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10
11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 SOUTHERN DIVISION
14

15 UNITED STATES OF AMERICA,) Case No. SA CR 07-33-DOC
16)
16 Plaintiff,) GOVERNMENT'S OPPOSITION TO
17) DEFENDANT POHLABLE'S MOTION TO
17 v.) DISMISS COUNTS ONE THROUGH SIX
18) OF THE INDICTMENT
18)
19 TANNER MILES PAULINE, et al.,) [Fed. R. Crim. P. 12(b)(3)]
20)
20 Defendants.)
21)
21 _____) DATE: March 17, 2008
22) TIME: 1:30 p.m.
22) PLACE: Courtroom 9-D
23) EST: 30 minutes
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1 INTRODUCTION

2 Defendant Michael Eugene Pohlable ("Pohlable") has filed a
3 motion to dismiss counts one through six of the indictment, which
4 charge him with various violations of Title 21, United States
5 Code, Section 841(a)(1) and 846. In summary, Pohlable argues
6 that the Controlled Substances Act ("CSA"), of which 21 U.S.C.
7 §§ 841 and 846 are apart, is unconstitutional as applied to the
8 charged conspiracy to distribute MDMA and Pohlable's distribution
9 of MDMA.

10 The motion is not a model of clarity. As best we can
11 determine, Pohlable makes essentially four arguments: (1) The CSA
12 is unconstitutional because it exceeds Congress' enumerated
13 powers, which do not include the power to "tell[] us what we can
14 eat"; (2) As applied to MDMA, the CSA constitutes an
15 unconstitutional delegation of congressional power to an
16 administrative agency and an unlawful administrative action;
17 (3) The CSA is unconstitutionally vague because it does not name
18 MDMA expressly as an illegal "controlled substance"; and (4) The
19 CSA's prohibition on the distribution of drugs, which Pohlable
20 suggests is just another type of "property," violates Pohlable's
21 Fifth Amendment rights to due process and equal protection.

22 The motion lacks merit and should be denied. As explained
23 below, the CSA constitutes a valid exercise of Congress' power to
24 regulate interstate commerce. The CSA's prohibition on the
25 distribution of MDMA does not constitute an improper delegation
26 of legislative power to an administrative agency. The CSA's
27 prohibition against the distribution of MDMA is not vague. And,
28 finally, the CSA's prohibition on the distribution of MDMA is

1 rationally related to a legitimate government interest, and thus
2 does not violate the Fifth Amendment's Due Process Clause.

3
4 **STATEMENT OF FACTS**

5 **A. Indictment**

6 On March 7, 2007, a federal grand jury returned an eight-
7 count indictment against Pohlable and four other persons.¹

8 Pohlable is charged in the first six counts of the indictment.

9 Count one charges a drug-trafficking conspiracy in violation
10 of Title 21, United States Code, Section 846. The indictment
11 alleges that, during the period between October 2006 and February
12 27, 2007, Pohlable and his co-defendants conspired and agreed
13 with each other to knowingly and intentionally (a) distribute and
14 (b) possess with intent to distribute approximately 1,100 grams
15 of a mixture or substance containing a detectable amount of 3,4-
16 methylenedioxymethamphetamine ("MDMA"), a Schedule I controlled
17 substance, in violation of Title 21, United States Code, Section
18 841(a)(1).

19 Counts two through six charge Pohlable with distributing
20 MDMA in violation of Title 21, United States Code, Section
21 841(a)(1). Specifically, counts two through six allege the
22 following offenses:

23
24
25

¹ Defendant Anthony Angeles ("Angeles") pled guilty and has
26 already been sentenced. Defendant Tanner Pauline ("Pauline")
27 pled guilty, but he is awaiting sentencing. Defendants Pohlable
28 and Melissa Koop ("Koop") are awaiting trial, which was recently
advanced by the Court to April 3, 2008. On the government's
motion, defendant William Young was dismissed from the case.

1 2. On November 21, 2006, Pohlable and Pauline
2 distributed approximately 46 grams of a
3 substance containing MDMA.

4 3. On December 14, 2006, Pohlable distributed
5 approximately 115 grams of a substance
6 containing MDMA.

7 4. On January 10, 2007, Pohlable distributed
8 approximately 82 grams of a substance
9 containing MDMA.

