

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)	
Plaintiff)	
)	Criminal No. SAG-19-CR-0500
V.)	
)	
JONATHAN WILLIAM WALL,)	
Defendant)	

BRIEF IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS INDICTMENT ON
EQUAL PROTECTION GROUNDS

NOW COMES the Defendant, Jonathan William Wall, by counsel, and states as follows:

RELEVANT FACTS

The undersigned attorney lives in Denver and occasionally accepts clients seeking counsel for investment in start-up funding. Clients include surgeons, professional athletes, attorneys, real estate developers, orthodontists, former law enforcement, and private equity. Clients are from California, New Mexico, Colorado, Florida, Texas, New York, and Washington D.C. Most common field of consultation is how to best structure the Series A round, which requires a valuation, so that market specialists are hired to determine the entity’s current and projected worth. These markets specialists hold advanced degrees in economics and are from institutions in Washington, Massachusetts, Florida, Illinois, Arizona, and Nevada. There are invariably tax issues—like with all major industries—so that we refer our clients to tax lawyers to develop and implement the best strategies and practices for structuring pre and post money equity and debt. Recently, the question arose as to whether a hedge fund could be utilized to raise capital so that we sought guidance from a securities attorney who had worked at the SEC.

The answer was not only a quick yes, but that bonds were the preferred instrument for multinational corporate investment in this multi-billion dollar market.

The start ups we are referring to here are not software, but cannabis companies in an industry projected to have a global value of \$73.6 billion by 2027 with an 84 percent market share in the United States.¹ Yet, a citizen's ability to engage in this American market depends neither on talent nor work ethic, but on the preferences of the local prosecutor. If you're in LA and own several dispensaries, then you are a successful businessperson. If you're in Maryland, then you are evidently a criminal.

Assume, respectfully, widgets. Citizen X is permitted to manufacture, sell, and distribute widgets in Nevada. Citizen Y engages in the same activity and is prosecuted for violation of law. The law is same in both places, the only thing that's changed is the will of the prosecutor.

This is constitutionally intolerable and the chief evil that the 14th Amendment Equal Protection Clause safeguards against, i.e. an irregular definition of citizenship that becomes more expansive as it flows toward money and resources. Economists, financiers, venture capitalists, attorneys, former jurists and law enforcement are, at this very moment, participating around the country in conspiracies to grow, sell, and distribute marijuana.

Yet, as they check on the status of their hedge funds, Jonathan Wall remains in jail.

THE INDICTMENT SHOULD BE DISMISSED ON EQUAL PROTECTION GROUNDS DUE TO DISPARATE AND ARBITRARY ENFORCEMENT OF THE FEDERAL DRUG LAWS

Four years ago, the venerable Judge Doumar in the Eastern District of Virginia expressed his serious concerns with federal drug law enforcement given the changes in public policy, as expressed by the changing nature of state law: "What troubled the Court at the hearing, however,

¹ <https://www.grandviewresearch.com/press-release/global-legal-marijuana-market>

was not the classification of possession of marijuana as a Grade B or a Grade C violation, but whether—given the evolving state of the laws criminalizing possession of marijuana—the Court could punish Defendant for possession of marijuana.” *United States v. Guess*, 216 F.Supp.3d 689, 691 (E.D. Va. 2016). The Court continued:

Nonetheless, this interaction between state law and federal policy creates three related issues that collectively trouble this Court: (1) it is apparent that AUSAs in states in which possession of marijuana has been legalized or decriminalized will refrain from prosecuting possession, cultivation, and distribution cases, so long as potential defendants are (a) in compliance with state law and regulations and (b) do not run afoul of the eight federal enforcement priorities; (2) this, in turn, creates uncertainty as to the CSA’s application and the federal prosecution of marijuana offenses; and (3) consequently, such uncertainty impacts district courts’ consideration of the 18 U.S.C. § 3553(a) factors when sentencing defendants for marijuana possession, cultivation, or distribution.

