No. 05-16466

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

vs.

MARIN ALLIANCE FOR MEDICAL MARIJUANA/
LYNNETTE SHAW Appellants-Defendants

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal From Entry of Final Judgment by the United States District Court
for the Northern District of California
District Court Nos. CV-98-00-86-98-00087-98-00088 CRB
The Honorable Charles R. Breyer

GREG ANTON
LAW OFFICES OF GREG ANTON
P.O. Box 299
Lagunitas, CA 94938
Telephone: (415) 789-8535
Fax: (415) 663-0350
greganton@wildblue.net

No. 05-16466

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

vs.

MARIN ALLIANCE FOR MEDICAL MARIJUANA/
LYNNETTE SHAW Appellants-Defendants

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal From Entry of Final Judgment by the United States District Court
for the Northern District of California
District Court Nos. CV-98-00-86-98-00087-98-00088 CRB
The Honorable Charles R. Breyer

GREG ANTON
LAW OFFICES OF GREG ANTON
P.O. Box 299
Lagunitas, CA 94938
Telephone: (415) 789-8535
Fax: (415) 663-0350
greganton@wildblue.net

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

GOVERNMENT CODE **PAGE**

CASE LAW

DOCUMENT REFERENCES

STATEMENT OF JURISDICTION

Appellant Marin Alliance for Medical Marijuana ("MAMM") is currently consolidated with the following cases: *United States v. Oakland Cannabis Buyers Cooperative* (02-16535)(OCBC); and *United States v. Ukiah Cannabis Buyers Club* (02-16715). Appellant has joined OCBC in its opening brief, including their statement of jurisdiction and factual summary. This Court has allowed MAMM to file a 5 page supplemental brief per its May 7, 2007 order. Appellant has attached a motion requesting permission of the court to file this seven-page brief.

STATEMENT OF ISSUES

I) Did the District Court commit judicial error in refusing to consider whether or not there is a rational basis for the inclusion of marijuana in Schedule I of 21 U.S.C. 812(b) (Controlled Substance Act (CSA)).

II) Is there a rational basis for The CSA as it applies to marijuana?

SUMMARY OF ARGUMENT

I) In its MEMORANDUM AND ORDER filed May 3, 2002, (OCBC Opening Brief; ER 74) the District Court granted the Government's motion for summary judgment and stated at page 9: "The Court must consider this entire statutory scheme in determining whether there is a rational basis for the CSA's prohibition on the manufacture and distribution of marijuana for any purpose." The court then incorrectly stated (p. 9, line 24.): "Defendants' challenge to the appropriateness of the classification of marijuana must be made to the DEA Administrator, not this district court."

Appellant contends that this is clear judicial error. The classification is the essence of the statute and its application. It is the court's responsibility to determine whether there is a rational basis for the statute as it stands. The court's statement is constitutionally incorrect and is circular in nature, i.e., it states that the fact that an activity is controlled by a statute creates a rational basis for controlling the activity. The history of this and other courts is a succession of proper jurisdictional reviews of classifications within a statute.

Precedent and reason dictate that inclusion of an activity within a statute is reviewable by a court when testing the rational basis of a statute.

II) Based on a plethora of scientific and factual information, there is no rational basis for Schedule I, 21 U.S.C. 812(b), as applied to marijuana.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO DETERMINE WHETHER OR NOT THE CSA AS APPLIED TO MARIJUANA (MEDICAL CANNABIS) IS RATIONAL.

Appellant is aware of the substantial deference given to a legislature by the courts in examining the rational basis of a statute, however this does not abdicate the court's responsibility to determine whether or not a statute is rationally related to a legitimate State interest. For the District Court to say that a classification within a statute is immune from constitutional examination by the court, is to say that the very substance of a law is not open to judicial scrutiny because it is a law. A statute may be challenged as irrational or arbitrary on the grounds of its inclusion within a statutory scheme of an item which cannot be rationally grouped with the other members of a class so regulated. *Gulf C. & S. F. Ry. v. Eillis*, 165 U.S. 150,

158-9, 165-66, 17 S.Ct. 255, 4 L.Ed. 666 (1897); *Baxstrom v. Herold*, 383 U.S. 17, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966); *Levy v. Louisiana* 391 U.S.68, 20 L. Ed.2d 436,439; 88 S. Ct. 1509 (1968). *Glona v. American Guar. & Lib. Ins. Co.*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 91968); *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed. 577; *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); *United States v. Carolene Products*, supra, at 153-154.

II. THE CLASSIFICATION OF MARIJUANA IN SCHEDULE 1 OF THE CSA IS ARBITRARY AND IRRATIONAL

It is apparent from the criteria that Schedule 1 is reserved for the most dangerous substances, substances without any medical use in treatment.

