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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>BRYAN R. SCHWEDER,<br>BRIAN PICKARD,<br>JUAN MADRIGAL OLIVERA,<br>MANUAL MADRIGAL OLIVERA,<br>FRED W. HOLMES, III,<br>EFREN RODRIGUEZ,<br>PAUL CRUCE ROCKWELL,<br>HOMERO LOPEZ-BARRON<br>VICTORINO BETANCOURT-MERAZ,<br>OSEAS CARDENAS-TOLENTINO,<br>FERNANDO REYES-MOJICA,<br>JUAN CISNEROS-VARGAS,<br>LEONARDO TAPIA,<br>FILBERTO ESPINOZA-TAPIA, and<br>OSIEL VALENCIA-ALVAREZ,<br><br>Defendants. | Case No. 2:11-CR-00449-KJM<br><br>DEFENDANT BRIAN PICKARD'S FOCUSED BRIEF RE: MOTION TO DISMISS INDICTMENT, SUBMITTED PURSUANT TO COURT ORDER DATED APRIL 22, 2014<br><br>[Excludable Time: 18 U.S.C. § 3161(h)(1)(D) through disposition]<br><br>Date: May 21, 2014<br>Time: 9:00 a.m.<br>Judge: Hon. Kimberly J. Mueller |

COMES NOW, Defendant BRIAN PICKARD, by and through counsel and respectfully submits the following focused brief in response to this Court's Order of April 22, 2014, asking the parties to address the following issues:

1. 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?

2. Assuming the Court articulates a standard of review before the hearing, what precisely should that standard be? How do defendants' fundamental rights, if any, affect the identification of the appropriate standard? Even if the Court articulates a standard prior to hearing, could the evidence elicited at hearing cause the Court to reconsider the appropriate standard prior to turning to the merits of defendants' motion?

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

4. Is the taking of live testimony warranted with respect to the equal sovereignty question raised by defendants' motion? If so, what precisely is the testimony a party proffers on the question and what is the appropriate scope of any such hearing?

(Doc. No. 271, pp. 3-4.)

## I.

## THE COURT NEED NOT DECIDE THE STANDARD OF REVIEW PRIOR TO THE EVIDENTIARY HEARING.

The defense does not believe this Court is required to decide the applicable standard of review prior to the evidentiary hearing, though the defense does understand the Government's desire to be so advised in order that they may determine the scope and nature of the evidence necessary to overcome the constitutional challenges. Whether a fundamental right to be free from incarceration would mandate strict scrutiny appears to be a legal issue which this Court may rule upon independent of the facts presented at the hearing. (See, Part II. 1., *infra*.) Be that as it may, the defense is not waiving or otherwise forfeiting the right to assert the standard should be heightened if the evidence presented at the hearing supports such a request, particularly as it relates to the suspect classification analysis. (*See*, Parts II. 2. and III, *infra*.)

## II.

## THIS COURT SHOULD APPLY STRICT SCRUTINY TO THE EQUAL PROTECTION ANALYSIS, AND THE STANDARD ARTICULATED IN SHELBY COUNTY v. HOLDER TO THE EQUAL SOVEREIGNTY ANALYSIS.

### A. Equal Protection

Assuming this Court articulates a standard of review before the hearing, the defense urges a finding that strict scrutiny be applied to the Equal Protection challenge because: (1) the statute infringes on a fundamental right to liberty, and (2) the challenged statute was enacted with a

discriminatory intent against, and has a disparate impact on, a suspect class.

**1. Fundamental Right**

While not controlling, the case of Fryman v. Duncan, 2008 U.S. Dist. LEXIS 111064 (2008) is instructive to the issue presented in this Court's inquiry regarding the fundamental right. (Doc. No. 271, p. 3, lines 27-28.) The Fryman case was brought pursuant to *28 U.S.C. § 2254*, by a California inmate who was sentenced to 25 years imprisonment for the possession of 1.2 grams of cocaine. The petitioner claimed his Equal Protection rights were violated by denying him the benefit of Proposition 36, an initiative mandating treatment in lieu of incarceration for those convicted of drug possession charges, which was enacted after petitioner's sentencing. Fryman argued, in part, that the State Courts should have analyzed his constitutional claim under the strict scrutiny standard of review as he was asserting an equal protection violation where he would have received a far lesser sentence had he been in the class of people sentenced after the effective date of Proposition 36. The Honorable District Court Judge Marilyn Hall Patel began her analysis by confirming that Supreme Court precedent has long held strict scrutiny applies when the freedom from unconstitutional imprisonment is at issue:

> [I]t is well established federal law that, as a general proposition, **freedom from imprisonment is a fundamental liberty interest protected by the federal constitution**. See e.g., Zadvydas, 533 U.S. at 690 (detention of resident aliens that had been ordered removed beyond 90-day removal period implicated liberty interest); Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (continued confinement of insanity acquittee after hospital review committee had reported no evidence of mental illness and recommended discharge implicated liberty interest); Youngberg v. Romeo, 457 U.S. 307, 316, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (involuntary confinement of mentally retarded individual implicated liberty interest); Hydrick v. Hunter, 466 F.3d 676, 700 (9th Cir. 2006) (civil commitment of sex offenders implicated liberty interest). The court also agrees with Fryman that it is **well established federal law that, as a general proposition, heightened scrutiny will be applied when such a fundamental liberty interest is at stake**. Hydrick, 466 F.3d at 700 (citing Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942)).

Fryman, *supra,* at 17, emphasis added.

While holding the State Courts' failure to apply this heightened scrutiny did not meet the standard for review on a *habeas* petition, Judge Patel distinguished the cited precedent, noting

the petitioner could not "point to any clearly established federal precedent adopting strict scrutiny review based on *the timing* of the application of a change in sentencing law." *Id*. at 19, emphasis added. As Fryman did not involve a challenge to the statute under which the petitioner was convicted in the first instance, the deprivation of liberty resulting from the application of an unconstitutional statute was not at issue. Instead, the Court was asked to decide whether a *constitutionally-sound* statute, unevenly applied due to a prospective change in sentencing laws, warranted a heightened standard of review.[1]

The case before this Court, however, challenges the statute itself as an unconstitutional classification rather than the statute's uneven application based on the timing of its enactment, and as such the instant challenge directly implicates the fundamental liberty interest identified as the long standing general rule articulated in Fryman.

