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6
7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9

10 UNITED STATES OF AMERICA, CR 02-53 CRB

11 Plaintiff,

12 v.

13 EDWARD ROSENTHAL,

14 Defendant.

MOTION *IN LIMINE* TO INTRODUCE
EVIDENCE RE: MEDICAL BENEFITS OF
MARIJUANA OR ALTERNATIVELY
DISMISS ON DUE PROCESS GROUNDS

Date: May 10, 2007

Time: 2:15 p.m.

15

16 COMES NOW defendant EDWARD ROSENTHAL, before trial and the
17 selection of a jury, and hereby moves this Court *in limine*,
18 pursuant to the Federal Rules of Evidence, and all other
19 provisions of statutory and constitutional law, to expand and
20 admit evidence relating to the medical benefits of marijuana.
21 In support of this request the defense requests an evidentiary
22 hearing and proffers the testimony of leading expert Dr. Donald
23 Abrams, a University of California, San Francisco professor who
24 led a government funded study at the UCSF medical school and San
25 Francisco General Hospital.

26 The defense seeks to introduce evidence in this trial on
27 the medical benefits of marijuana predicated on numerous
28 scientific studies that reveal its measurable benefits to

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1 countless ailments. Marijuana has currently accepted medical
2 uses in the United States as set forth herein.

3 Moreover, the defense asserts that the grounds for the
4 classification of marijuana as a Schedule I controlled
5 substance, under the Uniform Controlled Substance Act, 21 USC
6 section 801, is arbitrary and irrational, thus, denying Mr.
7 Rosenthal Due Process and Equal Protection of the law pursuant
8 to the Fifth Amendment to the United States Constitution.

9 I.

10 **MARIJUANA HAS CURRENTLY ACCEPTED MEDICAL**
11 **USES IN THE UNITED STATES.**

12 First, it is important to note that the medical use of
13 marijuana is not entirely a recent phenomenon. Marijuana has
14 been used as a medicine for thousands of years. As the
15 Secretary of Health, Education and Welfare has stated:

16 The therapeutic use of cannabis (marijuana)
17 predates recorded history. The earliest
18 written reference is to be found in the
19 fifteenth century B.C., Chinese
Pharmacopeia, the Rh-Ya. From the Chinese
plateau its use...spread to India, the
Middle East and far beyond...

20 Cannabis was widely used in painful
21 conditions like neuralgia, gysmenorrhoea and
22 toothache, and its relaxant and euphoriant
23 properties may well have been utilized in
24 the treatment of melancholia and hysteria.
Because of its purported analgesic effect,
supported by some recent findings, cannabis
also found service in minor operations like
circumcision and boil lancing.

25 Marijuana and Health, Fifth Annual Report,
26 supra, at pp. 117-118.

27 Marijuana was also widely used as a medicine in this
28 country from the mid-1880's to 1937. Beginning in the 1940's,

1 over a hundred articles appeared in the medical journals
2 describing potential medical uses for marijuana, and marijuana
3 was prescribed in the country for a wide variety of uses,
4 including its use as a pain reliever, in the treatment of
5 migraine headaches, and in the treatment of addictions. At the
6 beginning of the Civil War, marijuana was the most often used
7 anesthetic on the battlefield. Grinspoon, Marijuana
8 Reconsidered, at 13-14, 218-28; Secretary of HEW, Marijuana and
9 Health, Fifth Annual Report, at 117-199.

10 Marijuana was also America's number-one analgesic for 60
11 years before the rediscovery of aspirin around 1900. From 1842
12 to 1900 cannabis made up half of all medicine sold, with
13 virtually no fear of its high. The 1839 report on the uses of
14 cannabis by Dr. W.B. O'Shaugnessy, one of the most respected
15 members of the Royal Academy of Science, was just as important
16 to mid-19th Century Western medicine as the discoveries of
17 antibiotics (like penicillin and Terramycin) were to mid-20th
18 Century medicine. See Herer, J., The Emperor Wears No Clothes,
19 11th Edition, 13th printing, 2000, Ah Ha Publishing, Van Nuys, CA,
20 page 40. See also, Schlosser, E., Reefer Madness, Houghton
21 Mifflin Company, Boston-New York, 2003, page 19 ("The first
22 American law concerning marijuana, passed by the Virginia
23 Assembly in 1619, required every household to grow it. Hemp was
24 deemed not only a valuable commodity, but also a strategic
25 necessity...Maryland, Virginia, Pennsylvania, and other colonies
26 eventually allowed hemp to be used as legal tender to boost its
27 production and relieve colonial shortages of currency...In the
28 latter half of the nineteenth century, marijuana became a

1 popular ingredient in patent medicines and was sold openly at
2 pharmacies in one-ounce herbal packages and alcohol-based
3 tinctures as a cure for migraines, rheumatism, and insomnia.
4 Dr. Brown's Sedative Tablets contained marijuana, as did Eli
5 Lilly's One Day Cough Cure.")

6 **A. Cannabis has Accepted and Proven Therapeutic Value.**

7 A recent study, conducted at San Francisco General Hospital
8 from 2003 to 2005 and published in the Neurology Journal,
9 revealed that smoked marijuana effectively reduces chronic pain
10 for people living with HIV/AIDS. Dr. Donald Abrams, the
11 University of California, San Francisco professor led the study,
12 which involved 50 patients suffering from HIV-related foot pain
13 known as peripheral neuropathy. There are no drugs specifically
14 approved to treat that kind of pain.

15 Half the patients received marijuana, while the other 25
16 received placebo cigarettes that lacked the drug's active
17 ingredient, tetrahydrocannabinol. Scientists said the study was
18 the first one published that used a comparison group, "which is
19 generally considered the gold standard for scientific research."
20 Dr. Donald Abrams explained: "These results provide evidence
21 that there is measurable medical benefit to smoking cannabis for
22 these patients." Marijuana Eases Foot Pain, Elias, Paul,
23 Associated Press; 2/12/2007.

24 This study builds on other international evidence and a
25 1999 Institute of Medicine (IOM) report, Marijuana and Medicine,
26 Assessing the Science Base, [http://www.safeaccessnow.org/
27 article.php?list=type&type=265](http://www.safeaccessnow.org/article.php?list=type&type=265)

28 Additionally, more than 6,500 published scientific articles

1 on medical applications for marijuana are found in the National
2 Library of Medicine's database (<http://pubmed.com>) Of these,
3 many are clinical studies that show marijuana's efficacy for
4 treating pain, nausea, loss of appetite, and spasticity.

5 Over the past two decades, there has been a resurgence in
6 the therapeutic use of marijuana in the United States. A review
7 of clinical studies conducted in several states during the past
8 two decades has shown that, in 768 patients, marijuana was a
9 highly effective antiemetic in chemotherapy. Musty, R.E. and
10 Rossi, R., 2002, Effects of Smoked Cannabis and Oral Delta-9-
11 Tetrahydrocannabinol on Nausea and Emesis After Cancer
12 Chemotherapy: A Review of State Clinical Trials, Journal of
13 Cannabis Therapeutics 2001(1):26-56. Recent double-blind,
14 placebo controlled studies of HIV/AIDS patients showed that
15 marijuana both reduced neuropathic pain and produced weight gain
16 without immunological compromise. Abrams, DI; Hilton, JF;
17 Leiser, RJ; Shade, SB; Elbeik, TA; Aweeka, FT; Benewits, NL;
18 Bredt, BM; Kosel, B; Aberg, JA; Deeks, SG; Mitchell, TF;
19 Millugan, K; Bachetti, P; McCune, JM; and Schambelan, M, 2003,
20 Short-term Effects of Cannabinoids on Patients with HIV-1
21 Infection, a randomized, placebo-controlled clinical trial,
22 Annals of Internal Medicine 139:258-266.

23 Clinical studies of Multiple Sclerosis, for which there are
24 few effective treatments, have shown cannabis extracts to be
25 effective for spasticity and other symptoms (Wade, DT; Makela,
26 P; Robson, P; House, H; and Bateman, C, 2002, Do Cannabis-Based
27 Medicinal Extracts Have General or Specific Effects on Symptoms
28 in Multiple Sclerosis? A double-blind, randomized, placebo-

1 controlled study on 160 patients, *Multiple Sclerosis* 10:434-41),
2 as well as chronic pain (Notcutt, W; Rangappa, D, 2004, A
3 Response to 'Cannabis Abuse and Anaesthesia', Mills, PM, and
4 Penfold, N, *Anaesthesia* 58:1125, *Anaesthesia* 59-519). Three
5 additional articles supporting the benefit of marijuana in
6 treating MS patients for spasticity (Vaney, C; Heinzl-
7 Gutenbrunner, M; Jobin, P; Tschopp, F; Gattlen, B; Hagen, U;
8 Schnelle, M; and Reif, M, 2004, Efficacy, Safety and
9 Tolerability of an Orally Administered Cannabis Extract in the
10 Treatment of Spasticity in Patients with Multiple Sclerosis: A
11 randomized, double-blind, placebo-controlled, crossover study,
12 Multiple Sclerosis 10:417-24), pain, sleep, and spasticity
13 (Wade, supra) and bladder function (Brady, CM; DasGupta, R;
14 Dalton, C; Wiseman, OJ; Berkley, KJ; and Fowler, CJ, 2004, An
15 Open-Label Pilot Study of Cannabis-based Extracts for Bladder
16 Dysfunction in Advanced Multiple Sclerosis, *Multiple Sclerosis*
17 10:425-433) appear in the August 2004 issue of the journal
18 *Multiple Sclerosis*.

19 A study of patients who have used standardized, heat-
20 sterilized, quality-controlled medical marijuana as part of the
21 federal government's Compassionate Investigational New Drug
22 Program demonstrates the long-term clinical effectiveness of
23 marijuana in treating chronic musculoskeletal pain, spasm, and
24 nausea, and spasticity of Multiple Sclerosis. Russo, EB, 2002,
25 Role of Cannabis and Cannabinoids in Pain Management, In Weiner,
26 RS (Ed.), Pain Management: a Practical Guide for Clinicians,
27 Baco Raton, FL:CRC Press. After using medical marijuana
28 supplied by the federal government for periods ranging from 11

1 to 27 years, these patients showed no functionally significant
2 problems in their physiological systems, as determined by MRI
3 scans of the brain, pulmonary function tests, chest X-ray,
4 neuro-psychological tests, hormone and immunological assays,
5 electroencephalography, P300 testing, and neurological clinical
6 examination.

7 Additionally, other government studies have demonstrated
8 the medical effectiveness of marijuana. For example, millions
9 of Americans suffer from glaucoma, a serious illness
10 characterized by increasing pressure in the eye, which can
11 result in total blindness. Although there is not a known cure
12 for glaucoma, marijuana has been found to have been effective.
13 Secretary of HEW, Fifth Annual Report, supra, at 120-121; Eighth
14 Annual Report, supra, at 28-31.

15 Marijuana has also been proven to be an effective and
16 useful medicine for cancer patients receiving chemotherapy and
17 radiation therapy. These forms of therapy are extremely
18 painful, and are characterized by loss of body hair, often
19 extreme depression, and prolonged nausea and vomiting.
20 Marijuana has been found to be effective in reducing or
21 eliminating the nausea and vomiting experienced by many of these
22 cancer patients. Secretary of HEW, Eighth Annual Report, supra,
23 at 28-29.

