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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRYAN SCHWEDER, et al., Defendants.	Case No. 2:11-CR-449-KJM GOVERNMENT'S SUPPLEMENTAL BRIEF REPLY Date: May 21, 2014 Time: 9:00 am Hon. Kimberly J. Mueller

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The government replies in support of its position that to the extent an evidentiary hearing is conducted at all, the standard of review should be announced in advance of the hearing. The correct standard of review is rational basis.

1. The standard of review should be decided before an evidentiary hearing to probe the scientific and medical evidence.

The parties both appear to agree that the question of a fundamental right is a legal question that can be decided on the pleadings in advance of a hearing. The disagreement is over whether the Defendants might adduce some evidence about invidious intent/disparate impact that would cause the Court to raise the standard of review to strict scrutiny.

The government maintains its position that Court must first decide the issue of whether Defendants have met their burden of proving that the Controlled Substances Act was an invidious law with a disparate impact. There is no reason Defendants cannot proffer all of the evidence they have in support of this theory well in advance of the evidentiary hearing on the scientific and medical evidence. Defendants have proffered two declarations of James Nolan. For the reasons that follow, these declarations are inadequate to meet Defendants' burden of proof of racist intent and disparate impact.

Defendants suggest that more evidence of racist intent/disparate impact will be forthcoming. Defense Brief, ECF No. 280 at pg. 10 ("additional evidence is likely to be presented at the hearing which further informs the issue."). But the Court's Order of April 22 limits the scope of the evidentiary hearing to the scientific and medical evidence relating to marijuana. Defendants have had an opportunity to submit all evidence favorable to their position on invidious intent/disparate impact. This is the third round of briefing on this issue, and it is dubious that Defendants have not already proffered all the evidence on this point that they can find.

The evidence they have proffered is not enough to trigger strict scrutiny. The Court can and should make this finding in advance of the evidentiary hearing on scientific and medical evidence, so that it is understood which side bears the burden of proof in that hearing. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

2a. The standard of review is rational basis.

Because the Controlled Substances Act implicates no fundamental rights and is race-neutral, the

correct standard of review is rational basis. *Personal Admin. Of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

2b. The statute does not burden any fundamental rights.

The parties agree that there is no fundamental right relating to the cultivation or distribution of marijuana. Defendants are instead arguing a theory that *all* criminal statutes must be evaluated under strict scrutiny because the statutes burden the fundamental right to liberty. This is not a novel or debatable theory; it is an incorrect theory. Criminal statutes are evaluated under the rational basis standard of review. *See, e.g. United States v. Emerson*, 846 F.2d 541, 546 n.2 (9th Cir. 1988) ("The fact that section 811(h) is a criminal statute does not mandate a more searching inquiry than rational basis review."), *citing United States v. Alexander, 673 F.2d 287, 288* (9th Cir. 1982) (substance classification under 21 U.S.C. § 812 "need not be perfect or ideal," only rational and reasonable)[1].

Criminal defendants' right to liberty is protected by other constitutional safeguards. *Chapman v. United States*, 500 U.S. 453, 464-65 (1991). The Court may not employ strict scrutiny in an equal protection context as a means of protecting that liberty interest. Rather, strict scrutiny is triggered only when the criminal statute encroaches on a fundamental right *not* otherwise guarded by the Constitution – for example, the right to marry, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to refuse unwanted lifesaving medical treatment. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). The case cited by Defendants, *Skinner v.*

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[1] *Alexander* affirms the decision of the decision of the district court refusing to take evidence on the allegation that cocaine is mis-scheduled: "The district court's refusal to permit evidence on cocaine's alleged misclassification was not error in light of this court's repeated holdings that the classification is proper." 673 F.3d at 289. The district judge in *Alexander*, Judge Patel, is the same district judge in the *Fryman v. Duncan* case cited by Defendants in support of their theory of fundamental rights. 2008 U.S. Dist. LEXIS 111064 (N.D. Cal. 2008). If *Fryman* really stood for the proposition that all criminal statutes should be analyzed under strict scrutiny because they implicate the fundamental right to liberty, then *Alexander* ought to have been a strict scrutiny case as well. But it isn't; it is a rational basis case, and one easily resolved by the district court without evidence on the grounds of existing Ninth Circuit precedent.

