UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

SHAWN ANDREW TAYLOR

Defendant.
_____/

Case No. 1:14-cr-67

Hon. Robert J. Jonker

GOVERNMENT'S AMENDED RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

On April 15, 2014, a grand jury charged Defendant Shawn Taylor with conspiracy to manufacture, possess and distribute marijuana and marijuana plants in violation of 21 U.S.C. § 846; six additional counts of maintaining a drug involved premises in violation of 21 U.S.C. § 856 were also brought. He moves to dismiss the Indictment, contending that 21 U.S.C. § 812, Schedule I (c)(10) and (17) are unconstitutional. The Defendant wishes to present evidence in support of this claim to establish that there is no rational basis for treating marijuana as a controlled substance; further, he argues that the government's prosecution violates the Equal Protection and Equal Sovereignty clauses of the Constitution.

Because this same issue has been repeatedly rejected by the federal courts, Defendant's motion should be denied. Contrary to the his contention, marijuana's status as a Schedule I Controlled Substance is constitutional and the government's prosecutorial policy does not violate Equal Protection or Equal Sovereignty.

FACTS

The indictment charges that from January of 2009, through October 16, 2013, Shawn Taylor and the co-defendants conspired to manufacture, possess and distribute marijuana plants.

The grand jury specifically found that, "[i]n order to promote the conspiracy, the defendants developed a plan to hide behind the framework of the Michigan Medical Marihuana Act (MMMA)[1] as they sold marijuana to persons who both consumed and resold the marijuana to other persons in violation of federal law. The conspirators were not attempting to alleviate the suffering of "patients" assigned to them; rather they were attempting to profit from the sale of the marijuana they produced. Most of the marijuana produced was not distributed to "patients" of members of the conspiracy – it was sold for profit to other individuals."

The MMMA provides no defense to this federal prosecution, even had the Defendants been complying with the Act, which they were not. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494-95 (2001). "[B]ecause Congress has determined that there is no medical benefit from the use of marijuana, such use cannot serve as a defense to conduct prohibited by the Controlled Substances Act." *United States v. Henry*, 673 F.3d 285, 291-92 (4th Cir. 2012). Defendants challenge the constitutionality of the indictment, claiming that the placement of marijuana in Schedule I is wrong and that the concepts of Equal Protection and Equal Sovereignty preclude their indictment.

SUMMARY OF ARGUMENT

The Defendant may not attack the scheduling of marijuana in this Court. Judicial review of decisions such as the scheduling of controlled substances are proscribed by 21 U.S.C. § 877. In the Controlled Substances Act, Congress set forth the exclusive means of challenging the scheduling of controlled substances. 21 U.S.C. § 811(a)(1). To allow criminal defendants to collaterally attack the scheduling of controlled substances based on their view that a drug has been misscheduled would place a continuing, onerous burden on the district courts to re-litigate the same issue.

[1] The Michigan Medical Marihuana Act (MMMA) is codified at MCL § 333.26421 *et. seq.*

While Defendant seeks to recast his argument in terms of Equal Protection and Selective Prosecution, the holding of an evidentiary hearing to determine whether Congress had a rational basis to enact a statute would be improper. Moreover, Defendant bears the especially heavy burden "of negating every conceivable basis which might support [the law]." Policy arguments surrounding rescheduling are not matters for the judiciary to decide and are "better suited for a congressional hearing room than the courtroom."

Further, Defendant may not succeed on a Selective Prosecution claim without first identifying a suspect class in which he fits. He may not claim to be in that class of persons who are in full compliance with a state medical marijuana law, because the government contends, and the grand jury found, that he was not.

Finally, the prosecution of the Defendant does not violate principals of Equal Sovereignty.

ARGUMENT

A. Defendant cannot attack the placement of marijuana in Schedule I in this Court.

As a preliminary matter, Defendant cannot collaterally attack the scheduling of marijuana. *See United States v. Forrester*, 592 F.3d 972, 978-79 (9th Cir. 2010); *United States v. Carlson*, 87 F.3d 440, 446 (10th Cir. 1996); *cf. Kiffer*, 477 F.2d at 355-57 (upholding Congress' decision to list marijuana as a Schedule I substance). Nor, in light of the statutory procedures for changing the classification of a controlled substance, is there any basis for a claim that a substance has been *de facto* rescheduled.