24 Further, in 1997, the White House Office of National Drug
25 Control Policy commissioned the National Institute of Medicine
26 of the National Academy of Sciences (IOM) to review the
27 scientific evidence of the therapeutic application of cannabis.

28 See Institute of Medicine, Marijuana and Medicine: Assessing the

1 Science Base (Janet E. Joy, et al. eds, 1999). The year long
2 study included scientific workshops, analysis of relevant
3 scientific literature and extensive consultation with biomedical
4 and social scientists. Id. at 15. It resulted in a 250-plus-
5 page report which concluded that "scientific data indicate the
6 potential therapeutic value of cannabinoid drugs, primarily THC,
7 for pain relief, control of nausea and vomiting, and appetite
8 stimulation." Id. at 179.

9 The IOM report found that marijuana can provide superior
10 relief to patients who suffer these symptoms as a result of
11 certain illnesses and disabilities, in particular metastatic
12 cancer, HIV/AIDS, multiple sclerosis (MS), spinal cord injuries
13 and epilepsy, and those who suffer the same symptoms as side
14 effects from the aggressive treatments for such conditions. See
15 Id. at 53, 142, 153-54, 157, 160. As a consequence, the IOM
16 report cautiously endorsed the medical use of marijuana. See
17 Id. at 179.

18 At about the same time as the IOM study, the British House
19 of Lords opened public hearings on the medical benefits and
20 drawbacks of cannabis. Like the IOM, the Lords concluded that
21 "cannabis almost certainly does have genuine medical
22 applications, especially in treating the painful muscular spasms
23 and other symptoms of MS and in the control of other forms of
24 pain." Select Comm. on Sci. & Tech., House of Lords, Sess. 1997-
25 1998, Ninth Report, Cannabis: The Scientific and Medical
26 Evidence: Report section 8.2 (Nov. 4, 1998). The Lords further
27 recommended that the British government act immediately "to
28 allow doctors to prescribe an appropriate preparation of

1 cannabis, albeit as an unlicensed medicine." Id. section 8.6.

2 In Conant v. Walters, 309 F.3d 629 (9th Cir. 2002), cert
3 denied, the Ninth Circuit held that the federal government may
4 not revoke a physician's license to prescribe controlled
5 substances or conduct an investigation of a physician, where the
6 basis for the government's action is solely the physician's
7 professional recommendation of the use of medical marijuana.
8 Judge Kozinski in his concurring opinion chronicled several
9 medical studies regarding marijuana's efficacy:

10 Numerous other studies and surveys support
11 the use of medical marijuana in certain
12 limited circumstances. n6 The federal
13 government itself has conducted studies on
14 the subject, and continues to fund and
15 provide the marijuana for studies conducted
16 by private researchers. See, e.g., Bill
17 Workman, *Pot Study in Spotlight: San Mateo*
18 *County's Clinical Trial Is a First in U. S.*,
19 *S.F. Chron.*, July 25, 2001, at A13; see also
20 University of California Center for
21 Medicinal Cannabis Research, *Research*, at
22 [http://www.cmcr.ucsd.edu/geninfo/research.ht](http://www.cmcr.ucsd.edu/geninfo/research.htm)
23 [m](http://www.cmcr.ucsd.edu/geninfo/research.htm) (last visited Aug. 23, 2002) (listing
24 eleven studies, nine of which have received
25 regulatory approval, that will use federally
26 supplied marijuana). Finally, the medical
27 histories of individuals who have received
28 and continue to receive medical marijuana
29 from the federal government (reproduced in
30 the Appendix) provide compelling support for
31 the view that medical marijuana can make the
32 difference between a relatively normal life
33 and a life marred by suffering.

34 **n6** See, e.g., Clive Cookson, *High Hopes for*
35 *Cannabis To Relieve Pain*, *Fin. Times*, Sept.
36 4, 2001, *National News*, at 4 ("Cannabis
37 extract is proving remarkably effective at
38 relieving severe pain in patients with
39 multiple sclerosis and spinal injury . . .
40 ."); David Baker et al., *Cannabinoids*
41 *Control Spasticity and Tremor in a Multiple*
42 *Sclerosis Model*, 404 *Nature* 84 (2000)
43 (finding therapeutic potential in the use of
44 cannabis to control the debilitating
45 symptoms of MS); William J. Martin, *Basic*
46 *Mechanisms of Cannabinoid-Induced Analgesia*,
47 *Int'l Ass'n for the Study of Pain*

1 Newsletter, Summer 1999, available at
2 <http://www.halcyon.com/iasp/TC99Summer.html>
3 (noting that cannabinoids can reduce pain);
4 Richard E. Doblin & Mark A.R. Kleiman,
5 *Marijuana as Antiemetic Medicine: A Survey*
6 *of Oncologists' Experiences and Attitudes*, 9
7 J. Clinical Oncology 1314 (1991) (reporting
8 that a majority of oncologists surveyed
9 thought marijuana should be available by
10 prescription); H.M. Meinck et al., *Effect of*
11 *Cannabinoids on Spasticity and Ataxia in*
12 *Multiple Sclerosis*, 236 J. Neurology 120
13 (1989) (concluding from a neurological study
14 that herbal cannabis provided relief from
15 both muscle spasms and ataxia, a combined
16 benefit not found in other available
17 medications); Vincent Vinciguerra et al.,
18 *Inhalation Marijuana as an Antiemetic for*
19 *Cancer Chemotherapy*, 88 N.Y. St. J. Med. 525
20 (1988) (finding that 78 of patients who were
21 unresponsive to standard antiemetics
22 responded positively to cannabis).

23 APPENDIX

24 From 1978 to 1992, the federal government
25 conducted its own medical marijuana program.
26 Today, the government continues to supply
27 individuals who participated in this program
28 with marijuana under its Compassionate Care
program; they are among the few people in
the country who can use the drug legally.
Together with the American Public Health
Association and other health care and
medical organizations, individuals in this
group filed an amicus brief supporting the
plaintiffs. The following are their personal
statements, taken from that brief.

Barbara M. Douglass was diagnosed with
Multiple Sclerosis in 1988 at the age of 22.
In 1991, Ms. Douglass began receiving herbal
cannabis from the United States government
upon the advice and assistance of her
physician. Prior to this date, Ms. Douglass
had never tried cannabis. Each month, the
government provides her physician with one
can containing three hundred cannabis
cigarettes, each weighing 7/10 oz. Ms.
Douglass and her physician report that
herbal cannabis provides relief from pain
and spasms and stimulates her appetite to
counteract the effects of wasting syndrome
from which she suffered prior to using
cannabis. Ms. Douglass has never experienced
any adverse side effects from marijuana.
Without cannabis, Ms. Douglass believes she
would not be alive today.

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George Lee McMahon was born July 22, 1950, with Nail Patella Syndrome, a rare genetic disorder that causes severe pain, nausea and muscle spasms. Mr. McMahon tried conventional medications to treat his symptoms, but found the side effects of these medications to be intolerable. In the early 1980s, Mr. McMahon discovered that herbal cannabis alleviated his pain, nausea and spasms, stimulated his appetite and allowed him to sleep through the night. In 1988, Mr. McMahon informed his physician that he was successfully self-medicating with cannabis. His physician ordered him to cease his cannabis use and return to prescription medications. Over the following six months, Mr. McMahon's health progressively degenerated. Mr. McMahon's physician then helped Mr. McMahon apply to the federal government's Compassionate Care IND Program. In March 1990, Mr. McMahon was accepted into the program and for the past decade has received 300 cannabis cigarettes each month from the United States government. Mr. McMahon and his physician believe that without cannabis Mr. McMahon would not be alive today.

Elvy Musikka was diagnosed with glaucoma in 1975 at the age of 36. She tried conventional medications to treat her condition, but could not tolerate them. Reluctantly, in 1976, she decided to try herbal cannabis at the advice of her physician. The cannabis provided her immediate relief, substantially lowering her intraocular pressure as no other medication had, with few side effects. Ms. Musikka ingests cannabis by smoking it, as well as eating it in baked goods and olive oil. Fearful of the legal consequences of smoking cannabis, Ms. Musikka underwent several risky surgeries in an attempt to correct her condition, but they were unsuccessful and left her blind in one eye. In 1988, Ms. Musikka was arrested in Florida and charged with cannabis possession. She challenged her conviction in the Florida Supreme Court, where she prevailed, becoming the first person in that state to establish a medical necessity defense for cannabis. Shortly thereafter, the federal government enrolled Ms. Musikka in its medical cannabis program and has provided her with one and one-half pounds of herbal cannabis on a quarterly basis ever since. Ms. Musikka and her

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1 physician believe that if she were deprived
2 of cannabis she would go blind.

3 **Irvin Henry Rosenfeld** was diagnosed at age
4 10 with multiple congenital cartilaginous
5 exostosis, a disease causing the continuous
6 growth of bone tumors, and the generation of
7 new tumors, on ends of most of the long
8 bones in his body. He was told he would not
9 survive into adulthood. In an attempt to
10 treat the painful symptoms of this disease,
11 he was prescribed high doses of opioid
12 analgesics, muscle relaxants and anti-
13 inflammatory medications, which he took on a
14 daily basis, but which had minimal efficacy
15 and produced debilitating side effects. In
16 1971, Mr. Rosenfeld began using smoked
17 herbal cannabis with the approval and under
18 the supervision of a team of physicians. Mr.
19 Rosenfeld found the cannabis highly
20 efficacious in alleviating pain, reducing
21 swelling, relaxing muscles and veins that
22 surround the bone tumors, and preventing
23 hemorrhaging. In 1982, the United States
24 government, operating under the
25 Compassionate Care IND Program, at the
26 request of his physicians, began supplying
27 Mr. Rosenfeld with herbal cannabis to treat
28 his condition. For the past 19 years, the
government has consistently provided him
with a 75-day supply of herbal cannabis,
totaling 33 ounces per shipment. Mr.
Rosenfeld smokes 12 marijuana cigarettes a
day to control the symptoms of his disease.
In the 30 years that Mr. Rosenfeld has used
herbal cannabis as a medicine, he has
experienced no adverse side effects
(including no "high"), has been able to
discontinue his prescription medications,
and has worked successfully for the past 13
years as a stockbroker handling multi-
million dollar accounts. Mr. Rosenfeld and
his physicians believe that but for herbal
cannabis, Mr. Rosenfeld might not be alive,
or, at the very least, would be bed-ridden.

Conant v. Walters, supra at 642-643, and
Appendix at 648-649.

Further, the U.S. Supreme Court questioned the viability of
marijuana classified as a Schedule I substance citing the IOM
report and Judge Kozinski's concurring opinion in Conant as
stated above. Gonzalez v. Raich, 125 S.Ct. 2195, 2212 n. 37,

1 162 L.Ed.2d 1, 19 n. 14 (2005).