The excerpted portion of *Fryman* provided by Defendants is a correct statement of the law: heightened scrutiny is appropriate where there is some *other* liberty interest at play – in immigration detention, in insanity cases, in the confinement of the mentally retarded, and in the civil commitment of sex offenders. 2008 LEXIS 111064 at 17. These liberty interests are not otherwise protected by the portions of the Constitution that give safeguards to criminal defendants. *Fryman* does not stand for the theory that all criminal statutes are evaluated under strict scrutiny.

Oklahoma, 316 U.S. 535 (1942), is in this line of cases. The fundamental right implicated by *Skinner* is the right to procreate. 316 U.S. at 536. Where a criminal statute encroaches on one of these *other* fundamental rights, then the standard of review may be strict scrutiny.

There is no fundamental right to avoid prison that triggers strict scrutiny of all criminal statutes. Equal protection challenges to criminal statutes that do not otherwise burden a fundamental right are reviewed for a rational basis. There is no case law in support of Defendants' position, and the Court can easily dispense with this claim in advance of any evidentiary hearing.

2c. The Court should not revisit the standard of review mid-hearing.

If the evidentiary hearing is limited to scientific and medical evidence, then there is no possibility that that evidence could cause the Court to reconsider the standard of review.

If the Court expands the scope of the evidentiary hearing to include further presentation on invidious intent/disparate impact, then the standard of review could theoretically change. A change in the standard of review from rational basis to strict scrutiny would flip the burden of proof, perhaps mid-hearing. *Heller v. Doe*, 509 U.S. 312 (1993) (rational basis burden of proof); *Feeney*, 442 U.S. at 272 (strict scrutiny burden of proof).

Defendants have suggested that they may present additional evidence of invidious intent/disparate impact, but there is no good reason for any delay in a proffer of *all* the evidence they intent to offer on this point. This issue can and should be decided in advance of the evidentiary hearing on scientific and medical evidence. *United States v. Dumas*, 64 F.3d 1427 (9th Cir. 1995) (declining to apply strict scrutiny after reviewing proffered evidence on discriminatory intent).

3a. The correct standard of review for every defendant in this case is rational basis.

Simply being "a member of a suspect class"[2] is not adequate to raise the standard of review from rational basis to strict scrutiny. The defendants claiming membership in a protected class bear the burden of (1) identifying that protected class; (2) proving that Congress had an invidious intent toward

[2] Defendants Tapia and Rodriguez have thus far identified himself as Hispanic. Camacho-Reyes, Juan Madrigal Olivera, and Manuel Madrigal Olivera identified themselves as "a member of a suspect class," but did not specify which class that might be. Hearing of April 16, 2014, pg. 10-11. Defendant Pickard, who is not a member of a protected class, now appears to be making arguments on behalf of his co-defendants, though it is not clear that they have joined the supplemental brief.

that class in authoring the Controlled Substances Act; and (3) demonstrating that the Controlled Substances Act has a disparate impact on that class. Only when all three prongs are met should the Court apply strict scrutiny. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate [government] interest." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Defendants bear the burden of overcoming this presumption.

"[T]he Fourteen Amendment guarantees equal laws, not equal results." *Feeney*, 442 U.S. at 273. The purpose of these prongs is to sort out laws that may simply have a disproportionate impact on a particular race versus laws that are unconstitutional because of their invidious purpose. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (Constitution forbids "invidious racial discrimination.").

A. Protected Class

Pickard on behalf of his co-defendants appears to argue that the statute discriminates against Hispanics.[3] Hispanic is a protected class. *Hernandez v. State of Texas*, 347 U.S. 475, 479 (1954). Simply claiming membership in a protected class is not enough though; those members of the protected class must also demonstrate discriminatory purpose and disparate impact.

