UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA Case No. 1:14-cr-00067-RJJ

Plaintiff,

v. Hon. Robert J. Jonker

SHAWN ANDREW TAYLOR

Defendant.

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

NOW COMES, Defendant Shawn Taylor, and submits the following in reply to the Plaintiff's Opposition to Defendant's Motion to Dismiss Indictment (Doc 439).

INTRODUCTION

In their response to Mr. Taylor's motion to dismiss indictment, the Government posits myriad arguments: that Mr. Taylor cannot attack the placement of marijuana in Schedule I in this Court, that a rational basis review is "highly deferential" to the Government, and that an evidentiary hearing is unnecessary for rational basis review because among other things, Congress has a rational basis for listing marijuana as a Schedule 1 Controlled Substance. Defendant will attempt to address these myriad issues.

DEFENDANT'S ALLEGED NON-COMPLIANCE WITH THE MICHIGAN MEDICAL MARIHUANA ACT IS NOT RELEVANT TO THE ISSUES RAISED

The Government's theory of prosecution involves an illustration of Defendant's alleged non-compliance with the Michigan Medical Marihuana Act (MMMA), a section of the state public health code that provides both an immunity from arrest and prosecution

as well as an affirmative defense to certain criminal prosecutions involving marijuana in state court. While Defendant leaves the Government to their proofs (subject to the rules of evidence concerning relevancy), Defendant wishes to point out the relatively obvious fact that his motion to dismiss is not based upon either compliance with the MMMA or some statutory protection within the MMMA that the Defendant wishes to apply in federal court.

Further, Defendant would contend that the basis of his motion to dismiss would be relevant and viable in jurisdictions that have not legalized medical or recreational marijuana cultivation and use under state law, because Defendant believes that both the continued presence of marijuana within Schedule 1 of the CSA as well as the entire application of federal resources to treat targets of marijuana investigations and prosecutions differently based upon which state the activity occurs, constitutes an Equal Protection violation throughout the Union.

The Government's suspicion of Defendant's noncompliance with the MMMA in this regard is somewhat of a red herring. The Government somehow believes that Defendant's activities vis a vis the state's MMMA should persuade this Court to deny Defendant's right to Equal Protection under the United States Constitution, yet mischaracterizes both the state of the law as well as Defendant's argument.

THIS COURT IS NOT BEING ASKED TO RESCHEDULE MARIJUANA

The specific relief that Defendant is asking this Court to consider is the granting of an evidentiary hearing as to the rationale (or lack thereof) to maintain Marijuana as a Schedule I Controlled Substance and to consider dismissing the indictment against the

Defendant on the basis of an Equal Protection violation should this Court find that there is no basis for its current scheduling.

For if this Court finds, as it is urged, that 21 U.S.C. Section 812, Schedule 1(c)(10) and (17) are constitutional invalid, they may not form the basis for a prosecution under 21 U.S.C. Sections 846, 841(a)(1), under any circumstances. (See, *Bond v. United States*, __ U.S.__, 131 S.Ct. 2355, 2367 (2011), (Ginsburg, concurrence, "Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law.... If a law is invalid as applied to the criminal defendant's conduct, the defendant is entitled to go free);" see also *Ex parte Siebold*, 100 U.S. 371, 376-377 (1880), a "conviction under [an unconstitutional law] is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." Id., at 376-377.)

The defense in not asking this Court to force the DEA to reclassify marijuana. *Americans for Safe Access (ASA) v. DEA*, 706 F.3d 438 (D.C. Cir. 2013) is therefore irrelevant.

Specifically, the defense asserts that the current scheduling of cannabis in Schedule I is irrational and is thus violative of Equal Protection as an unreasonable classification inconsistent with the current scientific and medical research, and the prosecution of defendant is based on an arbitrary classification that violates Equal Protection[1]. These challenges are supported by detailed evidentiary proffers, including expert statements made under penalty of perjury and supporting exhibits. Without discrediting any of this evidence, nor addressing the Equal Protection and Equal

[1] It is well settled that "the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition." *United States v. Caroline Products,* supra, 394 U.S. 144, 153-154.

Sovereignty arguments, the Government ostensibly relies on cases with no precedential value. While several court opinions have touched on the issue of reclassifying marijuana, not one has been confronted with the Constitutional challenges raised by the defense in the instant motion, nor presented the evidence proffered in support thereof. Further, most of these opinions recognize that the scientific evidence is evolving, and therefore a decision made in 1978, will have no factual similarity to the issues to be litigated in 2014.