10 5. On January 24, 2007, Pohlable and Pauline
11 distributed approximately 69 grams of a
12 substance containing MDMA.

13 6. On February 10, 2007, Pohlable and Pauline
14 distributed approximately 115 grams of a
15 substance containing MDMA.

16 **B. Motion To Dismiss**

17 On or about February 21, 2008, Pohlable, acting in pro per,
18 filed the pending motion to dismiss the indictment. At a prior
19 hearing, the Court granted Pohlable leave to represent himself in
20 connection with this motion. In the even the motion is denied,
21 Pohlable's stand-by counsel will be appointed anew to represent
22 Pohlable at trial.

23
24 **ARGUMENT**

25 **I. THE CSA'S PROHIBITION ON THE DISTRIBUTION OF MDMA IS A VALID**
26 **EXERCISE OF CONGRESS' POWER TO REGULATE INTERSTATE COMMERCE**

27 Pohlable argues that the CSA is unconstitutional because it
28 exceeds Congress' enumerated powers. As Pohlable explains it,

1 "Telling us what we can eat is not one of [those enumerated
2 powers]." (Mtn. at 10, 16-17.) Pohlable contends that, by
3 exercising powers not granted by the state or federal
4 constitutions, "[t]he federal government has usurped our right to
5 determine the extent to which we would like to investigate these
6 pleasure giving plants." (Id.) The argument lacks merit.

7 Congress is vested with the power to "make all Laws which
8 shall be necessary and proper" to "regulate Commerce . . . among
9 the several States." See U.S. Const., Art. I, § 8. The Supreme
10 Court has held that the provisions of the CSA criminalizing the
11 manufacture, distribution, and possession of controlled
12 substances constitute a valid exercise of Congress' power under
13 the Commerce Clause. See Gonzales v. Raich, 545 U.S. 1, 16-22
14 (2006) (holding the CSA's prohibitions on the manufacture,
15 distribution, and possession of marijuana by wholly intrastate
16 growers and users was valid).

17 As explained in Raich, Congress is authorized under its
18 commerce power to regulate more than just the channels and
19 instrumentalities of interstate commerce. Id. at 16-17.
20 Congress is also authorized "to regulate activities that
21 'substantially affect' interstate commerce," including purely
22 local activities that are part of an economic "class of
23 activities" that have a substantial effect on interstate
24 commerce. Id. at 17; see also Perez v. United States, 402 U.S.
25 146, 151 (1971); Wickard v. Filburn, 317 U.S. 111, 128-29 (1942).
26 Thus, "even if [a person]'s activity be local and though it may
27 not be regarded as commerce, it may still, whatever its nature,
28

1 be reached by Congress if it exerts a substantial economic effect
2 on interstate commerce." Raich, 545 U.S. at 17.

3 Under established precedent, "Congress can regulate purely
4 intrastate activity that is not itself 'commercial,' in that it
5 is not produced for sale, if it concludes that failure to
6 regulate that class of activity would undercut the regulation of
7 the interstate market in that commodity." Id. at 18. Thus, the
8 fact that an individual's conduct is so "de minimis" that it does
9 not alone have a "substantial effect" on commerce is "of no
10 consequence," provided that the regulatory statute under review
11 "bears a substantial relation to commerce." Id. "Congress'
12 power to regulate commerce [also] includes the power to prohibit
13 commerce in a particular commodity." Id. at 19 n.29.

14 Notwithstanding Pohlable's contrary claim, the Commerce
15 Power includes the power to regulate the things that people eat
16 or otherwise consume. Wheat is edible. Yet, in Wickard, the
17 Court rejected a farmer's argument that Congress did not have the
18 power to control his ability to produce wheat that was "not
19 intended in any part for commerce, but wholly for consumption on
20 the farm." See Wickard, 317 U.S. at 118, 127-29. Likewise, in
21 Raich, the Court held that Congress has the power to prohibit
22 people from using marijuana and growing it even though it is
23 intended solely for consumption within the State of California,
24 and even though the conduct was permissible under state law.
25 Raich, 545 U.S. at 16-22.

26 It also bears noting that Pohlable does not stand charged
27 with conspiring to have lunch. He and his co-defendants are
28 charged with distributing MDMA and conspiring to do so. Such

1 conduct constitutes core commercial activity, and the CSA is a
2 valid exercise of regulatory authority over that activity. See
3 Raich, 545 U.S. at 25-26 ("The CSA is a statute that regulates
4 the production, distribution, and consumption of commodities for
5 which there is an established, and lucrative, interstate market.
6 Prohibiting the intrastate possession or manufacture of an
7 article of commerce is a rational (and commonly utilized) means
8 of regulating commerce in that product.").