The three criteria of 21 U.S.C. 812(b) for inclusion of a substance in Schedule 1 are as follows:

(1) The drug or other substance has a high potential for abuse;

(2) The drug or other substance has no currently accepted medical use in treatment in the United States;

(3) There is a lack of accepted safety for use of the drug or other substance under medical supervision.[i]

The record before the court (Appellant's Opening Brief pp. xvi, xvii; Appellant's Reply Brief pp. xiii, xiv; ER Volumes XIV, XV, pp.3267-3738) is replete with evidence that not even one of these criteria is met. Current science and the Government's own accusations in this and other cases that medical cannabis is in fact being recommended by physicians and distributed

[i] This code section has been referred to as requiring all three criteria to be met. (Pearson v. McCaffrey 139 F. Supp. 2d 113 at 124 (2001). In the past the criteria have been considered as not cumulative or exclusive. U.S. v. Fogerty, 692 F2d. 542, cert denied 103 S.Ct. 1434, 460 U.S. 1040, 75 L. Ed. 2d. 792 (1982).

for medical use, flies in the face of the assertion that there is "no currently accepted medical use in treatment."

At least thirteen states, over 25% of our United States, have legalized the medical use of cannabis. (Alaska, Arizona, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington.) (*See* OCBC footnote 1.) California, like other states, has: (1) drafted their legislation in close collaboration with the medical community; and (2) the legislation itself requires a physician's supervision for the medical use of marijuana.

Appellant poses the obvious question: How can cannabis currently be used legally in medical treatment in twelve States, yet rationally be said to have "*no* currently accepted medical use in treatment in the United States?" (criteria 2., *supra*, emphasis added.)

"The Nation's laws and traditions in the past half century are most relevant here." *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), "....that a legislative declaration of facts appears to be reasonable when enacted does not insulate the statute from judicial review. *See Chastleton Corp. v. Sinclair*, 264 U.S. 453, 44 S.Ct. 405, 68 L.Ed. 841 (1921); *Abie State Bank v. Bryan*, 282 U.S. 765, 772, 51 S.Ct. 252, 75 L.Ed. 690 (1931); *Block v. Hirch*, 256 U.S. 135, 154, 41 S.Ct. 458, 65 L.Ed. 8655 (1921); *United States v. Carolene Products Co.*, 304 U.S. 144, 153, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

While arbitrariness and irrationality may not be evident from the literal words of a statute, such arbitrariness and irrationality may be demonstrated by scientific or other empirical evidence. The Supreme Court reaffirmed this principle in *Leary v. United States*, 395 U.S. 6, 90 S.Ct. 1532, 23 L.Ed.2d 57

(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." Id. at p. 38, n. 68. See also *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); *Block v. Hirsch*, *supra*.

"We recognize 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 reasons for the prohibition." *Carolene*, *supra* at 153-54.

Any legitimate governmental purpose served by a classification within the CSA is nullified by an arbitrary, irrational, or incorrect classification. Classifying a substance in Schedule 1 of the CSA that by any rationale does not meet the criteria, cannot be said to be rationally related to a legitimate government purpose. It can, in fact, have the opposite effect. By lumping medical cannabis in with other, actually dangerous drugs, less informed members of the public, such as young people, who have had experience with the relatively innocuous nature of medical cannabis, may discount or question the validity of other, perhaps more accurate (or rational) classifications of illegal substances.

"Comparison of the effects of marijuana use on both the individual and society with the effects of other drug use demonstrates not only that there is no rational basis for classifying marijuana with the 'hard narcotics' but, also, that there is not even a rational basis for treating marijuana as a more dangerous drug than alcohol." *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878, 881 (1972).

"It appears that the use of marijuana as it is presently used in the

United States today, does not constitute a public health problem of any significant dimensions. It is, for instance, far more innocuous in terms of physiological and social damage than alcohol or tobacco. . . It appears that effects of marijuana on the individual are not serious enough to justify widespread concern at least as compared with the far more dangerous effects of alcohol, barbiturates and amphetamines. Moreover, the current patterns of use in the United States are not such as would warrant concern that in the future, consumption patterns are likely to change . . . Thus, we conclude that no adequate justification for the State's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home, has been shown. The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied." *Ravin v. State*, 537 P.2d 494 (1975). (Later limited by *Walker v. State,* 991 P.2d 799 (Alaska App.1999).)

Today, we have an untenable situation where medical evidence before this and other courts documents the eventuality of seriously ill medical patients dying from *lack* of medical cannabis while there has yet to be a death directly attributed to use of the cannabis itself. *Conant v Walters*, 309 F.3d 629, 00-17222, 2002 WL 31415494 (9th Cir. Oct. 29, 2002); *Gonzales v. Raich*, 524 U.S. 936 (2004).

By far, the most negative documented evidence of harm caused by the use of medical cannabis is as a result of governmental enforcement of its illegality and the enormous cost to individuals and society. "One hopes that the advocates and opponents will allow science to substitute for slogans."

Kuromiya v. U.S. 78 F. Supp. 2d 367 (1999)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the District Court erred in not applying a rational basis review and that when such review is applied, the CSA classification of marijuana will be found to be unconstitutional.

Dated: May 18, 2007

Respectfully submitted,

GREG ANTON, Attorney for Defendant, MARIN ALLIANCE FOR MEDICAL MARIJUANA and LYNNETTE SHAW