Judicial review of the scheduling of controlled substances is proscribed by 21 U.S.C. § 877, which provides:

> **Judicial review.** All final determinations, findings and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of

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

In *Forrestier*, the defendant claimed that ecstasy should have been listed as a Schedule III controlled substance and did not belong in Schedule I. The Court stated, "[f]irst, the decision to schedule a substance like [ecstasy] is a complex matter, ... [and] [s]econd, and more importantly, the agency itself is not a party in the case; hence it has no opportunity to defend its scheduling order. Additionally, to allow all criminal defendants to collaterally attack a permanent scheduling order based on their view that a particular drug has been misscheduled would potentially place a continuing, onerous burden on district courts to constantly re-litigate the same issue." *Id* at 978-79.

Defendant contends that the United States Supreme Court has cast doubt on the viability of marijuana remaining a Schedule I controlled substance in his opening paragraph by incompletely citing a footnote in its decision in *Gonzales v. Raich*, 545 U.S. 1, 28 n.37 (2005). (Def. Br. at 1). While the Court noted that proffered evidence might cast doubt on the accuracy of Congressional findings, the footnote concluded with the statement, "But the possibility that the drug may be reclassified in the future has no relevance to the question whether Congress now has the power to regulate its production and distribution. Respondents' submission, if accepted, would place all homegrown medical substances beyond the reach of Congress' regulatory jurisdiction." *Id.* While *Gonzales* dealt with the reach of the Commerce Clause, the reasoning behind the footnote cited by Defendant should apply equally as well to the Equal Protection

Clause. Having the power to regulate the manufacture and distribution of marijuana in all respects, Congress also has the power to schedule it.

The complete statement of the Supreme Court is important, because of the exclusive procedures Congress has adopted involving the rescheduling of controlled substances. This Court is ill-equipped to reschedule marijuana into any of the five categories of controlled substances identified by Congress.

B. Standard of Review

Even were this Court to decide to address the issue of what Schedule marijuana should be listed in under the Controlled Substances Act, the review of the Court is seriously constricted. In assessing an equal protection challenge, a law which is based on a "suspect classification" or infringes upon a fundamental right is subject to strict scrutiny. *Dillinger v. Schweiker*, 762 F.2d 506, 508 (6th Cir. 1985). There is no fundamental right to manufacture, distribute, possess or use marijuana, nor are people who do such things subject to invidious discrimination that places them in a "suspect classification." Absent that review, the Court is left to "determine whether the legislative classification is rationally related to a legitimate governmental purpose." *Id.*

Because the scheduling of marijuana is not based on a suspect classification and the courts have "explicitly rejected the existence of a fundamental right to use medical marijuana," the defendant's challenge is subject to rational basis review, "which is highly deferential." *United States v. Washington*, 887 F. Supp. 2d 1077, 1102 (D. Mont. 2012); *see also United States v. Fogarty*, 692 F.2d 542, 547 (8th Cir. 1982). In raising an equal protection claim, the defendant "bears the burden of negating every conceivable basis which might support [the law]." *Washington*, 887 F. Supp. 2d at 1102 (internal quotation marks omitted). In its review, "the court

does not question the wisdom of the legislation . . . [n]or should the court substitute its conception of sound public policy for Congress'." *Dillinger*, 762 F.2d at 508.

C. **An Evidentiary Hearing Is Unnecessary For Rational Basis Review.**

Since the equal protection challenge raised, if properly before the Court, is subject to rational basis review, the Court should not grant an evidentiary hearing. Federal courts have recognized that a "court holds evidentiary hearings only when necessary to resolve material disputes of fact. In constitutional law, to say that such a dispute exists . . . is to require a decision for the [government]. Outside the realm of 'heightened scrutiny' there is therefore never a role for evidentiary proceedings." *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (holding that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data"); *Planned Parenthood v. Abbott*, 748 F.3d 583, 596 (5th Cir. 2014) (holding that "there is 'never a role for evidentiary proceedings' under rational basis review."). Because the defendant's equal protection claims are subject to rational basis review, holding an evidentiary hearing would be improper. The very claim that a material question of fact exists to the point where an evidentiary hearing is required mandates that the Court thereafter defer to Congress which has already exercised its judgment.

