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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 MOTION IN LIMINE TO EXCLUDE TESTIMONY OF JAMES J. NOLAN Date: September 4, 2014 Time: 10:00 am Judge: Hon. Kimberly J. Mueller

NOTICE OF MOTION AND MOTION

TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

Please take notice that, on September 4, 2014, at 10:00 a.m., or at such other time as the Court shall designate, in Courtroom 3 of the United States District Court, the United States will, and hereby does, move this Court for an order excluding the testimony of Defendants' witness James J. Nolan on the grounds that his testimony lacks probative value and that his opinions are not based upon sufficient facts or data as required by Rule 702. In fact, they are not expert opinions at all, just observations for which no special expertise is required. This motion is made pursuant to Federal Rules of Criminal Procedure 12 and 47, Local Rule 430.1, and this Court's May 23, 2014, Order (Dkt. No. 294).

DATED: August 12, 2013

BENJAMIN B. WAGNER
United States Attorney

By: */s/ Gregory T. Broderick*
GREGORY T. BRODERICK
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The opinions offered by Defendants' proffered expert James Nolan should be excluded. His opinion that marijuana's scheduling is a result of "racially offensive attitudes existing in the 1930s" is not probative of any fact of consequence in this proceeding, addresses the wrong question, and lacks any methodology or the factual support required by Rule 702. Nolan's discrimination opinion is not even expert in nature—he simply draws conclusions that anyone is qualified to make or not make, though they are based on unsourced or ill-sourced statements. In addition, his opinion that marijuana's status as an illegal substance does more harm than good is a policy argument, and entirely irrelevant to the question of whether marijuana's continued inclusion as a Schedule I controlled substance "passes constitutional muster." Thus, the Court should strike his declaration and exclude him from testifying in this matter.

II. ANALYSIS

A. Nolan's Opinions Have No Probative Value.

Nolan offers two basic opinions: That the original placement of marijuana on Schedule I was motivated by race discrimination (*see* Dkt. No. 314 at ¶¶ 1-12 & 22), and that marijuana's status as an illegal substance does more harm than good. (*See id*. at ¶¶ 13-22). Rule 401 generally requires that all evidence be probative of a fact "of consequence" in the proceeding. Fed. R. Evid. 401(b). In addition, Rule 702(a) requires expert opinion to "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Because Nolan's opinions lack probative value, they fail the relevance requirements of Rules 401 and 702 and must be excluded.

1. Nolan's Opinion that Marijuana's Status as an Illegal Substance Does More Harm than Good Is Irrelevant.

Nolan's second opinion is that marijuana's criminalization causes more harm than good. (Dkt. No. 314 at ¶¶ 13-22). As an initial matter, this hearing is supposed to address the constitutionality of marijuana's placement on Schedule I, not its general criminalization. Further, this hearing is meant to "probe the medical and scientific information" (Dkt. No. 271 at 3:14), not

policy arguments. Nolan's policy arguments have no bearing on the legal question, and are more fit for the legislative hearing room than the courtroom. As the Supreme Court has warned, the Equal Protection and Due Process clauses must not "be subtly transformed into the policy preferences" of the federal courts. *Washington v. Glucksberg*, 521 U.S. 702, 720 [117 S.Ct. 2258] (1997) (internal quotations omitted). This Court should, therefore give no consideration to Nolan's policy arguments, and should strike his second opinion from the record. (Dkt. No. 314 at ¶¶ 12-22).

2. Nolan's First Opinion Is Not Probative of Any Fact of Consequence.

Nolan's first opinion—that marijuana's placement on Schedule I was motivated by racism—lacks probative value and will not be helpful to the trier of fact. First, it is based on unreliable information. The quotes he attributes to Mr. Anslinger, for example, are unsourced, and there is a dispute over whether Mr. Anslinger ever said those things. (*See* Dkt. No. 314 at ¶¶ 1 & 4). His quotations about state legislative action in the 1930s are similarly flawed, in that they report what an internet paper says that a newspaper said about what legislators said. (*See id*. at ¶ 2). As the Ninth Circuit has explained, "[i]t is too long a leap from newspaper and magazine articles to an inference that Congress enacted" drug control laws for racist purposes. *United States v. Dumas*, 64 F.3d 1427, 1430 (9th Cir. 1995) (internal quotations omitted).

Nolan's quotations from Congressman Cohen at a March 2014 hearing (*see id*. at ¶ 4) are likewise of no evidentiary value. Cohen was not under oath and did not testify before the committee; that is, he was speaking as a committee member, not a witness. And Cohen admitted that he had no personal knowledge of the underlying events, explaining that they "came to my attention through a Huffington Post article recently."[1] If contemporaneous newspaper and magazine articles are "too long a leap," then surely statements from politicians based on internet posts a half-century after the events in question are likewise insufficient. *Id*. The same is true for the quotations Nolan attributes to President Nixon, based on a book written by a Nixon staffer decades after the events in question. (Dkt. No. 314 at ¶¶ 4-5 &7). Rule 702 requires an expert to use reliable methods, and to base his opinions on the reliable

[1] The video of Mr. Cohen's comments is available at http://oversight.house.gov/hearing/mixed-signals-administrations-stance-marijuana-part-two/. The quoted material is at 29:37-41.

application of those methods to "sufficient facts or data." Nolan has failed to do so.