2 Finally, many more medical studies are underway today. For
3 example, in response to the concern (although unproven) that
4 long term use of smoked marijuana may be a health risk, recent
5 studies have shown that cannabis vaporization (a technology
6 designed to deliver inhaled cannabinoids while avoiding the
7 respiratory hazards of smoking by heating cannabis to a
8 temperature where therapeutically active cannabinoid vapors are
9 produced, but below the point of combustion where noxious smoke
10 is formed), can deliver therapeutic doses of cannabinoids with a
11 drastic reduction in pyrolytic smoke compounds. Thus,
12 vaporization is a viable alternative to smoked marijuana for
13 future medical cannabis studies. See Gieringer, D., St.
14 Laurent, J., and Goodrich, S., Cannabis Vaporizer Combines
15 Efficient Delivery of THC with Effective Suppression of
16 Pyrolytic Compounds, Journal of Cannabis Therapeutics, Vol.
17 4(1), 2004. Noteworthy, with respect to long-term smoked
18 marijuana, the amount of marijuana ingested is statistically far
19 less than a habitual cigarette smoker. So, the potential or
20 likelihood of lung cancer may not even be realistic.

21 Importantly, recent studies have found that smoking
22 cannabis and the development of lung cancer are not linked. For
23 example, the results of the largest case-control study
24 addressing marijuana use and cancer to date, found that smoking
25 marijuana is not a major causal factor for head, neck, or lung
26 cancer in young adults. See Ford, D., Marijuana Use Is Not
27 Associated with Head, Neck or Lung Cancer in Adults Younger than
28 55 Years: Results of a Case Cohort Study.

1 Moreover, in June of 2005, Dr. Ronald Tashkin of UCLA
2 presented at the International Cannabinoid Research Society,
3 that smoking marijuana -"even heavy long term use"- does not
4 cause cancer of the lungs, upper airways, or esophagus. See
5 Fred Gardner, C-Notes, June 29, 2005.

6 Further, physicians also accept the medical efficacy of
7 marijuana and recommend its use on a regular basis. A Harvard
8 study found that 44% of oncologists were already recommending
9 marijuana to their cancer patients. Doblin, R, Keliman, MA,
10 1991, Marijuana as Antiemetic Medicine: a Survey of Oncologists'
11 Experiences and Attitudes, Journal of Clinical Oncology 9:1314-
12 1319.

13 As detailed above, much scientific evidence establishes
14 that marijuana has valid therapeutic uses. Further, many
15 international and national organizations, such as the British
16 Medical Association, Canadian AIDS Society, the Lymphoma
17 Foundation of America, Kaiser Permanente, American Nurses
18 Association, California Pharmacists Society, and San Francisco
19 Mayor's Summit on AIDS and HIV, support immediate legal access
20 to medical marijuana. See List of Health Organizations
21 Supporting Immediate Legal Access and Research of Medical
22 Marijuana compiled by NORML, Dec. 21, 2004.

23 **B. Twelve States and Numerous Countries Have Legalized Medical
24 Marijuana and/or Decriminalized Marijuana Use.**

25 Twelve states, including Alaska, Arizona, California,
26 Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon,
27 Vermont and Washington, legalize the medical use of marijuana.

28 The vast majority of those states utterly removed criminal
penalties for the use, possession and cultivation of medical

1 marijuana. In addition to those states mentioned above that
2 have discriminalized medical marijuana, several other states
3 have similar legislation pending.

4 Further, several European Union nations have ratified laws
5 liberalizing or decriminalizing the possession and use of
6 marijuana. This policy shift from the US-styled "war on drugs"
7 ideology was caused in large part to health issues and lack of
8 individual and societal harm by marijuana use. See European
9 Drug Policy: 2002 Legislative Update, NORML, March 20, 2003.

10 For example, Belgium's government officials issued a formal
11 declaration in January 2001 mandating prosecutors and judges to
12 "no longer interfere in the lives of people who use cannabis on
13 a personal basis and who do not create harm or do not show
14 dependence." Thus, marijuana cultivation and possession for
15 personal use was no longer criminally prosecuted. In
16 Luxembourg, cannabis was reclassified in April 2001 as a
17 "Category B" controlled substance, effectively decriminalizing
18 personal possession and use. Id.

19 The Ministry of Justice officials in the Netherlands
20 declared in July 2002 that they would maintain existing policies
21 tolerating the sale of cannabis in public coffee shops. Under
22 Dutch policy, coffee shops may sell up to five grams of
23 marijuana per customer. In addition, patients who require
24 marijuana for medicinal purposes may be able to obtain
25 prescription-grade cannabis in pharmacies by 2003, according to
26 an April 2002 announcement by the Dutch Ministry of Health. Id.

27 Government Officials in the United Kingdom formally
28 downgraded marijuana so that its possession is no longer an

1 arrestable offense. Id. Cannabis was rescheduled from a class B
2 controlled substance to a class C - the least harmful category
3 of illegal drugs.

4 The trend in this country, nearly a quarter of the union,
5 and the trend internationally has recognized the medical
6 evidence about marijuana in that it has medicinal value and is
7 not as harmful of a substance as many were lead to believe.

8 Further, an overwhelming majority of the American public
9 supports the legalized use of marijuana for medical purposes.
10 See Time/CNN Poll (Oct. 23-24, 2002) (reporting that 80% of
11 Americans think adults should be able to use marijuana legally
12 for medical purposes) (reported by Joel Stein, The New Politics
13 of Pot, Time (Nov. 4, 2002) at 56-57); Pew Research Center Poll
14 (Mar. 2001) (reporting that 73% of Americans support allowing
15 doctors to prescribe marijuana); Gallup Poll (Mar. 1999)
16 (reporting that 73% of Americans say they would vote for making
17 marijuana legally available for doctors to prescribe marijuana);
18 Family Research Council Poll (June 1997) (reporting that 73% of
19 respondents agreed that "people who find that marijuana is
20 effective for their medical condition should be able to use it
21 legally").

22 Thus, when the majority of Americans support medical use of
23 marijuana, over one fifth of the states have taken the dramatic
24 step of outright legalization, and when physicians regularly
25 recommend the use of medical cannabis to thousands of patients
26 in these states, there can be no rational argument that cannabis
27 "has no currently accepted medical use in treatment in the
28 United States."

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II.

**THE CLASSIFICATION OF MARIJUANA AS A SCHEDULE I
SUBSTANCE VIOLATES THE DUE PROCESS CLAUSE AND EQUAL
PROTECTION OF THE LAW PURSUANT TO THE FIFTH AMENDMENT**

The U.S. Supreme Court recently questioned the viability of marijuana classified as a Schedule I substance, when Justice Stephens 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.

Gonzalez v. Raich, 125 S.Ct. 2195, 2212 n. 37, 162 L.Ed.2d 1, 19 n. 14 (2005).

The viability and application of the Controlled Substances Act is under intense constitutional scrutiny. The high court examined the constitutionality of the Controlled Substances Act in Ashcroft v. O Centro Espirita Beneficiente Uniao de Vegetal, 125 S.Ct. 686, 160 L.Ed.2d 518 (2004). This case was remanded from the Supreme Court to the tenth circuit to decide if exemptions under the Controlled Substances Act to import, possess, and distribute a Schedule I substance are warranted in certain circumstances. Gonzales v. O Centro Espirita Beneficiente Uniao de Vegetal 546 U.S. 418 (2006).

Here, Mr. Rosenthal presents evidence to this Court to assess the credibility on whether the classification of marijuana in the Uniform Controlled Substances Act, 21 U.S.C. section 801, *et seq.*, (hereinafter "CSA"), is arbitrary and irrational under the Due Process and Equal Protection of the law, in violation of the Fifth Amendment to the United States

1 Constitution.

2 **A. Marijuana Was Initially Placed as a Schedule I Substance**
3 **Without Any Studies Justifying its Preliminary Placement.**

4 Marijuana or cannabis sativa was not significantly
5 regulated by the Federal Government until 1937, when Congress
6 passed the Marihuana Tax Act, Pub. L. 75-238, 50 Stat. 551
7 (repealed 1971). See also Gonzalez v. Raich, 125 S.Ct. 2195,
8 2202 n. 14, 162 L.Ed.2d 1, 19 n. 14 (2005) citing R. Bonnie & C.
9 Whitebread, The Marijuana Conviction 154-174 (1999): L.
10 Greenspoon & J. Balakar, Marihuana, the Forbidden Medicine 7-8
11 (rev. ed. 1997). Noteworthy, the Marihuana Tax Act did not
12 outlaw cannabis per se, nor outlawed the possession or sale of
13 marijuana outright. Id. The Act merely imposed registration
14 and reporting requirements for all individuals importing,
15 producing, selling or dealing in marijuana, and required the
16 payment of taxes. Id.

17 It was not until 1970, when President Nixon took office and
18 declared a national "war on drugs," did Congress enact
19 legislation that resulted in the Comprehensive Drug Abuse
20 Prevention and Control Act of 1970, 84 Stat. 1236. Id. at 2201.
21 Title II of the Act is known as the Controlled Substances Act
22 ("CSA"). 21 U.S.C. sections 801-848. The CSA classifies
23 controlled substances according to their inclusion in one of
24 five schedules. The listing of a substance in one of the five
25 schedules depends on the extent to which the particular drug has
26 a currently accepted medical use, the level of its potential for
27 abuse, and the degree of psychological or physical dependence.

28 21 U.S.C. section 812(b). The CSA imposes restrictions and

1 penalties on the manufacture and distribution of the substance
2 according to the schedule in which it has been placed.

3 A drug is included in Schedule I, the most restrictive
4 schedule, if it "has a high potential for abuse," "has no
5 currently accepted medical use in treatment in the United
6 States," and has "a lack of accepted safety for use under
7 medical supervision." 21 U.S.C. section 812(a)(1)(A)-(c). A
8 drug is included in Schedule II if it "has a high potential for
9 abuse," but "has a currently accepted medical use in treatment
10 in the United States" or "a currently accepted medical use with
11 severe restrictions." 21 U.S.C. section 812(b)(2)(A). Schedules
12 III through V consist of drugs that similarly have a "currently
13 accepted medical use in treatment in the United States," 21
14 U.S.C. sections 812(b)(3)(B), (4)(B) and (5)(B), but have a
15 lower potential for abuse and a more limited degree of
16 dependence than drugs listed in Schedules I and II. 21 U.S.C.
17 sections 812(b)(3)-(5).

18 In 1970, Congress classified marijuana as a Schedule I
19 controlled substance and it has remained a Schedule I substance
20 ever since. 21 U.S.C. section 812(c)(10) and (17). Marijuana's
21 preliminary classification was based, in part, on the recommend-
22 ation of the Assistance Secretary of the Department of Health,
23 Education, and Welfare (HEW), "that marihuana be retained within
24 Schedule I at least until the completion of certain studies now
25 underway." Gonzales v. Raich, 125 S.Ct. 2195, 2204, 162 L.Ed.2d
26 1, 24 (2005) citing H.R. Rep., at 61 (quoting letter from Roger
27 E. Egeberg, M.D. to Hon. Harley P. Staggers (Aug. 14, 1970)).

28 Further, marijuana's classification was due to a "void in

1 our knowledge of the plant and ... at least until the completion
2 of certain studies." See H.R. Rep. No. 91-1444 (1970) reprinted
3 in 1970 U.S.C.C.A.N. at 4579 & 4629.

4 Additionally, recently declassified Oval Office tapes
5 reveal that the scheduling of marijuana was based on President
6 Nixon's misinformation and hatred of political enemies, rather
7 than on any factual findings regarding the medical use of
8 cannabis. See Common Sense for Drug Policy Research Report,
9 Nixon Tapes Show Roots of Marijuana Prohibition: Misinformation,
10 Culture Wars and Prejudice (March 2002).