Indeed, those United States Supreme Court cases referenced by Judge Patel demonstrate that strict scrutiny must be applied where the consequences of a statute impinge on the fundamental right to be free from incarceration. This is demonstrated in the case of Skinner v. Oklahoma, 316 U.S. 535 (1942), which makes clear this principle applies to the consequences of *criminal* prosecutions brought under a constitutionally unsound *penal* statute. The challenge in Skinner involved an Oklahoma law under which the punishment was sterilization. The United States Supreme Court held this statute violated the Equal Protection Clause of the Fourteenth Amendment and did so applying the strict scrutiny standard of review. Whether the punishment for a violation of a statute denies one the fundamental right to procreate, as in Skinner, or to be free from incarceration, as in the present case, enforcement of such a statute must survive strict scrutiny analysis.

Accordingly, should this Court find the defendants' fundamental right to liberty is implicated by application of the challenged statute, Supreme Court precedent demands the law be narrowly tailored to further a compelling governmental interest.

[1] This is consistent with the interpretation of Chapman v. United States, 500 U.S. 453 (1991), articulated in Defendant's Opposition to Government's Motion for Reconsideration at pages 10-11 (i.e, there is a clear distinction between the impingement on the right to liberty in the context of sentencing as opposed to the right to liberty in the context of the finding of guilt).

**B. Suspect Classification**

Counsel for defendants Juan Madrigal Olivera, Manuel Madrigal Olivera, Rodriguez, Camacho-Reyes, Betancourt-Meraz and Tapia indicated before this Court that they are members of a suspect class based upon their Hispanic or Latino origin, their nationality, or their status as aliens. *See, inter alia*, Graham v. Richardson, 403 U.S. 365, 371-372 (1971), finding alienage, along with race and nationality, warrant strict scrutiny analysis; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 205, 227 (1995), "*all* racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny;" Melendres v. Arpaio, 2013 U.S. Dist. LEXIS 73869, 5-6, *fn.* 1 (D. Ariz. 2013), "[h]istorically, there is no separate racial designation for persons of Hispanic or Latino ancestry. Nevertheless, to the extent that such persons are separately classified for purposes of distinctions in their treatment by the government, courts have applied the strict scrutiny analysis that is reserved for racial distinctions," citing Johnson v. California, 543 U.S. 499, 502 (2005).

Thus, strict scrutiny necessarily applies to those above named defendants who are members of a suspect class should this Court find the challenged statute was enacted with a discriminatory intent and has a disparate impact. (*See*, Part III, *infra*, for detailed discussion.)

**C. Equal Sovereignty**

As relating to the Equal Sovereignty challenge the controlling standard of review would be that articulated in Shelby County (Alabama) v. Holder, __ U.S.__, 133 S.Ct. 2612, 2623 (2013), (i.e., the government must show the *current* burdens of the disparate treatment are justified by *current* needs, and that any imposition upon the equal sovereignty of the States is limited to remedy present-day "*local* evils." *Id*., at 2627, citing Northwest Austin (Municipal Utility District No. One) v. Holder, 557 U.S. 193, 203 (2009); *see also* South Carolina v. Katzenbach, 383 U.S. 301, 328-329 (1966).

**D. Heightened Rational Basis**

As discussed in Defendant's moving papers, in the event this Court finds no facts exist to support strict scrutiny review, the defense contends an active rational basis analysis should be employed as directed by the Supreme Court in United States v. Windsor, 133 S. Ct. 2675, 2693

(2012) and Shelby County (Alabama) v. Holder, *supra*, 2623. (See, Reply to Government's Opposition to Motion to Dismiss Indictment, Part III.A, pp. 5:1-6:5, and Defendant's Opposition to Government's Motion for Reconsideration, Part II.B.3. p. 13:6-12.)

**E. Effect of Advanced Ruling**

Should, however, evidence be produced at the hearing on this motion which supports a finding that one or more of the predicate elements exist for applying a heightened scrutiny, this Court would be obligated to modify any previous ruling.

**III.**

**IMPACT OF SUSPECT CLASSIFICATION ON LEVEL OF REVIEW.**

**A. Heightened Scrutiny for Discriminatory Intent and Disparate Impact.**

If this Court finds the challenged statute was enacted with a discriminatory intent, and that the statute has a disparate impact on a suspect class, those defendants identified as members of a suspect class are deserving of heightened scrutiny. Johnson, *supra,* 543 U.S. at 509; Pena, *supra*, 515 U.S. at 227; Melendres v. Arpaio, 2013 U.S. Dist. LEXIS 73869, *supra*, at *fn* 1. Courts must employ strict scrutiny analysis wherever members of a suspect class show: (1) a discriminatory intent was a "motivating factor" in enacting the challenged law, and (2) the law has a disparate impact on a suspect class. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

As discussed above in Section II. B., one or more of the joined defendants are members of a suspect class. Thus, should the two elements outlined above be sustained here, strict scrutiny must be applied to the constitutional challenges as alleged and, further, such a showing may trigger an alternative theory of a constitutional violation, as heightened analysis must be applied to the statute *regardless* of whether marijuana is irrationally classified, or where the CSA is prosecuted unevenly throughout the states, as alleged in Mr. Pickard's moving papers under United States v. Carolene Products, 304 U.S. 144 (1938), and Oyler v. Boles, 368 U.S. 448 (1962), respectively. The challenge to the statute made by those joined codefendants would indeed constitute distinct attack upon the constitutionality of *21 U.S.C. 812 Schedule I(c)(10)* and *(17)* that is premised on the race-based application of the law and abides based on those two

elements alone.

