a book interview after the fact. *Id.* However, it is the intent of **Congress** that is relevant in this
2 inquiry. *Dumas*, 64 F.3d at 1430 (rejecting an argument that Congress had a discriminatory intent in
3 passing the 100 to 1 crack cocaine laws). None of the evidence proffered by the Defendants thus far
4 even suggests, let alone proves, that the intent of the 1970 Congress was to discriminate against African
5 Americans via the inclusion of marijuana in Schedule I of the Controlled Substances Act. *NORML v.*
6 *Bell*, 488 F.Supp. 123, n. 44 (D.D.C. 1980) ("NORML also suggests that the marijuana provisions of the
7 CSA are racially discriminatory because they are most often applied against blacks. This claim is
8 meritless. Congress passed the CSA to promote the public health and welfare, and there is no
9 discriminatory intent.").

10 To the extent that the record in this case is not already closed, the government should be given
11 the opportunity to respond to any proffer in advance of the evidentiary hearing on the separate issue of
12 the scientific and medical evidence on marijuana.

13 **C. There Is No Racial Classification In The Controlled Substances Act.**

14 The Controlled Substances Act is a race-neutral law. There is no racial classification in the
15 statute itself. Defendants' claim of race-based discrimination must therefore come from a theory of
16 invidious intent and disparate impact.

17 > [W]hen a statute []neutral on its face is challenged on the ground that its effects upon
18 > [minorities] are disproportionately adverse, a two-fold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is
19 > not [race]-based. If the classification itself, covert or overt, the second question is whether the adverse effect reflects invidious [race]-based discrimination. . . .In this
20 > second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution. It is against this background
21 > of precedent that we consider the merits of the case before us.

22 *Personal Admin. of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

23 Defendants first bear the burden of demonstrating discriminatory intent. Unless defendants can
24 first establish discriminatory intent, the correct standard of review is rational basis. *Feeney*, 442 U.S. at
25 272 ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is
26 unconstitutional under the Equal Protection Clause **only if that impact can be traced to a discriminatory**
27 **purpose**.") (emphasis added); *Coleman*, 24 F.3d at 39 ("Because Coleman has not established
28 discriminatory intent, we must sustain the sentencing scheme as long as it is rationally based.").

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3a. Are defendants Juan Madrigal Olivera, Manuel Madrigal Olivera, Rodriguez, Camacho-Reyes, Betancourt-Meraz[10] and Tapia entitled to a higher standard of review based on suspect classification?

No. Defendants' argument in favor of strict scrutiny review is flawed in two ways: first, Defendants have not alleged nor proffered any evidence of invidious intent of the 1970 Congress; and second, Defendants have not alleged that they are a member of the class (African American) that allegedly suffers the disparate impact.

To succeed, these Defendants would have to prove: (1) they are a member of a protected class; (2) Congress harbored an invidious intent to harm that class when it authored Schedule I of the Controlled Substances Act; and (3) Schedule I of the Controlled Substances Act has a disparate impact on that protected class. As the pleadings currently stand, there is no allegation of invidious intent of the 1970 Congress. *Feeney*, 442 U.S. at 276. There is also no allegation that defendants are members of the protected class that is allegedly suffering the disparate impact. *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1171 (9th Cir. 2007).

Both of these are threshold requirements before the Court may consider evidence of a disparate impact. Whether defendants can prove discriminatory intent is the "dispositive question." *Feeney*, 442 U.S. at 276. "[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). "Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.*

Whether Defendants are a member of the protected class is also a dispositive question. Standing is a required element in race-based equal protection challenges. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). Defendants in this case do not allege to be members of the protected class identified in the Nolan Declaration (African American), nor in the alleged Nixon commentary (African American). The Court should decline to apply strict scrutiny on this simple basis.

3b. If yes, what are the implications for the standard of review applicable to other defendants?

The other Defendants can only challenge whether there is a rational basis to the law. There is no

[10] Betancourt-Meraz pleaded guilty on April 23, 2014, and withdrew from this motion. ECF No. 273.

third party standing to challenge the alleged discriminatory impact and discriminatory intent in this context. *Dept. of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *Singleton v. Wulff*, 428 U.S. 106 (1976).

D. The Equal Sovereignty Argument Should Be Rejected On The Pleadings.

The Controlled Substances Act does not treat any one state differently from any other. The Court has now clarified in its April 22 order that the Cole Memorandum of August 29, 2013 will not be at issue. ECF No. 271 at pg. 3 ("the hearing will not include the presentation of evidence applicable only to . . . any administrative decision of the Attorney General."). Defendants are limited to challenging the statute itself, and the statute treats all states equally. There is no Tenth Amendment claim to be made.

4a. Is the taking of live testimony warranted with respect to the equal sovereignty question raised by defendants' motion?

No. Any remaining Tenth Amendment challenge to the statute is foreclosed by binding precedent. *Gonzales v. Raich*, 545 U.S. 1, 22, 29–33 (2005); *Raich v. Gonzales*, 500 F.3d 850, 867 (9th Cir. 2007).

4b. If so, what precisely is the testimony a party proffers on the question and what is the appropriate scope of any such hearing?

At this time, the government does not intend to introduce evidence on the equal sovereignty issue; however, upon clarification of any remaining aspect of Defendants' Tenth Amendment challenge, the government may wish to rebut any proffered evidence.

V. <u>Conclusion</u>

For these reasons, the Court should reject the motion to dismiss the indictment for lack of standing or lack of subject matter jurisdiction. If the Court holds an evidentiary hearing, the government urges the Court to set the standard of review as rational basis in advance of the hearing, and to limit the scope of the hearing accordingly.

Respectfully Submitted,

DATED: May 9, 2014

BENJAMIN B. WAGNER
United States Attorney

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

By: /s/ Gregory T. Broderick
GREGORY T. BRODERICK
Assistant U.S. Attorneys