11 Further, the Commission on Marijuana and Drug Abuse (the
12 "Shafer Commission" created with the CSA) ultimately recommended
13 the decriminalization of marijuana. Marijuana: A Signal of
14 Misunderstanding; First Report of the National Commission of
15 Marihuana and Drug Abuse (1972). The Commission investigated
16 many aspects of cannabis use, conducted hearings, both formal
17 and informal, reviewed the existing research which had been done
18 on cannabis in this country and in other countries, and itself
19 commissioned more than sixty research projects in areas where
20 additional information was needed. Members of the Commission
21 also traveled to more than thirty countries as part of their
22 research. The Commission's First Report concluded at pages 56-
23 70:

24 A large amount of research has been performed in man
25 and animals regarding the immediate effect of
26 marihuana on bodily processes. No conclusive evidence
27 exists of any physical damage, disturbances of bodily
28 processes or proven human fatalities attributable
solely to even very high doses of marihuana
These few consistently observed transient effects on
bodily function seem to suggest that marihuana is a
rather unexciting compound of negligible immediate
toxicity at the doses usually consumed in this

1 country. The substance is predominately a
2 psychoactive drug. The feelings and state of
3 consciousness described by the intoxicated seem to be
4 far more interesting than the objective state noted by
5 an observer.

6 Id., at pp. 152-54. Despite the Commission's
7 recommendation, Congress did not revisit the scheduling of
8 cannabis.

9 Thus, the initial placement of marijuana by the CSA
10 implicated no congressional findings as to whether it properly
11 belonged in Schedule I, and its placement was done without any
12 proper justification.

13 **B. Applicable Constitutional Standards to be Applied in this
14 Case.**

15 The Fifth Amendment states, inter alia, that: "No person
16 shall be ... deprived of ... liberty ... without the due process
17 of law..." The plain language of this portion of the Amendment
18 establishes explicit substantive protection for Due Process
19 rights. However, while not containing the actual phrase "Equal
20 Protection of the law," it is "...also now established that the
21 basic concepts of equal protection apply to the federal
22 government through the due process clause of the Fifth
23 Amendment." Johnson v. Robison, 415 U.S. 361, 364, n. 4 (1974);
Richardson v. Belcher, 404 U.S. 78, 81 (1971); Bolling v.
Sharpe, 347 U.S. 497, 499 (1954).

24 The Supreme Court has utilized two standards of review in
25 assessing Equal Protection challenges to legislative provisions.
26 Where the challenged statutory scheme has involved infringement
27 of a constitutional guarantee or a "fundamental interest," or
28 discrimination based upon a "suspect classification," the court

1 has applied "strict scrutiny" and has upheld the statutory
2 scheme only when it has been shown necessary to promote a
3 "compelling government interest." San Antonio Independent
4 School District v. Rodriguez, 411 U.S. 1 (1973); Graham v.
5 Richardson, 403 U.S. 365, 371 (1971). In all other
6 circumstances, the court has applied the "rational relationship"
7 test: "Under traditional equal protection analysis, a
8 legislation classification must be sustained if the
9 classification itself is rationally related to a legitimate
10 governmental interest." United States Dept. of Agriculture v.
11 Moreno, 413 U.S. 528, 533 (1973).

12 Here, Mr. Rosenthal contends that strict scrutiny analyses
13 should apply since fundamental rights are at issue.
14 Alternatively, if the Court should so find that fundamental
15 rights are not at issue, the proper standard for constitutional
16 review of a statutory scheme is the rational relationship test.
17 As detailed below, the government will not be able to articulate
18 a compelling government interest when the law itself does not
19 pass muster under a rational relationship analysis, since
20 marijuana's classification is irrational and arbitrary.

21 1. The Rational Relationship Test is Not a Rubber Stamp
22 That Should Automatically Approve Every Government
Decision.

23 An act of the legislature carries a presumption of validity
24 and will be upheld unless it is demonstrated to be irrational.
25 South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177
26 (1938). Nevertheless, that a legislative declaration of facts
27 appears to be reasonable when enacted does not insulate the
28 statute from judicial review. See Chastleton Corp. v. Sinclair,

1 264 U.S. 543 (1924); Abie State Bank v. Bryan, 282 U.S. 765, 772
2 (1931); Block v. Hirsch, 265 U.S. 135, 154 (1921); United States
3 v. Carolene Products Co., 304 U.S. 144, 153 (1938).

4 As the Supreme Court stated in Truax v. Corrigan, 257 U.S.
5 312, 337-38 (1921):

6 Classification is the most inveterate of our
7 reasoning processes. We can scarcely think
8 or speak without consciously or uncon-
9 sciously exercising it. It must therefore
10 obtain in and determine legislation ...
[B]ut it must regard real resemblances and
11 real differences between things and persons,
12 and class them in accordance with their
13 pertinence to the purpose at hand. Id.

14 The Court has recognized that "regulations under the police
15 power, although valid or presumed valid when made, may become
16 arbitrary and irrational in the light of later events."
17 Chastleton v. Sinclair, 264 U.S. 543, 547-48 (1924). Moreover,
18 a court is "...not at liberty to shut its eyes to an obvious
19 mistake, when the validity of the law depends upon the truth of
20 what is declared." Id., at pg. 547. Thus, as the Supreme Court
21 stated in United States v. Carolene Products, Co.:

22 We recognize that the constitutionality of a
23 statute, valid on its face may be assailed
24 by proof of facts tending to show that the
25 statute as applied to a particular article
26 is without support in reason because the
27 article, although within the prohibited
28 class, is so different from others of the
29 class as to be without the reasons for the
30 prohibition.

31 Carolene, supra, at 153-54.

32 Further, the rational relationship test will not sustain
33 government conduct that is malicious, irrational or plainly
34 arbitrary. Wedges/Ledges of California, Inc. v. City of Phoenix,
35 24 F.3d 56, 67 (9th Cir. 1994); South Carolina Highway Dept. v.

1 Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed.2d 734
2 (1938). While the rational basis standard sets a low threshold
3 for government action, it is not a rubber stamp that should
4 automatically approve every government decision. See, e.g.,
5 Schumacher v. Nix, 965 F.2d 1262, 1269 (3rd Cir. 1992).

6 A statute may be challenged as irrational and arbitrary
7 either on the ground of its inclusion within a statutory scheme
8 of an item which cannot be rationally grouped with the other
9 members of the class so regulated, Gulf C. & S.F. Ry. V. Eillis,
10 165 U.S. 150, 158-9, 165-66 (1897); O v. Herold, 383 U.S. 17
11 (1966); Glonn v. American Guar. & Lib. Ins. Co., 391 U.S. 73
12 (1968); Rinaldi v. Yeager, 384 U.S. 305 (1966); Carrington v.
13 Rash, 380 U.S. 89 (1965); United States v. Carolene Products,
14 supra, at 153-154; or by its exclusion from the provisions of
15 the statute of a person or thing which rationally belongs within
16 the regulated class, Connelly v. Union Sewer Pipe Co., 184 U.S.
17 540, 560 (1902); Norey v. Doud, 354 U.S. 457 (1957); Hatford
18 Steam Boiler I. and Ins. Co. v. Harrison, 301 U.S. 459 (1927);
19 Smith v. Cahoon, 283 U.S. 553 (1931); Louisville Gas and Elec.
20 Co. v. Coleman, 277 U.S. 32 (1928).

21 2. Historically Courts Have Utilized Presently Available
22 Empirical Evidence in Determining the Legality of a
23 Statute.

24 "The constitutionality of a statute predicated upon a
25 particular state of facts may be challenged by a showing to the
26 court that those facts have ceased to exist." United States v.
Carolene Products Co., 304 U.S. 144, 153 (1938).

27 In Muller v. Oregon, 208 U.S. 412 (1908), the first
28 "Brandeis brief" case, the Court was presented with a challenge

1 to a statute which imposed a limitation on the hours women might
2 work, but which did not also apply to men. Significantly, the
3 Court examined a great deal of factual material as to the actual
4 effect of "protective" work legislation for women. Based on the
5 data presented, the Court upheld the statute.

6 In Brown v. Board of Education, 347 U.S. 483 (1954), the
7 Court granted relief based upon extensive empirical data
8 regarding the psychological effects on black children of
9 segregated education. There the Court stated:

10 The effect of this separation on their
11 educational opportunities was well stated by
12 a finding (in the lower court) in the Kansas
13 case...:"Segregation of white and colored
14 children in public schools has a detrimental
15 effect upon the colored children. The
16 impact is greater when it has the sanction
17 of the law; for the policy of separating the
18 races is usually interpreted as denoting the
19 inferiority of the Negro group. A sense of
20 inferiority affects the motivation of a
21 child to learn. Segregation with the
22 sanction of the law, therefore, has a
23 tendency to retard the educational and
24 mental development of Negro children and to
25 deprive them of some of the benefits they
26 would receive in a racially integrated
27 school system. Whatever may have been the
28 extent of psychological knowledge at the
time of Plessy v. Ferguson, this finding is
amply supported by modern authority (citing
numerous scientific studies).

347 U.S. at 494.

23 While arbitrariness and irrationality may not be evident
24 from the literal words of a statute, such arbitrariness and
25 irrationality may be "demonstrated" by scientific or other
26 empirical evidence. The Supreme Court reaffirmed this principle
27 in Leary v. United States, 395 U.S. 6 (1969). There the court
28 was presented with a challenge to 21 U.S.C. section 176a, which

1 provided that persons who possessed marijuana in the United
2 States would be presumed to know that the marijuana had been
3 illegally imported. After surveying a mass of reports, studies,
4 and articles by experts on the cultivation, importation, and
5 distribution of marijuana, the Court concluded that it could not
6 be said that "at least a majority of marijuana possessors have
7 learned of the foreign origin of their marijuana." Id. at p.
8 52. Accordingly, the Court struck down the presumption as
9 invalid, in light of the empirical data. The Court expressly
10 stated:

11 A statute based upon a legislative
12 declaration of facts is subject to
13 constitutional attack on the ground that the
14 facts no longer exist; in ruling upon such a
15 challenge, a court must, of course, be free
16 to reexamine the factual declaration.

17 Id. at p. 38, n. 68. See also Turner v.
18 United States, 396 U.S. 398 (1970); Block v.
19 Hirsch, supra.

20 When such evidence is presented, the court must consider it
21 in determining the validity of the challenged legislation, and
22 when such evidence is overwhelming, the court may not rely on a
23 presumption of "reasonableness" to sustain the legislation.

24 This is true for two reasons. First, the presumption of
25 legislative validity must be rebuttable, if overwhelming
26 evidence as to the irrationality of the legislation is not
27 sufficient to overcome that presumption, then the presumption is
28 effectively irrebuttable. Second, the scope of scientific and
empirical knowledge is constantly increasing, and society's
definition of "arbitrary" and "irrational" changes over time.

As the United States Supreme Court declared in Harper v.

1 Virginia State Board of Education, striking down the poll tax
2 even though it was "an old familiar form of taxation":

3 [T]he Equal Protection Clause is not
4 shackled to the political theory of a
5 particular era. In determining what lines
6 are constitutionally discriminatory, we have
7 never been confined to historic notions of
8 equality, any more than we have restricted
9 due process to a fixed catalogue of what was
10 at a given time deemed to be the limits of
11 fundamental rights...Notions of what
12 constitutes equal treatment for purposes of
13 the Equal Protection Clause do not change.

