NO._____

IN THE SUPREME COURT OF THE UNITED STATES

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RAYMOND GENTILE,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Johanna S. Schiavoni, Esq.
LAW OFFICE OF JOHANNA S. SCHIAVONI
3170 Fourth Avenue, Suite 250
San Diego, California 92103
Telephone: (619) 269-4046
Email: johanna@schiavoni-law.com

Counsel for Petitioner

## QUESTIONS PRESENTED

Is geographic location an arbitrary classification in the application of prosecutorial decisions for marijuana-related offenses under 21 U.S.C §§ 841 and 846?

What evidence is sufficient to establish a prima facie showing that geographic location, rather than other factors, was the reason for the prosecution of petitioner sufficient to entitle petitioner to additional discovery on his selective prosecution claim?

## PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the title page.

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Petitioner Raymond Gentile respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Ninth Circuit's July 23, 2019 decision is unpublished and reproduced in the appendix to this petition at A1-A7. The judgment and sentence of the United States District Court for the Eastern District of California (Drozd, D.) is not reported. It is reproduced in the appendix at B1-B7. The amended judgment and sentence also is not reported, and is reproduced in the appendix at C1-C8.

## BASIS FOR THIS COURT'S JURISDICTION

Petitioner Raymond Gentile seeks review of the July 23, 2019 decision of the Ninth Circuit affirming his convictions on three marijuana-related drug offenses, namely, conspiracy to manufacture, distribute and/or possess with the intent to distribute 100 or more marijuana plants in violation of 21 U.S.C. §§ 841 and 846, manufacture of 100 or more marijuana plants in violation of 21 U.S.C. § 841, and possession with intent to distribute 100 or more marijuana plants in violation of 21 U.S.C. § 841. *See* Appendix A1-A7, B1, C1.

This petition is timely filed, as it is being filed within 90 days after the Ninth Circuit's decision. Sup. Ct. Rule 13(3). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution guarantees that "due process of law" must be part of any proceeding before a person can be denied "life, liberty, or property." U.S. Const., Amend 5. The federal due process clause also contains an equal protection component. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

21 U.S.C. § 841 makes it unlawful for any person "knowingly or intentionally--(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." *Id.*

21 U.S.C. § 846 provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *Id.*

## STATEMENT OF THE CASE

Gentile was convicted by a jury of conspiracy to manufacture, distribute and/or possess with the intent to distribute 100 or more marijuana plants in violation of 21 U.S.C. §§ 841 and 846, manufacture of 100 or more marijuana plants in violation of 21 U.S.C. § 841, and possession with intent to distribute 100 or more marijuana plants in violation of 21 U.S.C. § 841. Appendix E1-E10. He also was convicted of two counts of making false claims in connection with the purchase or attempted purchase of guns in violation of 18 U.S.C. § 1001, which counts are not at issue here.

In challenging his three drug-related convictions, Gentile contends that selective prosecution based on geographical disparity violated his federal due process and equal protection rights. Appendix F9. Seeking to preserve and litigate that selective prosecution claim in the district court prior to trial, Gentile filed motions: (1) for discovery; and (2) to dismiss counts 1 through 3 of the indictment. Appendix F1-F4, F5-F21.

Gentile has been prosecuted by the office of the U.S. Attorney for the Eastern District of California. Appendix E1-E10. He contends that he would not have been prosecuted if he lived in, for example, Colorado, whose U.S. Attorney has taken a

hands-off approach to federal prosecution of marijuana-related offenses. Appendix F6-F7, F11-F18, G13-G18 (Opening Statement of John F. Walsh, U.S. Attorney, District of Colorado, U.S. DOJ, Before the Committee on Oversight & Government Reform Subcommittee on Government Operations, May 4, 2014). As outlined in U.S. Attorney Walsh's testimony to Congress, Colorado's federal law enforcement has focused on "federal enforcement priorities," including targeted enforcement of activities near schools, international smuggling, interstate shipment, grows "where firearms and violence are involved," grows on public lands, and organized crime. Appendix G16-G17. Gentile maintained throughout the litigation that none of those enforcement priorities apply in his case. Appendix H2-H5.

Gentile contends that the hands-off approach employed in Colorado aligns with policies articulated by Attorneys General under the Obama Administration, outlined in the October 19, 2009 "Ogden memo," G8-G10,[1] and June 29, 2011 "Cole memo," Appendix G11-G12, [2] which provided guidance at the time Gentile was tried and convicted. This guidance de-emphasized prosecution of marijuana-based crimes. Appendix G8-G12. Gentile's position is that the U.S. Attorney for the Eastern District of California has taken a different approach than recommended. Appendix F2-F9.