In contrast, Defendant "asserts the right at issue is liberty" and that "the most exacting level (of scrutiny), commonly known as "strict scrutiny" should be applied. (Def. Br. at 5). The "liberty" interest is not the liberty to use marijuana or even medical marijuana – he claims that it is the liberty Defendant would lose if convicted of a criminal act. Accepting Defendant's argument would mean that there is no reason for the Courts to have developed specialized review for the "suspect classifications" (such as race, national origin, religious affiliation or alienage) or

fundamental rights (such as the right to vote or travel) or the "semi-suspect" classifications (such as gender and illegitimacy) that Defendant has identified in his brief -- because all that would really matter is whether a Defendant can attach a "liberty" interest to a claim. (Def.s Br. at 5). Perhaps this is why Defendant claims that his legal discussion addresses the "rational basis" standard of review. But having accepted that standard of review, he is no longer entitled to the hearing he has requested and he has failed in his brief to "negate every conceivable basis" supporting the law.

D. Congress Has A Rational Basis For Listing Marijuana As A Schedule I Controlled Substance.

In 1970, Congress passed the Controlled Substances Act (CSA) in an effort to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzales*, 545 U.S. at 12. Under the CSA, substances are categorized into five schedules, "grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body" *Id*. at 13. Classifying a substance as Schedule I makes the "manufacture, distribution, or possession of [the drug] a criminal offense. *Id.* at 14. Since the CSA was enacted, marijuana has been classified as a Schedule I substance, which requires a finding that: (A) the drug has a high potential for abuse, (B) it has no currently accepted medical use, and (C) there is a lack of accepted safety for use of the drug under medical supervision. 21 U.S.C. § 812(b)(1), (c). In deciding whether or not placing marijuana in Schedule I was proper, the Court had "no difficulty" in deciding that Congress acted rationally in regulating all distribution of marijuana, holding that

> The fact that marijuana is used "for personal medical purposes on the advice of a physician" cannot itself serve as a distinguishing factor. The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses. Moreover, the CSA is a comprehensive regulatory regime

> specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner. Indeed, most of the substances classified in the CSA "have a useful and legitimate medical purpose." 21 U.S.C. § 801(1). Thus, even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug, the CSA would still impose controls beyond what is required by California law. . . Accordingly, the mere fact that marijuana-like virtually every other controlled substance regulated by the CSA-is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.

Gonzalez at 27-28. Thus, the Supreme Court has held that marijuana is rightly regulated as a controlled substance. Having decided to regulate marijuana, Congress has the authority to Schedule it as well.

Congress also created an exclusive procedure for reclassification of a controlled substance. *See* 21 U.S.C. § 811(a)(1). Under the CSA, the Attorney General (or his designee, the Administrator of the Drug Enforcement Administration) may reclassify a substance by holding a hearing and making findings about the substance's potential for abuse, its medical use, and its safety under medical supervision. *Id.*; *Americans for Safe Access v. DEA*, 706 F.3d 438, 441 (D.C. Cir. 2013); *United States v. Canori*, 737 F.3d 181, 183 (2d Cir. 2013). This proceeding may be initiated by the Attorney General himself, at the request of the Secretary of Health and Human Services, or "on the petition of any interested party." 21 U.S.C. § 811(a)(1).

Congress does not lack a rational basis for classifying marijuana as a Schedule I controlled substance. The Supreme Court recently held that "by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses," and that they acted rationally in doing so. *Gonzales*, 545 U.S. at 26-27. Additionally, our Circuit has repeatedly upheld marijuana's classification against arguments similar to the one presented by the defendant in this case. *See United States v. Smith*, 46 F. App'x 247, 250 (6th Cir. 2002) ("[C]ourts have held that the classification of marijuana as a controlled substance was a rational

decision by Congress, and we will not disturb that decision . . . ."); *United States v. Burton*, 894 F.2d 188, 192 (6th Cir. 1990) (holding that the current classification of marijuana is not "irrational or unreasonable."). In *United States v. Greene*, 892 F.2d 453, 455-56 (6th Cir. 1989), the Court held that the classification of marijuana as a controlled substance was a rational decision by Congress. As here, the defendant in *Greene* based his constitutional argument on medical testimony that marijuana did not satisfy the three requirements for a Schedule I classification. *Id.* at 455. The Sixth Circuit followed its sister circuits and rejected the constitutional challenge. *Greene*, 892 F.2d at 456.[2]