14 Harper v. Virginia State Board of Education,
15 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed. 169
16 (1966).

17 Here, there is ample precedent for the defendant, Mr.
18 Rosenthal, to demonstrate through expert testimony and empirical
19 evidence that the classification of cannabis is without support
20 in reason because the article, although within the prohibited
21 class, is so different from others of the class as to be without
22 the reason for the prohibition.

23 **C. The Classification of Marijuana in Schedule I of the CSA is
24 Arbitrary and Irrational.**

25 Marijuana is currently classified as a Schedule I substance
26 in the CSA, the classification Congress first gave it when the
27 law was passed in 1970. See, 21 U.S.C. section 812(b). The
28 three criteria required for inclusion in Schedule I are as
29 follows:

- 30 (1) The drug or other substance has a high potential for
31 abuse;
- 32 (2) The drug or other substance has no currently accepted
33 medical use in treatment in the United States;
- 34 (3) There is a lack of accepted safety for use of the drug
35 or other substance under medical supervision.

36 As is apparent from these criteria, Schedule I has been

1 reserved for the most dangerous substances, and those substances
2 without medical uses in treatment, such as heroin. Substances
3 listed in Schedule I are generally subject to the strictest
4 controls and harshest penalties, compared to substances listed
5 in the lower schedules of control. See, 21 U.S.C. sections 811-
6 812, 841-49.

7 It is important to note that the legislative history of the
8 CSA demonstrates that marijuana's classification in Schedule I
9 was intended as a temporary measure, based upon limited
10 information. Congress clearly indicated that a reconsideration
11 of marijuana's classification would be appropriate when a number
12 comprehensive studies, then underway, were completed. The House
13 Report on the CSA, H.R. Rep. No. 91-1444, 91st Cong., 1st Sess.
14 (1970), states:

15 The committee requested recommendations from
16 the Department of Health, Education and
17 Welfare concerning the appropriate location
18 of marijuana in the schedules of the bill,
19 and by letter of August 14, 1970, ...the
20 Assistant Secretary for Health and
21 Scientific Affairs recommended "that
22 marijuana be retained within Schedule I at
23 least until the completion of certain
24 studies underway." In addition, section 601
of the bill provides for establishment of a
Presidential Commission on Marijuana and
Drug Abuse The recommendations of this
commission will be of aid in determining the
appropriate disposition of this question in
the future.

Id. at 4578-79.

25 All of the studies and reports mentioned in this
26 legislative history have now been completed, and in addition,
27 there have been a number of other major studies on marijuana
28 conducted in the United States and abroad. Over the past thirty

1 years, a very extensive amount of research has been done on
2 cannabis. It is these studies and reports which the court must
3 consider in determining whether marijuana can be classified in
4 Schedule I, rather than the limited information available to
5 Congress when the CSA was passed, or the exaggerated and
6 distorted claims about marijuana which have often appeared in
7 the media.

8 1. Several Courts Have Declared Marijuana Laws
9 Unconstitutional on Misclassification Grounds
10 Similar to Those Raised Herein.

11 Numerous courts have found that marijuana is not narcotic
12 or addictive, and its classification as such was
13 unconstitutional. In State v. Zornes, 78 Wash.2d 9, 469 P.2d
14 552 (1970), overruled on other grounds, State v. Benn, 120
15 Wash.2d 631, 672, 845 P.2d 289 (1993), the defendant had been
16 convicted for possession of marijuana under a statute
17 classifying marijuana as a narcotic. The Supreme Court of
18 Washington compared empirical evidence on the effects of
19 marijuana with evidence of the effects of narcotics and
20 concluded that the effects of the drugs were so different that
21 the statutory classification was arbitrary and irrational.
22 Noting that it "is doubtful whether a legislative declaration
23 contrary to all the evidence can be sustained as
24 constitutional," Id. at 20, the court held that the convictions
25 could not stand.

26 In People v. McCabe, 49 Ill.2d 338, 275 N.E.2d 407 (1971),
27 the Supreme Court of Illinois held that classification of
28 marijuana with narcotic drugs under the state Narcotic Drug Act
was arbitrary and deprived the defendant of the constitutional

1 guarantee of Equal Protection of the laws. After comparing the
2 effects of marijuana with those of narcotics and other dangerous
3 drugs, the court concluded:

4 Observations to be drawn on marijuana are
5 that it is not a narcotic and it is not
6 truly addictible. Its use does not involve
7 tolerance, physical dependence or the
8 withdrawal syndrome. Physical ill effects
9 from its use are, so far as is known,
10 relatively moderate. Its abuse does not
11 have the profound and ill consequences
12 observed in the use of some of the other
13 drugs considered. Its use does not
14 singularly or extraordinarily lead to opiate
15 addiction or to aggressive behavior or
16 criminal activity.... We do not find a
17 rational basis for the classification...

18 275 N.E.2d at 413.

19 In People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827
20 (1972), the Supreme Court of Michigan held that the penalty of
21 20 years imprisonment prescribed by statute for selling a
22 narcotic drug, as it included sale of marijuana, violated
23 constitutional prohibitions against cruel and unusual
24 punishment. After comparing the statutory penalty with
25 penalties for offenses involving the sale of various substances,
26 offenses against persons or property, and with provisions of the
27 state Controlled Substances Act of 1971, the court concluded
28 that the term of imprisonment was "in excess of any that would
be suitable to fit the crime," (194 N.W.2d at 821), offended
"the evolving standards of decency that mark the progress of
maturing society." Id., at pp. 8342-33), and would not serve
the goal of rehabilitation. Id.

 At the same time the Supreme Court of Michigan announced
the Lorentzen decision, it reversed the defendant's conviction

1 for possession of marijuana in People v. Sinclair, 387 Mich. 91,
2 194 N.W.2d 878 (1972). Two judges were of the opinion that the
3 statutory categorization of marijuana along with "hard drug"
4 narcotics for purposes of imposition of penalties denied
5 defendant equal protection of the laws, one judge was of the
6 opinion that the statute denied defendant the right to liberty
7 and the pursuit of happiness, two judges were of the opinion
8 that incriminating evidence should have been excluded as
9 evidence obtained as a result of illegal entrapment, and two
10 judges were of the opinion that the minimum sentence of nine and
11 a half years constituted cruel and unusual punishment. The
12 opinion of the court, written by Swainson, J., declared:

13 Comparison of the effects of marijuana use
14 on both the individual and society with the
15 effects of other drug use demonstrates not
16 only that there is no rational basis for
17 classifying marijuana with the 'hard
18 narcotics' but, also, that there is not even
19 a rational basis for treating marijuana as a
20 more dangerous drug than alcohol.

21 194 N.W.2d at 881.

22 The court concluded: "We agree with the Illinois Supreme
23 Court in People v. McCabe, supra, that marijuana is improperly
24 classified as a narcotic and hold that [the Michigan statute
25 prohibiting possession of marijuana] in its classification of
26 marijuana violates the equal protection clause of the U.S.
27 Constitution..." Id. at 887. A subsequent Michigan decision
28 indicated that the McCabe holding, i.e., that marijuana cannot
29 rationally be classified as a narcotic, has been adopted as a
30 matter of law. See People v. Waxman, 41 Mich.App. 277, 199
31 N.W.2d 884 (1972), rev'd on authority of People v. Sinclair, 338

1 Mich. 774, 200 N.W.2d 322 (1972). See also, People v. Griffin,
2 39 Mich.App. 464, 198 N.W.2d 21 (1972).

3 In State v. Carus, 18 N.J. Super 159, 286 A.2d 740 (1972),
4 Carus was convicted of violation of a motor vehicle statute
5 which provided: "No person shall operate a motor vehicle on any
6 highway while knowingly having in his possession or in the motor
7 vehicle any narcotic drug within the meaning of section 24:18-2
8 of the Revised Statutes..." Section 24:18-2 defined narcotic
9 drugs as including "coco leaves, opium, marijuana and every
10 substance not chemically distinguishable from them." Citing
11 empirical studies on the effects of marijuana and recent changes
12 in the state drug statute, the court held that marijuana could
13 not be classified as a narcotic drug within the meaning of the
14 motor vehicle statute.

15 In Sam v. State, 500 P.2d 291 (Okla. Ct. Crim. App. 1972),
16 the defendant had been charged with possession of marijuana. At
17 the close of evidence, the trial judge instructed the jury as
18 follows:

19 You are instructed that if you believe from
20 the evidence in this case beyond a
21 reasonable doubt that the defendant did ...
22 possessed [sic] a narcotic drug, to wit:
23 marihuana, you shall find the defendant
24 guilty as charged in the information. If
25 you fail to so find, your verdict shall be
26 not guilty.

27 500 P.2d at 296.

28 Sam argued on appeal that the trial court erred in
instructing the jury that marijuana was a narcotic, and the
Court of Criminal Appeals agreed. Citing State v. Carus, supra,
and People v. McCabe, supra, the court concluded that "marihuana
is not a narcotic drug ... and the trial court's instructions to

1 that effect are error." Id. at 297.

2 Finally, the Supreme Court of Alaska held, in Ravin v.
3 State, 537 P.2d 494 (1975), that the right of privacy protects
4 the personal use of marijuana in the home. After reviewing the
5 testimony of expert witnesses present at the hearing at the
6 trial court and numerous studies and scientific reports on the
7 effects of marijuana, the court concluded:

8 It appears that the use of marijuana as it
9 is presently used in the United States
10 today, does not constitute a public health
11 problem of any significant dimensions. It
12 is, for instance, far more innocuous in
13 terms of physiological and social damage
14 than alcohol or tobacco.... It appears that
15 effects of marijuana on the individual are
16 not serious enough to justify widespread
17 concern at least as compared with the far
18 more dangerous effects of alcohol,
19 barbiturates and amphetamines. Moreover,
20 the current patterns of use in the United
21 States are not such as would warrant concern
22 that in the future consumption patterns are
23 likely to change... Thus we conclude that no
24 adequate justification for the state's
25 intrusion into the citizen's right to
26 privacy by its prohibition of possession of
27 marijuana by an adult for personal
28 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.

Id. at 506, 509-511 (footnote omitted).

2. Marijuana Does Not Have a High Potential for Abuse.

The first criterion for placement in Schedule I is that
"the drug or other substance has a high potential for abuse." 21
U.S.C. section 812(b)(1). Studies of cannabis conducted since
the promulgation of the CSA demonstrate, however, that the

1 reverse is true - it has a low potential for abuse.

2 For example, the White House Domestic Counsel Drug Abuse
3 Task Force, which consisted of the federal government's chief
4 officials involved with drugs and abuse, including HEW and DEA,
5 made a number of significant recommendations. The report urged
6 that marijuana possession offenses be "de-emphasized" because
7 they pose the least risk of harm to the individuals and to
8 society of the drugs commonly used in the United States. White
9 House Domestic Counsel Drug Abuse Task Force, White Paper on
10 Drug Abuse (Sept. 1975), at pg. 33. The report called for a
11 "better targeting of limited resources ... on the basis of
12 priorities which reflect current conditions and current
13 knowledge." Id. at p. 34.