9 As Raich held regarding marijuana, Congress had a "rational
10 basis" for finding that purely local "incidents" of interstate
11 traffic in controlled substances (including MDMA), such as the
12 manufacture, possession, and local distribution of such
13 substances, "have a substantial and direct effect upon interstate
14 commerce," even though they "are not an integral part of the
15 interstate or foreign flow" of commerce. See 21 U.S.C. § 801(3).
16 "The illegal . . . manufacture, distribution, possession, and
17 improper use of controlled substances have a substantial and
18 detrimental effect on the health and general welfare of the
19 American people." Id. § 801(2). Controlled substances are
20 commonly transported in interstate commerce immediately before
21 they are manufactured, possessed, or distributed locally, and
22 they are commonly derived from other substances that have been so
23 transported. Id. § 801(3). Local distribution and possession
24 also "contributes to swelling the interstate traffic in such
25 substances." Id. § 801(4). Federal control of such conduct is
26 also necessary because "it is not feasible to distinguish, in
27 terms of controls, between controlled substances that are
28

1 manufactured and distributed interstate and [those] manufactured
2 and distributed intrastate." Id. § 801(5).

3 In light of Congress' express findings that the local
4 possession, manufacture, and distribution of controlled
5 substances have a substantial and direct effect on interstate
6 commerce, the CSA must be upheld as valid exercise of Congress'
7 Commerce Power. Accordingly, Pohlable's commerce clause argument
8 must be rejected.

9 At best, Pohlable's argument reflects little more than a
10 normative policy disagreement with the CSA and its enforcement.
11 Pohlable bemoans the size and regulatory influence of the federal
12 government and its disregard of "rights" established by State
13 constitutions. (Mtn. at 10-11, 16-17.) He also argues that
14 federal drug laws "should not be used to infringe upon our
15 liberties," including the "right to pursue happiness by using
16 [Ecstasy], this harmless plant derivative." (Id. at 10-11.)

17 As Raich indicates, however, these arguments are not
18 properly addressed to the courts, but to the democratically-
19 responsive branches of government. Raich, 545 U.S. at 33
20 (advising proponents of "medical marijuana" to avail themselves
21 of "the democratic process, in which the voices of voters allied
22 with these respondents may one day be heard in the halls of
23 Congress"). Pohlable and other fans of MDMA also may avail
24 themselves of statutory "procedures for the reclassification of
25 Schedule I drugs." Id.; see also 21 U.S.C. § 811(a)(2)
26 (authorizing Attorney General to remove drugs from schedules of
27 controlled substances under certain circumstances).

28

1 **II. THE CSA'S BAN ON THE DISTRIBUTION OF MDMA DOES NOT**
2 **CONSTITUTE AN IMPROPER DELEGATION OF CONGRESSIONAL POWER**

3 Pohlable argues that the CSA is "void" because Congress
4 improperly delegated to the Attorney General and DEA its
5 authority to determine which drugs are illegal. (Mtn. at 9-10,
6 11-12.) He thus argues that the classification of MDMA as a
7 Schedule I controlled substance is an illegal administrative
8 action. (Id.) This argument is not new. The Supreme Court and
9 various lower courts have rejected it.

10 The Constitution provides that "[a]ll legislative Powers
11 herein granted shall be vested in a Congress of the United
12 States." U.S. Const., Art. I, § 1. "From this language, the
13 [Supreme] Court has derived the nondelegation doctrine," which
14 holds that "Congress may not constitutionally delegate its
15 legislative power to another branch of Government." Touby v.
16 United States, 500 U.S. 160, 165 (1991). "The nondelegation
17 doctrine is rooted in the principle of separation of powers that
18 underlies our tripartite system of Government." Id. (quoting
19 Mistretta v. United States, 488 U.S. 361, 371 (1989)).