In fact, the United States Supreme Court almost invited the present challenge when, in what is admittedly dicta from the case of *Gonzalez v. Raich*, supra, 545 U.S. 1, it stated: “We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I.” *Id*., at p. 28.

The Defendant is not asking this Court to order Congress or the Executive to do anything. Rather, the Defendant is asking the Court to review the constitutionality of Defendant’s prosecution in light of recent High Court decisions concerning the 14th Amendment to determine if this prosecution can constitutionally go forward.

THIS COURT HAS ORIGINAL JURISDICTION, AND INDEED A DUTY TO REVIEW THE CONSTITUTIONALITY OF CONGRESSIONAL ACTIONS.

The Government urges this Court to abdicate its role as one of the equal branches of government and find that, pursuant to 21 U.S.C. § 877, it is without authority to review the challenge here made. Such an assertion wholly misconstrues § 877, which by its terms applies to judicial review of administrative action, not Congressional Acts.

In the present case, this Court is urged to determine whether the Congressionally-enacted statutes violate Equal Protection of the Law and the Equal Sovereignty of the States. This challenge has always found jurisdiction in the first instance the District Court. (See, e.g. *Gonzales v. Raich*, 545 U.S. 1, 6-8 (2005) the case establishing Congress' authority to regulate medical cannabis under the Commerce Clause, and *United States v. Emerson*, 846 F.2d 541 (9th Cir. 1988), where the defendants successfully challenged their convictions under 21 U.S.C. § 841, 846, for the distribution of 3,4-methylenedioxymethamphetamine.)

It has been the firm duty of the Courts to interpret the constitutionality of Congressional action since 1803 when the United States Supreme Court struck down a portion of the Judiciary Act of 1789, holding:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. *This is of the very essence of judicial duty. Marbury v. Madison*, 5 U.S. 137, 178 (1803), emphasis added.

For over 200 years, this principle has been applied by the Courts, and has been instrumental in preserving the rights of the citizenry and the protection of our Constitution. In 2012, citing to *Marbury v. Madison*, the High Court again reaffirmed its role when striking a portion of the legislation known as the Affordable Care Act:

> There can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566, 2579 (2012). Accordingly, the Government's suggestion that this Court is without jurisdiction

to question the judgement of Congress is not only inaccurate, it divests the Court of "the very essence of [its] judicial duty," (i.e., to determine whether a Congressional action comports with the Constitution).

THE GOVERNMENT MISCHARACTERIZES THE APPLICABLE STANDARD OF REVIEW IN THIS CASE

In their responsive pleadings to Defendant's motion to dismiss, the Government cites case law from 2012 and 1982 to characterize rational basis review as "highly deferential" while completely minimizing recent developments in the United States Supreme Court concerning Equal Protection doctrine.

The rational basis standard has recently been heightened in Equal Protection challenges to federal statutes involving issues of federalism and the Equal Sovereignty of the States, which the defense has asserted in the instant matter[2]. In the 2012 case of *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2012), the Court analyzed the Defense of Marriage Act [DOMA] under principles of federalism that converged with the Plaintiff's Fifth Amendment rights. Ultimately striking the statute on the federalism grounds, the Court determined that DOMA's "interference with the equal dignity of same-sex marriages, *a dignity conferred by the States in the exercise of their sovereign power*, was more than an incidental effect of the federal statute. It was its essence." *Id.*, emphasis added. Deferring to the sovereignty of the States, the Court held, "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance." *Id.* at 2692. Importantly, the Court employed a heightened level of rational basis scrutiny, rather than employ the

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[2] See, Ernest A. Young and Erin C. Blondel, Federalism, Liberty, and Equality in *United States v. Windsor*, in CATO INSTITUTE SUPREME COURT REVIEW 2012-2013, 117-147, (Ilya Shapiro eds., 2014), acknowledging "active" or heightened rational basis review for Equal Protection claims involving challenges to our nation's federalist structure.

intermediate scrutiny that is afforded to cases involving gender and illegitimacy. See, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985), for discussion of intermediate scrutiny. Justice Kennedy set forth what has since been dubbed "active" rational basis review, finding that "[d]iscriminations of an unusual character especially require careful consideration." *Id.*, citing *Romer v. Evans*, 517 U.S. 620 (1996).