14 The report also contained a chart which compared the
15 potential for abuse of marijuana with other drugs in Schedule I
16 (heroin and hallucinogens) and Schedule II (cocaine,
17 amphetamines and barbiturates). Id. at pf. 33. Marijuana had
18 the lowest potential for abuse of all the listed drugs.

19 The Canadian Commission of Inquiry into the Non-Medical Use
20 of Drugs (the "LeDain Commission") also published its report on
21 marijuana in 1972, which stated in pertinent part:

22 In summary, at typical doses of cannabis
23 use, few acute physiological effects have
24 been detected. Those which have been
25 identified generally seem to have little
26 clinical significance. Even at relatively
27 high does, few substantial physiological
28 changes occur.

29 LeDain Commission at 114.

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28
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28

a. Cannabis is not a "Gateway" Drug and Does Not Cause Death or Brain Damage.

Many myths about marijuana have been scientifically proven as invalid. For example, marijuana does not cause people to use hard drugs. What the gateway theory presents as a causal explanation is in fact a statistical association between common and uncommon drugs, an association that changes over time as different drugs increase or decrease in prevalence. Since marijuana is the most popular controlled substance used in the United States, people who have used other less popular drugs, are more likely to have used marijuana. Further, most marijuana users never use any other controlled substance. See Zimmer, L., and Morgan, J., Marijuana Myths, Marijuana Facts: A Review of the Scientific Evidence, New York and San Francisco, The Lindesmith Center (1997), Chapter 4. The authors of said book, Lynn Zimmer, Ph.D and John P. Morgan, M.D., compiled and reviewed the scientific literature prior to making their findings.

Further, none of the medical tests currently used to detect brain damage in humans have found harm from marijuana, even from long-term high dose use. Researchers found no evidence of brain abnormality in monkeys that were forced to inhale the equivalent of four to five marijuana cigarettes every day for a year. Additionally, there is no convincing evidence that heavy long-term marijuana use permanently impairs memory or other cognitive functions. See Zimmer, L., and Morgan, J., Marijuana Myths, Marijuana Facts: A Review of the Scientific Evidence, New York and San Francisco, The Lindesmith Center (1997), Chapters 7 and

1 9.

2 Further, studies have proven that no casual connection
3 between use of marijuana and loss of motivation (marijuana
4 "amotivational syndrome"), brain damage, birth defects, or
5 "chromosome breakdown" exist. Marihuana and Health, Second
6 Annual Report to Congress from the Secretary of Health,
7 Education and Welfare, 111-132(1972); Marihuana and Health,
8 Third Annual Report to Congress from the Secretary of Health,
9 Education and Welfare, 129-153(1973); Marihuana and Health,
10 Fourth Annual Report to Congress from the Secretary of Health,
11 Education and Welfare, 93-121 (1974); Marihuana and Health,
12 Fifth Annual Report to Congress from the Secretary of Health,
13 Education and Welfare, 78-112(1975); Marihuana and Health, Sixth
14 Annual Report to Congress from the Secretary of Health,
15 Education and Welfare, (1976); Marihuana and Health, Seventh
16 Annual Report to Congress from the Secretary of Health,
17 Education and Welfare, 15-35 (1977).

18 Also, the National Governor's Conference conducted an
19 extensive examination of the marijuana issue in 1977, and
20 published its findings in Marijuana: A Study of State Policies
21 and Penalties (Nov. 1977), which reported the medical and health
22 issues in detail (Id. at 41-63), concluding that "compared to
23 most pharmaceuticals, marijuana is quite low in biological
24 toxicity." Id. at 42.

25 The President's Commission on Mental Health Task Panel
26 issued its report on Psychoactive Drug Use/Misuse on February
27 15, 1978. The report reaffirmed the findings and
28 recommendations on the National Commission, and the other

1 reports, calling for the decriminalization of marijuana because
2 of its low potential for abuse. Id. at pp. 2114-18.

3 Dr. Lester Grinspoon's encyclopedic work, Marihuana
4 Reconsidered (Second Edition 1977), is the seminal text
5 analyzing the use and effect of marijuana. Drawing upon
6 hundreds of studies, as well as his own research, Grinspoon
7 documented the conclusions reached by earlier researchers:
8 "moderate use of marijuana causes no physical or psychological
9 harm to users (Id. at 370-71); marijuana is not addicting (Id.
10 at 223); has never been shown to have caused death of any user
11 (Id. at 227); does not produce psychosis (Id. at 253), et seq.;
12 does not lead to use of other drugs such as heroin (Id. at 235,
13 et seq.); does not lead to criminal or otherwise violent
14 behavior (Id. at 308-312)."

15 Major research studies on the effects of chronic marijuana
16 use have also been conducted in Jamaica, Greece, and Costa Rica
17 - three countries with a history of heavy marijuana use going
18 back hundreds of years. The Jamaican Study, Ganja in Jamaica: A
19 Medical Anthropological Study of Chronic Marijuana Use (1975),
20 as well as the other studies were discussed extensively in the
21 HEW Annual Reports. See Sixth Annual HEW Report, at pp. 20-21;
22 Fifth Annual HEW Report, at pgs. 7-8. In all these studies,
23 cannabis users were carefully matched with non-users on such
24 variables as age, marital status, education, use of alcohol and
25 tobacco. The cannabis users smoked cannabis which is
26 substantially more potent than the marijuana smoked in the
27 United States, and they smoke much more often than marijuana
28 smoked in this country. Users in the three studies had smoked

1 cannabis for an average of seven to seventeen years. The
2 cannabis users and matched controls were subjected to an
3 extensive battery physiological and psychological tests. No
4 significant differences were found between cannabis users and
5 non-users which could be attributed to cannabis use.

6 Finally, in considering marijuana's low potential for
7 abuse, it is important to emphasize that it is virtually
8 impossible to consume a lethal dose of marijuana. The "lethal
9 dose" of a drug is the dose which causes death. The
10 "therapeutic ratio," or ratio of safety, is the ratio of the
11 effective dose (dose which achieves desired result) to the
12 lethal dose. For alcohol, the ratio of safety is approximately
13 four to ten - if a person takes four times the effective dose of
14 alcohol, the dose may be lethal. For barbiturates, the ratio
15 of safety is approximately three to fifty. There are no
16 documented causes of death from marijuana overdose, but from
17 animal studies it has been estimated that the ratio of safety
18 for marijuana is between 20,000 and 40,000, i.e., a person would
19 have to consume 20,000 to 40,000 times the effective dose to
20 consume a lethal dose, a virtual impossibility. See Select
21 Comm. on Sci. & Tech., House of Lords, Sess. 1997-1998, Ninth
22 Report, Cannabis: The Scientific and Medical Evidence: Report
23 section 4.3 (Nov. 4, 1998)

24 Further, the DEA's Administrative Law Judge Francis Young
25 concluded:

26 In strict medical terms marijuana is far
27 safer than many foods we commonly consume.
28 For example, eating 10 raw potatoes can
result in a toxic response. By comparison,
it is physically impossible to eat enough
marijuana to induce death. Marijuana in its

1 natural form is one of the safest
2 therapeutically active substances known to
3 man. By any measure of rational analysis
4 marijuana can be safely used within the
5 supervised routine of medical care.

6 See Opinion and Recommended Ruling, Findings of Fact,
7 Conclusion of Law and Decision of Administrative Law Judge,
8 Section VIII, paragraphs 15 and 16.

9 b. Cannabis by Itself Also Does Not Cause Fatal
10 Car Crashes Nor Causes Adverse Effects on
11 Driving Performance.

12 In 1992, the U.S. Department of Transportation issued its
13 Final Report entitled The Incidence and Role of Drugs in Fatally
14 Injured Drivers. The following are pertinent experts:

15 Blood specimens were collected from a sample
16 of 1,882 drivers from 7 states, during 14
17 months in the years 1990 and 1991. The
18 sample comprised operators of passenger
19 cars, trucks, and motorcycles who dies
20 within 4 hours of their crash.
21 ...While cannabinoids were detected in 7
22 percent of the drivers, the psychoactive
23 agent THC was found in only 4 percent.
24 ...The THC-only drivers had a responsibility
25 rate below that of the drug free drivers.
26 ... While the difference was not
27 statistically significant, there was no
28 indication that cannabis by itself was a
29 cause of fatal crashes.

30 See Terhune, K.W.; Ippolito, C.A.; Hendricks, D.L.;;
31 Michalovic, J.G.; Bogema, S.C.; Santinga, P.; Blomberg, R., and
32 Preusser, D.F. (1992), The Incidence and Role of Drugs in
33 Fatally Injured Drivers, Report Number DOT HS 808 065,
34 Washington, D.C.: U.S. Department of Transportation, National
35 Highway Traffic Safety Administration, pp. 1 and 100.

36 Further, regarding the effects of marijuana smoking on
37 actual driving performance, the U.S. Department of
38 Transportation National Highway Traffic Safety Administration

1 concluded:

2 This program of research has shown that
3 marijuana, when taken alone, produces a
4 moderate degree of impairment which is
5 related to the consumes THC dose. The
6 impairment manifests itself mainly in the
7 ability to maintain a steady lateral
8 position on the road, but its magnitude is
9 not exceptional in comparison with changes
10 produced by many medicinal drugs and
11 alcohol. Drivers under the influence of
12 marijuana retain insight in their
13 performance and will compensate when they
14 can, for example, by slowing down or
15 increasing effort. As a consequence, THC's
16 adverse effects on driving performance
17 appear relatively small.

18 See W. Hindrik and J. Robbe and J. O'Hanlon,
19 1993, Marijuana and Actual Driving Performance,
20 Washington, D.C.: U.S. Department of
21 Transportation National Highway Traffic Safety
22 Administration, Report No. DOT HS 808 078.

23 Thus, cannabis actually has a far less impact on the
24 psychomotor skills needed for driving than alcohol does, and is
25 seldom a causal factor in automobile accidents. See also
26 Marijuana and Driving: A Review of the Scientific Evidence,
27 compiled by NORML, March 18, 2004.

28 3. Marijuana Has Currently Accepted Medical Uses in
the United States.

29 The Second Criterion for placement in Schedule I is that
30 "the drug or other substance has no currently accepted medical
31 use in treatment in the United States." 21 U.S.C. section
32 812(b)(1). See Section I of the present motion for current
33 accepted medical uses and benefits of marijuana.

34 4. Marijuana Can be Safely Used Under Medical
Supervision.

35 The third and final criterion for placement in Schedule I

1 is that "there is a lack of accepted safety for use of the drug
2 or other substance under medical supervision." 21 U.S.C.
3 section 812(b)(1). The studies and reports cited in the
4 previous sections of the memorandum documents marijuana's low
5 potential for abuse, and indicate that there is no "lack of
6 safety" attendant to the use of marijuana with or without
7 medical supervision.

8 a. The Drug Enforcement Administration's Own
9 Administrative Law Judge Recommended
Rescheduling Marijuana.

10 As a result of petitions to reschedule cannabis filed in
11 the 1970's, the DEA's own Administrative Law Judge, Francis L.
12 Young, conducted extensive evidentiary hearings on marijuana's
13 medical efficacy and safety. See Opinion and Recommended
14 Ruling, Findings of Fact, Conclusion of Law and Decision of
15 Administrative Law Judge.

16 On the basis of a thorough review of the record, Judge
17 Young recommended that the DEA Administrator reschedule
18 marijuana from Schedule I to Schedule II.