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1 https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf

2 https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf

In his motion seeking discovery pursuant to Federal Rule of Criminal Procedure 16(c), Gentile sought "all information . . . which sets forth the policy . . . as to whether residents of the State of California and Colorado who have engaged in conduct in violation of the statutes alleged in Counts one, two, and three of the Indictment, are to be prosecuted equally or differently." Appendix F2. He sought discovery to support his geography-based selective prosecution claim by showing that disparate policies in Colorado and California resulted in different treatment of similarly situated residents. Appendix F2-F4, F5-F9.

In discovery, Gentile received the memoranda issued by the U.S. Attorney General and information about prosecutorial policies of the U.S. Attorney for the District of Colorado. Appendix D2, D4-D6. But, the government *refused* to produce any discovery relating to policies of the U.S. Attorney for the Eastern District of California. Appendix D2.

The government filed no written opposition to Gentile's discovery motion. It merely argued at the motion hearing that Gentile had not set forth a prima facie case of discriminatory effect and thus it need not provide further discovery. Appendix D3-D4. Notably, the government did not deny the existence of such a policy or memoranda. *See generally id.*

The district court denied Gentile's motion for discovery relating to Eastern District of California policies in an oral order. Appendix D10-D11. The district court stated it had not "been provided information that would lead [the court] to at least indicate that the United States Attorney, the Attorney General, has issued

any memoranda that might cause there to be discriminatory enforcement of the marijuana, prosecution on marijuana cases based on geographic location." Appendix D11. Based on that ruling, the district court denied Gentile's related motion to dismiss. Appendix D12.

Gentile timely appealed his convictions on several grounds, including his selective prosecution/denial of discovery claim. In an unpublished decision dated July 23, 2019, a panel of the Ninth Circuit affirmed. *See* Appendix A1-A6.

As to Gentile's claims of error based on the denial of his motion for discovery regarding his selective prosecution claim, the Ninth Circuit's complete analysis was as follows:

> The district court did not err in denying Gentile's motions for discovery and to dismiss for selective prosecution, in which Gentile asserted a theory of "geographic disparity." "To establish a claim of selective prosecution, a defendant must show both discriminatory effect and discriminatory purpose." *United States v. Sellers*, 906 F.3d 848, 852 (9th Cir. 2018). To warrant discovery for such a claim, a defendant must present at least "some evidence" that constitutes a "credible showing of different treatment of similarly situated persons." *United States v. Armstrong*, 517 U.S. 456, 470 (1996).
>
> Even if we assume that selective prosecution based on "geographic disparity" could trigger constitutional concerns, Gentile has not produced sufficient evidence in support of a cogent disparity theory to meet a discovery standard that is "nearly as rigorous as that for proving the [selective prosecution] claim itself." *Sellers*, 906 F.3d at 852. Gentile has not provided any statistics showing that similarly situated defendants are prosecuted in California but not Colorado, let alone evidence that any differential treatment is explained by bias or some other impermissible purpose, so he was not entitled to discovery, or relief, for a selective prosecution claim.

Appendix A2.

As is discussed in more detail below, Gentile seeks review by this Court because the Ninth Circuit's decision implicates an important question of federal law of nationwide importance, which issue has not yet been settled by this Court. Supreme Court Rule 10(c). Additionally, because that issue had not yet been settled, the Ninth Circuit applied selective prosecution standards on a discovery motion in a manner that conflicts with the relevant decisions of this Court. *Id.*

## SUMMARY OF ARGUMENT

Certiorari is warranted in this case so this Court can resolve an important but unsettled question of federal law relating to selective prosecution by geography of marijuana-related drug offenses under 21 U.S.C. §§ 841 and 846, and to expound upon the proper standards for obtaining discovery on a claim for selective prosecution based on geographic disparity. Supreme Court Rule 10(c).

## REASONS FOR GRANTING THE WRIT

### I. Geographic Location Is an Arbitrary Classification in the Application of Prosecutorial Decisions Relating to Marijuana-Related Offenses Under 21 U.S.C §§ 841 and 846, Giving Rise to a Potentially Cognizable Selective Prosecution Claim

While prosecutorial discretion is broad, the government must stay within the bounds of due process and equal protection guaranteed by the Constitution. U.S. Const., Amend V; *United States v. Batchelder*, 442 U.S. 114, 125 (1979); *Bolling*, 347 U.S. at 500. Accordingly, the decision to prosecute may not be based on "an

unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Yick Wo v. Hopkins,* 118 U.S. 356, 374 (1886) (vacating convictions of Chinese laundry operators, where facially neutral law had been discriminatorily applied). An arbitrary classification in application of prosecutorial decisions gives rise to a potentially cognizable claim for selective prosecution. *Oyler*, 368 U.S. at 456.