20 Like most legal doctrines, the "nondelegation doctrine" is
21 subject to various limiting principles. It "does not prevent
22 Congress from seeking assistance, within proper limits, from its
23 coordinate Branches." Touby, 500 U.S. at 165. "Thus, Congress
24 does not violate the Constitution merely because it legislates in
25 broad terms, leaving a certain degree of discretion to executive
26 or judicial actors." Id. "So long as Congress lays down by
27 legislative act an intelligible principle to which the person or
28 body authorized to act is directed to conform, such legislative

1 action is not a forbidden delegation of legislative power." Id.
2 (emphasis added); J.W. Hampton, Jr. & Co. v. United States, 276
3 U.S. 394, 409 (1928).

4 The CSA establishes an "intelligible principle" by which the
5 Attorney General must conform when exercising the statutory
6 authority to schedule controlled substances. The CSA expressly
7 authorizes the Attorney General, by rule, to "add to" the
8 "initial" schedules of controlled substances established by 21
9 U.S.C. § 812(c), or "transfer between such schedules[,] any drug
10 or other substance if he--(A) finds that such drug or substance
11 has a potential for abuse, and (B) makes with respect to such
12 drug or substance the findings prescribed by [21 U.S.C. § 812(b)]
13 for the schedule in which such drug is to be placed." See 21
14 U.S.C. § 811(a). The CSA provides that any such rule by the
15 Attorney General "shall be made on the record after opportunity
16 for a hearing pursuant to the rulemaking procedures prescribed by
17 the [Administrative Procedures Act]. Id. Before commencing any
18 rulemaking procedure, the Attorney General must obtain from the
19 Secretary of Health & Human Services "a scientific and medical
20 evaluation, and his recommendations, as to whether such drug or
21 other substance should be so controlled . . . as a controlled
22 substance." Id. § 811(b).

23 The CSA gives the Attorney General clear guidance as to how
24 the discretion under Section 811(a) must be exercised. The CSA
25 provides that a drug or substance may not be scheduled as a
26 controlled substance "unless the findings required for such
27 schedule are made with respect to such drug or other substance."
28 21 U.S.C. § 812(b). The CSA specifies the following required

1 findings for Schedule I controlled substances: (1) it "has a high
2 potential for abuse"; (2) it "has no currently accepted medical
3 use or treatment in the United States"; and (3) "there is a lack
4 of accepted safety for use of the [substance] under medical
5 supervision." Id. § 812(b)(1). In making these determinations,
6 the Attorney General is further directed to consider 8 specific
7 factors with respect to any drug or substance proposed to be
8 controlled under the CSA. See 21 U.S.C. § 811(c) (listing such
9 factors).

10 The Ninth Circuit has held repeatedly that the CSA's
11 authorization of the Attorney General to "add" to the schedules
12 of controlled substances is not an unconstitutional delegation of
13 Congress' legislative authority to define a crime and specify
14 penalties for a violation thereof. See United States v. Davis,
15 564 F.2d 840, 843-44 (9th Cir. 1977) ("There are sufficient
16 guidelines and standards expressed in the language of 21 U.S.C.
17 § 811 itself (see subsections (b) and (c) of § 811), in addition
18 to the application of the protections of the Administrative
19 Procedure Act."); United States v. Alexander, 673 F.2d 287, 289
20 (9th Cir. 1982) ("This delegation is clearly constitutional";
21 holding that Attorney General's decision to not reclassify
22 cocaine was not "arbitrary or unreasonable").

23 The Ninth Circuit is not alone in this regard. Since 1970,
24 when the CSA was enacted, the other circuit courts have held that
25 the Act's delegation of authority to the Attorney General
26 regarding the "permanent" scheduling of controlled substances is
27 constitutional. See, e.g., United States v. Piaget, 915 F.2d
28 138, 140-41 (5th Cir. 1990) (holding that MDMA was properly

1 scheduled on a "permanent" basis as a Schedule I controlled
2 substance, and rejecting claim that "the delegation by Congress
3 to the Attorney General of the authority to schedule MDMA was
4 unconstitutional");² United States v. Touby, 909 F.2d 759 (3d
5 Cir. 1990) (holding that Attorney General's scheduling of
6 "Euphoria" on a "temporary" basis was not an unconstitutional
7 delegation); United States v. Dunbar, 590 F.2d 1340 (5th Cir.
8 1979) ("While Congress did not designate methaqualone as a
9 schedule II controlled substance, it could constitutionally
10 delegate power to the Executive to do so."); United States v.
11 Barron, 594 F.2d 1345 (10th Cir. 1979); United States v. Gordon,
12 580 F.2d 827 (5th Cir. 1978); United States v. Roy, 574 F.2d 386
13 (7th Cir. 1978); United States v. Pastor, 557 F.2d 930 (2d Cir.
14 1977).