For instance, in the seminal case Yick Wo v. Hopkins, 118 U.S. 356 (1886), the defendant was prosecuted for violating a San Francisco ordinance that prohibited laundries in wooden buildings. The defendant, however, did not challenge the statute in and of itself, but rather claimed the disparate application of the otherwise constitutional law violated his Equal Protection rights. *Id*. at 366. It follows that should the defendant members of a suspect class evidence the discriminatory intent and disparate impact arising from the application of the questioned statute (i.e., *21 U.S.C. § § 812, Schedule I(c)(10)* and *(17)*), the Court must employ strict scrutiny on that basis irrespective of the standard employed to analyze any other claims. As discussed below, such defendants will sustain their burden triggering the application of the heightened standard of review.

**1. Discriminatory Intent**

A discriminatory intent need not be the only, or even ultimate, purpose for the law. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979); Village of Arlington Heights, *supra*, 429 U.S. at 265-266.[2] Rather it need only be a motivating factor in the selection *or* reaffirmation of a "particular course of action at least *in part* because of, not merely in spite of, its adverse effects upon an identifiable group. Feeney, *supra,* 442 U.S. at 279, emphasis added. Further, courts may infer a discriminatory purpose where a totality of circumstances, including a disparate impact, evidence a discriminatory intent. Washington v. Davis, 426 U.S. 229, 240 (1976). This approach is well explained in Justice Stevens' concurring opinion in Washington v. Davis, *supra*:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is

[2] The Supreme Court has carved out an exception to the rule that race need only be *a* motivating factor in enacting the challenged law in cases relating to allegations of gerrymandering based on race, where the discriminatory purpose need not be the sole intent in enacting the law, but must be a predominant factor. *See, inter alia,* League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006). This exception is not relevant here. The gerrymandering cases do not overrule the rationale for the rule that invidious discriminatory intent need only be *a* motivating factor. *See, inter alia*, Village of Arlington Heights, *supra*, 429 U.S. at 265-266, "racial discrimination is not just another competing consideration [for officials to consider when enacting legislation]. When there is a proof that a discriminatory purpose has been a motivating factor in the decision... judicial deference is no longer justified."

> presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decision maker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process.

*Id.* at 253 (Stevens, J., concurring).

Justice Stevens' rationale in establishing the intent requirement is grounded in the principle of *scienter* rules which jurors are directed to apply when deciding a cause, as the model jury instruction for "intent" authorizes fact-finders to properly consider the reasonably foreseeable results of their actions, as "a person intends the natural and probable consequences of acts knowingly done or knowingly omitted." (Kevin O'Malley et al., Federal Jury Practice and Instructions § 17.07 (5th ed. 2000); *see, inter alia,* 9th Cir. Model Criminal Jury instruction 8.25, co-conspirator liable for "natural consequence" of substantive offenses co-conspirator.)[3]

Here, however, the Court need not rely on disparate impact alone to find a discriminatory intent, as there is clear evidence that marijuana's inclusion in Schedule I was motivated at least in part by a discriminatory purpose, as is evidenced in the proffers presented in previous filings and beginning in 1937 with Henry Anslinger's congressional statement: "[r]eefer makes darkies think they're as good as white men." (Motion to Dismiss, Doc. 199-1, pp. 1-11 *fn.* 16; *see* also President Nixon's statements regarding the motivation for classifying marijuana in Schedule I, Doc. No. 266, p. 12; Supplemental Declaration of James Nolan, Ph.D., submitted herewith, at ¶ 4.)

[3] The Defense's contention that a discriminatory intent behind the enactment of *21 USC 812, Sch. I(c)(10)* an *(17)* also contemplates that, should the evidence adduced at the evidentiary hearing show Congress later became aware of the dramatically disparate impact of this provision among minority groups, but affirmatively allowed the racist application to persist, a discriminatory intent may also be found for the government's "reaffirm[ation of] a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Feeney, *supra,* 442 U.S. at 279, internal quotations omitted; *see also* United States v. Reddrick, 90 F.3d 1276, 1284 (8th Cir. 1996) (Cudahay, J. concurring, stating "the "no longer rational argument".... may be distinct from an argument based on discriminatory intent;" United States v. Then, 56 F.3d 464, 466 (2nd Cir. 1995) (Calabresi, J., concurring), both concurring opinions relating to the former 100:1 ratio in sentencing disparity between cocaine base and powder.

**2. Disparate Impact**

Evidence of the disparate impact of the challenged statute includes excerpts from the 2013 U.S. Sentencing Commission Sourcebook, attached collectively as Exhibit A, establishing that 63.3% of all federal marijuana offenders in 2013 were Hispanic, 65.4% were Hispanic in 2012, 66.5% in 2011, 64.4% in 2010, and 57.2% in 2009. (*See*, excerpts of Table 34 from U.S. Sentencing Commission's Sourcebook for 2009-2013, attached collectively as Exhibit A; *see also* Nolan Dec., ¶ 7.) For each of these years, the number of Hispanics convicted in federal court for marijuana was almost *double* the conviction rate for white persons.[4] Additionally, from 2009 until 2013, between 35-53% of all federal marijuana offenders were non-citizen aliens. (Exhibit B).

| | 2009 | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|---|
| Percentage of total marijuana related convictions in federal court by Hispanics | 57.2% | 64.4% | 65.5% | 65.4% | 63.4% |
| Percentage of total marijuana related convictions in federal court by non-citizens | 34.8% | 40.2% | 53% | 48.9% | 38.5% |
| Percentage of Hispanics in general population | 16%[5] | 16.3%[6] | 16.6%[7] | 16.9%[8] | --[9] |

As demonstrated in the above table, these numbers standing alone are staggering, and sufficient to raise the presumption of discriminatory intent. When considered, however, in conjunction with the history of marijuana prohibition it is apparent that Anslinger's crusade against Hispanics and Latinos left an indelible mark on the investigation, prosecution, and

[4] *See*, excerpts to American Civil Liberties Union report entitled "The War on Marijuana in Black and White," attached to Mr. Pickard's Motion to Dismiss (Doc. No. 199) as Exhibit E to that motion.)

[5] Taken from American Community Survey data for 2009, located online at http://www.census.gov/acs/www/.

[6] https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf.

[7] *See, footnote 5.*

[8] http://quickfacts.census.gov/qfd/states/00000.html.