Also in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the Supreme Court employed a heightened or "active" rational basis test when deciding that the justification proffered for the Voting Rights Act in 1965 was no longer rationally related to the problems existing in 2004, and thus, invalidated sections of the Voting Rights Act. *Id.* (See also *Leary v. United States*, 395 U.S. 6, 38, fn. 68 (1969), "[a] statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge, a court must, of course, be free to reexamine the factual declaration;" and, *Massachusetts v. United States Health & Human Services Agency [HHA]*, 682 F.3d 1 (1st Cir. 2012) (heightened scrutiny greater than rational basis applied in Equal Protection cases involving federalism challenges.)

Thus, for the foregoing reasons, the issues should be evaluated under the heightened rational basis test.

THERE IS NO RATIONAL BASIS TO LIST MARIJUANA AS A SCHEDULE 1 CONTROLLED SUBSTANCE

Marijuana is not properly listed as a Schedule I Controlled Substance. This is so, because even when employing a rational basis standard of review, there exists no facts to support a finding that marijuana is constitutionally classified. It is conceded that the law presumes the constitutionality of an Act of Congress, and the prosecution may rely on this presumption when defending a challenge. Where, as in the present case,

evidence is proffered which rebuts that presumption, and the "policy goals" can not be justified by the policy employed by federal government officials, the failure to proffer any rational basis for the continued inclusion of marijuana in Schedule I lends truth to the defense assertion that such classification can not survive even the most deferential judicial scrutiny as it has no footing in the realities of the subject. See, *Heller v. Doe*, 509 U.S. 312 (1993) holding"even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Id*, at 321.

THE 2013 COLE MEMO AND RECENT EVENTS IMPACTING THE ISSUES PRESENTED

The DOJ's policy outlined in the 2013 Cole Memo has yet to be addressed by this or any Court in the context of an Equal Sovereignty challenge, although a recent District Court did consider the Memo's impact on marijuana prosecutions. In *United States v. Dayi,* No. JKB-13-0012, JKB-13-0304, 2013 WL 5878922 *4 (D.Md. Nov 1, 2013), the Court sua sponte departed downward two levels when sentencing each of the 22 defendants. Holding:

> [T]he Court finds that it appropriately may consider recent changes in federal marijuana enforcement policy, as well as the changes in state law that have apparently motivated the change in federal enforcement policy" in sentencing. *Id*.

Recognizing a potential Equal Protection violation, the Court concluded: "[t]he Court therefore finds it should use its sentencing discretion to dampen the disparate effects of prosecutorial priorities." *Id*. Although the Court in *Dayi* stopped short of declaring the CSA unconstitutional as applied to marijuana, the Judge clearly questioned the continued viability of the scheduling scheme, stating: "[t]here is no

evidence that Congress has ever thoroughly reevaluated the appropriateness of its Schedule I designation for marijuana," the Court went on to note the 2013 Cole Memo evidences "an undeniable signal that violating federal marijuana laws is not as serious an offense as it once was." *Id*.

Not only have the trial courts begun to recognize the rapidly changing legal landscape for cannabis in the sentencing context, significant changes have occurred since early 2014. Importantly, the DOJ and the Department of Treasury each issued memoranda relating to financial crimes involving marijuana which present guidelines for legally providing services to marijuana-related businesses. To be sure, this regulation would have been deemed money laundering in any other context.

Our own President in essence acknowledged that cannabis does not meet the three criteria required for inclusion in Schedule I, stating, "I don't think [marijuana] is more dangerous than alcohol." See, New Yorker Magazine, "Going the Distance: On and off the road with Barack Obama," published on January 27, 2014.

While the Government argues this Court should defer to Congress, Congress itself has deferred its own authority to the Executive Branch, and specifically to the DEA Administrator. See 21 U.S.C. § 811; 28 C.F.R. § 0.1000. Congress' frustration with the DEA's refusal to reschedule marijuana has been patent, as the DEA Administrator famously refused to acknowledge that crack cocaine or heroin are worse for one's health than marijuana when asked while testifying before Congress in 2012. (See, Huffington Post article entitled "*Michele Leonhart, DEA Chief, Won't Say Whether Crack, Heroin Are Worse For Health Than Marijuana,*" dated June 21, 2012).

CONCLUSION

The judiciary's role, established in *Marbury v. Madison*, supra, almost two centuries ago, demands that this Court step in where the other branches of government have failed to act, and where this failure infringes on the Constitution.

Defendant requests that the Court set an evidentiary hearing wherein the issues raised in Defendant's moving papers may be properly developed and scrutinized by the Court.

Respectfully Submitted,

August 4th, 2014

By: /s/
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