Federal courts addressing the question have consistently held that the "ongoing vigorous dispute . . . supports the rationality of the continued Schedule I classification." *Fogarty*, 692 F.2d at 548; *see also Washington*, 887 F. Supp. 2d at 1102-03 ("[T]here remains sufficient debate regarding the public benefits and potential for harmful consequences of marijuana use to find a rational basis to uphold the continued classification of marijuana as a schedule I controlled substance."). The existence of some debate surrounding the issue proves that the defendant has failed to negate "every conceivable basis" which may support the legislature's choice. The Eighth Circuit even went so far as to say that marijuana could rationally be classified as a Schedule I substance even if it had accepted medical uses, "in view of countervailing factors such as the current pattern, scope, and significance of marijuana abuse and the risk it poses to public health." *Fogarty*, 692 F.2d at 548.

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[2] Courts in other circuits have similarly held that the classification is constitutional. See Fogarty, 692 F.2d at 548; United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982); United States v. Miroyan, 577 F.2d 489, 495 (9th Cir. 1978), overruled in part on other grounds; United States v. Kiffer, 477 F.2d 349, 355-57 (2d Cir. 1973); *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972); United States v. Tat, No. 12-81, 2014 WL 1646943 (W.D. Pa. Apr. 24, 2014); *Washington*, 887 F. Supp. 2d at 1102; United States v. Zhuta, No. 09CR357A, 2010 WL 5636212, at *4 (W.D.N.Y. Oct. 29, 2010).

Additionally, federal courts have held that the policy arguments surrounding rescheduling are not matters for the judiciary to decide and are "better suited for the congressional hearing room than the courtroom" *United States v. Plume*, 447 F.3d 1067, 1076 (8th Cir. 2006); *see also Greene*, 892 F.2d at 456 (concluding that the rescheduling provision "evidences Congressional intent to provide an efficient and flexible mechanism for assuring the continued rationality of the classification of controlled substances."); *Kiffer*, 477 F.2d at 357 ("The provisions of the Act allowing periodic review of the control and classification of allegedly dangerous substances create a sensible mechanism for dealing with a field in which factual claims are conflicting and the state of scientific knowledge is still growing.").

Last year the District of Columbia Circuit upheld the Drug Enforcement Administration's decision to not reclassify marijuana. *Americans for Safe Access*, 706 F.3d at 440. The court considered the question of whether the DEA arbitrarily and capriciously declined to reschedule the drug and noted that "something more than 'peer reviewed' studies [presented by the petitioners] is required to satisfy [the] DEA's standard" of adequate and well-controlled studies necessary to make a finding of acceptable medical use of a drug. *Id.* at 452. The court denied the constitutional challenge because it found "nothing in the record that could move [them] to conclude that the agency failed to prove by substantial evidence that such studies confirming marijuana's medical efficacy do not exist." *Id.* In the instant case, the studies Defendant seeks to present in an evidentiary hearing are peer-reviewed studies, much like those found to be inadequate by the District of Columbia Circuit, and are therefore not enough to sustain a finding of accepted medical use.

Finally, contrary to the defendant's argument, the effects of other substances in comparison to marijuana's are irrelevant to the constitutionality of marijuana's Schedule I

classification. "If Congress decides to regulate or prohibit some harmful substances, it is not thereby constitutionally compelled to regulate or prohibit all. It may conclude that half a loaf is better than none." *Kiffer*, 477 F.2d at 355; *see also United States v. Carolene Prods. Co.*, 304 U.S. 144, 151 (1938) ("A legislature may hit at an abuse which it has found, even though it has failed to strike at another."). Regardless of the safety or harmfulness of over-the-counter medications, or any other substance for that matter, marijuana rightfully remains a Schedule I controlled substance.

In sum, the classification of marijuana as a Schedule I controlled substance is not unconstitutional. This circuit, along with every other federal court to consider the issue, has upheld the rationality of Congress's decision to classify marijuana as a Schedule I substance as well as the decision to not reschedule it. The ongoing debate surrounding the potential for medical use of marijuana reinforces the reasonableness of Congress's decision. Because there is a rational basis for the current scheduling of marijuana, it does not violate the Equal Protection Clause and this Court should deny the defendant's motion.