[9] Data not yet available.

conviction rates of Hispanics for federal marijuana related offenses. This is particularly so where studies show white people use marijuana at a similar or even higher rate. (*See*, Motion to Dismiss, Doc. No. 199, p. 10-11, *fn.* 16; *see* Motion to Dismiss, Doc. No. 199, Exhibit E; *see also* Opposition to Motion for Reconsideration, Doc. No. 266, p. 12; Nolan Dec., ¶ 8.)

Moreover, recent statements by President Obama, as well as the Assistant United States Attorney for the District of Colorado, support what is so plainly clear as to warrant judicial notice, to wit: the CSA as applied to marijuana has a grossly disparate impact on a suspect class.[10]

While the defense contends this is sufficient to meet the burden mandating strict scrutiny, additional evidence is likely to be presented at the hearing which further informs the issue. It appears, therefore, a ruling on the appropriate standard to apply in this context may be premature.[11]

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[10] President Barak Obama's statements have previously been submitted to this Court and are not repeated herein; *also see*, Hearing entitled "Marijuana: Mixed Signals," held on March 4, 2014, before Congress' Committee on Oversight and Government Reform, where Congressman Gerry Connelly (VA) questions Assistant United States Attorney for the District of Colorado, John F. Walsh, as follows:

> Q: Mr. Walsh... are you troubled by the statistics I read into the record with respect to arrest and incarceration rates, the inequality among whites and non-whites...?
>
> A: Congressman, the Department of Justice is focused on the question of insuring equity in the way the drug laws are enforced. In fact, last August..., the Attorney General announced his Smart on Crime Initiative. In part, that was intended to make sure that we in the federal government have a balanced approach, where enforcement remains - anti-drug enforcement- remains one component, but we also build into it prevention.
>
> Q: Mr. Walsh... But the record is wretched. We certainly have not lived up to our own, any kind of minimum standard of equality with respect to the meeting out of justice on this subject, on racial lines, have we?
>
> A: I think there is room to be concerned about the way that it has played out in effect... Its not based on race.
>
> Connelly: It may not be, but it leads to an outcome that certainly is racially divided in very stark terms.

Video located online at http://oversight.house.gov/hearing/mixed-signals-administrations-stance-marijuana-part-two/ (transcript pending).

[11] As additional and more specific information may be in the exclusive control of the federal government, discovery may be necessary should the prosecution contest the statistics provided through the declaration and proffered testimony of Dr. Nolan.

**B. Implication for Defendants Not Members of a Suspect Class**

Should this Court find strict scrutiny review is applicable to the constitutional challenge made by the defendant members of a suspect class, and that the statute fails to meet the heightened scrutiny, it must be pronounced unenforceable irrespective of the racial identity of the affected individuals. As the Court held in Yick Wo, *supra*, 118 U.S. 356, a law applied in violation of the Equal Protection Clause must be "pronounce[d] inoperable and void." *Id*., at 373. Further, it has long been held all defendants have a personal right not to be convicted under a constitutionally invalid law, a "conviction under [an unconstitutional law] is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." Bond v. United States, __ U.S.__, 131 S.Ct. 2355, 2367 (2011), *Id*., at 376-377, and Ex parte Siebold, 100 U.S. 371, 376-377 (1880). Therefore, regardless of the theory under which the statute is found unconstitutional, such a finding would preclude prosecution of any individual not merely those who fit the criteria triggering the heightened analysis.

While not completely analogous to the present situation, the Supreme Court's holding in Powers v Ohio 499 U.S. 400 (1991) supports finding that government action deemed unconstitutional based on invidious discrimination of a suspect class applies to everyone who has standing to challenge the action. In Powers the Court held that a prosecution's discriminatory use of peremptory challenges in jury selection violates the rights of equal protection even when the defendant, a white male, is not of a suspect class.

> In this case, petitioner alleges race discrimination in the prosecution's use of peremptory challenges. Invoking the Equal Protection Clause and federal statutory law, and relying upon well-established principles of standing, we hold that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race.

Powers, at p. 402.

This Court has already determined that those defendants not members of a suspect class have standing to challenge the statute as they are subjected to penalties arising therefrom. Thus, the defense urges this Court to find that once this standing is established the level of review must apply with an even hand.

Admittedly this case is complicated by the fact that the constitutional challenge is premised on several theories, and thus, the question remains: should this Court apply a different standard when evaluating the evidence presented to support each of the theories underlying the equal protection challenge. At first glance it would appear the answer would be in the affirmative; however, because the equal protection issues are intertwined and much of the evidence supporting one theory is supportive of the others, and additionally because all defendants have standing to challenge the statute on Equal Protection grounds, the level of review should be the same for all parties on all theories. To hold otherwise would likely implicate the Equal Protection doctrine first articulated by the Supreme Court in Regents of University of California v. Bakke, 438 U.S. 265 (1978), as discussed below.

When challenging a statute, "any person, of whatever race, has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." Gratz v. Bollinger, 539 U.S. 244, 270 (2003), citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995). Indeed, it is well settled in Equal Protection claims that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification. Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), citing Wygant v. Jackson Board of Education, 476 U.S. 267, 279-280 (1986). Indeed, in Regents of University of California v. Bakke, the Supreme Court stated:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

*Id*., *supra*, 438 U.S. at 289-290.

The principle that an Equal Protection violation is not restricted by the race of the challenging party is due to the judiciary's duty to "smoke out" illegitimate uses of race, however benign they may appear:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or

> simple racial politics. Indeed, purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Croson Co., *supra*, 488 U.S. at 493.

Accordingly, the Court may not apply strict scrutiny only for the Hispanic defendants. As Equal Protection of the law does not abide simply for members of a suspect class, but rather abides for all, and does so in order to assure that an invidious application of the CSA be "smoked out" and neutralized.