19 The evidence in this record clearly shows
20 that marijuana has been accepted as capable
21 of relieving the distress of great numbers
22 of very ill people, and doing so with safety
23 under medical supervision. It would be
24 unreasonable, arbitrary and capricious for
25 the DEA to continue to stand between those
26 sufferers and the benefit of this substance
27 in light of the evidence in this record.

24 Id. at Section IX.

25 Moreover, the Decision, in numerous other contexts, terms
26 elements requiring marijuana's inclusion in Schedule I as
27 "unreasonable, arbitrary and capricious." Id. at Section VIII.

28 With regard to marijuana's safety, the Decision stated,

1 "marijuana, in its natural form, is one of the safest
2 therapeutically active substances known to man. By any measure
3 of rational analysis marijuana can be safely used within a
4 supervised routine of medical care." Id. at Section VIII at
5 paragraph 16. Unfortunately, the Decision was advisory, not
6 mandatory. Consequently, the DEA ignored its Administrative Law
7 Judge, ordering that marijuana had "no currently accepted
8 medical use" and thus had to remain in Schedule I.

9 In addition, the experience of the states which have
10 allowed the use of marijuana as medicine documents the safety of
11 the substance when used under medical supervision. The
12 classification of marijuana in Schedule I must therefore be
13 deemed to be arbitrary and irrational, because current
14 information shows that marijuana satisfies none of the three
15 criteria for placement in Schedule I.

16 **D. Marijuana is Classified with Dissimilar and Much More**
17 **Dangerous Substances.**

18 The classification of marijuana in Schedule I is also
19 arbitrary and irrational because marijuana is a much less
20 dangerous substance than the other substances included in
21 Section I, particularly heroin and the hallucinogens.
22 Marijuana, "although within the prohibited class, is so
23 different from others of the class as to be without the reason
24 for the prohibition." United States v. Carolene Products Co.,
25 supra, at 153-54. In fact, marijuana has a much lower potential
26 for abuse than the substances listed in Schedules II-V of the
27 Act, including the barbiturates, amphetamines, and central
28 nervous system depressants.

For example, heroin, a Schedule I listed drug, produces a

1 feeling of total numbness, indifference to pain, and complete
2 drive satiation. Jaffe, Drug Addiction and Drug Use, in Goodman
3 and Gilman, Eds., The Pharmacological Basis of Therapeutics
4 (1970), at 824. The primary harmful effect of heroin use is the
5 rapid development of addiction. The phenomenon of addiction is
6 in turn comprised of two elements: tolerance, a diminished
7 effect of the drug upon repeated administrations, or conversely,
8 a need to take larger and larger doses to obtain the initial
9 effect, and the withdrawal syndrome, a series of regular
10 symptoms experienced by the addict when drug use is
11 discontinued.

12 [I]f the addicted individual is deprived of
13 his drug, he experiences severe and highly
14 unpleasant physical and psychological
15 withdrawal symptoms...By 48 hours the
16 withdrawal syndrome reaches its peak with
17 nausea, retching, vomiting, diarrhea,
18 anorexia, and rapid weight loss. After 72
19 hours the abstinence syndrome begins to
20 subside slowly, and after 5 to 10 days, most
21 of the signs and symptoms have
22 disappeared...Four to six months after
23 withdrawal, hypersensitivity of the
24 automatic nervous system has been reported.

19 Grinspoon, supra, at 256-57.

20 Amphetamines (CSA Schedule II) are synthetic drugs which
21 are commonly used as diet pills and stimulants. The most common
22 amphetamines are benzedrine and dexedrine. Use of amphetamines
23 may cause cardiovascular difficulties. Amphetamine abusers may
24 develop paranoid psychoses; such individuals may commit violent
25 acts without provocation. Amphetamine users may go into
26 catatonic-like states which may last for hours or days.

27 National Commission, Drug Use in America, supra at 145. A
28 significant tolerance develops from chronic use of amphetamines,

1 and death from an overdose is not uncommon. Id., at 146. Death
2 is often associated with exceptionally high fever, cardiovascular
3 shock, and convulsions, or with hemorrhages in the blood vessels
4 of the brain. Id. These dangers are exacerbated by the
5 rapidity with which users develop tolerance to amphetamines.
6 Id., at 144.

7 Barbiturates (CSA Schedule III) are synthetic drugs which
8 are commonly used as sedatives. Regular use of barbiturates
9 leads to addiction and other behavioral disorders. Use of
10 barbiturates may also cause violent and aggressive behavior.
11 Chronic barbiturate intoxication closely resembles alcoholism
12 with similar depressant effects on the central nervous system
13 (clouded consciousness, slurred speech, impaired muscle
14 coordination, and marked swings in mood from depression to
15 euphoria, from passivity to extreme aggression). National
16 Commission, Drug Use in America, supra, at 90. The withdrawal
17 symptom is characterized by loss of appetite, insomnia, tremor,
18 convulsions, delirium, and in extreme cases, death. Id. at 92.

19 Potentially more harmful to the individual than either the
20 effects of barbiturate intoxication or the symptoms of
21 withdrawal is the danger of overdose: "poisoning by barbiturates
22 constitutes a major social problem. In the United States, these
23 drugs account for 15% of all poisonings and are involved in more
24 deaths than any other poisonings...Death resulting from
25 barbiturate overdose is becoming an increasingly common social
26 phenomenon, whether suicidal or accidental." Id., at 96-98.
27 The Commission's conclusion stated that "the whole pattern of
28 barbiturate dependency is a more dangerous one than that of

1 opiate abuse." Id., at 97.

2 Further, a number of central nervous system depressants are
3 listed in Schedule IV of the CSA. The National Commission
4 reported in Drug Use in America, supra, at 93, stated that these
5 substances:

6 [h]ave been shown to be capable of producing
7 barbiturate-like intoxication and inducing
8 tolerance, dependence, and an abstinence
9 syndrome strikingly similar to that seen
10 with alcohol and the barbiturates...All of
11 the drugs produce symptoms of intoxication
12 which are similar to one another and to the
13 barbiturates. Excessive doses cause varying
14 degrees of drowsiness, confusion, and motor
15 incoordination with slurred and thick
16 speech, double vision, staggering and
17 falling. Memory is impaired, intellectual
18 functions blunted, and emotional control
19 reduced. Rage reactions may occur. ...With
20 larger doses, respiration and blood pressure
21 are depressed. The patient may enter a coma
22 which can be fatal....

23 A barbiturate-like dependence pattern
24 develops in those individuals who abuse
25 these agents. During periods of chronic
26 intoxication, tolerance and physical
27 dependence develop. Tolerance is usually
28 correlated with an accelerated hepatic
breakdown of the drug...Convulsions and
delirium have been reported with all these
dependence, which results in withdrawal,
delirium, with prominent paranoia, and
occasional tremor...As in the case of
barbiturates, the ordeal of abstinence may
be life-threatening, and deaths have
occurred during withdrawal...

29 National Commission reported in Drug Use in America,
30 supra, at 93.

31 Thus, it is irrational to classify marijuana in Schedule I
32 when it is much less dangerous than the other drugs in Schedule
33 I and when it is even less dangerous than the substances listed
34 in the lower Schedules of the Act.

1 **E. Severe Penalties for Marijuana Offenses, While Identical**
2 **Conduct Involving Alcohol and Tobacco Cannot Be Criminally**
3 **Punished, are Arbitrary, Irrational and Hypocritical.**

4 Defendant's final argument is that it is arbitrary,
5 irrational, and hypocritical to classify marijuana in Schedule I
6 of the CSA, with its attendant severe penalties, when identical
7 conduct involving alcohol and tobacco cannot be criminally
8 punished. The CSA specifically exempts alcohol and tobacco. 21
9 U.S.C. 802(6).

10 The disparity in treatment between marijuana on the one
11 hand, and alcohol and tobacco on the other, can no longer be
12 justified. Evidence indicates that alcohol and tobacco are far
13 more dangerous drugs than marijuana, and present a much greater
14 health hazard to the user.

15 Alcohol operates in the body as a central nervous system
16 depressant: its effects are very similar to those produced by
17 the barbiturates. Jaffe, supra, at 289. Tolerance develops
18 from regular use, and discontinued use precipitates a severe
19 withdrawal syndrome similar to that of barbiturate withdrawal
20 and marked by hallucinations and delirium tremors which can lead
21 to death. Id., at 292. What is commonly called "alcoholism" is
22 actually physical addiction to the drug alcohol. Alcohol abuse
23 causes cirrhosis of the liver, which is a leading cause of
24 death. J. Fort, Alcohol: Our Biggest Drug Problem (1973), at
25 197. It also leads to kidney dysfunction, psychosis, and
26 hyperthyroid. Id. Jaffe, supra, at 292.

27 Tobacco ranks with alcohol in widespread use among
28 Americans; it is also the single major cause of heart and blood
vessel disorders, and cancer, which are the two most common

1 causes of death in America. Alcohol, supra, at 197. Nicotine,
2 the primary active substance in tobacco, is a central nervous
3 system stimulant similar to the amphetamines in its general
4 effects. The harmful characteristics of nicotine are well
5 known:

6 Nicotine is one of the most toxic drugs
7 known and is usually thought of as a
8 poison...Heavy doses produce nausea,
9 vomiting, diarrhea, headaches, disturbed
10 vision and hearing, confusion, weakness,
11 sharp drop in blood pressure, convulsions,
12 and untimely death from paralysis of the
13 respiratory muscles.

14 Fort, supra, at 154-55.

15 In addition to heart and blood vessel disorders and cancer
16 of the lungs, mouth, larynx, and esophagus, tobacco smoking may
17 also cause chronic bronchitis, emphysema, and loss of vision.
18 Id. at 155.

19 As the Supreme Court noted in Morey v. Doud, 354 U.S. 457,
20 469, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957), the critical issue in
21 determining the constitutional validity of the exemption is
22 whether or not it is rational in view of the statute. As argued
23 above, the classification of marijuana as a Schedule I drug is
24 irrational and arbitrary, and thus, unconstitutional.

25 III.

26 **FEDERAL PROHIBITION ON CANNABIS CULTIVATION IS
27 UNCONSTITUTIONAL BECAUSE IT DOES NOT PROMOTE GENERAL
28 WELFARE, INTERFERES WITH LIBERTY RIGHTS, IS CONTRARY
29 TO JUSTICE, AND IRRATIONAL.**

30 In addition to the constitutional problems associated with
31 applying the federal Controlled Substances Act to the narrow
32 class of activity of medical cannabis cultivation, the Act is

1 unconstitutional on due process and equal protection grounds as
2 applied to cannabis cultivation generally -- such prohibition is
3 premised on outdated and disproven myths about the evils of
4 marijuana. The Supreme Court has held that a regulation
5 "although valid or presumed valid when made, may become
6 arbitrary and irrational in the light of later events" and that
7 a court is "not at liberty to shut its eyes to an obvious
8 mistake, when the validity of the law depends on the truth of
9 what is declared." Chastleton v. Sinclair, 264 U.S. 543, 547-48
10 & 547 (1924); see also Petteys v. Butler, 367 F.2d 528, 536 (8th
11 Cir. 1966) ("When the reason of the law ceases, the law itself
12 ceases (to operate), is a well-known and time-proved rule of
13 construction").

