Nos. 02-16335, 02-16534, 02-16715, 03-15062

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIN ALLIANCE FOR MEDICAL MARIJUANA and LYNNETTE SHAW,
Defendants-Appellants,

AND CONSOLIDATED APPEALS

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case Nos. C 98-0086 CRB, C 98-0087 CRB, C 98-0088 CRB, MC 02-7012 JF

RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF

PETER D. KEISLER
Assistant Attorney General

KEVIN V. RYAN
United States Attorney

MARK B. STERN
Appellate Litigation Counsel

MARK T. QUINLIVAN
(202) 514-3346
Senior Trial Counsel
Civil Division, Room 7128
U.S. Department of Justice
20 Massachusetts Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

REGULATORY MATERIALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIN ALLIANCE FOR MEDICAL MARIJUANA and LYNNETTE SHAW,
Defendants-Appellants,

AND CONSOLIDATED APPEALS

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case Nos. C 98-0086 CRB, C 98-0087 CRB, C 98-0088 CRB, MC 02-7012 JF

RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF

PRELIMINARY STATEMENT

Pursuant to this Court's Order of August 7, 2003, defendant-appellee United States of America hereby files this response to the supplemental brief filed by defendants-appellants Marin Alliance for Medical Marijuana and Lynnette Shaw (hereafter the "Marin Defendants"), in appeal no. 02-16335, which has been consolidated for argument with appeal nos. 02-16534, 02-16715, and 03-15062.

ARGUMENT

There is no merit to the Marin Defendants' contention that the district court erred by refusing to consider whether there is a rational basis for marijuana's classification in Schedule I of the Controlled Substances Act (hereafter "CSA" or "the Act"), 21 U.S.C. § 812(b)(1). The district court carefully considered and rejected the Marin Defendants' rational basis challenge to marijuana's classification in Schedule I, and its conclusion is in accord with longstanding circuit precedent. *See* United States v. Miroyan, 577 F.2d 489, 495 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978); United States v. Rodriquez-Camacho, 468 F.2d 1220, 1221-22 (9th Cir. 1972), *cert. denied*, 410 U.S. 985 (1973). Every other court to have considered this question has reached the same conclusion.

Moreover, as the district court also correctly concluded, the availability of the CSA's statutory procedure whereby controlled substances that have been placed in Schedule I (or any other Schedule) may be transferred to another Schedule or entirely removed from the Schedules, should changes in scientific or medical evidence warrant such an action, further supports the conclusion that marijuana's classification in Schedule I satisfies rational basis review.

1. The Marin Defendants contend that, "[w]hen the District Court in the instant case deferred from determining if there is a rational basis within 21 U.S.C.

§ 812(b), the court committed a judicial error." Appellants' Supplemental Brief (hereafter "Supp. Br.") at 6. Specifically, the Marin Defendants point to the district court's statement that "[d]efendants' challenge to the appropriateness of the classification of marijuana must be made to the DEA Administrator, not this District Court" (ER 4412), and contend that the district court thereby failed to adhere to its "responsibility to determine whether there is a rational basis for the statute as it stands." Supp. Br. at 2.

Contrary to the Marin Defendants' contention, the district court specifically considered and rejected their rational basis challenge to marijuana's continuing classification in Schedule I of the CSA. The district court first considered and rejected the Marin Defendants' rational basis challenge to the CSA on December 3, 1998, in rejecting their motion for reconsideration of the denial of their motion to dismiss. In pertinent part, the district court held that: "To the extent the Court has jurisdiction to hear defendants' rational basis challenge, the Court must nevertheless reject defendants' argument because the Ninth Circuit has previously determined that the Controlled Substances Act's restrictions on the manufacture and distribution of marijuana are rational." SSER 1-2 (citing Miroyan, 577 F.2d at 495).[1]

---

[1] "SSER" refers to the government's Second Supplemental Excerpts of Record.

Similarly, in granting the United States' motions for summary judgment, the district court again considered and rejected on the merits the Marin Defendants' rational basis challenge to marijuana's classification in Schedule I. In pertinent part, the district court held that:

> The Court must consider this entire statutory scheme [of the CSA] in determining whether there is a rational basis for the CSA's prohibition on the manufacture and distribution of marijuana for any purpose. In light of the available statutory procedure for reviewing the appropriateness of the current classification of marijuana, *the Court cannot conclude that the CSA's prohibition on the distribution of marijuana is not rationally related to a legitimate government purpose,* namely, to limit the distribution of drugs with a high potential for abuse.