**IV.**

**EVIDENCE RELEVANT TO THE EQUAL SOVEREIGNTY CHALLENGE**

As events relevant to the Equal Sovereignty challenge continue to evolve, evidence may become available which is not included in the following proffer. Be that as it may, presently the defense intends to present documentary evidence in support of the contention that the federal government's disparate geographic application of the challenged statute violates the doctrine of Equal Sovereignty of the States. This includes those documents proffered as exhibits to defendant's various briefs such as the "Cole Memo," the marijuana banking regulations, DHHS notification of release of cannabis for studies treating veterans suffering from PTSD, and Congressional hearing transcripts. Unless the parties reach a stipulation regarding this proffered evidence witnesses will likely be required to authenticate and lay a foundation for their admissibility. It is anticipated this issue will be resolved when the parties meet and confer as directed by this Court.

In addition, the defense anticipates calling a witness or witnesses who will testify about the interaction between marijuana retailers and federal agencies in the state of Colorado, and a similarly situated individual in a state where the distribution of marijuana has not been sanctioned.

This Court found an evidentiary hearing is warranted on the Equal Sovereignty claim, as "the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the

trial court to conclude that contested issues of fact exist." United States v. Howell, 231 F.3d 615, 620 (9th Cir. 2000); United States v. Carrion, 463 F.2d 704, 706 (9th Cir. 1972). In determining, however, whether live testimony should be required in an evidentiary hearing, the Court must consider "the risk of an erroneous deprivation of [the private interest] through the procedures used, and the probable value, if any, of additional... safeguards." Oshodi v. Holder, 729 F.3d 883 (9th Cir. 2013), citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The defense does not object to the use of the affidavits and declarations in lieu of direct examination of the parties' witnesses, with the understanding that the parties may present live testimony for cross- and redirect examination, and thereby absolve any issues relating to witness credibility, and safeguard the requirements of Due Process. The case of United States v. Bergera, 512 F.2d 391, 394 (9th Cir. 1975) is instructive on this issue:

> When the vindication of important legal rights necessarily hangs in the balance, the law must require whatever is essential to preserve the integrity of the fact-finding process. The method most widely recognized as effective in that regard is imposition of the requirement that the fact-finder actually observe the evidentiary process so as to properly weigh and appraise testimony. This court has often recognized the value of observing witnesses in order to determine the truth.

Bergera, *supra,* 512 F.2d at 394.

Finally, it should be noted the witnesses who will be called to testify in support of the Equal Protection claim will also be relevant to the Equal Sovereignty issue, tending to prove that the current burdens of the disparate treatment are *not* justified by current needs, and any imposition upon the equal sovereignty of the States is *not* limited to remedy present-day "local evils." Thus, where neither judicial economy nor the defendants' Constitutional or substantial rights are implicated, live testimony on the issue of Equal Sovereignty should be held.

**CONCLUSION**

In sum, the defendants state the following:

1. The defense is not aware of any authority requiring this Court to decide the standard of review prior to resolving the merits of the hearing, and submits this issue to the Court's discretion.

2. The Court should review the Equal Protection challenges under strict scrutiny as a fundamental right is implicated, and the Equal sovereignty challenge under the

standard set forth in Shelby County v. Holder, *supra*. Although this Court has inherent authority to employ a different standard during the course of litigating this motion, should the facts presented so require.

3. The defense requests strict scrutiny be applied to the Equal Protection challenges, based on one or more of the joined defendants' membership in a suspect class, and as such defendants are being prosecuted under a law that was enacted with a discriminatory motivation and has a grossly disparate impact.

4. The defense asserts that live testimony is both warranted and necessary to resolve of the Equal Sovereignty claim.

The defense asks this Court to make such an Order in light of the foregoing and in the interests of the Constitutional rights here at issue.

Dated: May 9, 2014

Respectfully submitted,

*/s/ Zenia K. Gilg*
ZENIA K. GILG
HEATHER L. BURKE

Attorneys for Defendant
BRIAN JUSTIN PICKARD

# Exhibit A

## Table 34

## RACE OF DRUG OFFENDERS IN EACH DRUG TYPE[1]
## Fiscal Year 2013

| | | WHITE | | BLACK | | HISPANIC | | OTHER | |
|---|---|---|---|---|---|---|---|---|---|
| **DRUG TYPE** | **TOTAL** | N | % | N | % | N | % | N | % |
| **TOTAL** | **22,846** | **5,127** | **22.4** | **6,063** | **26.5** | **10,939** | **47.9** | **717** | **3.1** |
| **Powder Cocaine** | **5,497** | 523 | 9.5 | 1,717 | 31.2 | 3,192 | 58.1 | 65 | 1.2 |
| **Crack Cocaine** | **2,972** | 172 | 5.8 | 2,459 | 82.7 | 304 | 10.2 | 37 | 1.2 |
| **Heroin** | **2,213** | 298 | 13.5 | 803 | 36.3 | 1,096 | 49.5 | 16 | 0.7 |
| **Marijuana** | **4,922** | 1,037 | 21.1 | 518 | 10.5 | 3,119 | 63.4 | 248 | 5.0 |
| **Methamphetamine** | **5,496** | 2,043 | 37.2 | 170 | 3.1 | 3,060 | 55.7 | 223 | 4.1 |
| **Other** | **1,746** | 1,054 | 60.4 | 396 | 22.7 | 168 | 9.6 | 128 | 7.3 |

[1] Of the 80,035 cases, 23,179 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 22,895 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 22,895 cases, 49 were excluded due to missing information on offender's race. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2013 Datafile, USSCFY13.

## Table 34

## RACE OF DRUG OFFENDERS IN EACH DRUG TYPE[1]
## Fiscal Year 2012

| | | WHITE | | BLACK | | HISPANIC | | OTHER | |
|---|---|---|---|---|---|---|---|---|---|
| **DRUG TYPE** | **TOTAL** | N | % | N | % | N | % | N | % |
| **TOTAL** | **25,298** | **6,396** | **25.3** | **6,542** | **25.9** | **11,697** | **46.2** | **663** | **2.6** |
| **Powder Cocaine** | **6,128** | 952 | 15.5 | 1,707 | 27.9 | 3,412 | 55.7 | 57 | 0.9 |
| **Crack Cocaine** | **3,505** | 235 | 6.7 | 2,895 | 82.6 | 340 | 9.7 | 35 | 1.0 |
| **Heroin** | **2,182** | 348 | 15.9 | 785 | 36.0 | 1,027 | 47.1 | 22 | 1.0 |
| **Marijuana** | **6,974** | 1,560 | 22.4 | 631 | 9.0 | 4,561 | 65.4 | 222 | 3.2 |
| **Methamphetamine** | **4,912** | 2,361 | 48.1 | 126 | 2.6 | 2,208 | 45.0 | 217 | 4.4 |
| **Other** | **1,597** | 940 | 58.9 | 398 | 24.9 | 149 | 9.3 | 110 | 6.9 |

[1] Of the 84,173 cases, 25,712 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 25,367 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 25,367 cases, 69 were excluded due to missing information on offender's race. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2012 Datafile, USSCFY12.