In addition, Nolan's first opinion is flawed because it is not really an expert opinion. He simply collects openly-racist but ill-sourced statements about marijuana, and then offers the opinion that the statements show racist intent. This does not require expertise, nor the application of any method. He simply draws a conclusion that racist statements show racist intent. But anyone could do that. As the Supreme Court has explained, such "expert" testimony is not only unnecessary but improper. *See Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 [82 S.Ct. 1119] (1962). If "all the primary facts can be accurately and intelligibly described" to the fact-finder, and if the fact-finder is "as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training," then the "expert" opinion is unnecessary and should be excluded. *Id*. (internal quotations omitted). If Defendants wish to offer this evidence for the proposition that marijuana's scheduling was racist, they may lay a foundation for it and offer it. But they cannot admit this otherwise inadmissible evidence simply by having an expert rely on it. (Fed. R. Evid. 703); *see also Paddack v. Dave Christensen Inc.*, 745 F.2d 1254, 1262 (9th Cir. 1984) (expert reliance on inadmissible evidence does not admit the evidence for the "general proof of the truth of the underlying matter.")

In brief, Nolan fails to offer expert opinion. The party presenting an expert "must establish that reliable principles and methods underlie the particular conclusion offered." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315-16 (9th Cir. 1995) (*Daubert II*). Nolan neither articulates nor applies any method for his determination that the marijuana laws were and are racist. He simply asserts that conclusion from supposed statements on the subject. That is clearly within the province of the fact-finder, and he should not be permitted to do so. Moreover he fails to rely on "sufficient facts or data" as required by Rule 702(c), instead citing internet publications and the unsworn comments of politicians from a hearing, which were themselves based on an internet article. Nolan's sincere belief in the truth of these matters or his assurance that they are true is insufficient; after all, a district court may not admit expert opinion based on an expert's "bald assurance of validity." *Daubert II*, 43 F.3d at 1316. Internet rumors and unsourced information is simply not "sufficient facts or data" upon which to base an expert

opinion—even when the internet rumors are repeated in the halls of Congress. *See, e.g., Gonzales v. Unum Life Ins. Co. of America*, 861 F.Supp.2d 1099, 1104 n.4 (S.D. Cal. 2012) ("the internet is not typically a reliable source of information"). Nolan's opinions about racist intent are based on flimsy information and no apparent method, and fail to meet Rule 702's standards. His declaration should be struck, and he should be excluded from testifying.

3. Nolan's First Opinion Lacks Probative Value Because It Fails to Address the *Continued* Inclusion of Marijuana on Schedule I.

Nolan's opinions do not bear on the only question at issue in this proceeding: "whether the continued inclusion of marijuana as a Schedule I controlled substance in Title 21 of the federal statutes passes constitutional muster." (Order, Dkt. No. 271, at 3:11-13). For example, Nolan mainly focuses on statements supposedly made in support of the adoption of the Marijuana Tax Act of 1937, proceedings from state legislatures, and allegations made by a Congressman at a March 2014 hearing. But the question at issue here is not whether the Marijuana Tax Act violates the Equal Protection Clause, nor whether any state legislatures did anything untoward. This dated material is therefore irrelevant. *See, e.g., 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.") All such statements should be struck from Nolan's declaration, and excluded from this proceeding. (*See* Dkt. No. 314 at ¶¶ 1, 2, 4 & 6-22).

Nolan's opinions regarding the supposed racist intentions of the Controlled Substances Act of 1970 are also irrelevant. First, the claim has been repeatedly rejected. *See, e.g., NORML v. Bell*, 488 F.Supp. 123, 141 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."). Second, the claim is based on scant evidence from a book written years later by a Nixon advisor, as retold by a marijuana *advocate* during a Congressional hearing. (*See, e.g.*, Dkt. No. 314 at ¶¶ 4-5 & 7). Courts have refused to sustain the claim of discriminatory purpose when presented with such "sketchy and unpersuasive bits of information." *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994). Third, the Nixon Administration's supposed secret purpose in proposing

the Controlled Substances Act is largely irrelevant. Courts have made clear that it is Congress' intent that is relevant. *United States v. Dumas*, 64 F.3d 1427, 1430 (9th Cir. 1995). The House vote in favor of the Controlled Substances Act was 341-6, and the Senate 54-0.[2] It seems rather unlikely that a Senate in which Edward M. Kennedy (D-MA) served as the majority whip would pass a racist bill without a single vote in opposition.[3]

Because Nolan fails to address the current scheduling and instead speaks to actions in the distant past, the Court should strike the entirety of his declaration and exclude his testimony as irrelevant.

4. Nolan's Disparate Impact Opinions Are Irrelevant.

Nolan purports to offer evidence of marijuana's disparate impact. (*See* Dkt. No. 314 at ¶¶ 7-11). But this evidence is irrelevant without probative evidence of discriminatory purpose. To support a claim of invidious discrimination, a party "must plead and prove that the [other party] acted with discriminatory purpose." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 [129 S.Ct. 1937] (2009) (internal citations omitted). It is clear that this showing requires more than an "awareness of consequences." *Id*. (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 [99 S.Ct. 2282] (1979)). Rather, Defendants must show that the "decisionmaker's" action was "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Id*. (alterations in original). In brief, Defendants cannot prevail unless they show that marijuana's "continued inclusion" as a Schedule I controlled substance is "for the purpose of discriminating on account of race … or national origin." *Id*. As set forth above, Defendants have failed to offer any evidence of discriminatory intent of Congress in 1970. Thus, any evidence about disparate impact or uneven enforcement does not bear on any "fact of consequence" (Fed. R. Evid. 401) and cannot "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). It must therefore be excluded.

III. CONCLUSION

For the foregoing reasons, the Court should grant this motion, exclude the testimony of James Nolan, and strike his declarations from the record.

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[2] *See* https://www.govtrack.us/congress/votes/91-1970/h355 & https://www.govtrack.us/congress/votes/91-1970/s584

[3] *See* http://www.senate.gov/artandhistory/history/common/briefing/Party_Whips.htm#3.

DATED: August 12, 2013

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