ER 4412 (emphasis supplied).

These rulings make clear that the district court did, in fact, consider and reject on the merits the Marin Defendants' rational basis challenge to marijuana's classification in Schedule I. The Marin Defendants' assertion (Supp. Br. at 6) that the district court "deferred from determining if there is a rational basis" to marijuana's classification in Schedule I, consequently, is entirely devoid of merit.[2]

---

[2] The district court's statement (ER 4412) that, "[d]efendants' challenge to the appropriateness of the classification of marijuana must be made to the DEA Administrator, not to this Court," merely reflects the fact that, in the absence of a meritorious due process or equal protection claim, the only recourse for the defendants is the administrative process established by Congress.

2. The district court's conclusion that this Court's decision in Miroyan forecloses the Marin Defendants' challenge to marijuana's classification in Schedule I is plainly correct. In Miroyan, a defendant contended that the CSA "unreasonably and irrationally categorize[s] marijuana as a Schedule I controlled substance," insofar as it was asserted that marijuana "cannot rationally be deemed to meet the criteria required for a Schedule I substance: high potential for abuse, no currently accepted medical use, and lack of accepted safety under medical supervision." 577 F.2d at 495. This Court found no merit to this claim, holding that "[w]e need not again engage in the task of passing judgment on Congress' legislative assessment of marijuana. As we recently declared, '[t]he constitutionality of the marijuana laws has been settled adversely to [the defendant] in this circuit.'" *Id.* (quoting United States v. Rogers, 549 F.2d 107, 108 (9th Cir. 1976)).

Similarly, in Rodriquez-Camacho, this Court rejected the like contention that Congress' determination that "controlled substances have a substantial and detrimental effect on the health and general welfare of the American people," 21 U.S.C. § 801(2), was inapplicable to marijuana. In pertinent part, this Court held that "[t]his is a matter * * * whose ultimate resolution lies in the legislature and

not in the courts. It is sufficient that Congress had a rational basis for making its findings." 468 F.2d at 1222.

This Court is not alone in reaching this conclusion: ***Every*** court which has considered a similar claim has likewise rejected rational basis challenges to Congress' classification of marijuana in Schedule I.[3]

3. The district court also correctly determined (ER 4412) that the available statutory process for rescheduling controlled substances also supports the rationality of marijuana's continuing classification in Schedule I. The CSA

---

[3] *See, e.g.*, United States v. Burton, 894 F.2d 188, 192 (6th Cir.) ("Regarding the defendant's claim that this court should reclassify marijuana out of the Schedule I category, 'our inquiry is limited to the question of whether classification * * * is irrational or unreasonable.' There has been no such showing here." (internal quotation omitted)), *cert. denied*, 498 U.S. 857 (1990); United States v. Fry, 787 F.2d 903, 905 (4th Cir. 1986) ("[W]e cannot agree that the congressional decision to prohibit marijuana production and distribution was so irrational as to deprive Fry of due process."), *cert. denied*, 479 U.S. 861 (1986); United States v. Fogarty, 692 F.2d 542, 548 n.4 (8th Cir. 1982) ("[W]e are in accordance with the heretofore uniformly held view among federal courts that the Schedule I classification of marijuana is rational and, therefore, not violative of equal protection or due process."), *cert. denied*, 460 U.S. 1040 (1983); United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982) ("Middleton has failed to produce any evidence that the congressional classification [of marijuana] is unreasonable or irrational."), *cert. denied*, 460 U.S. 1051 (1983); United States v. Kiffer, 477 F.2d 349, 357 (2d Cir. 1972) ("The very existence of the [section 811] statutory scheme indicates that, in dealing with the 'drug' problem, Congress intended flexibility and receptivity to the latest scientific information to be the hallmarks of its approach. This * * * is the very antithesis of the irrationality [defendants] attribute[] to Congress."), *cert. denied*, 414 U.S. 831 (1973); National Organization for the Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 142 (D.D.C. 1980) (three-judge panel) (same).