Id. at 694, citing *United State v. Dayi*, 980 F.Supp.2d 682, 688 (D. Md. 2013) (“The seriousness of violations of federal marijuana laws has been undercut by (1) recent state enactments decriminalizing, legalizing, and regulating not only the possession of marijuana but also its cultivation, distribution, and sale, and (2) the federal government’s expanding policy of non-enforcement.”) (granting a two-level downward variance to each defendant’s sentence based on the recent shift in the legal landscape governing marijuana possession, in combination with the accompanying federal policy of non-enforcement).

The *Guess* Court continued: “[T]he current state of the law—in which state law either legalizes or criminalizes marijuana; federal law criminalizes marijuana; and federal policy does not enforce the federal criminalization of marijuana depending on a defendant’s geographic location—creates an untenable grey area in which such certainty and notice have effectively, if not formally, been eradicated.” *Guess, supra* at 695. The *Guess* Court concluded, relevant to this case, that this situation “results in two legal problems with respect to either prosecuting an individual or revoking supervised release based on simple possession: (1) unequal prosecution,

and (2) unwarranted sentencing disparities.” *Id.* The Court then flatly held that prosecution for marijuana use “creates a problem of unequal prosecution of the law analogous to selective prosecution.” *Id.* The Court based its holding on the following analysis and logic:

But the executive branch has decided to enforce its laws against some individuals and not against others—the essence of selective prosecution— depending on where one resides. For example, the federal government will prosecute an individual in Virginia for the same crime that would not be prosecuted in Washington or Colorado. Thus, the federal prosecutorial policy with respect to marijuana possession produces an effect that is, at least to a degree, undoubtedly and strikingly similar to the effect of selective prosecution: it results in the prosecution of certain individuals (marijuana possessors not in contravention of DOJ’s enforcement priorities) for a crime that other, similarly-situated individuals (fellow marijuana possessors also not in contravention of DOJ’s enforcement priorities) are not prosecuted for. This difference is based on what is arguably a relatively arbitrary classification: which state one resides in.

Id. at 696.

The concerns articulated in *Guess* and *Dayi* regarding disparate and selective enforcement are now squarely before the Fourth Circuit: “[S]ome of our district courts have noted disparities in both prosecution and sentencing for marijuana offenses, arising in part from a patchwork of state laws and an overlay of federal criminalization.” *United States v. Coston*, 964 F.3d 289, 297 (4th Cir. 2020) (citing *Guess* and *Dayi*).

Denial of Equal Protection: Access to Market

We acknowledge that the manufacture, distribution, and possession of cannabis is illegal on the federal level, so that no matter where a citizen is in the United States, if he or she is engaged in this activity, then they are in violation of the law and subject to prosecution. Yet, there are millions of people right now in this country who are engaged in the manufacture, distribution, and/or possession of cannabis, who are not, in fact, being prosecuted. Based on geography, some citizens enjoying economic liberties that other citizens are being denied, which

violates bedrock equal protection law such as the right to work where one will, pursue a livelihood, and liberty of contract:

“The liberty mentioned in that [Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.” *Allgeyer v. Louisiana*, 165 U.S. 578, 589, (1897). *See also*, Art. 10, Clause 1 of the U.S. Const., i.e. “Contracts Clause.”

The issue here is not whether marijuana should be legal, but whether a market being open to some Americans and not to others comports with Equal Protection and Due Process. Outside of the Reconstruction era that gave rise to the 14th Amendment, there has never been this kind of disparity in our history. One group of citizens owning hedge funds, securitizing their investments, paying taxes to the Internal Revenue Service, while another group of citizens is prosecuted and incarcerated for the same activity.

The federal government cannot enable a multi-billion dollar market to operate in States A, B, C, D, E, then prohibit citizens of State F from participating in it without a constitutional rationale. Not as to whatever the market produces, but as to why some citizens are not allowed to engage in it. Having no real reason for this disparate denial of access, the government runs afoul of the Constitution in its prosecution of Mr. Wall.

WHEREFORE, the Defendant respectfully requests that the Indictment be dismissed on grounds that it violates the Equal Protection Guarantees of the 14th Amendment.

Respectfully submitted this 1st day of November 1, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2020, I electronically filed the within document with the Clerk of the Court using the CM/ECF system which will send notification of such filing(s) to all counsel of record.

/s/ Jason Flores-Williams
Jason Flores-Williams