To present a prima facie showing of selective prosecution, a defendant must show prosecution had a "discriminatory effect" and was motivated by a "discriminatory purpose." *United States v. Armstrong,* 517 U.S. 456, 465 (1996). Discriminatory effect can be shown where similarly situated persons were not prosecuted. *Id.*

As to discriminatory purpose, in *Wayte v. United States*, 470 U.S. 598 (1985), this Court explained that the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights." *Id.* at 608 (citations and internal quotations omitted). This explanation illustrates the broad rule underlying the issue: these "unjustifiable standard[s]" or "arbitrary classification[s]" would undoubtedly include protected classes or classifications based on constitutional rights, but is not limited to *only* those classifications. *Id.*

In *State v. Kramer*, the Wisconsin Supreme Court recognized "geographic location" as an "arbitrary classification" that could give rise to a discriminatory

purpose behind selective criminal prosecutions. *State v. Kramer*, 248 Wis.2d 1009, 1024 (2001) (citing *United States v. Kerley*, 787 F.2d 1147, 1148 (7th Cir. 1986)). In *Kramer*, a defendant tavern owner succeeded in meeting his burden to present a prima facie case of discriminatory *purpose* based on evidence that only taverns within one geographical area were sent letters notifying them of potential prosecutions under Wisconsin's newly-changed law regarding video poker machines. *Id.* at 1024. The Wisconsin Supreme Court concluded that because only businesses within one geographical area received letters indicated an underlying "arbitrary classification: geographic location." *Id.* at 1025. The Court also concluded the defendant made a prima facie showing of discriminatory *effect* because similarly-situated tavern owners were not threatened with prosecution for the same conduct. *Id.* at 1026-27.

At least one federal district court similarly has recognized that geographic location may serve as the basis for a selective prosecution claim. *See Ingram v. United States*, 296 F.Supp.3d 1076, 1083 (N.D. Iowa 2017). In *Ingram,* the district court considered a defendant's claim that the application of a sentencing enhancement for prior felony convictions violated his Fifth Amendment rights to due process and equal protection based on the disparity between geographic districts in whether and how sentencing enhancements were applied. *Id.* at 1080, 1083. The district court concluded that "geographic location" can be "an 'unjustifiable standard' or an 'impermissible motive,' because, for example, it is an 'arbitrary classification.'" *Id.* at 1083 (quoting *Wayte,* 470 U.S. at 608).

Although this Court has not yet articulated the same protection against an "arbitrary classification" (*Oyler,* 368 U.S. at 456; *Wayte,* 470 U.S. at 608) based on geographic location, such a rule is well-rooted of due process and equal protection. U.S. Const., Amend. V. For example, in dissenting from the denial of certiorari, Justices Breyer and Ginsburg recognized that the petitioner "may well have received the death penalty not because of the comparative egregiousness of his crime, but because of an arbitrary feature of his case, namely, geography. . . . One could reasonably believe that if [the petitioner] had committed the same crime but been tried and sentenced just across the Red River in, say, Bossier Parish, he would not now be on death row." *Tucker v. Louisiana*, 136 S.Ct.1801, 1801-02 (2016) (Breyer, J. & Ginsburg, J., dissenting from denial of certiorari); *accord Glossip v. Gross*, 135 S. Ct. 2726, 2761-2763 (2015) (Breyer, J., dissenting).

Geography is an arbitrary basis for different treatment of similarly situated persons. This Court should grant certiorari in this case to consider this unsettled issue of federal law, which has implications for prosecutions nationwide.

## II. In Failing to Recognize the Scope of Petitioner's Selective Prosecution Claim Based on Geographic Disparity, the Ninth Circuit's Analysis of Whether Petitioner Articulated a Prima Facie Case Sufficient to Warrant Discovery Was Contrary to This Court's Authorities

While selective prosecution claims are evaluated "according to ordinary equal protection standards," *Wayte*, 470 U.S. at 608-09, the bar for obtaining *discovery* to support a claim for selective prosecution is lower than a claim on the merits. *Armstrong,* 517 U.S. at 469. Namely, to obtain discovery, a defendant need only

present "some evidence tending to show the existence of the essential elements" of a selective prosecution claim. *Id.*

As Gentile argued below, because he was denied critical discovery about prosecutorial policies of the Eastern District of California, he was not able to fully pursue his selective prosecution claim on the merits. *See* Appendix D2, D5-D6, F1-F4. Nevertheless, he presented "some evidence" of discriminatory effect and purpose, *Armstrong,* 517 U.S. at 469, based on geographic disparity in prosecutorial policy for marijuana offenses. The evidence presented should have been sufficient to meet his discovery request had the Ninth Circuit and district court properly recognized his claim based on geographic disparity.