15 Likewise, the Supreme Court has held that the 1984
16 amendments to the CSA, which authorize the Attorney General to
17 schedule controlled substances on a "temporary basis" pursuant to
18 expedited proceedings, "did not unconstitutionally delegate
19 legislative power to the Attorney General." Touby, 500 U.S. at
20 163-69. Touby also rejected the same argument made by Pohlable
21 here (Mtn. at 11), namely, that the CSA's delegation of
22 scheduling authority to the Attorney General involves heightened
23 separation-of-powers concerns because the Attorney General and
24 DEA are not only authorized to schedule controlled substances but
25

26 ² Consistent with Piaget, the Eleventh Circuit held in
27 United States v. Carlson, 87 F.3d 440, 444-45 (11th Cir. 1996),
28 that the DEA validly scheduled MDMA on a permanent basis as a
Schedule I controlled substance.

1 to prosecute those who manufacture, possess, and distribute
2 substances scheduled by the Attorney General. Id. at 165-66,
3 167-68 ("We conclude that [21 U.S.C. § 811(h)] passes muster even
4 if greater congressional specificity is required in the criminal
5 context.").

6 Accordingly, Pohlable's motion must be denied to the extent
7 it relies on a separation of powers argument.

8 **III. THE CSA'S PROHIBITION ON THE POSSESSION AND DISTRIBUTION OF**
9 **MDMA IS NOT UNCONSTITUTIONALLY VAGUE**

10 Pohlable argues that his Sixth Amendment right "to be
11 informed of the nature and cause of the accusation" has been
12 violated. (Mtn. at 10.) The gist of his argument, however, is
13 directed toward the alleged ambiguity of the statutes that he is
14 charged with having violated, not any ambiguity in the
15 indictment. (Id.) Pohlable argues, for example, that 21 U.S.C.
16 § 841 does not even "mention" MDMA or Ecstasy. (Id.) He also
17 asks, "What is a controlled substance?," and he expresses
18 exasperation about trying to find the law that makes his alleged
19 conduct illegal.

20 As framed, Pohlable's reliance on the Sixth Amendment is
21 misplaced. The argument really amounts to a Fifth Amendment due
22 process challenge based on Pohlable's belief that the CSA itself
23 is vague, and we will address the argument as such. The argument
24 lacks merit in any event.

25 **A. Vagueness Doctrine**

26 "It is a basic principle of due process that an enactment is
27 void for vagueness if its prohibitions are not clearly defined."
28 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). "Vague

1 laws that do not infringe upon First Amendment rights have two
2 principle evils: (1) they do not give a 'person of ordinary
3 intelligence a reasonable opportunity to know what is prohibited,
4 so that he may act accordingly'; and (2) they encourage arbitrary
5 and discriminatory enforcement by not providing explicit
6 standards for policemen, judges, and juries." United States v.
7 Kim, 449 F.3d 933, 941-42 (9th Cir. 2006) (quoting Grayned, 408
8 U.S. at 108-09).

9 "The void-for-vagueness doctrine requires that a penal
10 statute define the criminal offense with sufficient definiteness
11 that ordinary people can understand what conduct is prohibited
12 and in a manner that does not encourage arbitrary and
13 discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352,
14 357 (1983). "Thus, if a statute is not sufficiently clear to
15 provide guidance to citizens concerning how they can avoid
16 violating it and to provide authorities with principles governing
17 enforcement, a defendant cannot be punished for violating that
18 statute." Kim, 449 F.3d at 942; United States v. National Dairy
19 Products Corp., 372 U.S. 29, 32-33 (1963) ("Void for vagueness
20 simply means that criminal responsibility should not attach where
21 one could not reasonably understand that his contemplated conduct
22 is proscribed.").

23 **B. Section 841(a)(1) Is Not Unconstitutionally Vague**

24 "The resolution of this void-for-vagueness challenge turns
25 on whether the language of [§ 841(a)(1)] put [defendant] on
26 notice that his conduct was criminal." United States v. Purdy,
27 264 F.3d 809, 811 (9th Cir. 2001). As is relevant here, Section
28 841(a) provides that it is "unlawful for any person knowingly and

1 intentionally" --(1) "distribute . . . or possess with intent to
2 . . . distribute . . . a controlled substance." See 21 U.S.C.
3 § 841(a)(1).