## Table 34

## RACE OF DRUG OFFENDERS IN EACH DRUG TYPE[1]
## Fiscal Year 2011

| | | WHITE | | BLACK | | HISPANIC | | OTHER | |
|---|---|---|---|---|---|---|---|---|---|
| **DRUG TYPE** | **TOTAL** | N | % | N | % | N | % | N | % |
| **TOTAL** | **25,215** | **6,086** | **24.1** | **6,684** | **26.5** | **11,692** | **46.4** | **753** | **3.0** |
| **Powder Cocaine** | **6,022** | 949 | 15.8 | 1,474 | 24.5 | 3,518 | 58.4 | 81 | 1.3 |
| **Crack Cocaine** | **4,353** | 265 | 6.1 | 3,614 | 83.0 | 434 | 10.0 | 40 | 0.9 |
| **Heroin** | **1,804** | 268 | 14.9 | 608 | 33.7 | 911 | 50.5 | 17 | 0.9 |
| **Marijuana** | **6,942** | 1,567 | 22.6 | 555 | 8.0 | 4,614 | 66.5 | 206 | 3.0 |
| **Methamphetamine** | **4,546** | 2,161 | 47.5 | 105 | 2.3 | 2,051 | 45.1 | 229 | 5.0 |
| **Other** | **1,548** | 876 | 56.6 | 328 | 21.2 | 164 | 10.6 | 180 | 11.6 |

[1] Of the 86,201 cases, 25,664 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 25,278 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 25,278 cases, 63 were excluded due to one or both of the following reasons: missing information on offender's race (61) or missing information on drug type (3). Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2011 Datafile, USSCFY11.

## Table 34

## RACE OF DRUG OFFENDERS IN EACH DRUG TYPE[1]
## Fiscal Year 2010

| | | WHITE | | BLACK | | HISPANIC | | OTHER | |
|---|---|---|---|---|---|---|---|---|---|
| **DRUG TYPE** | **TOTAL** | N | % | N | % | N | % | N | % |
| **TOTAL** | **24,319** | **6,194** | **25.5** | **6,721** | **27.6** | **10,648** | **43.8** | **756** | **3.1** |
| **Powder Cocaine** | **5,708** | 959 | 16.8 | 1,532 | 26.8 | 3,124 | 54.7 | 93 | 1.6 |
| **Crack Cocaine** | **4,887** | 359 | 7.3 | 3,838 | 78.5 | 638 | 13.1 | 52 | 1.1 |
| **Heroin** | **1,625** | 262 | 16.1 | 449 | 27.6 | 898 | 55.3 | 16 | 1.0 |
| **Marijuana** | **6,328** | 1,552 | 24.5 | 484 | 7.6 | 4,078 | 64.4 | 214 | 3.4 |
| **Methamphetamine** | **4,303** | 2,243 | 52.1 | 102 | 2.4 | 1,784 | 41.5 | 174 | 4.0 |
| **Other** | **1,468** | 819 | 55.8 | 316 | 21.5 | 126 | 8.6 | 207 | 14.1 |

[1] Of the 83,946 cases, 24,713 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 24,366 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 24,366 cases, 47 were excluded due to missing information on offender's race. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

## Table 34

## RACE OF DRUG OFFENDERS FOR EACH DRUG TYPE[1]
## Fiscal Year 2009

| | | WHITE | | BLACK | | HISPANIC | | OTHER | |
|---|---|---|---|---|---|---|---|---|---|
| **DRUG TYPE** | **TOTAL** | N | % | N | % | N | % | N | % |
| **TOTAL** | **24,852** | **6,492** | **26.1** | **7,611** | **30.6** | **9,877** | **39.7** | **872** | **3.5** |
| **Powder Cocaine** | **6,020** | 1,031 | 17.1 | 1,684 | 28.0 | 3,202 | 53.2 | 103 | 1.7 |
| **Crack Cocaine** | **5,669** | 558 | 9.8 | 4,476 | 79.0 | 584 | 10.3 | 51 | 0.9 |
| **Heroin** | **1,619** | 281 | 17.4 | 450 | 27.8 | 875 | 54.0 | 13 | 0.8 |
| **Marijuana** | **6,151** | 1,784 | 29.0 | 579 | 9.4 | 3,520 | 57.2 | 268 | 4.4 |
| **Methamphetamine** | **4,118** | 2,158 | 52.4 | 118 | 2.9 | 1,577 | 38.3 | 265 | 6.4 |
| **Other** | **1,275** | 680 | 53.3 | 304 | 23.8 | 119 | 9.3 | 172 | 13.5 |

[1]Of the 81,372 cases, 25,164 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 24,918 were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 24,918 cases, 66 were excluded due to missing information on offender's race. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY09.

# Exhibit B

## Table 36

## CITIZENSHIP OF DRUG OFFENDERS IN EACH DRUG TYPE[1]
## Fiscal Year 2013

| | | U.S. CITIZEN | | NON-U.S. CITIZEN | |
|---|---|---|---|---|---|
| **DRUG TYPE** | **TOTAL** | N | % | N | % |
| **TOTAL** | **22,878** | **16,871** | **73.7** | **6,007** | **26.3** |
| **Powder Cocaine** | **5,502** | 3,869 | 70.3 | 1,633 | 29.7 |
| **Crack Cocaine** | **2,975** | 2,899 | 97.4 | 76 | 2.6 |
| **Heroin** | **2,216** | 1,606 | 72.5 | 610 | 27.5 |
| **Marijuana** | **4,932** | 3,034 | 61.5 | 1,898 | 38.5 |
| **Methamphetamine** | **5,502** | 3,828 | 69.6 | 1,674 | 30.4 |
| **Other** | **1,751** | 1,635 | 93.4 | 116 | 6.6 |

[1] Of the 80,035 cases, 23,179 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 22,895 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 22,895 cases, 17 were excluded due to missing information on offender's citizenship status. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2013 Datafile, USSCFY13.