B. Discriminatory Purpose

Strict scrutiny is only triggered by intentional discrimination against a protected class. *Washington v. Davis*, 426 U.S. at 239-45. Unintended consequences of laws adopted for reasons unrelated to any intention to discriminate is not a sufficient basis for a finding of unconstitutional discrimination. *City of Mobile v.* Bolden, 446 U.S. 55, 66-68 (1980). The Supreme Court has very recently confirmed the "exceptionless nature" of the dual requirements of discriminatory purpose and disparate impact. *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1647 (2014). Defendants must prove invidious intent before the Court may apply strict scrutiny.

Defendants have proffered absolutely no relevant evidence that could prove intentional discrimination. Defense Supplemental Brief, ECF No. 280, pg. 8. Defendants have pointed to a 1937

[3] Pickard also includes in his attachments statistics relating to the federal prosecution of non-citizens, but thus far no defendant in this case has asserted his membership in a protected class of non-citizens; nor does Pickard argue that Congress intended to discriminate against non-citizens in authoring the Controlled Substances Act.

statement by Henry Anslinger, but that statement was made in 1937, not contemporaneous with the 1970 Controlled Substances Act, and not properly considered as evidence of the intent of the 1970 Congress. *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.").

Defendants next cite, via the supplemental Nolan Declaration, an alleged discussion from a state legislature. ECF No. 280-3 at ¶ 2b. Again, the alleged statements of a different legislative body are not evidence of the intent of the 1970 United States Congress.

Defendants cite, via the Nolan Declaration, the alleged statement of President Nixon.[4] ECF No. 280-3 ¶ 2d. This statement is not relevant for two reasons. First, because of the unique statutory scheme of the Controlled Substances Act, marijuana is only on Schedule I today because the agencies tasked by statute with the job of rescheduling or de-scheduling have declined to do so. *Americans for Safe Access v. DEA*, 706 F.3d 438 (D.D.C. 2013). Any remarks by President Nixon are not contemporaneous with the reason marijuana is on Schedule I today. For this reason, any invidious sentiments from the 1970s are not relevant to evaluating the constitutionality of the current scheduling of marijuana.

Second, even if the proper timeframe for evaluating Congressional intent in this case is 1970, there is no question that Congress had a legitimate, non-discriminatory purpose. The Controlled Substances Act was the 1970 Congress's comprehensive approach to meet the narcotic and dangerous drug problems at the federal level by combining all existing federal laws into a single new statute. "The Controlled Substances Act was the product of a decades-long battle of trying to curb the ever-rising tide of drug abuse and drug trafficking in the United States." *United States v. Cortes-Caban*, 691 F.3d 1, 39 (1st Cir. 2012). The statute's legislative history reveals the following Congressional purpose: "to deal in a comprehensive fashion with the growing menace of drug abuse in the United States (1) through providing authority for increased efforts in drug abuse prevention and rehabilitation of users, (2) through providing more effective means for law

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[4] In his previous declaration, Nolan quoted President Nixon as speaking about the impact of the marijuana laws on African Americans. ECF No. 266 at pg. 12. In his recent declaration, Nolan has edited the alleged Nixon quote to read "people of color." ECF No. 280-3 ¶ 2d. This is an attempt to broaden the scope of the alleged Nixon quote to suggest that Nixon's alleged ire was directed at Hispanics as well as African Americans, since, apparently, no Defendant in this case is claiming to be in the protected class of African Americans. But there is no umbrella protected class of "people of color."

enforcement aspects of drug abuse prevention and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs.". H.R.Rep. No. 91–1444, 1970 U.S.C.C.A.N. 4566 at 4567 (1970).

This Congressional purpose is evident from the statute's stated purpose, from the statute's legislative history and from the context of the statute's passage. Courts have had no trouble recognizing this legitimate Congressional objective. *Raich*, 545 U.S. at 12 ("The main objectives of the CSA were to conquer drug abuse and to control the legitimate an illegitimate traffic in controlled substances."); *Cortes-Caban*, 691 F.3d at 45 ("It is thus beyond cavil that the object and intent of the Controlled Substances Act was the control of drug abuse and drug trafficking.").