4 Since 1972, the Ninth Circuit has held that Section
5 841(a)(1)'s prohibitions are not unconstitutionally vague. See
6 United States v. Rodriguez-Camacho, 468 F.2d 1220, 1221 (9th Cir.
7 1972) ("We conclude that § 841(a)(1) and the corresponding
8 definitions create a 'sufficiently definite warning' that
9 possession with intent to deliver or transfer a controlled
10 substance, either interstate or intrastate, constitutes a federal
11 offense, and therefore is not unconstitutionally vague."); United
12 States v. Davis, 36 F.3d 1424, 1433-34 (9th Cir. 1994) (holding
13 that Section 841(a)(1) was not vague as applied to defendant
14 charged with possession of "cocaine base," even though the
15 statute did not define that term); United States v. Rosenberg,
16 515 F.2d 190, 192-93 (9th Cir. 1975) (holding that § 841(a)(1)
17 was not vague as applied to a doctor charged with unlawful
18 distribution of certain prescription drugs); see also Kim, 449
19 F.3d at 941-43 (holding that another subsection that uses similar
20 terminology, 21 U.S.C. § 841(c)(2), was not unconstitutionally
21 vague).

22 For Pohlable's edification, we provide the following review
23 of the relevant statutory definitions. "The term 'controlled
24 substance' means a drug or other substance, or immediate
25 precursor, included in schedule I, II, III, IV, or V of part B of
26 this subchapter" (that is, in Section 812 of Title 21). See 21
27 U.S.C. § 802(6). Section 812 makes clear that the list of
28 scheduled controlled substances is subject to modification, in

1 accordance with the provisions of 21 U.S.C. § 811. See 21 U.S.C.
2 §§ 812(a),(b), and (c). Section 812(a) provides that the updated
3 schedules must be published on an annual basis. Id.

4 So, where may defendant find a list of Schedule I controlled
5 substances that specifically lists 3,4-methylenedioxymetham-
6 phetamine ("MDMA")? He can find it in the Code of Federal
7 Regulations, at 21 C.F.R. § 1308.11(a),(d)(10), which read, in
8 relevant part, as follows:

9 (a) "Schedule I shall consist of the drugs
10 and other substances, by whatever official
11 name, common or usual name, chemical name, or
12 brand name designated, listed in this
section. Each drug or substance has been
assigned the DEA Controlled Substances Code
Number set forth opposite it."

13 (d) "Unless specifically excepted or
14 unless listed in another schedule, any
15 material, compound, mixture, or preparation,
16 which contains any quantity of the following
17 hallucinogenic substances, or which contains
18 any of its salts, isomers, and salts of
19 isomers whenever the existence of such salts,
isomers, and salts of isomers is possible
within the specific chemical designation (for
purposes of this paragraph only, the term
"isomer" includes the optical, position and
geometric isomers):

20 (11) 3,4-methylenedioxymethamphetamine
(MDMA).

21 See 21 C.F.R. §§ 1308.11(a), (d)(10).

22 What does "distribute" mean? Section 802 of Title 21
23 provides that "[t]he term 'distribute' means to deliver (other
24 than by administering or dispensing [by a registered
25 practitioner]) a controlled substances or a listed chemical."

26 See 21 U.S.C. § 802(11). The term "deliver" means "the actual,
27 constructive, or attempted transfer of a controlled substance."

28 Id. § 802(8).

1 In summary, Pohlable's motion to dismiss must be denied to
2 the extent it is based on a void-for-vagueness challenge.³

3 **IV. THE CSA DOES NOT VIOLATE DEFENDANT'S FIFTH AMENDMENT RIGHTS**
4 **TO DUE PROCESS AND EQUAL PROTECTION**

5 Pohlable argues that "Congress made an end run around the
6 Fourth Amendment by criminalizing malum prohibitum⁴ acts such as
7 mere possession of non-stolen property, which, according to
8 Pohlable, "is unconstitutional." (Mtn. at 12.) This argument is
9 inscrutable. We do not know what Pohlable means, though we are
10 confident his point has nothing to do with the Fourth Amendment.