## Table 36

## CITIZENSHIP OF DRUG OFFENDERS IN EACH DRUG TYPE[1]
## Fiscal Year 2012

| | | U.S. CITIZEN | | NON-U.S. CITIZEN | |
|---|---|---|---|---|---|
| **DRUG TYPE** | **TOTAL** | N | % | N | % |
| **TOTAL** | **25,342** | **17,635** | **69.6** | **7,707** | **30.4** |
| **Powder Cocaine** | **6,131** | 4,206 | 68.6 | 1,925 | 31.4 |
| **Crack Cocaine** | **3,510** | 3,432 | 97.8 | 78 | 2.2 |
| **Heroin** | **2,192** | 1,592 | 72.6 | 600 | 27.4 |
| **Marijuana** | **6,981** | 3,568 | 51.1 | 3,413 | 48.9 |
| **Methamphetamine** | **4,929** | 3,358 | 68.1 | 1,571 | 31.9 |
| **Other** | **1,599** | 1,479 | 92.5 | 120 | 7.5 |

[1] Of the 84,173 cases, 25,712 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 25,367 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 25,367 cases, 25 were excluded due to missing information on offender's citizenship status. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2012 Datafile, USSCFY12.

## Table 36

## CITIZENSHIP OF DRUG OFFENDERS IN EACH DRUG TYPE[1]
## Fiscal Year 2011

| | | U.S. CITIZEN | | NON-U.S. CITIZEN | |
|---|---|---|---|---|---|
| **DRUG TYPE** | **TOTAL** | N | % | N | % |
| **TOTAL** | **25,253** | **17,630** | **69.8** | **7,623** | **30.2** |
| **Powder Cocaine** | **6,029** | 4,029 | 66.8 | 2,000 | 33.2 |
| **Crack Cocaine** | **4,360** | 4,239 | 97.2 | 121 | 2.8 |
| **Heroin** | **1,807** | 1,224 | 67.7 | 583 | 32.3 |
| **Marijuana** | **6,953** | 3,688 | 53.0 | 3,265 | 47.0 |
| **Methamphetamine** | **4,554** | 3,055 | 67.1 | 1,499 | 32.9 |
| **Other** | **1,550** | 1,395 | 90.0 | 155 | 10.0 |

[1] Of the 86,201 cases, 25,664 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 25,278 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 25,278 cases, 25 were excluded due to one or both of the following reasons: missing information on offender's citizenship (22) or missing information on drug type (3). Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2011 Datafile, USSCFY11.

## Table 36

## CITIZENSHIP OF DRUG OFFENDERS IN EACH DRUG TYPE[1]
## Fiscal Year 2010

| | | U.S. CITIZEN | | NON-U.S. CITIZEN | |
|---|---|---|---|---|---|
| **DRUG TYPE** | **TOTAL** | N | % | N | % |
| **TOTAL** | **24,349** | **17,083** | **70.2** | **7,266** | **29.8** |
| **Powder Cocaine** | **5,716** | 3,583 | 62.7 | 2,133 | 37.3 |
| **Crack Cocaine** | **4,896** | 4,757 | 97.2 | 139 | 2.8 |
| **Heroin** | **1,626** | 1,084 | 66.7 | 542 | 33.3 |
| **Marijuana** | **6,332** | 3,411 | 53.9 | 2,921 | 46.1 |
| **Methamphetamine** | **4,309** | 2,968 | 68.9 | 1,341 | 31.1 |
| **Other** | **1,470** | 1,280 | 87.1 | 190 | 12.9 |

[1] Of the 83,946 cases, 24,713 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 24,366 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 24,366 cases, 17 were excluded due to missing information on offender's citizenship. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

## Table 36

## CITIZENSHIP OF DRUG OFFENDERS FOR EACH DRUG TYPE[1]
## Fiscal Year 2009

| | | U.S. CITIZEN | | NON-U.S. CITIZEN | |
|---|---|---|---|---|---|
| **DRUG TYPE** | **TOTAL** | N | % | N | % |
| **TOTAL** | **24,901** | **17,994** | **72.3** | **6,907** | **27.7** |
| **Powder Cocaine** | **6,029** | 3,912 | 64.9 | 2,117 | 35.1 |
| **Crack Cocaine** | **5,683** | 5,516 | 97.1 | 167 | 2.9 |
| **Heroin** | **1,624** | 1,003 | 61.8 | 621 | 38.2 |
| **Marijuana** | **6,160** | 3,508 | 56.9 | 2,652 | 43.1 |
| **Methamphetamine** | **4,125** | 2,946 | 71.4 | 1,179 | 28.6 |
| **Other** | **1,280** | 1,109 | 86.6 | 171 | 13.4 |

[1]Of the 81,372 cases, 25,164 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 24,918 were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 24,918 cases, 17 were excluded due to missing information on offender's citizenship. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY09.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| UNITED STATES OF AMERICA, | No. 2:11-cr-00449-KJM-16 |
| Plaintiff, | SUPPLEMENTAL DECLARATION OF JAMES J. NOLAN, III, Ph.D. |
| v. | |
| BRIAN PICKARD et al., | |
| Defendant. | |

I, JAMES J. NOLAN, III, hereby submit the following Supplemental Declaration, and declare as follows:

1. My training and experience were set forth before this Court in my initial Declaration (Doc. No. 199-3.) and are therefore only briefly summarized below:

I have been a faculty member at West Virginia University in the Department of Sociology and Anthropology since 2000. I worked for the FBI from 1995 until 2000; the majority of that time I was Chief of the Crime Analysis, Research and Development Unit in the Criminal Justice Information Services Division. I also served as the Senior Policy Advisor to the Secretary of Public Safety for the State of Delaware, from 1993 through 1995 and as a Police Officer for the City of Wilmington (Delaware) Department of Police for thirteen years, starting in 1980. I was assigned to the Special Investigations Units for Drug, Organized Crime, and Vice investigations. While working in Drug, Organized Crime, and Vice units, I personally participated in the execution of over 400 search warrants and often worked in an undercover

capacity investigating narcotics conspiracies and distribution of narcotics, including marijuana. I hold a Ph.D. in Psychoeducational Processes, two Masters degrees, and a Bachelor of Science degree. I have authored or c-authored numerous articles, papers, a book, technical reports and peer-reviewed conference papers, and I also perform significant public and private research. A copy of my Curriculum Vitae was attached to my initial Declaration in this case (Doc. No. 199-3.)