E. The Government's Decision To Prosecute Taylor Does Not Violate Equal Protection.

As a preliminary matter, Taylor has no standing to make an equal protection challenge in this case. It is a well-settled principle that "plaintiffs must assert their own legal rights and interests, and cannot rest a claim to relief on the rights or interests of third parties." *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 363 (6th Cir. 2012). At most, Taylor could argue that those acting in accordance with state law, and contrary to federal law, were selectively prosecuted in violation of their equal protection rights.[3] Taylor, however, is charged with

[3] Contrary to the defendant's claim that a selective prosecution claim does not require that the groups be similarly situated, the Supreme Court explicitly stated that "the similarly situated

conspiracy to distribute over 100 marijuana plants for profit, which is not within laws of any state, and he is therefore not being treated any differently than those engaging in similar activity.[4] [5] Because the defendant may only assert his own legal rights, he has no standing for his claim. *See Tat*, 2014 WL 1646943, at *4 (rejecting a due process claim where defendant "has made no argument or presented any evidence that his involvement in the charged multi-state conspiracy to distribute marijuana was authorized under the laws of any other jurisdictions" and further rejecting Defendant's claim that marijuana did not belong in Schedule I of the CSA).

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requirement is necessary." United States v. Armstrong, 517 U.S. 456, 466 (1996); see also McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (same).

[4] The undersigned alone has prosecuted the following additional cases in which those charged claimed to have been growing more than 100 marijuana plants as "medical marijuana": *United States v. Jenkins*, WDMI No. 1:14-CR-072; *United States v. Neubauer-Keyes*, WDMI No. 1:14-CR-061; *United States v. Martin, et. al*., WDMI No. 1:12-CR-77;*United States v. Shane Benit*, WDMI No. 1:12-CR-139; *United States v. John Degraaf*, WDMI No. 1:12-CR-090; *United States v. Laurel Ellis*, WDMI No. 1:12-Cr-091; and *United States v. Stephen Parker*, WDMI No. 1:10-CR-289. Other similar cases before the Court include: *United States v. John Dunn*, WDMI No. 1:12-CR-102; *United States v. Edward Hammond*, WDMI No 1:12-CR-94; *United States v. Randall Darling*, WDMI No 1:11-CR-09-01; *United States v. Joseph Johnson*, WDMI No. 1:11-CR-09-02; *United States v. Corey Hathaway*, WDMI No. 1:11-CR-132-01; *United States v. Dustin Norris*, WDMI No. 1:11-CR-132-02 ; *United States v. Jeremy Halverson*, WDMI No. 1:11-CR-262-01; *United States v. Victoria Halverson*, WDMI No.1:11-CR-262-02 ; *United States v. John Marcinkewiciz*, WDMI No. 1:11-CR-340-01; *United States v. Shelly Waldron*, WDMI No. 1:11-CR-340-02; *United States v. Jaycob Montague*, WDMI No.1:11-CR-340-03; *United States v. Todd Holforty*, WDMI No.1:12-CR-92-01; *United States v. Cynthia Loomis*, WDMI No.1:12-CR-92-02. *United States v. Scott Messenger* WDMI No. 1:12-CR-89; *United States v. Jeremy Rasmussen* WDMI No. 1:12-CR-11; *United States v. Andrew Sinadinos*, WDMI No. 1:12-CR-131; and *United States v. Lamont Thomas*, WDMI No. 1:12-CR-49. This is by no means a complete list.

[5] *Cf.* Cole Memo II at 4 ("Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances.")