Specifically, Gentile provided "some evidence" to support discriminatory *effect* by showing that, pursuant to stated policy of the U.S. Attorney of the District of Colorado, citizens in Colorado operating marijuana businesses according to state laws were treated differently than similarly situated Californians. Appendix F2-F4, F11-F18, G8-G18; *see Armstrong,* 517 U.S. at 469. In other words, Californians were placed in jeopardy of federal drug prosecution while Coloradans were not. *Compare* Appendix G16-G18, *with* Appendix H2-H4.

Additionally, as recognized in *Kramer* and *Ingram,* the geographic disparity in how the prosecution of similarly situated individuals are treated is an "arbitrary classification" that evidences discriminatory *purpose* in prosecutorial decisions. *Kramer,* 248 Wis.2d at 1025; *Ingram,* 296 F.Supp.3d at 1083.

The denial of Gentile's discovery request thwarted his efforts to make a further prima facie claim of selective prosecution. Appendix D5-6, D10-12. The district court's order created a double-edged sword—a 'heads you lose, tails I win' dilemma in the government's favor. *See United States v. Bourgeois,* 964 F.2d 935, 939 (9th Cir. 1992) (recognizing that too high of a burden on defendant seeking discovery will create such "a dilemma: to obtain discovery, a defendant must show discriminatory intent; but to sufficiently show discriminatory intent, the defendant needs discovered documents.").

The Ninth Circuit followed suit in thwarting Gentile's efforts, in concluding that to be entitled to *discovery* on his selective prosecution claim based on geographic disparity, Gentile first had to proffer either "statistics showing that similarly situated defendants are prosecuted in California but not Colorado" or "that any differential treatment is explained by bias or some other impermissible purpose." Appendix A2 (citing *Sellers,* 906 F.3d at 852). Those requirements do not give fidelity to the "some evidence" standard set forth in *Armstrong*, which was met here based on the showing made through the publicly-available policy documents demonstrating that similarly situated Colorodans would not be prosecuted for the same offenses prosecuted in the Eastern District of California under the same federal statutes. *E.g., Kramer,* 248 Wis.2d at 1024-27 (prima facie showing of discriminatory purpose where only businesses within one geographical area received letters indicated and prima facie showing of discriminatory *effect* where

similarly-situated tavern owners were not threatened with prosecution for the same conduct).

Citing *Sellers*, the Ninth Circuit overly narrowed *Armstrong*'s "some evidence" standard to eliminate avenues of establishing entitlement to discovery. Doing so deviates from this Court's precedent in a manner that unduly restricts a defendant's ability to pursue discovery of his potentially cognizable selective prosecution claim. This Court should grant certiorari to clarify application of its decisions in the context of a geographic disparity selective prosecution claim.

## CONCLUSION

Review is warranted here because the Ninth Circuit's decision affirming the district court's denial of discovery relating to selective prosecution based on geographic disparity failed to recognize Gentile's claim as a matter of due process and equal protection and in doing so, applied a standard to Gentile's claim seeking discovery in a manner contrary to this Court's precedents.

This Court should grant certiorari to address these issues, which have nationwide impact in marijuana-related prosecutions.

Dated: October 21, 2019

Respectfully submitted,

*s/ Johanna S. Schiavoni*

JOHANNA S. SCHIAVONI

LAW OFFICE OF
JOHANNA S. SCHIAVONI
3170 Fourth Avenue, Suite 250
San Diego, CA 92103
Tel: (619) 269-4046
johanna@schiavoni-law.com

*Attorney for Petitioner*
*Raymond Gentile*

**CERTIFICATE OF COMPLIANCE WITH RULE 33.2**

I, Johanna Schiavoni, counsel for petitioner, certify that this document is prepared in accordance with the requirements of Supreme Court Rule 33.2, and contains 2,902 words, exclusive of the table of contents, table of authorities, signature lines, and certificates of service and compliance, as counted by the word count program of Microsoft Word**.**

I also certify that this brief complies with the typeface requirements because the brief is prepared in a proportionally spaced typeface using 12-point Century Schoolbook font.

I declare under penalty of perjury that the foregoing is true and correct. Executed October 21, 2019 at San Diego, California.

*s/ Johanna S. Schiavoni*

By: Johanna S. Schiavoni

LAW OFFICE OF
JOHANNA S. SCHIAVONI