I offer this Supplemental Declaration in order to expand on the issues and information referenced in my initial declaration regarding the invidious discrimination which exists in both the enactment and enforcement of the marijuana legislation, and I would testify to the following if called:

2. History of Marijuana Laws:

a. I am familiar with numerous research papers, books, periodicals and other information documenting the roots of the current federal prohibition of marijuana, the Marihuana Tax Act of 1937, legislation that came about due to the characterization of Hispanic people as drug-addled maniacs, and as violent threats to the safety of our communities. In fact, lores abounded of marijuana-induced killing sprees and brutal rapes of upstanding members of the white community by Hispanic immigrants, lores which even made their way onto the floor of Congress, as noted in my initial declaration. (Doc. No. 199-3, ¶ 1.)

b. It was this race-based fear that social historians appear to agree was one of the central, if not the predominant, rationales for early federal legislation prohibiting and regulating the cannabis plant. Indeed, in one state legislature, the discussion regarding marijuana's effects was characteristic of the time and was reported as follows:

> Marihuana is Mexican opium, a plant used by Mexicans and cultivated for sale by Indians. "When some beet field peon takes a few rares of this stuff," explained Dr. Fred Fulsher of Mineral County, "He thinks he has just been elected president of Mexico so he starts out to execute all his political enemies. I understand that over in Butte where the Mexicans often go for the winter they stage imaginary bullfights in the 'Bower of Roses' or put on tournaments for the

favor of 'Spanish Rose' after a couple of whiffs of Marijuana."[1]

c. Some forty years later, a portion of the Marihuana Tax Act was determined to be unconstitutional and the Supreme Court struck it in 1969.[2] In response to the striking of the Marihuana Tax Act, Congress passed the Controlled Substance Act [CSA], which included marijuana as one of the Nation's most dangerous drugs in Schedule I. (*See* discussion on this topic in Gonzales v. Raich, 545 U.S. 1, 11 (2005).)

d. I am informed and do believe that President Nixon and his Attorney General authored and presented the Controlled Substance Act in order "to devise a system that recognizes [that the law will have a disparate impact on people of color] while not appearing to," and with the surreptitious motivation of "criminalizing [people of color's] common pleasure:" marijuana.

e. Based on my training, experience, and upon the above-noted facts, I believe the CSA as applied to marijuana was motivated in significant part by an intent to discriminate against people of color, particularly Hispanics and Black people. I also believe that Congress, by responding to the striking of the Marihuana Tax Act by including marijuana in Schedule I, simply carried on the egregiously racist principles against Hispanics upon which the Tax Act was grounded.

3. Disparate Impact

a. Unfortunately, Henry Anslinger and President Nixon's purpose in enacting federal marijuana prohibitions in order to disproportionately burden people of color has been successful, as the United States Sentencing Commission's statistics indicate that the CSA has a grossly disparate impact on people of color, particularly among persons of Hispanic origin.

b. As noted in the chart below, data from the United States Sentencing Commission

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[1] *"Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal Hisotry of American Marijuana Prohibition*," by Richard J. Bonnie; Charles H. Whitebread, II, located online at http://www.druglibrary.org/schaffer/library/studies/vlr/vlr2.htm

[2] Leary v. United States, 395 U.S. 6 (1969).

for the years of 2009-2013 indicates that *more than half* of all federal criminal convictions for marijuana related offenses for the past five years were of Hispanic persons, though Hispanics make up just 17% of the U.S. population. [3] Morever, some 35-53% of all federal marijuana convictions for the same years were of non-citizen aliens.

| | 2009 | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|---|
| Percentage of total marijuana related convictions in federal court by Hispanics | 57.2% | 64.4% | 65.5% | 65.4% | 63.4% |
| Percentage of total marijuana related convictions in federal court by non-citizens | 34.8% | 40.2% | 53% | 48.9% | 38.5% |

c. The increased marijuana convictions for people of color, and for Hispanics in particular, is attributable to the discriminatory enforcement of the marijuana laws, as Hispanics and other people of color are more likely to be surveiled, detained, searched, investigated, arrested, and prosecuted than their white counterparts. For example, the New York Police Department gathered statistics on their "stop and frisk" program in 2009 and found that eighty-four percent of the subjects stopped were either Black or Hispanic, though contraband was only found 1.5% of the time. Only 16% of the people stopped where white, though that group was found to be in possession of contraband 2.2% of the time.[4] However, population data actually indicates that white people use cannabis in similar or even greater numbers than do Blacks or Hispanics.

9. In sum, it is my considered opinion that the CSA as applied to marijuana was enacted for the purpose of discriminating against people of color, particularly Hispanics, and that the government's own data shows the marijuana prohibition laws are applied disparately among the Hispanic community.

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[3] Census Bureau Data avilable online at http://quickfacts.census.gov/qfd/states/00000.html; and http://quickfacts.census.gov/qfd/meta/long_RHI725212.htm

[4] ACLU Report, "*The War on Marijuana in Black and White*," p. 21, noting comparable use rates.

I declare under penalty of perjury that the foregoing is true and correct, except for those matters stated on information and belief, and as to those matters I believe them to be true. This declaration signed on the 7th day of May, 2014, in Morgantown, West Virginia.

*/s/ James J. Nolan, III*
JAMES J. NOLAN, III