11 Interpreted generously, though, Pohlable's motion appears to
12 be arguing that Section 841(a)(1) deprives him of a "fundamental
13 right" to "mere possession" and use of MDMA, which, in Pohlable's
14 view, is just another type of "property" that he should be able
15

16 ³ If Pohlable actually meant to challenge the sufficiency of
17 the indictment on Sixth Amendment "notice" grounds, that argument
18 would also lack merit. "To be sufficient, an indictment must
19 state the elements of the offense charged with sufficient clarity
20 to apprise a defendant of the charge against him, primarily so
21 that he can defend himself against the charge and plead double
22 jeopardy in appropriate cases." Echevarria-Olarte v. Reno, 35
23 F.3d 395, 397 (9th Cir. 2004). "The indictment must be read as a
24 whole and construed according to common sense." Id. As to each
25 count in which Pohlable is named as a defendant, the indictment
26 specifies the statute that he is accused of violating, it recites
27 the elements of the offense by tracking the language of the
28 statute, and it states the approximate date of the offense. The
indictment also identifies the specific controlled substance he
and his co-defendants are accused of distributing: namely, MDMA.
Nothing more is required.

25 ⁴ "Traditionally, the criminal law distinguishes between
26 malum in se, conduct wrong upon principles of natural moral law,
27 and malum prohibitum, conduct not inherently immoral but wrong
28 because prohibited by law." United States v. Weitzenhoff, 35
F.3d 1275, 1296 (9th Cir. 1993) (Kleinfeld, J., dissenting as to
denial of en banc review) (citing BLACK'S LAW DICTIONARY 1112 (4th
ed. 1951)). These concepts have no relevance here.

1 to possess so long as he did not steal it from others. (Mtn. at
2 10, 12.) Elsewhere, Pohlable expresses consternation over the
3 differential treatment of "controlled substances" (like
4 MDMA/Ecstasy) and other plants and substances (e.g., beer,
5 perfumes, isosafrole, dill, vanilla, licorice, and other
6 "pleasure giving plants"). We interpret these arguments as due
7 process and equal protection claims made pursuant to the Fifth
8 Amendment. These arguments must be rejected on several grounds.

9 First, the due process and equal protection claims are
10 irrelevant to the pending case. As framed by Pohlable, the
11 asserted "fundamental right" to "mere possession" and "use" of
12 MDMA (whether or not it has been stolen from others) is not
13 implicated by the pending indictment. The indictment does not
14 charge Pohlable with "mere possession" or "use" of MDMA. Counts
15 two through six of the indictment charge Pohlable with
16 "distribut[ing]" MDMA. Count one charges him with conspiring
17 with others to "distribute" and "possess with intent to
18 distribute" MDMA.

19 Second, as a matter of law, Pohlable has no "fundamental
20 right" under the Fifth Amendment to distribute (or even merely
21 possess) MDMA. The appellate courts have held that "there is no
22 fundamental constitutional right to import, sell, or possess
23 marijuana." See United States v. Fogarty, 692 F.2d 542, 547 (8th
24 Cir. 1982) (rejecting due process claim of defendant charged with
25 importation and possession with intent to distribute); United
26 States v. Horsley, 519 F.2d 1264, 1265 (5th Cir. 1975) (same as
27 to defendant charged with possession with intent to distribute
28 marijuana); and United States v. Kiffer, 477 F.2d 349, 352 (2d

1 Cir. 1973) (same). “[C]rimes of possession with intent to
2 distribute and actual sale” involve an “element of
3 commercialization” which make them different from acts of mere
4 possession. Horsley, 519 F.2d at 1265.

5 The Ninth Circuit recently reached the same result, though
6 it did so only after being reversed by the Supreme Court and even
7 then with a great deal of hand-wringing. See Raich v. Gonzalez,
8 500 F.3d 850, 866 (9th Cir. 2007):

9 “For now, federal law is blind to the wisdom
10 of a future day when the right to use medical
11 marijuana to alleviate excruciating pain may
12 be deemed fundamental. Although that day has
13 not yet dawned, considering that during the
14 last ten years eleven states have legalized
15 the use of medical marijuana, that day may be
upon sooner than expected. Until that day
arrives, federal law does not recognize a
fundamental right to use medical marijuana
prescribed by a licensed physician to
alleviate excruciating pain and human
suffering.”