"[T]he Due Process Clause of the Fifth Amendment subjects the federal government to constitutional limitations that are the equivalent of those imposed on the states by the Equal Protection Clause of the Fourteenth Amendment." *Consejo De Desarrollo Economico De Mexicali, A.C. v. United States*, 482 F.3d 1157, 1170 n. 4 (9th Cir. 2007). The Supreme Court has held that "[t]he Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). An equal protection challenge may lie where there is evidence that an individual or group has been selectively prosecuted. *See United States v. Armstrong*, 517 U.S. 456, 464-65 (1996). In order to establish a selective prosecution claim, a defendant is faced with a "rigorous standard" which requires "clear evidence" that the prosecutorial decision or policy in question had both "a discriminatory effect and . . . was motivated by a discriminatory purpose." *Armstrong*, 517 U.S. at 465, 468." *United States v. Sammons*, 918 F.2d 592 (6th Cir. 1990); *see also, United States v. Alameh*, 341 F.3d 167, 173 (2nd Cir. 2003). "The discriminatory effect prong requires a showing that 'similarly situated individuals of a different [classification] were not prosecuted.'" *Alameh*, 341 F.3d at 173 (quoting *Armstrong*, 517 U.S. at 465). The discriminatory purpose prong requires a showing that "the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.' " *Wayte v. United States*, 470 U.S. 598, 610 (1985) (quoting *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)).

Defendant's argument may fairly be summarized as simply suggesting that marijuana users in states that have more liberal medical marijuana laws may more easily evade and violate federal law and therefore he should not be prosecuted. This argument does not rise to a valid Constitutional challenge.

Further, a decision to prosecute in federal, rather than state, court is unreviewable unless the decision can be shown to have been based on race, sex, religion or the exercise of a Constitutional right. *United States v. Davis*, 15 F.3d 526 (6th Cir. 1994); *United States v. Allen*, 954 F.2d 1160 (6th Cir. 1992). Defendant has not claimed that the decision of the United States Attorney's Office to bring criminal charges was based upon the race, sex, or religion of the Defendants, nor has he claimed a Constitutional right to grow or sell marijuana; providing yet another reason to deny his claim.

Even assuming this Court finds that Taylor has standing to make an equal protection claim, his rights were not violated by the government's prosecutorial policy. "In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985). The Supreme Court has recognized that prosecution decisions are "particularly ill-suited to judicial review" because factors such as "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis that the courts are competent to undertake." *Id.* As a result, "in the absence of clear evidence to the contrary, courts presume that [the prosecutors] have properly discharged their official duties." *Armstrong*, 517 U.S. at 464 (internal quotation marks omitted); *Reno v. Am.-Arab AntiDiscrimination Comm.*, 525 U.S. 471, 489 (1999). Moreover, "[t]here is no right under the Constitution to have a law go unenforced against you, even if you are the first person against whom it is enforced, and even if you think (or can prove) you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced somewhere[.]" *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir. 1996), *overruled on other grounds by Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

"'[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such a race, religion, or other arbitrary classification.' " *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). So long as the federal prosecutorial policy does not have either a "discriminatory effect [or] a discriminatory intent," there is no equal protection violation. *United States v. Jones*, 399 F.3d 640, 642 (6th Cir. 2005).

Taylor has provided no evidence whatsoever that the government's prosecution policy has a discriminatory effect. In fact, the *Ogden Memo* that he relies on in his brief specifically advises prosecution of those similarly situated to the defendant. *See Memorandum from Deputy Att'y Gen. David W. Ogden, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, at 3* (Oct. 19, 2009) (hereinafter "Ogden Memo") ("[N]othing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law."). Taylor is accused of hiding behind the framework of the Michigan Medical Marihuana Act in his conspiracy to distribute marijuana.

Additionally, nothing in either the Ogden Memo or the Cole Memos indicates an intention by the government to prosecute based on a discriminatory effect to an "identifiable group." Indeed, every federal court to address the issue has agreed that the memoranda present no constitutional issues. *See*, *Washington*, 887 F. Supp. 2d at 1091 ("The Ogden memo makes clear that the federal government retains the discretion and authority to prosecute violations of federal laws prohibiting marijuana, and does not grant any person or class of persons immunity

from federal prosecution."); *Canori*, 737 F.3d at 185 ("The Attorney General's exercise of that discretion, in the Ogden Memo, neither legalizes marijuana nor creates a constitutional crisis.").

In an analogous case to this one, the Sixth Circuit held that the government's policy was "a matter of prosecutorial discretion" and passed the rational basis test. *United States v. Gaytan*, 226 F. App'x 519, 522 (6th Cir. 2007). In *Gaytan*, the defendant argued that the federal "Fast Track" plea bargaining program violated his equal protection rights because it was only offered in certain districts. *Id.* at 521-22. The court his claim because "the Government [had] a legitimate interest in conserving and allocating law enforcement resources . . . and the program is rationally related to that goal. *Id.* at 522.