As to marijuana in particular, the Congressional intent in placing the drug in Schedule I was based in science. The Supreme Court recognized this purpose in *Raich*: "In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW that marijuana be retained within schedule I at least until the completion of certain studies now underway." 545 U.S. at 14 (internal quotation omitted); *see also NORML v. Bell*, 488 F.Supp. 123, n. 44 (D.D.C. 1980) ("NORML also suggests that the marijuana provisions of the CSA are racially discriminatory because they are most often applied against blacks. This claim is meritless. Congress passed the CSA to promote the public health and welfare, and there is no discriminatory intent.").

The Controlled Substances Act passed the House by a vote of 341-6, and the Senate by a vote of 54-0. It was ratified by President Nixon, but there was obviously overwhelming congressional support for the law. There is no evidence that President Nixon communicated any views on race and marijuana to the 1970 Congress. There is no evidence that Congress was motivated by any such views. There is no evidence linking President Nixon's alleged commentary specifically to the classification of marijuana as a Schedule I drug, as opposed to placing it a different Schedule. There *is* evidence that President Nixon himself had a permissible, nondiscriminatory purpose in ratifying this legislation: "[S]hortly after taking office in 1969, President Nixon declared a national 'war on drugs.'" *Gonzalez v. Raich*, 545 U.S. 1, 10 (2005).

The Controlled Substances Act is not a new law. It has been the federal statute on narcotics and drugs for more than 40 years. The idea that it has been racially motivated for all these 40 years, and no other court

has divined that invidious intent through tens of thousands of prosecutions of individuals of all races is astounding. The Controlled Substances Act had no impermissible discriminatory purpose.

To the extent Defendants are instead arguing that Congress developed a discriminatory purpose along the way, in failing to legislate marijuana off of Schedule I, this type of discriminatory intent argument has been foreclosed by the Ninth Circuit. Neither Congressional awareness of a racially disparate impact, nor Congressional awareness of new science alone provide a basis for a court to infer an invidious intent. *United States v. Coleman*, 24 F.3d 37, 39 (9th Cir. 1994) (rejecting argument that the court should infer discriminatory intent from Congress's failure to address the racially disparate impact of the crack guidelines: "Awareness of consequences alone does not establish discriminatory intent.") (quotation omitted); *Dumas*, 64 F.3d at 1430 (rejecting argument that developments in the medical community's evaluation of the crack/powder cocaine distinction ought to be considered by the court in its evaluation of the constitutionality of the statute: "The medical community's present disagreement with earlier congressional testimony does not establish discriminatory purpose, or for that matter, a lack of scientific support for Congress' [earlier] action.") (quotation omitted); *see also United States v. Blewett*, __ F.3d __, 2013 WL 6231727 at *11 (6th Cir. 2013) (en banc) (rejecting argument that strict scrutiny should be applied to Congress's failure to make the Fair Sentencing Act retroactive: "A disproportionate effect does not violate the Equal Protection Clause, even if it was foreseen.").

The law requires a showing of a Congressional discriminatory purpose before the standard of review can be elevated to strict scrutiny. Defendants have not made this showing. The statute has an obvious, recognized non-discriminatory purpose.

The record on this issue should now be considered closed. Defendants have proffered two versions of the Nolan declaration, neither of which, even if presumed true, provides a basis for a finding of invidious intent of the 1970 Congress. The Court can easily decide this issue in advance of any evidentiary hearing: the standard of review for all Defendants is rational basis. *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.").

C. Disparate Impact

Defendants also bear the burden of proving disparate impact, and the government does not concede

that Defendants can meet this burden via the proffered statistics alone. Defendants have attached statistics that indicate that in recent years federal marijuana prosecutions have been around 60% Hispanic, whereas the Hispanic population of the United States is around 17%. ECF No. 280-1.