16 See also United States v. Baker, 197 F.3d 211, 216 (9th Cir.
17 1999) (holding that defendant had “no fundamental right to
18 possess an assault rifle”).

19 The rights to distribute MDMA, or to possess it with the
20 intent to distribute, are no more fundamental than the right to
21 possess and use “medical marijuana.” The right is not
22 “fundamental” because (1) it is not “deeply rooted in this
23 Nation’s history and tradition,” and (2) it is not so “implicit
24 in the concept of ordered liberty” that “neither liberty nor
25 justice would exist if they were sacrificed.” Raich II, 500 F.3d
26 at 864.

27 Finally, Pohlable’s equal protection claim fares no better
28 than his due process claim. Because Section 841(a)(1) does not

1 impinge upon a fundamental constitutional right, and does not
2 rely upon any suspect classification, the statute does not deny
3 equal protection of the laws so long as its provisions are
4 "rationally related to a legitimate governmental interest." See
5 Baker, 197 F.3d at 216; Doe v. United States, 419 F.3d 1058, 1063
6 (9th Cir. 2005).

7 Congress has a legitimate interest in protecting the
8 American people from the societal woes that would flow from
9 unfettered distribution of MDMA. MDMA is a powerful psychoactive
10 drug with both stimulant (amphetamine-like) and hallucinogenic
11 (LSD-like) properties. See 51 Fed. Reg. 36552-01 (1986); 53 Fed.
12 Reg. 5156-01 (1988) (incorporating earlier findings). "MDMA has
13 no currently acceptable medical use." See id.; 53 Fed. Reg.
14 5156-01; Piaget, 915 F.2d at 142. "Acute lethal doses of MDMA
15 and MDA are similar." See 53 Fed. Reg. 5156-01. MDMA has a
16 "high potential for abuse," it is highly toxic, and has been
17 found responsible for overdose deaths. See 51 Fed. Reg. 36552-01
18 (1986). Section 841(a)(1)'s prohibition on the distribution, and
19 possession with intent to distribute, MDMA is rationally related
20 to the interest in minimizing the use of MDMA.

21 That Congress has not abolished possession of other
22 substances (e.g., beer, licorice, etc.) is of no moment. "If
23 Congress decides to regulate or prohibit some harmful substances,
24 it is not thereby constitutionally compelled to regulate or
25 prohibit all. It may conclude that half a loaf is better than
26 none." Kiffer, 477 F.2d at 355 (citing McDonald v. Board of
27 Election Commissioners, 394 U.S. 802, 809-811 (1969) (rejecting
28 equal protection challenge to statute on similar grounds)).

1 **CONCLUSION**

2 For the foregoing reasons, the Court should deny defendant's
3 motion in its entirety.

4 This brief could have been short and largely dismissive of
5 Pohlable's arguments. We opted to present a more fulsome
6 response so that Pohlable would have a clear understanding of why
7 the charges are legally valid. We are also mindful of the fact
8 that Pohlable is not an attorney. Moreover, we are concerned
9 that he may be getting bad advice from the "expert attorney"
10 named in his moving papers. (Mtn. at 4-5.)

11
12 Date: March 10, 2008.

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13
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15
16 /s/ R.J.K.
17 ROBERT J. KEENAN
Attorneys for Plaintiff
18 UNITED STATES OF AMERICA
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1 CERTIFICATE OF SERVICE

2 I am a citizen of the United States and a resident of Orange
3 County, California. I am over 18 years of age, and I am not a
4 party to the above-entitled action. My business address is the
5 United States Attorney's Office, Ronald Reagan Federal Building
6 and United States Courthouse, 411 West Fourth Street, Suite 8000,
7 Santa Ana, California 92701.

8 On this date, March 10, 2008, I served a copy of the above
9 entitled document, **GOVERNMENT'S OPPOSITION TO DEFENDANT
10 POHLABLE'S MOTION TO DISMISS COUNTS ONE THROUGH SIX OF THE
11 INDICTMENT**, on the following person(s) as follows:

- 12 ■ by e-mail to defendant and his standby counsel at the
13 following e-mail address:

14 **earlylaw@cox.net**
15 **mike@pohlable.com**

16 I declare under penalty of perjury that the foregoing is
17 true and correct. Executed on March 10, 2008, at Santa Ana,
18 California.

19 _____
20 /s/ R.J.K.
21 Robert J. Keenan
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