14 Although many courts have rejected constitutional
15 challenges to statutes prohibiting marijuana, see, e.g., Clark
16 v. Craven, 437 F.2d 1202, 1202 (9th Cir. 1971) (rejecting
17 substantive due process challenge to California statutes
18 proscribing marijuana possession); Bettis v. United States, 408
19 F.2d 563, 569-70 (9th Cir. 1969) (rejecting contention that
20 Narcotic Drug Import and Export Act violates due process because
21 of incorrect scientific classification); Halprin v. United
22 States, 295 F.2d 458, 461 (9th Cir. 1961) (rejecting
23 constitutional challenge to sentences imposed by Narcotic Drug
24 Import and Export Act on due process and cruel and unusual
25 punishment grounds); Gallego v. United States, 276 F.2d 914 (9th
26 Cir. 1960) (rejecting constitutional challenge to sentences
27 imposed by Narcotic Drug Import and Export Act on due process as
28 constituting cruel and unusual punishment), new scientific

1 evidence has emerged demonstrating their folly. The Supreme
2 Court has established that "a statute would deny due process
3 which precluded the disproof in judicial proceedings of all
4 facts which would show or tend to show that a statute depriving
5 the suitor of life, liberty, or property had a rational basis."
6 United States v. Carolene Products, 304 U.S 144, 151 (1938).
7 Under our constitutional structure and, in particular, its
8 system of checks and balances, the courts serve an "equitable
9 and historic role by examining the facts of each case in the
10 light of the stated goals to determine on an ad hoc basis
11 whether the purposes of the Act are in any way being served by
12 the applicable provisions." Petteys v. Butler, 367 F.2d 528,
13 536 (8th Cir. 1966); see also U.S. Const., Preamble (noting that
14 United States was formed to "establish justice . . . promote the
15 general welfare, and secure the blessings of liberty")¹;
16 McCulloch v. Maryland, 4 Wheat. 316, 421 (1819) (Marshall, J.)
17 (laws must not only be "necessary and proper" to achieve
18 legitimate ends, but they must be "consistent with the letter
19 and spirit of the constitution")².

20
21 ¹ Mr. Rosenthal urges this court to consider the purposes
22 of the Constitution as defined in the Preamble to evaluate and
23 find marijuana prohibition unconstitutional. "The Preamble
24 explains the purposes of the Constitution, and defines the
powers of the new government as originating from the people of
the United States." See U.S. Senate web page
(http://www.senate.gov/civics/constitution_item/constitution.htm
1).

25 ² Further, Mr. Rosenthal wishes this Court to consider the
26 spirit of the Constitution as defined in the following
Federalist Papers. Specifically, Federalist Paper No. 78,
27 Hamilton, pp. 498-500: "No legislative act, therefore, contrary
to the Constitution, can be valid...A constitution is, in fact,
28 and must be regarded...as a fundamental law...in other words,
the Constitution ought to be preferred to the statute, the
intention of the people to the intention of their agents."

1 In the early-1970s, Congress, in passing the federal
2 Controlled Substances Act, 21 U.S.C. § 801 et seq., even as
3 President Richard Nixon was declaring his "War on Drugs," did
4 not make any specific findings respecting marijuana. See supra.

5 Aside from disregarding established scientific evidence

6
7 Federalist Paper No. 31, pp. 187-188, further discusses the
8 notion of the public trust and public good: "A government ought
9 to contain in itself every power requisite to the full
10 accomplishment of the objects committed to its care, and to the
11 complete execution of the trusts for which it is responsible,
12 free from every other control but a regard to the public good
13 and to the sense of the people." Federalist Paper No. 45, p.
14 294, further stated: "...[T]he public good, the real welfare of
15 the great body of the people, is the supreme object to be
16 pursued; and that no form of government whatever has any other
17 value than as it may be fitted for the attainment of this
18 object...the public happiness."

19 Judicial review is also an essential tenet of upholding the
20 letter and spirit of the Constitution. As stated in Federalist
21 Paper No. 78:

22 The complete independence of the courts of
23 justice is peculiarly essential in a limited
24 Constitution...Limitations of this kind can
25 be preserved in practice no other way than
26 through the medium of courts of justice,
27 whose duty it must be to declare all acts
28 contrary to the manifest tenor of the
29 Constitution void. Without this, all the
30 reservations of particular rights or
31 privileges would amount to nothing....
32 There is no position which depends on
33 clearer principles, than that every act of a
34 delegated authority, contrary to the tenor
35 of the commission under which it is
36 exercised, is void. No legislative act,
37 therefore, contrary to the Constitution, can
38 be valid...A constitution is, in fact, and
39 must be regarded by the judges, as a
40 fundamental law. It therefore belongs to
41 them to ascertain its meaning, as well as
42 the meaning of any particular act proceeding
43 from the legislative body. If there should
44 happen to be an irreconcilable variance
45 between the two, that which has the superior
46 obligation and validity ought, of course, to
47 be preferred; or, in other words, the
48 Constitution ought to be preferred to the
49 statute, the intention of the people to the
50 intention of their agents.
51 Federalist Paper No. 78, Hamilton, pp. 497-502.

1 demonstrating the proven medical benefits of cannabis for
2 symptoms ranging from nausea, muscle spasticity and chronic
3 pain, Congress has ignored emerging evidence demonstrating that
4 the deleterious effects of cannabis are wholly inadequate to
5 justify the draconian punishments associated with cannabis
6 prohibition. Unlike alcohol and nicotine, which are not
7 controlled substances at all, see 21 U.S.C. § 802, cannabis is
8 not toxic at any level, and it does not result in physical
9 dependence. See supra. These two criteria, both of which
10 strongly favor cannabis, are generally considered the most
11 important in any evaluation of the abuse potential of drugs.
12 Indeed, in 1999, the National Institute of Medicine, after
13 surveying the scientific evidence of the harms associated with
14 marijuana, concluded that "except for the harms associated with
15 smoking, the adverse effects of marijuana use are within the
16 range of effects tolerated for other medications." Relevant
17 pages from Institute of Medicine, Marijuana and Medicine:
18 Assessing the Science Base (Janet E. Joy, et al. eds, 1999).

19 Furthermore, whereas the relatively undisputed short-term
20 physiological effects of cannabis are at worst innocuous,
21 studies have emerged since Congress first passed the Controlled
22 Substances Act that long-term use of cannabis is safe. See
23 supra. In contrast to nicotine and alcohol, as well as other
24 traditional medicines, long-term use of cannabis does not harm
25 the heart, stomach, liver, or kidneys. See supra.

26 Nor is cannabis a gateway drug, as it was once feared.
27 Recent research suggests that recreationally used cannabis does
28 not act as a gateway drug to harder drugs such as alcohol,

1 cocaine, and heroin. A very recent survey by the Attorney
2 General of California shows that teenage use of marijuana has
3 *declined* after its legalization by the State for medical use.
4 See Press Releases and 10th Biennial California Student Survey,
5 Drug, Alcohol and Tobacco Use, California Attorney General's
6 Office, Summer 2004.

7 Also, contrary to the public perception existing at the
8 time when the War on Drugs was implemented, cannabis use does
9 not increase the risk of automobile accidents or the risk of
10 lung cancer. See supra.

11 Thus, the overwhelming evidence establishes that cannabis,
12 as presently used by twenty to thirty million Americans, does
13 not constitute a health problem of any significant dimension.
14 Cannabis use is far more innocuous in terms of physiological and
15 social damage than alcohol or tobacco.

16 Rather, the greatest harms associated with cannabis are
17 caused by its criminalization, which results in (1)
18 unnecessarily saturating the criminal justice system with
19 marijuana offenders; and (2) stigmatizing and traumatizing the
20 lives of citizens who could otherwise contribute positively to
21 our society. For example, arrest and incarceration rates for
22 drugs have substantially increased under the ideology of the
23 "war on drugs." As of 2003, 161,673 persons were held in
24 federal prisons, an increase of 81% from 1995. See The Federal
25 Prison Population: A Statistical Analysis, The Sentencing
26 Project, 2005. More than half (55%) of the federal prisoners
27 are serving time for a drug offense, and 13% for a violent
28 offense. Id. Nearly three-fourths (72.1%) of the population

1 are non-violent offenders with no history of violence. Id.

2 Further, the drug policies produce disparate sentences.
3 For example, since full implementation of the federal sentencing
4 guidelines in 1989, disparity in sentencing between African
5 Americans and whites has increased. Id. African American (20%
6 greater) and Hispanics (40% greater) have a greater chance than
7 whites to a prison sentence, and African Americans receive
8 longer terms than whites. Id.

9 Additionally, despite a huge increase in drug control
10 spending - from \$65 million in 1970 to \$19 billion currently at
11 the federal level only - rates of marijuana use have remained
12 essentially unchanged. Thus, there is no clear relationship
13 between arrests and use, and the impact of increased arrests,
14 convictions and incarcerations of people for marijuana offenses
15 has significant and measurable "collateral consequences" on
16 communities and individuals. See Efficacy and Impact: The
17 Criminal Justice Response to Marijuana Policy in the United
18 States, Justice Policy Institute, 2005. Thus, arrest and
19 incarceration has not deferred conduct.

20 Mr. Rosenthal further points this Court towards a
21 comprehensive report by King County Bar Association Drug Policy
22 Project entitled Effective Drug Control: Toward a New Legal
23 Framework, State-Level Regulation as a Workable Alternative to
24 the "War on Drugs," 2005. The report found that the current
25 drug policy is fundamentally flawed with substantial negative
26 societal consequences, and that the federal drug law was a major
27 impediment to any meaningful drug policy reform of the states.

28 When one compares the social effects of prohibition against

1 the social effects of decriminalization, a rational balancing
2 test overwhelmingly favors decriminalization. Under the
3 rational basis test enumerated in Carolene Products, supra;
4 Craig v. Boren, 429 U.S. 190 (1976), and Massachusetts Board of
5 Retirement v. Murgia, 427 U.S. 307 (1976), the statute fails to
6 pass constitutional muster.

7 Further, Mr. Rosenthal submits that the general welfare is
8 not promoted when, as shown above and taken in totality, the
9 congressional enactment of the CSA had erroneous historical
10 underpinnings; did not achieve its intended aim; and resulted in
11 unequal application of the law. Here, where a process of
12 government lacked objectivity or fairness, as in the enactment
13 of legislation based on false premises, or where the practical
14 effect on an act of government results in unequal application or
15 unfair treatment, the spirit of the Constitution is violated.

16 Further, as detailed at length above regarding the
17 misclassification of marijuana as a Schedule I Substance, since
18 the historical underpinnings resulting in the prohibition of
19 marijuana were erroneous, it is akin to convicting Mr. Rosenthal
20 based upon false or fabricated evidence. "One of the bedrock
21 principles of our democracy, 'implicit in any concept of ordered
22 liberty', is that the State may not use false evidence to obtain
23 a criminal conviction." Hayes v. Brown, 399 F.3d 972, 978 (9th
24 Cir. 2005) citing Napue v. Illinois, 360 U.S. 264, 269, 3
25 L.Ed.2d 1217, 79 S.Ct. 1173 (1959). Analogous here, false
26 evidence or erroneous information should not be allowed to
27 sustain legislation that imposes criminal penalties against
28 defendant herein.