It is not clear that this statistic alone proves disparate impact. "The first step in a statistical analysis is to identify the base population for comparison." *Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002). It is not clear that the percentage of Hispanics federally prosecuted for marijuana should be compared against a base population of the entire population of Hispanics in the United States. If the issue is marijuana as a Schedule I drug, the proper comparison may be federal prosecutions of Hispanics for marijuana crimes as compared to federal prosecutions of Hispanics for Schedule 2-5 drug crimes. Or, federal prosecution of Hispanics for marijuana crimes compared to federal prosecution for the other Schedule I drugs. Or, the relevant statistic may be the percentage of Hispanic federal marijuana prosecutions immediately after the law was passed, in the early 1970s, as the disparate impact of a law is evaluated only in conjunction with the intent of the legislature that authored that law.

The government submits that this type of statistical evaluation requires expert presentation. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 n. 25 (1979) ("We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances.") (quotation omitted). Not every disproportionate statistic has meaning of constitutional magnitude. *McKlesky v. Kemp*, 481 U.S. 279, 319 (1987) ("Legislatures also are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.") (quotation omitted).

Expert presentation of statistical presentation on disparate impact is not necessary in this case, however, because the lack of evidence of discriminatory intent is dispositive.

3b. Remaining Defendants are not entitled to heightened scrutiny.

Defendants are correct that because this is a facial challenge to the constitutionality of the statute, to the extent this Court finds the Controlled Substances Act to be unconstitutional, that finding would apply to all defendants in this case. ECF No. 280 at pg. 11. But the Court's question asks the *standard of review* for the remaining defendants, and the answer to that question is rational basis. The standard of

review is rational basis because they are not members of a protected class. *Feeney*, 442 U.S. at 273.

There is no authority for the idea that the Court should apply strict scrutiny as a matter of convenience, simply because some of the defendants are members of a protected class. Defendants' reference to *City of Richmond v. J.A. Croson Co.*, 488 U.S 469 (1989) and *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) are inapposite: those cases deal with laws that had an overt racial classification. In *City of Richmond* , white contractors who lost a contract under a minority set-aside program prevailed because there was no compelling governmental interest in the classification. *Id.* *Bakke* dealt with the affirmative action admissions policy of a university. Neither case has any bearing here, where there is no racial classification in the statute, no white Defendant is claiming a discriminatory intent against the white population, and no white Defendant is arguing that there is a disparate impact on the white population.

Instead, the remaining defendants are attempting to piggy-back onto the claims of the Defendant-members of a protected class. There is no basis for them to do so.

In any event, question 3 pre-supposes that there might be a basis for strict scrutiny review in this case. There is not. The standard of review for all Defendants is rational basis because the Controlled Substances Act is not a racially discriminatory law. There is no need to decide the logistics of an evidentiary hearing under two different standards of review for two different groups of defendants. To the extent there is an evidentiary hearing at all, it must be one hearing under rational basis review for all defendants.

4a. No testimony warranted on equal sovereignty claim.

Defendants argue in favor of live testimony on the equal sovereignty issue. The government's position is that there is no equal sovereignty issue. The statute does not treat any one state differently from any other state.

Defendants suggest that they might proffer the Cole Memorandum of August 29, 2013 and various other documents in support of their arguments. These documents have already been attached to the Defendants' earlier pleadings. Defendants assert that more evidence may become available as events continue to "evolve;" ECF No. 280 at pg. 13; the government's position is that the statute has not changed.

Defendants do not identify their possible witness by name, but instead describe him/her as someone 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." ECF No. 280 at pg. 13. The government objects to this testimony as it is completely irrelevant to the issue of the constitutionality of the Controlled Substances Act. At most, this is testimony about executive branch policy. Defendants are not a state, are not a state agency, are not representatives of a state, and are not even marijuana retailers. They have offered no linkage for how this proposed testimony would support a theory that the statute violates the Tenth Amendment.

4b. No government witnesses on the equal sovereignty claim.

The government still does not intend to introduce any evidence or testimony on the equal sovereignty claim, as this claim can be resolved on a reading of the face of the statute alone.

Respectfully Submitted,

DATED: May 16, 2014

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