Here, the government's prosecutorial policy is driven by similar interests of preserving prosecutorial resources, as mentioned in the Cole and Ogden memos. The memoranda were released to provide "guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana." *Memorandum from Deputy Att'y Gen. James M. Cole, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, at 1 (June 29, 2011) (hereinafter "Cole Memo"); *Memorandum from Deputy Att'y Gen. James M. Cole, Guidance Regarding Marijuana Enforcement*, at 1 (Aug. 29, 2013) (hereinafter "Cole Memo II"); Ogden Memo at 1. Specifically, the memoranda advised U.S. Attorneys that federal resources should not be spent on "individuals whose actions are in clear and unambiguous compliance with existing state laws" such as "individuals with cancer or other serious illnesses." Cole Memo at 1; Ogden Memo at 1. However, the memoranda go on to say that "[p]ersons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state

law. . . . such persons are subject to federal enforcement action, including potential prosecution." Cole Memo at 2; Cole Memo II at 3; Ogden Memo at 2.

Due to limited prosecutorial resources, the federal government "has not historically devoted resources to individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property," and has instead left such conduct to local and state authorities. Cole Memo II at 2. In those states that have now passed medical marijuana laws, the federal government expects "strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests." *Id.* Michigan's medical marijuana act provisions do not evidence a "strong and effective regulatory and enforcement system."

As noted by the Court in *United States v. Hicks*, 722 F. Supp. 2d 829 (E.D. Mich. 2010),

> The Department of Justice's discretionary decision to direct its resources elsewhere does not mean that the federal government now lacks the power to prosecute those who possess marijuana. *See United States v. Stacy*, 696 F.Supp.2d 1141, 1149 (S.D.Cal.2010) ("Defendant has not pointed to any authority for dismissing an indictment because it is contrary to internal Department of Justice guidelines.")

Because the federal government has a legitimate interest in preserving its limited resources and the prosecutorial policy is rationally related to that goal, there has been no equal protection violation and this Court should not grant an evidentiary hearing on the matter.

F. **The Government's Prosecutorial Policy Does Not Violate Equal Sovereignty.**

Finally, Taylor's claim of an equal sovereignty violation fails because the CSA applies equally over all states. As explained by the Supreme Court, the doctrine of equal sovereignty means that the federal government may not treat one state more harshly than other states, absent extreme circumstances justifying the disparate treatment. *Shelby Cnty. v. Holder*, 133 S. Ct.

2612, 2619, 2624 (2013). In *Shelby County*, the Court struck down provisions of the Voting Rights Act of 1965, which applied only to certain states. *Id.* at 2631.

Unlike the present case, *Shelby County* involved a law that applied disparately among the states by its own provisions. Here, Taylor argues that federal prosecutorial policy, as it applies the CSA, violates equal sovereignty. The Cole and Ogden Memos do not carve out an exception to the CSA for those acting in accordance with state law. Ogden Memo, at 3 ("Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests."). Instead, the memoranda provide guidance to U.S. Attorneys on how to best utilize the "limited prosecutorial and investigative resources to address the most significant threats in the most effective, consistent, and rational way." Cole Memo II, at 1.

The Ninth Circuit recently struck down a claim similar to the defendant's, noting that, "[l]ocal decriminalization notwithstanding, the unambiguous *federal* prohibitions on medical marijuana use set forth in the CSA continue to apply equally" across the states. *James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir. 2012) (emphasis in original). The Second Circuit similarly held that "[a] U.S. Attorney's decision to exercise prosecutorial discretion by not prosecuting uses of marijuana consistent with state law . . . does not conflict with the principles of federalism, preemption, or the supremacy of federal law." *Canori*, 737 F.3d at 185.

Because the defendant cannot show that the federal prosecutorial policy violates equal sovereignty, this Court should follow other federal circuits and deny the defendant's motion.

CONCLUSION

The federal government's designation of marijuana as a Schedule I controlled substance and prosecutorial policies in enforcing the Controlled Substances Act present no constitutional problems. Courts have consistently rejected claims similar to Taylor's, and this Court should deny his motion to dismiss. This Court should also deny the defendant's request for evidentiary hearing, as it is not necessary for a rational basis review.

Respectfully submitted,

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Dated: July 17, 2014

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