permits the Attorney General to reschedule marijuana if he or she determines, *inter alia*, that marijuana has a currently accepted medical use, *see* 21 U.S.C. §§ 811, 812(b), and the Food, Drug and Cosmetic Act authorizes the Food and Drug Administration ("FDA") to approve marijuana for medical use if it finds that marijuana is safe and effective for any intended medical use, *see* 21 U.S.C. §§ 355(a), (b), (d). Congress also has authorized the courts of appeals to review arbitrary or unsubstantiated final agency action under those Acts, 21 U.S.C. §§ 355(h) and 877. The availability of this statutory and regulatory process for reclassifying marijuana, should scientific or medical evidence warrant such a change, with review in the court of appeals, sufficiently guards against unlawful or irrational governmental action. As the Second Circuit has observed, this statutory process "is the *very antithesis* of the irrationality appellants attribute to Congress." Kiffer, 477 F.2d at 357.

Furthermore, it bears emphasis that the FDA has not approved marijuana for use as a treatment for any condition, and the advocates of the use of marijuana for therapeutic purposes have repeatedly been unsuccessful in convincing the FDA and DEA that marijuana has an accepted medical use for treatment in the United States. *See* 57 Fed. Reg. 10,499 (Mar. 26, 1992) (declining to reschedule marijuana because record demonstrated that it had "no currently accepted medical

use for treatment in the United States"), *petition for review denied*, Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1137 (D.C. Cir. 1994); 66 Fed. Reg. 20,038 (April 18, 2001) (comprehensive review by FDA's Controlled Substance Staff concluding, *inter alia*, that it remained the case that marijuana has "no currently accepted medical use for treatment in the United States"), *petition for review dismissed*, Gettman v. DEA, 290 F.3d 430 (D.C. Cir. 2002). This only further underscores the rationality of marijuana's classification in Schedule I.

CONCLUSION

The judgments of the district court should be affirmed.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KEVIN V. RYAN
United States Attorney

MARK B. STERN
Appellate Litigation Counsel

MARK T. QUINLIVAN
(202) 514-3346
Senior Trial Counsel
Civil Division, Room 7128
U.S. Department of Justice
20 Massachusetts Ave., N.W.
Washington, D.C. 20530

August 15, 2003

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached ***Response to Appellants' Supplemental Brief*** is:

Proportionately spaced, has a typeface of 14 points or more and contains 1738 words, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, and the Proof of Service. The number of words was determined through the word-count function of WordPerfect 9.

MARK T. QUINLIVAN
Counsel for Appellee

CERTIFICATE OF SERVICE

I, Mark T. Quinlivan, Senior Trial Counsel, Civil Division, United States Department of Justice, whose address is 20 Massachusetts Ave., Room 7128, Washington, D.C. 20530, hereby certify that on the 15th day of August 2003, I caused to be served a copy of the foregoing ***Response to Appellants' Supplemental Brief***, by first-class mail, postage prepaid, upon the following counsel:

Appeal no. 02-16335 (Marin Alliance for Medical Marijuana, *et al.*)

Greg Anton
P.O. Box 299
Lagunitas, CA 94938

Appeal No. 02-16534 (Oakland Cannabis Buyer's Cooperative, *et al.*)

Annette P. Carnegie
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

Robert A. Raich
1970 Broadway, Suite 1200
Oakland, CA 94612

Gerald F. Uelmen
Santa Clara University
School of Law
Santa Clara, CA 95053

Randy Barnett
Boston University School of Law
765 Commonwealth Ave.
Boston, MA 02138

Appeal No. 02-16715 (Ukiah Cannabis Buyer's Club, *et al.*)

Susan B. Jordan
515 South School Street
Ukiah, CA 95482

David Nelson
Nelson & Riemenschneider
106 North School Street
Ukiah, CA 95482

Appeal No. 03-15602 (Wo/Men's Alliance, *et al.*)

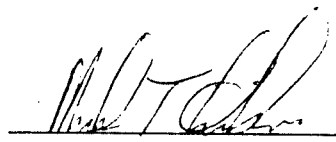
Gerald F. Uelmen
Santa Clara University
School of Law
Santa Clara, CA 95053

Benjamin Rice
331 Soquel Avenue
Suite 110
Santa Cruz, CA 95062

Counsel for Amicus Curiae

Taylor S. Carey
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814

David A. Handro
Julie M. Carpenter
Jenner & Block, LLC
601 13th St., N.W.
Washington, D.C. 20005



MARK T. QUINLIVAN